

And Now A Word From The Panel: MDL Distancing

By Alan Rothman

Law360 (July 27, 2020) -- 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. In light of the COVID-19 pandemic, the panel will follow its new practice of holding its hearing sessions remotely.



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As with its May 28 hearing session, the July 30 hearing will be held as a video teleconference via the Zoom meeting app, rather than an in-person meeting in the panel's previously scheduled locale of Boston. Counsel scheduled to argue at the session must first attend a training session.[1]

But lest panel watchers think that video panel sessions will become a fixture of panel practice, the panel cautioned that it "plans to return to its practice of in-person hearings when it becomes practicable to do so." [2] Moreover, "only counsel presenting oral argument will be provided access to the videoconference during the designated time[s]." [3]

All others — including nonarguing counsel, members of the press and the general public — can dial in to the hearing. [4] Following the hearing, a copy of the transcript for a particular docket can be obtained by placing an order for the transcript. The panel has cautioned that "[a]ll recording of the Hearing Session is prohibited." [5]

In this era of social distancing, this month's column explores a few areas of "MDL distancing." In addition to the remote hearing sessions, we look anew at the role of (1) "geographic distancing" in the selection of MDL venues; and (2) "jurisdictional distancing," reflecting the interface between personal jurisdiction and MDL proceedings, where the MDL venue is distant from a defendant's home state.

But before exploring these issues, let us review the results of the panel's May session, also conducted by videoconference, with the audio replay available on the panel's website. At the May session, the panel considered four new MDL petitions. The panel granted three of those new MDL motions and denied one, with the three new MDLs relating to securities, marketing/sales practices and product liability.

Although the baseball season is just beginning, the panel is now batting .500 for the year, establishing eight new MDL proceedings out of a total of 16 petitions considered by the panel in 2020. The pace of new MDL petitions is now picking up, with the panel slated to hear arguments at its July hearing on a whopping 12 new MDL petitions. With the increased number of petitions, the panel has divided its July hearing into morning and afternoon sessions. Counsel should only sign into the Zoom session in which counsel will be arguing.

The overall number of pending MDL proceedings is now at 183, a slight decline of one MDL since two months ago.[6] The panel continues to close out older MDL dockets, terminating a total of 15 existing MDLs this year through mid-July.[7]

Product liability MDLs continue to comprise more than a third of the total number of MDL proceedings.[8] The 183 MDL proceedings encompass 130,649 actions.[9] There are now 25 MDL proceedings that have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[10]

Looking Back: MDL Venue/Geographic Distancing

Interestingly, the venue selection for this year's MDL proceedings has been distinct for its relative lack of distancing. Indeed, almost all of the new MDLs are venued in district courts east of the Mississippi River.

For the eight new MDLs this year, the panel has selected federal courts in Delaware, Florida, Georgia, Illinois, Massachusetts, New York and Washington, D.C. — along with only one west of the Mississippi, in the Western District of Missouri. As readers may recall, in our year-in-review edition, we noted a similar pattern in 2019.[11]

In particular, the panel selected venues east of the Mississippi for 17 of the 21 new MDL proceedings in 2019.[12] While this distancing, or lack thereof, is most likely coincidental, and a function of the venues most apt for the MDL petitions at issue, it is a trend to watch.

Looking Back: MDL Jurisdictional Distancing

Last year, this column considered the fascinating, if not scintillating, interplay between MDL practice and personal jurisdiction. At the time, we observed that the existence (or absence) of personal jurisdiction is not of concern to the panel in making its determination whether an MDL should be created.

Specifically, the panel rejected the argument that, due to personal jurisdiction considerations, Section 1407 MDL transfer presented the only means for discovery to proceed in a coordinated fashion in a single forum. The panel found that any difficulty in establishing personal jurisdiction over particular defendants is not a pertinent factor.[13]

In a decision last month, the panel again considered and rejected an argument against transfer based on personal jurisdiction. In particular, the argument arose from the potential (and ultimate) selection of an MDL forum that was distant from a defendant's home state. A

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June Trivia Question

Prior to the March hearing session, when was the last hearing session that the panel did not create a new product liability MDL?

Answer to June Trivia Question

November 2017 (for MDLs categorized by the panel as product liability).

July Trivia Question

Which judicial district has the most pending MDL proceedings?

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.

plaintiff asserted that if the panel did not select a federal court in the state in which the defendant is headquartered, the defendant likely would argue that specific jurisdiction is lacking — which "presents an unnecessary risk that could adversely impact the effort to certify a national class." [14]

Finding that argument "unavailing," the panel observed that it "does not consider the possible implications of potential rulings when it selects a transferee district." [15] In addition, the panel stated that it would pay no heed to the contention that "uncertainty created by the specter of such jurisdictional arguments ... would be inefficient and could result in additional case filings and pretrial proceedings." [16] In a lesson that panel practitioners should appreciate, the panel made clear that it does not "base [its] transfer decision on ... conjecture." [17]

What will the July video hearing bring? Will the pace of new MDL petitions continue to increase? What new venues will be selected for MDL proceedings? Only time will tell whether the panel holds its Sept. 24 hearing session at its previously scheduled locale of Birmingham, Alabama. But even if panel hearings continue to be conducted remotely, stay tuned for our September edition of And Now Word from the Panel. May all be well and safe!

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Supplemental_Notice_of_Hearing_Session-7-30-20.pdf.

[2] Id.

[3] Id.

[4] Id.

[5] Id.

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_District-July-16-2020.pdf.

[7] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MD_Ls-January%201-July-16-2020.pdf.

[8] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending MDL Dockets By MDL Type-July-16-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_MD_L_Type-July-16-2020.pdf).


[9] [https://www.jpml.uscourts.gov/sites/jpml/files/Pending MDL Dockets By Actions Pending-July-16-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-July-16-2020.pdf).

[10] Id.

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

[12] Id.

[13] "And Now a Word from the Panel: It's Nothing Personal," Law360 (Dec. 3, 2019) (citation omitted).

[14] [In re Evenflo Company Inc. Marketing, Sales Practices, Product Liab. Litig.](#) , MDL No. 2938, at 2 n.4 (J.P.M.L. June 2, 2020) (citation omitted).

[15] Id.

[16] Id.

[17] Id.

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