

And Now A Word From The Panel: Baseball And MDLs

By **Alan Rothman** (March 29, 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 spring in the air and the confluence of a panel hearing session and opening day of a new baseball season on March 30, it is a great time to explore connections between the national pastime and MDL practice.

Before embarking on that journey, let's take a closer look at this month's panel hearing session scheduled to take place in Tucson, Arizona, as well as the results from the January session held on the East Coast, in Miami.



Alan Rothman

This month, the panel is scheduled to hear five new MDL petitions, a decrease from the eight ultimately heard by the panel in January. Of the eight petitions considered in January, the panel created six new MDL proceedings, propelling the panel to an impressive 6-2 start for the year with a "batting average" of .750.

This is even above the panel's lofty .679 average for 2022. The six new MDL proceedings — which include data breach, marketing and sales, product liability and antitrust proceedings — are venued in Georgia, Illinois, New Jersey, North Carolina and Wisconsin.

Over the past two months, the overall number of pending MDL proceedings has ticked up slightly to 175 proceedings in mid-March.[1] Since January, the panel has closed out three MDL proceedings.[2]

Product liability MDLs still dominate the MDL landscape, currently comprising 36% of the total number of MDL proceedings — 63 out of 175 MDLs.[3] The 175 MDL proceedings now encompass a total of 397,808 actions, a negligible tick down from the 400,196 actions pending as of mid-January.[4]

There are currently 20 MDL proceedings, which have more than 1,000 pending actions, almost all of which are from among the product liability MDLs.[5]

Play Ball!

It is hard to resist writing a column about opening day, as this column is peppered with sports references and, of course, keeping close tabs on the panel's batting average.

Thus, it is a most fascinating coincidence to this baseball fanatic that the panel is holding its March hearing session on the first day of the baseball season.

Opening Day Hearing Sessions

As readers of this column are well aware, the panel generally meets on the last Thursday of every other month — the odd months of January, March, May, July, September and November, with a few exceptions for November and sometimes September.

Historically, the first pitch of a new season was in April. In more recent years, baseball fans

have looked forward to a March start. At times, that date has been on the last Thursday of March.

For example, on March 28, 2019, the first day of the baseball season and panel session were aligned. The panel met in our nation's capital, home to the Washington Nationals, who conveniently had an afternoon home opener that same day.[6]

What makes this year interesting is while the panel session and opening day coincide, the panel is meeting in a city without a major league team, Tucson, Arizona. The closest home team, the Arizona Diamondbacks, begin the season in Los Angeles.

Fortunately, the Diamondbacks have a night game, affording panel fans who may want to catch the opening pitch with plenty of time to arrive in Los Angeles before the 7:30 p.m. start time.

Sports MDLs

Over the years, there has been no dearth of MDLs relating to sports.[7]

The MDL process has featured sports-related proceedings in the areas of antitrust, personal injury, marketing and sales, and even fantasy football.[8]

Several current MDL proceedings touch upon sports, whether at the professional or collegiate level. As this column has previously noted, the history of sports has even loomed large in arguments considering the appropriate venue for a sports MDL.[9]

Who's on First

In its never-ending interest in the elusive factors supporting the venue for a new MDL proceeding, this column has addressed that wide range of considerations.

One such factor has been the venue of the first-filed action.

The venue of the first action to hit the docket, a venue selected by plaintiffs' counsel, is at times the panel's venue choice for a new MDL.[10]

Home Field

Turning to another venue factor, the panel will at times consider an MDL venue near a defendant's headquarters, where witnesses and documents may be located, or where various plaintiffs reside.[11]

Field of Dreams

In recent years, the MDL and baseball worlds have collided in the context of MDL reform.

There is nothing like a good analogy to highlight a fundamental problem in MDL practice.

As this column has observed, there is an ever-burgeoning number of actions with MDL proceedings, particularly product liability and other personal injury MDLs.

That does not even take into account the number of multiplaintiff complaints and unfiled claims.

This has been enshrined as the "if you build it, [they] will come" phenomenon, a catchphrase from a classic baseball film, "Field of Dreams."

As recognized in an Agenda Book for the Advisory Committee on Civil Rules:

There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations — perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices — a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.[12]

And tipping its cap to this classic flick, that Agenda Book further noted:

[T]he source of these problems might be called the "Field of Dreams" problem, or "If you build it, they will come." 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.[13]

Should guidance for managing MDLs be adopted as part of the Federal Rules of Civil Procedure, we hope that the background cited above will feature prominently in the explanation for a rules change — not only because it is a baseball reference, but because it cuts to the heart of the need for rulemaking here.

Indeed, the Rules Enabling Act requires a written report explaining the body's action in recommending a proposed rule change.[14]

If a process for addressing meritless claims is not addressed at the outset of an MDL proceeding, it can cause problems for the court and parties with respect to the management of the MDL, the selection of bellwether cases and throughout the process.

Are there more sports-related MDLs on the horizon? Will the panel continue to create new MDL proceedings? Can the panel keep up its blazing batting average?

Will product liability actions continue to dominate new petitions and new MDL proceedings? Where will new MDL proceedings be venued?

Stay tuned for our next edition of And Now A Word From The Panel, when the panel heads back east for the May 25 hearing session in Philadelphia.

PANEL TRIVIA CORNER

January Trivia Question

When did the panel last hold an in-person January hearing session in a city other than Miami?

Answer to January Trivia Question

Jan. 30, 2020, in Tampa, Florida.

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?

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.

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-16-2023.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-March-16-2023.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Docket_Type-March-16-2023.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-16-2023.pdf.

[5] Id.

[6] See "And Now a Word from the Panel: An MDL Denial," Law360 (Mar. 26, 2019); "And

Now a Word from the Panel: MDL Year in Review," Law360 (Jan. 29, 2019).

[7] See "And Now a Word from the Panel: 20/20 MDL Vision," Law360 (Mar. 29, 2016) ("Why Sports?").

[8] See e.g., "And Now a Word from the Panel: 2015 JPML Practice Trends," Law360 (Jan. 26, 2016) (antitrust and fantasy football MDL petitions); "And Now a Word from the Panel: 20/20 MDL Vision" (Mar. 29, 2016) (fantasy football).

[9] See "And Now A Word From The Panel: Top 10 Venue Arguments," Law360 (July 29, 2014) ("Sixty percent of the 1980 'Miracle on Ice' U.S. Olympic Hockey Team were players born and raised in Minnesota," a state which is also recognized as the "State of Hockey").

[10] See n.7, *supra* (noting "first-filed action" as a factor for selection of MDL judge).

[11] See "And Now a Word from the Panel: There's No Place Like Home," Law360 (Mar. 23, 2021).

[12] Agenda Book, Advisory Committee on Civil Rules, at 142 (Nov. 1, 2018).

[13] *Id.* at 143 (emphasis added).

[14] 28 U.S.C. § 2073(d).