

Managing Complex Civil Litigation: The Consolidation of Pending Federal Lawsuits

This past summer, the relatively unknown United States Judicial Panel on Multidistrict Litigation (informally known as the MDL Panel) consolidated 15 lawsuits accusing Standard & Poor's of fraudulently inflating credit ratings. While the original lawsuits were filed in 14 different states and the District of Columbia, the MDL Panel moved the suits to New York, where Judge Jesse M. Furman of the Federal District Court of Manhattan will oversee the pretrial proceedings. The Panel argued that centralization of the lawsuits was appropriate given that "the inconvenience to S.&P. of litigating in numerous different districts, as well as state courts, is high, and centralization allows for all parties to obtain substantial efficiencies in dealing with common issues."¹

Established by the Multidistrict Litigation Act of 1968, the MDL Panel may consolidate any cases that share common issues of fact but are filed in different districts and transfer those cases to a single judge for coordinated pretrial proceedings. Since 1968, the MDL Panel has consolidated and transferred nearly 400,000 lawsuits, including cases relating to the Bernie Madoff Ponzi scheme, the 2010 Deep Water Horizon oil spill, and the collapse of Lehman Brothers. While

theoretically, the cases return to the original district in which they were filed for trial, in practice nearly all cases are resolved while consolidated. How does the MDL decide to consolidate and transfer pending federal lawsuits? In the first comprehensive empirical investigation of MDL Panel decisions, Margaret S. Williams, Senior Research Associate in the Federal Judicial Center Research Division and Tracey E. George, Charles B. Cox III and Lucy D. Cox Family Chair in Law & Liberty, Professor of Law and Political Science, Director of the Cecil D. Branstetter Litigation and Dispute Resolution Program, and CSDI Affiliate at Vanderbilt University, explain the rationale for consolidation, and the selection of specific courts and judges to hear consolidated cases.

Williams and George's analysis of consolidation decisions focuses on three parts. First, the authors explore the MDL Panel's decisions to consolidate. The MDL Panel has substantial discretion in deciding whether and where to consolidate cases, and no higher court has ever overturned a transfer ruling by the Panel. The only two formal prerequisites for consolidation are that cases must involve common factual questions, and be filed in

at least two federal district courts. Informally, panelists act in the interest of furthering just and efficient resolution and look to consolidate cases with common questions of fact that are complex, numerous, unresolved and unique. While the Panel is likely to consolidate cases in response to a motion, the Panel may initiate

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proceedings on its own, even if all parties are opposed to consolidation. For example, despite the fact that a vast majority of both plaintiffs' and defendants' lawyers were opposed to the consolidation of the tens of thousands of personal injury cases resulting from asbestos exposure, the Panel consolidated the cases in 1991 and formed MDL 875, In Re: Asbestos Products Liability Litigation. The Panel

¹"Lawsuits Against S&P Sent to One Court." *The New York Times*, June 6, 2013. The original lawsuits were filed in Arizona, Arkansas, Colorado, Delaware, the District of Columbia, Idaho, Iowa, Maine, Mississippi, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee and Washington.

argued consolidation was necessary to eliminate duplication and overlap and to encourage a uniform case management plan for handling an issue that had reached “crisis proportions.”² To date, MDL 875 is the largest, longest running Panel and has handled over 180,000 cases.³

After the Panel consolidates a group of cases, the Panel then transfers the consolidated cases to a designated district court and judge. The Panel may choose from any federal district and any federal trial judge, and that judge handles all discovery, pretrial motions and pretrial alternative dispute resolution for all parties in the suits. The ability to argue before the Panel regarding the selection of a court and judge has become a specialized area of the law. Elite trial attorneys who specialize in multidistrict litigation routinely appear before the panel to argue where cases should be sent. While the decision to transfer cases to a specific district may be independent of the designation of a judge, the Panel frequently justifies its selection of a district based on the location of the judge to whom the Panel wants to assign the consolidated cases. The Panel transfers over one half of all consolidated cases to New York City, San Francisco, Chicago, Los Angeles, and Philadelphia and the districts that are most likely to receive a transfer are

those recommended by a defendant or a mixed group of defendants and plaintiffs. In addition, districts that are currently represented on the Panel are more likely to receive a transfer. Other factors that influence the decision to transfer are the location of parties and witnesses and the location of evidence.

Finally, Williams and George examine the Panel’s selection of transferee judges to assess the characteristics of judges that are relevant in the decision to transfer. They find that the Panel often looks for judges who have previous experience managing consolidated cases. Given that appointment on the MDL Panel often reflects a judge’s experience with complex litigation, the Panel is more likely to assign cases to one of the seven district or circuit court judges who serve on the Panel at the time of transfer. In addition, current and former chief district judges are more likely to receive transfers. Senior judges are less likely to receive a transfer. Remarkably, the current workload of a judge has minimal effect on the probability of transfer.

The U.S. Judicial Panel on Multidistrict Litigation’s decision to consolidate and transfer cases to a specific district and judge is tremendously important, as nearly all consolidated cases are resolved in pretrial proceedings. In fact, the preliminary fight in modern

litigation often centers on where parties will litigate a lawsuit. Williams and George provide important insights into an underappreciated mechanism for resolving large-scale and high-stakes cases. If civil actions filed in different federal districts share common facts, it seems likely that a party will consider a motion to centralize the litigation. Once a motion is before it, the MDL Panel often grants consolidation but exercises substantial discretion in choosing where and to whom to transfer the consolidated cases. The Panel is much more likely to assign cases to a district court where a current member of the Panel sits and to a judge who currently serves on the Panel. This research suggests that the MDL Panel and its composition have important implications for the management of complex litigation.

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The research summarized in this policy brief draws from “Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation” by Margaret S. Williams and Tracey E. George, which was published in the September 2013 issue of the *Journal of Empirical Legal Studies* (10(3): 424-461).

For further information about this policy brief, please contact Alan Wiseman, Associate Professor of Political Science and Law (by courtesy), CSDI Co-Director. Email: alan.wiseman@vanderbilt.edu.

²Labaton, Stephen. “Business and the Law: Deciding the Fate of Asbestos Cases.” *The New York Times*, May 30, 1991.

³Eduardo C. Robreno, Presiding Judge, United States District Court for the Eastern District of Pennsylvania. 2013. “MDL-875: Past, Present, and Future.” Available at <http://www.paed.uscourts.gov/mdl875a.asp>