

# And Now A Word From The Panel: A One-State MDL?

By **Alan Rothman** (September 27, 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 autumn upon us, the panel prepares for its September hearing session at the panel chair's hometown of Lexington, Kentucky, with the hearing to be held at the University of Kentucky College of Law.[1]

Once again, the panel has a relatively paltry docket, with the panel considering only three new MDL petitions. At its July hearing session in San Francisco, the panel ruled on only two new MDL petitions.

At the July session, the panel batted a thousand, granting both petitions it considered. With those new MDLs, the panel is now batting .727 for the year, up from .700 two months ago.

In 2023, the panel has created a total of 16 new MDLs and denied six MDL petitions. The two new MDL proceedings from the July hearing session are held in Arizona and New Jersey, involving product liability and sales practices, respectively.

Over the past two months, the overall number of pending MDL proceedings has ticked down slightly to 172, from 173 proceedings in mid-July.[2] Since January, the panel has closed out 16 MDL proceedings.[3]

Product liability MDLs still dominate the MDL landscape and have grown to more than 37% of the total number of MDL proceedings — 65 out of 172 MDLs.[4] MDL proceedings continue to encompass more than 400,000 actions, with a total of 408,636 actions pending in the current 172 MDL proceedings.[5]

There are currently 19 proceedings that have more than 1,000 pending actions, 10 of which have more than 5,000 pending actions, all of which are from among the product liability MDLs.[6]

As we have reminded our readers, these tallies are just civil actions, not the total number of plaintiffs, and they do not include unfilled claimants.

## A One-State MDL?

As this column has noted from its earliest days, under the MDL statute, a minimum requirement for an MDL proceeding is that there be a total of at least two pending federal actions in different federal judicial districts.[7]

Put another way, if there are multiple federal actions in only a single federal district court, those actions are ineligible for consideration as an MDL.

Notably, there is no statutory limitation on an MDL comprised exclusively of actions pending in a single state, provided that those actions are pending in different federal districts — as many states embody multiple federal districts.



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Nonetheless, where actions are limited to a single state, there may be meaningful alternatives to MDL centralization that can facilitate informal or even formal coordination without the need to resort to an MDL proceeding.

This is especially true where there are only a limited number of pending actions and/or involved counsel.

At the September hearing session, the panel will consider on the papers an MDL petition where the two constituent actions are both pending in Pennsylvania, but in different federal districts — one in the U.S. District Court for the Eastern District of Pennsylvania and the other in the U.S. District Court for the Middle District of Pennsylvania.[8]

These civil rights actions were filed five years apart by the same prison inmate against various state staff and officials.

While the parties dispute the degree of overlap between the two actions and whether an MDL should be created, the key takeaway for MDL practitioners is that the presence of actions in a single state does not preclude the filing of an MDL petition, so long as the actions are pending in different federal judicial districts.

Whether the creation of an MDL in a single state is appropriate will likely focus on the same questions typically considered by the panel:

- Do the actions involve common discovery?
- Will MDL centralization facilitate the just and efficient conduct of the litigation as well as conserve the resources of the court and parties?
- Are there alternative means to MDL centralization such as Section 1404 transfers or informal coordination?
- Are the actions in varying procedural postures?

Of course, the pendency of actions in the relatively close proximity of the same state, coupled with a limited number of actions and counsel, may affect these questions, especially the ability to coordinate informally.[9]

Will there be an uptick in new MDL petitions? Or will the panel be headed for its slowest year in recent memory? Will the panel's batting average stay above .700? Will there be other new MDL petitions limited to actions pending in only one state?

Stay tuned for our next edition of *And Now A Word From The Panel*, when the panel heads to San Antonio for a somewhat rare November — rather than early December — panel session and its final hearing session of the year.

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[1] [https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed\\_September%202023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed_September%202023.pdf).

[2] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-September-15-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-September-15-2023.pdf).

[3] [https://www.jpml.uscourts.gov/sites/jpml/files/Recently\\_Terminated\\_MDLs-January%201-September-15-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-September-15-2023.pdf).

[4] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Docket\\_Type-September-15-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Docket_Type-September-15-2023.pdf).

[5] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-September-15-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-September-15-2023.pdf).

[6] Id.

[7] 28 U.S.C. § 1407; see "And Now a Word From the Panel," Law360 (Jan. 28, 2013).

[8] In re Pennsylvania Department of Corrections Inmate Confinement Litig. (MDL No. 3085).

[9] See generally "And Now a Word From the Panel: 3 Alternatives to MDLs," Law360 (Sept. 27, 2016); "And Now a Word From The Panel," Law360 (Jan. 28, 2013).