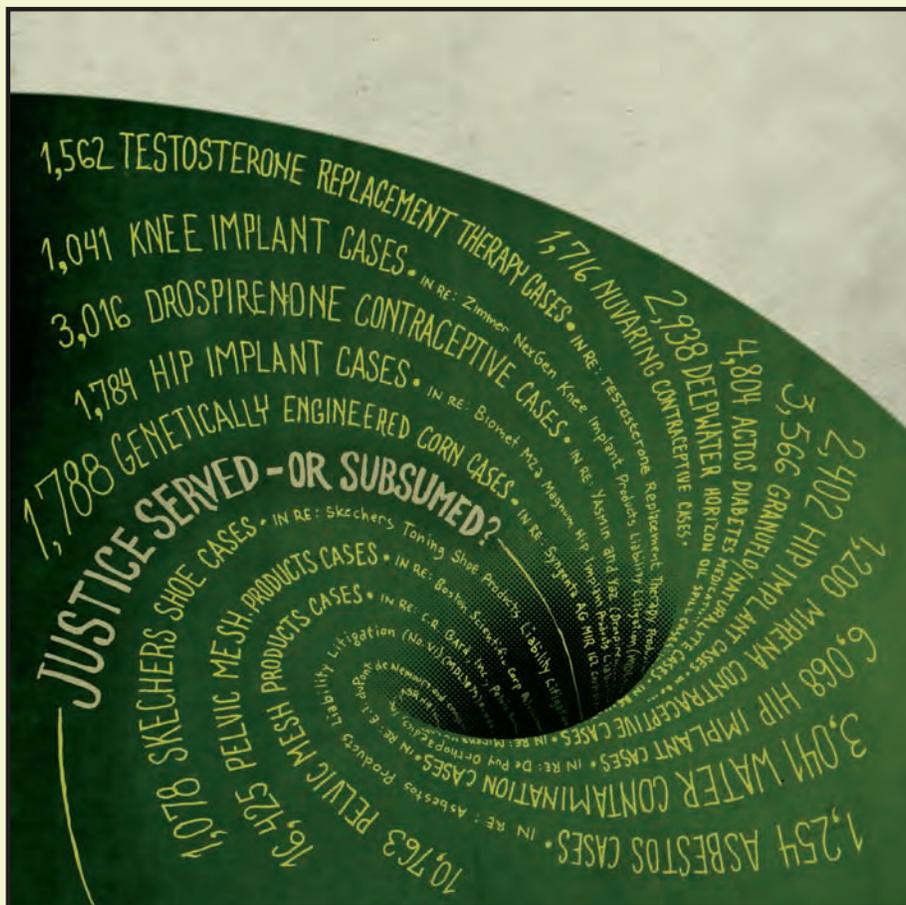


# JUDICATURE

## The MDL Vortex Revisited



THE MODERN CONCEPT AND UNDERSTANDING OF MASS TORTS DEVELOPED AFTER THE CREATION OF THE MDL PROCESS. HOW HAS THE MASS-TORT CLAIM BEEN TREATED UNDER THE MDL PROCESS — AND TO WHAT ULTIMATE EFFECT?

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ONE OF THE MORE INTERESTING CASES I WORKED ON AS A YOUNG ASSOCIATE IN THE EARLY 1980S INVOLVED GEORGE STEINBRENNER, the well-known owner of the New York Yankees. He had invested in an oil and gas venture in West Virginia aptly named Yankee Energy. When the investment did not pan out, he filed suit against a wide array of defendants, including the West Virginia driller, the tax accountant who had worked on the deal, the attorney who had put together the investment documents, as well as his own personal financial advisor and assistant. Steinbrenner claimed that the defendants had received improper kickbacks and had taken other actions that were fraudulent.

The case became one of those scorched-earth lawsuits that have given U.S. litigation a bad name. Scores of depositions — some consisting of more discussion and argument among the lawyers than questions asked of deponents — were taken around the country, with most going for days if not longer. At one point, there were over 100 discovery motions pending before the district court.

In the middle of this procedural morass, one of the defendants filed a motion pursuant to Section 1407 to consolidate the Steinbrenner case and a handful of similar lawsuits involving other plaintiffs who had invested with the same West Virginia oil and gas driller. This was my first involvement with the multidistrict litigation (MDL) process. It was not something that was taught in either the basic Civil Procedure or advanced Civil Procedure courses that I had taken in law school.

My initial reaction was that these cases probably were not the type of complex, large-claim cases that surely must make up the bulk of the MDL docket. But in researching the MDL process — which at that point had only been around for a dozen years — I was surprised that many of the MDL dockets were in fact consolidations of a relatively small number of cases. Indeed the origins of the MDL process did not

define with any exactness the type of cases that could be found suitable for the process. While there were some general categories of case types that were identified as particularly appropriate, the MDL procedure was open-ended and could be applied widely across the litigation spectrum.

We opposed the motion to consolidate, generally arguing that there were too few cases to benefit from consolidation and that the cases had significant factual variations. Also, our case was already in the later stages of discovery at the time of the Section 1407 filing. The Judicial Panel on Multidistrict Litigation (JPML) held a hearing on the case in Seattle. Several attorneys from Atlanta, Florida, and West Virginia made the long trek to Seattle for a very short 15-minute hearing. My opening comment made some reference to the Boston Red Sox not being forced to move a game in the top of the seventh inning (one of the panel judges was from Massachusetts so it seemed appropriate in a case involving the Yankees). The panel ultimately denied the motion to consolidate. We continued to slog through the trench warfare of discovery until ultimately the case was settled on the eve of trial. In retrospect, I still wonder whether MDL consolidation might have offered some benefits.

The experience demonstrated to me — as it probably did to many litigators during this time period — the potential importance of the MDL process. If the Steinbrenner case had been transferred, it could have significantly impacted the handling of the case. A new transferee judge could have established a new approach to discovery that could have radically altered the dynamics of the case.

That the MDL process has grown and evolved since those early days is clear. The question is *how* it has evolved. Is it still a general procedure applicable across a wide range of litigation case types? Or are there particular litigation types that have come to dominate the process as the currents of litigation have changed over time?

This question is of particular impor-

tance in the area of mass torts — those personal-injury claims that can involve hundreds or even thousands of victims of a single alleged wrong.

The conventional wisdom is that the MDL process *is* generally applicable to a wide range of litigation types, and that mass torts can be included as “one among many” types of lawsuits potentially subject to the MDL process. While one can view the MDL case statistics to support that view, a more careful examination of the MDL data as it now stands reveals a very different reality: Mass-tort claims have come to dominate the MDL docket. This growing trend raises questions as to how mass torts are shaped, defined, and ultimately resolved through the MDL process. Given the enormous potential liability associated with mass-tort claims, understanding the procedural processing of these claims is both interesting and important.

### *Historical Overview*

It is useful to provide a quick overview of the origins of the MDL process focusing on the types of cases its proponents envisioned as being particularly suitable to its approach.

The MDL arose out of judicial experience with an extraordinary number of antitrust cases filed by utilities, municipalities, and others against the manufacturers of electronic equipment. Following a successful government antitrust prosecution of manufacturers of electrical equipment in the 1960s, over 1,800 civil cases were filed in over 30 different federal court districts. The discovery in those cases was extensive, and the potential for overlapping depositions and document production was obvious. To deal with this “wave of litigation [that] threatened to engulf the courts,” the Judicial Conference of the United States recommended the creation of a new “Coordinating Committee for Multiple Litigation” to recommend actions to control and manage the cases.<sup>1</sup>

The Coordinating Committee recommended a series of uniform pretrial and discovery orders that each

district court judge could apply to the cases in their respective districts. The uniform orders established rules for centralized document depositories. These depositories made nearly 1 million documents available to the parties. The coordinating efforts also established the taking of “national” depositions in which attorneys from other cases could ask questions.

The consensus view was that the actions taken by the Coordinating Committee were greatly successful in preventing the federal courts from being overwhelmed by the electrical equipment cases. By the same token, many recognized that the coordinating process itself had some inefficiencies, as over 30 district court judges had to arrange schedules and travel. Also, because the efforts were voluntary, there was the risk that in similar future cases, some judges would not fully cooperate.

Accordingly, the Coordinating Committee drafted legislation to formalize a procedural tool to deal with situations that might arise. As a result of the recommendation, Congress in 1968 established the JPML and empowered it to transfer groups of cases and assign them to a judge for the “limited purpose of conducting pretrial proceedings.” In discussing what was encompassed in this charge, the House report noted that pretrial proceedings “generally involve deposition and discovery” but that under the federal rules additional steps would be possible, including rendering summary judgment, controlling and limiting pretrial proceedings, and imposing sanctions for “failure to make discovery or comply with pre-trial orders.”<sup>2</sup> After completion of the pretrial proceedings, the cases were to be remanded to the district where they were originally filed. There was never any expectation that the transferee judge would actively manage the case to consider a global settlement, although it was understood that some settlements may occur, such as in cases where liability was clear. The main focus for the transferee judge was to oversee the discovery process with the expectation that the cases would ultimately be remanded for trial.

“It is surprising that the description used for eligible cases was “massive filings” — as if the MDL process would be reserved for a relatively small number of actions.

Having only had the electrical equipment “massive filings” as an example to justify the new procedure, it is interesting to consider what other areas of litigation might have been anticipated as especially likely to be subject to the new process at the time of the passage of the MDL procedures. The legislative history set forth the following as potential candidates for MDL treatment:

“The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include not only civil antitrust actions but also, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.”<sup>3</sup>

Given the scant history of similar types of “massive filing” cases, this description has a bit of an “I know when I see it” feel to it. The electrical equipment cases had revealed a potential problem, and a simple solution had been found. It is probably not fair to assert that the MDL procedures were created as a prophylactic measure only for the extraordinary cases like the electrical equipment cases, but it was anticipated to be the exception rather than the rule.

Knowing what we now know of the MDL process, it is surprising that the description used for eligible cases was “massive filings” — as if the MDL process would be reserved for a relatively small number of actions that fit the model of the electrical equipment cases. As the history of the MDL process shows, this focus on “massive filings” has been significantly relaxed.

It is less surprising that the focus of the anticipated use of the MDL process was not more clearly centered on what we have come to refer to as mass-tort cases. When enacted in 1968, the category of mass-tort cases was not well understood. Of course, this was well prior to the Agent Orange, Dalkon Shield, and Bendectin litigations that helped develop our appreciation for the potential of mass-tort claims. In the litigation world at the time, tort claims that could potentially be suitable for the new MDL process were imagined as primarily “common disasters,” such as airplane crashes, and, to a more limited extent, product-liability cases.

#### *Early Experience with the MDL Process*

The MDL process quickly revealed that it was not going to be limited to exceptional cases with “massive filings.” An early study published in 1974 in the *Harvard Law Review* detailed extensive use of Section 1407.<sup>4</sup> At the time of the study, the panel had considered 148 actions under Section 1407 and consolidated actions in 112 dockets for a grant rate of 75 percent. As probably anticipated, antitrust was the leading area with 35 consolidations (31 percent of the total dockets granted). Securities cases — which interestingly was not a category listed in the House report — constituted 28 of the total dockets created (25 percent). “Mass disasters” (which were primarily airplane crash cases) also constituted 28 of the dockets that were transferred. The only other category with a significant number of MDL dockets created was patent/copyright cases (11 dockets constituting 10 percent of the total dockets granted).

Significantly, product-liability cases — the category in which most of the mass-tort cases would fall in our current understanding of mass torts — were negligible. The panel considered only three potential product-liability dockets during the first six years of its operations; it denied transfer in two of the three matters.

One of those three early MDL product-liability cases is particularly interesting in the evolution of the

use of the MDL process for mass-tort cases. In *In re Oral Contraceptives Products Liability Litigation*,<sup>5</sup> the JPML considered the possible consolidation of 20 different actions filed in 10 different districts based upon alleged injuries resulting from oral contraceptives manufactured by defendant G.D. Searle & Company. After citing the legislative history expressly listing product-liability cases among possible MDL candidates, the panel noted the “existence of several groups of product-liability litigation during the past two years.” Having become aware of the multiple claims against G.D. Searle, the panel itself initiated the MDL proceedings by entering an order directing the parties to show cause why the cases should not be transferred for consolidated pretrial proceedings. Ordinarily, this number and dispersion of cases would have justified consolidation, based upon the *Harvard Law Review* study. In response to the panel’s show-cause order, however, the parties stated that there were few if any common questions of law or fact and that the transfer of the cases would not serve the convenience of the parties or witnesses. The panel refused to transfer.

One can read the panel’s decision in *In re Oral Contraceptives* in one of two ways. By its action, as well as the lack of other product-liability cases at the time, the panel could be seen as having doubts as to whether mass-tort cases were appropriate for consolidation under Section 1407. The other reading — probably the more likely given the radical increase over time of precisely these sorts of mass-tort claims being consolidated — is that the panel was expressing its opinion that this was an area where MDL consolidation should be expanded. The opinion goes out of its way to make the point that the panel was aware of the existence of these types of product-liability cases. It also made clear that its decision to deny transfer was a function of the views expressed by the parties and was without prejudice to reconsidering the issue at a later time.<sup>6</sup>

The main gist of the *Harvard Law Review* study was that the panel was

aggressively using Section 1407. The panel had expressed a strong preference for consolidation even in cases in which there were noncommon facts or a small number of actions. As long as there were significant common issues, the panel was likely to grant consolidation. For example, with respect to air disaster litigation — the primary type of mass tort generally recognized at the time — consolidation was routinely granted unless discovery in the actions was close to completion.<sup>7</sup> The panel, driven by its charge for achieving judicial efficiency, liberally granted consolidation under Section 1407 sometimes even in the face of objections by the parties to the litigation.

Rather than set a high threshold for the number of filings needed to justify consolidation, the study found that the panel regularly ordered consolidation if there were more than five actions involved (a far cry from the described justification of “massive filings”). The *In Re Oral Contraceptives* decision was one of only two cases involving more than five actions where transfer was denied based upon a finding of an absence of common facts.

The study also noted that from the beginning of the MDL process, transferee judges as well as the panel itself demonstrated an interest in resolving the cases as opposed to remanding them to the districts in which they were originally filed. Only some of the resolutions were expressly based upon existing pretrial procedures. On occasion, for example, transferee judges granted motions to dismiss or motions for summary judgment (pretrial procedures that were clearly within the purview of pretrial procedures that the transferee judge was expected to utilize). But use of such motions was usually only to “simplify litigation by eliminating certain issues or cases and only rarely to dispose of an entire group of cases.” The study noted only a single instance when a transferee judge had granted summary judgment on the basic common issue at the end of pretrial.<sup>8</sup>

While there was nothing controversial about the use of existing pretrial

motions, transferee judges — with the support of the panel — also took other steps to avoid remanding. Most notable was the use of Section 1404(a), by which some judges entered orders transferring cases to their districts for the purpose of trying the case and imposing final judgment. While the practice of retaining cases for trial rather than remanding to the transferor court was controversial, there was substantial support for the practice based upon efficiency considerations.<sup>9</sup> Ultimately, the Supreme Court held that this approach was inconsistent with the plain meaning of Section 1407, especially in light of the relevant legislative history.<sup>10</sup>

The *Harvard Law Review* study also made clear that many MDL dockets resulted in settlements achieved through the efforts of the transferee court. For example, in antitrust cases following a successful government prosecution, the main issue was to determine damages as opposed to liability (which had already been established). In those cases, settlements were common without the need for remand.

### *Evolution of the MDL Process*

Since the early 1990s and the *Harvard Law Review* study, MDL practices have continued to evolve and gradually expand. An article published as part of a symposium on multidistrict litigation by Judge John Heyburn, chair of the Judicial Panel on Multidistrict Litigation between 2007 and 2014, provides an excellent overview of the state of MDL affairs as of 2008.<sup>11</sup> As of that date, the panel had considered motions in nearly 2,000 dockets involving a quarter-million cases (likely involving millions of claims).

The workload of the panel has gradually increased over time. In 1996, the panel for the first time considered more than 60 requests for consolidation; in 2007, the panel considered almost 100 claims. As of 1997, there were 161 open MDL dockets encompassing 54,000 actions. Ten years later, the number of open MDL dockets had increased to 297, encompassing over 76,000 pending actions.<sup>12</sup>

In his analysis of the panel's workload, Judge Heyburn made the special point to challenge the "common misconception" that the MDLs are mostly "mega-cases." He noted that there were indeed some "mega-cases" in the MDL process, but that the large majority of MDLs did not fit that description.<sup>13</sup> As of 2008, only 37 out of about 300 active MDLs comprised more than 100 constituent actions, while only 10 had more than 1,000. He referenced three mass-tort cases dealing with asbesto-sis claims (42,000 pending actions at the time), Vioxx claims (9,300 pending actions in which the judge had recently approved a settlement), and Seroquel claims (5,600 pending claims). In contrast, he noted that about half of all MDLs had 10 or fewer actions. Judge Heyburn reiterated the commonly made point that MDL dockets encompassed a wide variety of litigation categories.

He did point out that recent developments limiting the use of class actions in mass litigation perhaps created the possibility of greater use of MDL procedures for such claims. As class-action devices became less available or desirable, "some litigants may be turning to the MDL processes as a way of achieving some of the benefits or advantages formerly available under Rule 23."<sup>14</sup> This prediction proved to be on the money as one looks to the present composition of MDL dockets, which have come to be dominated by mass-tort cases.

### *Contemporary MDL Proceedings and the Ascendancy of Mass Torts*

In looking at the most recent six years of MDL activity following the overview described by Judge Heyburn, MDL activity at first glance seems to have reached a plateau. The high-water mark for MDL docket requests occurred in 2009, when for the first time, the number of requests topped the century mark with 121 new docket requests. After a dip in 2010 (84 new docket requests), it again surpassed 100 new dockets in 2011. In the following three years, new docket requests have been stable, averaging about 90 requests per year (which is essentially at the same

level as the last few years documented by Judge Heyburn).<sup>15</sup>

More noteworthy, however, is that significantly fewer new MDL docket requests have been granted recently, with a corresponding increase in denials of MDL status. While the number of new MDL dockets in 2009 (83 new dockets granted) almost equaled the record 85 docket requests granted in 2008, the number of new dockets has declined dramatically since then and is now at the levels of the early 2000s. From 2010 to 2014, a total of 241 MDL docket requests were granted (on average 48 per year). During that same period, the denial rate for MDL dockets increased, as a total 160 MDL docket requests were denied (averaging 32 per year). The overall grant rate during this period was a historically low 60 percent. By way of comparison, for the previous five-year period covering 2005–2009, the panel granted MDL docket requests in 327 cases and denied requests in only 52 cases for a grant rate of 86 percent.

But what can be said about any changes in the type of cases subject to MDL treatment? For the past couple of years, annual statistics published by the JPML have shown the distribution of the types of cases for pending MDL dockets. The data initially seems to confirm the conventional wisdom that the MDL process ranges broadly across many types of litigation, with a few areas of concentration. The statistics focusing solely on the number of MDL dockets show that there are many types of cases that are subject to MDL treatment. But there is a flip side to this coin that tells a very different story if one focuses more on the number of pending actions that comprise those MDL dockets.

If one were to think about the faces carved on to an MDL Mt. Rushmore, it would certainly include antitrust and securities actions as long-standing major categories of litigation regularly achieving MDL status. The 64 antitrust dockets constitute close to 22 percent of the pending MDL dockets (a percentage markedly similar to what was found in the earliest *Harvard Law Review* study).

Securities would be a lesser figure, but this category still constitutes a durable 10 percent of the MDL docket. Competing for a possible position would likely be sales practices (constituting 12 percent of the dockets) or intellectual property cases (which has slipped to only 6 percent of the MDL docket).

The main nominees for the remaining "monument" status would be products liability (with 70 MDL dockets or 24 percent of the total) and the somewhat mysterious miscellaneous category with 49 dockets (17 percent of the total). Since the MDL statistics do not have a specific category for mass torts per se, if one were interested in assessing the impact of MDL litigation on mass-tort claims, it would be necessary to examine whether the largest category of cases — product liability — is comprised primarily of mass-tort cases or other types of product-liability cases.

One might even reach a preliminary conclusion that there has been a decline of sorts as it relates to at least some categories of cases most often associated with mass tort. The number of air disaster and common disaster cases (two of the nine specific categories that the MDL statistics track) has shrunk to the bottom of the list, with only three and two MDL dockets respectively constituting a paltry 2 percent of pending dockets. These categories historically — especially during the early years of the MDL process — constituted a much more significant part of the workload.

### *Mass Torts Dominate MDL Dockets*

In drilling down into the current state of pending MDL dockets, it is possible to tell a very different story about the current state of MDL practice. Rather than being a process that is regularly used across a wide range of litigation types, it is in fact dominated by mass-tort cases at a remarkable level. The JPML statistics that simply report an overview of the mere number of MDL dockets disguise that incredible concentration of mass-tort actions through the MDL process.

The primacy of mass-tort claims in the MDL process can be demonstrated

## JUDICATURE

TABLE 1  
**MASS-TORT MDL DOCKETS** (as of March 16, 2015)

CATEGORY	# of MDL Dockets	Pending Actions	Historical Actions
<i>Common Disaster</i>	2	2,964	3,111
<i>Air Disaster</i>	3	29	108
<i>Miscellaneous</i>	7	2,558	2,636
<i>Product Liability (Mass Tort only)</i>	55	119,667	393,209
<b>TOTAL:</b>	<b>67</b>	<b>125,218</b>	<b>399,064</b>

by looking more carefully at the current cases. Using the JPML's March 16, 2015, report (most recent as of the time of the writing of this article), one can examine in detail the 287 MDL dockets to determine which dockets fall within the mass-tort category. The results are stunning: mass-tort MDL dockets consolidated over 125,000 civil actions constituting over 96 percent of all pending actions included in all of the MDL dockets.

To develop a comprehensive list of mass-tort claims, one first includes the small number of dockets included in the air disaster and common disaster categories. The three air disaster dockets involve relatively few pending actions. The common disaster category which includes the Deepwater Horizon MDL with 2,941 pending actions — has considerably more actions.

It is then necessary to review the product-liability cases closely, as not all product-liability cases involve mass-tort claims. A careful review of the product cases reveals that 16 of the 71 product-liability MDLs are not mass-tort claims. For example, nine of the MDL dockets involve claims against building supply companies whose products (windows, shingles, decking, or cement siding) were defective but were not alleged to have caused any personal injury.<sup>16</sup> Three other MDL dockets involved product-liability claims based upon alleged defects in engines. There were four other MDL dockets alleging damage to products such as mold in washing machines, an herbicide that damaged trees, or products that contaminated well water (but not alleged to have caused any

personal injury). In contrast to the mass-tort product claims, the number of actions in these non-mass-tort product claims was modest, with the exception of the Toyota Acceleration MDL Docket that included 88 actions.<sup>17</sup> Three other MDL dockets

dealt with other types of property damage.<sup>18</sup> Collectively, these 16 MDL dockets constituted only 561 pending civil actions. Only two of the dockets included more than 25 actions. The median number of actions per docket for these “non-mass-tort” product-liability cases was only 12 actions.

The remaining 55 product-liability cases involve claims fairly described as mass-tort claims. These claims include numerous MDL dockets against suppliers of medical devices such as artificial hips, as well as claims against pharmaceutical companies for alleged injuries resulting from drugs. Overall, these 55 MD mass-tort product-liability dockets consolidated nearly 120,000 pending civil actions. While 20 of the cases currently involve fewer than 100 current consolidated actions (probably because the matters are in the last stages of resolution), most have historically involved hundreds and indeed usually thousands of actions. The historical total of actions consolidated in these 55 product-liability cases is over 390,000 actions.<sup>19</sup>

To determine the full range of mass-tort MDL dockets, it is also necessary to peruse the miscellaneous category. It contains some of the new types of litigation that are constantly developing within the U.S. litigation system. For example, the pending list includes a number of dockets involving claims against companies such as Target and Sony for damages related to security breaches. The category also includes a variety of claims based upon unfair business practices relating to mortgages. But the MDL miscellaneous category also includes a number of

mass-tort claims, such as the high-profile National Football League concussion cases (and similar claims filed against the National Hockey League and the National Collegiate Athletic Association). Overall there are seven MDL dockets in the miscellaneous category that are fairly characterized as mass-tort claims. They include a total of 2,558 pending civil actions.

#### *MDL Mass-Tort Docket Statistics*

Table 1 (at left) is a summary of the current MDL dockets composed of cases from four different categories: (1) common disaster; (2) air disaster; (3) those product-liability dockets that involve mass-tort claims; and (4) those miscellaneous dockets that involve mass-tort claims. The results are, again, stunning: There are a total of 67 MDL mass-tort dockets (23 percent of the total MDL dockets). Numerically, this is the largest category of MDL dockets (with a few more dockets than in the antitrust category). But the true MDL dominance of mass torts is revealed when one examines the number of pending actions contained in those dockets. Those 67 MDL dockets include almost 125,000 pending civil actions. In comparison, the remaining non-mass-tort MDL dockets account for only about 6,000 pending cases. Thus, the mass-tort MDL dockets comprise an amazing 96 percent of the actual actions covered by MDL consolidations.

In stark contrast to the non-mass-tort product claims or other MDL dockets that typically have relatively few claims, there are numerous mass-tort MDL claims with huge numbers of consolidated actions. Table 2 (next page) is a list of the 23 MDL mass-tort dockets as of March 16, 2015, that include over 1,000 pending civil actions.

The incredible concentration of MDL pending actions in several large mass-torts cases represents an important trend. According to statistics published by the Center for Judicial Studies at Duke Law School, prior to 2004, there were only a couple of large MDL dockets (defined as including more than 1,000 pending actions) ▶

TABLE 2  
**MASS-TORT PENDING MDL DOCKETS WITH 1,000 OR MORE  
 PENDING ACTIONS** (as of March 16, 2015; all Product Liability unless noted)

MDL #	Short Name	Pending Actions	Historical Actions
2327	Ethicon, Inc.	23,569	24,220
2325	American Medical	19,093	19,600
2326	Boston Scientific	15,429	15,700
2187	C.R. Bard	10,525	10,823
2244	DePuy Orthopaedics	7,147	7,240
2197	DePuy Orthopaedics	6,819	9,395
2299	Actos (Pioglitazone)	4,130	4,286
2100	Yasmin	3,502	11,801
2179	Deepwater Horizon	2,941	3,083 (CD)
2428	Fresenius GranuFlo	2,925	2,926
2441	Stryker Hip Implant	2,316	2,387
2433	Du Pont C-8 (drinking water)	2,191	2,197 (Misc)
2502	Lipitor	2,079	2,082
2387	Coloplast Corp	1,870	2,011
2391	Biomet Hip Implant	1,863	2,458
1964	NuvaRing	1,739	1,863
2385	Pradaxa	1,647	2,597
875	Asbestos	1,510	192,049
1871	Avandia	1,332	5,277
2434	Mirena IUD	1,212	1,234
2545	Testosterone Replacement	1,172	1,174
2272	Zimmer NexGen Knee	1,090	1,579
2308	Skechers Shoe	1,038	1,110
<b>TOTAL:</b>	<b>23 CASES</b>	<b>117,139</b>	<b>327,092</b>

outside of the asbestos cases.<sup>20</sup> Thus, for the years 1999–2003, there were only one or two non-asbestos “large” MDL dockets that included on average a total of about 3,800 pending actions consolidated through the MDL process. These few MDL dockets had only about 9 percent on average of the total MDL pending actions. In the last ten years, the concentration of the large MDL cases — virtually all of which are mass-tort cases — has risen exponentially. Thus, the same statistics from the Center for Judicial Studies show that for the years 2011–2014, there were on average 15 large MDL dockets with more than 1,000 pending actions and that those MDL dockets were, on average during this period, composed of nearly 65,000 pending actions

(representing nearly 75 percent of the MDL pending actions during this time period). The above analysis for the most recent information shows that the ascendency and concentration of “large” MDL mass-tort documents have continued and indeed accelerated.

Nor has the recent increase in MDL denials mitigated the growth in mass-tort dockets. With a few minor exceptions, the denials have occurred in patent or consumer cases involving relatively few potential cases to consolidate. For example, from Oct. 1, 2013, through Sept. 30, 2014, the panel denied consolidation in 27 dockets.<sup>21</sup> The vast majority of denials came in nontort areas such as labor and employment disputes, patent cases, or nontort product-liability cases. Only three of dockets involved claims

that could be considered as potential mass torts. Each of the dockets was comprised of a small number of cases (averaging nine cases per docket), and presented unusual facts. For example, in one of the denied dockets involving the Mirena intrauterine device (IUD), the panel refused consolidation of nine cases filed by the same attorney that claimed neurological injuries distinct from the type of injury commonly alleged in an existing MDL docket. None of the MDL denials was in a docket with more than ten cases alleging tort claims.

It may well be that growth in mass-tort MDLs is perfectly consistent with the origins of the MDL process. Many of the mass-tort claims present the type of “massive-filing” cases that gave

rise to the initial MDL legislation. Handling cases with literally thousands of claims indeed raises the specter of overburdened courts grappling with massive, duplicative discovery proceedings. So, even though Congress had not specifically anticipated the onslaught of mass-tort cases in its present form, the MDL process is arguably well suited to the development.

But what is also clear is that the MDL process has important implications for how cases are managed. What was initially designed as a simple procedure for coordinating discovery is obviously much more than that today. As Judge Alex Kozinski wrote in his dissent to the Ninth Circuit’s decision in *Lexicon*, “[t]he simple reality is that once a case is sucked into the MDL vortex, it seldom comes back.”<sup>22</sup> While the Supreme Court has limited what Kozinski called the federal court’s “remarkable power grab” by limiting the use of transferee courts transferring actions to their own courts, the fact remains that the vast majority of cases transferred through the MDL are never remanded back to where they were filed. Instead, the cases are most often resolved through settlement as part of the MDL proceedings.

It is impossible to view the MDL process as a neutral procedure designed simply to achieve discovery efficiencies.<sup>23</sup> From the beginning, the MDL process did more than that. The development represents more than a simple “power grab” by some transferee judges. It also reflects the evolution and expansion of what constitutes “pretrial” procedures since the time when Section 1407 was enacted. Not only have discovery practices radically evolved over time (requiring far more judicial supervision controlling perceived discovery abuse as well as dealing with the development of e-discovery), but numerous other changes have radically redefined the role of the judge in managing the pretrial process.

Consider just a few important changes that impact pretrial procedures: The Supreme Court reinvigorated summary judgment in the 1980s and more recently refined how district courts

are to examine motions to dismiss. The Court also imposed important gate-keeping obligations on the district court to review the reliability of opposing parties' expert witnesses. The role of the judge in actively managing the settlement process also has greatly evolved over this period. The use of court-ordered ADR was unheard of at the time of the enactment of Section 1407.

The point is simply that what was initially thought of as the purpose of the MDL process — coordination of “depositions and discoveries” — is in fact much more than that.

### Conclusion

The conventional wisdom has long been that MDL has continually expanded since its inception and that it has come to play an important — and increasingly controversial — role in American litigation. It has never been limited to situations with “massive filings,” but rather was a procedural

option that was utilized in a wide variety of litigation types, a bit of a “one-size-fits-all” approach that impacted many litigation contexts.

The conventional wisdom needs to be refined. To be sure, there are several types of litigation that are subject to the MDL process that involve relatively modest numbers of claims. The utilization of the MDL process in those contexts has remained stable, and may indeed be decreasing (or at least not expanding as it was in the past). The reality with respect to mass-tort claims is radically different. The MDL process has come to be dominated by large mass-tort dockets typically involving thousands of underlying actions. Indeed, over 95 percent of the total actions currently consolidated through the MDL process are mass-tort cases. This represents a significant evolution in the utilization of the MDL process that initially took a restrictive approach to the mass-tort context.

Any hesitancy or concern with the appropriateness of MDL treatment is now certainly a relic of the past. The MDL process has indeed become a vortex with respect to mass torts. This is not necessarily a problem or wrong — indeed it is arguably fully consistent with original conceptualization of the MDL process. But given the reality that well over 100,000 mass-tort actions are currently consolidated through the MDL process, it is important to examine carefully and critically how the MDL works.



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<sup>1</sup> For a discussion of the processes used in the electrical equipment cases, see Phil C. Neal & Perry Goldberg, *The Electrical Equipment Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

<sup>2</sup> See H.R. REP. NO. 1130, 90th Cong., 2d Sess. 1 (1968), reprinted in 1968 U.S.C.C.A.N 1898.

<sup>3</sup> See H.R. REP. NO. 1130, *supra* note 2 at 3.

<sup>4</sup> Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974).

<sup>5</sup> *In re Oral Contraceptives Products Liability Litigation*, 322 F. Supp. 1011 (J.P.M.L. 1971).

<sup>6</sup> See *id.* at 1012.

<sup>7</sup> NOTE, *supra* note 4 at 1007.

<sup>8</sup> NOTE, *supra* note 4 at 1029.

<sup>9</sup> See, e.g., Edward Sherman, *The MDL Model for Resolving Complex Litigation if Class Action is Not Possible*, 82 TULANE L. REV. 2205 (2007).

<sup>10</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

<sup>11</sup> John C. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230 (2008).

<sup>12</sup> Heyburn, *supra* note 11, at 2232.

<sup>13</sup> *Id.* at 2230.

<sup>14</sup> *Id.* at 2232 (As the “class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning

to the MDL processes as way of achieving some of the benefits or advantages formally available under Rule 23.”) (Referencing the restrictive Supreme Court decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).)

<sup>15</sup> All statistical information is from CALENDAR YEAR STATISTICS OF THE U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., JANUARY THROUGH DECEMBER 2014, available at [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2014\\_0.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2014_0.pdf) [hereafter CALENDAR YEAR STATISTICS 2014].

<sup>16</sup> There are some “judgment calls” that need to be made respecting a few of the MDL dockets. For example, MDL Docket #2047 has 293 current actions dealing with defective drywall manufactured in China. Some of the cases include claims for personal injury based upon exposure to the drywall, but the dominant claims are for property damage. So, the *Chinese Drywall* docket were not included as mass-tort claims.

<sup>17</sup> The exclusion of MDL #215 Toyota Acceleration is also a judgment call. In its order granting MDL status, the JPML noted that the current actions did not include personal injury claims but that it was possible that additional actions could be added that would include personal injury claims.

<sup>18</sup> See MDL #1358 Methyl Tertiary Butyl Ether (contamination of water in wells but no personal injury claims included); MDL #2001 Whirlpool (mold in washing machines); MDL #2284

Imprelis Herbicide Marketing Product Liability (herbicide killed trees).

<sup>19</sup> To be sure, about half of the historical actions consolidated in mass-tort MDL dockets came from the Asbestos MDL #875 with 192,049 actions. But the remaining 54 cases still consolidated over 200,000 actions. Thirty of the mass-tort product-liability cases consolidated over 1,000 actions. The median number of actions consolidated per mass-tort MDL docket is 1,179 claims with the mean number of claims being about about 3,700 claims even excluding the asbestos cases.

<sup>20</sup> See generally STANDARDS AND BEST PRACTICES FOR LARGE MASS-TORT MDLS, available at <http://law.duke.edu/judicialstudies/research/>.

<sup>21</sup> SUMMARY OF LITIGATIONS NOT CENTRALIZED UNDER 28 U.S.C. 1407 FOR THE PERIOD OCTOBER 1, 2013 TO SEPTEMBER 30, 2014, available at [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical%20Analysis%20of%20Multidistrict%20Litigation\\_2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf).

<sup>22</sup> *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, A., dissenting).

<sup>23</sup> For a recent critique of the MDL process, see MARTIN H. REDISH & JULIE M. KARABA, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015).