

2018

MDL Problems - A Brief Introduction and Summary

Morris A. Ratner

UC Hastings College of the Law, ratnerm@uchastings.edu

Follow this and additional works at: https://repository.uchastings.edu/faculty_scholarship

Recommended Citation

Morris A. Ratner, *MDL Problems - A Brief Introduction and Summary*, 37 *Rev. Litig.* 123 (2018).

Available at: https://repository.uchastings.edu/faculty_scholarship/1662

This Article is brought to you for free and open access by UC Hastings Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

FOREWORD

“MDL Problems” – A Brief Introduction and Summary

Morris A. Ratner*

Multidistrict litigation (“MDL”) proceedings are administrative aggregations of separately filed actions that involve “one or more common questions of fact.”¹ This low bar for transfer and coordination can result in the creation of mega cases that lump together for pretrial purposes tens of thousands of individually represented plaintiffs.² Once considered the poor cousin of the class action, MDL proceedings now account for roughly forty percent of the federal civil docket.³ Their impact on the litigation landscape has sparked both hope⁴ and anxiety⁵ among commentators.

*Academic Dean and Professor of Law, University of California, Hastings College of the Law, JD, Harvard Law School (1991), BA, Stanford University (1988). Dean Ratner organized and moderated the AALS Section on Litigation panel “MDL Problems” at the Annual Meeting of the AALS on January 6, 2017, in his capacity as 2017 Chair of the Section. The Section on Litigation is grateful to the editors of *The Review of Litigation* for partnering with us to publish the panelists’ articles.

1. 28 U.S.C. §1407.

2. *Standards and Best Practices for Large and Mass Tort MDLs*, DUKE LAW CENTER FOR JUDICIAL STUDIES (December 19, 2014), <https://perma.cc/2YJM-A2YD> (“Approximately 90% of the individual actions pending in MDLs in 2014 are consolidated in 18 cases.”).

3. See Judith Resnick, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1913 n.38 (2017) (analyzing the number and percentage of federal civil cases that are part of MDLs).

4. See, e.g., Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 842-856 (2017) (describing how the federalization of mass torts via the Class Action Fairness Act and the MDL statute intersected to create conditions for managing some of worst abuses of the pre-CAFA era, including the reverse auction).

5. See, e.g., Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) (documenting the repeat player phenomenon among common benefit counsel and analyzing the potential for abuse); 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, 111 (2015) (“MDL involves something of a cross between the Wild West, twentieth century political smoke-filled rooms, and the *Godfather* movies.”).

The following articles⁶ are by a subset of presenters at the American Association of Law Schools' Section on Litigation panel, "MDL Problems," which took place on January 6, 2017, in San Francisco, California.⁷ The program addressed the growth of and challenges posed by MDLs⁸ in federal district courts:

MDLs comprise an increasingly significant portion of the federal docket and account for much of the growth in the civil side of the docket in the last few years. Trial court judges to whom the Judicial Panel on Multidistrict Litigation transfers cases, operating with little guidance from the MDL statute or the Federal Rules, have improvised ways to appoint counsel to leadership positions; control pleading, motion practice and discovery; and resolve mass torts via trial or aggregate settlements in a system expressly designed for pretrial purposes only. Though creative, their solutions raise a number of concerns regarding litigant autonomy, agency costs, and the role of federal court judges in litigation. This program explores the MDL phenomenon and the problems it poses for our civil litigation system.

Panelists included scholars, practitioners, and a federal district court judge, who have all grappled directly with MDLs in their research or practice:⁹

6. Andrew Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. (forthcoming 2018); Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. (forthcoming 2018); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All-Writs Act*, 37 REV. LITIG. (forthcoming 2018); Chilton Davis Varner, *The Beginning of MDL Consolidation: Should Cases be Aggregated and Where?*, 37 REV. LITIG. (forthcoming 2018).

7. AALS 111th Annual Meeting, "Why Law Matters," Program, at 43 (Jan. 3-7, 2017), https://www.aals.org/wp-content/uploads/2016/12/AM2017_Program.pdf.

8. See 28 U.S.C. §1407 (governing multidistrict litigation in federal courts).

9. Readers who are members of the AALS can listen to the panel presentations, which are accessible via the AALS podcasts page. <https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=75b8e4cc-2dd1-4905-be92-469210b54826>. Select the 2017 Annual Meeting Podcasts, and then select "Litigation."

- Professor Andrew D. Bradt's¹⁰ body of work includes a groundbreaking historical inquiry into the genesis and evolution of the MDL statute, 28 U.S.C. § 1407.¹¹ At the panel on January 6, Professor Bradt explained how the MDL statute's durability and dominance is partly attributable to strategic choices made by its drafters in the 1960s. The drafters of the MDL statute intended to insulate the device from the regular tinkering to which the Federal Rules are subjected, to protect what they knew was a radical experiment. Professor Bradt's article for this symposium issue explores this history and its implications.
- Plaintiffs' mass tort and class action litigator Elizabeth J. Cabraser¹² is an experienced member of the MDL plaintiffs' bar.¹³ At the panel on January 6, Ms. Cabraser described trends in MDL practice, including the increasing prevalence of MDL trials and the emergence of particularly participatory classes. She emphasized how quickly MDL practice changes at the trial court level and predicted and hoped for even greater innovation regarding bellwether trials and the facilitation of plaintiff engagement through technological

10. Assistant Professor of Law, University of California, Berkeley School of Law (Berkeley Law). <https://www.law.berkeley.edu/our-faculty/faculty-profiles/andrew-bradt/>.

11. See Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PENN. L. REV. 831 (2017). (examining the historical origins of MDL).

12. Partner, Lief Cabraser Heimann & Bernstein, LLP. See <https://www.lieffcabraser.com/attorneys/elizabeth-j-cabraser/>.

13. Ms. Cabraser recently served as lead plaintiffs' counsel in the Volkswagen "clean diesel" litigation which resulted in a global settlement of approximately \$15 billion. See Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement at 3, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig.*, Case No. 315-md-02672 (N.D. Cal. October 25, 2016), ECF No. 2102. Ms. Cabraser writes extensively about complex litigation. See, e.g., Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 NYU L. REV. 846 (2017) (discussing the impact of the "participatory class action"). She serves on the Executive Committee of the Council of the American Law Institute (ALI), and has been an advisor to several ALI projects, including Aggregate Litigation.

advances in communication and information exchange.

- Professor Alexandra D. Lahav's¹⁴ research focuses on procedural justice and the limits of due process in aggregate litigation. She has written extensively about how courts can better manage MDL litigation.¹⁵ At the panel, Professor Lahav focused on the question of how MDL bellwether trials are structured. She canvassed key issues, including the sample size and mix of cases necessary to produce reliable outcomes, and some of the knotty ethical questions raised by this form of litigation. Professor Lahav's article in this symposium issue dives deeper into the topic of MDL bellwether trial best practices.
- Professor Linda S. Mullenix¹⁶ has written widely about complex litigation in general and mass tort litigation in particular.¹⁷ At the panel, Professor Mullenix canvassed the different methods by which aggregate settlements are typically effectuated in MDLs. She focused on non-class aggregate settlements, questioning the ability of trial court judges to police them for fairness absent an expansion of their authority to do so.

14. Ellen Ash Peters Professor of Law, University of Connecticut School of Law. <https://www.law.uconn.edu/faculty/profiles/alexandra-d-lahav>.

15. See, e.g., Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012) (defending district court attempts to adopt statistical methods in order to promote outcome equality); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

16. Professor of Law, Rita and Morris Atlas Chair in Advocacy, University of Texas School of Law. <https://law.utexas.edu/faculty/linda-s-mullenix>.

17. See, e.g., Linda S. Mullenix, *Designing a Compensatory Fund: The Search for First Principles*, 3 STAN. J. COMPLEX LITIG. 1 (2015) (analyzing the goals of compensation funds and whether such funds comport with theories of justice); Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in the Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015). Professor Mullenix is an elected Life Member of the American Law Institute and has served as the Associate Reporter for the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS and a consultative member of the COMPLEX LITIGATION PROJECT.

- The Honorable Jon Tigar,¹⁸ United States District Court Judge for the Northern District of California, is a member of the American Law Institute, serves as Advisor to the RESTATEMENT (THIRD) OF TORTS, and has managed MDL proceedings. At the panel presentation, Judge Tigar mused about some of the key challenges in MDLs, including the difficulty of assessing value at the front end and encouraging proportional investment in litigation by the parties.
- Complex litigation defense attorney and King & Spalding partner Chilton S. Varner¹⁹ focused her panel presentation on how consolidation decisions are made by the Judicial Panel on Multidistrict Litigation, problems associated with filing relatively large numbers of weak claims in MDL proceedings, and the practice of having “multi-plaintiff” bellwether cases, which she suggested poses the risk of prejudice to defendants. Ms. Varner’s article, included with this symposium issue, further explores those issues.

The January 6, 2017 AALS panel presentation and the articles included in this symposium issue are a window into rapidly evolving practices, the competing procedural values they implicate, and the creativity of practitioners, judges, and scholars struggling to find the right balance.

18. <http://www.cand.uscourts.gov/jst>.

19. <https://www.kslaw.com/people/ChiltonDavis-Varner>.