

And Now A Word From The Panel: MDL Nostalgia

By **Alan Rothman** (December 2, 2020)

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. As this column concludes its eighth year, this month's edition will engage in a bit of nostalgia, reminiscing about what has changed and what has remained the same at the panel over time.



Alan Rothman

Hearing Sessions

Clearly, what has changed in the wake of the COVID-19 pandemic is the new practice of holding hearing sessions remotely via the Zoom meeting app. As with the past three hearing sessions, the panel will hold its Dec. 3 hearing session remotely.[1] But the panel reminds us that:

The use of videoconference technology for presentation of oral argument is not normal Panel practice. In light of the ongoing COVID-19 pandemic, the Panel and Panel staff are making the time- and resource-intensive arrangements necessary to conduct a virtual hearing in an efficient and effective manner. The Panel plans to return to its practice of in-person hearings when it becomes practicable to do so.[2]

For its upcoming hearing session, the panel has made an audio line available for "[n]on-arguing counsel, members of the press, and the general public." [3] And consistent with its practice over the years, when Thanksgiving falls on the last Thursday of November — as it did this year — the panel holds its hearing on the first Thursday in December.

Welcome to the Panel ... Again

Another change is the composition of the panel. For the third time in as many years, the panel has two new members.

As readers of this column may recall, the MDL statute vests the chief justice of the U.S. with the sole authority to appoint panel members. Under the statute, U.S. Supreme Court Chief Justice John Roberts selects the seven panel members from among district and circuit court judges, although no two panel members may be from the same circuit.[4]

Since 2018, we have previously welcomed four new panel members, including the current panel chair Judge Karen K. Caldwell, from the U.S. District Court for the Eastern District of Kentucky; Judge Nathaniel M. Gorton, from the U.S. District Court for the District of Massachusetts; Judge Matthew F. Kennelly, from the U.S. District Court for the Northern District of Illinois; and Judge David C. Norton, from the U.S. District Court for the District of South Carolina.

We now welcome two new members to this seven-member panel: Senior Judge Roger Benitez, from the U.S. District Court for the Southern District of California, and Senior Judge Dale A. Kimball, from the U.S. District Court for the District of Utah. These new panel members replace Senior Judge Ellen Segal Huvelle, from the U.S. District Court for the District of Columbia, and Judge R. David Proctor, from the U.S. District Court for the Northern District of Alabama, as members of the panel.

With these changes, there is no panel member remaining from 2013, the first year of this column. Moreover, with these appointments over the past several years by the chief justice, there are only district court judges, and no circuit court judges, on the panel.[5]

Looking Back to September

Before looking a little further into the past, let's turn to the panel's September video hearing session. At that session, the panel considered eight MDL petitions. The panel denied five of those MDL motions, but created four new MDLs, splitting one of the MDL applications into two new MDL proceedings.

In a change of pace, the panel for the second time this year did not create a new product liability MDL proceeding. The new MDLs continue to be spread out a bit more across the country, and again include venues in California, Illinois and Missouri. For the first time this year, Texas joins the ranks of a selected MDL venue.

The panel's 2020 batting average remains .500 for the year, establishing 18 new MDL proceedings out of a total of 36 petitions considered by the panel. New MDL petitions maintain a steady pace, with the panel slated to hear arguments on nine MDL petitions at its December hearing. This is a marked uptick from the three petitions heard at last December's hearing.[6]

Although the panel created three new MDL proceedings, the overall number of pending MDL proceedings has held steady since two months ago at 180 MDL proceedings.[7] The panel continues to close out older MDL dockets, terminating a total of 30 existing MDLs this year through mid-November.[8]

Notwithstanding the absence of a new product liability MDL over the past two months, there are still 59 such proceedings — or nearly a third of all MDLs.[9]

The Burgeoning MDL Caseload

The 180 MDL proceedings currently encompass an eye-popping 331,400 actions.[10] There are now 24 MDL proceedings that have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[11]

By contrast, as of 2013 — the first year of this column — there were close to 300 MDL proceedings, but only 89,123 individual actions.[12]

What will the December video hearing bring? Will the panel bat .500 for the year? What trends will see as we close out the year? Whether the panel kicks off the year for its January hearing session in its typical warm Florida locale or remotely, stay tuned for our year-in-review edition of And Now A Word From The Panel. May all be well and safe. Best wishes for a happy and healthy 2021!

PANEL TRIVIA CORNER

September Trivia Question

When was the last time that the panel held two hearing sessions within the Eleventh Circuit during the same calendar year?

Answer to September Trivia Question

2018, when the panel held back-to-back hearing sessions in the circuit. The January session was held in Miami, and the March session was held in Atlanta.

December Trivia Question

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

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/Supplemental_Notice_of_Hearing_Session-12-3-20.pdf.

[2] Id.

[3] Id.

[4] 28 U.S.C. § 1407(d).

[5] https://www.jpml.uscourts.gov/sites/jpml/files/ROSTER%20OF%20CURRENT%20AND%20FORMER_1.pdf.

[6] And Now a Word from the Panel: "MDLs, Continue to Thrive," Law360 (Feb. 21, 2020).

[7] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-November-16-2020.pdf.

[8] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MDLs-January%201-November-16-2020.pdf.

[9] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-November-16-2020.pdf.

[10] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-16-2020.pdf.

[11] *Id.*

[12] https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2013.pdf at 4; https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf at 12.