



**2023 Litigation
Statistics Series:**

Multidistrict Litigation

Introduction

This Litigation Statistics Series report provides data-driven analysis of claims filed in federal district courts that are considered for consolidation into multidistrict litigation (MDL), and of the MDL process itself.

Section 1 provides an **overview of multidistrict litigation** and the case management procedures, which are crucial for practitioners to understand as they navigate the MDL process. Data in this section include judicial analytics for the members of the panel overseeing the process.

Section 2 explores **MDLs' place in the courts**—that is, the prominence and impact of multidistrict litigation on federal dockets. Data in this section address not only the largest MDL cases, but the smaller ones that actually comprise the majority of MDLs' judicial footprint.

Section 3 dives into **trends in consolidation motions** with charts on the Judicial Panel on Multidistrict Litigation's (JPML's) record in granting and denying filers' motions for consolidation of cases into MDLs. Results are broken down by who files the motions: plaintiffs or defendants.

Section 4 turns to the courts to illustrate **trends in pending dockets** with several charts depicting how many cases are currently in the system, which districts are seeing the most transfers, and which types of cases are dominating the MDL landscape.

Section 5 spotlights **MDLs' biggest cases**, from those commanding the most attention due to their sheer size to one with the potential to result in an even bigger settlement.

Finally, Section 6 shifts the focus from currently pending cases to **potential changes and next steps** for MDL in the future—in particular, a new judicial rule in the works that could alter the way practitioners approach the MDL process.

Methodology

The information in this report comes from multiple public and Bloomberg Law resources. These include search results from [Bloomberg Law Dockets](#), as of Aug. 15, 2023, and Bloomberg Law's [Litigation Analytics](#) tool, as of Aug. 31, 2023.

The report primarily draws on publicly available statistical and case management data from the US federal court system. Many graphics reflect data on pending multidistrict litigation cases that are regularly maintained and published by the Judicial Panel on Multidistrict Litigation, updated as of Aug. 15, 2023, and on annual statistical data from the JPML.

The report also relies on case management and judicial load statistics maintained and published by the Administrative Office of the United States Courts.

Bloomberg Law's Dockets obtains data from PACER. As court dockets may be updated after the data collection for the report, some filings may not be fully represented in the analysis, including case dismissals and transfers. PACER includes duplicate entries in certain cases, such as intra-district transfers or changes in judge assignment. We have sought to eliminate duplicates from the tabulations.

Bloomberg Law's Litigation Analytics tool provides data-driven analytical information about federal district courts, federal district court judges, companies, law firms, and lawyers. Appeal outcomes for judges are drawn from Bloomberg Law's opinions database to derive the analytics, not the entire universe of motions or appeals that may have been filed. Thus, the analytics are a good indicator of how often a judge is affirmed in relation to other judges, but they may not include the entire universe of the judge's decisions or appeals.

Section 1

Overview of Multidistrict Litigation

Multidistrict litigation currently constitutes about a third of all pending cases in the federal system, and fully half of all pending civil cases.

But the great bulk of these actions are wrapped up into a few large products liability multidistrict cases, or MDLs. And the big-headline numbers involved with these cases conceal a general downward trend in parties seeking consolidation and in new MDLs being consolidated.

Most MDLs (74%) contain fewer than 100 actions, and almost 30% of MDL dockets contain 10 actions or fewer. In contrast, 97% of the consolidated actions currently pending can be found in only the largest 10% of MDL dockets.

In short, the MDL ecosystem contains a couple of whales and a lot of minnows. But the reach and importance of these actions—both the large ones and the small—are substantial.

For a huge number of litigants, this specialized pretrial procedure will be their only experience with the American judicial system and will determine to a large degree whether they are compensated for their alleged loss.

For many defendants, of course, MDL will manage the critical pre-trial phase of litigation against them, and likely will be where viability and settlement value of claims are determined.

Indeed, JPML statistics indicate that only about 1.5% of MDL actions get remanded for trial.

That makes the management of MDL proceedings the most important feature of products liability litigation in federal court, and critical to understanding the litigation outcomes in several other types of litigation subject to consolidation.

Procedural Framework

Multidistrict litigation consolidates or coordinates lawsuits that have been filed in disparate federal courts, and share a factual basis, before a single court. Pursuant to [28 U.S.C. § 1407](#), that court—the “transferee court”—handles pretrial proceedings in all of the consolidated actions, and will remand each case back to the federal court where it originated for trial.

Panel Profile: Karen K. Caldwell, Chair

[Judge Caldwell](#) serves in the US District Court for the [Eastern District of Kentucky](#). She was nominated by President George W. Bush on Sept. 4, 2001 to fill a seat vacated by Henry Wilhoit Jr. Caldwell was confirmed by the US Senate on Oct. 23, 2001, and received her commission the following day. She [served](#) as chief judge of the district from 2012 to 2019.

Judge Caldwell was born in 1957 in Stanford, KY. She received a bachelor’s degree from Transylvania University in 1977, and a JD from the University of Kentucky College of Law in 1980. She spent the bulk of her career in private practice before assuming the bench, but served as US attorney for the Eastern District of Kentucky, 1991-1993.

She was appointed to the JPML in October 2018, and has served as the chair since 2019.

She announced on June 22, 2022, that she will take senior status at an unspecified time.

Consolidation is decided and transfer initiated by the US Judicial Panel on Multidistrict Litigation.

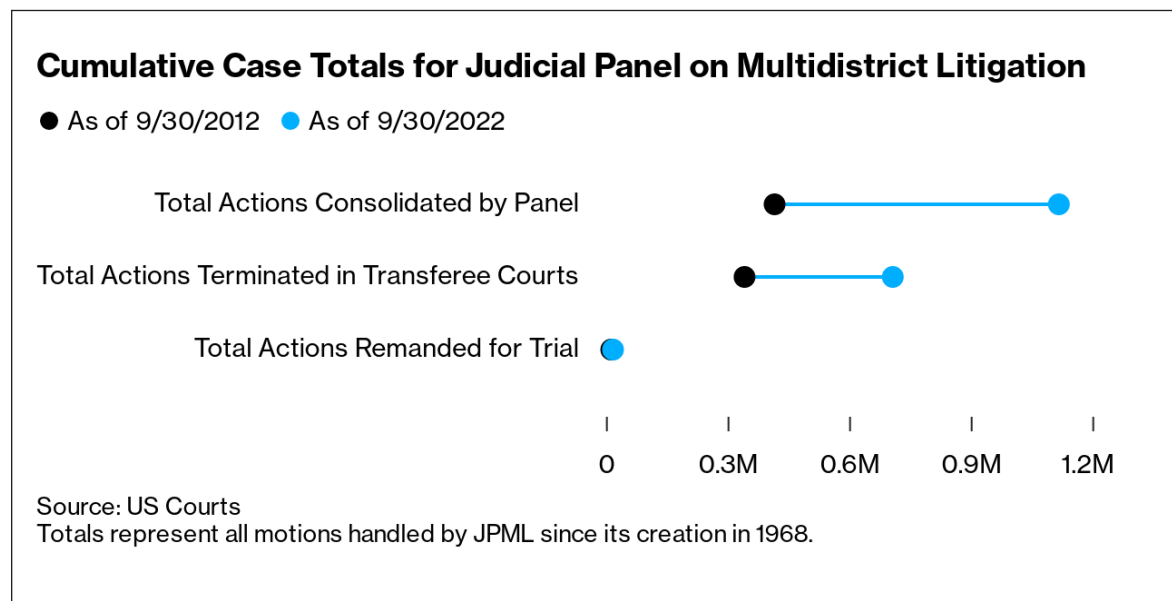
The JPML may consolidate actions on its own initiative or on the motion of any party to an action. Upon a determination that actions filed in different federal districts share common facts, the JPML **determines** whether consolidation would promote convenience and efficiency. When the panel considers consolidation, it gives notice to all parties in the affected actions and provides the time and date for a hearing that will consider whether consolidation is appropriate.

The panel meets **six times** per year to hear motions to consolidate, and produces **statistics** regarding pending actions on a rolling basis during the year. It also produces annual **statistical summaries** of its decisions.

Since the panel was created in 1968, it has consolidated more than 1.1 million separate actions into MDLs, according to US Courts data. That cumulative total has more than doubled in just the past 10 years—mostly due to the presence of the “whales” dominating multidistrict litigation.

The total number of actions terminated by transferee courts has more than doubled during that time as well, from just under 350,000 to more than 707,000 terminations.

The number of actions remanded for trial, on the other hand, has increased only slightly, from 13,065 in 2012 to 17,374 in 2022.



Once the JPML makes a decision, there is limited ability to appeal from that order under **28 U.S.C. 1407(e)**. If the panel declines to consolidate, there is no appeal from that decision. Appeal from a consolidation order is only by means of extraordinary writ pursuant to **28 U.S.C. 1651**.

Panel Members

The JPML is composed of seven sitting federal judges, who are appointed to serve on the panel by the Chief Justice of the United States. The multidistrict litigation statute provides that no two panel members may be from the same federal judicial circuit.

The current panel members have all been appointed by Chief Justice John Roberts between October 2018 and October 2021.

Judicial Panel on Multidistrict Litigation: Current Members

Member	On Panel Since	Federal District	On Bench Since	Nominated By	Affirm Rate on Appeal*	Product Liability Cases 2007-13
Chair Karen K. Caldwell	2018	E.D. Ky.	2001	G.W. Bush	74.4%	89
Nathaniel M. Gorton	2018	D. Mass.	1992	G.H.W. Bush	73.3%	87
Matthew F. Kennelly	2019	N.D. Ill.	1999	Clinton	68.5%	2,079
David C. Norton	2019	D.S.C.	1990	G.H.W. Bush	77%	457
Roger T. Benitez	2019	S.D. Cal.	2004	G.W. Bush	60.5%	34
Dale A. Kimball	2020	D. Utah	1997	Clinton	62.5%	75
Madeline Cox Arleo	2021	D.N.J.	2014	Obama	88.1%	59

Source: JPML

*Affirm rates do not include opinions that were affirmed in part and reversed in part.

Further details about the panel's members are featured in boxes throughout this report.

MDLs and Class Actions

An MDL is not the same as a class action, although it may contain class actions if the presiding judge certifies a class among the MDL plaintiffs. Still, the two procedures serve different purposes and adhere to different rules.

To be certified as a class action pursuant to [Federal Rule of Civil Procedure 23](#), a class' claims and injuries must be very similar, and issues common among the class members must predominate over individual ones. MDL plaintiffs, on the other hand, need not have the same claims, and may be suing for various injuries under different laws.

Federal courts have tightened restrictions on class actions during the past 20 years, leading (according to some scholars) to an increased use of MDLs for mass torts. It's a trend worth watching in federal litigation.

Idiosyncratic Management

Despite their prominence in the federal court system, MDLs aren't currently governed by the same rules and procedures that govern other federal civil suits.

Once consolidated by the JPML, actions are subject to management that transferee court judges often improvise to fit the circumstances of the case. Features that distinguish MDL management include:

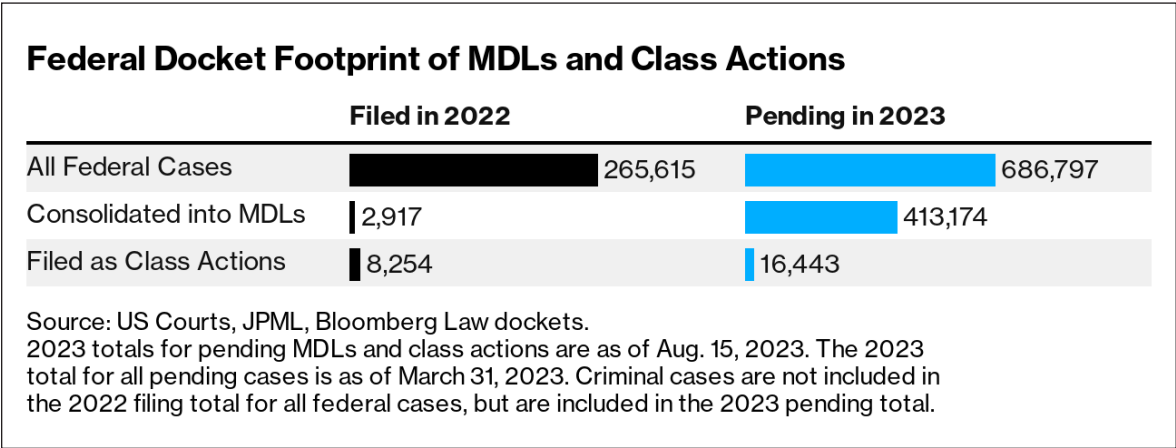
- Cases may or may not involve a consolidated complaint by groups of plaintiffs with similar claims.
- Cases may or may not have assigned lead or liaison counsel coordinating among groups of plaintiffs and/or defendants.
- Cases may or may not be designated for trial as “bellwether” cases of specific types to provide both sides with a better idea of the settlement potential and value of claims.
- Cases may or may not involve filing of master complaints.
- Discovery may be uniform among various plaintiffs (e.g., utilizing form discovery or fact sheets).
- Cases may be bifurcated into dual management streams for discovery/motions practice and bellwether trials on the one hand, and settlement discussions (possibly under distinct leadership) on the other.

Judges in transferee courts have great latitude in establishing procedures to fit what they consider to be the needs of each case.

Section 2

MDLs’ Place in The Courts

As of Aug 15, 2023, there were 413,174 actions pending in 174 open multidistrict litigation matters in the US federal district court system, according to JPML data. (For comparison, Bloomberg Law dockets show that there were 16,443 open class actions in federal court on that date.)



Because reporting periods from different organizations don’t line up, it’s difficult to compare those numbers to those reported by federal courts overall. But the US Courts reports that **686,797** cases of all types were pending in federal court as of March 31, 2023. So, it’s safe to estimate that roughly 60% of all pending cases in federal courts are wrapped up in MDLs.

But the numbers overall likely reflect the length of time that complex MDL actions pend, rather than a swell in MDL filings.

A total of 265,615 civil cases were filed in US district courts during **2022**. In that same year, the JPML granted just 22 motions for consolidation, which resulted in a total of 2,917 actions being consolidated during the year. (Meanwhile, 8,254 federal class actions were filed in 2022.)

That means that only about 1% of all civil actions that were filed in federal court during 2022 were consolidated into MDLs. So how can MDLs be accounting for the majority of all pending actions at the same time?

The answer can be found in a single case.

Panel Profile: Nathaniel M. Gorton

Judge Gorton serves in the US District Court for the **District of Massachusetts**. George H.W. Bush **nominated** Gorton on April 28, 1992, to a new seat. The Senate confirmed him on Sept. 23, 1992, and he received his commission the following day.

Judge Gorton was born in 1938 in Evanston, Ill. He earned an A.B. from Dartmouth College in 1960, and his LL.B. from Columbia Law School in 1966. Judge Gorton spent more than 25 years in private practice in Boston before assuming the bench.

Judge Gorton has served on the JPML since October 2018.

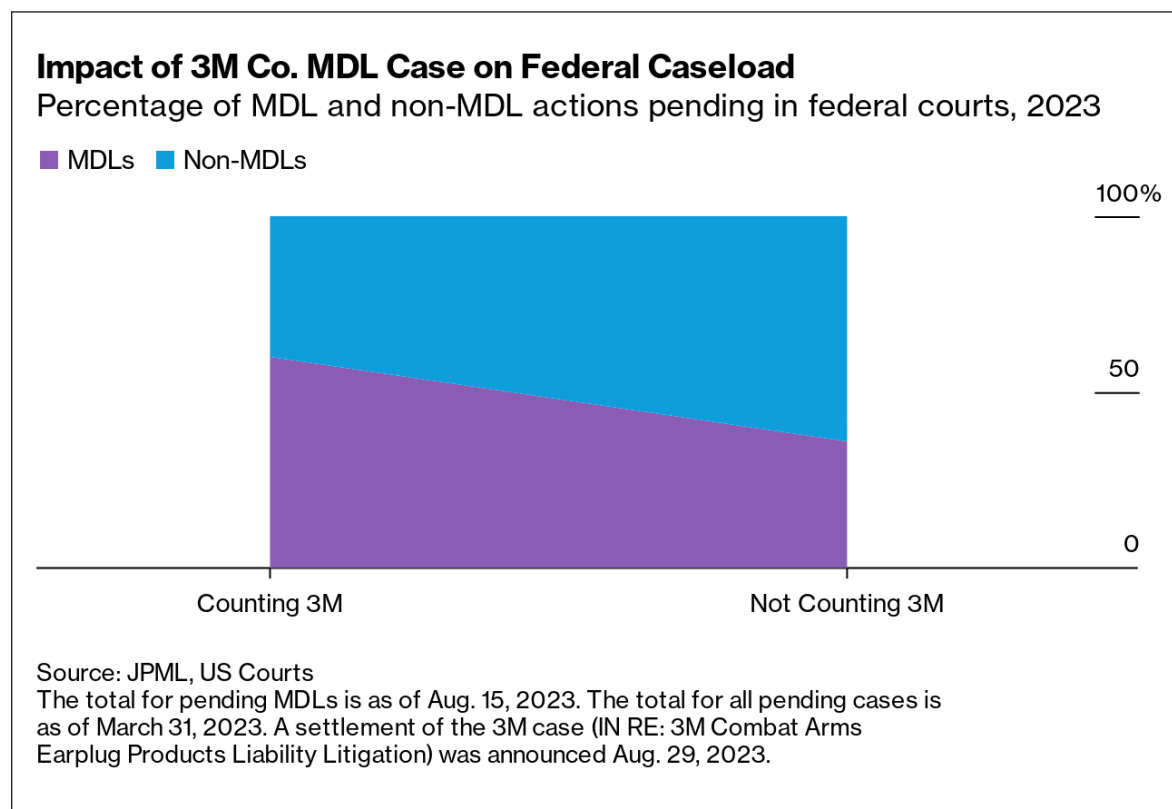
The Impact of 3M

Like a big meal moving slowly through the digestive tract of a snake, the biggest MDL ever consolidated is working its way through the US court system: a 2019 [case](#) alleging that combat ear plugs manufactured by a corporate subsidiary of [3M Co.](#) failed to protect service members' hearing.

The 3M combat ear plugs case is 10 times larger than the next-biggest MDL, comprising hundreds of thousands of actions—many involving multiple plaintiffs. Its size skews statistics and makes it more difficult to get an accurate picture of what's happening in MDLs more broadly.

As the 3M case ballooned, for example, MDLs made up around 70% of all pending federal civil cases at the end of fiscal year 2021. But at the end of 2022, as the number of actions in 3M dwindled, MDLs accounted for only around half of all cases.

Even in 2023, if the 3M ear plugs case totals were removed from the docket counts, then the total number of MDL actions pending as of Aug. 15 would amount to only about 36% of all pending federal cases, based on the official US Courts totals as of March 31.



Further details about the 3M ear plugs case, and its August 2023 settlement with plaintiffs, can be found in a case spotlight later in this report.

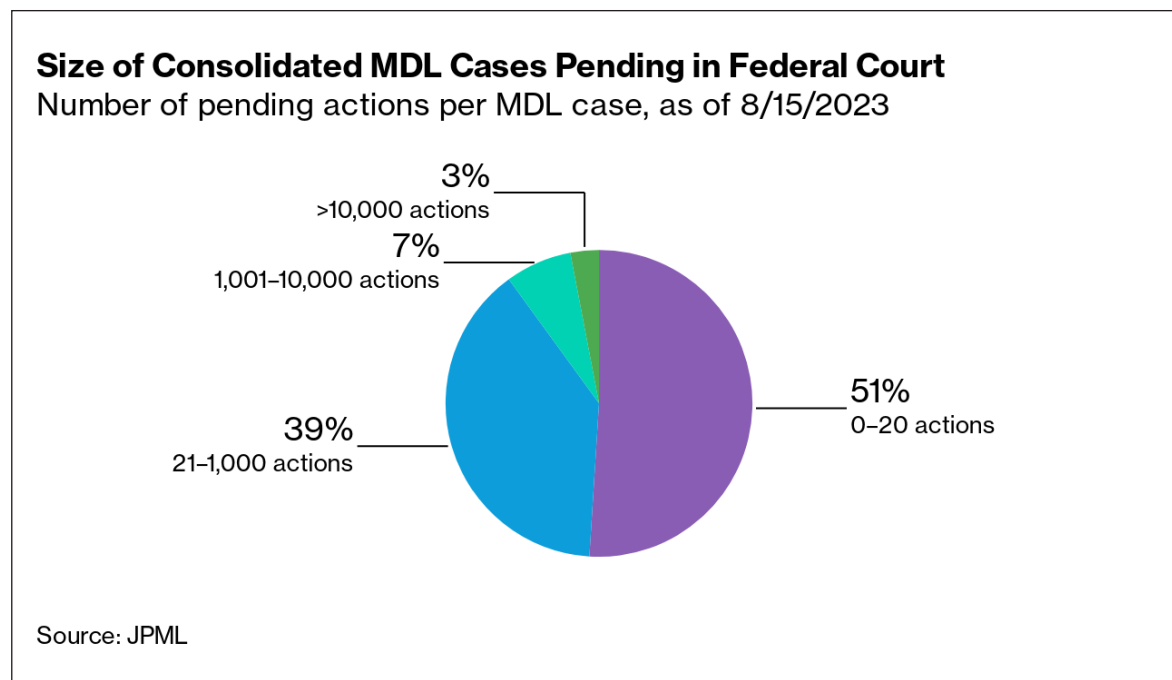
Smaller MDLs Are the Rule, Not the Exception

As the 3M case winds down, the actions that make up MDLs should comprise a markedly smaller share of overall federal litigation.

That's because, looking past the dominant presence of the 3M case, the general picture of

MDL activity appears to be a conservative one. Beyond the massive products liability cases that dominate the public's attention (and will be discussed later in this report), the fact is that just over 50% of the 174 consolidated MDL cases that are pending as of Aug. 15 are quite small, containing fewer than 20 actions.

At the other end of the spectrum, only 1 in 10 pending MDL cases involve more than 1,000 actions. (The remaining 39% of cases have between 21 and 1,000 actions pending.)



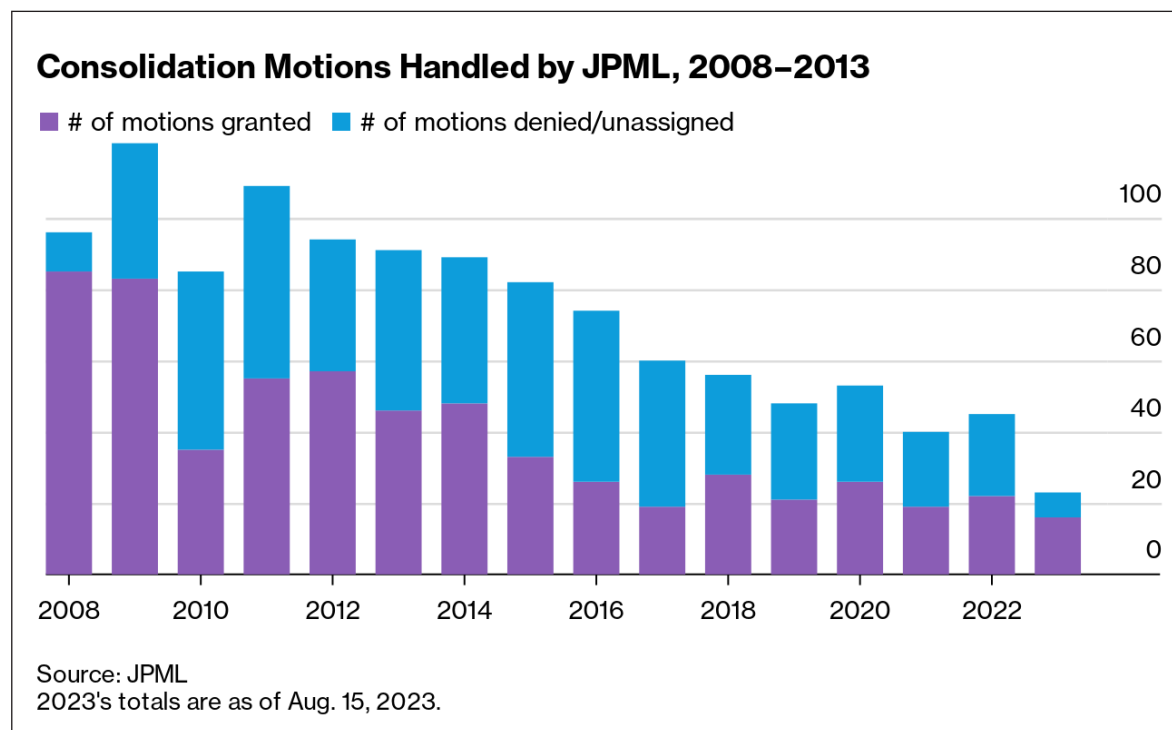
This array of case sizes suggests that MDLs are not entirely about “mass” litigation. The general public's idea of MDLs may be a picture of the giant products liability cases at the top of the size spectrum, but the vast majority of MDLs are smaller dockets.

Section 3

Trends in Consolidation Motions

The JPML granted 22 of the 45 consolidation motions it considered in 2022. This annual total is low compared to consolidations each year during the past decade, and is part of a general downward trend lower over the past 15 years.

In fact, the JPML handled fewer than half as many motions for certification of an MDL in 2022 (45) as it did 10 years earlier (94 in 2012).



So far in 2023, 23 motions to consolidate have been considered by the JPML, and the panel has granted 16 of those motions and denied seven of them.

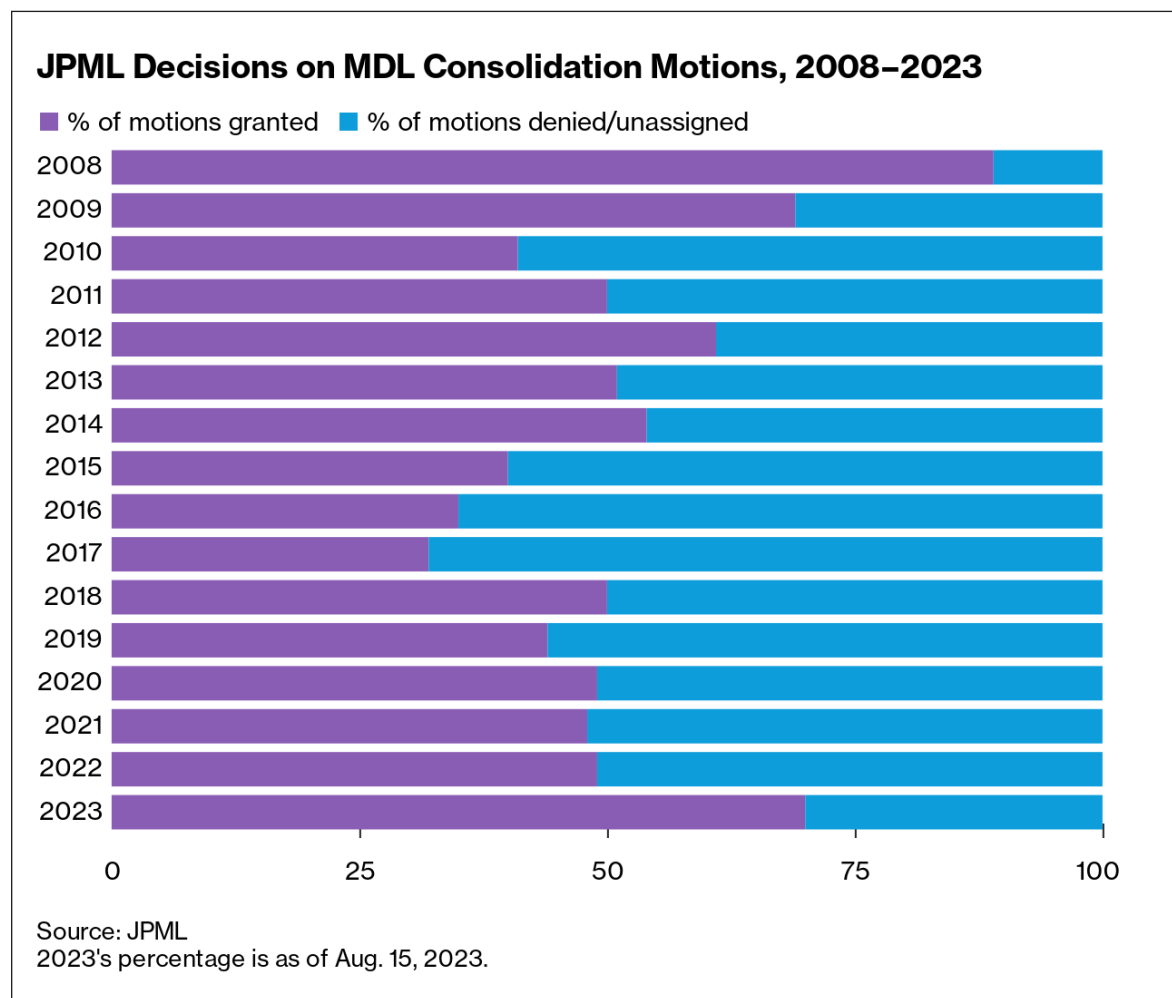
There are two more JPML hearings scheduled for 2023 (September and December). Based on the number of MDLs consolidated to date, as well as pending motions, the JPML in 2023 is on pace to once again consolidate a small number of cases, regardless of whether it finishes this year with the same or a slightly lower number of granted motions as compared to 2022.

Success Rates of JPML Filers

The 22 motions granted in 2022 constituted almost half of the 45 motions filed with the JPML that year.

Over most of the past 15 years, the percentage of motions to consolidate filed with the JPML that are ultimately granted has hovered around 50%. Indeed, the annual mean over the entire 15-year period is 50.66%.

But there was considerable variation over that period. The lowest percentage success rate for motions to consolidate occurred in 2017, when only 19 of 60 motions (32%) were granted. The highest percentage granted occurred in 2008, when the panel granted a whopping 89% of motions to consolidate (85 of 96 filed).



So far, 2023 is shaping up to be the most successful year for filers in more than a decade. The JPML has granted 16 of the 23 motions it has adjudicated this year, as of Aug. 15.

That's a 69.5% success rate for motions so far in 2023, but performance of motions heard in the remaining two JPML hearing dates of the year could alter that outcome.

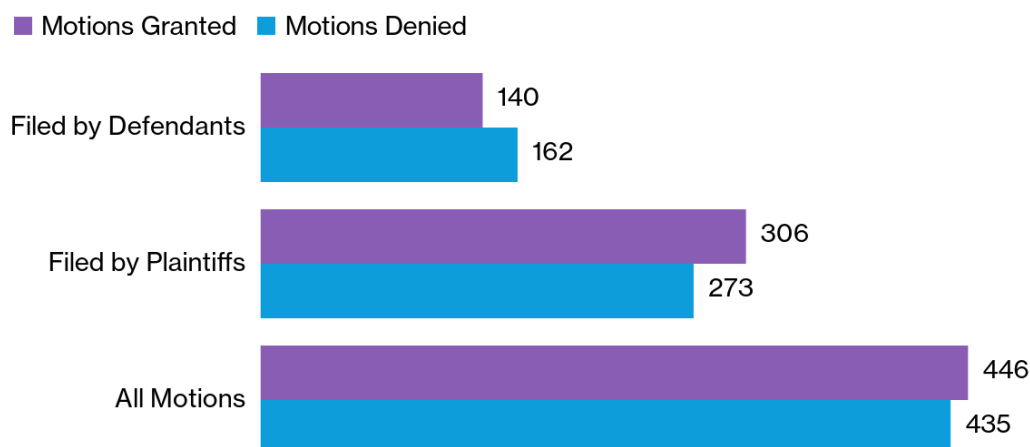
Still, if the current pace holds up, this will be the first year since 2014 that the panel would have granted more motions than it denied.

Plaintiff Motions vs. Defendant Motions

Which party filed a motion to consolidate—the plaintiff or the defendant—appears to play a role in its outcome.

Among the JPML dockets in Bloomberg Law, spanning 2002 to the present, plaintiffs asked to consolidate cases at nearly twice the rate that defendants did (579 times to defendants' 302 times). Plaintiffs' motions to consolidate were granted 53% of the time, while defendants' motions were granted about 46% of the time.

Results of Motions to Consolidate Before JPML, 2002–2023



Source: Bloomberg Law Dockets, JPML
2023's totals are as of Aug. 15, 2023.

In other words, the plaintiffs have been, on balance, successful in their consolidation motions before the JPML, while defendants have a losing record. But the numerical difference in their outcomes is only 7 percentage points.

Overall, regardless of who asked for consolidation, the JPML has been remarkably even-handed in its decision-making. Since the beginning of 2002, 446 (50.6%) of the 881 motions for consolidation have been granted, while 435 have been denied.

Looking only at 2023 so far (as of Aug. 15), plaintiffs have had 12 of 17 motions granted, and defendants have had four of six motions granted. So the success rate for each side in 2023 (70% for plaintiffs, and 66% for defendants) is running better than it generally has over the past 20 years.

Panel Profile: Matthew F. Kennelly

Judge Kennelly serves in the US District Court for the **Northern District of Illinois**. William J. Clinton **nominated** Kennelly on Jan. 26, 1999, to a seat vacated by Paul E. Plunkett. The Senate confirmed him on April 15, 1999, and he received his commission on April 22, 1999. Judge Kennelly assumed senior status on Oct. 7, 2021.

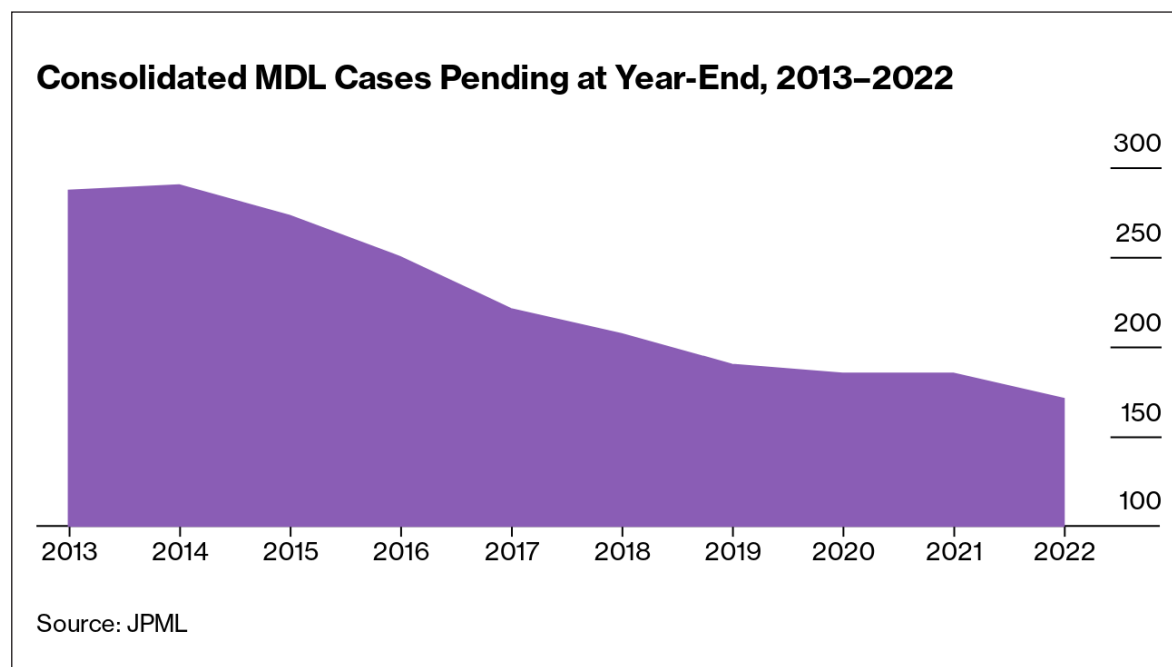
Born 1956 in Marion, Ind., Kennelly received a B.A. from the University of Notre Dame in 1978, and earned his J.D. from Harvard Law School in 1981. He clerked for Judge Prentice Marshall in the N.D. Ill. for two years, and otherwise spent his professional life, before assuming the bench, in private practice in Chicago.

Judge Kennelly joined the JPML in 2019.

Section 4

Trends in Pending Dockets

Overall, the number of consolidated MDL cases that are pending in federal courts has steadily declined in the past decade, from 287 MDLs pending at the end of 2013 to 171 pending at the end of 2022. (As of Aug. 15, 2023, there are 174 MDLs pending.)



2022 marks the eighth straight year that the federal court system has seen a decline in pending MDL cases.

As for 2023, there have been only 14 MDL dockets terminated as of Aug. 15, according to JPML records.

The longest-pending of these cases was consolidated and transferred in 2009, while only one case on the list was transferred as recently as 2022.

Panel Profile: David C. Norton

Judge Norton serves in the US **District Court for the District of South Carolina**. George H.W. Bush nominated Norton on April 18, 1990, to a seat vacated by Solomon Blatt, Jr. The Senate confirmed him on June 28, 1990, and he received his commission on July 12, 1990. He served as chief judge of the district between 2007-2012.

Judge Norton was born in 1946 in Washington, D.C. He earned a B.A. from the University of the South in 1968, and a J.D. from the University of South Carolina School of Law in 1975. He served as assistant deputy solicitor for the Ninth Judicial Circuit of South Carolina from 1977 to 1980, and as a city attorney for Isle of Palms, South Carolina, in 1980-1985. The remainder of his professional career was spent in private practice in Charleston.

Judge Norton joined the JPML in October 2019.

MDLs Terminated in Transferee Courts in 2023

Docket	Case Type	District	Months to Close
IN RE: Blood Reagents	Antitrust	E.D. Pa.	164
IN RE: Portfolio Recovery Associates, LLC	TCPA (Miscellaneous)	S.D. Cal.	139
IN RE: Emerson Electric Co. Wet/Dry Vac	Sales Practices	E.D. Mo.	131
IN RE: Propecia (Finasteride)	Products Liability	E.D.N.Y.	129
IN RE: General Motors LLC Ignition Switch	Products Liability	S.D.N.Y.	109
IN RE: London Silver Fixing, Ltd.	Antitrust	S.D.N.Y.	105
IN RE: Invokana (Canagliflozin)	Products Liability	D.N.J.	76
IN RE: Capital One Consumer Data	Security Breach (Miscellaneous)	E.D. Va.	44
IN RE: Sitagliptin Phosphate ('708 & '921)	Intellectual Property	D. Del.	42
IN RE: Generali COVID-19 Travel Insurance	Miscellaneous	S.D.N.Y.	32
IN RE: Lowe's Companies, Inc.	Employment Practices	W.D.N.C.	29
IN RE: T-Mobile Customer Data	Security Breach (Miscellaneous)	W.D. Mo.	20
IN RE: Johnson & Johnson Sunscreen	Sales Practices/ Products Liability	S.D. Fla.	18
IN RE: Procter & Gamble Aerosol Products	Sales Practices/ Products Liability	S.D. Ohio	15

Source: JPML

List is current as of Aug. 15, 2023.

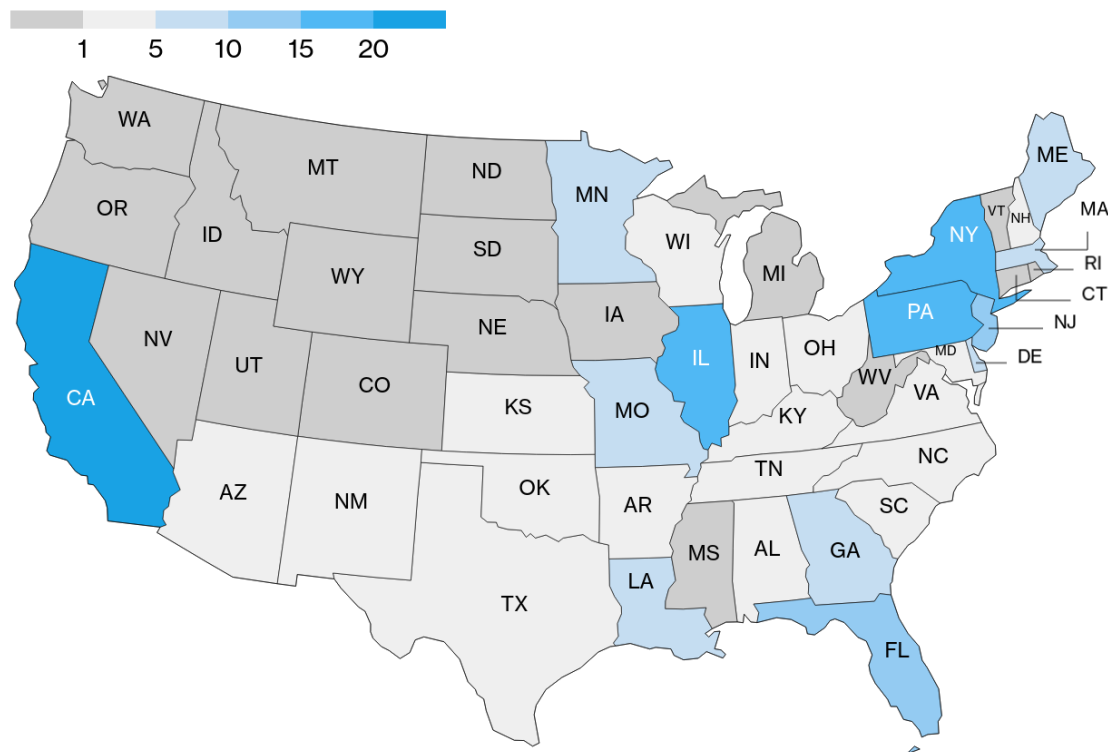
With 16 cases consolidated into MDLs by the JPML so far this year, and only 14 MDL cases fully resolved by transferee courts, 2023 could end as the first year since 2014 to register an uptick in the number of cases pending.

Where Cases Landed

The 174 consolidated cases that are currently pending in the federal court system are spread between 46 transferee districts and 145 judges (including chief judges of districts, district judges, and senior judges).

Transfer Targets for Consolidated MDL Cases

Number of pending MDL cases in federal district courts in each state



Source: JPML

State totals represent total MDL cases transferred to federal district courts within that state that are pending as of Aug. 15, 2023.

Two federal district courts are currently handling the largest number of cases: There are 17 pending MDLs in the US District Court for the **Northern District of Illinois**, and the same number pending in the US District Court for the **Northern District of California**.

However, Northern California may have the heavier workload: The 17 cases pending in that district comprise a total of 10,686 pending actions, while the number of pending actions in Northern Illinois is a relatively more manageable 1,383.

Other big targets for transferee cases are the **Southern District of New York** (13 cases, containing 1,330 pending actions), and the **District of New Jersey** (12 cases and 55,011 pending actions). The **Southern District of Florida** and the **Eastern District of Pennsylvania** each have nine pending MDLs, with Southern Florida having the heavier caseload (15,053 total actions, compared to Eastern Pennsylvania's 1,417).

(Strictly in terms of total actions in MDL cases, the district with the most to manage is the **Northern District of Florida**, whose only case transferred by the JPML is the mammoth 3M docket and its 239,388 pending actions.)

A closer look at the six districts with the most pending MDLs reveals several similarities between them.

Caseload Profiles of Top MDL Transferee Courts

	MDL Dockets Pending	Total MDL Actions Pending	Number of Judgeships	Vacancies on Bench (x Months)	Avg. Time to Disposition (Months)	Pending Cases per Judgeship
N.D. Cal.	17	10,686	14	25.4	7.1	989
N.D. Ill.	17	1,383	22	24.5	6.5	564
S.D.N.Y.	13	1,330	28	21.0	6.0	626
D.N.J.	12	55,011	17	25.8	10.8	3,732
S.D. Fla.	9	15,053	18	35.5	0	313
E.D. Pa.	9	1,417	22	57.0	7.7	371
National Mean	4	8,982	7	8.1	14.7	594
National Median	2	97	5	0	9.6	459

Source: JPML, US Courts

MDL-specific data are current as of Aug. 15, 2023; general data cover the 12 months ending June 30, 2023. "Avg. Time to Disposition" is for all civil cases completed in that district. "Pending Cases per Judgeship" includes all pending civil and criminal cases. National means and medians are for only the 46 courts with pending MDLs; the other 48 courts were not included.

In a nutshell, the districts that receive the most MDLs appear to be those that are well-equipped to handle them. All six of the most popular transferee districts have the largest benches in their circuits, in terms of judgeships—except for New Jersey (which is second to fellow list-topper Southern New York) and Northern California (which is second to Central California, also a top-10 MDL transferee court). It makes sense for the JPML to send cases where there are judicial resources available to manage them.

In fact, these top six transferee districts include three of the four district courts with the highest judgeship totals in the country. And all six of them have benches much larger than the nationwide average of seven per district.

On the other hand, all six top MDL courts have experienced serious staffing issues in the past year, with bench vacancy rates much higher than the nationwide average of 8.1 months of total judge vacancies in the 12 months ending June 30, 2023. Most districts in the country, in fact, have had no months of vacancies in the past 12 months.

Five of the 10 districts in the federal court system with the highest vacancy rates are also among the top six transferee courts for MDL cases. (The sixth, Southern New York, is still in the top 20.) If these staffing problems persist, they might begin to impact the JPML's decisions on transfer.

Another common factor among the top transferee districts is speed. Among all federal court districts, the average number of months they take to get from filing to disposition of a civil case was 14.7 in the year ending June 30, 2023. But all of the top MDL courts have track records better

than that (not including an average of zero months for civil cases at Southern Florida, according to US Courts records).

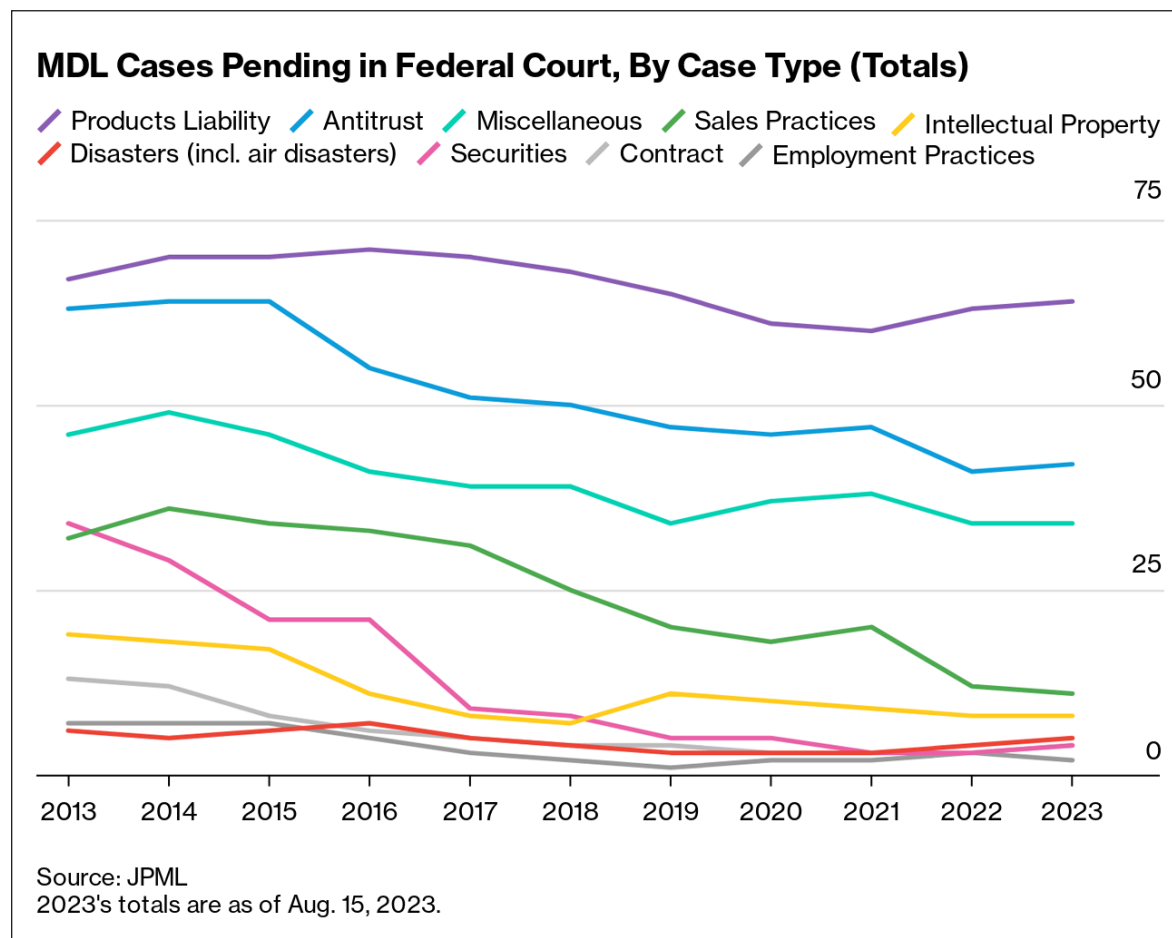
Finally, note that the top transferee districts do not have low per-judge caseloads in common. In fact, there is more variation among the top transferee districts' per-judge caseload than in the other metrics.

The number of pending cases (civil and criminal) per judgeship among the top six ranges from about 300 in Southern Florida to more than 3,000 in New Jersey. The nationwide average for this time period was 594 cases per judgeship. Again, if judicial staffing problems persist, caseloads may begin to factor more explicitly into transfer decisions.

One final note of interest about which cases are being sent where: They are not being sent to Texas. The four districts in Texas comprise a total of 52 judgeships—two of which have no vacancies at all—with case resolution speeds well below the nationwide average. And yet between all four districts, there are only three MDL dockets pending, totaling just 32 total actions.

Case Types of Pending MDLs

Products liability cases have consistently constituted the biggest single group of MDLs pending during the past decade. And that's not even taking into account the large number of actions that these types of cases typically involve. Looking only at pending dockets—not total actions—the number of pending products liability MDLs has still been remarkably stable during a decade that has seen most other types of MDLs fall off in popularity.



The total number of pending products liability MDLs has stayed between 60 and 71 each year since 2013 (it's currently at 66 cases this year), and the distance between the number of products liability MDLs and the next most common case type—antitrust—has never been higher than it is in 2023.

Speaking of antitrust cases, MDLs of this type are also not as plentiful as they used to be. The annual number of pending antitrust MDLs has fallen from 63 in 2013 to only 41 in 2022. (There are currently 42 pending antitrust MDLs in 2023.)

The fact is that every single case type has experienced a dropoff in the past decade, from a slight dip in pending products liability MDLs to steep plunges in sales practices and securities cases.

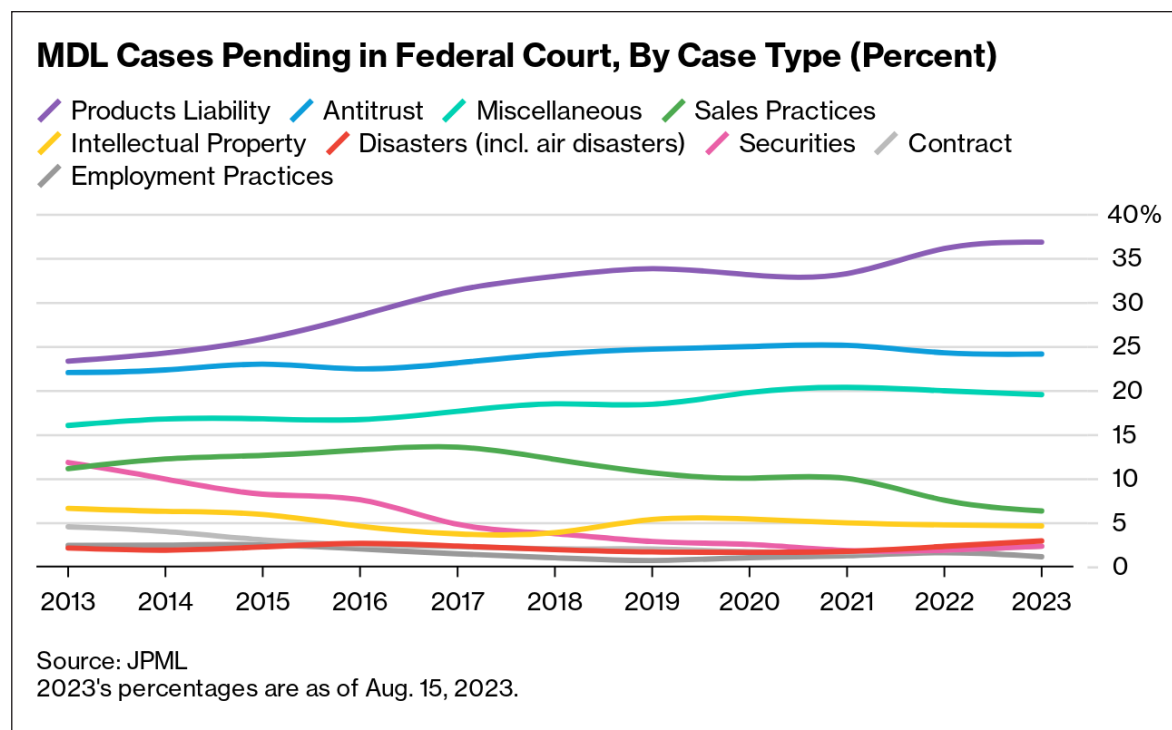
In the case of sales practices cases, many of them incorporate products liability claims and are therefore classified by the JPML as products liability cases.

But parties in securities disputes appear to have largely stopped seeking consolidation during the past decade. There are currently one-eighth as many securities MDLs pending as there were in 2013. In 2017, the number of pending securities MDLs dropped by half, and has been consistently in single digits since. In 2013, there were 34 securities MDLs pending; today there are four. One case, *IN RE: FTX Cryptocurrency Exchange Collapse Litigation* (MDL 3076), was consolidated in 2023; the second-newest securities MDL, *IN RE: SunEdison Inc. Securities Litigation* (MDL 2742), was consolidated in 2016.

There are about 40% as many IP MDLs pending as there were in 2013, but the current number of pending IP MDLs—eight—doesn't constitute the dramatic decrease over the past decade that other types have seen.

Sales practices MDLs have seen a steady decline during the past decade, from 32 pending actions in 2013 to 11 pending as of August 2023.

Percentage-wise, with so many types of MDLs in decline over the years, products liability cases have assumed a larger and larger share of the MDL docket and, due primarily to 3M's combat ear plugs case, of the federal docket overall.



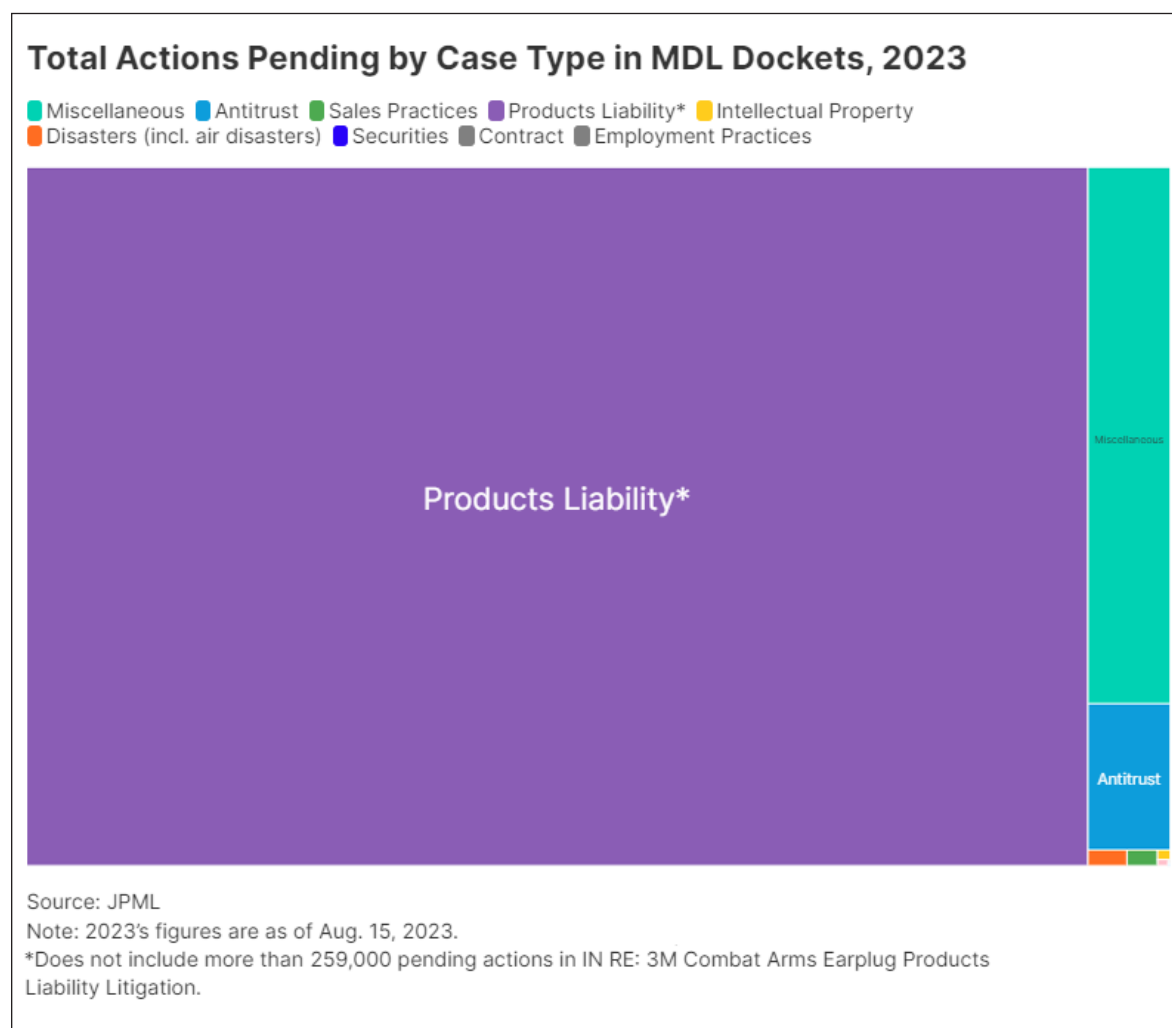
Since 2017, products liability has been the only case type with more than 30% of MDLs pending. (Between 2013 and 2016, roughly 25% of pending MDLs were classified as products liability actions.)

Products liability actions aren't unique in that regard: Despite drawing fewer cases, antitrust, miscellaneous, and disaster-related cases have maintained a relatively stable percentage of overall pending MDLs during the decade between 2013 and 2023.

Even so, there is clearly an imbalance between products liability litigation and all other types of consolidated cases.

Products liability's 66 pending cases make up more than one-third of the 174 consolidated cases still open in the courts (38%) as of Aug. 15, 2023. Antitrust is second, with almost one-quarter of all pending cases (24%), while cases categorized as "miscellaneous" account for one-fifth (20%). The remaining 18% of the dockets are shared by every other case type.

When all actions that are part of MDL cases are considered, the typically large size of products liability consolidations turns an imbalance into a colossal mismatch.



Pending actions in products liability cases currently account for more than 90% of all actions pending across the MDL landscape. And that is without counting the 259,000-plus actions that are wrapped up in the 3M ear plugs MDL, which, had they been added to this statistical analysis, would have rendered the graphic almost completely purple.

Section 5

Multidistrict Litigation's Biggest Cases

Product liability cases account for all 13 of the largest pending MDLs, and 20 of the largest 21. (The only outlier is *IN RE: National Prescription Opiate Litigation*, at No. 14, which is categorized as "miscellaneous.")

Below are details about the two largest pending product liability actions, as well as the largest pending actions in the miscellaneous, antitrust, and sales practices categories.

Largest MDL: 3M Combat Earplugs Litigation

IN RE: 3M Combat Arms Earplug Products Liability Litigation (19-md-2885), pending in the US District Court for the Northern District of Florida (Judge M. Casey Rodgers presiding), is the largest mass tort action in US history.

It has included up to 339,510 claimants historically and includes more than 259,000 actions as of Aug. 15, 2023. The cases comprising the 3M Combat Earplugs MDL constitute close to 40 percent of all pending cases in the federal court system in 2023.

Needless to say, 3M dwarfs all other MDLs.

Case History: Hundreds of thousands of former military personnel who were exposed to dangerous noise levels in combat or military training between 2003 and 2015 allege that 3M earplugs failed to protect them and left them with hearing loss or tinnitus. The JPML consolidated the lawsuits in April 2019 before Judge Rodgers in Pensacola, Fla.

Judge Rodgers has appointed "bellwether" cases to help the parties establish a realistic idea of the value of claims and the success of defenses. She ordered mediation in June 2022, after 16 bellwether trials and 19 verdicts, and again in September 2022. Mediation was unsuccessful.

The bellwether cases resulted in 10 wins for the plaintiffs and six for the defendants, with total damages against 3M (after post-trial reductions) of \$260.2 million. Individual plaintiff awards in the bellwether cases in which plaintiffs prevailed ranged from \$1 million to \$15 million in compensatory damages. The highest punitive damages award was \$72 million.

In July 2022, Aearo Technologies (the 3M subsidiary responsible for manufacturing the ear plugs at issue) voluntarily initiated chapter 11 proceedings under the US Bankruptcy Code seeking court supervision to establish a trust, funded by 3M, to satisfy all product claims. In July 2023, the Bankruptcy Court dismissed Aearo's bankruptcy case, holding that the fully funded trust means Aearo does not face an imminent threat of failure. 3M has appealed that decision to the US Court of Appeals for the Seventh Circuit.

3M also has appeals of plaintiffs' verdicts in the bellwether cases pending in the US Court of Appeals for the Eleventh Circuit. In May 2023, Rodgers identified 31 cases that will serve as the first actions remanded from the MDL to their original filing courts for trial.

Settlement: On Aug. 29, 2023, 3M announced that it has reached a universal settlement of the litigation. 3M will contribute a total amount of \$6.01 billion between 2023 and 2029, which is structured under the settlement to include \$5.01 billion in cash consideration and \$1 billion in 3M common stock.

There are really three agreements:

- a master combat arms settlement **agreement**,
- a settlement **agreement** with the verdict plaintiffs (those who went to trial against 3M and obtained a favorable verdict—14 are listed in the agreement), and
- a settlement **agreement** with the “wave plaintiffs,” which are cases that the court previously identified for pretrial discovery during the litigation. (While the “wave cases” are listed in the agreement, the list has been redacted in public filings.)

It’s important to note that the actual amount, payment terms, and dates of payment are subject to satisfaction of participation thresholds claimants must meet, including that at least 98% of individuals with actual or potential litigation claims must have enrolled in the settlement and released all claims involving the subject combat earplugs. 3M can also walk away if the equity portion of the settlement runs into regulatory roadblocks, or if the stock fails to sell.

Based on deadlines set in the settlement agreement, the settlement would either succeed or fail at about the end of the first quarter or early second quarter of 2024.

A 98% participation rate is a fairly high threshold, particularly considering the numbers of individual plaintiffs involved in this “opt in” agreement.

It’s difficult to gauge how that settlement, if completed, will rank among past MDL settlements because many are confidential, or comprised of contributions from many defendants that went to disparate plaintiffs groups. But compared to recent settlements in the **IN RE: National Prescription Opiate Litigation** MDL (around **\$26 billion** total) and the **IN RE: Roundup Products Liability Litigation** MDL (roughly **\$10 billion** to date, with an additional \$1.5 billion set aside by Bayer for the litigation), the 3M settlement is not historically large.

Before the 3M case, the previous largest MDL in US history was **IN RE: Asbestos Products Litigation (MDL 875)**, which included more than 3,000 actions when consolidated in the US District Court for the District of Pennsylvania in 1991. At its **height**, the case contained 192,100 actions.

Panel Profile: Roger Benitez

Judge Benitez serves on the US District Court for the **Southern District of California**. George W. Bush **nominated** Benitez to a new seat on May 1, 2003. Confirmed by the Senate on June 17, 2004, he received his commission on June 21, 2004.

Judge Benitez was born in 1950 in Havana, Cuba. He received his A.A. degree from Imperial Valley College in 1971, and his B.A. from San Diego State University in 1974. He earned a J.D. from Western State University College of Law (now the Thomas Jefferson School of Law) in 1978.

After almost 20 years in private practice in Imperial County, Cal., Judge Benitez served as a judge in the Superior Court of California in Imperial County from 1997 to 2001. He served as a magistrate judge in the US District Court for the Southern District of California in 2001-2004 before his appointment to the Article III bench.

He assumed senior status on Dec. 31, 2017, and has served on the JPML since October 2020.

Second-Largest Products Liability MDL: Johnson & Johnson Talcum Powder Litigation

IN RE: Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability Litigation ([16-md-2738](#)) was consolidated in October 2016 in the US District Court for the District of New Jersey ([Judge Michael A. Shipp](#) presiding). From a height of 38,644 actions in the consolidated case, the MDL is down to 37,770 actions pending as of Aug. 15, 2023. The case includes about 60,000 claimants, but J&J has estimated that it may face as many as 100,000 claims in total.

The cases allege that [Johnson & Johnson](#) knew that its talc products—particularly its baby powder—were contaminated with asbestos, and did nothing to warn consumers. The plaintiffs allege that the presence of asbestos in those products caused cancer.

In March 2023, the US Court of Appeals for the Third Circuit rejected J&J's attempts to pass its liability for the talc suits on to a subsidiary, [LTL Management LLC](#), and then declare the subsidiary bankrupt.

As part of that process, J&J floated a settlement offer of \$8.9 billion to settle all outstanding cases, which split plaintiffs.

The appeals court concluded that J&J did not access bankruptcy proceedings in good faith. LTL refiled, and the US Bankruptcy Court for the District of New Jersey [dismissed the petition](#) in keeping with the Third Circuit's decision.

With the company's bankruptcy strategy to end the litigation rejected by the court, the settlement is presumably off the table.

Largest Antitrust MDL: Generic Pharmaceuticals

IN RE: Generic Pharmaceuticals Pricing Antitrust Litigation ([16-md-2724](#)) was consolidated on Aug. 15, 2016, in US District Court for the Eastern District of Pennsylvania ([Judge Cynthia M. Rufe](#) presiding). The MDL currently contains only 131 cases pending, down from a high of 201, but the plaintiffs include attorneys general from 47 states, Puerto Rico, and the District of Columbia, along with classes of private plaintiffs suing 20 generic drug companies for allegedly agreeing to fix the prices of more than 300 drugs.

Rufe has [trimmed](#) the case since consolidation, dismissing claims against drug distributors and dismissing the states' claims for disgorgement under federal antitrust law. But she has so far resisted attempts to restrict damages theories, including "overarching conspiracy" claims that assert an industry-wide conspiracy.

Direct purchasers have settled with [Sun Pharmaceutical Industries Inc.](#) (and subsidiaries [Caraco Pharmaceutical Laboratories Ltd.](#), Mutual Pharmaceutical Company Inc., and [URL Pharma Inc.](#)) and [Taro Pharmaceuticals USA Inc.](#) for \$85 million (subject to provisions that could change the amount based on claims filed).

Largest Miscellaneous MDL: National Prescription Opiate Litigation

IN RE: National Prescription Opiate Litigation ([17-md-2804](#)) was consolidated on Dec. 12, 2017, in the US District Court for the Northern District of Ohio ([Judge Dan A. Polster](#) presiding). The plaintiffs in 46 actions moved to consolidate.

These cases allege improper marketing and distribution of opiate medications, leading to widespread addiction to these medications, and causing injury and death. Plaintiffs allege that the makers and marketers of opioids systematically overstated the benefits and downplayed the risks of their product, and ignored distribution patterns indicative of end-user abuse.

After five years of active MDL litigation, cases are progressing. Judge Polster tracked cases to advance as bellwethers. Extensive settlement talks have taken place, which included the US as a friend of the court in some instances. Some districts and groups have settled with some defendants. For example, [Allergan Inc.](#) reached a [settlement](#) with Ohio's Cuyahoga and Summit counties in August 2019.

There are currently 3,378 actions pending in the opiate MDL, down from a high of 3,523.

Largest Sales Practices MDL: SoClean Inc. Marketing Sales Practices

IN RE: SoClean, Inc., Marketing, Sales Practices and Products Liability Litigation ([22-mc-00152](#)) was consolidated on Feb. 2, 2022, before the US District Court for the Western District of Pennsylvania ([Judge Joy Flowers Conti](#) presiding). Plaintiffs moved to consolidate. The lawsuits arise from a 2020 FDA safety warning stating that devices marketed to clean Continuous Positive Airway Pressure (CPAP) machines and similar devices with ozone may expose users to excessive levels of ozone. On that basis, the plaintiffs allege that ozone sanitizing devices by [SoClean Inc.](#) pose potential health hazards to users and damage components of CPAP machines.

As of Aug. 15, 2023, *IN RE: SoClean* includes 41 pending actions, down from a high of 62. The parties have agreed to stay discovery pending mediation in an attempt to reach settlement.

Largest Potential Settlement Value: Aqueous Film-Forming Foams Products Liability Litigation

This MDL is just one subset of cases concerning ubiquitous contamination with per- and polyfluoroalkyl substances, or PFAS for short—cases that together have the potential to be the costliest mass tort litigation in history.

The MDL case, [18-mn-2873](#), was consolidated Dec. 7., 2018, before the US District Court for the District of South Carolina ([Judge Richard M. Gergel](#) presiding). Defendants moved to consolidate.

These cases concern exposure to per-fluorooctanesulfonate (PFOS) and/or per-fluorooctanoic acid (PFOA), either through direct contact with aqueous film-forming foam (AFFF) in various industrial, military, or fire-fighting applications, or by exposure to contaminated water. These substances allegedly cause cancer and other health impacts.

Panel Profile: Dale A. Kimball

[Judge Kimball](#) serves on the US District Court for the [District of Utah](#). William J. Clinton [nominated](#) Kimball on Sept. 4, 1997, to a seat vacated by David Keith Winder. Confirmed by the Senate on Oct. 21, 1997, he received his commission on Oct. 24, 1997.

Judge Kimball was born in 1939 in Provo, Utah. He earned a B.A. from Brigham Young University in 1964 and received his J.D. from the University of Utah College of Law (now S.J. Quinney College of Law) in 1967. He spent more than 20 years in private practice in Salt Lake City, and also taught at Brigham Young Law School in the 1970s.

He assumed senior status on Nov. 30, 2009. He has been a member of the panel since October 2020.

Defendant 3M attempted to consolidate cases involving non-AFFF PFAS chemicals into the MDL, but the JPML **denied** its motion. A considerable number of cases involving different chemicals and means of exposure are pending around the country, brought by states and municipalities with contaminated water or by individuals allegedly suffering impacts from exposure.

As of Aug. 15, 2023, the case was the eighth-largest pending MDL by number of actions pending with 5,614 actions (down from a historical high of 6,113). Yet the potential exposure is substantial: Estimates indicate that 600,000 service members may have been exposed to PFOS/PFOA-contaminated drinking water on US military bases alone.

3M **settled** with a class of municipalities with impacted water systems in the AFFF MDL in July 2023 for \$12.5 billion. **The Chemours Co., DuPont de Nemours Inc., and Corteva Inc.**, three more defendants, reached a preliminary settlement with municipal water systems for a collective **\$1.185 billion** in June 2023.

Because PFAS, also known as “forever chemicals,” are estimated to be present in essentially every person and animal in the US, observers contend that the size of the potential exposure dwarfs the largest mass tort settlement in US history, the 1998 Tobacco Master Settlement Agreement for \$206 billion.

Section 6

Potential Changes and Next Steps

MDLs have benefits in administration: less risk of inconsistent outcomes, for example, or less threat that a huge group of cases, spread throughout the federal system, will clog courts and slow down access to justice more broadly.

But there are also shortcomings to the procedure. First and foremost, the size and scope of MDLs make it more difficult for parties and the court to evaluate claims, and dispense with meritless claims, efficiently. Because MDLs are subject to idiosyncratic management, and because of their size and administrative load, some contend that MDLs often contain a high percentage of meritless cases—meaning, for example, products liability cases brought by plaintiffs who cannot demonstrate that they purchased or used the product, or that they have suffered the injury allegedly caused by the product.

Because of their size and complexity, MDLs can also result in the slow movement of cases through the justice system. Cases caught up in an MDL may languish for a considerable time while bellwethers are tried and complex discovery coordinated among many plaintiffs, for example, when any individual case could have been dealt with expediently in its transferor district.

Proposed Rules

A subcommittee of the Judicial Conference Committee on Rules of Practice and Procedure has been working for years on potential additions to the Federal Rules of Civil Procedure to govern MDLs—which are, shockingly, currently mentioned nowhere in the FRCP.

Initially, the committee considered amendments to existing rules 16 and 26, which govern pretrial scheduling/management and disclosures/discovery in civil litigation, to address MDLs. After comment and consideration, however, they decided to draft a new subrule, FRCP 16.1, unique to these proceedings.

In March 2023, the committee published a proposed **draft** rule for MDLs, which emphasizes in the Draft Committee Note a need to formalize “a framework for the initial management of MDL proceedings.” However, the rule does not require procedures that “must” be instituted to manage an MDL; instead, it consists of a series of suggestions that “may” be used. The proposed rule amounts to a suggested set of best practices, while leaving great discretion in managing MDLs in the hands of the transferee court.

That’s an unusual approach for the FRCP, which generally requires specific procedures in given circumstances. However, it makes sense for a set of proceedings that vary as much as MDLs can. Some MDLs, with only a few very similar cases involving plaintiffs who are injured in the same way by common conduct, may not require much early intervention from the court to administer them efficiently. Others, involving thousands of actions and tens of thousands of plaintiffs in varying relationships to the defendants, will require more intervention early in the process from the court and more administration.

Key Provisions

The proposed rule 16.1 recommends the following:

Potential Changes to Post-Consolidation MDL Workflow

Details of proposed Subrule 16.1 of Federal Rules of Civil Procedure

Step	Actor	Action	Details	Section
1	Transferee court	Designation of coordinating counsel	The transferee court may designate coordinating counsel to meet and confer and submit a report for the initial MDL management conference.	16.1(b)
2	Coordinating counsel	Preparation of pre-conference report	The court should order the parties to meet and confer to prepare and submit a report to the court prior to the initial MDL management conference.	16.1(c)
3	Court and parties	Initial MDL management conference	The court should schedule an initial management conference to develop a management plan for the proceedings.	16.1(a)
4	Transferee court	Initial MDL management order	The court should enter an initial MDL management order addressing the matters designated under the report and addressed in the conference, and any other matters in the court's discretion. This order controls the course of the MDL proceedings unless and until the court modifies it.	16.1(d)

Source: Judicial Conference Committee on Rules of Practice and Procedure

The proposed rule's highest level of detail centers on the report, called for in section 16.1(c). The committee envisions a report that addresses several key matters, including:

- Identifying the key factual and legal issues likely to be presented by the MDL;
- Suggesting how and when the parties will exchange information about the factual bases for claims and defenses;
- Proposing a discovery plan;
- Recommending whether leadership counsel should be appointed and, if so, how it will operate and be paid;
- Identifying the principal factual and legal issues likely to be presented in the MDL;
- Whether consolidated pleadings should be prepared;
- Whether the court should consider facilitating settlement, such as through ordering alternative dispute resolution;
- If matters should be referred to a magistrate or master; and
- Other issues, like evaluating existing scheduling orders and other orders, proposing other scheduling conferences, and management of new filings.

Potential Impact

Although the rule amounts to suggested practices, it could have an important impact on how MDLs are conducted. First, ordering the early exchange of factual information (for example, through “fact sheets” that outline basic information about each claimant and list or attach key documents like product receipts or diagnoses) would force more early due diligence on claimants and potentially efficiently sort out unfounded claims early in the MDL process.

That is important because defendants frequently complain that big MDLs contain a high percentage of claimants who have no actual evidence to support their entitlement to recover. Because of the structure and pace of big MDLs, those claims not only gum up the works and hamper processing and adjudication of meritorious claims, but also cloud a realistic understanding of settlement potential and litigation risk.

More information will also likely improve choosing bellwether cases and sorting claimants into functional groups for improved administration. MDLs, unlike class actions, don’t require that common issues of fact or law “predominate” among the plaintiffs. Accordingly, an MDL may include subgroups that have very different claims and damages with some nexus. Identifying those patterns early has many potential benefits.

The proposed rule may also have greater impact among rookie MDL transferees. While some courts have adjudicated multiple MDLs and have developed administrative procedures that work for them, new jurists may benefit from a basic toolbox of proposed first steps.

The public comment period is open until **February 16, 2024**. Following the comment period, the subcommittee will consider the public’s responses and potentially redraft the rule. The final proposed rule must be adopted by the Judicial Conference’s Committee on Rules of Practice and Procedure, then the Judicial Conference itself, and finally the Supreme Court. As a result, the final rule may feature important differences from the current proposal and, depending on any changes, may not enter into force for years.

Panel Profile: Madeline Cox Arleo

Judge Arleo, the newest member of the JPML, serves on the US District Court for the District of New Jersey.

Barack Obama nominated Arleo on June 26, 2014, to a seat vacated by Dennis M. Cavanaugh. The Senate confirmed her on Nov. 20, 2014, and she received her commission on the following day.

Judge Arleo was born in 1963 in Jersey City, New Jersey. She received a B.A. at Rutgers College in 1985 and an M.A. in 1986. She earned her J.D. from Seton Hall University School of Law in 1989.

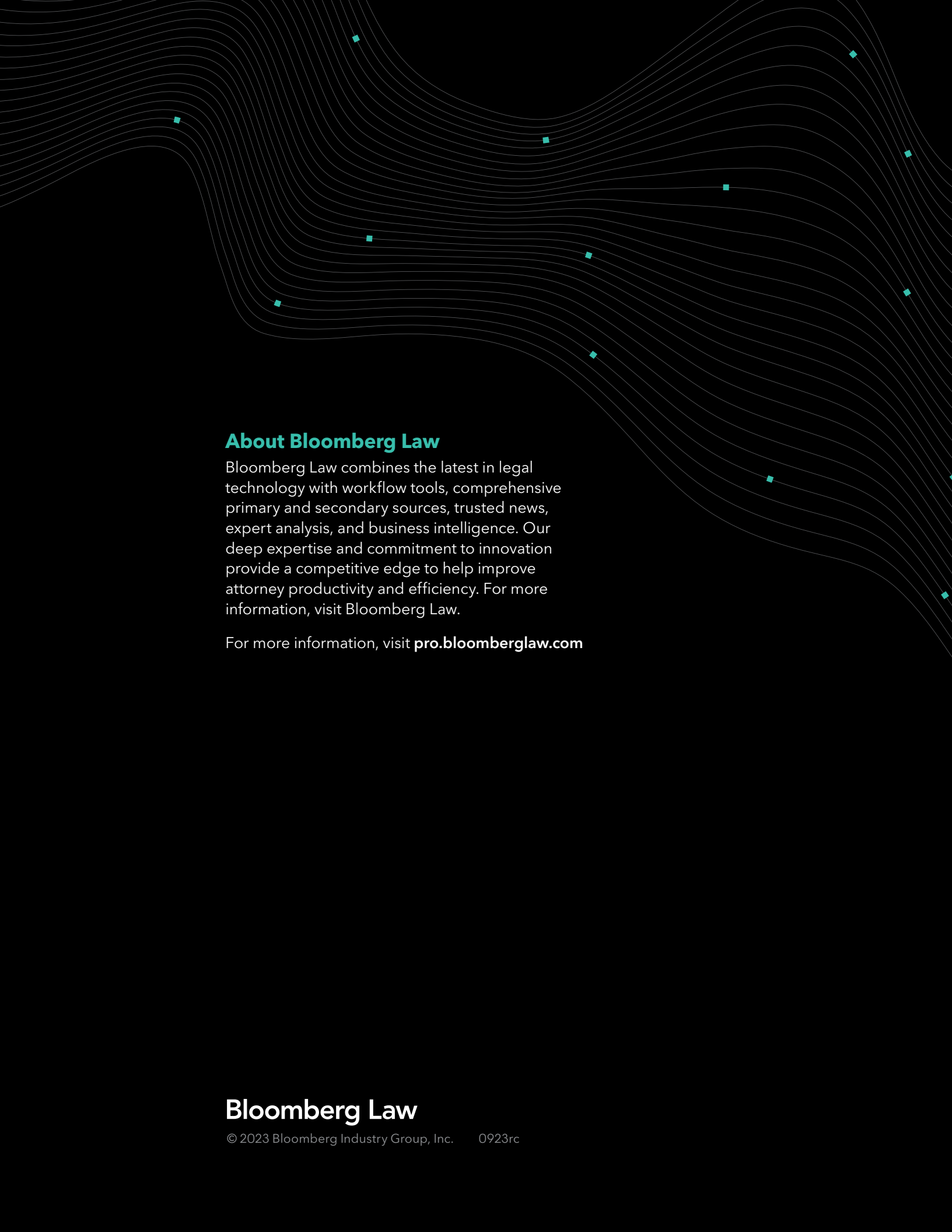
Judge Arleo clerked for New Jersey Supreme Court Justice Marie L. Garibaldi in 1989-90. Following 10 years in private practice in Newark, N.J., Judge Arleo served 14 years as a magistrate judge in the US District Court for the District of New Jersey from 2000 to 2014.

She joined the panel in October 2021.

About The Authors

Eleanor Tyler is a Principal Legal Analyst at Bloomberg Industry Group, with a focus on antitrust and general litigation. Before joining Bloomberg Law, Eleanor practiced law for six years, primarily as a litigation associate at Locke Lord LLP. She clerked for the Hon. Simeon Lake in the US District Court for the Southern District of Texas. She holds a JD from Georgetown University Law Center, an MA in international affairs from Johns Hopkins SAIS, and a BA from Texas Christian University.

Robert Combs is the manager of Bloomberg Law's Analysis Channel. In more than 20 years at Bloomberg Law, Robert has provided legal analysis on labor and employment issues, headed the company's knowledge services and customized research teams, and edited employment and payroll publications. Robert has an M.S. in journalism from Scripps School of Journalism at Ohio University and graduated with a B.A. in English from Denison University.



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