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Bylined Article

# And Now a Word from the Panel: What's Good for America?

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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 as it meets on a bi-monthly basis at venues around the country.

After months of anticipation, the panel is finally hearing arguments regarding the creation of an MDL for the General Motors ignition switch cases. *In re General Motors LLC Ignition Switch Litigation* (MDL No. 2543). As much ink has, and will be, spilled in covering that MDL motion, this column will take a "backseat" on that issue. Instead, we will address a perhaps less sensational, but no less important, MDL issue: How does the panel address motions to create an MDL involving America, or specifically, cases naming the United States of America?

To paraphrase Charles Erwin Wilson, former Secretary of Defense (and chairman of GM), during his confirmation hearing, is "what's good for General Motors ... good for America?"[1] Should practitioners be less "revved up" to seek an MDL when the defendant is the United States government, rather than a private litigant? As the panel "speeds" into the "Windy City" (Chicago, Illinois) for this month's hearing, it will consider a group of cases filed against the United States of America, among others, arising from an alleged outbreak of the Hantavirus at Yosemite National Park's Curry Village during the summer of 2012.

But before looking forward to this month's hearing, let's take a look back at the panel's March hearing, held in America's Finest City (San Diego, California).

[1] See William Safire, Safire's Political Dictionary, at 803 (1978) (noting that actual quote was, "For years I thought that what was good for our country was good for General Motors, and vice versa.")

## Looking Back: A Classless MDL?

At its March hearing, the panel considered 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 Oxyelite Pro and Jack3D Products Liability Litigation (f/k/a In re USPLabs Dietary Supplement Litig.)* (MDL. No. 2523).[2] As noted by the panel, plaintiffs in two of the consumer class actions represented that those actions would "not delve into the medical issues raised by the personal injury actions."

In denying the motion, the panel focused on a number of unique facets of these multiple, yet disparate cases. Practitioners should consider these factors when considering future MDL petitions in product liability cases. It is insufficient to simply argue that all of the actions allege "unsafe" products. Rather, in determining that an MDL was not warranted, the panel looked to the following:

- Health Risks: There were differences in the health risks alleged by the various plaintiffs.
- Regulatory Responses: The various products at issue involved different regulatory responses.
- Consumer Class Actions vs. Personal Injury Cases: The class actions, unlike the personal injury cases, raised a "unique threshold issue with respect to the alleged impact of a state court class settlement agreement."

The differences among the various actions led to the panel's conclusion that voluntary cooperation as opposed to formal MDL centralization was the preferred approach.

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The panel's decision also provides us with yet another opportunity to address a gnawing question as to panel practice, and no stranger to this column. Is there a magic number of pending cases which will virtually assure MDL treatment? The short answer is a resounding "no." For example, in Oxyelite, there were 18 cases (nine at the time of the original motion and nine additional tag-alongs). Nevertheless, by highlighting the above differences among the actions, those seeking to derail creation of an MDL prevailed.

[2] 2014 WL 1338475 (J.P.M.L. April 2, 2014).

## Looking Forward: Uncle Sam and MDLs

With the Fourth of July and summer vacations almost on our minds, the panel will consider a motion for MDL centralization of five actions arising from an alleged outbreak of the Hantavirus at Yosemite National Park. *In re Yosemite Park Hantavirus Litigation* (MDL No. 2532). The Hantavirus, a potentially fatal disease transmitted via rodents (deer mice), ravaged tent cabins at Yosemite during the summer of 2012. So severe was the fallout from this outbreak that, under certain insurance indemnity agreements, the United States hired private attorneys to represent it in these cases.

The motion to create an MDL proceeding was filed by the United States. Various plaintiffs opposed. There is no statutory exception precluding MDLs for cases naming Uncle Sam or any of our national parks. Thus, cases naming the USA are as ripe for MDL consideration as any other case. Moreover, the principles applied by the panel in evaluating whether an MDL proceeding is appropriate in cases naming the federal government will be similar to those applied in other cases, whether a GM or any other private entity. Nevertheless, nuances inherent in cases involving the government will impact how the panel applies its time-honored principles for MDL centralization of cases.

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Specifically, the general MDL principles implicated by this MDL petition are: (1) complexity of the common issues of fact; (2) unique issues of fact; (3) distinct legal theories; and (4) overlapping counsel.

- Complexity (or lack thereof): After the Hantavirus outbreak, certain government agencies conducted their own investigations and presented their findings, including a 10-page report (including pictures) from the Office of the Inspector General and a 13-page report (including references) from the Center for Disease Control. In opposing the US government's MDL motion, a plaintiff argued that the Hantavirus cases are insufficiently complex for MDL treatment; the relative "brevity" of those reports belies the contention that there is anything complex or numerous about the issues in these cases. Of note, and perhaps ironically, another party to these cases referred to the agency investigations as "thorough."
- Unique fact issues (deceased vs. living claimants): As is common in MDL motion practice, another opponent of MDL transfer argued that the five cases should not centralized in a single proceeding because some of the victims died from the virus and

thus do not present residual symptoms or the need for future care, each of which would require lengthy discovery.

- Distinct legal theories and remedies (punitive damages, attorneys' fees and varying state laws): Of the five actions, certain actions allege fraud and civil conspiracy with punitive damages, while another alleges violations of consumer protection statutes entitling the winner to attorneys' fees, while still another alleges state-specific claims, requiring discovery relating to the particular state law at issue. In opposing the MDL motion, some plaintiffs pointed to these differing theories and remedies as a reason to deny the motion.

- Overlapping plaintiffs' counsel: As is well known to readers of this column, the panel may hesitate to create an MDL proceeding when alternative means of coordination are available through overlapping counsel in the various cases. Ordinarily, and perhaps even counter-intuitively, cases naming the United States in different federal districts are less susceptible to such coordination because a distinct DOJ attorney (based on the district where a case is pending) would represent the government. As noted above, in the Hantavirus cases, the United States is represented by private counsel and thus the same national private counsel is able to more readily coordinate discovery in the various actions. Accordingly, certain plaintiffs opposed to the creation of an MDL argue that there is less need for MDL centralization here because there is overlapping private counsel representing the interests of the United States in multiple cases.

What is the panel's thinking as to whether cases naming the US warrant MDL treatment? Are cases involving different legal theories of recovery appropriate for MDL treatment? And (we cannot resist), what will happen to GM in its MDL battle, and if an MDL is created, to what MDL destination are the litigants headed? What new issues will make their way to the panel at the next hearing? Stay tuned for our next edition of "And Now a Word from the Panel …," as the panel heads to the "Heart of America" — Kansas City, Kansas — for the July session.

## **Panel Trivia Corner**

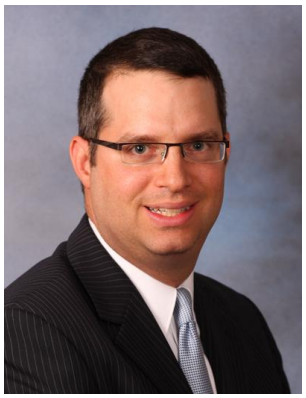
*March Trivia Question*
With the rescheduling of the Thursday, Jan. 30, hearing session to Thursday, Feb. 6, the Panel this year will have as many hearing sessions on the first Thursday of an "even" month as on the usual slot of the last Thursday of "odd" months. Which other sessions this year will be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

*Answer to March Trivia Question*
The Oct. 2 session (the last Thursday in September is the Rosh Hashanah/Jewish New Year holiday); and the Dec. 4 session (the last Thursday in November is Thanksgiving).

*May Trivia Question*
Which MDL proceedings have involved a National Park?

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.

## About the Author



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Alan Rothman is Counsel in Kaye Scholer's Product Liability Practice in New York. He has appeared and argued before numerous federal and state courts as well as the Judicial Panel on Multidistrict Litigation and pioneered in the area of removal of actions from state to federal court, including, among other issues, the removal of actions naming local company employees, sales representatives, pharmacies and health care providers.