KAYE | SCHOLER

And Now a Word From the Panel...

About the Author

Alan Rothman is the Coordinating Attorney for Kaye Scholer's Product Liability Litigation and Counseling group. He is a litigator with extensive experience in product liability litigation, including the defense of mass torts in federal multidistrict litigation and coordinated state court proceedings. His experience also includes addressing various jurisdictional aspects of the Class Action Fairness Act of 2005 ("CAFA"), including issues pertaining to both putative class actions and CAFA's "mass actions." Alan has lectured and written a number of articles with respect to these and other areas. He can be reached at ***alan.rothman@kayescholer.com***

This article originally appeared in *Law360* on January 28, 2013.

It is a pleasure to introduce: "And Now a Word from the Panel ..." In this bi-monthly column, we will "ride the circuit" with the Judicial Panel on Multidistrict Litigation (or simply the "Panel," for short), which meets on a bi-monthly basis at venues around the country — most often, on the last Thursday of that month. Like a traveling "Panel press corps" of sorts, we will journey together through the thicket of thorny issues that practitioners and their clients face as the Panel decides whether multidistrict litigation (MDL) proceedings should be created before a single federal district judge to efficiently and effectively manage separate cases that would otherwise clog numerous federal dockets around the country. This is, understandably, a critical issue to any company that may be facing lawsuits in any number of areas, including product liability, mass torts or large-scale accidents. The resolution of this multiple versus single venue issue can significantly impact:

- a company's resources (financial and otherwise)
- the magnitude of lawsuits filed
- legal strategy
- the legal standard applied to issues in those cases
- the judge (or judges) who will determine those issues; and
- (of course) the all-important outcome and resulting precedent.

Each issue of this column will take a retrospective and prospective look at the Panel: First, "looking back" on a retrospective basis, we will focus on an issue that the Panel has addressed at its most recent hearing session. Second, "looking forward" on a prospective basis, we will identify a case and/or issue to watch at the upcoming Panel hearing. Other bits of Panel trivia, procedures and history may also be addressed.

Looking Back: "Just Say 'No"

Before looking at what the Panel will face this month, we explore a recurring question that the Panel addressed in two of its rulings on motions heard at its last session (on Nov. 29, 2012) in Dallas, Texas: When will the Panel NOT create an MDL?

The MDL statute, 28 U.S.C. § 1407, provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings (emphasis added)."

Thus, the only statutory threshold for establishing an MDL proceeding is that there be a minimum of two actions, presenting one of more common questions of fact, pending in different federal districts. But whether such threshold requirements alone are sufficient to establish an MDL is within the Panel's discretion, resulting in great uncertainty for practitioners and their clients.

Of the cases heard this past November, the Panel denied two motions to create centralized MDL proceedings: (1) In re Droplets Inc. Patent Litig.; and (2) In re Chase Investment Svcs. Co. Fair Labor Standards Act (FLSA) and Wage and Hour Litig.[1] As those decisions illustrate, there are several factors that will militate against creation of an MDL:

- Paucity of cases/districts: In Droplets, there were six cases in a total of three federal judicial districts; in Chase Investment Svcs., there were four cases in a total of two federal judicial districts.

- Overlapping counsel: In Droplets, plaintiff was represented by the same counsel in all six cases and some defense counsel overlapped in four out of the six cases.

- Cases at varying procedural stages: In Droplets, not all cases were in their "infancy": One action had been pending for over a year with a key Markman hearing scheduled; another action had a pending dispositive motion.

But counsel and litigants should be cautioned that no one factor is dispositive. For example, with respect to other motions argued at the November hearing session, the Panel established MDL proceedings for as few as three cases.[2]

> ***"Whether such threshold requirements alone are sufficient to establish an MDL is within the Panel's discretion, resulting in great uncertainty for practitioners and their clients."***

In addition, even where the Panel decides to establish an MDL proceeding, it may exclude from such MDL coordination an action that does not involve the same product or alleged injuries. For example, the Panel ordered MDL coordination of 39 actions, but declined to include one action alleging an injury (hypomagnesaemia) different from that alleged in the other actions (bone-related injuries).[3]

Even where motions to create centralized MDL proceedings are denied, that does not negate the possibility of informal coordinated efforts. Indeed, the Panel encourages voluntary coordination among the various courts and counsel, without the need for transfer and designation of a single MDL judge to preside over the proceedings.[4]

Looking Forward: "If At First You Don't Succeed, Try, Try Again"

Looking ahead to this month's docket, the Jan. 31 Panel meeting in the backyard of the "Most Magical Place on Earth" — Orlando, Fla. — will address yet another recurring issue in MDL litigation: Does the Panel believe in "second chances" to establish an MDL proceeding where the Panel previously denied a motion to create an MDL for similar cases? This question tests the limits of the factors discussed in our "Looking Back" section as to the circumstances under which the Panel will deny (and perhaps continue to deny) a motion for MDL coordination.

In In re Plavix Prods. Liab. and Marketing Litig (No. II) (MDL No. 2418), the Panel will hear defendants' (renewed) motion to create an MDL proceeding for 30 cases around the country arising from alleged bleeding complications from an anti-blood clot medication.

In 2011, the Panel denied a motion to coordinate 12 Plavix cases: (i) pending in a total of three federal judicial districts; (ii) involving relatively few plaintiffs' counsel; and (iii) at various procedural postures.[5] By contrast, as of the time of the renewed motion, defendants sought to consolidate 30 Plavix cases: (i) pending in a total of 11 federal judicial districts; (ii) involving eight different sets of plaintiffs' counsel (even excluding cases in which federal jurisdiction was challenged);[6] and (iii) with the exception of actions originally filed in one judicial district (New Jersey), discovery in other actions had not started or was in its nascent stages.

> ***"Does the Panel believe in "second chances" to establish an MDL proceeding where the Panel previously denied a motion to create an MDL for similar cases?"***

To be sure, there is precedent allowing for "second chances" to create an MDL proceeding.[7] It should only be a few short weeks before we learn whether these Plavix cases will join the ranks of the latest class of MDL proceedings, enabling us to glean further insight into the Panel's thinking as to when MDL coordination is warranted.

How will the Panel rule in this and other cases? And what other issues will make their way to the Panel at the next hearing session? Stay tuned for our March edition of "And Now a Word from the Panel," when we journey with the Panel to the West Coast and America's "Finest City" — San Diego, Calif.

Panel Trivia Corner

Generally, as it will be this year, the Panel's January hearing session is held on the last Thursday of the month. In recent years, when did the Panel hold its January session on a day other than a Thursday? Any guesses why?

Tune in March 21 for the answer to this question and coverage of the next JPML meeting, to be held in

San Diego.

---

[1] *In re Droplets, Inc. Patent Litig.*, MDL No. 2403, 2012 WL 6554422 (J.P.M.L. Dec. 12, 2012); *In re Chase Investment Svcs. Co. Fair Labor Standards Act (FLSA) and Wage and Hour Litig*., MDL No. 2412, 2012 WL 6554648 (J.P.M.L. Dec. 11, 2012).

[2] *See, e.g*., *In re Higher One OneAccount Marketing and Sales Practices Litig*, MDL No. 2407, 2012 WL 6554438 (J.P.M.L. Dec. 11, 2012); *In re L'oreal Wrinkle Cream Marketing and Sales Practices Litig*., MDL No. 2414, 2012 WL 6554685 (J.P.M.L. Dec. 12, 2012).

[3] *In re Nexium (Esomeprazole) Prods. Liab. Litig.,* MDL No. 2404, 2012 WL 6062559 (J.P.M.L. Dec. 6, 2012).

[4] *In re Droplets*, 2012 WL 6554422, at *1 ("informal coordination among the three involved courts seems practicable"); *In re Chase Investment Svcs.*, 2012 WL 6554648, at *1 ("[g]iven the limited number of parties and courts, alternatives to transfer exist that may minimize whatever possibilities there are of duplicative discovery and inconsistent pretrial rulings").

[5] *In re Plavix Prods. Liab. Litig*., 829 F. Supp. 2d 1378 (J.P.M.L. 2011).

[6] As of the time of the motion, in 13 of those 30 cases, involving hundreds of plaintiffs in three different judicial districts, there were pending challenges to federal jurisdiction.

[7] *See, e.g., In re Glaceau Vitaminwater Mktg. and Sales Practices Litig. (No. II)*, 764 F. Supp. 2d 1349 (J.P.M.L. 2011). *But see In re Ambulatory Pain Pump–Chondrolysis Prods. Liab. Litig. (No. II),* 709 F.Supp.2d 1375 (J.P.M.L. 2010) (denying renewed motion for MDL centralization in more than 100 cases involving multiple defendants and products).