

And Now A Word From The Panel: Benefits Of MDL Transfers

By **Alan Rothman** (March 27, 2024)

This article is part of a bimonthly column that "rides the circuit" with the Judicial Panel on Multidistrict Litigation as it meets every other month at venues around the country. In this installment, I discuss one of the key functions performed by the panel: transferring individual cases into existing MDLs.



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With spring in the air, the panel heads back east for what is becoming a new panel tradition of a baseball opening day hearing session — or at least opening day in North America.

The March opening day session will be held in Charleston, South Carolina, once again this year in a city without a Major League Baseball team.[1] The panel enters the Palmetto State with a jam-packed schedule: It will consider nine new petitions, after a 10th new petition was recently rendered moot.[2]

This docket builds on the six new petitions considered by the panel in California during its rare West Coast January hearing session. This marks one of the busiest starts for the panel in years.

At the January session, the panel granted five of the six petitions before it, beginning the year with a sizzling .833 battling average. Of the five new MDL proceedings, one is venued in Florida, one in New York, two in Ohio and one in Pennsylvania. For those keeping score, the panel returned to creating MDLs exclusively east of the Mississippi River — and for this round, exclusively within the Eastern time zone.

With the jump in new MDLs, the overall number of pending MDL proceedings has ticked up slightly to 169, from 167 proceedings at the beginning of the year.[3] Since January, the panel has closed out three MDL proceedings.[4]

Product liability MDLs continue to dominate the MDL landscape, now representing more than 39% of the total number of MDL proceedings — 66 out of 169 MDLs.[5] The 169 MDL proceedings encompass a total of 458,469 actions, a notch above the calendar year-end record of 456,698 actions just a few months ago.[6]

There are currently 21 proceedings that each include more than 1,000 pending actions — an astounding dozen of which include more than 5,000 pending actions, all from among the product liability MDLs.[7] As we have reminded our readers, these tallies are just civil actions, not the total number of plaintiffs, and the figures do not include unfiled claimants.

The MDL Highway: Getting to an MDL

Although this column generally addresses considerations associated with the creation of MDL proceedings, we turn our attention today to a critical part of the MDL process and the panel's work: moving cases along the MDL highway into an existing MDL. Specifically, we consider some arguments commonly advanced by parties in an attempt to avoid MDL transfer into an already established MDL.

As a reminder, once an MDL is created, additional "tag-along" actions are generally considered for MDL transfer via the conditional transfer order, or CTO, process.

Under panel rules, when the clerk of the panel "determines that a potential tag-along action is not appropriate for inclusion in an MDL proceeding," parties can seek transfer via a motion to transfer.[8]

If a party moves to vacate a CTO, or opposes a motion to transfer, the transfer issue is addressed at the panel's bimonthly hearing session, albeit on the papers without oral argument.

A good illustration of the types of arguments against transfer that the panel typically sees is a January panel order in *In re: Philips Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products Liability* Litigation, denying a pro se plaintiff's motion to vacate a CTO.[9]

Specifically, the panel considered and rejected the following arguments.

Inconvenience/Delay

Although MDL transfer necessarily causes some attendant delays and sends a case to a different jurisdiction, that is the nature of MDL proceedings. The panel found that the benefits to the overall litigation of coordinating discovery and utilizing lead counsel outweigh any inconvenience.

Moreover, to the extent travel is a concern, the panel observed that because MDL proceedings are "for pretrial proceedings only, there is usually no need for the parties and witnesses to travel to the transferee district for depositions or otherwise." [10]

Jurisdictional Objections

As the panel has made clear time and again over the decades, jurisdictional objections — including objections to a federal court's subject matter jurisdiction — are not a basis to deny MDL transfer.[11] Moreover, until MDL transfer is effective — i.e., when a copy of the transfer order is filed with the clerk of the transferee district court — the case remains with the transferor court.[12]

Ultimately, in deciding whether a tag-along action will advance to first base or remain at

PANEL TRIVIA CORNER

January Trivia Question

When was the last time the panel scheduled an in-person January hearing session outside of the state of Florida, and what unusual event happened in that selected venue?

Answer to January Trivia Question

The panel had planned a January 2014 hearing session in New Orleans, Louisiana, which was hit with an unexpected ice and snow storm. See "And Now a Word from the Panel: Snow Day!," Law360, March 25, 2014.

March Trivia Question

When was the last time the panel ruled on more than 50 new MDL petitions in a calendar year?

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.

home plate, the panel must consider the mandate of the MDL statute.

According to the statutory language, the panel decides whether the action under consideration shares "one of more common questions of fact" with the other actions, and whether transferring the action "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." [13]

Will new MDLs continue to be on the rise? Will the total number of MDL proceedings hit 170 again? Will the number of actions in pending MDLs exceed half a million? Will the panel keep its red-hot batting average? Where will any new MDLs be located?

Stay tuned for our next edition of And Now a Word From The Panel, when the panel heads to Salt Lake City for its May hearing session. In the meantime, enjoy the early days of spring, a new season for our national pastime, and watching the outcome of yet another panel session!

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[1] See "And Now a Word from the Panel: Baseball and MDLs," Law360 (March 29, 2023), <https://www.law360.com/articles/1591048/and-now-a-word-from-the-panel-baseball-and-mdls>.

[2] <https://www.jpml.uscourts.gov/hearing-information>.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-1-2024.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January-1-2024-March-1-2024.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Docket_Type-March-1-2024.pdf.

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-1-2024.pdf.

[7] Id.

[8] Panel Rule 7.1(b)(i).

[9] In re: Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prods. Liab. Litig., MDL No. 3014 (J.P.M.L. Jan. 31, 2024).

[10] Id. at 1 (citations omitted).

[11] Id. at 2.

[12] Panel Rule 7.1(h); 28 U.S.C. § 1407(c).

[13] 28 U.S.C. § 1407(a).