

And Now A Word From The Panel: MDLs As A Last Resort

By **Alan Rothman** (May 24, 2023)

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.

With baseball's opening day in the rearview mirror, the panel heads back east this month, to the home of last year's National League champions, Philadelphia. At its May 25 hearing, the panel is scheduled to hear seven new MDL petitions — an increase from the five heard at the March hearing session in Tucson, a city without major league baseball.

Speaking of the March hearing, the panel slowed down the pace of new MDL proceedings, and denied three of the five petitions that it considered. With those results, the panel has created a total of eight new MDLs and denied five MDL petitions, dropping its "batting average" for the year from .750 to .615.

The March hearing reminds us that MDLs may not — nor should they — be a foregone conclusion. But more on that later.

The two new MDL proceedings from the March hearing session — involving alleged antitrust violations and a plane crash, respectively — are venued in Tennessee and Virginia, neither of which have a major league baseball team.

Over the past two months, the overall number of pending MDL proceedings has ticked down ever so slightly, from 175 proceedings in mid-March to 174 proceedings in mid-May.[1] Since January, the panel has closed out six MDL proceedings.[2]

Product liability MDLs still dominate the MDL landscape, currently comprising 35% of the total number of MDL proceedings, or 61 out of 174 MDLs.[3] MDL proceedings encompass more than 400,000 actions altogether, with a total of 405,996 actions pending in the current 174 MDL proceedings — an increase from the 397,808 actions pending as of mid-March.[4]

There are currently 19 proceedings which have more than 1,000 pending actions, almost all of which are from among the product liability MDLs.[5]



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PANEL TRIVIA CORNER

March Trivia Question

When was the last time prior to the March hearing session that the panel held a hearing session in a city without a major league baseball team?

Answer to March Trivia Question

March 31, 2022, in New Orleans.

May Trivia Question

Since 2013 and prior to the March hearing session, when was the last time that all of the new MDL proceedings arising from a single hearing session were venued in a state without a major league baseball team?

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.

MDLs: A Last Resort?

With the panel's batting average showing a marked increase over the past year — more MDLs created than denied — the March hearing session represented a shift in trajectory. As noted above, the panel denied three petitions and granted only two.

With the panel celebrating its 55th birthday, this shift also presents us with an opportunity to pause and reflect on MDL creation, as well as its consequences.

Although the absolute number of MDL proceedings has decreased significantly over the past decade — from nearly 300 in 2013, to 174 this month — the number of actions in those MDLs has exploded, rising from fewer than 100,000 to more than 400,000.[6]

As this column has reminded readers, that total does not tally the number of plaintiffs, as there are often multiplaintiff actions, or the number of unfilled claimants.

Whether one calls it the "MDL magnet" effect[7] or the "If you build it, they will come" effect,[8] the reality is that upon the filing of an MDL petition — and especially once an MDL is created — the number of new cases in the litigation will typically increase, and often spike.

MDL proceedings — particularly in the context of product liability and personal injury proceedings — provide relative easy ways to file a case, whether via direct filing orders or through the use of a master complaint. And only a very limited number of plaintiffs are ever subject to bellwether workups for trial.[9]

Indeed, an observation about MDLs from the Advisory Committee on Civil Rules bears repeating:

The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem.[10]

The MDL statute permits creation of an MDL once "civil actions involving one of more common questions of fact are pending in different [federal] districts."[11] By the terms of the statute, that is merely permissive: The actions "may be transferred for coordinated or consolidated pretrial proceedings."[12]

Moreover, to create an MDL, the panel must determine that such a proceeding "will promote the just and efficient conduct of such actions."[13]

As this column has noted in the past, it is interesting that the panel itself views creation of an MDL as the "last solution after considered review of all other options."[14] Those other options include informal coordination of discovery and other issues across actions by courts and counsel, as well as use of Section 1404 transfer.[15]

There was a time when the panel's annual batting average would well exceed .750, granting the overwhelming majority of new MDL petitions before it.[16] That pattern shifted significantly downward over the past decade, but has trended upward over the past few years.

More significantly, the inordinate number of actions pending in MDL proceedings relative to

the entire federal docket warrants continued "considered review" of other options before resorting to the MDL process.

Will the panel pick up the pace in creating new MDL proceedings? Or will the panel take a closer look consistent with MDLs being a last resort? Will the panel keep its batting average above .500? Or will it continue downward?

Where will new MDLs be venued? Will new districts get their chance to host an MDL? Stay tuned for our next edition of *And Now A Word From The Panel*, when the panel heads back west for the July 27 hearing session in San Francisco.

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_District-May-15-2023.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MD_Ls-January%201-May-15-2023.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Docket_Type-May-15-2023.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-May-15-2023.pdf.

[5] *Id.*

[6] "And Now A Word From The Panel: 10 Years of MDL Lessons," *Law360* (Nov. 30, 2022).

[7] "And Now A Word From The Panel: 4 MDL Lessons at 40," *Law360* (July 24, 2019).

[8] "And Now a Word from the Panel: Baseball and MDLs," *Law360* (March 29, 2023), citing Agenda Book, Advisory Committee on Civil Rules, at 143 (Nov. 1, 2018).

[9] See Alan E. Rothman and Mallika Balachandran, Early Vetting: A Simple Plan to Shed MDL Docket Bloat, 881 *UMKC Law Rev.* 89.4 (2021).

[10] See n.8, *supra*.

[11] 28 U.S.C. § 1407.

[12] *Id.*

[13] *Id.*

[14] See n.6, *supra*.

[15] *Id.*

[16] See "And Now A Word From The Panel: 20/20 MDL Vision," Law360 (March 29, 2016).