



The Advocate

KENTUCKY JUSTICE ASSOCIATION

**Service of Process in
the Time of Covid**

**No More Surprise
Medical Bills**

Multidistrict Litigation

**Avoid Unnecessary
Protective Orders**

**Recent Court
Summaries**



By Melanie S. Bailey and Jessica L. Powell

Multidistrict Litigation: The Most Common Case Proceeding Many Know Little About

On September 30, 2021, a little more than 62 percent of civil cases pending in federal district courts were subject to multidistrict litigation. Despite multidistrict litigation comprising most civil cases in federal court, many attorneys know little or nothing about it. This article attempts to serve as an introduction to the subject.

Imagine this scenario: The Food and Drug Administration announces a recall of Drug X after recent testing revealed the drug was contaminated with a substance that could cause serious injury or death. Not long after, lawsuits are filed by or on behalf of those who were injured or died due to Drug X in federal courts of varying districts.

Using traditional case progression, each of these separately filed cases would conduct its own discovery and file its own pre-trial motions. The problem is, with multiple cases in multiple courts, inconsistent rulings are a risk. Further, there is a vast duplication of work. For example, the defendants' experts would be deposed by every plaintiff. But what if there was a way to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel, and the judiciary? The Multidistrict Litigation Statute was Congress' attempt to do just that.

The Multidistrict Litigation Statute

In 1968, Congress enacted the Multidistrict Litigation Statute, 28 U.S.C. § 1407, in an attempt to make litigation less burdensome to the courts and parties. Under this statute, when civil actions involving one or more common questions of fact are pending in different districts, they may be transferred to any district for "coordinated or consolidated pretrial proceedings."¹ This statute is exceptional in that the transferee district is not subject to any venue restrictions.² In other words, the statute authorizes transfer to any district, not to a district where the action could have been brought. It is also unique in that it only grants the transferee court authority over pretrial proceedings except in very limited circumstances. That means, if the transferred cases do not

settle or otherwise terminate, they will be remanded back to their original districts on or before the conclusion of pretrial proceedings.³

Most cases, however, are not remanded. According to a November 17, 2021 Congressional Research Service publication, more than 97 percent of the transferred multidistrict litigation (MDL) cases terminated in the transferee court on motion to dismiss, motion for summary judgment, or due to settlement.⁴

Who Decides if the Cases are Transferred to Create an MDL?

The decision whether to transfer cases for coordinated or consolidated pretrial proceedings belongs to the Judicial Panel on Multidistrict Litigation (JPML), a body also created by 28 U.S.C. § 1407. To transfer cases to a district, the JPML must find 1) the cases have common questions of fact, 2) the transfer serves the convenience of the parties and witnesses, and 3) the transfer will "promote the just and efficient conduct of such actions."⁵

The JPML interprets the "common issues of fact" broadly to promote efficiency. For example, in 1977, the JPML denied the transfer of the then pending 103 asbestos cases, noting among other things, lack of commonality among defendants and plaintiffs, circumstances of exposure predominantly unique to each action, individual questions of causation in each action, and predominantly individual questions of the liability of each defendant in each action.⁶ In 1991, however, the JPML granted the transfer of more than 300,000 pending asbestos cases stating, "[W]e are persuaded that this litigation has reached a magnitude, not contemplated in the record before us in 1977, that threatens the administration of justice and that requires a new, streamlined approach."⁷

It is worth noting that there is no minimal case number requirement for an MDL. Indeed, as little as two cases have been consolidated.⁸ However, if there is only a minimal number of cases involved, the movant "is under a heavy burden

to show that those common questions of fact are sufficiently complex, and that the accompanying discovery will be so time-consuming as to further the purposes of Section 1407.”⁹

Who Is on the JPML? How Did They Get Appointed?

By statute, the JPML is composed of seven members: sitting circuit and district court judges, each from a different district, designated by the Chief Justice of the United States.¹⁰ The statute does not designate a term for the JPML members, but in recent years the members have been appointed to seven-year terms.¹¹ Currently, the Chair of the JPML is Judge Karen K. Caldwell, United States District Judge of the United States District Court for the Eastern District of Kentucky.¹² The other current members on the panel are Nathaniel M. Gorton (D. Massachusetts), Matthew F. Kennelly (N.D. Illinois), David C. Norton (D. South Carolina), Roger Benitez (S.D. California), Dale A. Kimball (D. Utah), and Madeline Cox Arleo (D. New Jersey).¹³

Since the JPML panel members have their own courts, the JPML’s “location” is somewhat of a misnomer. The Clerk of the JPML is in Washington, D.C.; however, JPML hearings can be heard at any federal courthouse.

The JPML conducts hearings approximately every two months¹⁴ and decides where the hearings will be held.

How Cases Get Transferred, Hearings

Cases get before the JPML in two ways. The first, and vastly more common, is by a party filing a motion to transfer with the JPML and each district court where the motion affects a pending action.¹⁵ The second way is the JPML itself raises the issue through an order directing the parties to show cause as to why an MDL should not be established.¹⁶

Regardless of the method in which cases come before the JPML, the panel holds a hearing to decide whether transfer for coordination is appropriate.¹⁷ However, the JPML may dispense with oral arguments if 1) the parties waive oral argument, 2) the dispositive issue has been authoritatively decided, or 3) oral argument would not sufficiently aid the decisional process.¹⁸ If oral argument is allowed, the JPML typically limits it to 20 minutes total. The twenty minutes are then split evenly between those who are for consolidation and those against. Since the time is very limited, typically the proponents for or against elect one attorney or just a few to speak on behalf of the group.

What Judge Gets the MDL?

The parties in a proposed MDL can suggest a district court judge(s) for the cases to be transferred to, and the JPML considers any recommendations. Ultimately, however, the JPML makes the decision. When deciding where to transfer a case, the JPML takes into consideration geographic and administrative issues. For example, the JPML considers where the defendants are based, where more cases originated, where witnesses are located, and the experience of the transferee judge.¹⁹ Examples of recent MDLs include the Opioid litigation, which was assigned to Judge Dan Aaron Polster in the Northern District of Ohio; the Zantac litigation, which was assigned to Judge Robin L. Rodenberg in the Southern District of Florida; and the Juul Labs., Inc. litigation, which was assigned to Judge William H. Orrick in the Northern District of California.

What Happens after Transfer?

Some MDLs are massive. For example, the 3M Combat Arms Earplug Product Liability Litigation—at its max—consisted of more than 300,000 cases. A court cannot realistically communicate with every single counsel

Continued on following page



Ray Forensic Consultants, LLC

Proudly serving the Midwest since 2001

Agricultural & Animals		Fires & Explosions
Elevators & Escalators		Sports & Recreation
Accounting & Economics		Real Estate & Insurance
Architecture & Construction	Jody Elliott	Human Factors & Warnings
Biomechanical & Biomedical	RayFC.com	Premises & Product Liability
Computers & Intellectual Property	614.519.5634	Vehicles & Crash Reconstruction

Multidistrict Litigation

Continued from previous page

representing those cases.²⁰ Therefore, once cases are transferred to a district judge, the judge often quickly appoints a Plaintiffs' Steering Committee (PSC) or lead counsel to speak on behalf of all plaintiffs. Typically, there are not many defendants in an MDL; however, if there are, the judge can appoint a Defendants' Steering Committee as well.

Although the MDL judge considers any agreements among the attorneys as to who should be selected for the steering committee, the judge has the final say. Generally, factors considered when determining who to select include an attorney's qualifications, resources (financial and otherwise), prior experience, and ability to work with the court and opposing counsel.

The duties of the steering committee typically involve conducting discovery, drafting pre-trial motions and responses, and disseminating information to the individual plaintiffs. Since the steering committee does work that advance all the cases (i.e., they work for the "common benefit" of all plaintiffs), they are typically compensated for that work when the cases settle. After the steering committee(s) is established, the judge enters standard orders to organize the case. These orders can include:

- An order establishing uniform written discovery often called the "plaintiff fact sheet" or "defendant fact sheet."
- An order directing plaintiffs to file and serve a Master Complaint and for defendants to respond with a Master Answer. The allegations within a Master Complaint and the defenses and answers in the Master Answer are generally deemed to have been plead in all the MDL cases.

- An order outlining the procedure for filing new cases with the transferee court. (More on this to come.)
- An order directing the parties to develop a census, which typically includes a list of the filed and unfiled cases handled by counsel in the MDL.
- Protective orders.

Later Cases and Tag-Along Actions

What do you do if there is an existing MDL, and you take on a case with common questions of fact with it? You potentially have three options: 1) file directly with the MDL court (if the MDL court established a procedure to do so), 2) file with the federal court that otherwise would have jurisdiction, or 3) file in state court (if you can).

Typically, the MDL court develops a procedure where new cases can be directly filed into the MDL, thereby bypassing transfer through the JPML. In some MDLs, this requires filing a traditional complaint. In MDLs where a master complaint has been filed, a new case can usually be filed by using a "short form complaint." A short form complaint is an abbreviated complaint that references the master complaint.

If one would prefer to file in the federal court where the case may ultimately be tried (and potentially avoid arguments over venue when and if the case is remanded), one can do that. However, counsel must notify the Clerk of the JPML of the potential "Tag-Along Action" (i.e., a case with common questions of fact with either an existing MDL or a pending motion to transfer to create an MDL).²¹ If the Clerk of the JPML determines the potential Tag-Along is appropriate for the MDL, the Clerk enters and serves all parties in the litigation a "Conditional Transfer Order."²² If no one opposes the Conditional Transfer Order, the case is transferred to the MDL. If there

is opposition, the opposing party must file a Motion to Vacate the Conditional Transfer Order.²³ Generally, any opposition to transfer requires unique issue particular to that case to succeed.

The last option is to file in state court if personal jurisdiction is proper. For this option to work, a defendant must be domiciled in the same state as a plaintiff. Otherwise, the defendants will likely remove the case to federal court where it would ultimately be transferred to the MDL.

It is important to note that, unlike class actions, a pending motion to transfer with the JPML and the formation of an MDL does not toll the statute of limitations on unfiled cases. Also, unlike class actions, each case within the MDL remains its own separate case. The cases are just consolidated for pre-trial proceedings.

Resolving MDLs

In general, MDLs resolve in a similar method as regular litigation via dispositive motions and settlement. There is, however, a unique case resolution tool in MDLs: the bellwether trial process. In the bellwether trial process, a sample of cases are selected from the pool of MDL suits for trial. The idea is that by trying a representative sample of cases, the parties learn important information, such as potential case value. Thus, these initial trials are "bellwethers," meaning indicators of trends.²⁴

Recall that 28 U.S.C. §1407 only provides the transferee court power to conduct coordinated pretrial proceedings. Therefore, for a bellwether to be tried in the MDL court, it 1) must have been originally filed or could have been originally filed in the MDL court, or, 2) the parties consent for the case to be tried in the MDL court.²⁵ One word of warning regarding consenting to have a case tried in an MDL: once a party has consented to having the case tried in the

MDL, that consent typically cannot be revoked.²⁶

Typically, the bellwether process ultimately places the MDL litigants into a settlement posture and the cases get resolved. However, if the cases are not terminated in the transferee court, they are referred back to the JPML for it to decide whether to remand the cases back to their original courts.

A party can ask the JPML to remand a case by filing a motion to remand or the JPML may remand on its own. However, the JPML is reluctant to remand cases back unless the transferee judge has suggested it.²⁷ Upon the suggestion of the transferee judge or the JPML's own initiative, the JPML enters a Conditional Remand Order.²⁸ If no party opposes the order, it becomes final after seven days. If a party does oppose the order, the party must file a notice of opposition within seven days and a motion to vacate within fourteen.²⁹ The JPML will then typically set the matter for a hearing.

Types of Cases Referred to the JPML

Plane-crash cases are the typical law school example of what cases are appropriate for an MDL. However, anything that involves multiple plaintiffs and districts could potentially qualify. For example, the JPML has considered motions for centralization in cases involving other accidents (e.g., train wrecks, hotel fires), products liability, antitrust price fixing, patent infringement, securities fraud, and employment practices.³⁰

Some Pros and Cons of MDLs

Pros:

MDL proceedings do, as Congress intended, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

Additionally, MDL proceedings can provide a path to justice for individuals whose cases were otherwise economically unviable. For example, pharmaceutical cases typically require multiple experts, such as epidemiologists, regulatory specialists, and physicians. If you have only one pharmaceutical case, the costs of working up the case for trial or settlement. However, if the experts' costs are split among hundreds of cases, the cases become more economically feasible.

Cons:

The biggest con to MDL proceedings is time. Although, in the aggregate, MDL proceedings save judicial resources, they are slower than a traditional case's progression. For example, the Deepwater Horizon oil spill—the largest marine oil spill in history—occurred on April 20, 2010. Lawsuits were filed, and on August 10, 2010, the JPML granted transfer of those cases

to Judge Emmet Sullivan of the United States District Court for the District of Columbia.³¹ In total, that litigation involved 6,117 cases. Of those, 815 *remain pending*.³² Obviously, not all MDL proceedings last more than a decade, but they do take considerably more time to resolve than traditional civil cases.

MDL cases account for most of the federal district courts' caseload. Yet, as the number of attorneys who practice in the type of cases that become MDLs is relatively small, many attorneys are not familiar with MDLs. MDL proceedings differ tremendously from traditional civil cases in that they allow for coordinated pre-trial proceedings, in potentially hundreds of cases, overseen by a district judge in a court that, had the case originally been filed there, may not have been an appropriate venue. Further, the MDL process involves rules and procedures unique to

Continued on following page



Demand Wizard
Settlement Brochures Done Like Magic

Take the Stress Out of Preparing Settlement Brochures!

The attorney provides, medical records, accident reports and a questionnaire and the Settlement Brochure is Prepared for You.

For more information and pricing go to
DemandWizard.com

Multidistrict Litigation

Continued from previous page

it. Therefore, strategic considerations unique to MDLs also arise. Accordingly, anyone who is looking to wade into the MDL waters for the first time is advised to proceed with caution and seek the help of an experienced MDL attorney.



— *Melanie S. Bailey is a shareholder at Burg Simpson Eldredge Hersh & Jardine. Melanie is a member of the firm's Cincinnati office and practices primarily in personal injury, complex litigation, pharmaceutical drug and medical device cases representing plaintiffs. Ms. Bailey has worked extensively on a number of mass tort and consolidated litigation matters including In re Ortho Evra Products Liability Litigation MDL 1742, In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation MDL 2100, In re Heparin Products Liability Litigation MDL 1953, and In re Depakote Litigation (consolidated in the S.D. of Illinois). In January 2021, she was appointed by Judge Brian Martinotti to the Plaintiffs' Steering Committee in In re Elmiron Pentosan Polysulfate Sodium Products Liability Litigation, MDL No. 2973 (D.N.J.) Melanie is licensed to practice in both Kentucky and Ohio.*

— *Jessica L. Powell is an associate at Burg Simpson Eldredge Hersh & Jardine's Cincinnati office. Jessica represents plaintiffs primarily in personal injury, wrongful death, and mass tort litigation, including lawsuits involving defective pharmaceutical drugs and devices. Jessica was significantly involved in the In re Depakote Litigation and is currently involved in the In re Elmiron Pentosan Polysulfate Sodium Products Liability Litigation, MDL No. 2973 (D.N.J.). Jessica is licensed to practice in Kentucky and Ohio.*

- 1 28 U.S.C. § 1407(a).
- 2 See *In re New York City Mun. Secs. Litigation*, 572 F.2d 49, 51 (2d Cir. 1978).
- 3 *Id.*
- 4 Joanna R. Lampe, CONGRESSIONAL RESEARCH SERVICE, *Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases*, (Nov. 17, 2021) available at <https://crsreports.congress.gov/product/pdf/IF/IF11976>.
- 5 28 U.S.C. §1407(a).
- 6 See *In re Asbestos Prods. Liab. Litigation*, 771 F. Supp. 415, 417 (J.P.M.L. 1991).
- 7 *Id.* at 418.
- 8 See *In re Cross-Florida Barge Canal Litigation*, 329 F. Supp. 543 (J.P.M.L. 1971).
- 9 *In re Garrison Diversion Unit Litig.*, 458 F. Supp. 223, 225 (J.P.M.L. 1978)
- 10 28 U.S.C. § 1407(d).
- 11 See Judge John G. Heyburn, *Panel Promotes Just and Efficient Conduct of Litigation*, The Third Branch: Newsletter of the Federal Courts, <https://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20February-2010-Heyburn%20Interview.pdf> (Feb. 6, 2010).
- 12 See Judicial Panel on Multidistrict Litigation, *About the Panel*, <https://www.jpml.uscourts.gov/about-panel> (last visited Jan. 24, 2022).
- 13 *Id.*
- 14 Hearings are held one day every January, March, May, July, September, and December.
- 15 28 U.S.C. § 1407(c)(ii).
- 16 8 U.S.C. §1407(c)(i).
- 17 See Panel Rule 11.1(c).
- 18 See Panel Rule 11.1 (b-c).
- 19 See *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364, 1366 (J.P.M.L. 2013) (Noting the transferee district selected was where the majority of actions had been filed, had an experienced judge, and was where defendants were based); *In re L'OrealWrinkle Cream Mktg. & Sales Practices Litig.*, 908 F. Supp. 2d 1381, 1382 (J.P.M.L. 2012) (Noting the transferee judge was experienced in MDLs and the court was where the first action was filed); *In re Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices & Prods. Liab. Litig.*, 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (Noting the defendant's corporate office was located in the transferee court's district, more actions were pending in the transferee court's district than anywhere else, and the selected judge's experience in complex cases prepared him to handle the MDL.)
- 20 Judicial Panel on Multidistrict Litigation, *Litigation Statistics by MDL* (Jan. 19, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-December-15-2021.pdf
- 21 Panel Rule 7.1(a).
- 22 Panel Rule 7.1(b).
- 23 Panel Rule 7.1(f).
- 24 Merriam-Webster, *Bellwether*, <https://www.merriam-webster.com/dictionary/bellwether> (last visited Jan. 24, 2022).
- 25 See *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (holding that an MDL court could not hold the trial of a transferred case without the consent of the parties). These have come to be known as "Lexecon waivers," where the parties waive objections to improper venue.
- 26 See *In re Fosamax Prods. Liab. Litig.*, 815 F. Supp. 2d 649, 654 (S.D.N.Y. 2011) (noting consent can be withdrawn only upon a showing of good cause); *In re Bair Hugger Forced Air Warming Devices Prods. Liab. Litig.*, 322 F. Supp. 3d 911, 913 (D.Minn. 2018) (same).
- 27 Panel R. 10.3(a).
- 28 Panel R. 10.2(a).
- 29 Panel R. 10.2(b, e).
- 30 Judicial Panel on Multidistrict Litigation, *About the Panel*, <https://www.jpml.uscourts.gov/about-panel> (last visited Jan. 24, 2022).
- 31 Judicial Panel on Multidistrict Litigation, *MDL Report* (Jan. 19, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-January-19-2022.pdf.
- 32 Judicial Panel on Multidistrict Litigation, *Dockets by Action Pending* (Jan. 19, 2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-19-2022.pdf.