

Multi-District Case Consolidation Has Pros and Cons

► Federal case consolidation through the MDL Panel process encourages efficiency in complex matters with similar questions of fact.

By Neil B. Nicholson

Multidistrict litigation (MDL) was enacted by Congress in 1968 as a way to efficiently manage mass tort litigation in federal courts.

There are both real and perceived pros and cons to all parties involved in cases that go before the MDL Panel. This panel is made up of seven circuit and district court judges, no two of whom can be from the same district, and determines whether cases are fit for consolidated pretrial proceedings.

The MDL Panel will transfer multiple pending cases if it determines that "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). The purpose of MDL is to avoid repetitive discovery compliance, eliminate inconsistent pretrial rulings, and conserve the resources of litigants and the judiciary.

One of the primary advantages of

MDL consolidation of federal cases potentially pending in 20 different federal circuits is that it really does promote efficiency.

Without an MDL, for example, a manufacturer's key employee could be deposed repeatedly, and response to similar sets of discovery requests would be required, over and over again. In MDL, that key employee gets deposed once, and only one set of discovery responses is required.

Another advantage of MDL is consistency of judicial rulings. In 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.

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.

Some defendants may find MDL dis-

advantageous because the speed of the pretrial discovery discourages delay, which is sometimes a defendant's friend. Defendants may also seek to avoid MDL because of the potential for negative publicity. Negative publicity can sour the defendant's goodwill and could even attract further lawsuits from injured persons.

What types of cases wind up in MDL?

A majority of the cases in MDL involve pharmaceutical claims, but the docket extends to all kinds of cases.

In the past 40 years, the MDL Panel has considered motions for centralization in almost 2,400 dockets involving nearly 400,000 cases and hundreds of millions of dollars in claims.

These dockets encompass litigation categories as varied as airplane crashes, train wrecks, hotel fires, asbestos, drugs and other product liability cases, patent validity and infringement, antitrust price fixing, securities fraud, and employment practices. There are 286 MDL dockets currently pending all over the United States.

How does a case wind up in the MDL docket?

A case ends up in MDL when a party in a federal action files a motion requesting centralization of all similar cases for purposes of conducting pretrial proceedings, consistent with 28 U.S.C. §1407.

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.

What happens upon transfer?

Once the MDL Panel 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 docket.

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 class action certification, if appropriate, 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.

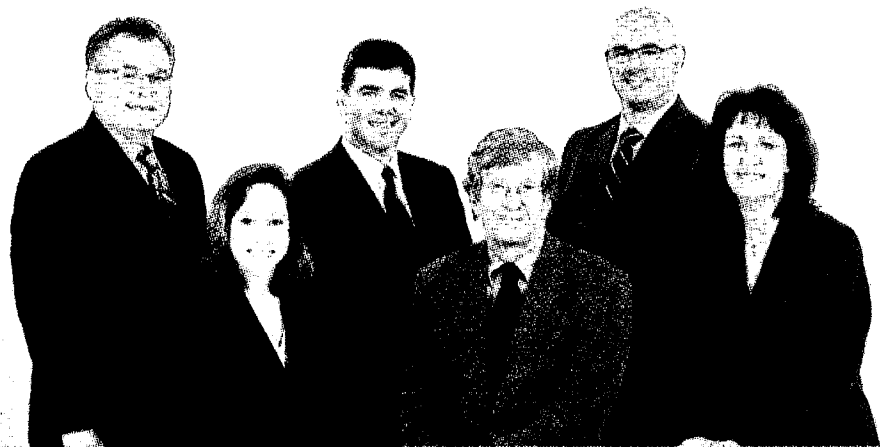
MDL in New Hampshire

There are two pending MDL matters in New Hampshire, both of which relate to the marketing and sales practices of companies that make certain soap products. See *In Re: Dial Complete Marketing and Sales Practices Litigation* (MDL 2263); No. 1:12-md-2320-PB, *In Re: Colgate-Palmolive Softsoap Antibacterial Hand Soap Marketing and Sales Practices Litigation* (MDL 2320).

The plaintiffs in the Dial soap MDL take issue with Dial's advertisement that Dial Complete handwash kills "99.99 percent" of pathogens or that it has 100 to 1,000 times more germ-killing ability than simply washing with soap and water.

The plaintiffs claim that these types of marketing statements are misleading and based on an allegedly flawed study that Dial conducted. A few months ago, the plaintiffs slipped past Dial's motion to dismiss these claims. Similarly, in March, the Colgate-Palmolive defendants' efforts to dismiss the plaintiffs' claims on the basis of the primary jurisdiction doctrine were washed out by the court. Both MDL matters remain active.

Neil B. Nicholson practices with the McLane Law Firm representing personal injury plaintiffs in state and federal courts, including MDL plaintiffs. He is a member of the NH Association of Justice Board of Governors and NHBA Federal Practice Section.



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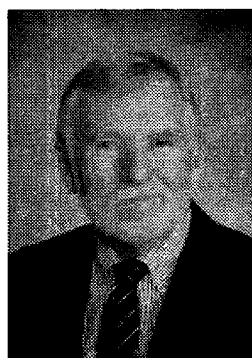
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