KAYE | SCHOLER

And Now a Word from the Panel: Too Hot or Too Cold for an MDL?

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

Welcome to our sixth edition of "And Now a Word from the Panel...," marking the end of the first year of this 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.

As winter approaches, the Panel heads West to Vegas as parties try their luck at the latest round of hearings on December 5 (slightly later than usual thanks to the Thanksgiving holiday). Before looking ahead to this month's hearing, we take a retrospective look at the September 26 Panel hearing in Philadelphia, Pennsylvania, picking up right where we left off.

LOOKING BACK: Too Hot for an MDL?

At the September hearing, the Panel considered 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. In a somewhat unique twist, many of the actions against the manufacturer were subrogation claims filed by insurers of homes in which the dryers were used and regarding which insurance claims were paid. Moreover, it was an insurer who took the lead in seeking MDL centralization.

At the time the MDL motion was filed, there were 52 pending actions (17 were subsequently terminated). Although these explosive cases had the possibility for MDL treatment, the Panel felt otherwise. Applying the same basic principles of whether an MDL should be created addressed in prior editions of this column, the arguments in support of an MDL for these sizzling cases simply fizzled. Specifically, and notwithstanding the pendency of numerous actions:

- Many of the actions were "procedurally advanced," with discovery completed in nine actions and soon to be completed in another ten actions.

About the Author

Alan Rothman is the Coordinating Attorney for Kaye Scholer's Product Liability Litigation Practice. 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. For more than a decade, he has counseled clients in various industries with respect to issues relating to practice and procedure before the Judicial Panel on Multidistrict Litigation, including appearing before the Panel on oral argument and other motion practice. 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 was originally published by *Law360* on December 3, 2013.

- The litigation was "quite mature, involving a product that has been on the market since the mid-1990s."
- There had already been numerous trials.
- The "individualized" facts of each overheating dryer, including "installation, repair and maintenance" would "predominate over the common factual issues."
- The manufacturer had committed to sharing common discovery among the various actions even in the absence of an MDL.
- The parties had joined multiple claims in a single action, offering a suitable alternative to MDL centralization.[1]

Once again, the takeaway lesson for practitioners before the Panel is not to assume that a multitude of actions guarantees that the actions will "tumble" their way into an MDL. In addition, parties who prefer adjudication of cases without an MDL may well be served by proactively seeking alternative means of coordination and cooperation, such as discovery sharing arrangements across the various actions. And, sometimes, too many cases with differing postures and individual issues will not qualify for an MDL.

> ***"Applying the same basic principles of whether an MDL should be created addressed in prior editions of this column, the arguments in support of an MDL for these sizzling cases simply fizzled."***

LOOKING FOWARD: Too Cold for an MDL?

Although air conditioning may be the last thing on readers' minds as we approach a December Panel hearing, the Panel is scheduled to hear arguments regarding MDL centralization of actions arising from defective evaporating coils and leaky refrigerants in HVAC systems. *In re Goodman Manufacturing Co., L.P. HVAC Prods. Liab. Litig.* (MDL No. 2499).

The litigation has relatively few federal cases. Although there are at least two actions pending in different federal districts, the bare minimum requirements to be considered for an MDL, those opposed to an MDL argued that:

- There were only three actions, two of which were pending in the same federal district, albeit in different divisions. (Subsequently, an additional federal case was filed in another district bringing the total number of federal actions to four.)
- Although the federal cases are all putative class actions, they are limited to statewide classes, with none of the cases seeking to certify a nationwide class. Thus, there is limited potential for conflicting class rulings.
- Defendants are represented by the same counsel in all cases and the same plaintiffs' counsel represents plaintiffs in two of the actions.

- Plaintiffs' counsel in two of the actions has requested voluntary coordination of pretrial discovery.

In support of transfer, one of the plaintiffs argues that "additional class actions against [the manufacturer] alleging similar claims will be filed in various other states within the next few weeks." But the Panel has rejected similar arguments and will not create an MDL based on speculation "that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases," while only several cases were pending at the time.[2]

What is the Panel's thinking as to whether leaky air conditioner cases warrant MDL treatment? Will too few cases put MDL aspirations on ice? Are multiple (non-nationwide) class actions enough to freeze parallel proceeding and send all the cases to 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 January 2014 edition of "And Now a Word from the Panel . . .," as parties head to the "Big Easy" (New Orleans, Louisiana) for the January 30 hearing, a change from the usual snowbird venue of the Sunshine State for the first Panel session of the new year.

Panel Trivia Corner

September Trivia Question:
How many (and which) current MDL proceedings involve home appliances?

Answer to September Trivia Question:
Although there may be some dispute as to what constitutes a "home appliance," there are at least three such MDLs: (1) In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (N.D. Ohio) (MDL No. 2001); (2) In re Comcast Corp. Set-Top Cable Television Box Antitrust Litig. (E.D. Pa.) (MDL No. 2034); and (3) In re Oreck Corp. Halo Vacuum and Air Purifiers Marketing and Sales Practices Litig. (C.D. Cal.) (MDL No. 2317).

December Trivia Question:
Of the MDLs created since 2012, which current MDL proceeding has had the fewest number of cases (and how many)?

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.

---

[1] *In re Electrolux Dryer Prods. Liab. Litig.*, 2013 WL 5719111 (J.P.M.L. Oct. 16, 2013).

[2] *In re Intuitive Surgical, Inc., Da Vinci Robotic Surgical System Prods. Liab. Litig.*, 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (denying motion to create an MDL).