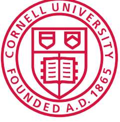

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Dear Members of the Subcommittee,

I am writing to you regarding recent proposals for amendments to the Federal Rules of Civil Procedure to address multidistrict litigation (MDL). I am a law professor at Cornell Law School and my research focuses on issues of complex litigation, including MDL.

In short, I am writing to urge caution with respect to any MDL-specific rules. The current proposals call for specialized rules for a subset of federal cases, a departure from the norm that should not be made lightly.

Exacerbating this concern, the proposals for MDL-specific rules are premised on a view of "MDL" that, in fact, describes only a small class of very large MDLs. Even if the proposed rules were justified for the largest MDLs, they are inapposite for many of the smaller MDLs that would be swept into these proposed rules. This is the "scope" question identified by the Subcommittee. Moreover, because of the difficulty in identifying *ex ante* the cases for which special rules might be justified, I urge the Subcommittee to leave questions of case management to the district judge in the first instance.

Variation among MDLs

In April 2018, the JPML published the astounding statistic that MDLs accounted for 123,293 pending cases in federal district court.[1] At the start of 2018, there were approximately 340,000 pending civil cases in federal courts overall, meaning that MDLs likely comprised more than one third of the federal docket.

But there is more to the story than these few numbers. The 120,000 pending MDL cases have been consolidated across 227 MDLs. The largest pending MDL has more 20,000 pending cases. The next largest has more than 13,000. Nineteen "large MDLs" (with more than 1,000 cases each) account for more than 85% of the pending MDL cases. Meanwhile, 70 MDLs have ten or fewer pending cases.

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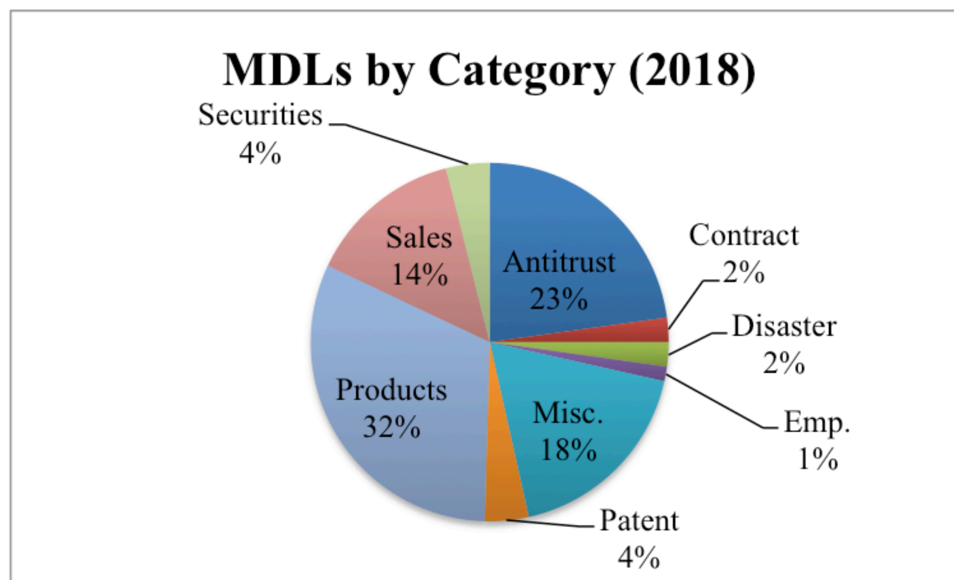
[1] The data in this letter are drawn from reports published by the Judicial Panel on Multidistrict Litigation and the Administrative Office of U.S. Courts.

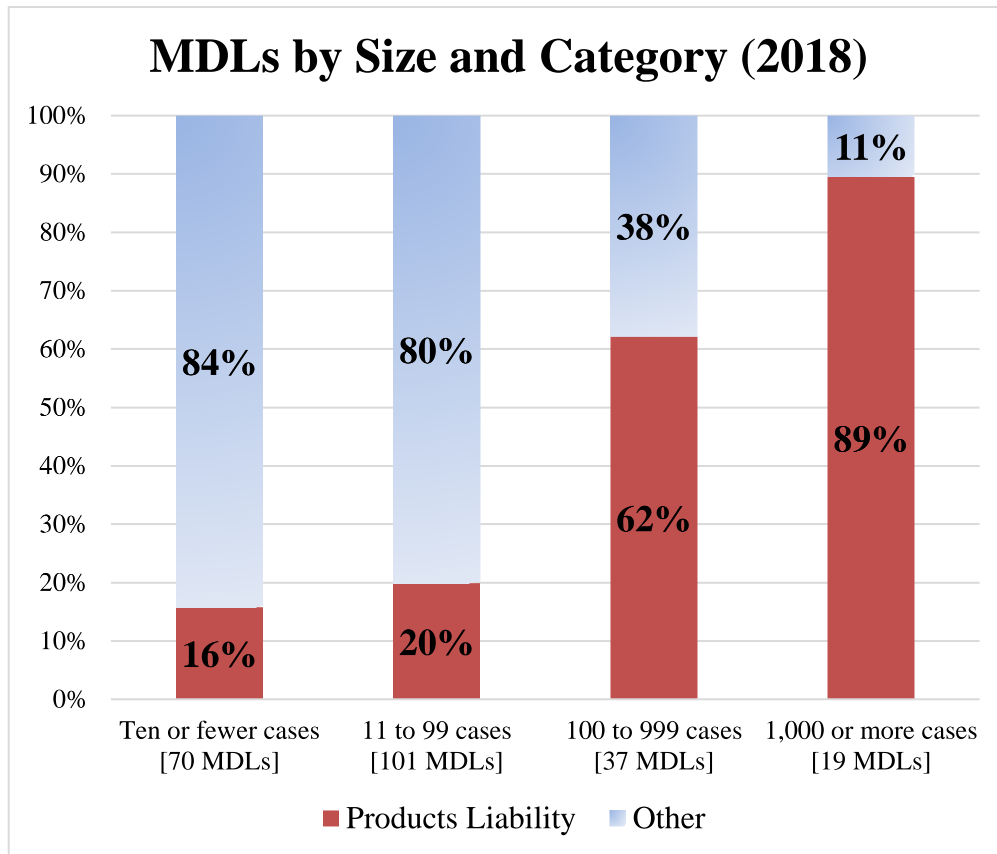
Notably, a small number of large MDLs receive most of the attention from the public and the academy, and thus this category dominates the narratives about MDL generally. Looking at the 19 large MDLs in my study, one would see familiar cases: the BP Oil Spill; Volkswagen "Clean Diesel"; Johnson & Johnson baby powder; and multiple MDLs involving pelvic mesh and hip replacements. Had I used data from July rather than April 2018, the opioid litigation would also have qualified as a large MDL.

While the large MDLs occupy public attention, they are not representative of MDL as a whole. As suggested above, large MDLs represent fewer than 10% of all pending MDLs, meaning that more than 90% of MDLs are not large MDLs.

In addition, the large MDLs have a different case-type profile from the rest. The 19 large MDLs include 17 cases categorized as products liability, one "common disaster" (BP Oil Spill), and one "miscellaneous" case that involves personal-injury litigation against a product manufacturer. In other words, we could easily categorize all 19 as "mass torts."

Looking at the full set of 227 MDLs, fewer than one third are products-liability cases. The next largest categories are antitrust and sales practice litigation, with the remaining cases covering topics including contract, disasters, employment, intellectual property, and securities. The smallest MDLs are sometimes products-liability litigation. But they also often involve cases sounding in antitrust, data security, intellectual property, marketing and sales practice, and securities law.





Finally, my interviews with judges handling MDLs revealed a shared sense that many MDLs are essentially equivalent to other complex cases for which Section 1407 was not used. There may be a class of MDLs that judges treat specially, but those are few and far between.

MDL Variation and MDL-Specific Rules

The discussion of the variation among MDLs connects directly to the current proposals before the Subcommittee. Many of these proposals are premised on caricatures of MDL that, at best, describe the large MDLs, but likely do not describe the other 90% of MDLs.

Some proponents of MDL-specific rules seem to assume that MDLs are massive and unwieldy proceedings that need elevated judicial management. This might be true for the large MDLs, but it does not seem particularly persuasive for the scores of MDLs comprising a handful of consolidated cases. Others argue that MDLs need special rules because of the unprecedented powers of MDL judges. For one thing, there are no such special powers. For another, it may be that large and unwieldy cases demand something different from the judges handling them, but that is not a comment about MDL as a category.

Still others suggest that MDLs need special rules because they are "black holes" from which cases are never returned. It is indisputable that most MDL cases are resolved by settlement or dispositive motion in the transferee court. But it is not as if the trial rate in non-MDL litigation is substantial either. Policy interventions to increase trial rates, in other words, need not target MDLs. Much of the criticism of MDLs also assumes that the creation of an MDL is a magnet for bad cases. But this claim is hard to sustain for many smaller MDLs, especially for those in which very few (if any) cases are filed after the creation of the MDL.

There is also no reason to think that just being an MDL—rather than something about case size, importance, or facts—should make a suit more or less likely to attract litigation financing, more or less in need of increased interlocutory review, or more or less likely to have parallel state-court litigation. Yet these too are arguments made in favor of MDL-specific rules.

Perhaps extremely large or important cases, or cases addressing certain types of issues, require special rules. Congress apparently thought so when it adopted the Private Securities Litigation Reform Act, the Prison Litigation Reform Act, the Class Action Fairness Act, the Fair Labor Standards Act, and others. But MDL is the wrong category.

Costs of MDL-Specific Rules

Importantly, the MDL category error could come with significant costs. All procedural rules involve tradeoffs. It is possible that, for some procedural issues, the tradeoffs point in one direction for large cases and in another direction for small cases. Adopting rules to solve problems in one set of cases risks creating new problems for other cases.

Moreover, adopting special procedures for MDLs invites a new brand of forum shopping. If MDL-specific rules favored plaintiffs (or their attorneys), then plaintiffs might file cases in separate districts in hopes of convincing the Panel to consolidate them into an MDL applying those MDL-specific rules. Were those rules to favor defendants, then defendants might seek consolidation in order to obtain those benefits, rather than in service of convenience, justice, or efficiency. Either way, horizontal equity will be disrupted, opportunities for abuse will increase, and the usual course of federal civil litigation will be upset.

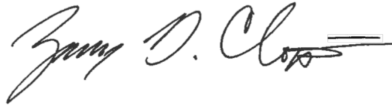
Specialized MDL rules also could magnify the "repeat player problem" in MDL. Critics of MDL have worried that a small set of attorneys dominate the process. My sense is that this objection, too, is targeted only at a subset of MDLs addressing mass torts. But if all MDLs applied a special set of procedures, then lawyers might develop expertise in MDL-specific work independent of the subject matter of the litigation.

For these reasons, therefore, I recommend that the Subcommittee decline to support special rules applicable to all MDL cases. The Federal Rules of Civil Procedure provide federal district judges with all of the tools they need to manage federal civil litigation.

* * *

Thank you for your time and attention. I intend to continue my research on MDL variation, and I plan to share those results with the Subcommittee when available. If there are particular topics for which more information would be useful, please do not hesitate to ask.

Sincerely,



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