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The JPML & Second Chances and Choosing Your MDL Destination

This is the second installment in the bimonthly series "And Now a Word From the Panel..."

Welcome to our second edition of "And Now a Word from the Panel...," the bi-monthly column which "rides the circuit" with the Judicial Panel on Multidistrict Litigation (or simply the "Panel," for short) as it meets on a bi-monthly basis at venues around the country.

Before looking ahead to the March 21 hearing in the world's "Finest City," San Diego, California, we take a retrospective look at the January 31 Panel hearing in Orlando, Florida, picking up right where we left off.

LOOKING BACK (Part I): "If at First You Don't Succeed, Try, Try Again"

At the January Hearing, in *In re Plavix Prods. Liab. and Marketing Litig (No. II)* (MDL No. 2418), the Panel considered and ***granted*** a renewed motion to create an MDL proceeding for actions arising from alleged bleeding complications from an anti-clotting medication. In 2011, the Panel denied a motion for an MDL proceeding arising from the same medication and alleged injuries.

In granting the renewed MDL motion, the Panel made clear that:

> [T]he earlier denial . . . does not preclude us reaching a different result here. We will do so only rarely, however, where a significant change in circumstances has occurred.[1]

The Panel established an MDL proceeding (in the District of New Jersey), holding "that there has been such a change" in circumstances.[2] Specifically:

Number of Actions/Districts: At the time of the original motion, there were 10 actions pending in three different judicial districts. By contrast, in ruling on the renewed motion, the Panel considered 21 federal actions pending in nine different judicial districts.[3]

Number of Counsel: At the time of the renewed motion, there were "significantly more involved counsel," which included counsel who "has appeared in no other related action."[4]

Stage of Proceedings: The Panel rejected plaintiffs' argument that an action with a pending summary judgment motion should be excluded from the MDL. That action was pending before the same federal

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judge to whom the MDL was assigned and that judge could "resolve any problems that may arise due to the different stages of the cases."[5]

Number of Related State Court Actions: Of particular interest in its decision, however, was the Panel's focus on ***state court*** actions. The Panel observed that at the time of initial motion, there were state court cases in only two states, but at the time of the renewed motion there were state court cases in at least four states involving more than 2,000 plaintiffs. This, the Panel found, "suggests that the number of related federal actions will increase as well" and would "facilitate coordination among all courts with Plavix cases."[6] Although state actions are ineligible for inclusion in a federal MDL proceeding, the Panel was mindful of the efficiencies of voluntary state-federal court coordination. In recent years, the Panel has considered the pendency of state court actions as a factor in its decision to establish an MDL proceeding, including where the MDL should be situated so as to better facilitate federal-state coordination.[7] It will be interesting to see whether such considerations by the Panel will encourage federal judges assigned to MDL proceedings to increase their efforts to seek coordination with state court judges.

> ***"Although state actions are ineligible for inclusion in a federal MDL proceeding, the Panel was mindful of the efficiencies of voluntary state-federal court coordination."***

The overall takeaway is that the determinative factors as to whether renewed efforts to establish an MDL proceeding will be successful are quite similar to the general principles used by the Panel in ruling on an initial application to create an MDL proceeding.[8]

An interesting side-story to this MDL is that the Panel declined to transfer several Plavix actions that were initially removed under both the "mass action" provision of the Class Action Fairness Act ("CAFA") and traditional bases for diversity jurisdiction. Under CAFA, "mass actions" -- *i.e*., actions filed by 100 or more plaintiffs whose claims "are proposed to be tried jointly"-- may not be transferred to an MDL proceeding "unless a majority of the plaintiffs in the action request transfer pursuant to section 1407."[9] Subsequent to the Panel's *Plavix* decision, defendant withdrew the "mass action" basis for removal in those cases and the district court is deciding whether the cases should be remanded to state court.[10] Stay tuned to this column, as the interplay between CAFA "mass actions" and MDLs may well be the subject of a future "Word from the Panel"!

LOOKING BACK (Part II): "Three Strikes and You're Out!"

While the adage of "if at first you don't succeed try, try again" is generally apt, sometimes (albeit rarely), the Panel will say "three strikes and you're out." In a motion heard at the January 31 hearing, the Panel took the extraordinary step of directing the Clerk of the Panel "to accept no document submitted by the [movants] for filing that relates to the same subject matter of this litigation unless and until leave is granted by the Panel to file the same."[11] This was the third motion for MDL coordination filed by the same movants. The Panel found that:

> The patently frivolous nature of the [movants'] papers in this litigation, coupled with their history in other U.S. courts, leads the Panel to conclude that it is in the best interest of judicial resources, as well as the resources of the parties, to deter the [movants] from filing future frivolous centralization motions.[12]

With this record, the Panel had no issue saying enough was enough!

LOOKING FOWARD: "You've Just Been MDL'd: Where are You Going Next?"

One of the most fascinating facets of Panel watching is trying to guess not simply whether an MDL will be created, but where it will be located. The short answer is one can never know and, believe it or not, there do not necessarily need to be cases pending in the selected forum. But there are undoubtedly factors that play a role in that never ending guessing game.

In re Mirena IUD Prods. Liab. and Marketing Litig. (MDL No. 2434), slated to be heard at the March 21 hearing, is no exception. As of the time the MDL motion was filed, that proposed MDL involved eight actions pending in eight different judicial districts arising from an FDA-approved intrauterine contraceptive system. Various plaintiffs supported MDL consolidation and defendant opposed, but even those supporting creation of an MDL were hardly unanimous as to the lucky city (judicial district), with some favoring the Eastern District of Pennsylvania and another group favoring the Northern District of Ohio, among other proposed venues. More important than the identity of those proposed cities is the "why." What factors do the parties think are relevant in choosing an MDL destination, and don't be surprised if some are even contradictory:

"The proposed MDL judicial district (city) is/has (a/an) _____ [one can fill in the blank from among the selections below]

- Neutral forum
- Heavy docket load
- Light docket load
- Quick disposition time (from filing to trial)
- Track record of efficiently managing litigation
- Many judges
- Absence of judicial vacancies
- Advanced courtroom technology
- MDL experience
- Many pending MDLs
- Relatively few pending MDLs
- Absence of judicial vacancies
- Preferred judge with MDL experience and assigned a current MDL
- Preferred judge with no current MDLs assigned

- Location of many documents and witnesses
- Location of defendant's headquarters/principal place of business
- Accessible and convenient
- Great airport
- Quick travel time from airport to courthouse
- Quality local hotels

How will the Panel rule in this and other cases? What is the Panel's thinking as to ***where*** MDL coordination is warranted (whether for Mirena cases, if an MDL is created, or otherwise)? And what other issues will make their way to the Panel at the next hearing session? Stay tuned for our May edition of "And Now a Word from the Panel," as MDL headwinds (hopefully warmer ones!) blow into the "Windy City" -- Chicago, Illinois -- for the May 30 hearing!

Panel Trivia Corner

January Trivia Question

Generally, as 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?

Answer to January Trivia Question

Wednesday, Jan. 27, 2010, when the Panel met in sunny Miami, Fla. As to why that change to a Wednesday was made, we have no knowledge. As pure speculation, the culprit may have been the NFL Pro Bowl, which was being held in Miami the following Sunday (Jan. 31), a week before Super Bowl XLIV (a rare step at the time for the NFL). Our conjecture is that holding the hearing session on Thursday in such close proximity to Pro Bowl weekend would have made accommodations and travel in connection with that Panel hearing in Miami next to impossible.

March Trivia Question

As of this month, which federal judicial district has the most currently 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 alan.rothman@kayescholer.com.

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[1] *In re Plavix Marketing, Sales Practices and Prods. Liab. Litig*. (No. II), 2013 WL 565971, at *1 (J.P.M.L. Feb. 12, 2013).

[2] *Id*.

[3] Additional actions were filed after the renewed MDL motion.

[4] *Plavix,* 2013 WL 565971, at *2.

[5] *Id*.

[6] *Id*.

[7] *See, e.g. In re Nexium (Esomeprazole) Prods. Liab. Litig.,* 2012 WL 6062559 (J.P.M.L. Dec. 6, 2012) ("The Central District of California . . . is proximate to at least four state court actions involving approximately another two hundred plaintiffs. Thus, centralization in this district will facilitate coordination with pending state court litigation"); *In re Zappos.com, Inc., Customer Data Security Breach Litig*.. 867 F.Supp.2d 1357, 1358 (J.P.M.L. 2012) ("With a pending Nevada state court action, centralization in the District of Nevada will facilitate coordination between the federal and state court actions"); *In re Fosamax (Alendronate Sodium) Prods. Liab. Liti*g. (No. II), 787 F.Supp.2d 1355, 1357 (J.P.M.L. 2011) ("[T]he federal courthouse in Trenton, New Jersey, is relatively close to the state court in Atlantic City, New Jersey, where hundreds of related cases are pending. Centralization in this district could facilitate coordination between the federal and state courts"); *In re Zicam Cold Remedy Marketing and Sales Practices Litig.*, 655 F.Supp.2d 1371, 1373 (J.P.M.L. 2009) ("[C]entralization in the District of Arizona will allow for coordination of the federal actions with related litigation pending in Arizona state court").

[8] *See generally* Alan E. Rothman, "And Now a Word from the Panel," *Law360* (Jan. 28, 2013).

[9] *Plavix,* 2013 WL 565971, at *3; 28 U.S.C. § 1332(d)(11)(B)(i)&(C)(i).

[10] *See, e.g*., *Olmstead v. Bristol-Myers Squibb Co*., Docket No. 3:12cv4619, Docket Entry No. 27 (N.D. Cal.) (Amended Notice of Withdrawal of CAFA Ground of Removal).

[11] *In re Kissi*, 2013 WL 489023, at *4 (J.P.M.L. Feb. 6, 2013).

[12] *Id*. at *3.