

SEEGER SALVAS & DEVINE LLP

ATTORNEYS AT LAW

455 MARKET STREET

SUITE 1530

SAN FRANCISCO, CALIFORNIA 94105

TEL. (415) 981-9260

FAX (415) 981-9266

SEEGERSALVAS.COM

Brian J. Devine

E-mail Address: bdevine@seegersalvas.com

June 25, 2019

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

**Re: Proposed Rule Amendment Regarding Interlocutory Appeals in
MDL Cases**

Dear Ms. Womeldorf:

A group of pharmaceutical defendants has proposed radically amending the Federal Rules of Civil Procedure to add a new rule allowing the immediate interlocutory appeal of certain non-final orders in multidistrict litigation (“MDL”) proceedings. I am writing to share our concerns and observations about the proposed new rule.

Although the proponents of the new rule have not proposed any specific language, they have suggested that in large MDL cases involving claims of personal injuries, a party could request—without the MDL judge’s permission—an interlocutory appeal of any order denying or granting a motion that, if successful, would be dispositive of a large number of claims. The defendants suggest—without pointing to any specific examples—that the existing procedures (such as discretionary interlocutory appeals under §1292(b), partial judgments under Rule 54(b), and writs of mandamus) are insufficient, and that erroneous orders by MDL judges are going unreviewed by the appellate courts.

Our research—described in detail below—concludes that no problem exists that could be solved by defendants’ proposed rule. Put simply, their proposal is a solution in search of a problem. Guided by the principle that any newly proposed federal rule should “do no harm,” we expanded our research to identify and quantify the negative consequences that would occur if the proposed rule was adopted.

Based on our research, we would like to share the following five observations regarding defendants’ proposed rule:

Ms. Rebecca A. Womeldorf
June 25, 2019
Page 2

Observation 1 – No Problem Exists That The Proposed Rule Would Solve

We conducted a wide-ranging, objective, data-based study to determine if any problem exists that defendants’ proposed rule could solve.¹ Our starting point was to identify—using the criteria proposed by the defendants—all of the recent MDLs to which the proposed rule would have applied. Using data provided by the Judicial Panel for Multidistrict Litigation, we identified all of the large (more than 500 cases), recent (opened in the last 20 years and either still open or terminated in the last 5 years), and mature (closed or with more than 70% of the cases resolved) MDLs involving personal injuries. Our search identified 37 MDLs that together resolved almost 200,000 individual cases.

Because defendants predicate their proposed rule on the assumption that the existing procedures do not work in large MDLs, we searched all 37 MDL cases to determine how frequently an MDL judge denied a request for interlocutory review of an order using the existing procedures, only to be reversed after final judgment. After searching the appellate history for all 37 of these MDL cases, we were not able to find even a single case where this occurred.

We then expanded our inquiry to determine if MDL judges commit reversible error at such a high rate that would justify subjecting them to the additional and heightened layer of appellate review that the defendants propose. To answer this question, we searched for all appellate decisions that reviewed an order issued by an MDL transferee judge in any of the 37 MDL cases. We reviewed each of the 115 resulting appellate court opinions and found that the MDL judge’s decision was fully affirmed 87 percent of the time and partially affirmed another 3 percent of the time.

This data shows that the existing procedures—including review of final judgments, discretionary interlocutory review under §1292(b), and review of partial judgments under Rule 54(b)—are working properly in large MDL cases. Subjecting MDL judges to an additional and heightened layer of appellate review is unnecessary and, as is discussed in the next sections, would significantly harm the judiciary and the parties.

Observation 2: The Proposed Rule Strips MDL Judges of The Discretion Needed To Manage Complex Litigation

A key provision that makes discretionary interlocutory appeals under §1292(b) work well is that *both* the district court judge and a panel of the circuit court must agree that an interlocutory appeal is justified. The original proposal for §1292(b)—like the defendants’ proposed rule—gave the circuit court the sole discretion to allow

¹ The full methodology that we used to conduct this study and the detailed results of our study are provided in Appendix 1.

Ms. Rebecca A. Womeldorf
June 25, 2019
Page 3

interlocutory appeals, removing the district court judge from the decision. Congress rejected this proposal, concluding that the district courts are in a superior position to exercise the discretion to allow or disallow interlocutory appeals.²

The Supreme Court repeatedly has held that permitting interlocutory appeals without the district court judge's approval "would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."³ As eight retired federal district judges recently observed, "[s]uch battlefield decisions are best made by the one observing the combatants."⁴

Because MDL cases are so complex, the circuit courts have provided MDL judges with even greater discretion to decide how to manage their cases. For example, the Eighth Circuit has held repeatedly that "MDL courts must be given greater discretion to organize, coordinate, and adjudicate its proceedings" ⁵ Likewise, the Fifth Circuit held that "[t]he trial court's managerial power is especially strong and flexible in matters of consolidation."⁶

Defendants' proposed rule singles out MDL judges for an additional and heightened layer of appellate review and strips them of the critical discretion over such appeals that

² H.R. Rep. No. 85-1667, at 5–6 (1958), reprinted in 1958 U.S.C.A.N.N. 5255, 5262 ("Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the future course of the litigation with any degree of accuracy.")

³ *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); see also, *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals"), *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-7 (1956) (holding that the district judge serves as a "dispatcher" of appeals, to "meet the demonstrated need for flexibility" in certifying partial judgments and this decision is, "with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay"), *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12 (1980) ("the task of weighing and balancing the contending factors [associated with certifying an issue for interlocutory appeal] is peculiarly one for the trial judge, who can explore all the facets of a case.")

⁴ Brief of Retired United States District Judges as *Amici Curiae* in Support Of Respondents, *Hall v. Hall*, U.S. Supreme Court case No. 16-1150 (available at https://www.supremecourt.gov/DocketPDF/16/16-1150/24465/20171219182434223_16-1150%20bsac%20Retired%20US%20DCT%20Judges%20PDF-A.pdf) (arguing that a the district court is in the best position to determine when partial appeals are appropriate in a consolidated case).

⁵ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007); see also, *Freeman v. Wyeth*, 764 F.3d 806, 809 (8th Cir. 2014); *In re Prempro Prods. Liab. Litig.*, 423 Fed. Appx. 659 (8th Cir. 2011).

⁶ *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413 (5th Cir. 2013).

Ms. Rebecca A. Womeldorf
June 25, 2019
Page 4

has been carefully guarded by both Congress and the Supreme Court. The proposed rule undermines MDL judges and, in so doing, significantly harms the judiciary.

Observation 3: The Proposed Rule Would Significantly Prejudice Plaintiffs By Causing Unnecessary Delays

In addition to harming the judiciary, the added layer of interlocutory appeals that the defendants propose would significantly harm plaintiffs by causing unnecessary disruption and delay in MDL cases. Indeed, when Congress debated allowing discretionary interlocutory appeals through what became §1292(b), Senators expressed concern that “the indiscriminate use of such authority [might] result in delay rather than expedition of cases in the district courts.”⁷

To quantify the amount of delay that the proposed rule would cause in MDL cases, we conducted a study to determine the average amount of time it takes for the circuit courts to decide interlocutory appeals.⁸ We set out to identify all of the cases decided in 2018 in which: (1) the district court certified an issue for appeal pursuant to §1292(b), (2) the circuit court agreed to accept the appeal, and (3) the circuit court rendered an opinion on the merits of the interlocutory appeal. We found that the average time that elapsed between the district court entering the order that was subject to interlocutory review and the circuit court filing a decision on the appeal was **23 months**. The shortest time was 10 months, and the longest time was 43 months.

The delays caused by interlocutory appeals impose significant detrimental consequences on the litigants and the judicial system, particularly in large MDL cases. For example, Judge Jack Weinstein (later quoted by Judge Shira Scheindlin) compared discovery in MDL proceedings to moving an oil tanker, noting that “neither is amenable to sudden stops or changes in direction. Suspending discovery for many months while appeals are taken would constitute a significant burden on the timely and efficient disposition of the cases.”⁹

In addition to the significant disruption to the judicial system, interlocutory appeals will also deprive many plaintiffs of the ability to obtain justice during their lifetime. The type of MDLs that defendants’ rule targets often involve medical devices and pharmaceuticals used by an older population with underlying medical ailments. This

⁷ S. REP. NO. 85-2434, at 3

⁸ The full methodology that we used to conduct this study and the detailed results of our study are provided in Appendix 2.

⁹ *National Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 167 (E.D.N.Y. 1999); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 9 (S.D.N.Y. 2001).

Ms. Rebecca A. Womeldorf
June 25, 2019
Page 5

population is at an increased risk of dying before their case gets resolved. Adding further delays to the already lengthy process to get a civil case resolved would only prejudice these people further.

Observation 4: Defendants’ Proposal Is A Cynical Attempt To Gain An Unfair Advantage

The U.S. Chamber’s Institute of Legal Reform—one of the key proponents of the proposed rule stripping MDL judges of their discretion over interlocutory appeals—recently argued against allowing a *plaintiff* to appeal a final judgment without approval from the MDL judge.

When a plaintiff appealed an MDL court’s dismissal of its entire complaint, the U.S. Chamber argued that the dismissal was not a “final judgment” because other cases, filed by other plaintiffs, remained in the MDL proceeding.¹⁰ Claiming that the plaintiffs’ appeal was interlocutory in nature, the U.S. Chamber argued to the Supreme Court that the MDL judge alone should decide when to allow appeals:

[I]n view of the enormous task that confronts a district judge assigned to manage an MDL, attention to on-the-ground practicalities is paramount. In particular, in order to achieve the efficiency that ‘Congress established MDL protocols to encourage,’ an ‘MDL court[] must be given greater discretion to organize, coordinate and adjudicate its proceedings’ than a judge handling a typical one-on-one suit.

* * *

The MDL judge is uniquely situated to decide when an immediate appeal in a constituent case “will promote the just and efficient conduct” of the actions generally. 28 U.S.C. § 1407(a). ***Accordingly, rather than decreeing a wooden, one-size-fits-all rule allowing immediate appeals from every dispositive order in an MDL, the Court should leave the determination of finality to the sound discretion of the MDL judge.***¹¹

¹⁰ The Supreme Court held that the dismissal of the plaintiff’s case was a final judgment creating proper appellate jurisdiction, so it did not address the discretion of an MDL court to disallow an interlocutory appeal. *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015).

¹¹ Brief Of The Chamber Of Commerce Of The United States Of America As Amicus Curiae In Support Of Respondents, *Gelboim v. Bank of America Corp.*, Supreme Court Case 13-1174, at 8 (accessible at <https://www.chamberlitigation.com/sites/default/files/scotus/files/2014/U.S.%20Chamber%20Amicus%20Brief%20--%20Gelboim%2C%20et%20al.%20v.%20Bank%20of%20America%20%28U.S.%20Supreme%20Court%29.pdf>).

Ms. Rebecca A. Womeldorf
June 25, 2019
Page 6

Despite the Chamber stridently—and correctly—arguing that MDL judges must have the discretion to disallow interlocutory appeals filed by *plaintiffs*, it now advocates a rule that would strip MDL judges of their discretion to disallow interlocutory appeals filed mostly by *defendants*. Far from a reasoned and thoughtful attempt to amend the federal rules to make them fair to all parties, the defendants' proposal is cynical gamesmanship aimed only at gaining an unfair strategic advantage.

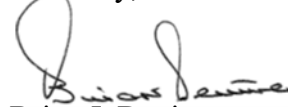
Observation 5: The Proposed Rule Will Have Unintended Consequences

In addition to the harm defendants' proposal would cause to the judiciary and to plaintiffs, we are also concerned about the resulting detrimental consequences on the efficiencies now realized from MDL cases. For example, if MDL cases become bogged down by interlocutory appeals, plaintiffs likely will choose to file their cases in state courts. This could diminish the significance of the MDL, cause the MDL to take a backseat to state court proceedings, and decrease the efficiencies realized by all parties. An MDL judge also might conclude that the appeal of an issue is not appropriate and might choose to take the motion under submission without ruling on it. This would give the parties less clarity about how the court will resolve key legal issues in the case, and would make resolution decisions more difficult.

Conclusion

For all of these reasons, we believe that a proposed rule that would strip MDL judges of their discretion to allow or disallow interlocutory appeals is unnecessary and would cause significant harm to the judiciary, to plaintiffs, and to the efficiencies realized through MDL proceedings.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian J. Devine". The signature is fluid and cursive, with a large initial "B" and "D".

Brian J. Devine

Appendix 1 – Affirmance Rate of MDL Transferee Judges

Our search was based on data available as of May 7, 2019.

To identify all multidistrict litigation proceedings, we used two reports published by the Judicial Panel on Multidistrict Litigation (“JPML”):

- “MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending” as of April 15, 2019, and
- “Multidistrict Litigation Terminated Through September 30, 2018” (the most recent data available as of 4/15/2019).

We reviewed this data to identify all MDLs that met the following four criteria:

- **Large** - More than 500 total actions;
- **Recent** – MDL created in last 20 years and either still open or terminated in the last 5 years; and
- **Mature** – Either terminated or open with more than 70% of the cases resolved; and
- **Personal Injury** – MDL primarily involved claims of personal injury caused by a product.

The 37 MDLs (17 terminated and 20 still open) that met all four criteria are:

	MDL No.	Name
1.	MDL - 1431	Baycol Products Liability Litigation
2.	MDL - 1871	Avandia Marketing, Sales Practices And Products Liability Litigation
3.	MDL - 1964	Nuvaring Products Liability Litigation
4.	MDL - 2158	Zimmer Durom Hip Cup Products Liability Litigation
5.	MDL - 2187	C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation
6.	MDL - 2197	DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation
7.	MDL - 2243	Fosamax (Alendronate Sodium) Products Liability Litigation (No. ii)
8.	MDL - 2272	Zimmer NexGen Knee Implant Products Liability Litigation
9.	MDL - 2325	American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation
10.	MDL - 2326	Boston Scientific Corp. Pelvic Repair System Products Liability Litigation
11.	MDL - 2327	Ethicon, Inc., Pelvic Repair System Products Liability Litigation

Letter from Brian Devine re: Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases
Appendix 1 - Page 2

	MDL No.	Name
12.	MDL - 2329	Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation
13.	MDL - 2331	Propecia (Finasteride) Products Liability Litigation
14.	MDL - 2387	Coloplast Corp. Pelvic Support Systems Products Liability Litigation
15.	MDL - 2391	Biomet M2a Magnum Hip Implant Products Liability Litigation
16.	MDL - 2419	New England Compounding Pharmacy, Inc., Products Liability Litigation
17.	MDL - 2428	Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation
18.	MDL - 2433	E. I. Du Pont De Nemours And Company C-8 Personal Injury Litigation
19.	MDL - 2440	Cook Medical, Inc., Pelvic Repair System Products Liability Litigation
20.	MDL-1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation
21.	MDL-1507	Prempro Products Liability Litigation
22.	MDL-1657	Vioxx Products Liability Litigation
23.	MDL-1742	Ortho Evra Products Liability Litigation
24.	MDL-1760	Aredia® and Zometa® Products Liability Litigation
25.	MDL-1789	Fosamax Products Liability Litigation
26.	MDL-1842	Kugel Mesh Hernia Patch Products Liability Litigation
27.	MDL-1909	Gadolinium-Based Contrasts Products Liability Litigation
28.	MDL-1928	Trasylol Products Liability Litigation
29.	MDL-1943	Levaquin Products Liability Litigation
30.	MDL-1953	Heparin Products Liability Litigation
31.	MDL-2004	Mentor Corp. Obtape Transobturator Sling Products Liability Litigation
32.	MDL-2092	Chantix (Varenicline) Products Liability Litigation
33.	MDL-2299	Actos (Pioglitazone) Products Liability Litigation

	MDL No.	Name
34.	MDL-2342	Zoloft (Sertraline Hydrochloride) Products Liability Litigation
35.	MDL-2385	Pradaxa (Dabigatran Etexilate) Products Liability Litigation
36.	MDL-2434	Mirena IUD Products Liability
37.	MDL-2502	Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No II)

We then conducted searches on Lexis between April 25, 2019 and April 30, 2019 to attempt to identify all cases in which a court of appeals reviewed a decision by the MDL judge in any of these 37 MDLs.¹ This search identified 115 decisions by MDL courts that were reviewed on the merits by a circuit court or the Supreme Court.

In these appellate opinions (which are summarized below):

- The circuit court affirmed the MDL court in 100 of the 115 cases (87%)
- The circuit court partially affirmed and partially reversed or vacated the MDL court's decision in 3 of the 115 cases (3%)
- The circuit court reversed the MDL court in 12 of the 115 cases (10%)

¹ We attempted to find all opinions by using search terms that included, in the disjunctive, the MDL number (*e.g.*, "MDL-2272"), the case number (*e.g.*, "md-2272"), and variations of the MDL case name (*e.g.*, "NexGen" OR "In re: Zimmer"). We recognize that we may not have found all opinions if an opinion did not contain the MDL number, the MDL case number, and if the name of the MDL was misspelled or otherwise was not accurate in the opinion. For example, if an individual case was appealed and the circuit court opinion did not mention or reference the MDL case name or number, we could have missed that opinion (although our use of broad search terms such as "NexGen" should have found any case that involved this product even if it did not mention the MDL case number). Because of the large number of cases that are included in our study, and because any missed cases likely would have the same affirmance rate as those that we found, we do not believe that any missed cases would significantly impact the conclusions we reach from the data.

Letter from Brian Devine re: Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases
Appendix 1 - Page 4

MDL No.	Case Name	Appeals	Affirmed	Reversed	Partially Affirmed / Reversed
MDL - 1431	Baycol Products Liability Litigation	8	3	3	2
MDL - 1871	Avandia Marketing, Sales Practices And Products Liability Litigation	10	9	1	0
MDL- 2187	C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation	1	1	0	0
MDL - 2243	Fosamax (Alendronate Sodium) Products Liability Litigation (No. Ii)	2	1	1	0
MDL - 2272	Zimmer NexGen Knee Implant Products Liability Litigation	1	1	0	0
MDL - 2326	Boston Scientific Corp. Pelvic Repair System Products Liability Litigation	2	2	0	0
MDL - 2327	Ethicon, Inc., Pelvic Repair System Products Liability Litigation	2	2	0	0
MDL - 2391	Biomet M2a Magnum Hip Implant Products Liability Litigation	1	1	0	0
MDL - 2434	Mirena IUD Products Liability Litigation	2	2	0	0
MDL- 1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation	39	38	1	0
MDL- 1507	Prempro Products Liability Litigation	5	4	1	0
MDL- 1657	Vioxx Products Liability Litigation	14	14	0	0
MDL- 1742	Ortho Evra Products Liability Litigation	1	1	0	0
MDL- 1760	Aredia and Zometa Products Liability Litigation	6	6	0	0
MDL- 1789	Fosamax Products Liability Litigation	3	3	0	0
MDL- 1909	Gadolinium-Based Contrast Agents Products Liability Litigation	1	1	0	0
MDL- 1928	Trasylol Products Liability Litigation	5	5	0	0
MDL- 1943	Levaquin Products Liability Litigation	2	1	0	1
MDL- 1953	Heparin Products Liability Litigation	1	1	0	0
MDL- 2004	Mentor Corp. Obtape Transobturator Sling Products Liability Litigation	5	1	4	0

Letter from Brian Devine re: Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases
Appendix 1 - Page 5

MDL No.	Case Name	Appeals	Affirmed	Reversed	Partially Affirmed / Reversed
MDL-2342	Zoloft (Sertraline Hydrochloride) Products Liability Litigation	1	1	0	0
MDL-2385	Pradaxa (Dabigatran Etexilate) Products Liability Litigation	2	1	1	0
MDL-2502	Lipitor (Atorvastatin Calcium) Marketing, Sales Practices And Products Liability Litigation (No II)	1	1	0	0
	TOTALS	115	100	12	3
			86.9%	10.4%	2.6%

DETAILS OF ALL APPEALS REVIEWED

Baycol Products Liability Litigation (MDL -1431)

1. Partially Reversed - Plaintiffs' attorneys appealed the MDL court's imposition of sanctions. The 8th Circuit affirmed the removal of an attorney from the Plaintiffs' Steering Committee, but vacated the sanctions. *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794 (8th Cir. 2005).
2. Reversed – Following the MDL court's denial of a motion by plaintiffs to certify a class of West Virginia consumers, other consumers sought to certify a class in West Virginia state court. The MDL judge granted defendants' request to enjoin the plaintiffs from relitigating class certification in state court. The 8th Circuit affirmed the MDL court's order. *Smith v. Bayer Corp. (In re Baycol Prods. Litig.)*, 593 F.3d 716 (2010). The Supreme Court later reversed the 8th Circuit and the MDL court's order and vacated the injunction under the Anti-Injunction Act. *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011).
3. Reversed – Plaintiff appealed the MDL court's dismissal of her qui tam case on the ground that she was not an "original source" of the information. The 8th Circuit reversed, holding that the MDL court misapplied the circuit's definition of "original source." *In re Baycol Prods. Litig.*, 870 F.3d 960 (8th Cir. 2017).
4. Reversed – A deceased plaintiff's successors in interest appealed the MDL court's denial of their motion to substitute following the plaintiff's death. The 8th Circuit reversed the MDL court's decision. *Torres v. Bayer Corp. (In re Baycol Prods. Litig.)*, 616 F.3d 778 (8th Cir. 2010)
5. Affirmed – Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Brewer v. Bayer AG (In re Baycol Prods. Litig.)*, 2009 U.S. App. LEXIS 24903 (8th Cir. 2009)
6. Affirmed - Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Caravella v. Bayer AG (In re Baycol Prods. Litig.)*, 359 Fed. Appx. 679 (8th Cir. 2009).
7. Affirmed - Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Flesner v. Bayer AG (In re Baycol Prods. Litig.)*, 596 F.3d 884 (8th Cir. 2010).
8. Partially Reversed – Qui tam plaintiff appealed MDL court's dismissal of her case for failure to plead fraud with particularity. The 8th Circuit affirmed the dismissal relating to some of plaintiff's claims, but reversed as to other claims and remanded for further proceedings. *United States ex rel. Simpson v. Bayer Healthcare (In re Baycol Prods. Litig.)*, 732 F.3d 869 (8th Cir. 2013)

Avandia Marketing, Sales Practices and Products Liability Litigation (MDL -1871)

1. Reversed - A health insurer appealed the MDL court's dismissal of its case against a pharmaceutical company, holding that the Medicare Act did not provide Medicare Advantage organizations with a private cause of action to seek such reimbursement. The 3rd Circuit reversed. *In re Avandia Mktg.*, 685 F.3d 353 (3rd Cir. 2012)

2. Affirmed - A plaintiff's attorney appealed the MDL court's pretrial order establishing a common benefit fund that included an assessment from proceeds recovered in cases litigated in state court. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 658 Fed. Appx. 29 (3rd Cir. 2016).
3. Affirmed – A plaintiff appealed the MDL court's dismissal of his complaint for failure to serve a required expert report. The 3rd Circuit affirmed the MDL court's dismissal. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 687 Fed. Appx. 210 (3rd Cir. 2017)
4. Affirmed – Plaintiff's attorney appealed an order by the MDL court holding that the law firm violated an order requiring a common benefit assessment on settled cases. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 617 Fed. Appx. 136 (3rd Cir. 2015)
5. Affirmed – A plaintiff appealed the MDL court's dismissal of her case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 746 Fed. Appx. 122 (3rd Cir. 2018)
6. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on a 12(b)(1) motion to dismiss. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 639 Fed. Appx. 866 (3rd Cir. 2016)
7. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on a 12(b)(1) motion to dismiss. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Lit.*, 564 Fed. Appx. 672 (3rd Cir. 2014)
8. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 639 Fed. Appx. 874 (3rd Cir. 2016).
9. Affirmed – Plaintiff appealed the MDL court's dismissal of his breach of express warranted claim. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 588 Fed. Appx. 171 (3rd Cir. 2014)
10. Affirmed – In an interlocutory appeal certified under §1292(b), pharmaceutical company appealed MDL court's denial of their motion to dismiss a third-party payor's RICO claim. The Third Circuit affirmed the MDL court's decision. ***This interlocutory appeal took two years to decide from the time of the MDL court's original order.*** *In re Avandia Mktg.*, 804 F.3d 633 (3rd Cir. 2015).

C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation (MDL 2187)

- Affirmed – Defendant appealed MDL judge's order excluding evidence of FDA 510(k) clearance at trial, and its order finding that the award of punitive damages was not unconstitutional. The 4th Circuit affirmed the MDL judge's orders. *Cisson v. C.R. Bard, Inc.* (*In re C.R. Bard, Inc.*), 810 F.3d 913 (4th Cir. 2016).

Fosamax (Alendronate Sodium) Products Liability Litigation (No. II) (MDL -2243)

1. Affirmed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150 (3rd Cir. 2014).

2. Reversed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 3rd Cir. reversed the MDL court. *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268 (3rd Cir. 2017).

Zimmer NexGen Knee Implant Products Liability Litigation (MDL -2272)

1. Affirmed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 7th Cir. affirmed the MDL court. *Zimmer, NexGen Knee Implant Prods. Liab. Litig.*, 884 F.3d 746 (7th Cir. 2018).

Boston Scientific Corp. Pelvic Repair System Products Liability Litigation (MDL -2326)

1. Affirmed - Defendants appealed the MDL judge's decisions to consolidate actions for trial and to exclude certain regulatory evidence. The 4th Cir. affirmed both decisions. *Campbell v. Boston Sci. Corp.*, 882 F.3d 70 (4th Cir. 2018),
2. Affirmed – Defendants appealed the MDL judge's decisions to consolidate actions for trial and his denial of a motion for judgment as a matter of law. The 11th Cir. affirmed both decisions. *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304 (11th Cir. 2017)

Ethicon, Inc., Pelvic Repair System Products Liability Litigation (MDL -2327)

1. Affirmed - Plaintiffs appealed an order dismissing the action for failure to effect service. The Fourth Circuit affirmed the decision. *Weer v. Ethicon, Inc. (In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.)*, 643 Fed. Appx. 304 (4th Cir. 2016).
2. Affirmed – Plaintiffs appealed an order dismissing the action for failure to effect service. The Fourth Circuit affirmed the decision. *Marshall v. Ethicon, Inc.*, 670 Fed. Appx. 775 (4th Cir. 2016).

Biomet M2a Magnum Hip Implant Products Liability Litigation (MDL-2391)

- Affirmed – Plaintiff appealed dismissal of his case on a motion for summary judgment. The 7th Circuit affirmed the MDL court. *Eastman v. Biomet, Inc.*, 724 Fed. Appx. 481 (7th Cir. 2018).

Mirena IUD Products Liability (MDL-2434)

1. Affirmed – Plaintiffs appealed the MDL court's order granting summary judgment on the basis of lack of admissible expert evidence. The 2nd Circuit affirmed the MDL court's order. *Mirena MDL v. Bayer Healthcare Pharms. Inc. (In re Mirena IUD Prods. Liab. Litig.)*, 713 Fed. Appx. 11 (2nd Cir. 2017).
2. Affirmed – Plaintiff appealed the MDL court's order dismissing her case as time barred. The 2nd Circuit affirmed the MDL court's order. *Medinger v. Bayer Healthcare Pharms. Inc.*, 667 Fed. Appx. 321 (2nd Cir. 2016).

Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig. (MDL-1203)

1. Affirmed – Plaintiffs and law firms appealed MDL court's award of common benefit attorneys' fees. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs*

- (*Phentermine/Fenfluramine/Dexfenfluramine*) *Prod. Liab. Litig.*, 582 F.3d 524 (3rd Cir. 2009)
2. Affirmed – Plaintiff filed an interlocutory appeal of MDL court’s order, pursuant to the All Writs Act, enjoining a mass opt out of a state class. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs Prods. Liab. Litig.*, 282 F.3d 220 (3rd Cir. 2002)
 3. Affirmed – Plaintiff appealed MDL court’s determination that she is not entitled to benefits under settlement agreement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 2019 U.S. App. LEXIS 4017 (3rd Cir. 2019)
 4. Reversed – Plaintiff appealed the MDL court’s orders, under the All Writs Act, preventing them from seeking certain damages in state court proceedings. The 3rd Cir. upheld the MDL court’s exercise of power under the All Writs Act, but vacated certain parts of the injunctions. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293 (3rd Cir. 2004).
 5. Affirmed – Plaintiff appealed MDL court’s order denying recovery in settlement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs Prods. Liab. Litig.*, 543 F.3d 179 (3rd Cir. 2008)
 6. Affirmed – Class members appealed the MDL court’s order approving class action settlement and imposing certain restrictions on opt-out claims. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., Fleming & Assocs., LLP*, 385 F.3d 386 (3rd Cir. 2004)
 7. Affirmed – Plaintiff appealed the MDL court’s denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 444 Fed. Appx. 627 (3rd Cir. 2011)
 8. Affirmed – Plaintiffs appealed MDL court’s order ruling that they were bound by a prior settlement agreement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141 (3rd Cir. 2005)
 9. Affirmed – Plaintiffs appealed MDL court’s order approving an amendment to the settlement agreement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 93 Fed. Appx. 338 (3rd Cir. 2004)
 10. Affirmed – Plaintiff appealed the MDL court’s order enjoining her from litigating a settled claim against the defendant. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 92 Fed. Appx. 890 (3rd Cir. 2004)
 11. Affirmed – Plaintiff appealed MDL court’s orders denying his motion for voluntary dismissal following exclusion of expert and granting summary judgment in favor of defendants. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs Prods. Liab. Litig. Rubin*, 85 Fed. Appx. 845 (3rd Cir. 2004)
 12. Affirmed - Plaintiff appealed the MDL court’s denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court’s order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 601 Fed. Appx. 143 (3rd Cir. 2015)

13. Affirmed - Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.*, 297 Fed. Appx. 181 (3rd Cir. 2008)
14. Affirmed – Plaintiff appealed MDL court's order denying his motion to compel settlement trust to audit a claim. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig.*, 200 Fed. Appx. 95 (3rd Cir. 2006)
15. Affirm and Remand – Plaintiff appealed MDL court's order enjoining opt-out plaintiffs from making evidentiary arguments related to, inter alia, punitive damages. The 3rd Circuit agreed with the MDL court's damage limitations and held that, for the most part, the terms of the injunction were appropriate. The 3rd Circuit made suggestions to clarify the injunction and remanded the case to the MDL court for further consideration. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 123 Fed. Appx. 465 (3rd Cir. 2005).
16. Affirm – Plaintiffs appealed the MDL court's order granting additional time to settlement trust to administer the settlement claims received by suspending all deadlines for five months. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 90 Fed. Appx. 643 (3rd Cir. 2004)
17. Affirmed - Plaintiff appealed MDL court's order denying his motion to compel settlement trust to audit a claim. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig. (Dahlka)*, 427 Fed. Appx. 233 (3rd Cir. 2011)
18. Affirmed – Plaintiffs appealed MDL court's dismissal of their claims for failure to comply with a discovery order concerning expert reports. The 3rd Circuit affirmed the MDL court's dismissal. *In re Diet Drugs Prods. Liab. Litig.*, 30 Fed. Appx. 27 (3rd Cir. 2002)
19. Affirmed - Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig. v. Farr*, 451 Fed. Appx. 165 (3rd Cir. 2011)
20. Affirmed – Plaintiff appealed MDL court's order denying her motion to opt out of a class settlement and dismissing her case. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig.*, 89 Fed. Appx. 314 (3rd Cir. 2004)
21. Affirmed – Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig.*, 133 Fed. Appx. 832 (3rd Cir. 2005)
22. Affirmed – Court of appeals affirmed the MDL court without a written opinion. *In re Diet Drugs Prods. Liab. Litig.*, 2001 U.S. App. LEXIS 20127 (3rd Cir. 2001)
23. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 575 Fed. Appx. 69 (3rd Cir. 2014)
24. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 596 Fed. Appx. 93 (3rd Cir. 2014)

25. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. Appx. 178
26. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. Appx. 184 (3rd Cir. 2014)
27. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.*, 412 Fed. Appx. 527 (3rd Cir. 2011)
28. Affirmed – Plaintiffs appealed MDL court's order denying reconsideration of attorneys' fee award. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.*, 383 Fed. Appx. 242 (3rd Cir. 2010)
29. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 601 Fed. Appx. 158 (3rd Cir. 2015)
30. Affirmed – Plaintiff appealed the MDL court's order enjoining her lawsuit against defendant. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. Appx. 182 (3rd Cir. 2014) *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig.*, 706 F.3d 217 (3rd Cir. 2013)
31. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermin/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 597 Fed. Appx. 719 (3rd Cir. 2015)
32. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 525 Fed. Appx. 140 (3rd Cir. 2013)
33. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramin/Dexfenfluramine) Prods. Liab. Litig.*, 595 Fed. Appx. 109 (3rd Cir. 2014)
34. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig.*, 553 Fed. Appx. 145 (3rd Cir. 2014)
35. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 609 Fed. Appx. 78 (3rd Cir. 2015)
36. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.*, 375 Fed. Appx. 269 (3rd Cir. 2010)

37. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. Appx. 186 (3rd Cir. 2014)
38. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 601 Fed. Appx. 162 (3rd Cir. 2015)
39. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Davis*, 551 Fed. Appx. 642 (3rd Cir. 2014)

Excluded Cases:

- Excluded: Court of appeals dismissed plaintiff's appeal because notice of appeal was untimely filed. *In re Diet Drugs Prod. Liab. Litig.*, 327 Fed. Appx. 334 (3rd Cir. 2009)
- Excluded: Plaintiff sought interlocutory appeal and writ of mandamus challenging MDL court's order requiring plaintiffs to pay a separate filing fee for each severed and amended complaint. Circuit court denied writ of mandamus and dismissed appeal. *In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372 (3rd Cir. 2005)
- Excluded: Court of appeals dismissed plaintiff's interlocutory appeal of MDL court's order declining to remand their cases from the MDL court to state courts. *In re Diet Drugs (Phentermine/ Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 93 Fed. Appx. 345 (3rd Cir. 2004)
- Excluded: Court of appeals denied plaintiff's writ of mandate. *In re Briscoe*, 448 F.3d 201 (3rd Cir. 2006)
- Excluded: Law firms sought interlocutory appeal and mandamus of MDL court's interim order awarding attorneys fees. Court of appeals denied mandamus and dismissed appeal. *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143 (3rd Cir. 2005)
- Excluded: Denial of writ of mandate – The 3rd Circuit denied a writ of mandate filed by plaintiffs seeking remand by the JPML. *In re Wilson*, 451 F.3d 161(3rd Cir. 2006)

Prempro Products Liability Litigation (MDL-1507)

1. Affirmed - Plaintiff appealed the MDL court's dismissal of her complaint for failure to comply with the court's pretrial orders. The 8th Circuit affirmed the MDL court's dismissal. *Freeman v. Wyeth*, 764 F.3d 806 (8th Cir. 2014)
2. Reversed – Plaintiff appealed the MDL court's orders denying the plaintiff's motion to remand and granting the defendants' motion for summary judgment. The 8th Circuit reversed, finding that remand to state court was proper. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613 (8th Cir. 2010)
3. Affirmed – Following trial, both parties appealed evidentiary decisions and rulings on post-trial motions. The 8th Cir. affirmed the jury verdict and the MDL court's evidentiary orders and jury instruction. It also affirmed the MDL court's order granting judgment as a matter of law in favor of Upjohn, but reversed it as to Wyeth, adopting the MDL court's alternative holding and granting Wyeth a new trial on punitive damages. *Scroggin v. Wyeth (In re Prempro Prods. Liab. Litig.)*, 586 F.3d 547 (8th Cir. 2009)

4. Affirmed – Plaintiffs appealed the MDL court’s dismissal for failure to prosecute. The 8th Circuit affirmed the MDL court. *In re Prempro Prods. Liab. Litig.*, 423 Fed. Appx. 659 (8th Cir. 2011)
5. Affirmed – Following trial, the plaintiff appealed the jury’s verdict and the MDL court’s evidentiary decisions and jury instructions. The 8th Circuit affirmed the verdict and the MDL court’s rulings. *Rush v. Wyeth (In re Prempro Prods. Liab. Litig.)*, 514 F.3d 825 (8th Cir. 2008)

Vioxx Products Liability Litigation (MDL-1657)

1. Affirmed – A plaintiff appealed the MDL court’s dismissal of his complaint for failure to serve a required expert report. The 5th Circuit affirmed the MDL court’s dismissal. *Dier v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 388 Fed. Appx. 391 (5th Cir. 2010)
2. Affirmed - A plaintiff appealed the MDL court’s dismissal of his complaint for failure to serve a required expert report. The 5th Circuit dismissed the appellant’s motion to proceed in forma pauperis, holding that the MDL court did not abuse its discretion in dismissing plaintiff’s case. *Schneller v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 452 Fed. Appx. 500 (5th Cir. 2011)
3. Affirmed – Plaintiff appealed order granting summary judgment of her misrepresentation and consumer protection claims against a number of attorneys and law firms. The 5th Circuit *affirmed the MDL court’s dismissal*. *Isner v. Seeger Weiss, L.L.P. (In re Vioxx Prods. Liab. Litig.)*, 661 Fed. Appx. 831 (5th Cir. 2016).
4. Affirmed – Plaintiff’s attorney appealed the MDL court’s order awarding attorneys fees to another attorney in a fee dispute. The 5th Circuit affirmed the MDL court’s order. *In re Vioxx Prods. Liab. Litig. v. Merck & Co.*, 544 Fed. Appx. 255 (5th Cir. 2013)
5. Affirmed - A plaintiff appealed the MDL court’s dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court’s dismissal. *In re Vioxx Prods. Liab. Litig. v. Merck & Co.*, 509 Fed. Appx. 383 (5th Cir. 2013)
6. Affirmed - A plaintiff appealed the MDL court’s dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court’s dismissal. *Bilal v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 499 Fed. Appx. 362 (5th Cir. 2012)
7. Affirmed – Plaintiff appealed the MDL court’s order denying his motion to vacate his enrollment in the settlement and entering a judgment dismissing his claims. The 5th Circuit affirmed the MDL court’s order. *Weeks v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 412 Fed. Appx. 653 (5th Cir. 2010)
8. Affirmed - A plaintiff appealed the MDL court’s dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court’s dismissal. *Chepilko v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 393 Fed. Appx. 242 (5th Cir. 2010)
9. Affirmed - A plaintiff appealed the MDL court’s dismissal of her complaint for failure to disclose her claim in a prior bankruptcy filing. The 5th Circuit dismissed the appellant’s motion to proceed in forma pauperis, holding that the appeal was frivolous. *Strujan v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 532 Fed. Appx. 551 (5th Cir. 2013)
10. Affirmed – Plaintiff appealed the MDL court’s order granting summary judgment on the ground that plaintiff’s action was barred by the statute of limitations. The Fifth Circuit affirmed the dismissal. *Roach v. Merck & Co.*, 529 Fed. Appx. 396 (5th Cir. 2013)

11. Affirmed – Plaintiffs appealed MDL court’s dismissal of their case on forum non conveniens grounds. The 5th Circuit affirmed the MDL court. *Adams v. Merck & Co.*, 353 Fed. Appx. 960 (5th Cir. 2009).
12. Affirmed – Insurers appealed MDL court’s denial of preliminary injunction prohibiting claims administrator from disbursing settlement funds. The 5th Circuit affirmed the MDL court’s order. *Avmed Inc. v. Browngreer PLC*, 300 Fed. Appx. 261 (5th Cir. 2008).
13. Affirmed – Plaintiff appealed the MDL court’s dismissal of her RICO complaint. The 5th Circuit affirmed the MDL court’s order. *Petty v. Merck & Co.*, 285 Fed. Appx. 182 (5th Cir. 2008).
14. Affirmed – Plaintiff appealed the MDL court’s order denial of his motion to proceed in forma pauperis. The 5th Circuit affirmed the MDL court’s decision. *Fitzgerald v. Merck & Co.*, 418 Fed. Appx. 366 (5th Cir. 2011).

Excluded Cases:

- Excluded: Plaintiff who signed a stipulation of dismissal, which was entered by the MDL court, filed an appeal to challenge the private settlement administrator’s determination of his claim. The 5th Circuit dismissed the appeal because it did not raise an appealable issue. *Jones v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 422 Fed. Appx. 315 (5th Cir. 2011)
- Excluded: Defendant sought review by appeal and writ of mandamus of MDL court’s order regarding privileged nature of documents sought in discovery. The Fifth Circuit dismissed the appeal, holding that discovery rulings are not immediately appealable. *Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co.*, 2006 U.S. App. LEXIS 27587 (5th Cir. 2006)

Ortho Evra Products Liability Litigation (MDL 1742)

1. Affirmed - Plaintiffs appealed the MDL court’s dismissal of their case. The 6th Cir. affirmed the MDL court’s dismissal. *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 808 F.3d 281 (6th Cir. 2015)

Aredia & Zometa Prods. Liab. Litig (MDL-1760)

1. Affirmed – Plaintiff appealed the MDL court’s order granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Osterwald-Kalkofen v. Novartis Pharm. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 352 Fed. Appx. 996 (6th Cir. 2009)
2. Affirmed - Plaintiff appealed the MDL court’s order granting summary judgment in favor of defendant and denying their motion for additional discovery. The 6th Circuit affirmed the MDL court. *Fragomeli v. Novartis Pharms. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 352 Fed. Appx. 994 (6th Cir. 2009).
3. Affirmed - Plaintiff appealed the MDL court’s order excluding expert opinions and granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Simmons v. Novartis Pharms. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 483 Fed. Appx. 182 (6th Cir. 2012)

4. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Emerson v. Novartis Pharms. Corp.*, 446 Fed. Appx. 733 (6th Cir. 2011)
5. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant and denying their motion for additional discovery. The 6th Circuit affirmed the MDL court. *Patterson v. Novartis Pharms. Corp.*, 451 Fed. Appx. 495 (6th Cir. 2011).
6. Affirmed - Plaintiff appealed the MDL court's order excluding expert opinions and granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court's decision. *Thomas v. Novartis Pharms. Corp.*, 443 Fed. Appx. 58 (6th Cir. 2011)

Fosamax Products Liability Litigation (MDL-1789)

1. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment. The 2nd Circuit affirmed the MDL court's order. *Secrest v. Merck, Sharp & Dohme Corp. (In re Fosamax Prods. Liab. Litig.)*, 707 F.3d 189 (2nd Cir. 2013)
2. Affirmed – Plaintiff appealed the MDL court instructing the jury on Florida's "government rules defense." The 2nd Circuit affirmed the MDL court's instruction and the jury verdict. *In re Fosamax Prods. Liab. Litig.*, 509 Fed. Appx. 69 (2nd Cir. 2013)
3. Affirmed – Plaintiff appealed the MDL court's dismissal of her case on the ground that the statute of limitations was not tolled by the filing of a putative federal class action that raised identical claims. The 11th Cir. certified questions to the Virginia Supreme Court and later affirmed the MDL court's decision. *Casey v. Merck & Co.*, 678 F.3d 134 (2nd Cr. 2012).

Gadolinium-Based Contrast Agents Products Liability Litigation (MDL-1909)

1. Affirmed – Following trial, plaintiff appealed the MDL court's decisions related to evidentiary matters, recusal, and its denial of a motion for new trial. The 6th Circuit affirmed all of the MDL court's orders and the verdict. *Decker v. GE Healthcare Inc.*, 770 F.3d 378 (6th Cir. 2014)

Trasylol Products Liability Litigation (MDL 1928)

1. Affirmed – Plaintiffs appealed the MDL court's dismissal of their case for failure to properly serve process on defendants. The 11th Cir. affirmed the MDL court's dismissal. *Nelson v. Bayer Corp. (In re Trasylol Prods. Liab. Litig.)*, 503 Fed. Appx. 850 (11th Cir. 2013)
2. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment on the ground that plaintiff's action was barred by the statute of limitations. The 11th Circuit affirmed the dismissal. *Rodriguez v. Bayer Corp.*, 440 Fed. Appx. 813 (11th Cir. 2011)
3. Affirmed - Plaintiffs appealed the MDL court's dismissal of their case. The 11th Cir. affirmed the MDL court's dismissal. *Roberts v. Bayer Healthcare*, 403 Fed. Appx. 427 (11th Cir. 2010)

4. Affirmed – Plaintiffs appealed MDL court’s order dismissing their complaints for failing to perfect service of process on defendants. The 11th Circuit affirmed the MDL court. *Moore v. Bayer Corp.*, 487 Fed. Appx. 477 (11th Cir. 2012).
5. Affirmed – Plaintiffs appealed MDL court’s order granting summary judgment in favor of defendants. The 11th Circuit affirmed the MDL court. *Putnam v. Bayer A.G.*, 467 Fed. Appx. 832 (11th Cir. 2012)

Levaquin Products Liability Litigation (MDL-1943)

1. Reversed / Affirmed – Following trial, defendant appealed the MDL court’s denial of judgment as a matter of law on the ground based on the jury’s award of compensatory damages and punitive damages. The 8th Circuit affirmed the MDL court’s decision denying the JMOL regarding compensatory damages, but reversed the MDL court regarding punitive damages. *Schedin v. Ortho-McNeil-Janssen Pharms., Inc. (In re Levaquin Prods. Liab. Litig.)*, 700 F.3d 1161 (8th Cir. 2012)
2. Affirmed – Following trial, and while its other appeal was pending, defendant appealed the MDL court’s denial of its motion for relief from judgment under FRCP 60(b)(2) and (3). The 8th Cir. affirmed the MDL court’s denial of the motion. *Schedin v. Ortho-McNeil-Janssen Pharms., Inc. (In re Levaquin Prods. Liab. Litig.)*, 739 F.3d 401 (8th Cir. 2014)

Heparin Products Liability Litigation (MDL-1953)

1. Affirmed - Plaintiffs appealed the MDL court’s order granting of summary judgment in favor of defendants on the basis of statute of limitations. The 6th Circuit affirmed the MDL court’s order. *Mustapha Nya v. Baxter Int’l, Inc. (In re Heparin Prods. Liab. Litig.)*, 629 Fed. Appx. 645 (6th Cir. 2015)

Mentor Corp. Obtape Transobturator Sling Products Liability Litigation (MDL-2004)

1. Reversed – Plaintiff appealed the MDL court’s dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court’s order. *Alvarado v. Mentor Corp. (In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.)*, 718 Fed. Appx. 772 (11th Cir. 2017)
2. Reversed - Plaintiff appealed the MDL court’s dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court’s order. *Perryman v. Mentor Worldwide LLC (In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.)*, 748 Fed. Appx. 212 (11th Cir. 2018)
3. Reversed – Plaintiff appealed the MDL court’s order dismissing her case on summary judgment. The 11th Cir. reversed the order granting summary judgment and remanded the case. *Hampton v. Mentor Corp.*, 725 Fed. Appx. 825 (11th Cir. 2018)
4. Reversed – Plaintiff appealed the MDL court’s dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court’s order. *Rogers v. Mentor Corp.*, 682 Fed. Appx. 701 (11th Cir. 2017).
5. Affirmed - Plaintiff appealed the MDL court’s dismissal of her claim based on the statute of limitations. The 11th Cir. affirmed the MDL court’s order. *Curtis v. Mentor Worldwide, LLC*, 543 Fed. Appx. 901 (11th Cir. 2013)

Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig. (MDL-2342)

- Affirmed – Plaintiffs appealed the MDL court’s order excluding an expert based on a Daubert challenge and granting of summary judgment in favor of defendants. The 3rd Circuit affirmed the MDL court’s order. *Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3rd Cir. 2017)

Pradaxa (Dabigatran Etexilate) Products Liability Litigation (MDL-2385)

1. Reversed – Defendant sought writ of mandamus against MDL judge’s order requiring several witnesses who lived in Germany to appear in the United States for a deposition. The 7th Circuit granted mandamus and directed the MDL court to rescind the order requiring the witnesses to appear in the United States. *In re Boehringer Ingelheim Pharms., Inc.*, 745 F.3d 216 (7th Cir. 2014).
2. Affirmed – Plaintiffs appealed MDL court’s order dismissing their case for failure to comply with deadlines and failure to respond to sanctions orders. The 7th Circuit affirmed the MDL court. *Nwatulegwu v. Boehringer Ingelheim Pharms., Inc.*, 668 Fed. Appx. 173 (7th Cir. 2016).

Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No II) (MDL-2502)

- Affirmed - Plaintiffs appealed the MDL court’s order excluding experts based on a Daubert challenge and granting of summary judgment in favor of defendants. The 4th Circuit affirmed the MDL court’s order. *Lipitor (Atorvastatin Calcium) Mktg. v. Pfizer, Inc.*, 892 F.3d 624 (4th Cir. 2018)

APPENDIX 2

A Lexis search was conducted on 4/22/2019 for all opinions referencing “1292(b).” The results were filtered to include only those cases decided by a circuit court between 1/1/2018 – 12/31/2018. This search returned 94 results.

We reviewed each of the 94 opinions to identify those that met the following criteria:

1. The district court had certified an order for interlocutory review pursuant to §1292(b), and
2. the circuit court accepted the order for interlocutory review, and
3. the circuit court issued an opinion deciding the interlocutory order.

25 cases met these criteria; 69 cases did not. The 69 cases that did not meet these criteria included a citation to §1292(b), but it was not the jurisdictional basis for the circuit court to issue a decision on the merits.

In the 25 cases that did meet these criteria, the average time that elapsed between the district court entering the order that was subject to interlocutory review and the circuit court filing a decision on the appeal was **23 months**. The shortest time was 10 months, and the longest time was 43 months.

The following 25 cases were included in this analysis:

Case Name	Circuit	Court of Appeals Decision	District Court Decision	Months
<i>Crystallex Int'l Corp. v. Petróleos de Venez., S.A.</i> 879 F.3d 79	3rd Cir.	1/3/2018	9/30/2016	15.3
<i>Lester v. Exxon Mobil Corp.</i> 879 F.3d 582	5th Cir.	1/9/2018	10/23/2014	39.1
<i>Gov't Emples. Ins. Co v. Tri-County Neurology & Rehab. LLC</i> 721 Fed. Appx. 118	3rd Cir.	1/10/2018	12/4/2015	25.6
<i>Galilea, LLC v. AGCS Marine Ins. Co.</i> 879 F.3d 1052	9th Cir.	1/16/2018	4/4/2016	21.7
<i>Batterton v. Dutra Grp.</i> 880 F.3d 1089	9th Cir.	1/23/2018	12/15/2014	37.8
<i>Mineworkers' Pension Scheme v. First Solar Inc.</i> 881 F.3d 750	9th Cir.	1/31/2018	8/10/2015	30.2
<i>Barahona v. Union Pac. R.R.</i> 881 F.3d 1122	9th Cir.	2/6/2018	6/7/2016	20.3
<i>Santomenno v. Transamerica Life Ins. Co.</i> 883 F.3d 833	9th Cir.	2/23/2018	3/14/2016	23.7
<i>Olympic Forest Coal. v. Coast Seafoods Co.</i>	9th Cir.	3/9/2018	6/3/2016	21.5

Letter from Brian Devine re: Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases
Appendix 2 - Page 2

Case Name	Circuit	Court of Appeals Decision	District Court Decision	Months
884 F.3d 901				
<i>A.D. v. Credit One Bank, N.A.</i> 885 F.3d 1054	7th Cir.	3/22/2018	8/19/2016	19.3
<i>Drummond Co. v. Conrad & Scherer, LLP</i> 885 F.3d 1324	11th Cir.	3/23/2018	1/22/2016	26.4
<i>Breuder v. Bd. of Trs. of Cmty. Coll. Dist. No. 502</i> 888 F.3d 266	7th Cir.	4/17/2018	3/3/2017	13.7
<i>Hartsock v. Goodyear Dunlop Tires N. Am. Ltd.</i> 723 Fed. Appx. 224	4th Cir.	5/24/2018	11/30/2015	30.2
<i>Petersen Energía Inversora S.A.U. v. Argentine Republic</i> 895 F.3d 194	2nd Cir.	7/10/2018	9/9/2016	22.3
<i>Reading Health Sys. v. Bear Stearns & Co.</i> 900 F.3d 87	3rd Cir.	8/7/2018	2/1/2016	30.6
<i>Thompson v. Cope</i> 900 F.3d 414	7th Cir.	8/14/2018	9/25/2017	10.8
<i>Taksir v. Vanguard Grp.</i> 903 F.3d 95	3rd Cir.	9/4/2018	5/26/2017	15.5
<i>Nwanguma v. Trump</i> 903 F.3d 604	6th Cir.	9/11/2018	8/8/2017	13.3
<i>Lupian v. Joseph Cory Holdings LLC</i> 905 F.3d 127	3rd Cir.	9/27/2018	3/7/2017	19.0
<i>Pa. Dep't of Env'tl. Prot. v. Trainer Custom Chem., LLC</i> 906 F.3d 85	3rd Cir.	10/5/2018	8/30/2016	25.5
<i>Hicks v. State Farm Fire & Cas. Co.</i> 751 Fed. Appx. 703	6th Cir.	10/15/2018	3/25/2015	43.3
<i>Hernandez v. Results Staffing, Inc.</i> 907 F.3d 354	5th Cir.	10/24/2018	9/1/2017	13.9
<i>Barron v. Am. Family Mut. Ins. Co.</i> 741 Fed. Appx. 451	9th Cir.	10/29/2018	4/27/2017	18.3
<i>Regents of the Univ. of Cal. v. United States Dep't of Homeland Sec.</i> 908 F.3d 476	9th Cir.	11/8/2018	1/9/2018	10.1
<i>Nat'l Ass'n of African American-Owned Media v. Charter Communs., Inc.</i> 908 F.3d 1190	9th Cir.	11/19/2018	10/24/2016	25.2