

## And Now A Word From The Panel: Fewer MDLs, More Actions

By **Alan Rothman** (January 27, 2021)

Welcome as we enter the ninth year 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 at venues around the country.

As we begin 2021, the panel continues its remote hearing procedures, and for the first time in a number of years, it will not be holding its January hearing in the state of Florida. Nevertheless, the Super Bowl is scheduled to return to the Sunshine State in early February — somewhat ironically, at the situs of the panel's last in-person hearing session, in Tampa in January 2020.



Alan Rothman

For its January hearing session, the panel has a lighter docket than usual, with only four new MDL petitions to begin the year.

### 2020: MDL Year in Review

Over the past several years, this column has noted the relative decrease in the number of MDL petitions. Last year was relatively consistent with the previous few years, in that the panel issued decisions with respect to 44 potential new MDL proceedings.

In both 2017 and 2019, the panel ruled on 40 petitions. A notable exception was in 2018, when the panel ruled on 61 petitions. If 2021 follows the slower pace of the January hearing session, the general trend of recent years may hold true this year as well.

One of the most notable statistics for 2020 is that the panel significantly increased its batting average to .591 — an uptick from 2019's .525 average. This was helped by the unusual 1.000 batting average in December, with the panel batting 8-8, granting all of the new MDL petitions before it.

The panel continued its cleanup efforts in 2020, terminating 34 MDL proceedings. With this continued pace of closing out old MDLs, there were 185 pending MDL proceedings as of the end of 2020 — a slight decrease from the 190 pending MDL proceedings as of the end of 2019.<sup>[1]</sup>

### 2020: By the Numbers

The chart below compares the panel's 2020 stats with those from 2019:

| CATEGORY  | 2020  | 2019  |
|---|-------|-------|
| Number of MDLs Created  | 26    | 21    |
| Number of MDL Motions Denied  | 18    | 19    |
| MDLs Created as Percentage of Total Number of MDLs Created and Motions Denied | 59.1% | 52.5% |

|   |     |     |
|---|-----|-----|
| Number of Terminated MDLs                       | 34  | 44  |
| Number of New Product Liability MDLs            | 6   | 8   |
| Number of New Marketing and Sales MDLs          | 0   | 2   |
| Number of New Antitrust MDLs                    | 5   | 3   |
| Number of New Data Breach/Privacy MDLs          | 3   | 3   |
| Number of New Securities MDLs                   | 1   | 0   |
| Number of New Intellectual Property/Patent MDLs | 2   | 5   |
| Total Number of MDLs Pending At Year's End      | 185 | 190 |

## 2020: Trendlines

Putting aside the shift to video hearings in light of the COVID-19 pandemic, there were a few additional trendlines from 2020 in panel practice. Although the number of new MDL petitions remained relatively stable, the following are key takeaways from the 2020 statistics:

- The panel created a slightly greater number of new MDL proceedings — 26 in 2020, as opposed to 21 in 2019.
- There were fewer new product liability MDLs — six — as compared to prior years — including eight created in 2019.
- For the first time in several years, securities MDLs made a comeback, with the panel creating one new proceeding.
- The panel also established the first employment MDL proceeding for the first time in a number of years.
- 2020 saw a decline in the number of new intellectual property/patent MDLs — two in 2020, as opposed to five in 2019.

- 2020 also saw an increase in the number of new antitrust MDLs — five in 2020, as opposed to three in 2019.
- The number of new data breach/privacy MDL proceedings remained the same, with three new MDLs again in 2020.

## **2020: MDL Venues**

Continuing this column's annual tradition, let us explore the panel's 2020 selection of MDL venues. Consistent with 2019, the new 2020 MDL proceedings are more heavily concentrated in the Eastern and Central time zones — 23 out of the 26 new MDL proceedings in 2020.

This trend can be best explained by where parties to the MDL happened to be based, or where the events occurred, and where witnesses and documents were located, rather than a particular geographic focus.

However, consistent with the adage "the more things change, the more they stay the same," New York and California were again among the most popular MDL destinations — with three new MDL proceedings in each state. Interestingly, one district — the Western District of Missouri — more than doubled its MDL population, with three new MDLs.

The state winner this year was Illinois, with four new MDL proceedings. Moreover, a few states reentered the ranks of MDL venues, including Arkansas and North Carolina.

In total, the 26 new 2020 MDLs are centralized in 16 states, embodying 16 judicial districts, with no more than one district selected per state this past year. Out of the 26 MDL proceedings that were created in 2020:

- 38% (10) are venued in the South, in Arkansas, the District of Columbia, Delaware, Florida, Georgia, North Carolina, Oklahoma, South Carolina and Texas;<sup>[2]</sup>
- 27% (seven) are venued in the Midwest, in Illinois and Missouri;
- 23% (six) are venued in the Northeast, in Massachusetts, New Jersey and New York; and
- 12% (three) are venued in the West, in California.

## **2020 and 2021: A Look Back and Forward**

Throughout the challenges of the past year, the panel did not miss a single hearing session, even if remote, and MDL practice remained a staple of the litigation landscape in the U.S.

Although the number of MDL proceedings continued to decrease, perhaps the most notable MDL statistic of 2020 was the sheer number of actions within the existing MDL proceedings. The 185 MDL proceedings pending at year's end embody more than 340,000 individual actions, as compared to just over 130,000 actions at the end of 2019.[3]

In fact, there are 16 MDL proceedings with more than 1,000 pending individual actions.[4] Even more dramatic is that the 14 product liability MDL proceedings established over the past two years already comprise a total of more than 220,000 individual actions.[5] As in years past, we will continue to watch this critical trend in MDL practice, and what may be accelerants for this growth.

What lies ahead in 2021 for the panel? Will we see an increase in the number of MDL petitions? Will product liability actions continue to occupy much of the MDL space? What will be the venue for new MDLs? Will we see a return to in-person panel hearings in 2021?

While the venue and date for the panel's next hearing remain to be determined, stay tuned for our next edition of And Now a Word from the Panel.

## **PANEL TRIVIA CORNER**

### **December Trivia Question**

When was the last time that the panel held a hearing session in November?

### **Answer to December Trivia Question**

Thursday, Nov. 29, 2018, when Thanksgiving fell on the second to last Thursday in November, instead of the last Thursday. That hearing session was held in the Big Apple — New York, New York.

### **January Trivia Question**

When was the last year that the panel considered more than 100 new MDL petitions?

*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](mailto:arothman@sidley.com).*

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*Alan E. Rothman is counsel at Sidley Austin LLP. He counsels clients on issues relating to practice and procedure before the Judicial Panel on Multidistrict Litigation, and has appeared before the panel on oral argument.*

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[1] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-January-19-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-19-2021.pdf).

[2] The regions are based on those used for purposes of the U.S. census.

[3] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_MDL\\_Type-January-19-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-January-19-2021.pdf).

[4] Id.

[5] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_MDL\\_Type-January-19-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-January-19-2021.pdf); [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-January-19-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-19-2021.pdf).