IMPROVING MULTIDISTRICT LITIGATION: THE CASE FOR THREE-JUDGE PANELS

Washington Legal Foundation WORKING PAPER

Executive Summary

In just the past decade, multidistrict litigation (MDL) has become the preferred vehicle for the resolution of aggregate litigation, especially mass-tort actions. Enabled by a 1968 act of Congress, MDL offers clear benefits—namely, the efficient use of finite judicial resources, the consistency in pre-trial rulings, and the avoidance of repetitive discovery.

With the modern explosion of MDL proceedings, however, scholars, judges, and litigators have begun to question whether the benefits bestowed by MDL are worth their costs. In June 2014, 36% of all civil cases pending in federal courts were pending in one or more MDL proceedings, compared to 16% in 2002. There are currently 226 active MDL proceedings in federal court, 19 of which have more than 1,000 active cases. Critics cite how rarely MDL cases are remanded to their originally filed jurisdictions for trial (often because courts pressure for global settlements) and that the *ad hoc* procedures adopted by many MDL courts permit the filing of many meritless claims.

This WLF WORKING PAPER by attorney Stephen A. Wood argues that with a few reforms the MDL process can live up to its promise without the costs imposed on litigants and the court system. One reform that should be part of that discussion is to convene a three-judge district court in large MDL, instead of the now-typical single judge. Three-judge MDL panels could achieve balanced and rigorous results without requiring many more judicial resources. Further, because the current MDL statute already anticipates multi-judge panels, there would be no need to for congressional action or rulemaking.

Scholars have long praised the effectiveness and efficiency of multi-judge panels where they exist. From lending dignity, to ensuring greater deliberation, to bestowing greater public confidence, multi-judge panels have the potential to elevate MDL proceedings and foster the best results of judicial decision-making. Critics may argue that three-judge panels will further delay decisions and impose a greater burden on the judiciary. If three-judge panels would be utilized to manage only the largest MDL, however, that approach would require at most 50 extra district court judges, likely fewer, drawn from the more than 600 judges currently sitting. Further, any delay in decision-making pales in comparison to the delay likely to result from interlocutory review, another popular proposed reform for the MDL process.

The *In re Engle Cases* provide a helpful case study for how multi-judge panels could function in MDL proceedings. While not an MDL itself, *In re Engle Cases* constituted 3,700 tobacco-related personal-injury actions pending in the Middle District of Florida. The judges of the Middle District decided that three of their number would oversee pretrial case management, citing the sheer volume of claims as the chief reason. By working together, the three judges were able to effectively navigate unfamiliar procedural and substantive waters to come to the best result for all parties. Their work demonstrates the potential of multi-judge panels for MDL proceedings.