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Strategic considerations for corporate plaintiffs in multi-district litigation

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Summary

IN SUMMARY

This article discusses the history and use of specialised multi-district litigation (MDL) pretrial procedures in US private antitrust litigation. The article also discusses potential challenges to the administration of MDLs involving monopolisation claims. Finally, the article summarises recent developments and proposals to modify the statutory framework for MDLs.

DISCUSSION POINTS

- Pretrial consolidation of related private antitrust proceedings into a single MDL court is a well-established procedure in the United States
- The cost and efficiency of an MDL proceeding can sometimes come at the expense of the court's attention to the details of individual litigation cases
- MDLs involving monopoly allegations are relatively rare and pose efficiency and other challenges to litigants in the proceedings

REFERENCED IN THIS ARTICLE

- Judicial Panel for Multidistrict Litigation
- The State Antitrust Enforcement Venue Act
- *Home Depot USA, Inc v Lafarge N Am, Inc*, 59 F.4th 55 (3d Cir. 2023)
- Proposed Rule 16.1, Federal Rules of Civil Procedure

INTRODUCTION

The Clayton Act is designed to encourage private enforcement of the US federal antitrust laws, enabling a private plaintiff to recover three times its actual damages for antitrust violations.[1] It is common that numerous different plaintiffs file related antitrust litigation against the same or similar defendants in multiple US federal courts. When this happens, the US federal court system provides a mechanism to consolidate the related cases into a common multi-district litigation (MDL) court for pretrial proceedings.

The stated purpose of the MDL is to 'avoid duplication of discovery, to prevent inconsistent pre-trial rulings and to conserve the resources of the parties, their counsel, and the judiciary' as would likely otherwise occur if related cases proceeded in different courts in parallel.[2] While widely recognised as promoting efficiency and conserving resources, the coordinated and collective nature of MDLs means that individual parties (and counsel) often find themselves in courts far from where they filed their lawsuits and subject to rules and decisions over which they have little control.

MDLs are a major component of US civil litigation. Published court statistics show that, as of 3 June 2024, approximately 73 per cent of all pending civil actions in the US federal courts are part of an MDL proceeding.

MULTI-DISTRICT LITIGATION

The MDL process originated in private antitrust litigation. In 1960, major electrical equipment manufacturers in the United States, including General Electric, Westinghouse, Allis-Chambers and many others, were indicted by the US Department of Justice for a conspiracy to fix the prices of electronic equipment components.[3] The indictments were followed by more than 1,900 separate private complaints, filed in 36 different federal courts, alleging price-fixing of over 20 different product lines.[4] The federal court system was overwhelmed, as were the defendants, who were naturally concerned with the cost and expense of duplicative discovery and potential for inconsistent rulings.

In 1962, US Supreme Court Chief Justice Earl Warren appointed the Co-ordinating Committee for Multiple Litigation (CCML), a special committee to address the challenge posed by the sprawling and duplicative electrical cartel proceedings.[5] The CCML proposed that the price-fixing cases could be managed together for purposes of common discovery and other pretrial proceedings involving common issues, such as summary judgment. The committee also developed several tools it used to administer the proceeding, including the use of a centralised document depository, procedures for depositions of a single witnesses to be taken by several parties, the tracking of cases into 'front' and 'back' burner priorities, and the adjudication of common liability issues. The CCML was widely hailed as a successful endeavour, resolving all of the electrical equipment private litigation by March 1967, after nine trials and numerous settlements.[6]

MDL's Statutory Framework

The statutory framework for MDL exists in US Code Title 28, section 1407. Enacted in 1968, the law simply provides that 'when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pre-trial proceedings'.[7] Only certain government actions are exempt from potential MDL.[8]

The Judicial Panel on Multi-District Litigation (JPML), a special panel organised by the United States Supreme Court, determines whether cases should be consolidated and – if so – where.[9] The JPML consists of seven federal judges from different jurisdictions and meets six times a year. The JPML may transfer cases on its own initiative, but in most instances a party or parties to an existing litigation petition for the consolidation.[10] There is no time limit on when a party may seek consolidation.

The MDL statute contains no specific guidance for the JPML to decide whether and when MDL is appropriate. For example, the MDL statute contains no express requirement that there be a minimum number of litigations. Cases can be transferred even if pretrial discovery has already begun. While the JPML will consider the number of cases and their progression, its core approach is that any case with one or more common questions of fact will presumptively 'serve the convenience of the parties and witnesses and promote the just and efficient conduct of litigation'.[11] Because the standard for consolidation is quite low, most MDL requests are granted.[12]

Nor does the MDL statute provide explicit requirements for the JPML to use to select the location of the MDL. The JPML therefore enjoys broad discretion in selecting the MDL forum. According to guidance issued by the JPML, it will typically consider:

- where the largest number of cases is pending;
- where discovery has occurred;

- where cases have progressed furthest;
- the site of the occurrence of common facts;
- where cost and inconvenience will be minimised; and
- the experience, skill and caseloads of available judges.[13]

Forum selection clauses in contracts between the parties do not limit the JPML's authority to select a forum different from those selected by the parties.[14] Parties can and often do petition for or against the particular location of the MDL court and the judge selected as administrator.

Once an MDL is established, later-filed complaints may be transferred to that proceeding over time.[15] Later-filed or 'tag-along' actions may attempt to show that their case should not be transferred and consolidated to the existing MDL but have no ability to try to change the chosen MDL court or individual judge.[16]

The MDL panel's decision about the location of an MDL court can be an important factor in the outcome of the case. The chosen district may be one that otherwise would not have personal jurisdiction over the parties and may use conflict of law and other legal standards that are different from those in which a case was originally filed. The MDL court, moreover, can require the filing of consolidated amended complaints or consolidated motions and responses. It can effectively terminate actions by ruling on class action or dispositive motions. It can also administer individual or joint settlements.

Once chosen, the opportunity to appeal a JPML decision on consolidation or choice of location is practically non-existent (allowing appeal only by 'extraordinary writ').[17] Nor do parties have the option to opt out or leave the proceeding once they are transferred into the MDL before their individual pretrial proceedings are concluded.

After the MDL or 'transferee court' conducts pretrial proceedings, it will remand each case back to the federal court where it originated for trial (the 'transferor court').[18] As a practical matter, most cases settle or are resolved on summary judgment during the course of administration by the MDL, making the MDL court the adjudicator in most litigation.[19]

MDL's Lack Of A Governing Framework

Importantly, the MDL statute provides no governing legal framework for the MDL court to use to administer the actual MDL proceeding. Nor does it govern or guide the MDL court as to how to reconcile differences between the jurisdictional laws that might apply to the actions. US Federal Court proceedings are governed by the Federal Rules of Civil Procedure (FRCP). The FRCP are, however, also silent as to MDLs and contain no provisions for their administration. Moreover, the FRCP rules, which govern, for example, the length of depositions and the number of written discovery requests a party may make, were not designed with MDL proceedings in mind. It is therefore typically necessary for the MDL court to initially suspend or modify some or all of the normal FRCP rules to accommodate the fact of the consolidation.

In the absence of any governing framework, the procedures used in any given MDL are necessarily improvised and ad hoc. While the JPML publishes best practices to MDL courts for administrating MDLs, this guidance is non-binding and aspirational.[20] While some MDL courts take an active approach to managing an MDL docket, others do not. Moreover, the

MDL court will often look to the parties in the first instance for assistance in organising the administration of the proceeding.

Common techniques to coordinate antitrust actions are to group the parties in some manner, such as in relation to the time of filing, by a status or by a product. Other procedures to promote efficiency include the MDL court's formal appointment of liaison counsel to communicate on behalf of larger litigation groupings.[21] A tool often employed in antitrust and other commercial litigation is the use of court-appointed Special Masters, who are individuals paid for by the parties to decide discovery disputes with an attention and speed often not available to the MDL court, which must still maintain a docket of other civil and criminal proceedings.

Among groups of plaintiffs and defendants, informal coordination is often employed to divide the labour of fact and expert discovery and for dispositive motions. In such 'behind the scenes' coordination, some parties may take the lead or more active roles overall or as to certain issues. The parties may also hire common experts as to common liability issues, defences or damages. Such arrangements can make the proceeding very cost-effective but is not without risk that any individual party may settle or otherwise be dismissed from the proceeding, taking its institutional knowledge with it. It also means that individualised arguments between the litigations are not always present or that certain arguments are not made based on group consensus.

MDL Distinguished From Class Actions And Substantive Consolidation

MDL procedures should not be confused with class actions, in which individual claims and injuries are consolidated for purposes of common resolution under Rule 23 of the FRCP. An MDL may include one or more class actions but the 'consolidation' is not equivalent. For a class action to proceed, Rule 23 requires express findings that common issues of fact and law predominate and that injury of each class member can be addressed using common methods. Once a class is certified, any subsequent resolution is binding upon all class members who do not expressly opt out.[22]

In contrast, MDL requires only that there exist 'one or more common questions of fact' across the litigations, with no requirement that those common questions predominate, or are even shared by each of the parties.[23] Each litigation in an MDL retains its separate identity and may consolidate or remain separate as they see fit. Even if formally consolidated, each case, however, retains its separate identity for appeal or for purposes of remand to a home court.-[24]

Law Of The Case Doctrine

Relatedly, it is a common misnomer that MDL courts apply 'law of the case' doctrine to decide all the cases in the MDL in a consistent manner. In the federal courts, the law of the case doctrine works to prevent reconsideration of legal issues already decided in the same case.[25] The MDL statute, however, does not make the cases to an MDL the 'same case' for the purposes of law of the case or any other doctrines of issue preclusion.

During the past year, the Third Circuit Court of Appeals provided a somewhat harsh reminder to an MDL court of the limits of law of the case doctrine in the antitrust price-fixing MDL *In re Domestic Drywall Antitrust Litigation.*[26] There, the MDL court had determined that the later-filed plaintiff Home Depot would not be allowed to attempt to prosecute its case against a defendant based on a legal theory of harm that the court had already decided

in that defendant's favour in a case brought by a different plaintiff. Reasoning that Home Depot had neither taken any new discovery nor offered a new theory to support re-raising the argument, the MDL court held that law of the case precluded it from offering an expert report supporting that theory of harm.[27]

The Third Circuit criticised the MDL court because it 'appeared to believe that the MDL procedure created an exception to the usual law of the case rules'.[28] It reiterated that Home Depot's action was not technically the 'same case' as the previously filed one for purposes of the doctrine and held the MDL court in error.[29]

Yet, the Third Circuit was not unsympathetic to the MDL court's desire to consistently and efficiently resolve the numerous cases to the proceeding. It observed:

> Complex multidistrict cases like this one demand much from transferee courts. The MDL process requires a judge to move hundreds of thousands of cases towards resolution while respecting each litigant's individual rights. Managing an MDL may be fundamentally . . . no different from managing any other case. But the complexity of most MDLs makes it harder to safeguard the procedural values which underlie all cases while simultaneously pursuing an efficient resolution the merits.[30]

It then suggested that the MDL court could have achieved the same 'efficiency' goal as law of the case but by other means. For example, in an MDL, 'a court may rely on its prior decisions as persuasive, and demand good reasons to change its mind'.[31] The MDL could therefore 'enter an order with respect to one party and then provide that it will be automatically extended to other parties if they do not come forward and show cause why it should not be applicable'.[32] In other words, the MDL court essentially binds later litigants to earlier rulings under the standard of law of the case, using its discretionary power rather than legal doctrine. While not acknowledged by the Third Circuit, such MDL 'work around' procedures can make adjudication and management of MDLs controversial.

Collateral Estoppel On Multiple Trials In Different Forums

Collateral estoppel (also known as issue preclusion) is another powerful and also sometimes controversial means to streamline disputes that may arise in the context of MDL. Collateral estoppel prevents a litigant who has had the merits of issues of fact determined against it in one proceeding from attempting to relitigate identical facts in another proceeding, if it shown that the litigant had a fair opportunity to be heard in the first proceeding.[33] Collateral estoppel can be used by a defendant against a plaintiff (ie, 'defensive' collateral estoppel) or by a plaintiff against a defendant (ie, 'offensive' collateral estoppel).[34] It is not necessary that the two proceedings be before the same court or involve identical allegations or causes of action for estoppel to apply.[35] Importantly, a plaintiff seeking to use estoppel offensively in the second action does not have to be identical or otherwise in privity with the plaintiff in the first action to bind a defendant to prior adjudications, although in such a circumstance the court will undertake certain additional equitable considerations.[36]

Prior private or government antitrust proceedings against defendants that have been litigated to the resolution of facts or in the case of a government proceeding, a guilty plea, are a common and well-established source of offensive collateral estoppel. [37] Private litigation in the United States is often preceded by or conducted in parallel with criminal or other

enforcement activities by government authorities. Where the plaintiffs allege the same or an overlapping antitrust violation as a prior private plaintiff or a government action, collateral estoppel will often work to prohibit a defendant from contesting liability to the extent it was previously admitted or was determined against it in the prior proceeding.[38] Collateral estoppel can create significant consequences for an MDL defendant not only within the MDL but also without, as MDL defendants face the prospect of numerous trials or other related proceedings following remand of the plaintiffs to the various transferor courts, because a finding of fact in the MDL or a verdict in one trial may be given binding effect in any subsequent actions.[39]

For all these reasons, the practical power of the MDL court extends significantly beyond what at first blush involves merely the 'coordination' of pretrial proceedings described in the MDL statute.

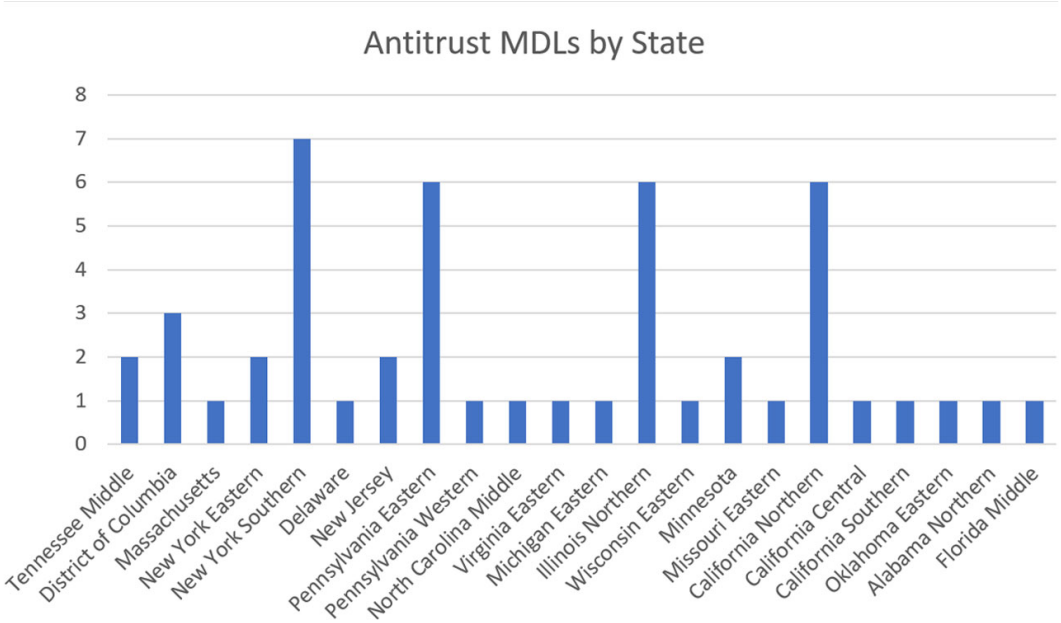
Antitrust MDL Trends

As of 3 June 2024, there are 37 active antitrust MDLs consisting of 2,007 separate cases. The oldest active antitrust MDL was formed in 2005 and currently involves just one out of a total of 53 total managed actions.[40] The three newest antitrust MDLs were each inaugurated in May 2024, evidencing that the MDL procedure continues to be a common means of managing private antitrust litigation.[41]

According to analyses published by Bloomberg News, antitrust cases have consistently ranked as the second most common type of MDL proceeding, surpassed only by product liability cases.[42] Moreover, the percentage of antitrust MDLs as a percentage of all MDLs has remained fairly constant.

The steady percentage of antitrust MDL cases over time belies that the number of MDLs over time has grown in both number and size – meaning that antitrust litigation subject to MDL has grown with it.[43] The current antitrust MDL cohort includes the two of the largest antitrust MDLs in history. The largest, *In re Automotive Autoparts Antitrust Litigation*-, venued in the Northern District of Michigan, began in 2012 and has over time involved approximately 401 separate private litigations concerning about 40 different automotive parts and over 100 defendants. It has to date generated over US$1.2 billion in settlements just to class-action members, with unknown more paid to litigants proceeding outside the class-action mechanism.[44] It is followed in size by *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, which began in 2016 and has involved approximately 201 separate litigations, involving approximately 20 generic drug company defendants for price-fixing as to more than 300 drugs.[45]

According to published JPML statistics the geographical distribution of current antitrust MDLs skews towards New York, Pennsylvania, Illinois and California. This distribution follows the trend of all MDLs, with these four states representing the majority of MDLs of all types.



Source: Joint Panel on Multidistrict Litigation Statistics

[46]

The current distribution of antitrust MDLs is heavily skewed toward price-fixing actions with 32 of the 37 active antitrust MDLs, or approximately 89 per cent, representing price-fixing or its variations, such as bid rigging, market allocation and output restrictions.

Of the five MDLs predominantly involving monopolisation, three of the five cases also include allegations that the monopolist entered illegal agreements that are also separately and additionally actionable as price-fixing.[47] For example, in the ***Digital Advertising Antitrust Litigation***, all plaintiffs assert monopolisation claims against Google, but some also separately name Facebook as a defendant and assert that anticompetitive agreements between Google and Facebook were part of Google's larger monopolisation scheme.[48] Only two of the MDLs – ***Google Play Store Antitrust Litigation*** (MDL No. 2981) and ***In re Apple Smartphone Antitrust Litigation*** (MDL No. 3113) – are litigations brought solely against single-firm monopoly conduct, and those were formed relatively recently, in 2021 and 2024, respectively.

The predominance of price-fixing over monopoly MDLs in private litigation is perhaps not surprising. Enforcement of the antitrust laws in the United States (both government and private) has skewed for decades towards 'section 1' conspiracies.[49] It has only been in the last handful of years that the US government has sought to aggressively enforce the 'section 2' monopolisation laws, with follow-up private litigation (which has a four-year statute of limitations period) trailing behind. Moreover, numerous consumer actions based on theories of harm, such as data privacy and cybersecurity against monopolistic technology giants such as Google and Apple, fall outside the scope of the US antitrust laws. And yet, there are numerous high-profile class-action and other private litigation proceedings alleging monopolistic sellers such as Ticket Master, Amazon Prime Video, Google and the rider-sharing service Uber of a scale and type that potentially could meet MDL statutory requirements.

A review of JPML decisions from the past few years suggests that if there is comparative lack of monopolisation MDLs, it is not because the JPML is hostile towards them. To the contrary,

the JPML has consolidated monopolisation litigations over the strenuous objections of some parties of the type not often seen in price-fixing litigations where non-objections and disputes over location but not consolidation are common. The May 2024 consolidations are no exception. Of the three antitrust actions formed by the JPML in May 2024, only the ***In re Apple Inc Smart Phone Antitrust Litigation*** monopolisation claim received any objections to consolidation. These objections and concerns reveal that there are qualitative differences in the prosecution of monopolisation cases that may affect the decision to seek MDL in the first instance as well as present challenges of MDL administration not seen in price-fixing cases.

One distinction in a monopolisation case is the presence of private litigation brought by competitors, who have no standing to bring a section 1 price-fixing lawsuit against a rival under the US antitrust laws, but who can sue for lost profits for exclusion from a relevant market by a rival under section 2.[50] Competitors to a monopoly operate in a different relevant market of competition than do purchasers or consumers. The competitor plaintiff's claim for lost profits, moreover, qualitatively differs from that of a consumer or other purchaser, whose harm is usually a monopoly price or overcharge. The JPML, however, has rejected arguments to exclude competitors from consolidated monopolisation proceedings on the basis that the MDL statute simply 'does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer'.[51]

Another major distinction between price-fixing and monopolisation cases in the United States is the application of the per se standard of liability for the former. Under the per se standard, a private litigant does not need to prove the existence of a relevant market, of market power or harm to competition for the purposes of a price-fixing or analogous case, which is adjudicated under application of a per se rule of liability.[52] The JPML will nevertheless consolidate price-fixing and monopolisation cases together so long as there is some factual overlap in the conduct alleged, as in the ***Keurig Green Mountain Single-Service Coffee Antitrust Litigation*** and the ***Digital Advertising Antitrust Litigation*** referenced above.

The insight of the CCML when it created the precursor to the MDL was that common antitrust liability for price-fixing could form a predicate for the efficient consolidation of pretrial proceedings. Claims for monopolisation, however, may involve many different kinds of conduct and effect and on various markets. On the same principle that any common factual or legal issues justify consolidation, the JPML has nevertheless routinely rejected arguments about different elements of proof or harms as a basis to deny consolidation. For the purposes of ***In re Apple Inc Smartphone Antitrust Litigation***, for example, it consolidated claims brought as to Apple watches together with claims as to Apple smartphones on the basis that the litigation as to these products involves a common allegation of Apple's resistance to cross-platform technology and despite the likelihood that the effects of Apple's resistance on different markets and pricing 'may present separate issues'.[53]

The JPML has similarly consolidated rather disparate claims brought by app developers with claims brought by consumers in relation to alleged monopolisation of the Google Play Store on Android mobile devices, despite their existence in different markets and presenting different theories of harm because the claims are 'interrelated' to the common factual question of Google's monopoly status in terms of the Google Play Store.[54] However, the MDL did not further consolidate litigations brought as to Google's separate provision of online display advertising services, which did not directly involve the Google Play Store app, citing evidence in a related government enforcement action against Google that established that

the advertising service matters 'plainly involve different relevant markets and that the alleged anticompetitive conduct differs substantially'.[55] Those advertising service litigations are now a separate MDL.[56] Whether the JPML would have come to the same result in the absence of well-developed evidence of the separateness of the advertising service market as developed by the US government is an open question.

Under the 'rule of reason' standard applicable to monopoly claims, a plaintiff must show harm to competition in a relevant market and harm to itself. A defendant may show that any anticompetitive effects in the former are outweighed by any pro-competitive effects in that market. It may also show that any individual plaintiff was responsible for its own harm, such as in the case of lost profits, or was not otherwise meaningfully and individually impacted. This means that a defendant alleged to have engaged in anticompetitive conduct as a monopoly can attempt to make individualised showings as to parts of the market or as to any particular plaintiff not available in a price-fixing case. This too makes the monopolisation issues less common. Anecdotally, it may be easier to implement a defence side 'divide and conquer' strategy outside the confines of the MDL, changing the strategic cost-benefit calculation for defendants considering petitioning for MDL.

The differences between monopolisation and price-fixing cases do not go away once the MDL court is selected. Rather, the greater complexity and diversity of the monopolisation case means there is less law of the case and collateral estoppel and puts a greater burden on the MDL court and the parties to administer a proceeding that is unlikely to be as efficient or cost-effective as a price-fixing proceeding. That the monopolisation cases are met with numerous objections arguably evidences that many parties do not seem to believe that the MDL procedure can provide the same efficiency and cost-saving benefits where monopolisation is alleged.

OTHER MDL DEVELOPMENTS

State Attorney General And US Department Of Justice Cases Exempted From MDL

Federal legislation effective as of 2023 expressly prohibits the transfer and consolidation of Attorney General and other civil government enforcement actions into MDL proceedings absent the government plaintiff's consent.[57] Prior to this, only United States criminal antitrust cases were exempted from MDL, and Attorney General actions in particular were routinely consolidated in MDLs alongside private litigants.[58]

New Proposed Federal Rule Of Civil Procedure For MDLs

Many feel that the efficiency of MDL is gained at the expense of attention to the merits of individual claims. Over the years, there have been numerous attempts to reform or revise the MDL rules but in almost 50 years none have been enacted. While these criticisms and proposed reforms are largely directed at issues arising from product liability cases,[59] proposals to revise the MDL statute or related rules have not been limited to that context and would apply equally to antitrust MDLs.

In March 2023, a subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure published a proposed draft rule for MDLs. The proposal is to change Rule 16.1 of the FRCP to address MDLs as unique proceedings for the first time. According to the proposed rule, the court 'should' require early conferences among the parties, develop a management plan and enter early MDL management orders. These are not procedures that a court must implement but instead would codify some of the best practices.[60]

As at the time of writing, the proposed Rule 16.1 has been subject to public comment but must still be approved by the Committee on Rules of Practice and Procedure, the Judicial Conference and the Supreme Court, as well as undergo review by Congress. As a result, if passed, it is unlikely to take effect before at least the end of 2025. Whether it would make a meaningful difference to antitrust MDL remains to be seen, although it might provide a useful framework for parties to kickstart the process of organising an MDL, particularly in those MDLs characterised by less active judicial management.

Endnotes

1 The Clayton Act, 15 U.S.C. § 15, provides that 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee'. ^ Back to section

2 See https://www.jpml.uscourts.gov/about-panel. ^ Back to section

3 Myron W Watkins, 'Electrical Equipment Antitrust Cases – Their Implications for Government and for Business', 29 ***U. Chi. L. Rev.*** 97 (1961). ^ Back to section

4 Colvin A Peterson, Jr and John T McDermott (August 1970), 'Multidistrict Litigation: New Forms of Judicial Administration', ***ABA Journal*** 56, Chicago: American Bar Association, 737–46. ^ Back to section

5 ibid. For further background on the origins of multi-district litigation (MDL), see Andrew D Bradt, 'Something Less and Something More: MDL's Roots as a Class Action Alternative', 165 ***U. Pa. L. Rev.*** 1711, 1735–37 (2017). ^ Back to section

6 See Lynn A Baker and Andrew D Bradt, 'MDL Myths, 101 ***Tex. L. Rev***. 1521, 1534 (2023). ^ Back to section

7 28 USC, § 1407(a). ^ Back to section

8 id., at § 1407(g). ^ Back to section

9 id., § 1407, paras. (a) and (d). ^ Back to section

10 Seeid., § 1407(c). ^ Back to section

11 The JPML, however, may be persuaded to overcome the presumption where the parties can establish that as a practical matter that the MDL court would not promote such efficiencies in the particular actions. See, eg, Order Denying Transfer, *In re: American Board of Medical Specialties Maintenance of Certification Antitrust Litigation* (MDL No. 2888) (denying transfer where all responding parties opposed consolidation and where the litigation involved only four actions in three districts, and plaintiffs in three of the actions share counsel such that informal cooperation among the actions were practical alternatives to MDL centralisation); Order Denying Transfer, *In re: Recore Antitrust Litigation* (MDL No. 3106) (denying transfer where there were only five actions, all brought by common counsel such that informal coordination was guaranteed). See also, for example, Transfer Order, *In re: Qualcomm Antitrust Litigation* (MDL No. 2773). ^ Back to section

12 Earle F Kyle, IV, 'The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation', 175 ***F.R.D.*** 589 (J.P.M.L. 1997). ^ Back to section

13 See, generally, 'Manual for Complex Litigation', at § 20.131 (4th ed). As noted by one commentator, the JPML's discretion is so broad that it is difficult to predict where any particular MDL will be located such that the 'JPML's precedent is not helpful'. See id., at 320 (noting also that as to location of the MDL, 'there are as many categorisations of the factors that influence the JPML as there are commentators on the subject'). ^ Back to section

14 See*In re Park W Galleries, Inc Mktg & Sales Practices Litig*, 655 F. Supp. 2d 1389, 1379 (J.P.M.L. 2009). ^ Back to section

15 See, for example, Transfer Order, *In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litig* (MDL No. 1720, 2024) (transferring related cases to an already existing MDL); ***Kyle***, 175 F.R.D. at 593 (noting that transfer of a tag-along action is usually a foregone conclusion unless it is the case that the tag-along action has advanced so far that pre-trial proceedings are essentially closed). ^ Back to section

16 See ibid. ^ Back to section

17 See id., § 1407(e). ^ Back to section

18 See*Lexecon, Inc v Milberg Weiss Bershad Hynes & Lerach* 523 U.S. (1998) (ending the practice used by some MDL courts of formally reassigning out-of-state MDL transferred parties to the MDL court for trial). ^ Back to section

19 See Judge Stephen R Bough and Anne E Case-Halferty, 'A Judicial Perspective On Approaches to MDL Settlement', 89(4) ***UMKC Law Review*** 971–82 (noting that over 97 per cent of litigations in MDL are resolved by the MDL and that many MDL courts see common resolution through settlement as the primary goal of the MDL proceeding). ^ Back to section

20 See Judicial Panel on Multi-District Litigation and Federal Judicial Center, ***Ten Steps to Better Management: A Guide to Multi-District Litigation for Transferee Judges*** (2d ed. 2014). ^ Back to section

21 See ibid. ^ Back to section

22 See Fed. R. Civ. P. 23. ^ Back to section

23 See id., § 1407(a). ^ Back to section

24 ***Hall v Hall***, 138 S. Ct. 1118 (2018). ^ Back to section

25 See ***Musacchio v United States*** 577 U.S. 237 (2016) ('when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'). ^ Back to section

26 See ***Home Depot USA, Inc v Lafarge N Am, Inc.,*** 59 F.4th 55 (3d Cir. 2023). ^ Back to section

27 id., at 58. ^ Back to section

28 id., at 61. ^ Back to section

29 id., at 61. ^ Back to section

30 id., at 61–62. ^ Back to section

31 id., at 66 and n.6. ^ Back to section

32 ibid. ^ Back to section

33 See***Parkland Hosiery Co, Inc v Shore***, 439 U.S. 322 (1979) (***Parkland***). While there is no strict 'test' for collateral estoppel, courts generally look to whether (1) the issue or fact is identical to the one previously litigated, (2) the issue or fact was actually resolved in the prior proceeding, (3) the issue or fact was critical and necessary to the judgment in the prior proceeding, (4) the judgment in the prior proceeding is final and valid, and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. See also***In re Microsoft Corp. Antitrust Litigation***, 355 F. 3d 322 326 (4th Cir. 2004). ^ Back to section

34 id., at 326 n.4. ^ Back to section

35 See, for example,***In re Neurontin Antitrust Litigation***, 2013 U.S. Dist. LEXIS 111587, **23–25 (D.N.J. Aug. 8, 2013) (MDL court in an antitrust case involving a drug adopted facts from a non-antitrust litigation involving the same defendant and the same drug even though 'the ultimate issues in the two cases are not entirely congruent'.) ^ Back to section

36 See ***Parkland***, 439 U.S. at 331. ^ Back to section

37 See ibid.; see also, for example***, GAF Corp v Eastman Kodak Co***, 519 F. Supp. 1203 (S.D.N.Y. 1981) ('offensive collateral estoppel effect may be given to a prior antitrust action in a subsequent private antitrust suit'); ***Selectron, Inc v Am Tel & Tel Co***, 587 F. Supp. 856 (D. Or. 1984); ***Argus Inc v Eastman Kodak Co***, 552 F. Supp. 589 (S.D.N.Y. 1982); ***Oberweis Dairy, Inc v Associated Milk Producers, Inc***, 553 F. Supp. 962 (N.D. Ill. 1982). ^ Back to section

38 See, for example, ibid. See also***In re Microsoft Corp. Antitrust Litig***, 355 F.3d 322 (4th Cir. 2004); ***In re Vitamin Antitrust Litig.*** ^ Back to section

39 See, for example,***Todd v F. Hoffman LaRoche***, 2006 Kan. Dist. LEXIS 5,*6 (Dec. 27, 2006) (Kansas state court applying offensive collateral estoppel to preclude defendants from asserting they were not liable to a price-fixing case as liability had been established in an MDL proceeding where they had been parties and where they had a full and fair opportunity to litigate their liability). ^ Back to section

40 See ***In re Insurance Brokerage Antitrust Litigation*** (MDL No. 1663) (Northern District of New Jersey) (bid rigging of insurance contracts). ^ Back to section

41 Joint Panel on Multidistrict Litigation, https://www.jpml.uscourts.gov/panel-orders (last visited on 28 June 2024). See also***In re Apple, Inc Smartphone Antitrust Litigation*** (No. 3113) (Northern District of California); ***In re: Granulated Sugar Antitrust Litigation*** (MDL No. 3110) (District of Minnesota) and ***Passenger Vehicle Replacement Tires Antitrust Litigation*** (MDL No. 3017) (Northern District of Ohio). ^ Back to section

42 Bloomberg Law, 2023 Litigation Statistics Series: Multidistrict Litigation. ^ Back to section

43 Margaret S Williams, 'The Effect of Multidistrict Litigation on The Federal Judiciary Over The Past Fifty Years', 53 ***Georgia Law Rev***. 1245, 1261 (2019) (discussing the growth of multidistrict litigation). ^ Back to section

44 United States Judicial Panel on Multidistrict Litigation, ***MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending-*** , https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-May-1-2024.pdf (last visited 28 June 2024). ^ Back to section

45 ibid. ^ Back to section

46 https://www.jpml.uscourts.gov/statistics-info (last visited on 28 June 2024). ^ Back to section

47 See ***Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*** (MDL No. 1720); ***Keurig Green Mountain Single-Serve Coffee Antitrust Litigation*** (MDL No. 2542); ***In re Digital Advertising Antitrust Litigation*** (MDL No. 3010). ^ Back to section

48 See Transfer Order, ***In re: Digital Advertising Antitrust Litig***, MDL No. 3010 (2021). ^ Back to section

49 In the federal Sherman Act, section 1 of the statute prohibits agreements in restraint of trade while section 2 of the statute addresses monopolisation and attempts to monopolise. 15 U.S.C. §§ 1–2. ^ Back to section

50 ***Matsushita Elec Indus. Co v Zenith Radio Corp***, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (rejecting a competitor's price-fixing claim and holding that a competitor does not have standing to challenge a conspiracy among competitors to charge higher than competitive prices because the plaintiff is a beneficiary of such a conspiracy). ^ Back to section

51 ***In re Keurig Green Mountain Single-Service Coffee Antitrust Litig***, 24 F. Supp. 2d 1361, 1363 (J.P.M.L. 2014). ^ Back to section

52 ***Catalano, Inc v Target Sales, Inc***, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (establishing per se standard in price-fixing cases). ^ Back to section

53 Transfer Order, ***In re: Apple Inc. Smartphone Antitrust Litig.***, MDL No. 3113 (2024). ^ Back to section

54 Transfer Order, ***Google Play Store Antitrust Litigation***, MDL No. 2981 (2021). ^ Back to section

55 ibid. ^ Back to section

56 See Transfer Order, ***In re: Digital Advertising Antitrust Litig***, MDL No. 3010 (2021). ^ Back to section

57 See The State Antitrust Enforcement Venue Act**,**2023 Pub. L. No. 117-328, Div. GG § 301, 136 Stat. 4459, 5970 (2022). ^ Back to section

58 See Transfer Order, ***In re: Digital Advertising Antitrust Litig***, MDL No. 3010 (2021), a decision preceding the new legislation and transferring a Texas Attorney General action to a New York MDL court over objections from Texas on the basis that the JPML regularly transferred state enforcement actions to antitrust MDLs. ^ Back to section

59 The common use of formal plaintiff steering committees and bellwether 'taste case' trials in product liability MDLs in particular are controversial and distinguish them from the procedures used in most antitrust MDLs. See, for example, Martin H Reydish and Julie M Karaba**,** 'One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism', 95 ***Boston Law Rev.*** 109. In November 2023, the US Supreme Court declined to hear an appeal from a product liability MDL asserting that bellwether trials chosen as test cases for all other proceedings should not have collateral estoppel effect on defendants. See ***E.I. DuPont de Nemours & Co v Abbott,*** 601 U.S. ___ (2023). ^ Back to section

60 For a general discussion of proposed Rule 16.1 and its background, including perspectives from both critics and supporters of the proposed rule, see the public commentary on the proposal, available at https://www.uscourts.gov/sites/default/files/civil_comments_on_2023_preliminary_draft.pdf. ^ Back to section

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