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Bylined Article

And Now a Word from the Panel: Snow Day!

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With Spring in the air (or at least on the calendar), welcome to the latest edition of "And Now a Word from the Panel...," a 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.

Illustrating that even the Panel lacks immunity from the grip of ice, snow and vortexes, for the first time in memory, the Panel had a...Snow Day! Although the Panel headed South to the Big Easy (which seemed like a safe bet to escape winter's elements), an ice and snow storm in New Orleans forced the cancellation of the January 30 hearing session, which was rescheduled for a rare *February* Panel hearing. As one of my colleagues ironically noted, the NFL was more fortunate than the Panel that week in choosing MetLife Stadium over the Superdome as its winter venue.

Turning to this month's hearing session, for the second March in a row, the Panel heads to America's Finest City, San Diego, California — where the last snowfall was in 1967, a year before the Panel was established.

In the spirit of school "Snow Days, " this edition will offer its readers insight into the Panel's thinking about...Class! — as in, "Class Actions," and the challenges those types of actions might, or might not, present to MDL centralization. Specifically:

- Is the pendency of mainly non-overlapping statewide class actions, as opposed to nationwide class actions, a reason to deny transfer?

- How will the mix of consumer class actions together with individual personal injury actions affect the Panel's thinking in whether to create an MDL?

In addition, although not a "class" issue, the Panel also shed some more light on the vexing question of MDL venue and whether the pendency of a case in that venue is a prerequisite for selection as the MDL host city. (You can probably guess the answer.)

LOOKING BACK: A Breath of Fresh Air?

At its February hearing, the Panel considered the issue of leaky windows, permitting "water to enter behind the windows, resulting in premature wood rot and deterioration and causing damage to both the windows and other property, such as drywall, window frames, and floor covering." *In re Pella Corp. Architect and Designed Series Windows Prods. Liab. Litig.* (MDL No. 2514).[1]

When the MDL motion was originally filed, there were six pending cases — five of which were non-overlapping statewide classes and one of which was a nationwide putative class. Two more recently filed related actions were brought on behalf of nationwide classes. But the overriding consideration for the Panel was whether "the Section 1407 requirement of common factual questions is satisfied."[2] The Panel answered that question in the affirmative in that "the subject actions all plainly allege that the subject windows…are defective in the same ways."[3] That the MDL would involve various non-overlapping class actions was of little concern, with the Panel citing its precedent that "[m]any MDLs…encompass non-overlapping classes."[4]

Another tip to practitioners from this decision is that the Panel will accept affidavits to address whether cases involve common questions of fact. In its decision, the Panel noted that an engineer's affidavit "found the windows suffered from three common defects permitting water leakage."[5]

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

Apropos for an MDL hearing session held the same week as the Super Bowl, the Panel once again tackled the issue of choosing an MDL venue and where the winners of the MDL hearing would be going next.[6] Illustrating that the pendency of an action in the transferee court is not a prerequisite for its selection as the MDL situs, the Panel found that the District of South Carolina "would be an appropriate forum" and the transferee judge's experience in another MDL involving allegedly defective windows manufactured by another entity "is likely to benefit the parties here."[7] But in a reminder to practitioners, the Panel was quick to note that "[a]lthough

[1] 2014 WL 576099, at *1 (J.P.M.L. Feb. 14, 2014).
[2] *Id.* at *2.
[3] *Id.*.
[4] *Id.*, quoting *In re North Sea Brent Crude Oil Futures Litig.*, 2013 WL 5701579, at *1 (J.P.M.L. Oct. 21, 2013).
[5] *Id.* at *1.
[6] *See* "And Now a Word From the Panel" (May 29, 2013); "And Now a Word From The Panel" (Mar. 19, 2013).
[7] 2014 WL 576099, at *2.

no constituent action currently is pending in that district, that is no impediment to its selection as transferee district."[8]

LOOKING FOWARD: A Classless MDL?

At the March hearing, the Panel shifts its attention to dietary supplements and whether consumer class actions seeking purchase price refunds would be properly centralized in an MDL proceeding with a series of individual personal injury actions. *In re USPLabs Dietary Supplement Litig*. (MDL. No. 2523).

The manufacturer supports creation of an MDL with all of the actions because they all share common factual allegations as to whether the products are safe, adulterated or can cause injury, even if the nature of the legal relief sought may differ in the actions. The manufacturer argues in favor of an MDL venue where some of the personal injury actions are pending or is otherwise near the home states of various individual personal injury plaintiffs.

"The manufacturer supports creation of an MDL with all of the actions because they all share common factual allegations as to whether the products are safe, adulterated or can cause injury, even if the nature of the legal relief sought may differ in the actions. "

Certain consumer class action plaintiffs oppose transfer of the actions on the ground that the consumer class actions "involve completely different claims, facts, and legal issues largely because none of them assert personal claims. Rather, they challenge the advertising of [the manufacturer's] products." Thus, those plaintiffs contend, discovery for the actions would be significantly different and there would be little overlap with the parties and witnesses; the consumer class actions do not require witnesses to testify regarding the physical effect of the products. Moreover, plaintiffs worry that a centralization of all actions would "complicate" the consumer class action because the testimony in individual actions would result in "individual issues" that could be used to defeat class certification. Other plaintiffs oppose MDL transfer on the ground that different products or ingredients are at issue or different injuries are alleged (cardiac vs. liver) in the various cases, even though those factors have not necessarily precluded MDL centralization of other groups of cases.

As illustrated by the *Pella* decision, the battleground as to whether to create an MDL will likely turn on whether the consumer class actions and individual personal injury actions share "common questions of fact" and whether creation of an MDL would add to the efficiencies in managing those cases. That the class actions address advertising and consumer protection laws, or even the laws of different states, rather than personal injury statutes, does not address the ultimate driver of whether they share common facts. As this column has previously noted, the

[8] *Id.*

presence of class actions is not *per se* the dispositive factor as to whether an MDL will be created.[9]

What is the Panel's thinking as to whether consumer class actions warrant MDL treatment? Are the allegations in these dietary supplement cases too thin 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 next edition of "And Now a Word from the Panel…," as the Panel heads once again for a May hearing in the "Windy City" (haven't we had enough of winter?)—Chicago, Illinois. And perhaps next year, the Panel will decide to return to the Sunshine State (Orlando or Miami) to ensure a *January* Panel Session.

Panel Trivia Corner

January Trivia Question
During 2013, which federal district was assigned the most new MDL proceedings?

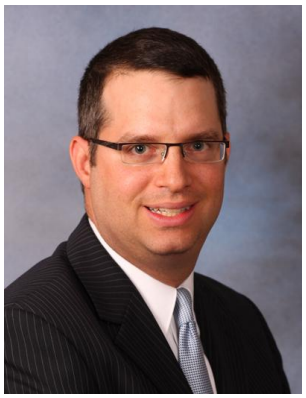
Answer to January Trivia Question
The Southern District of New York, with six new MDLs, buttressing its overall total of 41 MDLs. See also March 2013 Panel Trivia Question.

March Trivia Question
With the rescheduling of the Thursday, Jan. 30, hearing session to Thursday, Feb. 6, the Panel this year will have as many hearing sessions on the first Thursday of an "even" month as on the usual slot of the last Thursday of "odd" months. Which other sessions this year will be held on the first Thursday of an "even" month?

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.

[9] *See* "And Now a Word From The Panel" (July 23, 2013); "And Now a Word From The Panel" (May 29, 2013).

About the Author



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