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The JPML: "March Madness in May," MDL Venue Selection Factors, and MDLs Involving "Food Fraud" Class Actions

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

Welcome to our third 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.

It looks like the Panel has pulled an "audible" with an unexpected touch of "March Madness" in May. The Panel has bypassed the "Windy City" (Chicago, Illinois) where the May hearing had been scheduled to take place, and instead heads to the home of the NCAA champions, the Louisville Cardinals and the home court of Panel Chairman, Judge John G. Heyburn II. Before looking ahead to the May 30 hearing, we take a retrospective look at the March 21 Panel hearing in San Diego, California, picking up right where we left off.

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

At the March Hearing, in *In re Mirena IUD Prods. Liab. and Marketing Litig.* (MDL No. 2434), the Panel considered and subsequently granted a motion to create an MDL proceeding for actions arising from injuries allegedly caused by an FDA-approved intrauterine contraceptive system.

With respect to the all important question of where the MDL would be venued, the Panel considered the numerous proffered venues (10 in total). The winner was the Southern District of New York (the "SDNY"), the nation's most prolific MDL transferee court. *See* Answer to March Trivia Question (appearing at conclusion of this column). That district was suggested by a New York based plaintiffs' counsel with a pending Mirena case in the district.

In selecting this venue, the Panel noted that of the 10 districts suggested by various plaintiffs' counsel:

> Any of the districts...would be an appropriate transferee forum for this litigation in which actions are pending in various districts across the country.[1]

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***

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Nevertheless, the Panel ultimately selected Judge Cathy Seibel of the SDNY based on the following factors:

Defendants' Headquarters: One of the corporate defendants was located in New York and various corporate affiliates were located near New York (in New Jersey, Connecticut and Pennsylvania).

Location of Witnesses and Documents: Due to defendants' locations, corporate witnesses and documents would likely be located near the MDL forum.

Accessibility: The Panel found the White Plains (NY) division of the SDNY to be "easily accessible" for the MDL litigation.[2]

MDL Judge: The Panel further noted that Judge Seibel "is an experienced transferee judge" and was already presiding over three Mirena actions.[3]

There are a few other interesting tidbits that should be noted regarding the Mirena MDL:

- The defendant, in opposing creation of the MDL, did not suggest any proposed transferee district, in the event an MDL was created.
- In its MDL submission before the Panel, the winning party proffered not only a proposed MDL transferee district (SDNY), but a division within that district as well (White Plains).
- Although there were Mirena cases pending in the SDNY, none of those cases were pending at the time of the original MDL motion.

But the overall takeaway from the Mirena MDL story is that one can never truly predict where the winner of the MDL lottery will end up. Any one of the above factors cited by the Panel to support transfer to the SDNY could easily have weighed in favor of some of the other 9 districts proposed by various plaintiffs, particularly those located in the Northeast (or perhaps even a district not suggested by any party). In canvassing other decisions from the March 21 hearing which created MDL proceedings, the above factors seem to recur with increasing frequency.[4]

LOOKING FOWARD: MDLs with a "Taste of Class"

Both individual actions and class actions are eligible for MDL treatment. In some instances, the actions subject to an MDL motion are limited to individual actions; in other instances, they are mix of both individual and putative class actions; and in yet others, consist entirely of putative class actions. In recent months, there has been a rash of lawsuits filed against food manufacturers. Due to the relatively negligible amounts of damages allegedly sustained by any one individual consumer (possibly limited to the purchase price and some statutory damages), such actions are most often filed as class actions. Indeed, at the May hearing, the Panel will address arguments concerning whether to create MDL proceedings for three different food industry consumer fraud cases, which involve overlapping class actions filed in various jurisdictions throughout the country. Those lawsuits address practices regarding alleged false advertising and/or misleading marketing campaigns ranging from: (1) the power of energy

drinks, with "no crash later" (*In re 5 Hour Energy Marketing and Sales Practices Litigation* (MDL No. 2438)); (2) the length of submarine sandwiches (*In re Doctor's Associates Inc. Footlong Marketing and Sales Practices Litigation* (MDL No. 2439)); and (3) the alcohol content of various beer products (*In re Anheuser-Busch Beer Labeling Marketing and Sales Practices Litigation* (MDL No. 2448)).

> ***"The Panel will address arguments concerning whether to create MDL proceedings for three different food industry consumer fraud cases, which involve overlapping class actions filed in various jurisdictions throughout the country."***

Of particular interest in these cases is the approach adopted by the food manufacturer defendants with respect to MDL centralization. In the first two cases, the food manufacturers moved in support of creation of an MDL. In the third case, the food manufacturer opposed the MDL motion, arguing that the cases are non-complex, involve different products, involve federal and state regulatory schemes as well as state law claims with differing elements and that the multiple lawsuits in different jurisdictions were simply manufactured by the same plaintiffs' counsel to support creation of an MDL.

A defendant may be reluctant to seek MDL centralization because creation of an MDL may foreshadow certification of a class. But it is important to bear in mind that the standards for MDL centralization are not the same as those for class certification. *Compare* 28 U.S.C. §1407 (Panel can create MDL for cases involving "one or more common questions of fact" where the Panel concludes that transfer will serve the "convenience of parties and witnesses and will promote the just and efficient conduct of such actions") *with* Fed.R.Civ.P. 23 (setting forth standards for class certification). In addition, the Supreme Court has recently mandated increased scrutiny and "rigorous analysis" of both the commonality requirement of Rule 23(a) and the predominance requirement of Rule 23(b), including whether "individual damage calculations will inevitably overwhelm questions common to the class."[5] The MDL transferee court will be required to apply this rigorous standard to any class certification motion ultimately before it.

How will the Panel rule in these and other cases? What is the Panel's thinking as to whether the pendency of multiple class actions makes those actions particularly ripe for MDL centralization? And what other issues will make their way to the Panel at the next hearing session? Stay tuned for our July edition of "And Now a Word from the Panel," as the MDL heads for some summer shade in the "Forest City" -- Portland, Maine -- for the July 25 hearing!

Panel Trivia Corner

March Trivia Question

Which federal judicial district has the most currently pending MDL proceedings?

Answer to March Trivia Question

The Southern District of New York, with a whopping 40 MDLs — 39 as of March, plus one more from the

March panel hearing, including the new Mirena MDL discussed above — approximately 14 percent out of the total 290 currently pending MDLs nationwide!

May Trivia Question
Which federal judicial districts have never hosted an MDL proceeding?

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 Mirena IUD Prods. Liab. Litig*., 2013 WL 1497304, at *2 (J.P.M.L. Apr. 8, 2013) (MDL No. 2434).

[2] *Id*.

[3] *Id*.

[4] *In re Domestic Drywall Antitrust Litig.*, 2013 WL 1619517, at *1 (J.P.M.L. Apr. 8, 2013) (MDL No. 2437) (creating MDL in the Eastern District of Pennsylvania; "[r]elevant documents and witnesses may be found in or near this district, inasmuch as several defendants have their principal places of business in Pennsylvania or other states in the mid-Atlantic area [and the transferee judge] is an experienced transferee judge"); *In re NeuroGrafix (' 360) Patent Litig.,* 2013 WL 1399350, at *2 (J.P.M.L. Apr. 1, 2013) (MDL No. 2432) (creating MDL in the District of Massachusetts; "[f]ive of the actions . . . are already pending in that district . . . [; a defendant] is headquartered in the District of Massachusetts, and the district appears to be relatively convenient"); *In re Tylenol (Acetaminophen) Marketing, Sales Practices and Prods. Liab. Litig*., 2013 WL 1399352, at * 2 (J.P.M.L. Apr. 1, 2013) (MDL No. 2436) (creating MDL in the Eastern District of Pennsylvania; "[defendants] are both located in New Jersey [, near Pennsylvania]. . . . [;] many of defendants' witnesses and documents are likely to be found in or near the Eastern District of Pennsylvania [; the transferee judge] . . . is already overseeing the 21 constituent actions pending in that district, [and] served as transferee judge in MDL No. 1878 . . . . [and] is an experienced jurist").

[5] *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).