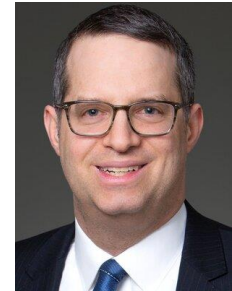


And Now A Word From The Panel: 5 Key MDL Factors

By **Alan Rothman** (September 28, 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 forgoing in-person meetings for more than two years in light of the COVID-19 pandemic, the panel is scheduled to hold its fourth consecutive in-person oral argument. For the Sept. 29 hearing session, the panel begins its trek back east, holding that session in the Show-Me State — specifically, in St. Louis, Missouri — after its July hearing session out west in Seattle, Washington.



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At the September hearing, the panel is scheduled to hear five new MDL petitions. But at the July hearing session, the panel considered seven new MDL petitions — including the petition addressed in our last column, arising from an alleged data breach of a timekeeping and payroll system. More to come on that below.

Keeping up with this year's trend of granting MDL petitions, the panel granted five of the petitions heard in July. In addition, in a rare expedited fashion, the panel considered an eighth petition shortly after the July hearing session, which it denied.

Accounting for these new results, the panel has now granted 16 new petitions and denied only seven petitions for the year. The panel is still maintaining one of its highest batting averages in years, now clocking in at .696 for 2022.

The five new MDL proceedings — which involve product liability and patent matters — are venued in Delaware, Illinois, North Carolina, Michigan and Texas, continuing an atypical 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 down slightly to 183, from 186 in mid-July.[1] Consistent with its general practice, the panel continues to close out older MDL proceedings, with a total of 18 MDLs terminated this year — a summertime jump from the 10 MDLs terminated as of mid-July.[2]

Product liability MDLs continue to dominate the MDL landscape, now comprising more than one-third of the total number of MDL proceedings — 62 out of 183 MDLs.[3] The 183 MDL proceedings now encompass a total of 393,071 actions, down a bit from 426,495 actions pending as of mid-July.[4]

There are currently 25 MDL proceedings that have more than 500 pending actions, almost all of which are from among the product liability MDLs.[5]

PANEL TRIVIA CORNER

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?

Answer to July Trivia Question

Counsel must typically be present at 8:30 a.m. local time, with arguments typically beginning at 9:30 a.m. Interestingly, for this month's hearing session and in a change from its original notice, the panel recently advised counsel to be present at 8 a.m.

September Trivia Question

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

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.

Looking Back: Five MDL Factors

As readers may recall, at the July hearing session, the panel considered a time-based MDL petition.^[6] More specifically, that petition encompassed 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.

In our last column, we asked whether it was time for the panel to create a new MDL for this data breach litigation. The panel has since responded in the negative. Let's explore the five factors that the panel considered in reaching its decision.

1. The Facts

Most notably, the first step in any MDL analysis is considering whether the actions present "one or more common questions of fact." [7] But the question is necessarily more nuanced.

Here, the panel found that "while the actions all share factual questions regarding the circumstances of the data breach, some also include wage and hour claims against" the payroll provider and the plaintiffs' employers. [8] The panel also found that:

These claims will involve factual issues unique to each employer and how each handled the payroll system outage. With a relatively small number of actions, the addition of such individualized facts and unique additional defendants would complicate the management of a coordinated proceeding. [9]

Interestingly, it was the combination of a relative dearth of actions in the litigation with various case-specific facts that tipped the scales for this factor against creating an MDL.

2. Informal Coordination

The panel concluded that "informal coordination among the small number of parties and involved courts appears eminently feasible." [10]

In particular, the panel noted that through voluntary cooperation, the actions pending in the U.S. District Court for the Northern District of California "already have resulted in consolidation in that court." [11] Thus, this factor militated against creating an MDL.

3. Location of Actions

Apart from the actions in California, there were nine remaining federal actions. Eight of those nine actions were before a single judge in Massachusetts. [12]

This factor suggested that the actions were confined and manageable without a formal MDL proceeding.

4. Common Counsel

The court observed that of the remaining actions outside of California, seven were filed by common counsel. [13] This factor also suggested that coordination was feasible even absent an MDL.

5. Consensus

Does it matter what the parties think regarding centralization? The panel answered that question in the affirmative.

Plaintiffs outside of Massachusetts and the common defendant in the litigation opposed centralization. Consistent with panel precedent, the panel "found persuasive that 'of all responding parties, those who would be most affected by centralization ... do not believe that centralization would be beneficial.'" [14]

Will the panel continue to create new MDL proceedings? What factors will the panel consider in its future deliberations as to whether to do so? 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 once again become home to new MDLs? Stay tuned for our next edition of And Now A Word From The Panel, in connection with the panel's Dec. 1 hearing session in this author's hometown, the Big Apple — New York, New York!

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

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

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

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

[5] Id.

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

[7] 28 U.S.C. § 1407(a).

[8] Kronos, at 2.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id. (citations omitted).