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November 17, 2021

Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases

Sometimes a single event or a common set of facts spurs litigation in multiple federal courts. For instance, a plane crash or a widespread product defect may affect individuals from many states and lead to numerous related district court lawsuits, or a federal regulation with national reach may trigger petitions for review in several federal appeals courts. Such proceedings are known as *multidistrict litigation* or *MDL* at the district court level and *multicircuit petitions for review* at the circuit court level. Congress has enacted statutes creating special procedures for both MDL and multicircuit petitions with the goal of allocating judicial resources efficiently and ensuring consistency across related cases.

District Court MDL

The procedures governing MDL in the trial-level federal district courts date from the 1960s. Between the 1940s and the early 1960s, the federal courts grappled with how to address the increasing complexity of federal litigation, particularly the proliferation of multiple cases raising overlapping questions of law and fact. In the early 1960s, federal courts developed ad hoc procedures to coordinate hundreds of civil suits that arose following criminal antitrust prosecutions of certain electrical equipment manufacturers. Recognizing the need for a more formal and comprehensive solution, the Judicial Conference of the United States also called on Congress to act in this area.

In 1968, Congress enacted the district court MDL statute, 28 U.S.C. § 1407, and established the Judicial Panel on Multidistrict Litigation (MDL Panel). The statute allows the MDL Panel to transfer cases to a single district court for coordinated or consolidated pretrial proceedings. The Panel may exercise this power when cases involve "one or more common questions of fact," and when it determines that the transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." The MDL statute gives the MDL Panel significant discretion in determining whether to consolidate proceedings.

The MDL Panel reports that since its establishment, it has "considered motions for centralization in more than 2,870 dockets involving almost 670,000 cases and millions of claims." The Panel further reports that its "dockets encompass litigation categories as diverse as airplane crashes [and other accidents]; mass torts, such as those involving asbestos, drugs and other products liability cases; data security breaches, patent validity and infringement; antitrust price fixing; marketing and sales practices, securities fraud; and employment practices."

A key feature of the district court MDL statute is that it allows for transfer and consolidation of pretrial proceedings only. MDL proceedings in a transferee court may include cases originally filed in that district, cases transferred to that district, and cases filed in the transferee district after the proceedings have been centralized there. The transferee court must remand any case that is not terminated before trial to the district from which it was transferred or the district in which the case would have been filed in the first instance. As a practical matter, however, relatively few MDL cases are remanded: the MDL Panel reports that as of September 30, 2020, more than 97% of terminated MDL proceedings were terminated by transferee courts, while fewer than 3% were remanded. One reason for this is that the vast majority of federal cases terminate before trial, either through motions to dismiss or for summary judgment or because the parties reach a settlement. Moreover, transferred MDL cases may remain in the transferee court for trial if the parties consent to it.

One high-profile example of district court MDL is the opioid MDL, in which an Ohio district court judge is coordinating pretrial proceedings in more than 2,400 cases against opioid manufacturers and distributors alleging that the defendants contributed to the opioid epidemic by misrepresenting the risks of long-term opioid use and failing to monitor suspicious orders.

Multicircuit Petitions for Review in the Federal Appeals Courts

While federal litigation often begins in the district courts, Congress has provided for direct review of some agency actions in the federal circuit courts of appeals. For instance, petitions for review of certain agency actions under the Clean Air Act and the Clean Water Act must commence in the federal appeals courts. Because federal agency rulemaking frequently applies nationwide, a single agency action often gives rise to petitions for judicial review in several federal appeals courts. A federal statute, 28 U.S.C. § 2112, governs those multicircuit petitions for review.

Congress enacted the current version of Section 2112 in 1988. Before the 1988 amendment, the statute provided that if petitions for review of the same agency action were filed in multiple circuit courts, all proceedings were to be transferred to the court where proceedings were first instituted. This practice sometimes led to a "race to the courthouse" as litigants sought to give their preferred court of appeals the first opportunity to consider their claims.

Following the 1988 amendment, multicircuit petitions for review are no longer automatically consolidated in the court of first filing. Instead, the statute provides that if petitions

for review of a single agency order are filed in two or more circuit courts within ten days after issuance of the order, the MDL Panel "shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed." MDL Panel Rule 25.5 implements the statutory provision for random selection through a lottery, directing the Clerk of the Panel to "randomly select a circuit court of appeals from a drum containing [a single] entry for each circuit wherein a constituent petition for review is pending." Once proceedings are consolidated in one circuit court, the statute authorizes the transferee court to transfer proceedings to any other appeals court "[f]or the convenience of the parties in the interest of justice."

A recent high-profile example of a multicircuit petition for review is the litigation surrounding the Coronavirus Disease 2019 (COVID-19) vaccine mandate for employers with 100 or more employees. On November 5, 2021, the Occupational Safety and Health Administration published an emergency temporary standard requiring those employers to implement certain vaccination and testing policies. Challengers of the policy filed petitions for review in multiple federal appeals courts. On November 16, 2021, the MDL Panel conducted a lottery and randomly selected the U.S. Court of Appeals for the Sixth Circuit to consider the cases in the first instance.

Considerations for Congress

The processes that Congress has established for MDL and multicircuit petitions for review are motivated primarily by practical considerations such as the efficient administration and consistent decision of large volumes of related claims. Congress has sometimes made adjustments or exceptions to those processes, tailoring how they apply to certain types of cases. For instance, Section 1407 provides that it does not apply "to any action in which the United States is a complainant arising under the antitrust laws." Congress amended Section 1407 in 1976 to allow the MDL Panel to "consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act." Section 2112 specifies that it does not apply to review of Tax Court decisions. Proposals from the 116th Congress, including the SAFE TO WORK Act, S. 4317, H.R. 8832 (116th Cong. 2020), would have imposed specific procedures in MDL involving certain legal claims related to COVID-19.

Many commentators agree that the statutes governing MDL and multicircuit petitions have generally advanced Congress's practical purposes, promoting efficiency for the parties and the courts. Some urge Congress to take additional steps in that direction, arguing that a substantial percentage of MDL claims are meritless, and that better procedures are needed to weed out unsupported claims before settlement or trial.

Other commentators have examined how the practice of case transfers and consolidation under the MDL and multicircuit petition statutes may affect the administration of justice more generally. Some assert that the statutes may prompt excessive consolidation and far-reaching settlement of claims. In their view, such settlements may affect the rights of future claimants, but the protections for absent claimants in Federal Rule of Civil Procedure 23 (which sets various procedural requirements for class actions) do not generally apply to MDL proceedings unless the transferee court formally certifies a class action. In addition, some note that the rules governing appeals may create an asymmetry for MDL plaintiffs and defendants. If a court grants an MDL defendant's motion to dismiss, the plaintiff is entitled to an immediate appeal; however, if the court denies the motion, the denial usually is not immediately appealable. While this rule applies generally in federal civil litigation, some commentators contend that in the MDL context it may impose particularly strong pressure on defendants to settle.

Along with class actions, MDL cases may also raise broader concerns about litigation funding and fees. In some cases, third parties fund federal litigation, including MDL and class actions, in exchange for a portion of the plaintiffs' recovery. The Litigation Funding Transparency Act of 2021, S. 840, H.R. 2025 (117th Cong. 2021), would respond to that concern by requiring disclosure of any entities with a right to payment contingent on the receipt of monetary relief in any MDL or class action.

Beyond the statutes governing MDL and multicircuit petitions for review, Congress has other tools available to address concerns about related lawsuits proceeding in multiple courts. One option is to channel certain types of cases to a specific venue. For instance, multiple federal statutory provisions require petitions for review of certain types of agency action to be brought in the U.S. Court of Appeals for the District of Columbia Circuit. If all challenges to a particular agency action are filed in the same court, that court can determine whether to consolidate or otherwise coordinate related litigation.

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