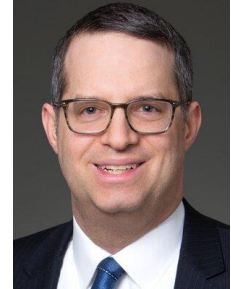


And Now A Word From The Panel: Doing The MDL Math

By **Alan Rothman** (March 30, 2022)

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.

As we welcome in spring, we also welcome the return of an in-person MDL hearing session, even if we need to wait an extra week until Opening Day of the baseball season. After a more than two-year hiatus in light of the COVID-19 pandemic, the panel will hear in-person oral arguments at the March 31 hearing session in the Big Easy — New Orleans.



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At this month's session, the panel is scheduled to hear oral arguments for three new MDL petitions, and decide a fourth petition on the papers. Although counsel will argue in person and will not be allowed to appear remotely, the panel's procedures remind us that there are some changes since the panel last heard counsel argue in person.

In its supplemental hearing notice, the panel notes it is possible that the district's COVID-19 procedures could limit the number of people permitted in the courtroom. The panel will allocate argument time in advance to limit the number of counsel required to be in the courtroom at the same time.

In addition, "[a]ll persons, including counsel and associated attendees, must wear masks in the courtroom and the overflow courtroom, regardless of vaccination status, unless instructed otherwise by the Panel."

Finally, the panel cautioned counsel that observance of COVID-19 protocols may take time: "Please plan ahead — the Panel will not delay argument because counsel is late to the courtroom due to the District's courthouse admittance procedures." The panel did not provide a dial-in option to listen to the oral arguments, although the hearing, as in the past, will be transcribed.[1]

Looking back at the January hearing session, the panel issued a total of three rulings on new MDL motions. The panel granted two of the motions and denied one of the motions, leaving the panel with a .667 batting average to begin the year. The two new product liability MDL proceedings — including one involving sales practices — are venued in Louisiana and Pennsylvania, respectively.

Although there are two new MDLs, the overall number of pending MDL proceedings ticked down to 183, from 185 in mid-January.[2] The panel continues to close out older MDL dockets, terminating four MDLs this year through mid-March.[3]

Product liability MDLs continue to dominate the MDL landscape, comprising exactly one-third of the total number of MDL proceedings — 61 out of 183.[4] The 183 MDL proceedings now encompass a whopping 425,905 individual actions.[5]

There are currently 26 MDL proceedings that have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[6]

Looking Back: MDL Math

As our readers may be aware, under the MDL statute, before the panel will consider whether to establish a new MDL proceeding, there must be a minimum of two federal civil actions pending in different districts. The MDL statute, Title 28 of the U.S. Code, Section 1407, provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.

Thus, the only statutory threshold for establishing an MDL proceeding is that there be a minimum of two civil actions, presenting one or more common questions of fact, pending in different federal districts.[7] But that is a floor.

In practice, there is no magic number. So how many actions does it actually take before the panel will grant an MDL proceedings? The short answer is: There no definitive answer to this question of MDL math.

Nevertheless, a decision from the January hearing session on a putative MDL, *In re: Harvest Entities Fair Labor Standards Act and Wage and Hour Litigation*, illustrates the hurdles a proponent of MDL centralization faces when there are relatively few cases. In denying the MDL motion in this labor-related litigation, the panel considered the four pending federal actions in four different federal districts.

The panel asserted that "where only a few actions are involved, the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate." In this instance, the panel held that the moving defendants failed to satisfy that burden.[8]

It is important for practitioners to appreciate that it is not merely the number of actions that is determinative. In ruling on this MDL petition, the panel also noted that the actions were not complex, and there were "few involved counsel." Moreover, these actions were putative class actions, none of which overlapped, and which were at different stages.[9]

How many cases will it take before the panel establishes a new MDL proceeding? Will the panel continue to establish product liability MDL proceedings? Will the number of new MDL petitions grow? Will the panel continue to hold in-person oral arguments? While the venue for the panel's pre-Memorial Day May 26 hearing session remains to be determined, stay tuned for our next edition of *And Now A Word From The Panel*. May all be well and safe!

PANEL TRIVIA CORNER

January Trivia Question

What was the venue for the last in-person March panel hearing session?

Answer to January Trivia Question

Washington, D.C. (on March 28, 2019, opening day of the 2019 baseball season).

March Trivia Question

Prior to the March hearing session, where was the last in-person panel hearing session held?

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 aroethman@sidley.com.

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[1] Supplemental Notice of Hearing Session, March 31, 2022 hearing (J.P.M.L. March 14, 2022).

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-16-2022.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-March%2016-2022.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-March-16-2022.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-16-2022.pdf.

[6] Id.

[7] See Rothman, "And Now a Word from the Panel," Law360 (Jan. 28, 2013) (the first column in this series).

[8] In re: Harvest Entities Fair Labor Standards Act and Wage and Hour Litig., MDL No. 3022 (J.P.M.L. Feb. 1, 2022).