

And Now a Word from the Panel: Top 10 Venue Arguments

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Welcome to the tenth installment 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 at venues around the country.

In honor of the occasion and as the panel heads to the “Heart of America” (Kansas City, Kansas) for its July 31 hearing, this column will take a bit of a detour from its regular format and present its “Top 10” list of arguments (some strange, yet true) made in support of a particular MDL venue. Some have worked and some have not. This column will provide practitioners with guidance as to the types of arguments that are more likely than others to carry the day. But before that countdown and on the heels of America’s birthday, let’s take a look back at the panel’s consideration of a group of cases involving Uncle Sam.

Looking Back: Uncle Sam and MDLs

Following its May hearing in the Windy City, the panel granted a motion for MDL centralization of four actions (with two potential tag-along actions) arising from an alleged outbreak of the Hantavirus at Yosemite National Park’s Curry Village during the summer of 2012. In re Yosemite Park Hantavirus Litigation (MDL No. 2532).¹ 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. In deciding to grant the MDL motion, the panel applied principles common to MDL motions, albeit laced with some nuances due to the presence of Uncle Sam as a defendant. In particular, the panel addressed two arguments raised by those opposing creation of an MDL: (1)

¹ 2014 WL 2547819 (J.P.M.L. June 4, 2014).

The issues are not complex; and (2) voluntary cooperation among counsel and the parties obviated the need for a formal MDL proceeding.

Complexity (or lack thereof): Interestingly, in finding that the cases presented complex issues, the panel focused on the nature of legal defenses unique to these actions. Due to the presence of the federal government as a defendant, it was anticipated that the United States would assert defenses under the Federal Tort Claims Act (the “FTCA”). The panel found that “such defenses—in particular, the assertion of the ‘discretionary function’ and ‘independent contractor’ exceptions to the FTCA—often entail complicated and lengthy discovery practice.”²

Voluntary Cooperation: As is often argued (successfully) by those opposing MDL transfer, where there are alternative means of cooperation, such as common counsel, there is no need for an MDL. While the panel “applaud[ed] any voluntary efforts at coordinating the litigation,” there were several unique aspects to the discovery in these cases which complicated cooperation efforts. The discovery already served “involved numerous document requests, several depositions, and subpoenas of various third-party witnesses—including three members of Congress.” The panel was not convinced that plaintiffs’ discovery plan was “a workable substitute for centralization.”³

“As is often argued (successfully) by those opposing MDL transfer, where there are alternative means of cooperation, such as common counsel, there is no need for an MDL.”

The lessons learned from this MDL decision are: (1) MDLs are available in all types of cases, no matter who the parties are and even if they are governmental entities; and (2) while one must be mindful of the general principles that the panel will consider in deciding whether to create an MDL proceeding, the nuances of a particular set of cases, especially those involving Uncle Sam, impact upon the application of these principles to the MDL motion at hand.

And Now Our Top 10 List!

As readers of this column are aware, one of the most interesting and least predictable aspects of panel practice is the issue of venue—i.e., to where will the lucky winners of MDL centralization be traveling for their MDL proceeding. While there is certainly a litany of factors that the panel considers as a basis for the selection of an MDL venue, it is somewhat intriguing to explore the creative (and even unusual) arguments presented to the panel as a basis for venue selection. In examining which arguments actually carried the day with the panel with respect to recent MDL petitions, we offer the following gentle suggestions to practitioners:

² Id. at *1.

³ Id.

- Be practical, concise and truthful
- Ensure that your argument actually bears on why the venue is helpful for your cases — for example, highlighting that a particular venue hosts an annual bodybuilding convention won't necessarily advance your advocacy (even if your MDL involves energy supplements and certainly if it does not)
- Serving as a tourism bureau spokesperson, or offering concierge or GPS services, has not always worked in the past

With those introductory thoughts, we now present our “Top 10” (venue) arguments. These arguments are ranked in order of their creativity, and not in order of which are likely to prevail. The winning arguments from this list are identified at the end of this column.

#10: Convenience

There are “adequate hotel rooms within easy walking distance of the courthouse.”⁴

#9: Airport Hubs

“The Minneapolis-St. Paul International Airport ranks 16th in the nation in the number of travelers served with over 400,000 landings and takeoffs annually.”⁵

#8: The Map Maker

“The Southern District of Ohio, Eastern Division’s Joseph P. Kinneary U.S. District Court courthouse is centrally located geographically, in Columbus, Ohio, the 15th largest U.S. city, and therefore convenient and economical to access” (map included).⁶

See <https://ecf.jpml.uscourts.gov/doc1/8501452773> (at 12).

#7 And Now a Word From the Tourism Bureau

“[Reno] has an active and vibrant tourism industry, [and] ample accommodations for visitors.”⁷

#6: And Now a Word About Our Hotels

“Las Vegas ... offers luxury hotel accommodations at inexpensive prices.”⁸

⁴ MDL No. 2522, Document No. 91.

⁵ Id.

⁶ MDL No. 2515, Document No. 31 (map available at p. 12).

⁷ MDL No. 2514, Document No. 22.

⁸ MDL No. 2504, Document No. 1.

#5: More About Airports

“Gulfport is easily accessible by plane. Accordingly, convenience weights in favor of transferring and consolidating these actions in the United States District Court for the Middle District of Louisiana.”⁹

#4: And Yet More About Airports

“Reno-Tahoe International Airport was named the Second Most Efficient Airport in North America by the Air Transport Research Society in 2011.”¹⁰

#3: The Convention Planner

“Many annual conventions, such as the Arnold Classic, are held in Columbus, Ohio, and draw visitors from throughout the country.”¹¹ (Note: The Arnold Classic has nothing to do with golf or even the MDL at issue.)

#2: Demographics

“California is the most populous state in the nation — by far. It has over 37 million people, according to the 2010 Census ... [and] California’s population is one of the world’s most diverse. No race or ethnic group constitutes a majority of the state’s population.” (Emphasis in original.)¹²

#1: Olympic Fever/America’s Pastime?

“Sixty percent of the 1980 ‘Miracle on Ice’ US Olympic Hockey Team were players born and raised in Minnesota,” a state which is also recognized as the “State of Hockey.”¹³

What is the panel’s latest thinking as to the venue for MDLs? What creative arguments will the panel face next? Stay tuned for our next edition of “And Now a Word from the Panel,” as the panel heads to the JPMDL Chairman’s hometown of Louisville, Kentucky (and home of the NCCA’s Louisville Cardinals) for a rare October session.

⁹ MDL No. 2522, Document No. 1.

¹⁰ MDL No. 2504, Document No. 22.

¹¹ MDL No. 2515, Document No. 31.

¹² MDL No. 2522, Document No. 20.

¹³ MDL No. 2551, Document No. 10. The only winning arguments were those ranked #10 and #9 in our “Top 10” list. Minnesota’s nexus to the sport of hockey (#1) is the subject of an MDL motion regarding the NHL Concussion litigation, to be heard at the Panel’s upcoming July Session.

PANEL TRIVIA CORNER

May Trivia Question:

Which MDL proceedings have involved a National Park?

Answer to May Trivia Question:

The Bus Disaster at Mt. McKinley National Park, AK (MDL No. 203); and, as discussed in this column, In re Yosemite National Park Hantavirus Litigation (MDL No. 2532).

July Trivia Question:

Of the 297 current MDL proceedings, which are located in states without nonstop flights from the New York City area (and not otherwise served by Amtrak's Northeast Corridor Acela)?

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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