THE ASBESTOS MULTIDISTRICT LITIGATION

MDL 875: PAST, PRESENT AND FUTURE

Eduardo C. Robreno, Presiding Judge
United States District Court for the
Eastern District of Pennsylvania

© June 12, 2009
As Amended
March 29, 2016

Available at:
http://www.paed.uscourts.gov/documents2/mdl/mdl875#About

Asbestos: A Health-Legal Crisis [?]

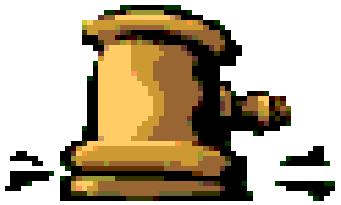
* A United States Judicial Conference Ad Hoc Committee on Asbestos Litigation appointed by the Chief Justice described the social effects of asbestos in a 1991 report:
  * The use of asbestos "is a tale of danger known about in the 1930s, [with] exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s."
    Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2–3 (Mar. 1991)

3 Phases of MDL 875

1. Class action: the aggregation effort (1991-1996)
2. The legislative effort (1998-2006)
3. One plaintiff, one claim (2008-present)

MDL 875 Phase I: Class Action Effort

* 1993: Attempted class action settlement
* Group of twenty asbestos product manufacturers and suppliers ("CCR") were defendants
* Putative class to include all persons exposed occupationally to asbestos or asbestos containing products supplied by defendants
* 1997: Supreme Court affirmed the Third Circuit Court of Appeals, ruling that the proposed class did not satisfy the requirements of Fed. R. Civ. P. 23. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (1996)



MDL 875 Phase II: Legislative Effort

* Opportunities for mass settlement through legislative action did not materialize
  * Fairness in Asbestos Compensation Act (1999)
  * Asbestos Compensation Act (2000)
  * Asbestos Claims Criteria and Compensation Act (2003)
  * Fairness in Asbestos Injury Resolution Act (2006)

Status of MDL 875 as of 2016

LAND DOCKET

* From 2006 through 2016, 112,238 land-based cases were transferred to the MDL. Nine cases currently remain.
* Each plaintiff sued an average of 50 defendants.

MARITIME DOCKET

* From 2006 through 2016, 63,373 cases were filed on the Maritime Docket (MARDOC) representing millions of claims against ship owners and manufacturers of products containing asbestos.
* Currently, 537 cases remain, mostly from the Northern District of Ohio.

MDL 875 Phase III: Changes in Law & Culture

* The aging of exposed asbestos population
* State tort reforms
* Discovery of widespread fraud in the medical diagnosing of silicosis
* Development of new litigation strategies by corporations

* Bankruptcy of all major manufacturers
* Litigation shifts to peripheral defendants
* Rise of Trusts for former manufacturers of asbestos

MANAGEMENT PLAN

- Operating Principles
- Personnel/Resources
- Procedures
- Communication

Operating Principles

- Deconstruction of cases – "one plaintiff, one claim;"
- Each case on a scheduling order;
- Reasonable but fixed deadlines and benchmarks;
- A commitment to hands-on management of cases; and
- Systematic differential diagnostics – all cases cannot be treated similarly.

Personnel/Resources

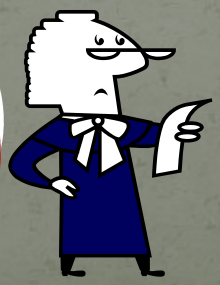
Presiding Judge

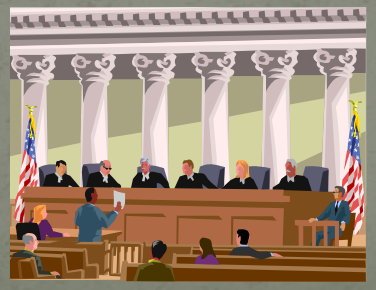
Magistrate Judges

Clerk of the Court

Case Administrators (E.D. Va. / MARDOC)

Other Judges of the Court





Procedures:

- Motions
- Settlements
- Summary Judgment
- Trials or Remands
- Legal Architecture

Communication

- MDL 875 website provides easily accessible information to litigants. The website includes:
  - Updates – any activity in the litigation is logged
  - Master Calendar
  - Opinions
  - Case Listings
  - Steering Committee
  - Regular Updates
  - Statistical Breakdown of the MDL
  - Contact Information
  - Word searchable database
- Steering Committees (Plaintiffs, Defense, and MARDOC)
- Legal Architecture

Foundations for Resolving the Case

- The Court issues Administrative Orders 11 and 12.

Administrative Order 11

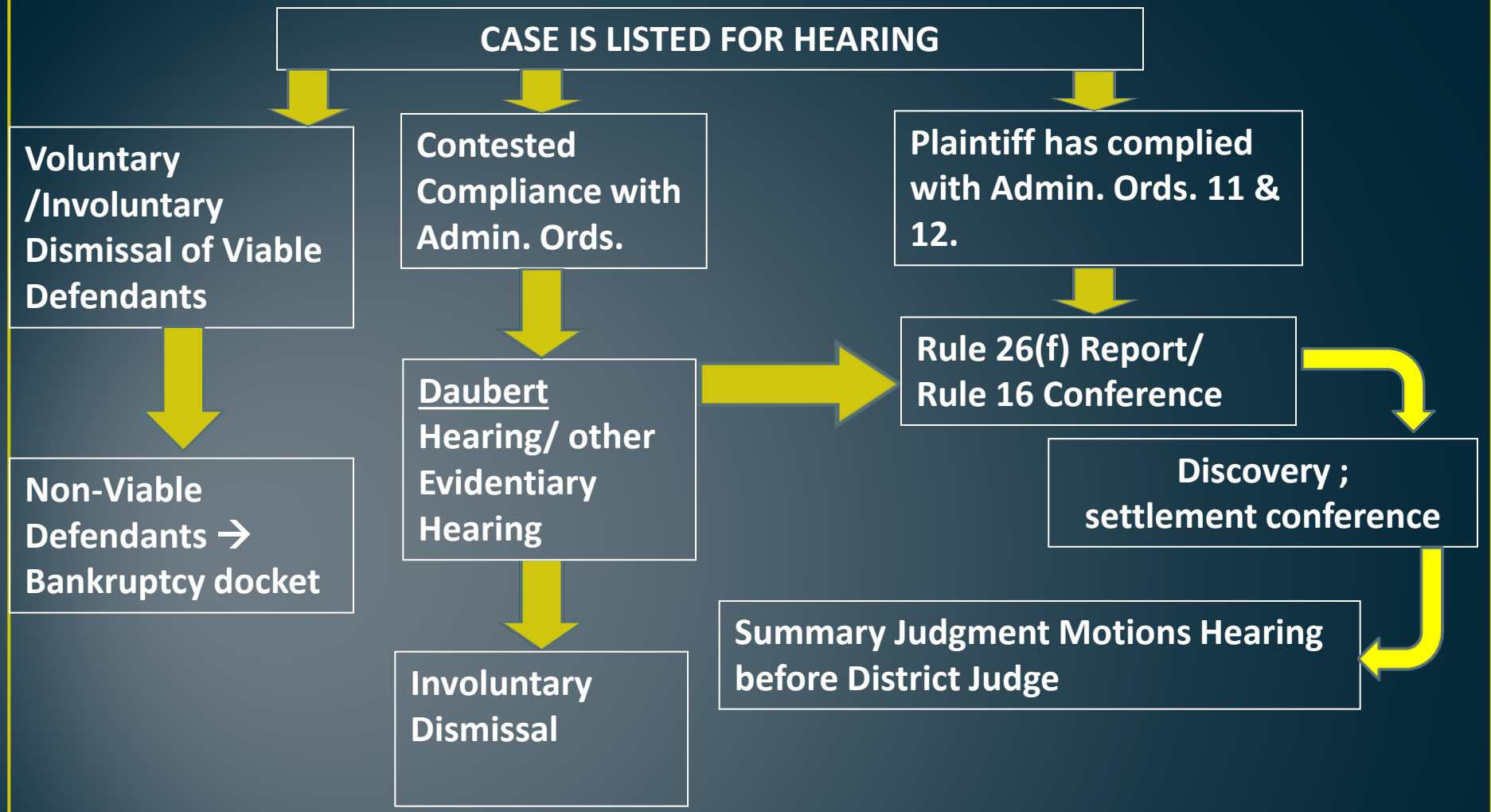
- **Transfer of all electronic dockets in MDL 875 to the E.D. Pa. CM/ECF system.**

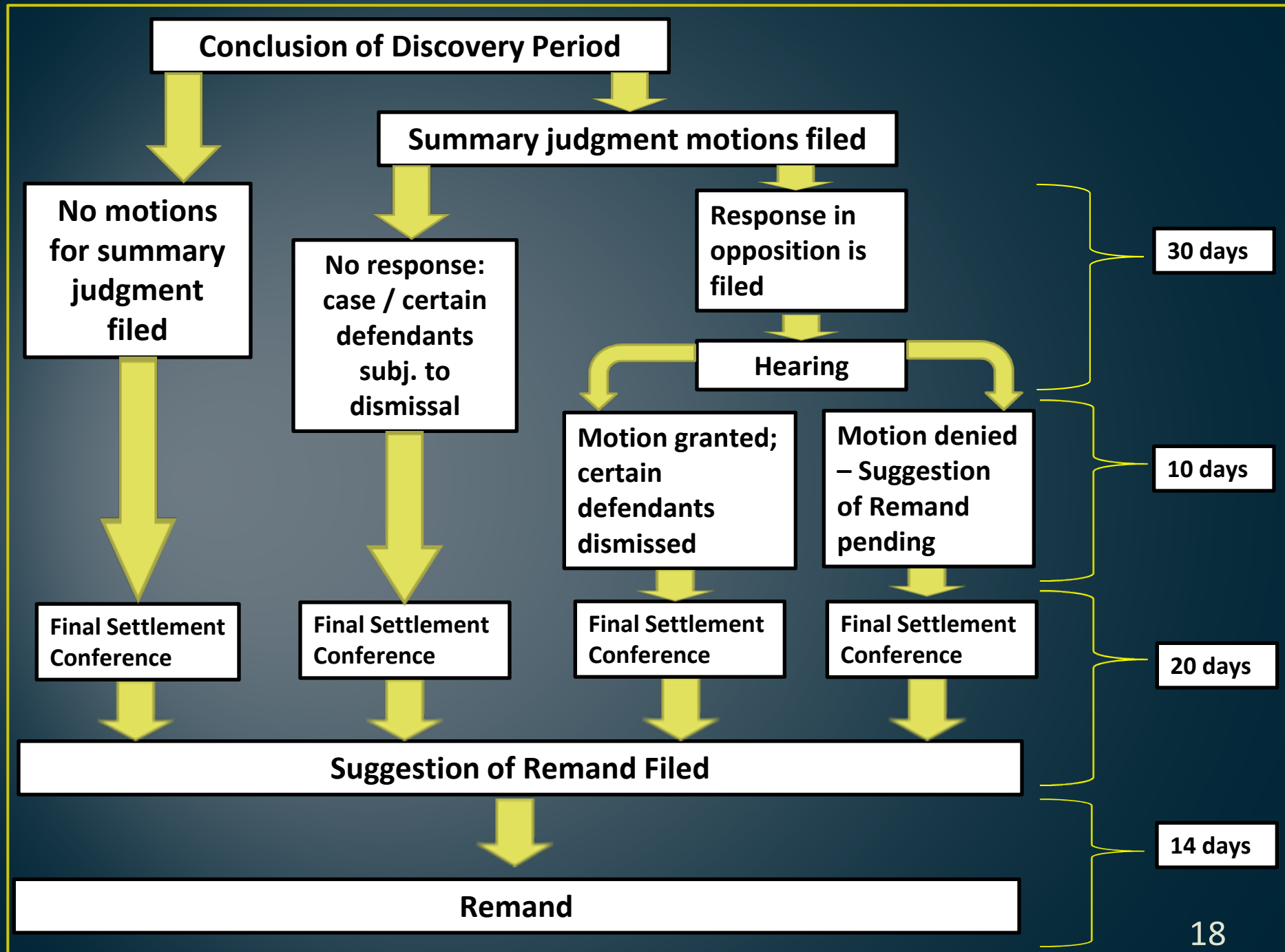
Administrative Order 12

- Requires each Plaintiff to submit to the Court the diagnosing report or opinion upon which they rely in pursuing their personal injury action. (Lone Pine Order; see Lore v. Lone Pine Corp., No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986)).

LAND CASES: INTERGRATION OF PRINCIPLES & PROCEDURES

- **The Flow Charts on the following slides illustrate how the Court is implementing its Case Management principles and procedures.**


CASE IS LISTED FOR HEARING
Voluntary /Involuntary Dismissal of Viable Defendants
Contested Compliance with Admin. Ords.
Plaintiff has complied with Admin. Ords. 11 & 12.
Non-Viable Defendants → Bankruptcy docket
Daubert Hearing/ other Evidentiary Hearing
Rule 26(f) Report/ Rule 16 Conference
Discovery ; settlement conference
Summary Judgment Motions Hearing before District Judge
Involuntary Dismissal


Conclusion of Discovery Period
Summary judgment motions filed
No motions for summary judgment filed
No response: case / certain defendants subj. to dismissal
Response in opposition is filed
Hearing
Motion granted; certain defendants dismissed
Motion denied – Suggestion of Remand pending
Final Settlement Conference
Final Settlement Conference
Final Settlement Conference
Final Settlement Conference
Suggestion of Remand Filed
Remand
30 days
10 days
20 days
14 days

REMAND TO THE TRANSFEROR COURT

- A case stays in E.D. Pa. through the summary judgment phase. A case that survives summary judgment (or in which no MSJs are filed) gets a suggestion of remand.

Criteria for Suggestion of Remand

* Discovery completed
* Settlement exhausted
* No outstanding motions
* Identify motions adjudicated by Court
* Identify viable defendants
* Severance of punitive damages

Suggestion of Remand Memorandum

* Status of the Case
* History of MDL 875
* Resources available to transferor court
* Contact information for MDL court

An Overview of the Issues Addressed

- Number of MSJs decided: **872**
- Number of state substantive issues addressed: **62**
- Number of federal substantive issues addressed: **19**
- Number of federal procedural issues addressed: **18**
- Number of cases remanded to state court: **193**
- Number of cases remanded to transferor court: **3,353**
- Number of jurisdictions where cases originated: **56**
  - Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, DC, Florida, Georgia, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Mariana Islands, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Federal Maritime Law

Legal Architecture

I. **Major Legal Issues in MDL 875**
   - A. Jurisdiction Over Military Related Exposure Claims
   - B. Choice of Law
     1. Determining the Applicable State Law
     2. Maritime Law
     3. Intersection of State Law and Maritime Law: Split Exposures
     4. Remanding Unsettled Issues of State Law
   - C. Product Identification
     1. Defined
     2. Various State Standards and Trends
     3. Maritime Law
     4. Intersection of Daubert Issues and Product Identification
     5. Common Causation Issues
     6. Coworker Testimony
     7. Secondary or "Take-Home Exposure"
   - D. Bare Metal Defense
     1. Defined
     2. Various State Standards and Trends
     3. Maritime Law
   - E. Government Contractor Defense
     1. Defined
     2. At he Removal Stage
     3. At the Summary Judgment Stage
   - F. Sophisticated User Defense
     1. Defined
     2. Various State Standards and Trends
   - G. Duty Owed By Shipbuilder Defendants to Plaintiffs
     1. A Maritime Law Issue
     2. Duty Defined
     3. A Navy Ship Is Not a "Product"

Legal Architecture (Continued)

II. **Other issues of Federal Law in MDL 875**
   - A. Federal Rules of Civil Procedure
     1. Federal Rule of Civil Procedure 56(c)(1)(A)
     2. Federal Rule of Civil Procedure 12(b)(2) & 12(b)(5)
     3. Federal Rule of Civil Procedure 12(b)(4) & 12(h)(1)(B)
     4. Federal Rule of Civil Procedure 41(b) & MDL 875 A.O. 12
   - B. Federal Rules of Evidence
     1. Federal Rule of Evidence 804(b)(1)
     2. Federal Rule of Evidence 611(c): Use of Leading Questions on Direct
     3. Federal Rule of Evidence 702
   - C. Jurisdiction and Fraudulent Joinder
   - D. Sham Affidavit Doctrine
   - E. Federal Employers Liability Act (FELA)
     1. Releases
     2. Statute of Limitations
   - F. The Longshore and Harbor Workers' Compensation Act (LHWCA)
   - G. Judicial Estoppel (Asbestos Claims Not Disclosed in Bankruptcy Filing)
   - H. Real Party-In-Interest (Bankruptcy Estate Owns Asbestos Claims)

III. **Other Issues of State Law in MDL 875**
   - A. Statute of Limitations
     1. Triggering of the Statute of Limitations
     2. One- or Two-Disease State
   - B. Statute of Repose
   - C. Diagnostic/Medical Evidence Requirement
   - D. Premises Liability and Duties Owed to Non-Employees
   - E. State Workers Compensation Schemes
   - F. Failure to Warn Claims
   - G. Issues of Successor Liability
   - H. Issues of Joint Venturer Liability
   - I. Sovereign Immunity
   - J. Intentional Torts
   - K. Punitive Damages

CASE TOTALS (LAND + MARDOC) AS OF FEBRUARY 29, 2016

By Year

	CASES TRANSFERRED TO EDPA	CASES TERMINATED IN EDPA	CASES PENDING IN EDPA	
8/1/2006 - 10/31/2008	53,803	1,985	AS OF 10/31/2008	51,818
11/1/2008 - 12/31/2009	44,779	44,553	AS OF 12/31/2009	52,044
1/1/2010 - 12/31/2010	46,936	79,240	AS OF 12/31/2010	19,740
1/1/2011 - 12/31/2011	38,780	47,485	AS OF 12/31/2011	11,035
1/1/2012 - 12/31/2012	2,142	6,996	AS OF 12/31/2012	6,181
1/1/2013 - 12/31/2013	144	3,334	AS OF 12/31/2013	2,991
1/1/2014 - 12/31/2014	12	915	AS OF 12/31/2014	2,088
1/1/2015 - 12/31/2015	11	1,554	AS OF 12/31/2015	545
1/1/2016 - 2/29/2016	4	3	AS OF 2/29/2016	546
TOTAL 8/1/2006 - 2/29/2016	**186,611**	**186,065**	AS OF 2/29/2016	**546**

By Docket

	CASES TRANSFERRED TO EDPA	CASES TERMINATED IN EDPA	CASES PENDING IN EDPA	
LAND CASES	123,238	123,229	AS OF 2/29/2016	9
MARDOC CASES	63,373	62,836	AS OF 2/29/2016	537
TOTAL 8/1/2006 - 2/29/2016	**186,611**	**186,065**	AS OF 2/29/2016	**546**

STATISTICS AS OF FEBRUARY 29, 2016 BY JURISDICTION

DISTRICT COURT	CASES FILED	CASES TERMINATED	CASES PENDING
DC	**34**	**34**	**0**
District of Columbia	34	34	0
1ST CIRCUIT	**2,834**	**2,834**	**0**
Maine	277	277	0
Massachusetts	2,065	2,065	0
New Hampshire	130	130	0
Puerto Rico	77	77	0
Rhode Island	285	285	0
2ND CIRCUIT	**26,278**	**26,276**	**2**
Connecticut	1,381	1,381	0
New York Eastern	6,924	6,924	0
New York Northern	344	344	0
New York Southern LAND	10,227	10,227	0
New York Southern MARDOC	6,959	6,957	2
New York Western	441	441	0
Vermont	2	2	0
3RD CIRCUIT	**10,224**	**10,206**	**18**
Delaware	460	460	0
New Jersey	828	828	0
Pennsylvania Eastern	8,613	8,604	9
Pennsylvania Middle	1	1	0
Pennsylvania Western	93	93	0
Virgin Islands LAND	203	203	0
Virgin Islands MARDOC	26	17	9

DISTRICT COURT	CASES FILED	CASES TERMINATED	CASES PENDING
4TH CIRCUIT	**20,120**	**20,120**	**0**
Maryland	1,388	1,388	0
North Carolina Eastern	1,249	1,249	0
North Carolina Middle	828	828	0
North Carolina Western	1,826	1,826	0
South Carolina	2,267	2,267	0
Virginia Eastern	11,464	11,464	0
Virginia Western	921	921	0
West Virginia Northern	66	66	0
West Virginia Southern	111	111	0
5TH CIRCUIT	**43,620**	**43,620**	**0**
Louisiana Eastern	379	379	0
Louisiana Middle	139	139	0
Louisiana Western LAND	82	82	0
Louisiana Western MARDOC	1	1	0
Mississippi Northern	568	568	0
Mississippi Southern	33,326	33,326	0
Texas Eastern	6,737	6,737	0
Texas Northern	1,544	1,544	0
Texas Southern	760	760	0
Texas Western	84	84	0

DISTRICT COURT		CASES FILED	CASES TERMINATED	CASES PENDING
6TH CIRCUIT		**62,182**	**61,656**	**526**
Kentucky Eastern		278	278	0
Kentucky Western		257	257	0
Michigan Eastern	LAND	120	120	0
Michigan Eastern	MARDOC	368	356	12
Michigan Western		30	30	0
Ohio Northern	LAND	4,152	4,152	0
Ohio Northern	MARDOC	56,019	55,505	514
Ohio Southern		236	236	0
Tennessee Eastern		250	250	0
Tennessee Middle		88	88	0
Tennessee Western		384	384	0
7TH CIRCUIT		**8,768**	**8,768**	**0**
Illinois Central		1,724	1,724	0
Illinois Northern		1,135	1,135	0
Illinois Southern		463	463	0
Indiana Northern		1,541	1,541	0
Indiana Southern		1,968	1,968	0
Wisconsin Eastern		1,273	1,273	0
Wisconsin Western		664	664	0

DISTRICT COURT	CASES FILED	CASES TERMINATED	CASES PENDING
8TH CIRCUIT	**3,541**	**3,541**	**0**
Arkansas Eastern	86	86	0
Arkansas Western	19	19	0
Iowa Northern	27	27	0
Iowa Southern	1,924	1,924	0
Minnesota	470	470	0
Missouri Eastern	350	350	0
Missouri Western	130	130	0
Nebraska	126	126	0
North Dakota	407	407	0
South Dakota	2	2	0
9TH CIRCUIT	**2,977**	**2,977**	**0**
Alaska	121	121	0
Arizona	602	602	0
California Central	248	248	0
California Eastern	16	16	0
California Northern	843	843	0
California Southern	57	57	0
Guam	3	3	0
Hawaii	81	81	0
Idaho	115	115	0
Montana	165	165	0
Nevada	187	187	0
Northern Mariana Island	4	4	0
Oregon	162	162	0
Washington Eastern	175	175	0
Washington Western	198	198	0

DISTRICT COURT	CASES FILED	CASES TERMINATED	CASES PENDING
10TH CIRCUIT	**2,525**	**2,525**	**0**
Colorado	503	503	0
Kansas	614	614	0
New Mexico	277	277	0
Oklahoma Eastern	29	29	0
Oklahoma Northern	223	223	0
Oklahoma Western	304	304	0
Utah	453	453	0
Wyoming	122	122	0
11TH CIRCUIT	**3,508**	**3,508**	**0**
Alabama Middle	77	77	0
Alabama Northern	748	748	0
Alabama Southern	296	296	0
Florida Middle	121	121	0
Florida Northern	22	22	0
Florida Southern	634	634	0
Georgia Middle	35	35	0
Georgia Northern	688	688	0
Georgia Southern	887	887	0
TOTAL	**186,611**	**186,065**	**546**

MDL 875 STATISTICS AS OF FEBRUARY 29, 2016 FOR BOTH LAND & MARDOC

- **MARDOC: 537**
- **E.D. Pa. Land Cases: 9**

Total pending cases (land + MARDOC): 546

Website Statistics

(2009 - 2016)

DIRECTORY DESCRIPTION	2009*	2010	2011	2012	2013	2014	2015	2016**	TOTAL
MDL 875 HOME	39075	48552	43290	33140	19161	12200	9926	1161	206505

SUBDIRECTORY DESCRIPTION	2009*	2010	2011	2012	2013	2014	2015	2016**	TOTAL
UPDATES	12918	19303	18110	13967	7459	4272	4066	115	80210
OPINIONS	2111	6126	10943	10360	7081	5934	4820	125	47500
PROCEDURES	4447	8734	8753	8204	4776	3736	3255	86	41991
ADMINISTRATIVE ORDERS	5866	7773	8472	6035	2852	3462	4864	40	39364
MARDOC CASE INFORMATION	504	6041	8443	8939	5853	1954	3276	78	35088
CONTACTS	4634	6448	5877	5548	5003	4664	1504	141	33819
CASES REFERRED TO JUDGE STRAWBRIDGE	-	1881	7016	8481	3780	1827	1327	43	24355
NOTICES	-	5638	7168	5060	2313	1596	1310	57	23142
ABOUT	-	3459	5769	5183	2384	1959	1716	76	20546
SUMMARY JUDGMENT PROCEDURES	-	4130	5530	4225	1547	1236	1947	44	18659
STATISTICS	1103	2489	4585	4440	2202	1673	1026	89	17607
COMPREHENSIVE MDL 875 CALENDAR	5327	3265	2414	1698	827	104	-	-	13635
CASES REFERRED TO JUDGE HEY	-	2000	4537	3641	1251	1269	899	43	13640
CASE INFORMATION	3228	4083	-	-	-	-	-	-	7311
ADMINISTRATIVE ORDER NO. 12 (AS AMMENDED)	3370	2317	650	-	-	-	-	-	6337
OPINIONS ISSUED BY JUDGE ROBRENO	-	-	1684	1841	1368	1281	1639	-	7813
MOTION SCHEDULE	2480	130	-	-	-	-	-	-	2610
CASE MANAGEMENT FLOWCHART	628	1265	432	48	-	-	1030	-	3403
DISCOVERY PLAN TEMPLATE	492	1326	276	82	-	-	-	-	2176
SETTLEMENT CONFERENCE SCHEDULE	1800	99	-	-	-	-	-	-	1899
STEERING COMMITTEES	953	385	-	-	-	-	-	-	1338
OLD ADMINISTRATIVE ORDERS	-	666	-	-	-	-	-	-	666

* BEGINNING 3/1/2009

** AS OF 2/29/2016

LIST OF JURISDICTIONS FOR FUTURE TAG-ALONG CASES

1	Eastern District of Virginia
2	Central District of Illinois
3	Northern District of Illinois
4	Southern District of Illinois
5	Northern District of Indiana
6	Southern District of Indiana
7	Eastern District of Wisconsin
8	Western District of Wisconsin
9	Northern District of Ohio

10	Northern District of California
11	Connecticut
12	Southern District of New York
13	Eastern District of New York
14	Eastern District of North Carolina
15	Middle District of North Carolina
16	Western District of North Carolina
17	North Dakota
18	Eastern District of Pennsylvania

Lessons Learned:

- MDL Litigation as a continuum;
- One Plaintiff-One Claim, or “If you build it…;”
- “It takes a village;”
- Procedural Road Map;
- Legal Architecture;
- Win-Win Plaintiffs-Defendants.