

And Now A Word From The Panel: Pandemic MDLs

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By Alan Rothman

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. The events of the past few months continue to affect every aspect of our lives, and the panel is no different.

In light of the COVID-19 pandemic and as with its March 26 hearing, the panel conducted its May 28 hearing from its offices in Washington, D.C., rather than meeting in person at its previously scheduled locale. The May hearing session was previously scheduled to be held at the courthouse of the U.S. District Court for the Northern District of California, in San Francisco.



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But in some very exciting panel news, this hearing session was conducted via the Zoom meeting app. Moreover, panel fans have an opportunity to listen to the oral arguments now posted on the panel website, as the panel advised that "an audio recording of the oral argument will be made available on the Panel website after the Hearing Session has concluded. All other recording of the Hearing Session is prohibited." [1]

In addition, counsel arguing at the hearing were required to attend a special training session. [2] Those sessions were scheduled for the week of May 18, to:

- (a) ensure that counsel are technologically prepared to participate in the videoconference; (b) inform counsel how the Panel intends to conduct oral argument; and (c) inform counsel of the procedures and protocols they will be expected to follow during the videoconference. [3]

While video arguments may be a new feature of panel practice amidst the COVID-19 pandemic, the panel is no stranger to personal injury MDLs resulting from viruses. While an MDL for pandemic-related issues is neither always warranted nor advisable, recent events afford us the opportunity to take a retrospective look at the panel's experience with personal injury MDLs in the aftermath of outbreaks.

But before taking that historical journey — and putting aside pending non-personal injury MDL proceedings related to COVID-19 that will likely be heard at the panel's July hearing session — let us take a look back at the March 26 telephonic hearing session.

At the March hearing, the panel met telephonically to address a total of seven new MDL petitions, but dispensed with oral argument on the petitions — five of which were originally slated to be orally argued, and two of which were to be heard on the papers. In all, the panel denied four of those motions and granted three motions, with the three new MDLs relating to patent/intellectual property, fair credit reporting and antitrust.

The venues for the new MDL proceedings are in Delaware, Georgia and Illinois, respectively. Of note, the panel did not miss a beat as a result of COVID-19, and issued all of those decisions by the Monday after its hearing session.

With the panel now batting .419 — five for 12 — for the year, even if there is no baseball season yet, it considered via video arguments last week four new MDL petitions. The new petitions include those in the areas of product liability, marketing and sales practices, the Americans with Disabilities Act and securities.

The overall number of pending MDL proceedings remains at 184, as compared to two months ago. [4] The panel continues to close out older MDL dockets, terminating a total of 11 existing MDLs this year through mid-May. [5] Product liability MDLs continue to comprise more than a third of the total number of MDL proceedings. [6]

The 184 MDL proceedings encompass 133,556 actions.[7] There are now 26 MDL proceedings that have more than 500 individual pending actions, almost all of which are from among the product liability MDLs.[8]

Looking Back: Swine Flu and Hantavirus MDLs

Swine Flu — MDL No. 330, circa 1978

Not surprisingly, the MDL world is no stranger to disease outbreaks, and personal injury cases arising from them. Litigation touches all walks of life and current events.

Looking back more than four decades ago, this nation confronted a swine flu outbreak, albeit in a much more narrow geographic area than the current crisis. Nevertheless, in that outbreak's aftermath, vaccines were developed, and under the National Swine Flu Immunization Program of 1976, the U.S. government assumed liability for any actions arising from injuries sustained as a result of the vaccine, subject to certain limitations.

As the program evolved and vaccines were administered, some of the recipients of the vaccine sustained paralysis — in particular, a type of paralysis known as Guillain-Barre syndrome. Under the statutory scheme at the time, claims against the federal government had to follow the typical claims procedures for potential actions against the government, ultimately resulting in a number of cases being filed against the government — and in a few instances, others — in federal district court.

These cases ultimately found their way to the panel, and in late 1977, the panel issued a show cause order as to why an MDL should not be created. By the time the panel ruled that winter as to whether to establish an MDL proceeding, there were more than two dozen federal actions and many other claims.[9]

In considering arguments that very much resemble arguments before the panel that have been made in other contexts over the decades, the parties arguing against creation of an MDL asserted that the actions presented different individual factors, different substantive law and liability questions — including the posture of the U.S. government in those cases. They also argued that creating an MDL would present an undue expense and inconvenience to individual plaintiffs.

Finding those "arguments unpersuasive," the panel established an MDL proceeding. The panel, in its own words, was:

persuaded that all these actions involve substantial common questions of fact concerning the development, production, testing and administration of the swine flu vaccine. Scientific knowledge concerning the efficacy of the swine flu vaccine and the potential risks involved in administration of the vaccine is relevant to all actions.[10]

PANEL TRIVIA CORNER

March Trivia Question

When was the last time that the panel adjourned a regularly scheduled hearing session?

Answer to March Trivia Question

January 2014. The panel was scheduled to hold a hearing session in New Orleans, Louisiana, but due to an ice/snow storm, the panel adjourned the hearing until the following week. See [And Now a Word from the Panel: Snow Day! Law360](#) (March 25, 2014).

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?

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.

By the time the MDL closed in 1988, more than 1,600 cases had been transferred to, or were filed in, the MDL proceeding. A notable fact about that MDL is that nearly 1,300 of those cases (1,299, to be exact) were ultimately remanded out of the MDL to the original transferor courts — representing nearly 10% of all remands in MDL history.[11]

Hantavirus — MDL No. 2532, circa 2014

Of more recent vintage, several years ago (and as some readers of this column may recall), the panel established an MDL proceeding for personal injury cases against the federal government and others arising from an outbreak of the hantavirus at Yosemite National Park.[12]

Those claims arose from an outbreak among visitors to cabins at a certain campsite at the park a few years earlier. Of course, that virus affecting a limited number of individuals in Yosemite was of a vastly different magnitude than the current COVID-19 pandemic, and involved different factors.

What decisions will the May video hearing bring? Will the MDL process yield any personal injury MDL petitions amidst the current pandemic? Will video arguments remain in the panel's future — and will future arguments also be available on the panel website?

Whether or not video arguments remain an option, we hope that by our July edition of *And Now A Word From The Panel*, there will be at least the possibility of an in-person session in Beantown — Boston, Massachusetts — the scheduled destination for the panel's July 30 hearing session — even if the Yankees and Red Sox are unable to play their previously scheduled game that evening in Fenway. All should be well and safe!

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[1] https://www.jpml.uscourts.gov/sites/jpml/files/Supplemental_Notice_of_Hearing_Session-5-28-20.pdf.

[2] *Id.*

[3] *Id.*

[4] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_District-May-15-2020.pdf.

[5] https://www.jpml.uscourts.gov/sites/jpml/files/Recently_Terminated_MD_Ls-January%201-May-15-2020.pdf.

[6] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_MD_L_Type-May-15-2020.pdf.

[7] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-May-15-2020.pdf.

[8] *Id.*

[9] *In re Swine Flu Immunization Prods. Liab. Litig.*, No. 330 (J.P.M.L. 1978).

[10] Id.

[11] https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2019.pdf.

[12] In re Yosemite National Park Hantavirus Litig., No. 2532 (J.P.M.L. 2014); see And Now A Word From The Panel: What's Good for America?, Law360 (May 27, 2014).

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