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The JPML: Culinary Commotion About a Remand Motion, Loss of Appetite for Food MDLs? & This is the Way We Dry Our Clothes

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

Welcome to our fifth 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.

The Panel enters the Fall season and heads for the city of "Brotherly Love"—Philadelphia, Pennsylvania—for its September 26 hearing. Before looking ahead to this month's hearing, we take a retrospective look at the July 25 Panel hearing in Portland, Maine, picking up right where we left off.

LOOKING BACK: Culinary Commotion About a Remand Motion

At the July hearing, the Panel considered whether it would transfer an action to an already existing food industry MDL arising from the marketing of "All Natural" food snacks. The issue before the Panel was whether a pending motion to remand a removed action back to state court is a basis to deny MDL transfer. *In re Frito-Lay North America, Inc., All Natural Litig.* (MDL No. 2413). As noted in our last edition, the interplay between the worlds of removal and MDL transfer is a long-standing tradition in the annals of the Panel. Specifically, parties (most often, plaintiffs) argue that the pendency of a remand motion is a basis to put the brakes on transfer of the action to an MDL proceeding, at least until the transferor court rules on the remand motion. Taking the bite out of plaintiff's attempt to change the Panel's thinking on this issue, the Panel noted that "[w]e have repeatedly held that a motion for remand alone is generally an insufficient basis to vacate a conditional transfer order."[1] Accordingly, and consistent with its precedents, the Panel denied this latest attempt to avoid transfer on the basis of a pending challenge to federal jurisdiction. Such objections to jurisdiction can be heard by the MDL transferee court.

LOOKING BACK SOME MORE: Loss of Appetite for Food MDLs?

In our last edition, we noted that the Panel recently created three new MDL proceedings involving the marketing of food products. Reversing this trend, in ruling on motions from the July hearing to create two new food industry MDL proceedings arising from "All Natural" marketing campaigns, the Panel held

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that MDLs were unwarranted. *In re Kashi Company Marketing and Sales Practices* (MDL No. 2456) (use of "cane juice" in "100% Natural" cereals, among other products); *In re Capatriti Brand Oilve Oil Marketing and Sales Practices* (MDL No. 2469) (use of "olive-pomace" in "100% Pure Olive Oil").

Practitioners before the Panel should note that the bases for denying or granting MDL motions are not unique to an industry or set of cases. Rather, as readers of this column are aware, patterns regarding the denial and grant of MDL motions cut across industry lines and have certain common characteristics. Specifically, in the two sets of food cases that were before the Panel, the following factors militated against creation of an MDL proceeding:

- A relatively small number of actions (two or four cases)
- Only a few federal districts (in the Capatriti cases, they were in "adjacent districts")
- Few plaintiffs' counsel
- With respect to the Capatriti cases, one action was more significantly advanced than the others (with discovery nearing completion)
- With respect to the Kashi cases, the Panel was "unconvinced...that [the] issues are sufficiently complex or numerous to warrant the creation of an MDL."[2]

This is in contrast to the three food industry MDL motions from the May hearing session that were granted. In those cases, there were between six to nine actions, pending in five to eight "geographically dispersed" judicial districts strewn about the country (from East to West and in between). In ruling on those motions, the Panel explained that any overlap among plaintiffs' counsel was "minimal," making informal coordination unlikely and difficult.[3]

> ***"Practitioners before the Panel should note that the bases for denying or granting MDL motions are not unique to an industry or set of cases."***

LOOKING FOWARD: "This is the Way we Dry our Clothes"

What makes MDL hearings so interesting is that the motions often concern issues or products to which many of us can relate, including household items. The upcoming September hearing is no exception. At that hearing, the Panel will consider whether to create an MDL proceeding arising from allegedly defective clothes dryers. *In re Electrolux Dryer Prods. Liab. Litig.* (MDL No. 2477). According to the complaints in those cases, the dryers were responsible for home fires as a result of lint which accumulated near the heat source of those dryers.

What makes the MDL motion even more intriguing is that the petition does not merely consider actions commenced by purchasers of the product, the types of products liability actions often centralized in an MDL proceeding. Rather, many of the actions were filed by insurers against the manufacturers who paid out claims on home fires allegedly caused by the dryers. Indeed, an insurer (American Family) filed the petition before the Panel seeking to create an MDL proceeding. Thus, the Panel is confronted with the

somewhat unusual issue of whether actions filed by insurers are appropriately centralized with the primary actions filed by consumers of the product at issue.

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To add further intrigue to this motion is one of the bases for the manufacturer's opposition to creation of the MDL. In a section of its opposition brief entitled "A Word About American Family" (which has a familiar ring to it), the manufacturer contends that the proponent of the MDL, insurer American Family, is the "wrong party to be making it." Specifically, the manufacturer argues, American Family: (1) is a party to only three actions, and discovery is already being shared; (2) twice failed to convince a district court to allow certain claims (arising from out-of -state fires) and is now seeking an MDL to circumvent those rulings; and (3) is in cases progressing to trial and it is thus "too late for this motion."

The ruling in these cases may well be of interest to:

- Insurers who could find themselves (willingly or unwillingly) tumbling into future MDL proceedings
- Parties in multi-action complex litigations who fail to obtain the relief they seek in individual actions and subsequently seek to create an MDL when the cases are closer to trial.

Although the scorching summer heat may have dissipated, what is the Panel's thinking as to whether cases arising from overheating dryers warrant MDL treatment? Is a delay in seeking MDL centralization an insurmountable wrinkle to creating an MDL? How will the Panel rule in other cases? And what new issues will make their way to the Panel at the next hearing session? Stay tuned for our December edition of "And Now a Word from the Panel...," as parties look to "roll the dice" on MDL motions in Las Vegas, Nevada at the December 5 hearing (yes, December not November, a slight deviation from the Panel's bimonthly schedule, presumably due to Thanksgiving).

Panel Trivia Corner

July Trivia Question

Bearing in mind that no two sitting judges on the JPML may be from the same Circuit, which judicial district has had the most judges serve on the JPML?

Answer to July Trivia Question

Southern District of New York (with five Panel judges) — coincidentally, the same district that has the most current MDL proceedings (see March Trivia Question).

September Trivia Question

How many (and which) current MDL proceedings involve home appliances?

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 Frito-Lay North America, Inc., All Natural Litig*., MDL No. 2413, at 1 (J.P.M.L. Aug. 7, 2013).

[2] *In re Kashi Company Marketing and Sales Practices Litig*., 2013 WL 4048299 (J.P.M.L. Aug. 6, 2013); *In re Capatriti Brand Olive Oil Marketing and Sales Practices Litig*., 2013 WL 4041561 (J.P.M.L. Aug. 6, 2013).

[3] *See* "And Now a Word from the Panel...," Law360 (July 23, 2013).