

And Now A Word From The Panel: Closing MDLs

By **Alan Rothman** (July 28, 2021)

Welcome to the latest installment of And Now a Word from the Panel, a column which "rides the circuit" with the Judicial Panel on Multidistrict Litigation as it meets on a bimonthly basis.

Consistent with recent panel practice in the wake of the COVID-19 pandemic, arguments for the panel's July 29 hearing session will be presented remotely via the Zoom meeting app. But, based on the hearing session order, the panel will be sitting in the federal courthouse in Boston.[1]



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In a change of pace from the last session when the panel heard a plethora of new MDL motions, the July session features oral argument as to only four MDL motions and one additional MDL motion to be decided on the papers. Once again, this month's hearing comes with the panel's reminder: "The use of videoconference technology for presentation of oral argument is not normal panel practice." [2]

Looking back at the May hearing session, the panel issued rulings on a remarkable 13 new MDL motions. The results were as close to evenly split as possible, with the panel granting seven of the motions and denying six of them. With these latest results, the panel's batting average for 2021 is now .522 (granting 12 out of 23 petitions for the year). The new MDLs are venued in federal district courts in California, Florida, Illinois, Minnesota and Missouri.

With these new MDLs, the overall number of pending MDL proceedings moved up to 189, from 184 in mid-May.[3] The panel continues to close out older MDL dockets, but at a slower pace than in years past, terminating only 10 MDLs this year through mid-July, a subject to which we will return shortly.[4]

Product liability MDLs now comprise approximately 30% of the total number of MDL proceedings.[5] The 189 MDL proceedings now encompass 372,681 individual actions, an approximately 2% increase in actions (from 365,594) over the past two months.[6] There are currently 23 MDL proceedings which have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[7]

Looking Back: Home Sweet Home?

As noted in our prior column, at its March hearing session, the panel considered whether to centralize actions arising from allegedly misleading ground coffee canister labels,

purportedly overstating the number of cups of coffee the canister would yield.

The panel granted the MDL petition.[8]

MDL Closeout

As noted above and regularly in this column, the panel frequently terminates MDL proceedings. Even with the addition of new MDL proceedings, the overall number of MDLs has remained relatively stable over the past few years (below 200 proceedings) by dint of the panel's continued closing of older proceedings.

For example, the panel terminated 45 proceedings in 2018; 44 proceedings in 2019; and 34 proceedings in 2020.[8] While the pace of terminating MDLs has slowed a bit this year — 10 as compared to 15 at the same time last year[9] — it is clear that closing out MDLs is a mainstay of panel practice.

Interestingly, while the process of creating a new MDL is accompanied by considerable briefing, deliberations, oral argument and ultimately a written panel decision, the closing of MDL proceedings is usually devoid of any fanfare.

Short of monitoring panel dockets or the panel's monthly and annual statistical updates, these terminations often transpire with barely a whimper. Indeed, even the MDL statute is silent as to the panel's role in closing an MDL proceeding or the standard to be applied in making that determination.

What then triggers an MDL closeout? It cannot merely be the dearth of actions in an MDL proceeding. Indeed, seven current MDL proceedings have no pending actions and another eight have only one pending action.[10]

Although an MDL may not be established absent the pendency of at least two actions in two different federal districts, there is no corollary rule requiring the closing of an MDL when the number of pending actions falls below a magic number.

Simply because an MDL proceeding has no pending actions does not foreclose the possibility that other related actions will be filed or perhaps some cases are on appeal, which might be sent back to the MDL court.

While there are no firm guidelines, there is a recent pattern as to when the panel will say farewell to an MDL. Typically, the panel will follow the lead of the MDL transferee court. Once that court enters an order of final judgment or directs the local district court clerk to

PANEL TRIVIA CORNER

May Trivia Question

How long did it take for the panel to reach its 1,000th MDL petition?

Answer to May Trivia Question

March 28, 2019. The panel had been scheduled to hold its March 26, 2020, hearing session on opening day as well, but opening day was postponed and the panel canceled oral argument for that session due to the COVID-19 pandemic.

July Trivia Question

How many MDL proceedings established prior to 2005 remain open?

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.

close the docket, that order is generally filed on the panel's docket.

Cases are ready to be closed in the MDL district because parties have obtained dismissals — either by motion or due to settlements — or because the panel has issued a final remand order, transferring all remaining cases to transferor courts. These developments ultimately lead to closure of the panel's docket for that MDL proceeding.

Looking at the past few years and as reflected in the chart below,[11] the panel's pace of terminating older MDLs picks up between July and the close of the federal government's fiscal year in September through the end of the calendar year:

Year	Terminated (mid-July)	Terminated (mid-September)	Terminated (year-end)
2018	26	35	45
2019	19	32	44
2020	15	25	34

Whether that trend will continue in 2021, during which the panel has terminated only 10 MDLs to date, remains to be seen.

Will the panel in fact close additional MDL proceedings? Will the number of overall MDL proceedings continue to increase? How many new MDL motions will the panel hear at the next hearing session? Will the panel keep its batting average for the year above .500? Will the panel return to in-person oral arguments? Where will the panel meet next?

Stay tuned for our September column. All should be well and safe!

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Hearing%20Session%20Filed_July%202021.pdf.

[2] https://www.jpml.uscourts.gov/sites/jpml/files/Supplemental_Notice_of_Hearing_Session-7-29-21.pdf.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2021.pdf.

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%2021-July%2021.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-July-15-2021.pdf.

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-15-2021.pdf.

[7] Id.

[8] See "And Now a Word from the Panel: Fewer MDLs, More Actions" Law360 (Jan. 27, 2021); "And Now a Word from the Panel: MDLs Continue to Thrive," Law360 (Feb. 21, 2020); "And Now a Word from the Panel: MDL Year in Review," Law360 (Jan. 29, 2019).

[9] See "And Now a Word from the Panel: MDL Distancing," Law360 (July 27, 2020).

[10] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-15-2021.pdf.

[11] See supra n.8; see also "And Now a Word from the Panel: Justifying an MDL," Law360 (Sept. 23, 2020); "And Now a Word from the Panel: MDL Distancing," Law360 (July 27, 2020); "And Now a Word from the Panel: Too Small for an MDL?," Law360 (Sept. 24, 2019); "And Now a Word from the Panel: 4 MDL Lessons," Law360 (July 24, 2019); "And Now a Word from the Panel: An MDL Breakup," Law360 (Sept. 25, 2018); "And Now a Word from the Panel: A Flood of MDLs," Law360 (July 24, 2018).