

# Introduction

Multidistrict litigation (MDL) is exploding in the federal courts. Under this procedural device, thousands of cases sharing common issues may be consolidated for pre-trial proceedings before a single judge. Each year, the federal courts preside over multiple MDL proceedings involving hundreds of thousands of individual cases addressing diverse subject matter. Despite this proliferation of MDL cases, multidistrict litigation is a phenomenon of which few in the general public have ever heard. While many may have seen late-night advertisements on television asking them if they have been injured by asbestos, pharmaceuticals, or other household products, most have not actually been plaintiffs themselves in such cases and, even if they have, most will never set foot in a court presiding over an MDL proceeding.

The MDL procedure started out as an attempt to increase efficiency of large-scale civil litigation by consolidating individual lawsuits that share common issues for pre-trial proceedings before a single judge. The theory was that a single judge would be able to avoid duplicative discovery and would be able to issue consistent rulings that applied to all cases, thus avoiding parallel proceedings occurring in courts throughout the country.

The goals of those responsible for developing this procedure were admirable. However, in recent years, participants in multidistrict litigation have expressed a variety of criticisms. Increasingly, multidistrict litigation is swallowing civil litigation in the federal courts. Data indicate that approximately 50 percent of all civil cases filed

in the federal courts are consolidated in multidistrict proceedings.<sup>1</sup> With this consolidation has come the potential for increasing numbers of meritless claims. As numerous participants in the process have observed, aggregation of claims results in less scrutiny provided to each individual claim, which, in turn, can provide an incentive for lawyers to file claims of dubious merit. Because of the reduced scrutiny, claims that normally would not be filed as individual cases may escape rigorous review if they are aggregated with meritorious claims before a single judge. Thus, for example, it is not uncommon for plaintiff counsel to file cases where the plaintiff was never exposed to the product that allegedly caused the injury, where the plaintiff never suffered the alleged injury, or where the statute of limitations that sets the deadline for filing the claim has expired.

In addition, aggregation in MDL proceedings increases the pressure on defendants to settle their claims, and frequently judges presiding over MDL cases view their task as facilitating settlement rather than digging in and addressing the merits of the thousands of claims before them. The sheer volume of claims at issue in an MDL proceeding increases the pressure on defendants to settle. Moreover, because these claims frequently are not subject to the scrutiny given to individual civil cases, there may be little opportunity to narrow the litigation. Critics have charged that the failure to provide such scrutiny and actually adjudicate claims in many MDL proceedings may have adverse consequences for both plaintiffs and defendants alike.

This book discusses the rise of multidistrict litigation and the procedures courts have employed in such proceedings to facilitate their resolution. Many of the largest MDL cases involve mass tort claims—for example, claims alleging that a defendant's products have caused personal injuries to the plaintiffs who filed the claims. However, MDL procedures can apply to any category of cases, as long as the cases share common issues and consolidation for pre-trial proceedings would increase the efficient resolution of those claims. Accordingly, MDLs may involve a variety of subject matters, including antitrust, securities, and consumer fraud.

Chapter 1 discusses the origins of multidistrict litigation and the process by which an MDL proceeding is established. Federal law establishes a Panel comprised of federal judges who decide whether

a particular group of cases should be consolidated in a single proceeding. The arguments in front of this Panel largely relate to *which* federal court (and ultimately which judge) should preside over the litigation. However, as the MDL process has come into disfavor among defendants, increasingly, the Panel is hearing objections to creating an MDL proceeding in the first place. Defendants sometimes seek to avoid multidistrict litigation, viewing the process as broken and potentially resulting in coercive settlements and unjust outcomes. While multidistrict litigation was originally designed with antitrust and other types of large commercial cases in mind, with parties increasingly utilizing MDL procedures to resolve personal injury litigation, it has quickly expanded to encompass nearly half of the civil cases filed in the federal court system.

Chapter 2 addresses the increasing concerns over the ability of MDL courts to give sufficient scrutiny to the claims being filed in these proceedings. The rise in multidistrict litigation has been accompanied by an increase in the number of meritless claims filed in these proceedings. A large mass tort litigation may involve thousands of individual claims, a significant percentage of which may not warrant compensation. As commentators have observed, aggregation in general can increase the number of meritless claims filed for a variety of reasons. It can increase such claims by decreasing the scrutiny given to individual cases in an aggregated proceeding. It can also increase such claims by intensifying the pressure on defendants to settle due to the sheer number of cases, which further reduces the scrutiny that otherwise would be applied to individual claims. Critics of the MDL system question whether MDL courts are adequately addressing the problem, as the stakes for litigants caught up in MDL cases continue to grow.

Chapter 3 examines the role of the MDL court in establishing a framework for resolving the claims before it. This process includes establishing a schedule and case-management procedures for the orderly resolution of the proceeding, overseeing the exchange of information by the parties in discovery, and putting in place procedures for the resolution of the claims. Each MDL proceeding presents its own unique circumstances impacting decisions regarding scheduling, case management, discovery, and dispute resolution.

Chapter 4 addresses discovery and exchange of information in an MDL proceeding. As in any other litigation, one of the core aspects of the dispute resolution process is the parties' exchange of information relevant to assessing the validity and value of the claims. In an MDL proceeding, while the dynamics may be different given the sheer number of cases involved, the basic rules are the same. The normal rules of civil procedure that provide for production of documents and testimony are the same in an MDL proceeding as in an individual civil case. However, MDL courts also have developed streamlined procedures to attempt to provide basic information more quickly and efficiently. While these procedures represent valuable supplements to the normal rules of civil procedure, they should not supplant these established rules. Once all parties have access to relevant information about the claims, the MDL court and the parties can then utilize a variety of procedural mechanisms to determine which claims are viable and should proceed.

Chapter 5 begins a discussion of the ways in which MDL courts have assessed the merits of the claims before them. Increasingly, courts presiding over MDL proceedings have come to recognize that such proceedings attract large numbers of meritless claims. As a result, there is now arguably an approaching consensus that MDL courts must employ procedures at the beginning of an MDL proceeding to weed out such claims. One way in which courts have done this is to grant generic motions that address the validity of all, or a subset, of the claims filed in an MDL proceeding. Indeed, one of the primary purposes of the MDL procedure appears to have been to allow courts to resolve such common issues during pre-trial proceedings. Moreover, courts are increasingly receptive to granting such omnibus motions.

Chapter 6 describes procedures MDL courts have employed to address claims on an individual basis. Issues raised in an MDL proceeding are not always common among a large group of claims. Rather, there also are case-specific issues that arise with respect to individual claims. This may involve, for example, whether a particular plaintiff was actually exposed to a particular product or whether a particular plaintiff's specific injury was actually caused by the product. The procedures courts have employed to deal with these case-specific issues are more diverse in nature. In addition to

motion practice, courts have used other procedural devices to weed out claims that lack merit or to encourage plaintiffs to dismiss them voluntarily. Such procedures often are employed in parallel with procedures designed to resolve common issues and provide another effective tool for narrowing the scope of the litigation.

Chapter 7 provides an overview of the process employed in many MDL proceedings for taking test cases to trial. Courts in large MDL proceedings frequently attempt to provide the parties with guidance regarding the potential value of the claims in the proceeding by selecting representative “bellwether” cases for trial. The hope is that such trials may help facilitate settlement, and if not, that they will provide the parties the opportunity to prepare materials that can be used in subsequent trials. While many MDL courts have employed such procedures, commentators and participants in MDL proceedings increasingly question their utility, with some going so far as to argue that trying cases within an MDL is contrary to the statutory mandate, which authorizes consolidation solely for pre-trial proceedings. In the future, this debate may result in a decline in the use of such bellwether trials as a means of resolving claims in MDL proceedings.

Chapter 8 discusses settlement in the context of MDL proceedings. The accepted wisdom is that most claims in MDL proceedings are resolved through settlement. However, as noted, courts are increasingly interested in weeding out meritless claims before any settlement is reached. Moreover, the settlement of claims in MDL proceedings has been criticized for a variety of reasons. Defendants note the inordinate pressure an MDL places on them to settle claims that lack merit, while plaintiff advocates suggest the settlement process favors lead plaintiff counsel at the expense of the plaintiffs themselves and lacks important procedural protections to ensure settlements are fair and equitable.

Chapter 9 explains some of the reasons MDL proceedings have encountered difficulty in moving toward resolution. One of the factors that is important for the successful resolution of an MDL proceeding is a significant level of engagement and activity by the presiding judge, who must not only administer but resolve potentially thousands of cases involving complicated and substantial issues. Where judges fail to engage, perhaps in the hope that the parties will eventually settle, MDLs tend to linger without resolution. Another phenomenon

that has led to problems with multidistrict litigation is the lack of complete centralization. The MDL procedure only applies to courts in the federal system. In many cases involving federal multidistrict litigation, there may be significant parallel state court proceedings. In such circumstances, state court litigation may interfere with progress in the MDL proceeding. Finally, even after MDL proceedings are settled, there may be problems with settlement administration. Not surprisingly, there have been prominent examples in which meritless, or even fraudulent, claims have received considerable compensation.

Chapter 10 addresses the more substantial criticisms of the MDL process and proposals for reform seeking to address them. While defendants originally viewed MDL proceedings as a potentially more efficient means of addressing large numbers of claims and avoiding duplicative proceedings, they increasingly see MDLs as oriented toward settlement and as failing to provide the necessary scrutiny to claims. Citing statistics showing that 30 to 40 percent of cases are not meeting basic requirements for stating a claim, defendants have proposed a series of reforms such as requiring plaintiffs to make a basic showing early in the litigation demonstrating that they can prove fundamental elements of their claims, mandating review of key MDL court rulings by an appeals court during the course of the MDL, and requiring the parties' consent before cases are tried in an MDL proceeding. While these formal proposals have not yet been implemented, the future may see significant changes in MDL procedures. At a minimum, the debate over reforming the system is likely to continue and to encourage judges presiding over MDL proceedings to implement procedures on their own that will address some of these criticisms within the existing legal framework.

Chapter 11 discusses some of the potential alternatives to multidistrict litigation. One obvious alternative is to litigate claims on an individual basis. However, unless the MDL procedure is abolished, this alternative is not likely to be employed and it may result in significant inefficiencies. A second alternative is the class action procedure. However, existing constraints make class actions an unlikely alternative, given that the diversity of claims in most MDL proceedings makes certification of a class to resolve the litigation less than feasible. Finally, the bankruptcy system provides a potential alternative for companies overwhelmed with large numbers of claims. However,

while bankruptcy provides many advantages, there are downsides for corporate defendants selecting this option, and it frequently is not the first alternative for companies facing significant liability.

In sum, multidistrict litigation arguably has reached a point of inflection. Increasingly, massive proceedings such as those addressing claims involving opioid addiction or allegations that popular weed killers cause lymphoma have attracted the public's attention. The corporate community sees a litigation landscape it believes leads to results that are inconsistent with the merits of the claims and which, in some cases, are arbitrary. Plaintiffs' law firms are provided with an increasingly greater incentive to bring ever-larger numbers of claims, while simultaneously conceding that in many cases there are problems with the filing of claims that lack merit. A handful of repeat players have amassed significant wealth as the result of a system that is arguably in need of improvement. This book attempts to shed light on the ongoing debate.