

7 Strategies to a Multidistrict Litigation Victory

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In July 2019, a Minnesota federal court dismissed with prejudice one of the 10 largest Multidistrict Litigation (MDL) dockets in the country. The MDL comprised more than 5,000 individual cases

relating to 3M's Bair Hugger™ system (a temperature management system used to maintain a patient's core body temperature during surgery). The dismissal sheds light on seven battle-tested strategies to help companies limit MDL exposure and exit the case at the earliest opportunity.

How and when MDLs are used

An MDL arises when individual lawsuits related to the same subject matter are consolidated and transferred to a single federal court. Congress created MDLs to save time and money and to ensure similar outcomes in lawsuits that involve numerous plaintiffs with similar factual allegations. Congress also established the US Judicial Panel on Multidistrict Litigation (MDL Panel), a special body within the federal court system, to manage MDLs.

MDLs are increasingly prevalent. According to the MDL Panel, as of March 16, 2020, there are currently 184 MDLs pending, which include more than 134,000 active cases. In 2018, the three most common types of MDLs involved product liability claims (32.9 percent), antitrust issues (24.1 percent), and sales practices (12.1 percent). MDLs sometimes involve thousands of individual lawsuits or dozens of class actions.

Resolving numerous cases with similar allegations in one proceeding is not unique to the United States. For example, China promulgated its first national code on civil justice in 1982 — the Civil Procedure Law (for trial implementation) — which provides a mechanism for "collective suits." These are lawsuits that involve two or more claimants, with similar interests or claims that can be dealt with collectively, who consent to the use of group litigation.

How MDLs arise

When numerous lawsuits are filed by plaintiffs who allegedly suffered harm caused by similar circumstances (e.g., the same product or act of corporate negligence), counsel may ask the MDL Panel to create an MDL to consolidate the cases. Notably, even if lawsuits are consolidated into an MDL, plaintiffs and defendants retain their individual attorneys.

The transferee court will then appoint a group of lawyers from across the country to coordinate pretrial proceedings and help resolve the litigation. (This applies only to mass tort lawsuits and not class actions, as class actions are generally filed in one action.)

Why MDLs are problematic

By their very nature, MDLs can often balloon to unmanageable proportions and last over a decade. For example, MDL No. 875 — concerning asbestos personal injury and wrongful death lawsuits — included more than 120,000 individual cases and was ongoing for 20 years since 1991; a federal judicial panel stopped centralizing most federal asbestos cases on a finding that the MDL had eliminated the backlog of asbestos cases.

According to one MDL Panel report, as of September 2019, there are 22 pending MDLs with more than 1,000 active actions. What's worse, MDLs are extremely difficult to escape outside of global settlement (which, unsurprisingly, can be costly). MDLs often result in years of exposure and high costs and attorney's fees.

Strategies for dealing with MDLs

Companies faced with an MDL can employ these seven strategies to mitigate exposure and exit the case at the earliest opportunity.

1. Dig in for the long haul

MDLs are messy and complicated. Because they consist of numerous independent plaintiffs, one trial does not win the day. An MDL may have numerous bellwether trials with all the attendant battles over fact witnesses, experts, and evidence. A winning strategist plays the long game.

For instance, in the *Bair Hugger* MDL, 3M moved to exclude plaintiffs' experts before the first bellwether trial in 2018 — the motions were unsuccessful. But after 3M's defense team won that first bellwether trial, they again moved to exclude the plaintiffs' experts, this time using trial testimony to demonstrate the inadequacy of their opinions. The Minnesota federal court agreed and dismissed the MDL.

2. Engage early and often

The procedural morass of an MDL brings with it the chance to repeat useful themes — over and over. Developing case themes early is an important component of a winning strategy.

Ideally, defense themes should be road-tested with outside counsel, key business leaders, and even in focus groups. Repeating solid themes at hearings, in briefs, during bellwether trials, and beyond creates consistency and builds credibility.

3. Hold a "Science Day"

For cases that are technical or medical in nature, a keen understanding of the technical and scientific principles involved is essential. A seldom used but highly useful tool in MDLs is the "Science Day." It is not granted by right and therefore must be requested (ideally, positioned so that both sides agree).

The purpose of a Science Day is to educate the court on the technology and science that will be involved throughout the litigation. It is often conducted off the formal record, and it is not unusual for a presiding judge to invite magistrate judges or judges from transferor courts to attend.

It is an opportunity to present winning themes early on, in a non-adversarial setting, and build credibility. Then, outside counsel can hammer home those principles in every written submission and oral presentation during the various small skirmishes that will likely arise during litigation.

4. Be a friend of the court

Is it clear that MDLs are messy and complicated? This poses another opportunity — make things easier on the court. Be a problem solver. Identify issues that are causing trouble in the administration of the MDL and propose constructive, win-win solutions.

Because of the possible, even unavoidable, longevity with MDLs, it pays to play the long game. Negotiate and compromise where possible, which will lend credence and power when you later stand your ground on important positions.

5. Have a long memory

There is a lot said during an MDL, with its many hearings and written submissions. Have your legal team track plaintiffs' representations to the court and hold them to those representations, using bellwether trials to cement weaknesses in the plaintiffs' cases where it makes sense.

6. Develop a style guide

Just as branding guidelines set forth the standardized treatment and rules for your corporate brand, you can develop a style guide for your MDL. The style guide becomes the guidepost ensuring that every written submission and oral presentation aligns with the larger goal of winning on the merits.

7. Leverage the experts

Experts are typically essential components of any MDL proceeding. Of course, you will move to exclude the opinions of the opposition's experts through *Daubert*, but courts are loath to exclude experts for fear of violating a plaintiff's right to present a full case. Subsequent bellwether trials offer an avenue to expose expert opinions that may have slipped past *Daubert* but which otherwise do not comport with the strictures of the Rules of Evidence.

Artful cross-examination can show the court that plaintiffs' promises about their experts' opinions or methodologies are not true, paving the way to revisiting *Daubert* exclusions of the plaintiffs' experts. Demonstrating through trial testimony that an expert's opinions are just as flawed as you claimed in your initial *Daubert* motion — in a second round of motions to exclude — can prove the difference in your attempt to defeat an all-consuming MDL. Often, with no experts, plaintiffs have no case.

Final thoughts

These are just seven strategies a corporate defendant can employ to win. For more information on MDLs, read the accompanying *ACC Docket* print article Litigation Nightmares: How to Tame Class Actions and Multidistrict Litigation. To read the entire *ACC Docket* May 2020 Litigation issue, members can login to the Digital Docket on Wednesday, April 29.

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