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JPML PROCESS: A DEFENDANT'S PERSPECTIVE

Sheila L. Birnbaum, Hayden A. Coleman, Jacqueline D. Harrington and Ashley A. Flynn*

INTRODUCTION

“Agreement is made more precious by disagreement.” While this quote, attributed to Publius Syrus (fl. 85-43 B.C.), a Latin writer best known for his proverbs, certainly was not written about modern-day litigators, it could have been. Plaintiffs and defendants tend to (respectfully) disagree on most issues large and small, and yet centralization of many cases through an MDL is one area where the parties may find common ground—under the right circumstances. Defendants tend to support MDLs when many cases are anticipated, and the benefits of streamlined discovery and uniform rulings loom large. Nonetheless, coordination before an MDL sometimes does not have the intended effect of increasing efficiency, for example, when an MDL covers vastly different defendants and alleged injuries. In those circumstances, defendants may find themselves disagreeing with plaintiffs who seek centralization before the Judicial Panel on Multidistrict Litigation (JPML, or “the Panel”) or trying to carve out categories of cases to avoid being swept into an overbroad MDL. To be successful, defendants must recognize that the Panel itself is a singular institution where defendants must carefully coordinate and pick their battles. Even then, making successful arguments concerning the MDL location or judge may prove challenging.

This article focuses on four key questions from the defense perspective concerning the formation of MDLs. *One*, what factors should defendants consider when faced with an MDL? *Two*, how can defendants avoid being swept into an MDL when they have determined that it is not in their interests? *Three*, what are the prospects for defendants to argue successfully in favor of a particular MDL location? *Four*, what types of arguments should defendants focus on before the Panel? While these are not the only considerations relevant to defendants, we hope that they will provide a flavor for the types of issues defendants typically consider during the initial stages of MDL formation.

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I. WHAT FACTORS SHOULD DEFENDANTS CONSIDER WHEN FACED WITH AN MDL? COPYCATS VS. EFFICIENCY

Defendants have a lot to consider in deciding whether to advocate for centralization, oppose centralization, or take no position on the issue. While MDLs can encourage the filing of additional lawsuits of dubious merit, they can also be a critical tool to help defendants manage costs, streamline discovery, and understand the value of a case for settlement purposes.

A. The Field of Dreams

We'll leave our friends from the plaintiffs' bar to explain the circumstances under which they prefer MDLs, but from a defense perspective, the reasons *not* to prefer an MDL are clear. Defendants know that once an MDL is formed, plaintiffs who might not otherwise file a claim will appear from around the country to join. Some commentators have observed that MDLs invite meritless claims because (1) lawyers anticipate that there "will be a settlement in the MDL transferee court in which they can get 'inventory value' for their claims" before remand to the original court and (2) "amassing a large inventory of claims can support a lawyer's quest for appointment to a leadership position in the MDL."¹ For this reason, MDLs are often analogized to the Field of Dreams: "If you build it, they will come."² Additionally, any adverse rulings or jury verdicts can be exacerbated when numerous cases are consolidated in an MDL.

Though the creation of an MDL may trigger additional filings, mere representations by counsel that more actions *will* be filed does not appear to strongly influence the Panel. In 2012, the Panel considered centralization of claims arising out of alleged defects in the da Vinci Robotic Surgical System. The Panel noted that "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions."³ The Panel has also recognized that the number of cases may not always be a relevant consideration when the cases are pending in relatively few districts. This is particularly true where the cases are in the same district and/or assigned to the same judge. For example, centralization has been denied where six actions were pending in just two districts, with five of the actions in the same district and assigned to the same judge.⁴ The Panel concluded "centralization [was] not

¹ Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, p. 143, available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

² See, e.g., *id.*; James M. Beck, *Stray Thoughts from the ACI Conference*, Drug & Device Law (Dec. 17, 2007), <https://www.druganddevicelawblog.com/2007/12/stray-thoughts-from-aci-conference.html>.

³ *In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012).

⁴ See *In re SLB Enter. RICO Litig.*, MDL No. 2899, Order Denying Transfer at 1-2 (J.P.M.L. July 31, 2019).

necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of the litigation” as there were “only two sets of pretrial proceedings to coordinate.”⁵

Where only a small number of actions are at issue, the Panel has reminded practitioners that “the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate.”⁶ The Panel has routinely denied MDL applications where litigation involved just a small number of individual claims.⁷ This tendency to deny centralization generally has been the case even when *defendants* try to use the Field of Dreams argument as a sword in *support* of centralization. In the TrueCar litigation, for example, defendants sought to centralize just two actions pending in two different jurisdictions, where the plaintiffs alleged the defendants breached their fiduciary duties (or aided and abetted such breaches) to TrueCar by causing the company to issue false and misleading statements.⁸ At oral argument, the defendants argued “several other cases were likely to be filed.”⁹ The Panel rejected this argument, holding that it was “reluctant to grant [MDL] centralization based on the mere possibility of future actions.”¹⁰

B. A “Precious” Moment of Agreement

If MDLs can beget more and more lawsuits, why would defendants *ever* want an MDL? For both parties, the objectives of forming an MDL are all rooted in efficiency: (1) streamline the discovery process to “eliminate duplicative discovery”; (2) “prevent inconsistent pretrial rulings”; and (3) conserve the resources of both the parties and the courts.¹¹ Thus, in the appropriate circumstances, both parties may find “precious” agreement that an MDL is desirable.

For example, in litigation involving thirty-two actions relating to the use of the oral contraceptives called Yaz or Yasmin, both sides (largely) supported centralization. The Panel agreed, finding the cases “involve[d] common questions

⁵ *Id.*

⁶ *In re Bernzomatic and Worthington Branded Handheld Torch Prods. Liab. Litig.*, MDL No. 2897, Transfer Order at 1 (J.P.M.L. July 31, 2019) (three actions in three judicial districts).

⁷ See, e.g., *In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d at 1340 (denying centralization of five personal injury and wrongful death actions involving alleged defects in a surgical device); *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2011) (denying centralization of nine actions alleging injury from recalled baby formula).

⁸ See *In re TrueCar, Inc., Shareholder Derivative Litig.*, MDL No. 2900, Order Denying Transfer Order at 1-2 (J.P.M.L. July 3, 2019).

⁹ *Id.*

¹⁰ *Id.* (citing *In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig.*, 883 F. Supp. 2d at 1340 (“While proponents maintain that this litigation may encompass ‘hundreds’ of cases or ‘over a thousand’ cases, we are presented with, at most, five actions.”)).

¹¹ See, e.g., *In re Hyundai & Kia Fuel Econ. Litig.*, 923 F. Supp. 2d 1364, 1365 (J.P.M.L. 2013); *In re Ford Fusion & C-Max Fuel Econ. Litig.*, 949 F. Supp. 2d 1368, 1369 (J.P.M.L. 2013); *In re Land Rover LR3 Tire Wear Prods. Liab. Litig.*, 598 F. Supp. 2d 1384, 1385 (J.P.M.L. 2009).

of fact, and that centralization . . . will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.”¹² Similarly, in litigation related to whether Zolofit had caused birth defects in utero, Pfizer sought to consolidate fifty-nine pending actions in an MDL.¹³ The briefing focused on arguments that an MDL would streamline discovery and avoid inconsistent pretrial rulings.¹⁴ In both of these examples, the fight between the parties focused on *where* the Panel should send the MDL, not *whether* an MDL should form.

Parties are most likely to agree that an MDL is advantageous when multiple cases have already been filed or will be filed regardless of whether an MDL exists, and defendants find value in limiting the number of venues in which they will have to defend themselves. For example, 3M recently supported centralization of the more than 200 Combat Arms Earplug actions filed against it; the allegations were that defective earplug design prevented a snug fit in the wearer’s ear, leading to hearing loss or tinnitus.¹⁵ At that time, plaintiffs’ counsel had signaled their intent to file “thousands” more actions.¹⁶ As with the oral contraceptive and Zolofit litigations, the focus of the argument was on the location of an MDL as the parties were unanimous in their view that an MDL should form.

II. HOW CAN DEFENDANTS AVOID GETTING SWEEPED INTO AN MDL WHEN THEY HAVE DETERMINED IT IS NOT IN THEIR BEST INTERESTS? DIFFERENTIATION IS KEY

Although the objectives of forming an MDL are rooted in efficiency, there are situations in which centralization may not achieve this goal. Defendants advocate against formation or oppose the transfer of particular actions into an MDL where there are, in our view, too many types of defendants, too many types of injuries, or both.

When arguing against centralization, defendants should focus not only on whether “common” factual issues exist, but also whether such issues are complex and burdensome enough to warrant an MDL. For example, all defendants opposed centralization sought by plaintiffs in litigation alleging injuries caused by spray polyurethane foam (“SPF”) insulation products installed in plaintiffs’ properties.¹⁷ The Panel concluded that far from making the case more efficient, “placing direct competitor manufacturer defendants into the same litigation would require protecting trade secret and confidential information from disclosure to all parties

¹² *In re Yasmin & Yaz Mktg.*, 655 F. Supp. 2d 1343, 1343 (J.P.M.L. 2009).

¹³ Brief in Support of Defendant Pfizer Inc.’s Motion Pursuant to 28 U.S.C § 1407 to Transfer Related Actions for Coordinated Pretrial Proc. in the S. Dist. of N.Y. at 1, *In re Zolofit* (Sertanline Hydrochloride) Prods. Liab. Litig., 856 F. Supp. 2d 1347 (J.P.M.L. 2012) (MDL No. 2342).

¹⁴ *Id.* at 7-8.

¹⁵ Defendant 3M Co.’s Response to Motion to Transfer Related Actions for Coordinated Pretrial Proceedings at 3, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 366 F. Supp. 3d 1368 (J.P.M.L. 2019) (MDL No. 2885).

¹⁶ *Id.* at 1.

¹⁷ *In re Spray Polyurethane Foam Insulation Prods. Liab. Litig.*, 959 F. Supp. 2d 1364, 1364 (J.P.M.L. 2013).

and complicate case management.”¹⁸ And while there were certain overlapping questions, “individualized facts concerning the chemical composition of the different products, the training and practices of each installer, and the circumstances of installation at each residence will predominate over the common factual issues alleged by plaintiffs.”¹⁹

Similarly, in August 2020, the Panel declined to centralize hundreds of cases filed by businesses seeking insurance coverage for losses during the COVID-19 pandemic. The Panel concluded “the MDL that movants request entails very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry.”²⁰ However, the Panel indicated it might be open to the creation of smaller, “single-insurer” MDLs which “are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions,” and “thus would not entail the managerial problems of an industry-wide MDL involving more than a hundred insurers.”²¹ The Panel directed these “single-insurers” to submit briefing on an expedited basis to show cause for why those actions should not be centralized, noting “that delay should be avoided in this litigation to the extent possible.”²²

In subsequent hearings, the Panel examined proposed MDLs with respect to six particular groups of insurers, concluding that centralization was not appropriate as to four insurers because it would further complicate the litigation.²³ For example, in one of the denials, the Panel considered whether to centralize sixty-six actions brought against a single group of insurers.²⁴ The Panel found that centralization was a “close question” given that the insurance policies “appear to use standard forms and will involve the interpretation of common policy language.”²⁵ But weighing against centralization, the Panel noted that “time is of the essence in this litigation” given that “[m]any plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders.”²⁶ Under these circumstances, the Panel concluded that efficiency was “best obtained outside the MDL context.”²⁷ In contrast, the Panel concluded that centralization was appropriate against two other insurers

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *In re* COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 U.S. Dist. LEXIS 144446, at *5 (J.P.M.L. Aug. 12, 2020) (MDL No. 2942).

²¹ *Id.* at *6.

²² *Id.*

²³ *In re* Erie COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 WL 7384529, at *1 (J.P.M.L. Dec. 15, 2020) (MDL No. 2969).

²⁴ *In re* Hartford COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 WL 5884782, at *1 (J.P.M.L. Oct. 2, 2020) (MDL No. 2963).

²⁵ *Id.* at *2.

²⁶ *Id.*

²⁷ *Id.*

where the actions were likely to be more limited in geographic scope and therefore more “manageable.”²⁸

Likewise, in the recent case of the aqueous-film forming foams (“AFFF”) litigation, some defendants successfully argued against transfer of three cases into an MDL by citing to the many factual differences between the cases in which they were named, and the other cases proposed for consolidation.²⁹ The AFFF cases involved the discharge of firefighting foam for training purposes by the military and other users at military bases, airports, fire training centers, and other locations. In contrast, three other cases involved the alleged presence of Perfluorooctanoic acid (“PFOA”) in groundwater and municipal water, but these were not alleged to be based on claims involving AFFF or the users of AFFF.³⁰ Defendants in these PFOA cases successfully argued that adding these cases to the AFFF MDL would “disrupt rather than promote efficiency.”³¹ And the MDL panel found that it would be “devoted to scores of cases that involve particularized facts and claims wholly distinct” from the facts and claims in the three PFOA cases.³² The Panel agreed that the actions did not belong in the MDL, noting that the cases were “different in kind from the AFFF actions and involve more varied defendants,” and were “being managed effectively in their current districts.”³³ In particular, the Panel acknowledged that the inclusion of such cases in the MDL would undermine the goal of efficiency and “could quickly become unwieldy.”³⁴

On the other hand, in considering whether to form an MDL to address alleged improper marketing and distribution of various prescription opiate medications, the Panel rejected carve out arguments made by certain plaintiffs and defendants to avoid centralization of specific cases.³⁵ Defendants focused on the fact that they were named in a limited number of cases with distinct allegations, or argued the claims against them were distinct because, for example, they involved captive wholesale distributors of opioids. Even though individualized factual

²⁸ *In re Erie COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2020 WL 7384529, at *2.

²⁹ *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1392 (J.P.M.L. Oct. 19, 2018) (MDL No. 2873).

³⁰ *Id.*

³¹ Brief in Response of Saint-Gobain Performance Plastics Corp. and Honeywell International Inc. In Opposition to 3M’s Motion to Transfer Actions Pursuant to 28 U.S.C. § 1407 at 2, *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d 1391, 1392 (J.P.M.L. 2018) (MDL No. 2873).

³² *Id.*

³³ *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, 357 F. Supp. 3d at 1396.

³⁴ *Id.*

³⁵ *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804, Transfer Order at 3 (J.P.M.L. 2017).

issues might arise, the Panel concluded that they did not “negate the efficiencies to be gained by centralization.”³⁶

III. WHAT ARE THE PROSPECTS FOR DEFENDANTS TO ARGUE SUCCESSFULLY IN FAVOR OF A PARTICULAR MDL LOCATION? NO ONE KNOWS

As many practitioners have observed, one of the “least predictable aspects of panel practice” is the selection of venue for a new MDL proceeding.³⁷ The Panel considers various factors in selecting the MDL district, including: the location of parties’ headquarters (where witnesses and documents are likely located), districts with the most cases or most procedurally advanced case(s), and the location of the first-filed action.³⁸ Typically, as found in a study cited in the Introduction to this Symposium, the Panel “tends to follow the preferences of the parties when they agree on where to consolidate the cases. When the parties disagree, the study found that ‘the Panel sides with plaintiffs and defendants roughly equally.’”³⁹

The Panel also considers the experience of the potential MDL judge, the familiarity of the MDL judge with factual or legal issues at play, and the docket conditions of a potential transferee district or MDL judge.⁴⁰ In particularly large and complex MDLs, the Panel may choose a judge with prior experience managing an MDL.⁴¹ But lack of MDL experience does not preclude a judge from being assigned to an MDL. In fact, the Panel has made a point to provide judges without prior MDL experience the opportunity to supervise an MDL should they want it, even in cases that might prove to have significant volume and complexity.⁴²

Because of the many considerations that go into selection of an MDL location, parties can sometimes be surprised by how venues and judges are chosen. The Panel will often hear scores of arguments advocating for particular locations,

³⁶ *Id.*

³⁷ Alan Rothman, *And Now a Word from The Panel: 5 MDL Lessons*, LAW360 (Nov. 28, 2017), <https://www.law360.com/articles/988626/and-now-a-word-from-the-panel-5-mdl-lessons>.

³⁸ *Id.*; Alan Rothman, *And Now a Word from The Panel: Spotlight on MDL Venue*, LAW360 (Mar. 25, 2020), <https://www.law360.com/articles/1256760/print?section=banking>.

³⁹ Ryan C. Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801, 808 (2021) (quoting Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713, 1714 (2019)).

⁴⁰ Kristen K. Bromberek, *MDL Strategies: Choosing a Transferee Court*, ALSTON & BIRD (Jan. 9, 2015), <https://www.alston.com/en/insights/publications/2015/01/mdl-strategies-choosing-a-transferee-court-ilaw360/>.

⁴¹ *In re Nat’l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1379, Transfer Order (J.P.M.L. Dec. 5, 2017) (MDL No. 2804) (assigning Judge Dan A. Polster noting he was an “experienced transferee judge who presides over several opiate cases” with “previous MDL experience. . .which involved several hundred cases, which has provided him valuable insight into the management of complex, multidistrict litigation”).

⁴² See, e.g., *In re Domestic Airline Travel Antitrust Litig.*, MDL No. 2656, Transfer Order at 2 (J.P.M.L. Oct. 13, 2015) (“[C]entralization in this district provides us the opportunity to assign the litigation to the Honorable Colleen Kollar-Kotelly, an able and experienced jurist who has not yet had the opportunity to preside over a multidistrict litigation.”).

and then a seemingly unlikely venue without broad support of the parties will be selected. Exacerbating the sense that these decisions are a bit of a black box, the Panel has even assigned MDLs to districts not requested by any party, including districts without *any* pending cases.⁴³ In deciding to assign an MDL to a district without any cases, the Panel may consider, for example, that “litigation is nationwide in scope, and thus almost any district would be an appropriate forum” and that the judge to whom the MDL is assigned has relevant experience that will “facilitate the just and efficient conduct” of the litigation.⁴⁴

IV. WHAT ARGUMENTS SHOULD DEFENDANTS FOCUS ON BEFORE THE PANEL? COORDINATE AND PICK YOUR BATTLES

The Panel is always well prepared. If you are arguing in front of the Panel, you can assume that the judges have read the parties’ briefs and have a list of questions prepared. As mentioned in this Symposium’s Introduction, in contrast to a traditional oral argument, it is not uncommon for parties to be limited to two to three minutes at oral argument. Defendants should be guided by a few principles to use their time wisely: (1) coordinate with co-defendants; (2) don’t fight on what is not in dispute; (3) don’t rehash your brief; and (4) avoid sounding like a travel agent.

Coordinate with co-defendants. Coordinate with co-defendants in advance of the hearing, if possible, to use your time wisely. Indeed, the Panel advises attorneys arguing the same viewpoint to designate a single representative.⁴⁵ For example, at a recent hearing on whether to centralize hundreds of COVID-19 insurance cases, a single attorney argued on behalf of more than 30 insurers who uniformly opposed the creation of an MDL.⁴⁶ Coordinating with co-defendants in advance of the hearing allows you to aggregate your time through a single representative, maximizing the number of arguments your group will be able to make.

Pick your battles. If all parties agree on an issue, do not waste what little time you have before the Panel on a non-issue. In the 3M litigation discussed above, where all parties unanimously supported an MDL, the entire argument focused on what court was best suited to hear the cases.⁴⁷ That being said, as

⁴³ See, e.g., *In re Pella Corp. Architect and Designed Series Windows Prods. Liab. Litig.*, 996 F. Supp. 2d 1380, 1382 (J.P.M.L. Feb. 14, 2014) (MDL No. 2514) (noting “[a]lthough no constituent action currently is pending in that district, that is no impediment to its selection as transferee district”).

⁴⁴ *Id.* at 1383.

⁴⁵ Julie Zeveloff, *7 Tips for Maximizing Your Time Before the JPML*, LAW360 (Sept. 21, 2010), <https://www.law360.com/articles/188341/print?section=classaction>.

⁴⁶ Jeff Sistrunk, *6 Key Moments from the COVID-19 Insurance MDL Hearing*, LAW360 (July 31, 2020), <https://www.law360.com/articles/1297345/print?section=classaction>.

⁴⁷ *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 366 F. Supp. 3d 1368, 1369 (MDL No. 2885) (J.P.M.L. Apr. 12, 2019).

previously noted, it can be difficult to predict the venue or judge that the Panel will select for the MDL.⁴⁸

Don't rehash your brief. As noted, the Panel will come to oral argument thoroughly prepared and will have read your briefs, so make sure they are comprehensive and persuasive; there is no need to rehash the arguments in your brief. Your valuable time will best be spent updating the judges on any new developments in the litigation, answering their questions, and driving home your key points.

Avoid sounding like a travel guide. Although the Panel considers convenience in its decision on where to transfer the MDL, it does not appear to be their top priority. Instead, "[t]he arguments presented in favor of a particular transferee district should be tied to the administrative factors that are likely to influence the JPML's decision."⁴⁹ Rather than focus on the merits of a location (e.g., size of the local airport or number of nearby hotels), focus on the merits of the district court and the evidentiary reasons why the case belongs there.

CONCLUSION

The formation of an MDL is one area where there may be "precious" agreement in a litigation. Of course, any agreement at this stage of the litigation is "precious" because it is rare, and often limited. Even when the parties agree on centralization, agreement on location is usually elusive. And oftentimes, there is no agreement on whether to form an MDL at all. Before the Panel, where time is of the essence, defendants must be efficient, the hallmark goal of MDL formation itself. And once the moment of agreement on MDL formation has passed (if it occurred at all), it's off to the races on the numerous disagreements that fuel litigation.

⁴⁸ See Rothman, *supra* note 37.

⁴⁹ Bromberek, *supra* note 40.

