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TWISTED BLACKJACK: HOW MDLS DISTORT AND EXTORT

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U.S. CHAMBER
Institute for Legal Reform

Twisted Blackjack: How MDLs Distort and Extort†

The game of blackjack ordinarily pits players against a dealer in a contest to reach 21 without going over. Normally, all the players' cards are visible while one of the dealer's is hidden, and players gamble on whether taking additional cards will put them over 21 while making an educated guess about the dealer's possible total.

Imagine a different game—Twisted Blackjack—where the rules were flipped and players (rather than the dealer) had the hidden cards. Cards that would cause a player to bust never had to be revealed. In addition, every hand cost essentially nothing to play, and anyone who wanted to go through the trouble of showing up at the casino could play a nearly unlimited number of hands. Imagine too that the dealer (i.e., the casino) were nevertheless required to pay every winner, often in amounts reaching millions of dollars.

How many players would crowd that table? How long would this dynamic be sustainable?

This admittedly imperfect analogy describes the current state of personal injury mass tort litigation in the federal court system.

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TRADITIONAL VERSUS MASS TORTS

Normally in personal injury litigation, an individual plaintiff sues an allegedly responsible defendant, who may move to dismiss the lawsuit after it is filed. If it is a baseless lawsuit, the defendant may win that motion or obtain certain initial discovery revealing that the plaintiff's claims are groundless. At that point, the lawsuit presumably would disappear and the parties would move on, ideally after investing relatively little time and expense. Only potentially meritorious lawsuits are supposed to proceed to more

intensive discovery and eventually either settlement or trial. Although this initial vetting process (e.g., dismissal motions, mandatory initial disclosures, and initial discovery) is far from perfect, it serves as an important check on the filing of ill-considered lawsuits.

Things work differently in the world of personal injury mass torts, where defendants are alleged to have done something, such as selling a defective product, that has injured thousands or even millions of different people. Once someone alleges a possible connection between the defendant and perceived widespread injury, lawsuits start being filed. Plaintiffs' firms solicit clients and stockpile inventories of potential claimants. Others follow suit—literally. Soon, the defendant faces thousands or even tens of thousands of pending lawsuits.

Under these circumstances, courts have concluded that they lack the capacity to consider motions to dismiss each individual case. And plaintiffs' counsel have successfully argued that it is too burdensome for them to provide mandatory initial disclosures or basic discovery responses in each of the hundreds or thousands of cases they have filed. There is thus no mechanism to separate the weaker claims from the potentially meritorious. So instead, the lawsuits pile up, and the vast majority lay stagnant in multidistrict litigation (MDL) proceedings in the federal court system until either a global settlement is reached or the defendant goes bankrupt.[1] And pile up these many lawsuits do.

MDLs by the Numbers

As of July 2021, there were 368,078 pending cases consolidated in the roughly 50 active federal MDLs involving primarily personal injury claims.[2] The largest of these—*In RE: 3M Combat Arms Earplug Products Liability Litigation*, MDL No. 2885 (N.D. Fla.), where military plaintiffs allege that defective earplugs caused them to suffer hearing damage—contained 241,387 pending cases as of July 15.[3] The next largest MDL—*In RE: Johnson & Johnson Talcum Powder Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2738 (D.N.J.), where plaintiffs allege that cosmetic talc causes cancer—contained 34,362 cases.[4]

To say that these cases comprise a large portion of the federal civil docket would be an understatement. It appears that two-thirds of the total private civil cases currently pending in federal courts are mass tort claims in MDL proceedings. As of June 30, 2021, there were 604,970 total civil cases pending in all U.S. district courts and 553,059 private civil cases (not involving the federal government), according to the

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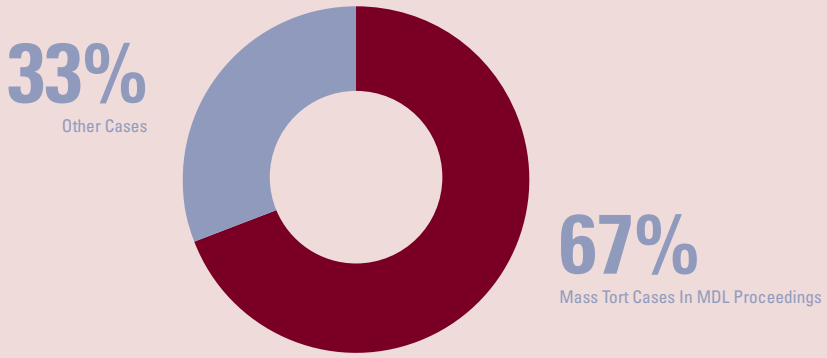
most recent available data from the U.S. court system's website.[5] The 368,078 pending cases in personal-injury-based MDLs as of July 15, 2021 are over 60 percent of the June 30, 2021 civil total. When only the private civil cases are considered, the 368,078 MDL cases account for two-thirds.[6]

Undeniably, this is a large and alarming number. But so what?

Estimated Percentage of Private Civil Cases In U.S. District Courts



If tens or hundreds of thousands of mass tort cases lay dormant in federal MDLs before ultimately being resolved in global settlements without the need for direct court attention, is there really any cost to the judicial system? Don't companies that sell products that allegedly injure scores of people deserve to confront scores of lawsuits? The problem, though, is that merit often has little to do with how compensation for injuries works through the federal MDL process, for several reasons.

Built-In Disadvantage

One of the biggest disadvantages for defendants in large personal injury MDLs is that there is no way to verify that all or even most of the cases filed against them are well grounded. As noted above, motions to dismiss individual cases (or even for more definite statements of vague allegations) are usually not permitted once cases are transferred into MDL proceedings. And while plaintiffs' attorneys are generally allowed to obtain essentially unlimited discovery from defendants in MDL proceedings, no opposite-direction discovery takes place (except as to a small handful of individual plaintiffs whose claims may be selected for "bellwether" trials).[7]

In other words, the defendants are left playing Twisted Blackjack, litigating with their own cards showing while nearly all the plaintiffs' cards remain hidden—and stay hidden forever once a settlement is reached. Defendants (and only defendants) are denied any use of many Federal Rules of Civil Procedure—including Rules 12(b)(6) (motions to dismiss), 12(e) (more definite statement), 26 (general discovery), 30 (depositions), 33 (interrogatories), 34 (document production), 36 (requests for admissions), and 56 (summary judgment). In that respect, the Rules do not fully apply

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in MDL proceedings—or apply only selectively—which is both unfair and ironic considering that such proceedings house a large majority of the overall federal civil docket.

Moreover, judges faced with thousands of pending cases on their dockets naturally feel compelled to pressure the parties to settle, which they can do via both explicit admonishments and arguably coercive rulings that make continuing to litigate more burdensome and expensive. Defendants faced with such pressure, added to the inherent costs and uncertainties of litigating, often elect to reach global settlements or "inventory" settlements with plaintiffs' firms holding large case inventories. This occurs, even though they have no idea which of the cases in those inventories are strong and which are weak, or even which are real and which are fake.

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And dubious cases abound, variously featuring claimants who did not use the defendant's product, did not suffer any injury, or filed suit long past the statute of limitations.[8] It has been estimated that typically 20 percent to 30 percent, and as much as 50 percent, of the claims included in personal injury MDL settlements may be marginal or downright frivolous in this sense.[9] In addition to cases like these that would never be filed as standalone suits, MDL settlement pools are rife with cases that are plausible but weak, such that they would probably not be advanced toward trial by plaintiffs' attorneys.

MDL Plaintiffs

To be sure, mass tort MDL proceedings may contain more viable cases as well, where the claimants might deserve compensation for their injuries. But the way mass tort litigations are prosecuted by claims-warehousing plaintiffs' firms does not serve these individuals' interests either. Unless these potentially legitimate claimants are the lucky few selected for bellwether trials, they are forced to wait years until a global settlement is reached in order to be compensated. Then, the share of the settlement pool they take home may or may not reflect the merits of their claims due to courts' failure to require development of facts about individual cases as needed to sort stronger and weaker claims. In short, their recovery may be diluted as they subsidize much weaker—or even meritless—claims.

Throughout this process, MDL plaintiffs are frequently kept in the dark about their cases and unable to exercise any control over how they are prosecuted. It is thus no wonder that a recent study found that more than 75 percent of MDL mass tort plaintiffs surveyed "did not know what was happening in their case while it was being litigated," nearly two-thirds were

"somewhat or extremely dissatisfied with their lawyers," and more than 80 percent of those who settled "were somewhat or extremely dissatisfied with the fairness of the settlement process."[10] Presumably, much of this dissatisfaction can be chalked up to the absence of an early vetting process that forces plaintiffs' counsel to communicate with their clients and familiarize themselves with the particular facts of each individual case.

> *"They also run the risk that a litigation loaded with weak or outright frivolous claims that cannot be culled will force the defendant into bankruptcy or other financial restrictions, leaving legitimate claimants most in the lurch."*

Of course, delay, powerlessness and disappointing individual awards are not the only problems that MDL plaintiffs with potentially meritorious claims face. They also run the risk that a litigation loaded with weak or outright frivolous claims that cannot be culled will force the defendant into bankruptcy or other financial restrictions, leaving legitimate claimants most in the lurch.

Solutions

Returning to Twisted Blackjack, two key elements of traditional blackjack prevent players from racking up millions in winnings each time they sit down: (1) they don't get to keep their cards hidden; and (2) they must have "skin in the game." Perhaps these principles could be applied here.

SHOW YOUR CARDS

One potential way to curb the filing of dubious suits in MDL proceedings is to require plaintiffs to provide more robust disclosures when they file. To this end, a bill passed by the U.S. House of Representatives in 2017 called the Fairness in Class Action Litigation Act (FICALA) would have required plaintiffs in MDL proceedings to submit basic factual evidence supporting their claim that they were in fact injured and were exposed to the relevant product or risk. These disclosures would not have entailed a significant burden—affidavits and medical or prescription records may have largely sufficed—and the requirement may have winnowed marginal claims, even if it would not have gotten rid of them entirely. Unfortunately, FICALA and these commonsense requirements died in the Senate. Hopefully, the odds of similar legislation moving forward in the future will increase with greater awareness of the problems with mass tort MDLs.

SKIN IN THE GAME

While anyone who sits down at a casino table must wager something to win something, the fact is that neither court filing fees nor the burden of drafting and filing complaints dissuades volume filing of cases in federal MDLs. It is unclear whether there is a fair and legal way to add a more meaningful upfront filing cost that discourages filing dubious lawsuits in MDLs. Perhaps

such costs could be targeted at plaintiffs' firms with huge inventories—for example, any firm that files more than a certain number of suits in an MDL could be required to post a substantial bond for each additional case.

The "cost" of filing groundless suits in MDLs could also be assessed indirectly. One way might be to randomly select tranches of MDL cases to be worked up for bellwether trials and impose penalties on plaintiffs' firms for any cases that are dismissed after being selected. If a bad case is randomly selected, the attorneys who filed it will not want to bring it to trial, and it will be voluntarily dismissed. The prospect of substantial penalties in the event of such dismissals may make plaintiffs' firms think twice before loading MDL dockets with cases they would never dream of taking to trial. Although this approach relies on random sampling and thus inherently entails a chance that the weakest cases would be under- or over-represented, the risk of getting busted with a bad hand might be enough to substantially curb groundless MDL filings.

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Conclusion

It is no secret that the rules of casino games are tilted against players. But the opposite is true in mass tort litigation in federal MDL proceedings, where plaintiffs' attorneys can gamble—cost and risk free—by filing essentially limitless lawsuits in order to extract enormous settlements from defendants without ever having to reveal their bad hands. Not only does this system disadvantage and penalize defendants, but there is little to protect potentially deserving individual claimants from having their cases devalued or lost in the shuffle. New rules that require plaintiffs' attorneys to reveal basic facts supporting the claims they file, and/or that impose penalties after meritless cases are uncovered and dismissed, would increase both the efficiency and fairness of large-scale personal injury litigation in federal courts.

Endnotes

† This edition of *ILR Briefly* was prepared by Benjamin Halperin, Skadden, Arps, Slate, Meagher & Flom LLP.

1 Occasionally, courts may dismiss large swaths of claims in MDL proceedings due to generally applicable flaws (e.g., preemption or inability to prove causation), but that is a relatively rare outcome.

2 *See* U.S. Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by District*, July 15, 2021, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2021.pdf. The total of 368,078 includes the MDL proceedings that appear to have been designed to fundamentally address personal injury claims, based on a review of the transfer orders centralizing the proceedings. The proceedings included in this total are MDL Nos. 875, 1431, 1964, 2151, 2179, 2197, 2243, 2244, 2323, 2331, 2391, 2428, 2433, 2441, 2452, 2492, 2543, 2545, 2570, 2592, 2599, 2641, 2642, 2666, 2734, 2738, 2740, 2741, 2750, 2753, 2768, 2775, 2782, 2789, 2804, 2809, 2816, 2841, 2846, 2848, 2859, 2873, 2875, 2885, 2913, 2921, 2924, 2949, 2973, 2974, and 3004. Data on pending cases in MDL proceedings as of September 15, 2021 recently became available. *See* U.S. Judicial Panel on Multidistrict Litigation, *Pending MDLs*, https://www.jpml.uscourts.gov/pending-mdls-0. The data from July 15 used here provide a closer comparison with the most recent available data on overall pending cases in federal district courts, which are from June 30.

3 *Id.*

4 *Id.*

5 U.S. Courts, *U.S. District Courts—Civil Federal Judicial Caseload Statistics Tbl. C*, June 30, 2021, https://www.uscourts.gov/statistics/table/c/statistical-tables-federal-judiciary/2021/06/30; U.S. Courts, *U.S. District Courts—Civil Federal Judicial Caseload Statistics Tbl. C-1*, June 30, 2021, https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2021/06/30.

6 *See* U.S. Courts, *U.S. District Courts—Civil Federal Judicial Caseload Statistics Tbl. C-1*, Mar. 31, 2021, https://www.uscourts.gov/statistics/table/c-1/federal-judicial-caseload-statistics/2021/03/31. One reason why it is appropriate to focus on private civil cases is that a large majority of cases involving the U.S. government are prisoner petitions and Social Security claims cases, which are subject to distinct procedures that do not resemble classic civil litigation. *See* U.S. Courts, *U.S. District Courts—Civil Federal Judicial Caseload Statistics Tbl. C-3*, June 30, 2021, https://www.uscourts.gov/statistics/table/c-3/statistical-tables-federal-judiciary/2021/06/30 (showing that in the 12-month period ending June 30, 2021, 71 percent of cases filed involving the government were prisoner petitions or Social Security claims cases).

7 In most MDL proceedings, the term "bellwether" is a misnomer because the claims selected for trial normally are not representative of the overall inventory of claims pending in the proceeding for multiple reasons, including that plaintiffs' lawyers are incentivized to select their strongest cases and defendants may be pressured by MDL courts to waive their objections. Nevertheless, some view such trials as helpful for evaluating the relative strengths and weaknesses of the pending claims and informing global settlement discussions. For an overview of how so-called "bellwether" trials in MDL proceedings significantly advantage plaintiffs and force unfair settlements on defendants, see U.S. Chamber Institute for Legal Reform, *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings*, Oct. 2019, *available at* https://instituteforlegalreform.com/research/trials-and-tribulations-contending-with-bellwether-and-multi-plaintiff-trials-in-mdl-proceedings/.

8 Advisory Committee on Civil Rules Report at 142, Nov. 1, 2018, https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

9 *Id.*

10 Alison Frankel, *First-ever survey of MDL plaintiffs suggests deep flaws in mass tort system*, Reuters, Aug. 9, 2021, https://www.reuters.com/legal/litigation/first-ever-survey-mdl-plaintiffs-suggests-deep-flaws-mass-tort-system-2021-08-09/.

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