

MDLs and Bellwether Trials: What are they?

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What is an MDL? And, what is a bellwether trial? (The name certainly is funny and – at first glance – tells you nothing about the type of trial it seeks to describe.) How are MDLs and bellwether trials related? What purpose do they serve?

These were all questions I found myself asking when I first encountered MDLs. And, if you are reading this post, I assume these are questions you yourself have asked at some point in time. And that's okay - because it certainly can be a difficult concept to understand if you do not regularly handle mass tort cases.

Multidistrict district litigation (MDL) is a Congressionally-created case management procedure used by federal courts to consolidate civil lawsuits involving one or more common questions of facts. Thus, unlike class action lawsuits – which involve only one lawsuit with multiple plaintiffs – MDLs involve multiple lawsuits filed by different parties, often in different jurisdictions. When Congress created multidistrict litigations through its enactment of 28 U.S.C. § 1407 in 1968, it did so with the intent that MDL “proceedings will be for the convenience of the parties and witnesses and will promote the just an efficient conduct of such actions.” 28 U.S.C. § 1407(a). By consolidating the hundreds or thousands of cases with common factual issues together for discovery, pre-trial hearings, trial scheduling and settlement conferences, MDLs serve to streamline what would otherwise be duplicative efforts by the various federal courts while also eliminating possible conflicting, simultaneous rulings on identical pretrial issues.

To be eligible for an MDL, the common question amongst the consolidated lawsuits must be predominantly factual. Indeed, 28 U.S.C. § 1407(a) restricts eligibility only to those actions “involving one or more common questions of fact.” Commonality of a legal question is not, on its own, sufficient. Moreover, the common question of fact among the consolidated actions must “predominate over individual questions of facts present in each action.” *In re Asbestos Sch. Prod. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985). Stated another way, the factual issues in the individual actions cannot be exceedingly different from one another when viewed as a whole.

Whether a case is eligible for, and can ultimately proceed to, MDL is a decision made by the Judicial Panel on Multidistrict Litigation. The Judicial Panel, which consists of seven circuit and district judges chosen by the Chief Justice of the U.S. Supreme Court, determines – on its own initiative or upon a motion of a party – when a group of lawsuits are eligible for an MDL. Once the Judicial Panel determines that multiple lawsuits should be centralized for a consolidated MDL proceeding, the Panel is authorized, pursuant to 28 U.S.C. § 1407(a), to transfer the lawsuits comprising of the MDL to any federal district court, irrespective of the jurisdiction in which the lawsuits were filed. The assigned MDL judge then presides over all discovery proceedings, pre-trial motions, and settlements conferences. If a trial of any single lawsuit

within the MDL is necessary, the case is then sent back to the district court in which it was originally filed for trial.

As one would expect, due to the numerosity of the individual cases within an MDL pool, it is impractical – and indeed, impossible – to try all MDL cases immediately upon completion of discovery and pre-trial proceedings. To address this issue, bellwether trials are used in MDL proceedings. In a bellwether trial procedure, a sample of randomly selected cases serve as “test” cases in order to educate the court and the parties about the strengths and weaknesses of the remaining cases within the MDL. The term “bellwether” is derived from the ancient practice of placing a bell around a wether (a male sheep) selected to lead his flock so that the flock could be tracked and monitored. “The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.” *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). Thus, in order to serve their primary purpose, the bellwether cases selected must – in some aspect – be representative of all the cases in the MDL pool. As one Court put it: “A bellwether trial designed to achieve its value ascertainment function for settlement purposes or to answer troubling causation or liability issues common to the universe of claimants has as a core element representativeness—that is, the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained.” *Id.*

While bellwether trials assist in predicting possible outcomes in future litigations, the verdict issued in a bellwether trial is not binding on the remaining cases in the MDL pool nor does it guarantee the same verdict across the MDL.

[Here is the full version](#) of 28 U.S.C. § 1407.