

## And Now A Word From The Panel: 10 Years Of MDL Lessons

By **Alan Rothman** (November 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 this column concludes its 10th year, we will take a retrospective look at MDL lessons learned over the past decade and how some lessons are as timely now as they were when this column began.

Before looking back, we look forward to the Dec. 1 hearing session as the panel completes its journey back east to this writer's hometown of the Big Apple: New York City. At the December hearing, the panel is scheduled to hear five new MDL petitions.



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At the September hearing session, the panel considered five new MDL petitions. Of those five petitions, the panel granted three of them.

With those decisions, the panel has now granted 19 new petitions and denied only nine petitions for the year. While taking a slight dip, the panel is still maintaining one of its highest batting averages in years, now clocking in at a .679 batting average for 2022.

The three new MDL proceedings — all of which involve product liability — are venued in New York and California, with the panel finally sending a new MDL to the Pacific time zone, breaking this year's streak of exclusively Eastern and Central time zone MDLs.

In an interesting development, the overall number of pending MDL proceedings ticked down markedly to 172 from 183 in mid-September.[1] This was aided by the panel's closing of a remarkable 14 older MDL proceedings between mid-July and mid-September, bringing the total number of terminated MDLs this year to 32.[2]

With these closures, product liability MDLs dominate the MDL landscape even more, currently comprising nearly 37% of MDL proceedings — 63 out of 172 MDLs.[3] The 172 MDL proceedings now encompass a total of 397,845 actions, up from 393,071 actions pending as of mid-September.[4]

There are currently 24 MDL proceedings that have more than 500 pending actions, almost all of which are product liability MDLs.[5]

## Looking Back: 10 MDL Lessons

As we conclude our first decade, we thought it appropriate to take a retrospective look back on 10 — some seemingly timeless — MDL lessons. So let's begin.

### **1. Facts still matter.**

As we reminded readers in the first column in January 2013 — and have continued to do so, as recently as in this September column — the MDL statute makes clear that a prerequisite for MDL transfer is that the actions present "one or more common questions of fact."<sup>[6]</sup>

MDL practitioners seeking or opposing an MDL are well advised to focus on the facts and whether there are sufficiently common facts necessitating common discovery to support creation of an MDL proceeding.

### **2. The batting average is climbing.**

When this column began, the panel's annual batting average hovered around .650, granting nearly two-thirds of the new MDL petitions it considered. For example, in 2013, the panel granted 46 of 71 new petitions, a .648 batting average.<sup>[7]</sup>

Over the past decade, that average dropped to around .500, including years when the panel denied more petitions than it granted. But over the past few years, the panel's batting average has climbed. As noted above, that average now sits at .679, the panel's highest in years.

### **3. MDL proceedings are dwindling. ...**

Another hallmark of the past decade has been a steady decline in the overall number of MDL proceedings. When this column began in January 2013, there were 291 MDL proceedings.<sup>[8]</sup>

As noted above, there are now only 172 MDLs, largely attributable to:

- The panel closing out old MDL proceedings;
- A decline in the number of new MDL petitions; and
- The panel's lower batting average in granting new petitions.

### **4. ... Yet the number of individual actions in MDLs soar.**

However, lest one think the decrease in the number of overall MDL proceedings signals the death knell for MDLs, the MDL world is more robust than ever.

What we have seen over the past decade is a stunning increase in the number of individual

#### PANEL TRIVIA CORNER

##### **September Trivia Question**

When was the last time that the panel established a new MDL proceeding in the Pacific time zone?

##### **Answer to September Trivia Question**

Prior to the September 2022 hearing session, the last MDL established in the Pacific time zone was a petition heard at the May 2021 hearing session.

##### **December Trivia Question**

When was the last time the panel met in New York (prior to the December 2022 hearing session)?

*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](mailto:arothman@sidley.com).*

actions in MDL proceedings. During 2013, there were fewer than 100,000 individual actions in the then-pending MDLs.[9] That number has now more than quadrupled to nearly 400,000 individual actions.

### ***5. Product liability dominates.***

What has been fairly constant over the past decade is the relative number of product liability litigations peppering the MDL landscape. Product liability has generally occupied roughly a third of the number of MDL proceedings and now is at a somewhat high-water mark of nearly 37%.

Even more significant is that those MDLs have a tendency to burgeon rapidly. Well over 90% of the individual actions in MDL proceedings are pending in product liability MDLs,[10] not to mention many unfiled claims associated within those proceedings as well.

### ***6. Know the MDL panel calendar.***

While there are doubtless various uncertainties about panel practice and how the panel will rule on a given petition, one thing is quite consistent: the panel calendar.

The panel inevitably meets on the last Thursday of every other month, except for November and September, when the panel may meet on the first Thursday of the following month.

Even more importantly, the panel will set its docket generally six to seven weeks prior to a hearing. If you want your motion heard at a panel session, it will need to be filed in advance of issuance of the hearing session docket and, usually, a week or two prior to that. Otherwise, you will need to wait until the next hearing session to be heard, whether on a petition to create a new MDL proceeding, a motion to transfer a case to an existing MDL or a motion to vacate a conditional transfer order.[11]

### ***7. Consider the alternatives.***

As readers are aware, the panel has observed that an MDL "should be the last solution after considered review of all other options." [12] Thus, parties should continue to consider whether alternatives to an MDL are available. This includes informal coordination as well as motion to transfer venue under Title 28 of the U.S. Code, Section 1404.

### ***8. Second chances are possible.***

In our very first column, we explored the notion of "If at first you don't succeed, try, try again." [13] The panel remains open to second chances where the panel may have initially denied an MDL petition.

Of course, a proponent of creating the MDL should make sure to explain the changed circumstances warranting a change of course to establish an MDL.

### ***9. Experience counts.***

Is a federal judge's prior MDL experience a factor in being assigned a new MDL? When we explored this topic almost one year ago, we noted that the panel had assigned judges with prior MDL experience to a majority of the new MDLs, 11 out of 17, to date that year.[14]

Of the 19 MDL proceedings established to date this year, the panel assigned 13 of those

MDLs to judges with prior MDL experience.[15]

### **10. It's still all about location, location, location.**

And last, but certainly not least, the most unpredictable aspect of panel practice remains the elusive venue issue. Where the panel will send a new MDL proceeding is often a mystery, although most of the factors used a decade ago, though they sometimes conflict, remain a staple of panel practice.[16]

The venue of an MDL has a real impact on the proceeding, including, among other things, which circuit's law is applied to issues of federal law, as well as the jury pool for bellwether cases, which are most often tried before the MDL court.

Will the panel continue to create new MDL proceedings? What factors will the panel consider in its future deliberations? Will the panel keep up its annual batting average as we approach the home stretch of 2022? Will product liability actions continue to dominate new petitions and new MDL proceedings? Will the West continue to become home to new MDLs?

Stay tuned for our year-in-review edition of *And Now A Word From The Panel* in connection with the panel's Jan. 26, 2023, hearing session in its typical January venue — Miami.

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[1] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-November-15-2022.pdf).

[2] [https://www.jpml.uscourts.gov/sites/jpml/files/Recently\\_Terminated\\_MDLs-January%201-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-November-15-2022.pdf).

[3] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_MDL\\_Type-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-November-15-2022.pdf).

[4] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-15-2022.pdf).

[5] *Id.*

[6] "And Now a Word from the Panel," *Law360* (Jan. 28, 2013); "And Now a Word from the Panel: 5 Key MDL Factors," *Law360* (Sept. 28, 2022).

[7] [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2021.pdf) at 8.

[8] [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-)

2012.pdf.

[9] [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical%20Analysis%20of%20Multidistrict%20Litigation\\_2013.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2013.pdf).

[10] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-15-2022.pdf).

[11] "And Now a Word from the Panel: ABCs of JPML Practice," Law360 (Sept. 30, 2014).

[12] "And Now a Word from the Panel: 4 MDL Lessons at 40," Law360 (July 24, 2019).

[13] "And Now a Word from the Panel," Law360 (Jan. 28, 2013).

[14] "And Now a Word from the Panel: Judging MDLs," Law360 (Nov. 29, 2021).

[15] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_MDL\\_Number-November-15-2022.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-November-15-2022.pdf) (identifying judges assigned to all current MDL proceedings); <https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report%20Cumulative%20Terminated%20MDLs.pdf> (identifying MDL judges in previously terminated MDL proceedings).

[16] "And Now a Word from the Panel," Law360 (Mar. 19, 2013); "And Now a Word from the Panel: Top 10 Venue Arguments," Law360 (July 29, 2014).