

And Now A Word From The Panel: Judging MDLs

By **Alan Rothman** (November 29, 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. As the seasons once again change, so does the composition of the panel, for the fourth consecutive year.

What remains the same is that the panel has once again expressed its intent to conduct its next hearing virtually, reminding us in a hearing notice filed on Nov. 15 that it "plans to return to its practice of in-person hearings when it becomes practicable to do so." [1]



Alan Rothman

The panel closes out the calendar year this week with a hearing session featuring only two new MDL motions, with a third to be decided on the papers. [2] However, do not be fooled by the relative dearth of new MDL motions. As reflected below, the number of actions within the existing 183 MDL proceedings continue to burgeon — now surpassing 400,000 filed actions. [3]

Welcome to the Panel, Again

With the December hearing session, the panel has a new member. As our readers may recall, the MDL statute vests the chief justice of the U.S. with the sole authority to appoint panel members.

Under the statute, Chief Justice John Roberts selects the seven panel members from among district and circuit court judges, although no two panel members may be from the same circuit. [4]

Since 2018, we have welcomed six new panel members, including the current panel chair Judge Karen K. Caldwell from the Eastern District of Kentucky, Judge Nathaniel M. Gorton from the District of Massachusetts, Judge Matthew F. Kennelly from the Northern District of Illinois, Judge David C. Norton from the District of South Carolina, Senior Judge Roger Benitez from the Southern District of California and Senior Judge Dale A. Kimball from the District of Utah.

We now welcome Judge Madeline C. Arleo from the District of New Jersey, replacing Judge Catherine D. Perry from the Eastern District of Missouri, as a member of the panel. With these changes, all current panel members have been appointed to the panel since 2018. Moreover, there continue to be only district court judges, and no circuit court judges, on the panel. [5]

Looking Back to October

Looking back at the October hearing session — when the panel almost held in-person oral arguments in St. Louis, Judge Perry's home court — the panel issued a total of four rulings on new MDL motions. The panel granted two of the motions and denied two of the motions.

With these latest results, the panel's batting average for 2021 is now .567, granting 17 out of 30 petitions for the year. The latest two new MDLs are again venued east of the Mississippi River, in Florida and Pennsylvania, respectively.

Although there are two new MDLs, the overall number of pending MDL proceedings ticked down to 183, from 185 in mid-September.[6] The panel continues to close out older MDL dockets, terminating 21 MDLs this year through mid-November.[7]

Product liability MDLs continue to account for more than 30% of the total number of MDL proceedings.[8] The 183 current MDLs now encompass a whopping 406,840 individual actions, increasing by more than 15,000 filed actions, from 391,831, over the past two months.[9]

There are currently 25 MDL proceedings which have more than 500 individual pending actions. Almost all of these are from among the product liability MDLs.[10]

Judging MDLs

With a new judge joining the panel for this hearing session, it might be of interest to readers of this column to take a closer look at another judicial issue: namely, the selection of a judge to preside over an MDL proceeding.

For years, we have noted with fascination perhaps one of the most unpredictable features of MDL practice — the selection of venue for new MDLs.[11] Of equal interest, and import, is the selection by the panel of the judge who will handle that proceeding. That selection process is not a mere randomized lottery pick from a wheel.[12]

What we know is that there are currently a total of 148 judges assigned to handle the 183 MDL proceedings. Thus, a number of the judges are assigned to multiple MDLs. Those judges are district court judges or senior district court judges, 16 of whom are the chief judge of their respective district court.[13]

One vexing question is how much experience a federal district court judge needs before the panel will assign an MDL to that judge. Looking back at the selections for the 17 MDL

PANEL TRIVIA CORNER

September Trivia Question

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

Answer to September Trivia Question

With the latest appointment of Judge Arleo, a total of 21 since 2006.

December Trivia Question

Which circuits are not currently represented on 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.

proceedings established to date this year by the panel, we gleaned the following insights, as reflected in the chart below:

Years of Federal District Court Experience	No. of MDL Judges
1-2 years	4
3-10 years	7
11-20 years	4
20+ years	2

As to whether the selected MDL judges have prior MDL experience, judges with prior MDL experience preside over 11 of these new MDL proceedings, while this is the first MDL judicial experience for six of these judges.[14]

Will the panel create any new MDL proceedings to close out 2021? Who will preside over any new MDLs? Will the panel continue to raise its batting average for the year? Will the number of actions in MDL proceedings continue to grow? Will the panel return to in-person oral arguments for its January hearing session?

Stay tuned for our year-in-review edition of And Now A Word From The Panel. May all be well and safe! Best wishes for a happy and healthy 2022!

Alan E. Rothman is counsel at Sidley Austin LLP. He counsels clients on issues relating to practice and procedure before the Judicial Panel on Multidistrict Litigation, and has appeared before the panel on oral argument.

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Supplemental_Notice_of_Hearing_Session-12-2-21.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed_Dec%202021.pdf; see also *supra*, n.1.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-November-15-2021.pdf.

[4] 28 U.S.C. § 1407(d); "And Now a Word from the Panel: MDLs and the High Court," Law360 (March 28, 2017).

[5] https://www.jpml.uscourts.gov/sites/jpml/files/ROSTER%20OF%20CURRENT%20AND%20FORMER_3.pdf.

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

[7] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-November%2015-2021.pdf.

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

[9] See *supra*, n. 3.

[10] *Id.*

[11] See, e.g., "And Now a Word from the Panel: Location is Central," Law360 (May 26, 2021); "And Now a Word from the Panel: Top 10 Venue Arguments," Law360 (July 29, 2014).

[12] By contrast, under 28 U.S.C. § 2112(a)(3), the panel utilizes a random lottery for determining which court of appeals will review an agency order when petitions for such review are filed in multiple circuits. See "And Now a Word from the Panel: It's Not Just MDLs," Law360 (Nov. 27, 2018) (discussing "multi-circuit" petitions (MCPs)).

[13] See *supra*, n. 3.

[14] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-November-15-2021.pdf (identifying judges assigned to all current MDL proceedings); https://www.jpml.uscourts.gov/sites/jpml/files/Cumulative%20Terminated%202020_0.pdf (identifying MDL judges in previously terminated MDL proceedings).