

And Now A Word From The Panel: MDL Time?

By **Alan Rothman** (July 27, 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.

After a hiatus of more than two years due to the COVID-19 pandemic, the panel is scheduled to hold its third consecutive in-person oral argument. For the July 28 hearing session, the panel heads west, holding that session in the Emerald City — Seattle.

At that hearing, the panel is scheduled to hear six new MDL petitions, with a seventh to be decided on the papers.

Before looking ahead to this month's session and a potential MDL arising from an alleged data breach of a timekeeping and payroll system, we take a retrospective look at the May hearing session held in the Steel City — Pittsburgh.

Not only did the panel entertain its largest docket of new MDL petitions in some time, but it also granted seven of the eight new petitions before it. With the grant of those motions, the panel is now sizzling at a blistering .733 batting average for the year, granting 11 new petitions and denying only four petitions.

The seven new MDL proceedings — which include product liability, antitrust, patent and retirement plan litigation, among other subject areas — are venued with one each in Illinois, Massachusetts, Michigan, Minnesota and New York, and two in Tennessee, continuing a pattern this year of limiting new MDL proceedings to the Eastern and Central time zones.

The MDL landscape remains robust. The overall number of pending MDL proceedings ticked back up to 186, from 185 in mid-May.[1]

Consistent with its general practice, the panel continues to close out older MDL proceedings, with a total of 10 MDLs terminated this year.[2]

Product liability MDLs continue to dominate the MDL landscape, comprising just under one-third of the total number of MDL proceedings, or 60 out of 186 MDLs.[3]

The 186 MDL proceedings now encompass a total of 426,495 actions, a negligible downtick from 428,415 actions pending as of mid-May.[4]

There are currently 26 MDL proceedings that have



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May Trivia Question

Prior to this hearing session, when was the last time that the panel considered at least eight new MDL petitions at a hearing session?

Answer to May Trivia Question

May 2021 (13 new MDL petitions).

July Trivia Question

At what time in the morning does counsel typically need to be present at a hearing session and at what time in the morning does oral argument typically begin?

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.

more than 500 pending actions, almost all of which are from among the product liability MDLs.[5]

Looking Forward: MDL Time?

At its July hearing session, the panel will consider a time-based MDL petition.[6] More specifically, the petition *In re: Kronos Customer Security Breach Litigation* encompasses a series of putative class actions against a provider of payroll and workforce management solutions arising from a ransomware cybersecurity attack.

The attack allegedly caused a data breach of a workforce management software application, including its timekeeping and payroll system. As a result, employees of the software provider's customers allegedly failed to receive their proper wages in a timely manner and certain personal information was allegedly disclosed.

Is it time for the panel to create a new MDL? This petition presents several issues central to whether the panel should establish an MDL proceeding:

1. Time to coordinate informally?

In opposition to the petition, the software provider defendant argued that only five actions remained pending, three of which were already consolidated in the U.S. District Court for the Northern District of California, and the two other actions were pending in Massachusetts and Pennsylvania, respectively.

In light of the relatively few actions and with the consolidation in California, there were in effect three pending cases, enabling the parties to coordinate without a formal MDL proceeding.

2. Time to file more cases?

As parties seeking to establish centralized MDL proceedings often contend, the plaintiffs here argued that an MDL should be created because additional cases are likely to be filed in the future.

Putting aside the issue of whether MDL proceedings themselves accelerate — or fuel — the growth of claims and new cases,[7] the software provider defendant countered that the panel "need not and should not speculate about whether and how the litigation might expand and should instead look to the cases presented for consolidation." [8]

3. Time to mediate?

As noted by the defendant, in one of the pending actions, the district court stayed the action pending a mediation with the plaintiffs' employer, suggesting that the time might not be ripe yet for an MDL proceeding.[9]

While we are on the subject of MDL time, we cannot help but remind practitioners that the panel issues decisions with alacrity, with relatively little time passing between a hearing session and the panel's decisions.

For example, following the May 27 hearing session, most of the decisions were issued by the end of the following week, even with the intervening Memorial Day weekend, with the panel issuing its final decision from the May hearing session on June 14.[10] Two days later,

the panel issued its docket for the July hearing session.[11]

Will the number of new MDL petitions continue to increase? What industries will be the subject of those petitions? Where will new MDLs be venued? Will MDLs return to more westerly locales? Will the panel continue to hold in-person oral arguments? Only time will tell!

Stay tuned for our next edition of And Now A Word From The Panel in connection with the panel's Sept. 29 hearing session in the Gateway to the West — St. Louis.

Enjoy the rest of the summer!

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-Jul-15-2022.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-Jul%2015-2022.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-Jul-15-2022.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-Jul-15-2022.pdf.

[5] Id.

[6] In re Kronos Customer Security Breach Litig. (MDL No. 3039).

[7] "And Now a Word from the Panel: Fewer MDLs, More Actions," Law360 (Jan. 27, 2021).

[8] MDL No. 3039, ECF No. 16, at 12.

[9] Id. at 5; see also "And Now a Word from the Panel: Why Not Just Arbitrate?" Law360 (May 29, 2019).

[10] <https://www.jpml.uscourts.gov/panel-orders>.

[11] https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed_July%202022.pdf; see also, "And Now a Word from the Panel: ABCs of JPML Practice," Law360 (Sept. 30, 2014).