

A CLOSER LOOK AT THE BENEFITS OF MULTIDISTRICT LITIGATION

PERSPECTIVE

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Toyota's unintended acceleration and the Gulf oil spill have given rise to lawsuits involving numerous plaintiffs and defendants throughout the U.S. As a result, the use of multidistrict litigation or MDLs has spiked.

Used as a device to increase efficiency in nationwide disputes with numerous parties and in multiple courts, multidistrict litigation can help manage complex civil federal lawsuits that are related and share common facts. At their outset, MDLs allow the transfer and consolidation of all pre-trial generic discovery in related cases to one federal judge, allowing for plaintiffs' lawyers to cohesively work together when facing voluminous discovery against corporate giants, such as Toyota and BP. While there are significant benefits to using this judicial device, MDLs may come with a price.

Congress first introduced multidistrict litigation in 1968 when a nationwide antitrust conspiracy was uncovered among electrical equipment manufacturers like General Electric. In that case, the country's largest manufacturers of electrical equipment were accused of widespread price fixing. There were more than 2,000 cases pending in 36 districts against General Electric among others, forcing courts and Congress to find ways to coordinate and consolidate pre-trial discovery.

Congress enacted Section 1407 of the U.S. Code to specifically address these kinds of cases. Through multidistrict litigation, Congress intended to avoid the potential for duplicative discovery and inconsistent decisions on pretrial matters that can result when different federal courts handle various lawsuits sharing the same or similar subject matter.

Section 1407 created the Judicial Panel on Multidistrict Litigation to transfer federal civil cases involving common questions of fact to a single judge for coordinated pretrial proceedings. Under this scheme, the Judicial Panel is comprised of a committee of seven judges from different circuit and district courts appointed by the Chief Justice of the U.S. Supreme Court. The Judicial Panel can transfer cases on its own initiative if the convenience to the parties, witnesses and the efficient conduct of the case warrants it, or through a petition by a party. If a case is selected for coordination, all generic discovery, pretrial matters and case management will be handled and supervised by one federal judge.

The Judicial Panel will next consider the venue where the cases can be transferred. Under Section 1407, there is no specific criteria for where the cases can be transferred. In fact, the panel can transfer the cases to a judge from a wholly different district than from where the cases will be transferred. If there are any disputes among opposing counsel at this stage, they are generally over where the cases will be transferred, rather than whether they should be transferred at all.

While the Judicial Panel can only consolidate federal court cases, parties who have similar cases pending in state court may also coordinate discovery and pretrial matters along with those in federal courts, but they are not required to do so. After completing pretrial matters, the Judicial Panel then remands the cases back to the districts from which they were transferred, unless the case is resolved while consolidated.

MDLs have been vastly successful. Multidistrict proceedings allow hundreds if not thousands of related cases to proceed smoothly by avoiding duplicative discovery. They save time and money and increase the potential for global settlement.

Witnesses need to be prepped and produced only once for depositions. Similarly, the judge overseeing the litigation often creates a document depository so that numerous sets of documents do not need to be prepared for each case. Attorneys can avoid reviewing duplicative mounds of discovery and can divvy up the materials produced by large, corporate defendants. Corporate giants also save on the costs discovery as MDLs often employ online databases, thus avoiding the need to print and mail materials to all plaintiffs involved. Defense firms can reduce billing expenses because they will be dealing with a single court to administer specific guidelines for all of the cases in the MDL. As a result, defense firms can't employ delay tactics because MDL subjects the parties to strict timetables and case management orders.

Plaintiffs' firms prefer many of the benefits of MDLs because defendants involved in them are often deep-pocketed national companies capable of ambushing smaller firms with mountains of discovery. In recent years, MDLs have been created for nearly all products liability cases against pharmaceutical companies, including Bayer, Pfizer, Wyeth, Merck and GlaxoSmithKline. In each of these cases, defendants have produced custodial records, scientific data, and advertising campaigns that have included more than 10 million documents. Plaintiffs' attorneys whose cases have been transferred to an MDL court can thoroughly process that plethora of information by uniting their forces.

The use of the MDL mechanism affords consistency among like cases that would not exist if the discovery matters were determined individually in their respective trial courts. Since the transferee judge decides all pretrial disputes and not just those relating to discovery rulings tend to be more consistent. As a result, plaintiffs don't need to fear inconsistent initial determinations that will unfavorably posture their case because they will be on equal footing with other plaintiffs and can rely on the same information to prove their case. The consistency of rulings also helps avoid repetitive appeals of pretrial motions.

A plaintiff steering committee is usually appointed to spearhead the completion of briefing on important motions and to facilitate case management. The committee is also responsible for disseminating pertinent information to all individual plaintiffs' attorneys who have cases pending in the MDL. While having a plaintiff steering committee can help because it consists of a group of attorneys who are greatly devoted to the prosecution of the cases, individual plaintiffs' attorneys may have minimal control of their cases at the critical early stages. This is because they must typically rely on the discretion of the committee to conduct research and to stay informed on critical matters. It's also possible that plaintiffs' attorneys can lose the incentive to creatively think and posture their cases as they can ultimately end up taking a more passive role in shaping the direction of their cases that are "parked" in the MDL.

Relying on a steering committee and splitting the workload between plaintiffs' attorneys can have its drawbacks. Dividing discovery between dozens if not hundreds of attorneys who are

involved in multidistrict litigation may leave at least some attorneys in the dark about key aspects of the litigation, especially in the fact finding phase. When their cases are remanded back to the respective trial courts, some plaintiffs' attorneys may arguably lack the level of familiarity they would have in an ordinary case in which they are more actively involved. Likewise, when a case is remanded back to the transferring court, the transferor court judge must become familiar with the case often several months after it was consolidated. The potential lack of preparedness of both the attorneys and the transferor judge can risk delays in litigation once it is remanded back.

While efficiency is the primary motivator for consolidation, plaintiffs' attorneys can feel handcuffed in using tactical strategies they would normally employ for pushing cases forward that are pending before favorable judges, or for those cases that have strong facts or are brought against weaker opposing counsel. This is because all cases in the MDL proceed together, under the same guidelines and timeframe. No creative tools can be used, unless they are used by all.

The MDL mechanism is particularly applicable to the Toyota cases currently pending and the Gulf oil spill suits on the horizon. So far, more than 200 suits have been transferred to multidistrict litigation in Santa Ana in the Toyota litigation. Interestingly, some plaintiffs' attorneys representing wrongful death claims against Toyota oppose the consolidation. These attorneys believe that joining all the suits in a single forum can only benefit the defendant because Toyota will only need to defend these suits on one front. Some attorneys are also reluctant to give up control of their cases to the steering committee, particularly if they think the committee members have less experience or expertise than they do.

Multidistrict litigation will likely surface as lawsuits are filed in connection with the oil spill in the Gulf as well. As a class action may be difficult to establish given the individual damages that exist as a result of the crisis, attorneys will experience a scenario similar to what's happening with Toyota. With damages encompassing thousands of potential plaintiffs nationwide, the managing of generic discovery in multidistrict litigation may be the only practicable option available. As the courts are seeing in Toyota, not all plaintiffs' attorneys will favor multidistrict litigation due to the varying degrees of damages and the different types of plaintiffs - restaurants, fishing industry concerns and tourist attractions - affected by the spill. The Toyota and BP suits underscore the risks and benefits inherent in multidistrict litigation. Despite the gains in efficiency and tremendous support afforded by consolidation, not all plaintiffs' attorneys are readily willing to surrender control of their cases from start to finish. Nonetheless, when it comes time for Toyota and BP to engage in burdensome discovery, it will not take long for plaintiffs' attorneys to remember the benefits of joining their colleagues and tackling the cases as one cohesive unit. Of course, the process of getting there will be interesting to watch.

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