By Heather A. Pigman and John M. Kalas

An Analysis of the Trends and Bases for Denial of Multidistrict Litigation Requests

There are over 280 ongoing multidistrict litigation (MDL) proceedings in federal courts.

See http://www.jpml.uscourts.gov/pending-mdls-0. Such a high number may not be surprising given the frequent splashy headlines, far-reaching opinions, or significant verdicts or settlements stemming from MDL proceedings on a seemingly regular basis. Therefore, it is easy to perceive that MDL requests are "routinely centralized," particularly in product liability cases. *See In re: CVS Caremark Corp. Wage and Hour Employment Practices Litigation*, 684 F. Supp. 2d 1377, 1378 (J.P.M.L. 2010) (noting that cases are routinely centralized by the Panel before rejecting centralization under the facts of the case).

However, an examination of data over the past ten years shows a developing trend against centralization in product liability cases, and data continue to reflect that progression. Of the 12 decisions issued in product liability cases as of October 15, 2014, the Judicial Panel on Multidistrict Litigation (the "Panel") created an MDL without objection from any party in four cases and denied centralization in four (33 percent) of the remaining cases. Therefore, of the eight contested product liability decisions, only four involved an MDL created over a party's objection. In August 2014 alone, the Panel denied centralization requests in two product liability cases and in a third case that involved fraud-based claims similar to those often found in product liability cases.

Here, we examine both the trend against centralization that has developed in the last 10 years in product liability cases and discuss what guidance those decisions provide to parties opposing MDL centralization of product liability claims.

The Trend Away from Automatic Centralization

In 2004, the Panel received eight requests to centralize product liability cases and granted each of them. In 2005, it granted all but two requests for centralization, and by 2006, it returned to granting all of the product liability requests it received. In product cases in the mid-2000s, it seemed fairly certain that an MDL would be created if requested, so the opposition briefing often focused on narrowing the scope or type of cases to be included in the MDL and where and before which judge the MDL should be located. In 2007, only 69 percent of the requests for MDLs were granted. But in 2008, the MDL creation rate was back to 90 percent, making it difficult to determine at that time whether 2007 foreshadowed the beginning of a trend against, or a blip on an otherwise fast track to, centralization.

With the benefit of additional years of data, the significant drop seen in 2007 was the start of a trend that, but for 2008, largely carried forward in MDL decisions involving product liability claims. *See Table 1.*

Although the Panel continues to grant most of the product liability MDL requests that it decides, it now does so at a lower rate than it did in the 2004–2008 time span. *See Table 2.*

Turnover among members of the Panel itself may be one reason for this decline. In 2007, the chairman of the Panel changed. By 2009, only two members remained on the Panel from 2006, and those positions rotated to new members in 2010 and 2013. As seen in the above graphics, the creation of product liability MDLs slowed during this period. In December 2014, the composition of the Panel changed again with the departure of one member and the addition of another. The Panel will consider several requests for new product liability MDLs at its December 2014 and early 2015 meetings; therefore, what impact, if any, this change in membership has on the trend of decreased centralization should become clear quickly.

Many of the opinions denying centralization in product liability cases since 2007 share common themes. For example, the Panel has denied requests for MDLs where a small number of cases are pending at the time the request is made. *See, e.g., In re: Nissan N.A., Inc., Infiniti FX Dashboard Prods. Liab. Litig.* (MDL-2164), 715 F. Supp. 2d 1355 (J.P.M.L. 2010) (order denying centralization due in part to the fact that only two cases were pending at the time). The number and prominence of individual issues has also been a major factor weighed by the Panel. *See, e.g., In re: Blair Corp. Chenille Robe Prods. Liab. Litig.* (MDL-

■ Heather A. Pigman focuses her practice at Hollingsworth LLP in Washington, D.C., on defending a wide variety of corporations and manufacturers facing serial or mass tort litigation. She has significant experience litigating class certification and other issues in complex, multi-defendant cases, including those involving pharmaceutical, tobacco, medical devices, and other products. John M. Kalas also represents firm clients involved in varying types of complex litigation, including litigation addressing compliance with regulatory guidelines and product liability claims.

2142), 831 F. Supp. 2d 1367 (J.P.M.L. 2010) (order denying centralization due in part to individualized circumstances particular to each case). Incidents stemming from a single accident or from an allegedly defective product widely disseminated in the same form to various users (such as car litigation) tend to be centralized more uniformly than pharmaceutical and medical device cases, in which the results are more mixed.

Recent Denials of Centralization in Product Liability Cases Reflect These Trends

The two denials of requests for centralization of product liability claims in August 2014 continue to reflect a trend toward a more detailed, and more skeptical, approach to deciding whether to create an MDL. For example, in *In Re: Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, MDL No. 2559, ___ F.Supp.2d ___, 2014 WL 4049821 (J.P.M.L. Aug 12, 2014), plaintiffs moved to centralize nine actions against a pharmaceutical company. Plaintiffs alleged that the company failed to warn users that levonorgestrel, the synthetic hormone released by the Mirena IUD, might cause certain neurological injuries. Although the Panel had recently created an MDL regarding other injuries allegedly resulting from use of the same IUD, it declined to do so here. In part, the Panel denied transfer because only nine actions and six tag-alongs had been identified, most of which involved the same plaintiffs' counsel, making coordination outside of an MDL feasible. The Panel specifically noted that the possibility that additional actions would be brought "does not convince us that centralization is warranted." *In Re: Mirena* at *1. It also noted that an earlier-created MDL had involved more cases at the time the Panel considered the centralization request. *Id.*

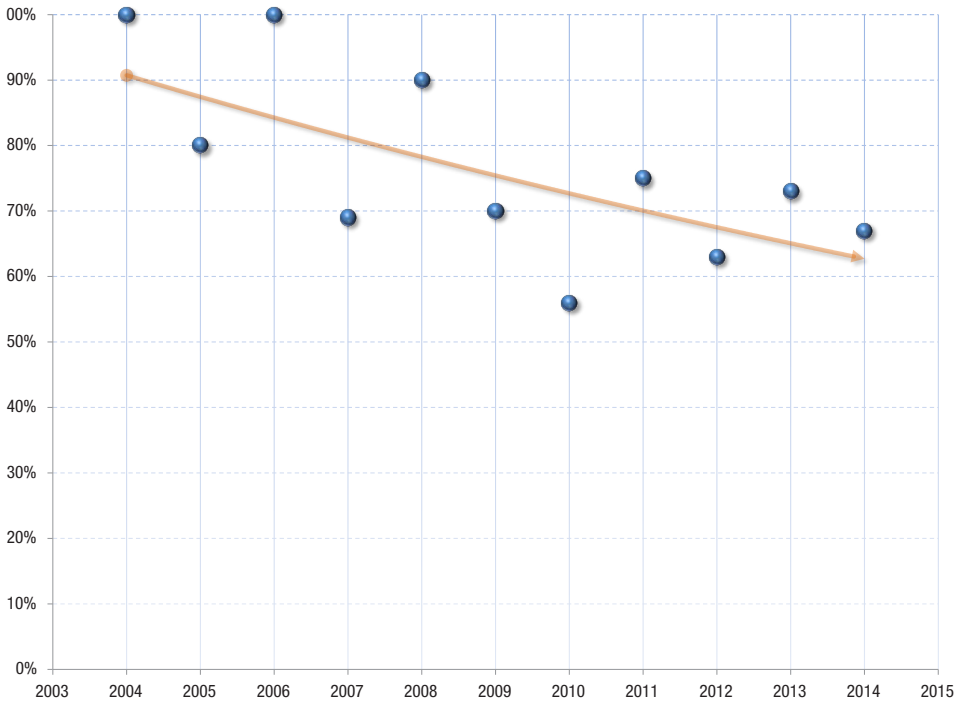
Most importantly for other parties opposing centralization in pharmaceutical product liability cases, the Panel found centralization was not appropriate because "plaintiffs' alleged neurological symptoms—principally, headaches and vision problems—are nonspecific, which [the defendant] asserts will give rise to a fact-intensive inquiry over whether each plaintiff was properly diagnosed." *In re Mirena* at *1. The Panel also relied on the fact that the neurological injury alleged (intracranial hypertension) "regularly is diagnosed in individuals who do not use Mirena, which will create further individualized causation issues." *Id.* at *1, n.2.

The Panel's decision in *In Re: Qualitest Birth Control Prods. Liab. Litig.*, MDL No. 2552, ___ F. Supp. 2d ___, 2014 WL 4049821 (J.P.M.L. Aug. 12, 2014), also relied heavily on the presence of individualized causation issues in denying centralization. The Panel stated: "It appears that the individualized facts—particularly relating to whether each plaintiff received an improperly packaged Qualitest birth control product and whether she became pregnant as a result of taking the pills in the wrong order—will predominate over the com-

Table 1

Year	Requests for MDLs decided:	Requests for MDLs granted:	Grant Rate
2004	8	8	100 percent
2005	10	8	80 percent
2006	15	15	100 percent
2007	16	11	69 percent
2008	20	18	90 percent
2009	23	16	70 percent
2010	16	9	56 percent
2011	16	12	75 percent
2012	24	15	63 percent
2013	15	11	73 percent
2014 (through 10/15/14)	12	8	67 percent

Table 2



mon factual issues alleged by plaintiffs." *In re Qualitest* at *2.

Nonspecific injuries, injuries that can occur in people who have not used the allegedly defective product, and whether the specific product a plaintiff used was actually defective at all are staples of the defense in many product liability cases. Therefore, just as these issues have played a role in the regular rejection of class action certification under Federal Rules of Civil Procedure 23(a) and (b)(3), the decisions in *In re Mirena* and *In re Qualitest* indicate the increasing importance of homogeneity of factual and legal issues across cases when the creation of an MDL is at issue.

Finally, although not a product liability case, the Panel's discussion of the fraud-based allegations in *In Re: Signal International LLC Human Trafficking Litig.*, MDL No. 2554, ___ F. Supp. 2d ___, 2014 WL 4050056 (J.P.M.L. Aug. 12, 2014), may reflect an increased willingness to deny centralization based on the presence of individual issues of proof inherent in fraud claims. Plaintiffs in *In re Signal* alleged that the defendants fraudulently lured almost 600 Indian welders and pipefitters into their employment by promising legal and work-based immigration to the United States. The Panel found that despite some common questions about the alleged fraudulent scheme to hire and place plaintiffs in defendants' facilities:

> each individual plaintiff must prove how he was recruited, the abuse he allegedly suffered while working for [defendants], and the damages caused to him by the alleged fraudulent scheme and discriminatory work conditions. These individualized facts very well may predominate over the common factual issues alleged by plaintiffs.

In re Signal at *1. The Panel found that alternatives to transfer, such as coordination of certain discovery, existed that would further judicial economy as well as any MDL. Therefore, the Panel denied centralization.

The bases for the Panel's August denials are not new; examples of similar decisions can be found before 2004. For example, before *In re Mirena* and *In re Qualitest*, the Panel occasionally declined to create MDLs where individual issues comprised the overwhelming bulk of the questions to be resolved. *See, e.g., In re Eli Lilly & Co. "OraFlex" Prods. Liab. Litig.*, 578 F. Supp. 422 (J.P.M.L. 1984); *In re Rely Tampon Prods. Liab. Litig.*, 533 F. Supp. 1346 (J.P.M.L. 1982); *In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig*, 431 F. Supp. 906 (J.P.M.L. 1977); *In re Asbestos Sch. Prods. Liab. Litig.*, 606 F. Supp. 713 (J.P.M.L. 1985).

> But in 2008, the MDL creation rate was back to 90 percent, making it difficult to determine at that time whether 2007 foreshadowed the beginning of a trend against, or a blip on an otherwise fast track to, centralization.

Similarly, the Panel had recognized that voluntary coordination by the parties was often preferable to transferring cases and, on scattered occasions, it had previously declined to create MDLs on that basis. *See, e.g., In re: Blood & 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) (endorsing alternatives to transfer as means of minimizing the possibility of duplicative discovery "particularly where… the same plaintiffs' counsel is involved in all, or nearly all, actions"); *In re G.D. Searle & Co., "Copper 7" IUD Prods. Liab. Litig.*, 483 F. Supp. 1343, 1345 (J.P.M.L. 1980) (finding that coordinated discovery was a "suitable alternative [] to transfer").

Therefore, although the Panel is not using novel bases to decline requests to centralize, the trends and recent opinions discussed above reflect better odds of success in defeating centralization and provide current guidance about the issues the Panel finds persuasive. For example, opposing counsel should be sure to highlight the Panel's repeated recent findings that discovery can be efficiently coordinated without centralization. This is particularly important given the ever-increasing burdens of electronic discovery on defendants. Expending both human and financial resources on one production, one set of depositions, and the like is burdensome; avoiding the need to repeat that process in multiple cases is essential. In most product liability cases, the discovery connected with each plaintiff is case-specific, meaning little to no benefit is derived from centralization, but a great benefit is provided by coordination of electronic discovery of defendants. As routinely noted by the Panel, much of the mass litigation before it involves a handful of plaintiffs' counsel controlling the vast majority of the cases, making coordination (not centralization) feasible and more efficient for both the parties and the courts.

Since 2007, the Panel has more frequently found that the possibility of coordination, the low number of cases at the time of the request, and/or the presence of individual issues outweigh the benefits an MDL offers. Parties opposing centralization should address specifically: (1) the small number of existing cases at the time centralization is sought (and that the possibility of later-filed cases does not outweigh the arguments against centralization), (2) coordination of discovery, and/or (3) the presence of individual issues, particularly where the injuries alleged are not pathognomonic or occur in others who have not used the allegedly defective product. As the Panel has noted recently in a product liability opinion granting the plaintiffs' MDL request, product liability cases typically raise some individual issues. *See In re: Cook Medical, Inc., IVC Filters Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 2570, ___ F. Supp. 3d ___, 2014 WL 5318059 (J.P.M.L. Oct. 15, 2014). Therefore, the more specific a party can be about why the individual issues are more central to discovery and other pre-trial activities than any common issues, the greater the chance of defeating a request for centralization.