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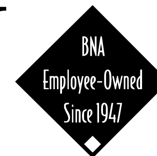

REPORT

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MULTIDISTRICT LITIGATION

Figuring out whether the Judicial Panel on Multidistrict Litigation will transfer a particular group of cases to one judge for pretrial rulings can be useful in planning the course of litigation, particularly in product liability cases.

Attorneys Mark Herrmann and Pearson Bownas analyzed the panel's precedents, concluding that the panel grants more motions to consolidate than it denies. They identify five factors that lower the odds of transfer and two that increase them, and offer some cautionary advice.

Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?

BY MARK HERRMANN AND PEARSON BOWNAS

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The dynamics of products liability litigation can change in a heartbeat if the Judicial Panel on Multidistrict Litigation grants (or denies) a motion to centralize related cases. Litigants therefore often ask counsel to predict how the panel will rule on a particular motion. Remarkably, it seems that no one has previously analyzed the panel's precedents involving products liability cases, which is the best way to predict the panel's conduct in the future. This article undertakes that analysis to permit future litigants to make book on the panel.

The Judicial Panel on Multidistrict Litigation (the MDL panel or the panel) is the self-described "traffic cop[ ]" for related lawsuits pending in federal court.[1]

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[1] Gregory Hansel, "Extreme Litigation: An Interview With Judge Wm. Terrell Hodges, Chairman of the Judicial Panel On

"When civil actions involving one or more common questions of fact are pending in different districts," the MDL panel may centralize those actions by "transferr[ing]" them "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). To a mass-tort defendant facing a tidal wave of federal lawsuits from coast-to-coast, this can mean the difference between duplicative pretrial proceedings (including repetitive discovery and briefing of dispositive and class certification motions) in scores of cases in dozens of district courts across the country, on the one hand, and coordinated pretrial treatment by a single district court judge, on the other hand.[2] Of course, either a defendant or a plaintiff may favor or disfavor MDL treatment for many reasons. As just one example, coordinating all federal cases in a single district prevents a party from accelerating a specific case perceived to be pending before a more favorable judge or to be subject to more favorable precedent.[3] Because litigants will likely plan differently to fight a single-front war than a multi-front one, correctly anticipating whether the MDL panel will grant or deny a motion to transfer and coordinate can be crucial. This article offers guidance for anticipating the MDL panel's decision.

This article analyzes all of the MDL panel's past decisions on whether to centralize products liability cases for coordinated pretrial treatment.[4] The article is meant to help lawyers and clients predict whether a motion to transfer products liability cases will be granted or denied. The article, however, is not a statistical analysis. Statistics alone cannot predict whether the MDL panel will grant or deny a motion to transfer and coordinate. Indeed, the panel has *granted* several transfer motions and created MDL proceedings for litigation involving just two actions pending in two districts,[5] and it has *denied* transfer motions in litigation involving scores of actions in a dozen or more districts.[6] Rather, the article identifies and analyzes the factors, including but not limited to the numerical factors, that seem to persuade the panel to grant or deny a motion to transfer and coordinate.

The MDL Panel Grants Far More Motions to Transfer Than It Denies

Congress created the MDL panel in 1968. Since then, the panel has decided 137 transfer motions involving products liability cases.[7] Three-fourths of the time (103 out of 137), the panel has granted the motion to transfer. This trend has been even stronger recently. Of the 94 products liability transfer motions that the panel decided from 1992 through mid-August 2006, it granted 82

Multidistrict Litigation," 19 Maine Bar J. 16, 21 (Winter 2004).

[2] Transfer and coordination by the MDL panel is not a panacea for overlapping and duplicative lawsuits because it is limited to lawsuits pending in federal courts; there is no equivalent statute that permits coordination of lawsuits pending in different states' courts. For a discussion of state court analogues to the MDL process that permit various degrees of transfer or coordination of lawsuits within a particular state's courts, see Mark Herrmann, Geoffrey Ritts, and Katherine Larson, *Statewide Coordinated Proceedings: State Court Analogues to the Federal MDL Process* (Thomson-West 2d rev. ed. 2004).

[3] For a comprehensive discussion of the strategic considerations for defendants in deciding whether to invoke the MDL process (or how to react if a plaintiff invokes it), see Mark Herrmann, "To MDL or Not to MDL? A Defense Perspective," 24 Litigation, No. 4, Summer 1998, at 43.

[4] In this context, "products liability" refers to one of the "MDL types" used by the MDL panel to classify its proceedings. (The others that the panel uses, or has used, include air disaster, antidumping, antitrust, contract, common disaster, copyright, employment practices, miscellaneous, sales practices, securities, and trademark.) The MDL panel appears not to use the term "products liability" in a strict, doctrinal sense. For example, although many cases transferred and coordinated as part of *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation*, MDL No. 1373, were personal injury cases arising from alleged tire failures, many other cases asserted only "no injury" claims, in which plaintiffs owning tires that had not failed sought economic damages under warranty and statutory consumer fraud theories for their tires' supposed propensity to fail. See *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (reviewing class certification ruling involving no-injury cases in MDL proceeding and observing that "it is not a products-liability suit"). This article analyzes those MDL proceedings that the MDL panel has classified as "products liability" proceedings, either by the name given to the MDL proceeding or as otherwise indicated in reports provided by the panel.

[5] E.g., *In re Canon U.S.A. Inc. Digital Cameras Prods. Liab. Litig.*, MDL No. 1740, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006); *In re Air Bag Prods. Liab. Litig.*, MDL No. 1181, unpublished Transfer Order, at 1 (J.P.M.L. Aug. 25, 1997); *In re Ford Motor Co. Head Rest Prods. Liab. Litig.*, MDL No. 1103, unpublished Transfer Order, at 1 (J.P.M.L. Apr. 10, 1996).

[6] E.g., *In re Repetitive Stress Injury Prods. Liab. Litig.*, MDL No. 955, unpublished Order Denying Transfer (J.P.M.L. Nov. 27, 1992) (denying motion to coordinate 159 actions pending in 12 districts); *In re Rely Tampon Prods. Liab. Litig.*, MDL No. 497, 533 F. Supp. 1346, 1346-50 (J.P.M.L. 1982) (denying motion to coordinate 92 actions pending in 38 districts).

[7] This number excludes many MDL transfer proceedings involving products liability cases that were assigned an MDL docket number but were rendered moot, usually when all but one of the underlying cases were remanded or otherwise dismissed, or in which the transfer motion was withdrawn, before the panel ruled.

This number also excludes *In re Bextra and Celebrex Products Liability Litigation*, MDL No. 1691, and *In re "Second Generation" Blood Factor Concentrate Products Liability Litigation*, MDL No. 1588. The MDL panel reports the transfer motion in these proceeding as having been denied. *In re Bextra*, however, involved five motions seeking to centralize four separate MDL dockets. Although the panel denied the motion filed in MDL No. 1691 to transfer and coordinate Bextra and Celebrex products liability actions by themselves, in the same opinion it transferred those actions together with Bextra and Celebrex marketing and sales practices actions for coordination as part of MDL No. 1699. *In re Bextra and Celebrex Marketing, Sales Practices and Prods. Liab. Litig.*, MDL Nos. 1691, 1693, 1694 & 1699, 391 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2005). Thus, although the panel technically denied the transfer motion in MDL No. 1691, it found that the actions subject to that motion were in fact appropriate for transfer and coordination as part of MDL No. 1699. *Id.* Accordingly, this article counts MDL No. 1699 as a "granted" motion and disregards the technically denied motion in MDL No. 1691.

Similarly, in *In re "Second Generation" Blood Factor Concentrate*, the panel denied the motion to coordinate actions in a new MDL proceeding but nevertheless found that the actions at issue should be transferred and coordinated as part of the already-pending *In re "Factor VIII or IX Concentrate Blood Products" Products Liability Litigation*, MDL No. 986. *In re "Second Generation" Blood Factor Concentrate Prods. Liab. Litig.*, MDL No. 1588, 303 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2004). Because the panel concluded that these actions did in fact meet the criteria for transfer and coordination as part of MDL No. 986, this article does not count the panel's denial of the transfer motion in MDL No. 1588.

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(87 percent) and denied 12 (13 percent). Of the 55 products liability transfer motions decided from 2000 through mid-August 2006, the panel granted 49 (89 percent) and denied just six (11 percent).

Size Matters

The MDL process is not simply a numbers game. Nonetheless, a key factor in the panel's determination whether to transfer and coordinate is how many actions are pending. To the extent any ''magic number'' of actions exists, a recent interview with the panel chairman, Judge William Terrell Hodges, suggests that all other things being equal (and they rarely are), the number lies somewhere between three and seven pending actions. When asked if the panel ever revisits its denial of a motion to transfer, Chairman Hodges answered: ''Yes. As a matter of fact, we did have that issue on a recent docket. Some cases had been filed two or three years ago, and at the time there were only two cases pending.'' ''Interview, Chair of Judicial Panel Sees Role as Gatekeeper,'' *The Third Branch*, Nov. 2005, at 11. ''Normally, if there's only a small number of cases, two or three in different districts, and it doesn't appear that there are going to be any more, and there are some differences between those cases, we would probably not centralize them.'' *Id.* ''But recently, a number of other cases had been filed. I think when we next considered the matter, there were seven cases pending in various districts. So, confronted with that changed circumstance, we changed our minds and entered an order centralizing the cases.'' *Id.*[8] Of course, the panel may have viewed the increase from two actions to seven as indicating potential additional growth of this litigation rather than viewing the seven actions as a critical mass in and of itself worthy of centralization.

Of the six motions to transfer and coordinate products liability actions that the MDL panel has denied since the beginning of 2000, two involved three or fewer pending actions.[9] The rest had one or more of the factors discussed below that lower the odds that the panel will grant a motion to transfer no matter how many pending actions are involved.[10] On the flip side, however, the panel has, since the beginning of 2000, granted nine motions to transfer and coordinate that involved three or fewer pending products liability actions.[11] The factors explaining why these actions were transferred despite their low numbers are also discussed below.

The panel has denied transfer when the underlying actions raise primarily individual, not common, issues because they involve many defendants, diverse plaintiffs, or different modes of exposure to the allegedly offending products.

In addition to the number of pending actions, the panel is influenced by the number of courts in which the actions are pending. For example, the panel denied transfer in a proceeding involving nine pending products liability actions because they consisted of ''essentially . . . three clusters of actions in only three federal districts.'' *In re Carbonless Paper Prods. Liab. Litig.*, MDL No. 1042, unpublished Order Denying Transfer, at 1 (J.P.M.L. Nov. 23, 1994). The panel similarly denied transfer in a proceeding involving seven pending actions because, among other reasons, six of them were pending in one district and had already been consolidated there for discovery. *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig.*, MDL No. 1497, 237 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002).

The panel is not oblivious to potential ''tag-along actions'' that are filed before the panel decides whether to centralize cases. A ''tag-along action'' is ''a civil action pending in a district court and involving common questions of fact with actions previously transferred'' by the MDL panel. Rule 1.1, R.P.J.P.M.L. Frequently, after a motion to transfer is filed with the panel but before the panel rules, potential tag-along actions surface. Although the panel has at least once expressly refused to consider ''the prospect of additional actions that are or may soon be pending in additional districts as a reason for ordering centralization'' because ''such actions [we]re not [then] before the Panel,'' *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig. II*, MDL

[8] Chairman Hodges' recent statements reinforce observations made in the panel's earliest days. *See* Note, ''The Judicial Panel and the Conduct Of Multidistrict Litigation,'' 87 Harv. L. Rev. 1001, 1010 (1974) (observing six years after the panel was formed that ''[c]onsolidation under section 1407 is also almost certain . . . if more than five actions are involved'').

[9] *In re DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig.*, MDL No. 1480, 217 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2002) (two pending actions); *In re Chromated Copper Arsenate Treated Wood Prods. Liab. Litig.*, MDL No. 1438, 188 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002) (two pending actions).

[10] *In re OxyContin Prods. Liab. Litig. II*, MDL No. 1716, 395 F. Supp. 2d 1358, 1358-59 (J.P.M.L. 2005) (25 pending actions, but some had advanced pretrial proceedings, and plaintiffs in all actions were represented by common counsel); *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig. II*, MDL No. 1669, 366 F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2005) (22 pending actions, but some had advanced pretrial proceedings); *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig.*, MDL No. 1497, 237 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002) (seven pending actions, but six were in the same district and had already been coordinated for discovery there, which was advanced, and same counsel represented all plaintiffs); *In re Blood and Blood Prods. Hepatitis C Virus Prods. Liab. Litig.*, MDL No. 1349, 2000 U.S. Dist. LEXIS 11149, at *1, *3 (J.P.M.L. Aug. 2, 2000) (eleven pending actions, but all, or nearly all, involved the same plaintiffs' counsel).

[11] *In re Profiler Prods. Liab. Litig.*, MDL No. 1748, 429 F. Supp. 2d 1381, 1381 (J.P.M.L. 2006); *In re Canon U.S.A. Inc. Digital Cameras Prods. Liab. Litig.*, MDL No. 1740, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006); *In re Maytag Corp. Neptune Washer Prods. Liab. Litig.*, MDL No. 1617, 333 F. Supp. 2d 1382, 1382-83 (J.P.M.L. 2004); *In re Gen. Motors Corp. ''Piston Slap'' Prods. Liab. Litig.*, MDL No. 1600, 314 F. Supp. 2d 1386, 1387-88 (J.P.M.L. 2004); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, MDL No. 1562, 293 F. Supp. 2d 1381, 1381-82 (J.P.M.L. 2003); *In re Welding Rod Prods. Liab. Litig.*, MDL No. 1535, 269 F. Supp. 2d 1365, 1366 (J.P.M.L. 2003); *In re Meridia Prods. Liab. Litig.*, MDL No. 1481, 217 F. Supp. 2d 1377, 1377-78 (J.P.M.L. 2002); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, MDL No. 1358, 2000 U.S. Dist. LEXIS 14901, at *1-*3 (J.P.M.L. Oct. 10, 2000); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2000 U.S. Dist. LEXIS 11651, at *1-*2 (J.P.M.L. Aug. 7, 2000).

No. 1669, 366 F. Supp. 2d 1384, 1385 (J.P.M.L. 2005), the panel routinely acknowledges potential tag-along actions in its transfer orders. Typically, the panel simply notes that, for example, it ''has been notified that 23 potentially related actions have been filed . . . .'' *In re Meridia Prods. Liab. Litig.*, MDL No. 1481, 217 F. Supp. 2d 1377, 1377-78 n.1 (J.P.M.L. 2002). At least once, however, the panel seems to have transferred cases in part based on potential tag-along actions pending in new districts. *In re Fialuridine Prods. Liab. Litig.*, MDL No. 1034, unpublished Transfer Order, at 1-2 (J.P.M.L. Dec. 1, 1994) (rejecting argument that ''voluntary cooperation is a suitable alternative to transfer in a docket of this size'' (three actions pending in two districts) in part because, ''since the filing of the Section 1407 transfer motion, related actions have been filed in two additional districts'').

Five Factors That Lower the Odds of Transfer

The MDL statute permits the panel to centralize cases for coordination upon a finding that this ''will be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the transferred] actions.'' 28 U.S.C. § 1407(a). There are five factors that, alone or in combination, were present in 27 of the 34 products liability proceedings in which the panel has found that these aims would not be met and, therefore, denied the motion to transfer.[12]

First, the panel considers whether any party favors centralization. The panel has denied transfer when it has *sua sponte* issued an order to show cause why pending actions should not be transferred and all or most plaintiffs and defendants have responded by opposing transfer. E.g., *In re ''Diethystilbestrol'' Prod. Liab. Litig.*, MDL No. 241, unpublished Order Vacating Show Cause Order, at 1 (J.P.M.L. May 21, 1976); *In re Oral Contraceptives Prods. Liab. Litig.*, MDL No. 62, 322 F. Supp. 1011, 1011-12 (J.P.M.L. 1971). ''The virtual unanimous opposition of the parties to transfer'' is ''a very persuasive factor in [the panel's] decision to deny transfer'' (though it ''is not by itself determinative''; ''[i]n an appropriate situation, the Panel has the power to order transfer . . . even if all parties are opposed to transfer''). *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, MDL No. 269, 431 F. Supp. 906, 908 (J.P.M.L. 1977). The situation is, however, unlikely to recur. The MDL panel has issued just two *sua sponte* orders to show cause regarding the transfer of products liability actions since 1980, and both were part of the panel's efforts to solve the federal asbestos litigation crisis.[13]

Of the nine successful products liability transfer motions since the beginning of 2000 involving three or fewer pending actions, all but one involved putative class claims.

Second, the panel has denied transfer when the underlying actions raise primarily individual, not common, issues because they involve many defendants, diverse plaintiffs, or different modes of exposure to the allegedly offending products. This occurred, for example, when the panel denied the first attempt to centralize federal asbestos litigation. Among the 103 actions presented to the panel, there were 80 different defendants, ''[t]he plaintiffs [we]re not a homogeneous group,'' and ''the circumstances of exposure [we]re predominantly individual to each action.'' *In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig.*, MDL No. 269, 431 F. Supp. 906, 908-09 (J.P.M.L. 1977). *See also, e.g., In re Blood and Blood Prods. Hepatitis C Virus Prods. Liab. Litig.*, MDL No. 1349, 2000 U.S. Dist. LEXIS 11149, at *3 (J.P.M.L. Aug. 2, 2000) (denying motion to transfer because, ''given the wide array of claims raised, encompassing various blood products, time periods, and transmission modes . . . , individual, not common, questions of fact rise to the forefront'').[14]

Third, the panel has denied transfer when the primary pretrial tasks that the MDL transferee judge would normally oversee have already been completed by other judges. Thus, for example, the panel refused to coordinate four well-advanced actions pending in two districts because ''[d]iscovery on the common questions of fact involved here . . . apparently has been completed . . . .'' *In re Dow Chem. Co. ''Polystyrene Foam'' Prods. Liab. Litig.*, MDL No. 275, 429 F. Supp. 1035, 1036 (J.P.M.L. 1977). In another case, the panel denied transfer and coordination of 16 actions in 11 districts not because any of those actions were themselves advanced, but because actions involving the same product ''had moved through the federal court system for at least twelve years without any party perceiving a need to seek multidistrict treatment.'' *In re Medtronic Inc. Bipolar Polyurethane-Insulated Pacemaker Leads Prods.*

[12] The other seven denials result from factors not likely to arise in most cases, such as an attempt to use the MDL process to consolidate third-party claims with main claims in a lawsuit, *In re Boncoat Prods. Liab. Litig.*, MDL No. 117, 353 F. Supp. 1302, 1303 (J.P.M.L. 1973), and second-attempts to transfer cases that the panel had previously declined to transfer. E.g., *In re Rely Tampon Prods. Liab. Litig. II*, MDL. No. 504, unpublished Order Denying Transfer (J.P.M.L. July 7, 1982); *In re Asbestos Prods. Liab. Litig. II*, MDL No. 416, unpublished Order Denying Transfer, at 1 (J.P.M.L. Mar. 13, 1980).

[13] *In re Asbestos Bankruptcy Litig.*, MDL No. 950, unreported Order, at 1 (J.P.M.L. Dec. 9, 1992); *In re Asbestos Prods. Liab. Litig. IV*, MDL No. 875, 771 F. Supp. 415, 416-17 (J.P.M.L. 1991).

[14] But see *In re Human Tissue Prods. Liab. Litig.*, MDL No. 1763, 435 F. Supp. 2d 1352, 1354 (J.P.M.L. 2006) (rejecting argument against transfer that the actions ''involve different tissue implants, several different defendants, and likely different damages,'' because ''[t]he alleged improprieties regarding the illegal harvesting, flawed processing and/or inappropriate distributing of human tissue forms the factual backdrop to all actions presently before the Panel''); *In re Deep Vein Thrombosis Litig.*, MDL No. 1606, 323 F. Supp. 2d 1378, 1380 (J.P.M.L. 2004) (''Notwithstanding differences among the actions in terms of named defendants . . . and/or types of injuries alleged, all actions remain rooted in complex core questions concerning whether various aspects of airline travel cause, or contribute to, the development of deep vein thrombosis in airline passengers.'').

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Liab. Litig., MDL No. 1169, unpublished Order Denying Transfer, at 2 (J.P.M.L. Mar. 27, 1997).[15]

Fourth, the panel has denied transfer when, ''[g]iven the minimal number of actions before'' it, the panel is not convinced ''that any common questions of fact that may be involved in these actions are sufficiently complex, and that the accompanying discovery will be so time-consuming, to justify Section 1407 transfer.'' E.g., *In re Republic of China Civilian Ammunition Prods. Liab. Litig.*, MDL No. 775, 1988 U.S. Dist. LEXIS 17031, at *1-*2 (J.P.M.L. Oct. 5, 1988) (denying transfer of two actions pending in two districts).[16] The panel has not in its products liability orders explained what the complexity threshold is. Accordingly, this factor seems to relate mostly to the number of pending actions.

Fifth, the panel has denied transfer when the same plaintiffs or plaintiffs' counsel are involved in most or all of the subject actions. In these instances, informal coordination and information sharing among the actions is easily achieved, and formal coordination through an MDL panel transfer is unnecessary. See, e.g., *In re Blood and Blood Prods. Hepatitis C Virus Prods. Liab. Litig.*, MDL No. 1349, 2000 U.S. Dist. LEXIS 11149, at *3 (J.P.M.L. Aug. 2, 2000) (denying transfer of 11 actions in six districts because, among other reasons, ''the same plaintiffs' counsel is involved in all, or nearly all, actions'').

Two Factors That Raise the Odds of Transfer

Because the presence of one or more of the five factors just discussed decreases the odds that the panel will grant a motion to transfer, their absence—*i.e.*, at least one side supporting transfer, a common primary defendant, newly filed actions raising issues new to the federal court system, many actions raising complex common issues, and multiple plaintiffs with different lawyers—necessarily increases the odds that the panel will grant a motion to transfer. There are two other independent and commonly present factors that also boost the odds of transfer and coordination.

One is the presence of overlapping or potentially overlapping putative class action claims.[17] According to one commentator, ''[t]his factor is a dominating one.'' David F. Herr, *Multidistrict Litigation Manual* § 5:25, at 119 (Thomson-West 2005). ''[I]f there are conflicting or potentially conflicting class claims in the litigation, transfer is likely regardless of the presence or absence of other factors that would otherwise favor or militate against transfer.'' *Id.* Indeed, in a non-products liability MDL proceeding, the panel observed that ''a potential for conflicting or overlapping class actions presents **one of the strongest reasons** for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts.'' *In re Multidistrict Private Civil Treble Damage Litig. Involving Plumbing Fixtures*, MDL. No. 3, 308 F. Supp. 242, 243-44 (J.P.M.L. 1970) (emphasis added).

The numbers bear this out. Of the nine successful products liability transfer motions since the beginning of 2000 involving three or fewer pending actions,[18] all but one involved putative class claims.[19]

The other factor favoring transfer is the defendant's support of transfer (either as the moving party or as a proponent of a plaintiff's motion to transfer). Because one of the statutory considerations for transfer is ''the convenience of parties and witnesses,'' 28 U.S.C. § 1407(a), the parties' views on transfer matter. Because the defendant is likely to have more common witnesses (in any individual products liability case, there is likely just one injured plaintiff, but many defense corporate witnesses), and because the defendant's convenience is typically more at stake (in any individual products liability case, the plaintiff will depose the defense witnesses and be deposed just once; only the defendant risks multiple depositions of its witnesses on the same topic absent coordination), the defendant's view of the convenience that transfer would engender rightly seems to matter more.

[15] See also *In re Penile Implants Prods. Liab. Litig.*, MDL No. 1020, 1994 U.S. Dist. LEXIS 21505, at *2 (J.P.M.L. Sept. 30, 1994) (''prior to the instant Section 1407 motion, AMS penile implant litigation had moved through the federal court system for more than 20 years without any party perceiving a need to seek multidistrict treatment''); *In re Asbestos School Prods. Liab. Litig.*, MDL No. 624, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (refusing to transfer and coordinate 20 actions in 13 districts because ''the common questions of fact involved in these actions have been extensively litigated for the past ten years in connection with thousands of personal injury actions arising from alleged asbestos exposure'').

[16] See also, e.g., *In re DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig.*, MDL No. 1480, 217 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002) (same; denying transfer of two actions pending in two districts); *In re Leon Blair Asbestos Prods. Liab. Litig.*, MDL No. 702, unpublished Order Denying Transfer, at 1 (J.P.M.L. Feb. 6, 1987) (same; denying transfer of two actions pending in two districts).

[17] See, e.g., *In re Apple iPod Nano Prods. Liab. Litig.*, MDL No. 1754, 429 F. Supp. 2d 1366, 1368 (J.P.M.L. 2006) (stressing the need for transfer and coordination to ''prevent inconsistent pretrial rulings (especially with respect to questions of class certification)''); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, MDL No. 1718, 398 F. Supp. 2d 1365, 1366 (J.P.M.L. 2005) (same).

[18] *See* note 11, *supra*.

[19] In seven of these eight MDL transfer proceedings, the panel emphasized the presence of class allegations in its transfer orders. *In re Canon U.S.A. Inc. Digital Cameras Prods. Liab. Litig.*, MDL No. 1740, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (centralization is necessary to prevent inconsistent pretrial rulings, ''especially with respect to questions of class certification''); *In re Maytag Corp. Neptune Washer Prods. Liab. Litig.*, MDL No. 1617, 333 F. Supp. 2d 1382, 1383 (J.P.M.L. 2004) (similar); *In re Gen. Motors Corp. ''Piston Slap'' Prods. Liab. Litig.*, MDL No. 1600, 314 F. Supp. 2d 1386, 1388 (J.P.M.L. 2004) (same); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, MDL No. 1562, 293 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003) (similar); *In re Welding Rod Prods. Liab. Litig.*, MDL No. 1535, 269 F. Supp. 2d 1365, 1367 (J.P.M.L. 2003) (same); *In re Meridia Prods. Liab. Litig.*, MDL No. 1481, 217 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002) (similar); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2000 U.S. Dist. LEXIS 11651, at *3 (J.P.M.L. Aug. 7, 2000) (same). The eighth action, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, MDL No. 1358, 2000 U.S. Dist. LEXIS 14901, (J.P.M.L. Oct. 10, 2000), also included class allegations according to a ''Citation Report'' for all products liability MDL transfer proceedings provided by the MDL panel's clerk's office. That report includes a column titled ''Class Alleg[ations].'' The title page of the report explains that ''[a] 'YES' notation in [this] column means that when a motion for transfer of a new group of actions under [Section] 1407 is received by the Panel, one or more of the actions included in the motion asserts a class action allegation.'' The ''Class Alleg[ation]'' column for MDL No. 1358 says ''YES.''

The numbers bear out the importance of the defendant's position on the transfer motion. Of the 34 transfer motions involving products liability actions that the MDL panel has denied since its creation, only eight were motions filed by defendants.[20] Of the 20 denied plaintiffs' transfer motions, the defendant opposed (or appears not to have supported) all 20 of them.[21]

Recently, this trend has been even stronger. Of the 12 denials of motions to transfer products liability actions decided since the beginning of 1992, 10 were plaintiffs' motions that the defendants opposed.[22] By contrast, when the defendant moved for transfer, or either supported or did not oppose a plaintiff's motion for transfer, the panel was much more likely to transfer the cases, even if few actions were involved.[23]

The defendant's support of the transfer motion appears to play a particularly strong role when the number of actions subject to transfer is low. Of the 36 transfer motions involving five or fewer products liability actions since the beginning of 1992, four were denied.[24] Three of those four were plaintiffs' motions that defendants opposed.[25] Of the 32 such motions that were granted, 28 were either defendants' motions or plaintiffs' motions that defendants supported (or did not oppose).[26]

[20] Each of those eight cases had at least one factor weighing heavily in favor of denial. *In re DaimlerChrysler Seat Belt Buckle Prods. Liab. Litig.*, MDL No. 1480, 217 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2002) (denying defendant's motion to centralize two pending actions in two districts); *In re Republic of China Civilian Ammunition Prods. Liab. Litig.*, MDL No. 775, 1988 U.S. Dist. LEXIS 17031, at *1 (J.P.M.L. Oct. 5, 1998) (denying defendant's motion to centralize two pending actions in two districts); *In re Leon Blair Asbestos Prods. Liab. Litig.*, MDL No. 702, unpublished Order Denying Transfer, at 1-2 (J.P.M.L. Feb. 6, 1987) (denying defendant's motion to coordinate two pending actions in two districts brought by the same plaintiff); *In re A.H. Robins Co. Inc. "Dalkon Shield" IUD Prods. Liab. Litig.*, MDL No. 631, 610 F. Supp. 1099, 1100 (J.P.M.L. 1985) (denying defendant's motion to centralize over 1,700 actions, including actions that had already been centralized as part of an earlier MDL proceeding and in which common discovery had long since been completed); *In re Asbestos School Prods. Liab. Litig.*, MDL No. 624, 606 F. Supp. 713, 714-15 (J.P.M.L. 1985) (denying defendant's motion to centralize 20 pending actions in 13 districts because common issues had been litigated for over 10 years in thousands of individual asbestos actions); *In re Firestone Tire and Rubber Co. Steel Belted Radial Tire Litig.*, MDL No. 370, unpublished Order Denying Transfer, at 1 (J.P.M.L. Jan. 23, 1979) (denying defendant's motion to centralize 13 pending actions in seven districts without prejudice pending resolution of jurisdictional issues so that defendant could make showing to panel regarding which actions were subject to MDL transfer); *In re Luminex Int'l Inc. Prods. Liab. Litig.*, MDL No. 287, 434 F. Supp. 668, 669 (J.P.M.L. 1977) (denying defendant's motion to centralize three pending actions in two districts that involved products from only one manufacturing lot); *In re Boncoat Prods. Liab. Litig.*, MDL No. 117, 353 F. Supp. 1302, 1303-04 (J.P.M.L. 1973) (denying defendant's motion to centralize two pending actions in two districts essentially to consolidate third-party claims in one case with primary claims against defendant in another case).

[21] *In re OxyContin Prods. Liab. Litig. II*, MDL No. 1716, 395 F. Supp. 2d 1358, 1359 (J.P.M.L. 2005); *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig. II*, MDL No. 1669, 366 F. Supp. 2d 1384, 1384-85 (J.P.M.L. 2005); *In re Zimmer Inc. Centralign Hip Prosthesis Prods. Liab. Litig.*, MDL No. 1497, 237 F. Supp. 2d 1376, 1377 (J.P.M.L. 2002); *In re Chromated Copper Arsenate Treated Wood Prods. Liab. Litig.*, MDL No. 1438, 188 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002); *In re Blood and Blood Prods. Hepatitis C Virus Prods. Liab. Litig.*, MDL No. 1349, 2000 U.S. Dist. LEXIS 11149, at *1-*2 (J.P.M.L. Aug. 2, 2000); *In re Medtronic Inc. Bipolar Polyurethane-Insulated Pacemaker Leads Prods. Liab. Litig.*, MDL No. 1169, unpublished Order Denying Transfer, at 1 (J.P.M.L. Mar. 27, 1997); *In re Shirley Hudak Temporomandibular Joint Implants Prods. Liab./Med. Malpractice Litig.*, MDL No. 1089, unpublished Order, at 1-2 (J.P.M.L. Dec. 7, 1995); *In re Carbonless Paper Prods. Liab. Litig.*, MDL No. 1042, unpublished Order Denying Transfer, at 1 (J.P.M.L. Nov. 23, 1994); *In re Penile Implants Prods. Liab. Litig.*, MDL No. 1020, 1994 U.S. Dist. LEXIS 21505, at *1-*2 (J.P.M.L. Sept. 30, 1994); *In re Repetitive Stress Injury Prods. Liab. Litig.*, MDL No. 955, unpublished Order Denying Transfer, at 1 (J.P.M.L. Nov. 27, 1992); *In re Ship Asbestos Prods. Liab. Litig.*, MDL No. 676, unpublished Order Denying Transfer, at 1 (J.P.M.L. Feb. 4, 1986); *In re McNeilab Inc. "Zomax" Prods. Liab. Litig.*, MDL No. 641, unpublished Order Denying Transfer, at 1 (J.P.M.L. May 28, 1985); *In re Eli Lilly & Co. "Oraflex" Prods. Liab. Litig.*, MDL No. 570, 578 F. Supp. 422, 423 (J.P.M.L. 1984); *In re Arc Furnace Transformer Prods. Liab. Litig.*, MDL No. 563, unpublished Order Denying Transfer, at 1 (J.P.M.L. May 24, 1984); *In re Rely Tampon Prods. Liab. Litig. II*, MDL No. 504, unpublished Order Denying Transfer, at 1 (J.P.M.L. July 7, 1982); *In re Rely Tampon Prods. Liab. Litig.*, MDL No. 497, 533 F. Supp. 1346, 1346-47 (J.P.M.L. 1982); *In re Firestone Tire & Rubber Co. Steel Belted Radial Tire Prods. Liab. And Securities Litig.*, MDL No. 431, unpublished Order Denying Transfer, at *1 (J.P.M.L. July 10, 1980); *In re Asbestos Prods. Liab. Litig. II*, MDL No. 416, unpublished Order Denying Transfer, at 1 (J.P.M.L. Mar. 13, 1980); *In re G.D. Searle & Co. "Copper 7" IUD Prods. Liab. Litig.*, MDL No. 404, 483 F. Supp. 1343, 1344 (J.P.M.L. 1980); *In re Dow Chem. Co. "Polystyrene Foam" Prods. Liab. Litig.*, MDL No. 275, 429 F. Supp. 1035, 1036 (J.P.M.L. 1977).

[22] These are the first 10 cases listed in note 21, *supra*.

[23] E.g., *In re Canon U.S.A. Inc. Digital Cameras Prods. Liab. Litig.*, MDL No. 1740, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006) (granting defendant's motion to coordinate two pending actions in two districts over plaintiffs' opposition); *In re Maytag Corp. Neptune Washer Prods. Liab. Litig.*, MDL No. 1617, 333 F. Supp. 2d 1382, 1382-83 (J.P.M.L. 2004) (granting defendant's motion to coordinate three pending actions in three districts over plaintiffs' opposition); *In re Gen. Motors Corp. "Piston Slap" Prods. Liab. Litig.*, MDL No. 1600, 314 F. Supp. 2d 1386, 1386-87 (J.P.M.L. 2004) (granting plaintiffs' motion, which defendants supported, to coordinate three pending actions in three districts).

[24] *In re DaimlerChrysler Corp. Seat Belt Buckle Prods. Liab. Litig.*, MDL No. 1480, 217 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2002); *In re Chromated Copper Arsenate Treated Wood Prods. Liab. Litig.*, MDL No. 1438, 188 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002); *In re Shirley Hudak Temporomandibular Joint Implants Prods. Liab./Med. Malpractice Litig.*, MDL No. 1089, unpublished Order, at 1-2 (J.P.M.L. Dec. 7, 1995); *In re Penile Implants Prods. Liab. Litig.*, MDL No. 1020, 1994 U.S. Dist. LEXIS 21505, at *1-*2 (J.P.M.L. Sept. 30, 1994).

[25] These are the last three cases listed in note 24, *supra*.

[26] *In re Profiler Prods. Liab. Litig.*, MDL No. 1748, 429 F. Supp. 2d 1381, 1381 (J.P.M.L. 2006); *In re Canon U.S.A. Inc. Digital Cameras Prods. Liab. Litig.*, MDL No. 1740, 416 F. Supp. 2d 1369, 1370 (J.P.M.L. 2006); *In re Am. Honda Motor Co. Inc. Oil Filter Prods. Liab. Litig.*, MDL No. 1737, 416 F. Supp. 2d 1368, 1368-69 (J.P.M.L. 2006); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, MDL No. 1718, 398 F. Supp. 2d 1365, 1366 (J.P.M.L. 2005); *In re Ford Motor Co. E-350 Van Prods. Liab. Litig. II*, MDL No. 1687, 374 F. Supp. 2d 1353, 1353-54 (J.P.M.L. 2005); *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, MDL No. 1632, 344 F. Supp. 2d 755, 756 (J.P.M.L. 2004); *In re Maytag Corp. Neptune Washer Prods. Liab. Litig.*, MDL No. 1617, 333 F. Supp. 2d 1382, 1382-83 (J.P.M.L. 2004); *In re Gen. Motors*

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When a plaintiff's motion to transfer is granted over a defendant's objection, it is usually because factors strongly favoring transfer, such as many pending actions, are present. Since 1992, there have been 37 plaintiffs' products liability transfer motions opposed (or at least not supported) by at least one primary defendant. 10 were denied.[27] Of the 27 that were granted, 21 involved seven or more pending actions.[28]

A Final Note of Caution

Scientists speak of an ''observer effect,'' whereby merely through observing a system, the observer alters the system. A similar unintended consequence may be possible here: by identifying and discussing the factors that raise or lower the odds of transfer, this article may unintentionally encourage parties to try to game the system to increase the odds of their desired outcome. Because plaintiffs' counsel initially decide how many actions to file against a defendant, and what allegations to make in those actions, plaintiffs' counsel are better situated to try to game the MDL system. Defense counsel—and the MDL panel—must therefore watch for, and not permit, artful pleading aimed at influencing the outcome of MDL proceedings to accomplish forum- or judge-shopping.[29]

Litigants are often keenly interested in whether the MDL panel will centralize a given set of products liability actions. By analyzing the panel's past decisions, counsel will be better able to advise clients on that score.

Corp. ''Piston Slap'' Prods. Liab. Litig., MDL No. 1600, 314 F. Supp. 2d 1386, 1387-88 (J.P.M.L. 2004); *In re Electrical Receptacle Prods. Liab. Litig.*, MDL No. 1595, 313 F. Supp. 2d 1378, 1379-80 (J.P.M.L. 2004); *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, MDL No. 1562, 293 F. Supp. 2d 1381, 1381-82 (J.P.M.L. 2003); *In re Welding Rod Prods. Liab. Litig.*, MDL No. 1535, 269 F. Supp. 2d 1365, 1366 (J.P.M.L. 2003); *In re Meridia Prods. Liab. Litig.*, MDL No. 1481, 217 F. Supp. 2d 1377, 1377-78 (J.P.M.L. 2002); *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, MDL No. 1421, 170 F. Supp. 2d 1356, 1357-58 (J.P.M.L. 2001); *In re Zonolite Attic Insulation Prods. Liab. Litig.*, MDL No. 1376, unpublished Transfer Order, at 1 (J.P.M.L. Dec. 7, 2000); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, MDL No. 1358, 2000 U.S. Dist. LEXIS 14901, at *1-*3 (J.P.M.L. Oct. 10,2000); *In re Gen. Motors Corp. Type III Door Latch Prods. Liab. Litig.*, MDL No. 1266, 1999 U.S. Dist. LEXIS 5075, at *2 (J.P.M.L. Apr. 14, 1999); *In re Skin-Cap Prods. Liab. Litig.*, MDL No. 1243, 1998 U.S. Dist. LEXIS 13253, at *1-*2 (J.P.M.L. Aug. 24, 1998); *In re Cheminova Inc. Insecticide ''Methyl Parathion'' Prods. Liab. Litig.*, MDL No. 1183, unpublished Transfer Order, at 1 (J.P.M.L. Aug. 22, 1997); *In re Air Bag Prods. Liab. Litig.*, MDL No. 1181, unpublished Transfer Order, at 1 (J.P.M.L. Aug. 25, 1997); *In re Ford Motor Co. Anti-Lock Brake Sys. Prods. Liab. Litig.*, MDL No. 1171, unpublished Transfer Order, at 1 (J.P.M.L. Apr. 10, 1997); *In re Isuzu Trooper Prods. Liab. Litig.*, MDL No. 1152, unpublished Transfer Order, at 1-2 (J.P.M.L. Mar. 11, 1997); *In re Ford Motor Co. Thick Film Ignition Module Prods. Liab. Litig.*, MDL No. 1133, unpublished Transfer Order, at 1 (J.P.M.L. Oct. 8, 1996); *In re Apple Juice Prods. Liab. Litig.*, MDL No. 1113, unpublished Transfer Order, at 1-2 (J.P.M.L. June 19, 1996); *In re Ford Motor Co. Head Rest Prods. Liab. Litig.*, MDL No. 1103, unpublished Transfer Order, at 1 (J.P.M.L. Apr. 10, 1996); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, MDL No. 1098, unpublished Transfer Order, at 1 (J.P.M.L. Apr. 16, 1996); *In re Ford Motor Co. Vehicle Paint Litig. II*, MDL No. 1063, unpublished Transfer Order, at 1 (J.P.M.L. Aug. 3, 1995); *In re Fialuridine Prods. Liab. Litig.*, MDL No. 1034, unpublished Transfer Order, at 1 (J.P.M.L. Dec. 1, 1994); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, MDL No. 991, unpublished Transfer Order, at 1 (J.P.M.L. Feb. 9, 1994).

[27] *See* notes 21 and 22, *supra*.

[28] *In re Fosamax Prods. Liab. Litig.*, MDL No. 1789, 444 F. Supp. 2d 1347, 1348-49 (J.P.M.L. 2006); *In re Seroquel Prods. Liab. Litig.*, MDL No. 1769, 447 F. Supp. 2d 1376, 1377-78 (J.P.M.L. 2006); *In re Aredia and Zometa Prods. Liab. Litig.*, MDL No. 1760, 429 F. Supp. 2d 1371, 1371-72 (J.P.M.L. 2006); *In re Medtronic Inc. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 1726, 408 F. Supp. 2d 1351, 1351-52 (J.P.M.L. 2005); *In re Bextra and Celebrex Marketing, Sales Practices and Prods. Liab. Litig.*, MDL No. 1699, 391 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2005); *In re Accutane Prods. Liab. Litig.*, MDL No. 1626, 343 F. Supp. 2d 1382, 1382-83 (J.P.M.L. 2004); *In re Deep Vein Thrombosis Litig.*, MDL No. 1606, 232 F. Supp. 2d 1378, 1379-80 (J.P.M.L. 2004); *In re Ephedra Prods. Liab. Litig.*, MDL No. 1598, 314 F. Supp. 2d 1373, 1374-75 (J.P.M.L. 2004); *In re Paxil Prods. Liab. Litig.*, MDL No. 1574, 296 F. Supp. 2d 1374, 1375 (J.P.M.L. 2003); *In re Phenylpropanolamine Prods. Liab. Litig.*, MDL No. 1407, 173 F. Supp. 2d 1377, 1378-79 (J.P.M.L. 2001); *In re St. Jude Med. Inc. Silzone Heart Valves Prods. Liab. Litig.*, MDL No. 1396, 2001 U.S. Dist. LEXIS 5226, at *1-*2 (J.P.M.L. Apr. 18, 2001); *In re ProteGen Sling and Vesica Sys. Prods. Liab. Litig.*, MDL No. 1387, 2001 U.S. Dist. LEXIS 1438, at *1-*4 (J.P.M.L. Feb. 7, 2001); *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348, unpublished Transfer Order, at 1-2 (J.P.M.L. June 9, 2000); *In re Deere & Co. Cotton Picker Fire Prods. Liab. Litig.*, MDL No. 1282, 1999 U.S. Dist. LEXIS 10664, at *1-*2 (J.P.M.L. July 13, 1999); *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 990 F. Supp. 834, 835-36 (J.P.M.L. 1998); *In re Latex Gloves Prods. Liab. Litig.*, MDL No. 1148, unpublished Transfer Order, at 1-2 (J.P.M.L. Feb. 26, 1997); *In re Exterior Insulation Finish Sys. Prods. Liab. Litig.*, MDL No. 1132, unpublished Transfer Order, at 1 (J.P.M.L. Oct. 4, 1996); *In re Baxter Healthcare Corp. Gammagard Prods. Liab. Litig.*, MDL No. 1060, unpublished Transfer Order, at 1-2 (J.P.M.L. June 9, 1995); *In re Abbott Labs. Omniflox Prods. Liab. Litig.*, MDL No. 1004, unpublished Transfer Order, at 1-2 (J.P.M.L. Apr. 18, 1994); *In re Temporomandibular Joint Implants Prods. Liab. Litig.*, MDL No. 1001, 844 F. Supp. 1553, 1553-54 (J.P.M.L. 1994); *In re ''Factor VIII or IX Concentrate Blood Prods.'' Prods. Liab. Litig.*, MDL No. 986, 853 F. Supp. 454, 455 (J.P.M.L. 1993).

[29] See, e.g., *In re 7-Eleven Franchise Antitrust Litig.*, MDL No. 97, 358 F. Supp. 286, 287-88 (J.P.M.L. 1973) (denying argument in MDL transfer proceeding that appeared to be part of an attempt to evade a particular court's substantive ruling).