

About the Author



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And Now a Word from the Panel: JPML, the Year in Review

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

Welcome as we enter our second year of "And Now a Word from the Panel ...," a bimonthly column which "rides the circuit" with the Judicial Panel on Multidistrict Litigation as it meets on a bimonthly basis at venues around the country.

With winter in full gear, the panel heads South to the "Big Easy" in New Orleans for the Jan. 30 panel session. Before looking ahead to this month's hearing, we take a retrospective look both at 2013 (by the numbers), as well as some of the lucky winners and losers at the Dec. 5 panel hearing in Las Vegas.

2013: The Year in Review

It was another busy year for the panel. Here's a quick rundown:

- 76 MDL petitions were docketed for the six hearing sessions in 2013, with the panel granting two-thirds of the MDL motions on which it ruled. Specifically:
 - 46 new MDLs were created.
 - 23 MDL motions were denied (with seven additional motions withdrawn or otherwise rendered moot).
- Of the 46 MDLs that were created:
 - Antitrust and product liability cases led the pack with eight new MDLs each.
 - Sales & marketing MDLs were next line with six new MDLs.
 - Intellectual property/patent picked up only two new MDLs after reaching a high water mark of eight new MDLs in 2012.
- The panel terminated 53 previously created MDLs.
- As of year-end, 287 MDL proceedings remained pending.

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LOOKING BACK: Too Cold for an MDL?

With the polar vortex capturing this month's headlines, air conditioning may be the last thing on most of the country's mind. But at the December hearing, the panel heard arguments regarding MDL centralization of actions arising from defective evaporating coils and leaky refrigerants in heating, ventilation and air conditioning systems. In re Goodman Manufacturing Co HVAC Prods Liab Litig. (MDL No. 2499).¹

Not surprisingly, the panel declined to create an MDL proceeding. Notably:

- The litigation had only six federal actions (three actions as of the time of the motion plus three additional "tag-along" actions).
- Two of the six actions involved the same plaintiffs' counsel.
- The panel considered the actions to involve "simple warranty claims and straightforward discovery."
- There was limited potential for conflicting class rulings, because the actions were statewide classes, without overlap.

Practitioners may wonder whether the pendency of only statewide class actions, as opposed to nationwide class actions, warrants denial of an MDL motion. But as the panel demonstrated last month in considering an MDL motion arising from defective asphalt shingles with "premature blistering and cracking [and] increased moisture penetration," that is hardly the case.

"Practitioners may wonder whether the pendency of only statewide class actions, as opposed to nationwide class actions, warrants denial of an MDL motion."

In creating an MDL for those six actions, with one additional "tag-along" action, the panel held that MDL centralization of actions was warranted, notwithstanding that "[a]ll actions [were] putative statewide class actions." In re Atlas Roofing Corp Chalet Shingle Prods Liab Litig. (MDL No. 2495).²

Why was there a different MDL result in this set of cases, seemingly similar to the set of HVAC cases which did not warrant MDL treatment? It appears that the key difference was the absence of any opposition to the MDL motion in the roof shingle cases, with "[a]ll responding parties ... support[ing] the motion"³ and it further appears that there was no overlapping plaintiffs' counsel in the original six roof shingle cases.

LOOKING FORWARD: A Breath of Fresh Air?

With the January hearing, the panel shifts its attention from leaky air conditioning to leaky windows, or more specifically, alleged defects in sill extrusion and nailing fin, permitting "water to be trapped between the aluminum [cladding] and the operable wood frame." In re Pella Corp. Architect and

Designed Series Windows Prods Liab Litig (MDL No. 2514). In contrast to the roof shingle cases, the manufacturer here has opposed creation of an MDL.

In arguing against MDL centralization of six actions, defendant has made the following arguments (similar to arguments made by many who came before to oppose an MDL):

- The manufacturer had successfully litigated against similar cases “for more than a decade.”
- The pending actions were at various procedural stages. Although all of the pending cases were filed during 2013, some were subject to pending motions to dismiss, others to amended complaints and yet another subject to a motion to strike class allegations.
- As graphically depicted by the manufacturer in its opposition to MDL centralization, the windows include hundreds of unique designs, in homes constructed during different centuries and in different geographic locations ranging from Thornton (Pennsylvania), Metairie and Natchitoches (Louisiana), Siletz (Oregon), Cazenovia (New York), Palatine (Illinois) to Reno (Nevada), arguably eliminating any common issue of fact among the case.
- There is already coordination among various plaintiffs’ counsel, thus obviating the need for a formal MDL proceeding.

What is the panel’s thinking as to whether rotting window casings warrant MDL treatment? Is the rush of fresh air into homes too much for an MDL? Will the unique design of each home fitted with such windows dissipate hopes for 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 March edition of “And Now a Word from the Panel ...,” as the panel heads once again for a March hearing in San Diego, Calif., “America’s Finest City” (one of the warmer parts of the country these days, and where this author was fortunate to be this month).

Panel Trivia Corner

December Trivia Question:

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

Answer to December Trivia Question:

The Nebivolol (‘040) Patent Litigation pending in the Northern District of Illinois, with the bare minimum of two cases.

January Trivia Question:

During 2013, which federal district was assigned the most new 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@kayescholar.com.

¹ 2013 WL 6531773 (J.P.M.L. Dec. 13, 2013).

² 2013 WL 6825610 (J.P.M.L. Dec. 19, 2013).

³ Id. at *1.