

And Now A Word From The Panel: Checking Out Of An MDL

By **Alan Rothman** (September 27, 2021)

Welcome to the latest installment of And Now a Word from the Panel, a column that "rides the circuit" with the Judicial Panel on Multidistrict Litigation as it meets on a bimonthly basis.

In a change in practice since the onset of the COVID-19 pandemic, the panel initially considered a return to in-person oral arguments in St. Louis, Missouri — at the U.S. District Court for the Eastern District of Missouri, home court of a current panel member — for the panel's Sept. 30 hearing session.[1]



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But the panel subsequently determined that the "circumstances caused by the COVID-19 pandemic warrant hearing oral argument by videoconference or teleconference." [2]

The September session again features relatively few oral arguments on motions to establish new MDL proceedings. At this month's session, the panel will only hear three new MDL motions, and will decide a fourth on the papers.[3]

Looking back at the July hearing session where the panel members gathered in Boston — at the home court of another panel member, although arguments were heard remotely — the panel issued a total of five rulings on new MDL motions. The panel granted three of the motions, and denied two of the motions.

With these latest results, the panel's batting average for 2021 is now .536, granting 15 out of 28 petitions for the year. The latest three new MDLs are venued east of the Mississippi River, in Florida, Illinois and New York, respectively.

Although there are three new MDLs, the overall number of pending MDL proceedings ticked down to 185, from 189 in mid-July.[4] The panel continues to close out older MDL dockets, terminating 17 MDLs this year through mid-September, picking up the pace from only 10 terminated as of mid-July.[5]

Product liability MDLs comprise more than 30% of the total number of MDL proceedings.[6] The 184 MDL proceedings now encompass 391,831 individual actions — an increase of more than 5% in such actions, from 372,681, over the past two months. This figure does not include numerous unfiled claims associated with some of the MDL proceedings.[7]

There are currently 24 MDL proceedings which have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[8]

Return Trip: Exiting an MDL Proceeding

PANEL TRIVIA CORNER

July Trivia Question

How many MDL proceedings established prior to 2005 remain open?

Answer to July Trivia Question

Four.

September Trivia Question

How many panel members has Chief Justice John Roberts appointed to the panel?

Like to venture a guess as to this month's trivia question? Have tidbits of panel trivia that you would like to be featured in an upcoming column? Please do not hesitate to drop me a note at arothman@sidley.com.

This column has generally focused on the process by which MDLs are created (or not created), the transfer of actions to an existing MDL and, most recently, the process by which MDLs are closed.

Another facet of MDL practice is the process by which cases are transferred out of an MDL proceeding back to their original federal (transferor) courts, a process known as remand.

This should not be confused with the term "remand" as used to describe the motion filed by a plaintiff to send a case removed to federal court back to state court.

A motion to remand an action from In re: Keurig Green Mountain Single-Serve Coffee Antitrust Litigation, an MDL proceeding in the U.S. District Court for the Southern District of New York, back to the U.S. District Court for the Eastern District of California is scheduled to be considered by the panel at its Sept. 30 session, without oral argument.[9]

While it may surprise some, remand to the federal transferor court is an appropriate means to exit an MDL. Indeed, the MDL statute itself provides that:

[E]ach action so transferred [to an MDL proceeding] shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.[10]

The reason some may be surprised to learn of this remand process is that in the panel's 50-year-plus history, and as of the end of the last fiscal year, only 17,104 individual actions have been remanded.[11] Nevertheless — and perhaps contrary to popular thinking — it is important to bear in mind that settlements are not the only way to exit an MDL.

Remands as well as rulings on dispositive motions are in the arsenal as well. Of course, as the plain language of the MDL statute makes clear, only the panel can remand a case.

However, the panel accords considerable weight to the view of the MDL judge in deciding whether to grant remand.[12] As the panel's rules provide, "the Panel is reluctant to order a remand absent the suggestion of the transferee judge."[13]

Thus, and while not required, parties who seek remand back to the federal transferor court will usually first seek from the MDL judge what is known as a suggestion of remand. The MDL judge can consider a wide range of factors in assessing whether pretrial proceedings have concluded, thus warranting a suggestion of remand.

If a suggestion of remand is made by the MDL judge, the panel will issue a conditional remand order, or CRO. As with the conditional transfer order process, which occurs on the way in to an MDL, parties have seven days to oppose a CRO.

If an opposition is filed, the panel will order briefing on a motion to vacate the CRO and ultimately decide, usually on the papers, whether to remand the action.[14] If the panel does not issue a CRO, a party may still move to remand, but must provide an affidavit testifying to the following:

whether the movant has requested a suggestion of remand and the judge's response, whether the parties have completed common discovery and other pretrial proceedings, and whether the parties have complied with all transferee court orders.[15]

In the remand motion pending before the panel at the upcoming session, one of the Keurig plaintiffs moved for a suggestion for remand three times in the transferee court. Two days prior to the denial of the third motion, the plaintiff filed its motion to remand with the panel.[16]

Many questions remain. Will the panel remand additional cases? Will the number of overall MDL proceedings continue to increase? Will the trend of relatively few new MDL motions continue? Will the panel continue to see its batting average climb for the year? Will the panel return to in-person oral arguments?

With the Thanksgiving holiday falling on the last Thursday in November, and the next panel hearing session slated for the first Thursday in December, stay tuned for our December edition of *And Now a Word from the Panel*. May all be well and safe!

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed_September%202021.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/First%20Amendment%20Hearing%20Session%20Filed_Sep%202021.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Supplemental_Notice_of_Hearing_Session-9-30-21.pdf; see also *supra*, n.1.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-September-15-2021.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-September%2015-2021.pdf; see "And Now a Word from the Panel: Closing MDLs," Law360 (July 28, 2021).

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-September-15-2021.pdf.

[7] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-September-15-2021.pdf.

[8] *Id.*

[9] *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.* (MDL No. 2542).

[10] 28 U.S.C. § 1407.

[11] https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf, at 3.

[12] See *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) ("[i]n considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings").

[13] Panel Rule 10.3(a).

[14] See generally Panel Rule 10.2.

[15] Panel Rule 10.3(a)(i)

[16] See *supra*, n. 9.