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Bylined Article

And Now A Word From The Panel: End Of An Era

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Welcome to the 12th installment of "And Now a Word from the Panel ...," a 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.

On Dec. 4, the panel heads to the Palmetto State and the City of Charleston for its December hearing (skipping November, due to the Thanksgiving holiday falling on the last Thursday of November). But before turning to our usual features of this column, we would be remiss if we didn't acknowledge a changing of the guard at the panel helm.

Judge Sarah S. Vance, a panel member from the Eastern District of Louisiana, will now assume the panel chairperson reins from Judge John G. Heyburn II of the Western District of Kentucky. Judge Heyburn, the panel's seventh chairman in its history, served for the past seven years and presided over the seven-member panel's consideration of more than 700 MDL petitions during that period. With the panel's December hearing, the panel also welcomes its newest member, Judge Catherine D. Perry of the Eastern District of Missouri.

Looking Back: A Multidistrict Litigation About Multijurisdictional Practice?
Before turning to the upcoming hearing, we take a look back at a fascinating MDL petition about MJP, multijurisdictional practice. As our readers may recall, at the October hearing, the panel considered whether to create an MDL relating to cases concerning local rules governing attorney admission and several lawsuits naming members of the federal judiciary—including a member of the panel, who is also a district court judge in Washington, DC (and did not participate in the panel's decision).

After considering the arguments of plaintiffs—a group of attorneys challenging the local requirements to gain general admission to federal district courts—the panel agreed with the defendant district court judges and the US Attorney General in denying the MDL petition. *In re National Association for the Advancement of Multijursidiction Practice Litigation* (MDL No. 2568) (J.P.M.L. Oct. 9, 2014).

The panel's decision highlights for practitioners an important consideration in assessing whether an MDL will be created. The MDL statute (28 U.S.C. § 1407(a)) requires that the actions present "one or more common questions of ***fact***" (emphasis added). By contrast, the actions at issue in this petition primarily presented "common legal questions," namely "the constitutionality of restrictions on attorney admission contained in each court's local rules." The actions presented "too few common fact questions" and thus did not require "significant, if any discovery." The panel also found that the local rules at issue in the three actions were "different," as were the courts and defendants in each action (with the exception of the US Attorney General, who was named in all of the actions).

The lesson from this decision is clear. Before considering whether to seek an MDL, one must be prepared to identify common factual questions among the various actions. The mere overlap of legal issues will simply not carry the day before the panel.

As we have reminded our readers in the past, even somewhat unusual MDL petitions present the opportunity for valuable insight into panel practice and factors that the panel will consider in evaluating whether to create an MDL.

"Before considering whether to seek an MDL, one must be prepared to identify common factual questions among the various actions."

Looking Forward: If at First You Don't Succeed, Try, Try Again (Redux)

In our very first column, we presented the question: Does the panel believe in "second chances" to establish an MDL proceeding where the panel previously denied a motion to create an MDL for similar cases?[1] The Dec. 4 panel hearing again presents the panel with an opportunity to address that important question. *In re Oxyelite Pro and Jack3D Prods. Liab. Litig.* (No. II) (MDL No. 2582).

This column previously covered the initial Oxyelite MDL application, which at the time of the request for MDL centralization encompassed nine actions, including a number of consumer class actions.[2] In April of this year, the panel rejected that application finding differences in the health risks and regulatory responses at issue. The panel also noted that the class actions at issue raised unique issues relating to a prior state court class settlement agreement.[3]

In its renewed application before the panel, now involving 17 pending actions with a total of 46 plaintiffs, the defendant distributor of the supplements (involving two lines of its products)

[1] "And Now a Word from the Panel," *Law360* (Jan. 28, 2013).
[2] "And Now a Word from the Panel," *Law360* (May 27, 2014); "And Now a Word from the Panel," *Law360* (Mar. 25, 2014).
[3] *In re Oxyelite Pro and Jack3D Prods. Liab. Litig.*, 11 F. Supp. 3d 1340 (J.P.M.L. Apr. 2, 2014).

highlighted the changed circumstances since its prior application. Those circumstances, that the distributor argues warrant a different result, include:

- Number of Actions/Plaintiffs: Since the prior application, there were 12 new suits, involving 40 new plaintiffs, in four different judicial districts.
- Elimination of Certain Actions from MDL Petition: The current MDL application excluded the consumer class actions, which related to a prior state court settlement.
- Overlapping Allegations: Some of the new actions included punitive damages claims with overlapping allegations regarding the two ingredients in its products.
- Overlapping Discovery: At least one of the plaintiffs issued written discovery that addressed both of the ingredients in the products, even though that plaintiff alleged ingestion of a product containing only one of the ingredients.
- Overlapping Injuries: Almost all of the plaintiffs allege liver-related illness.
- Concession by Plaintiffs that Actions Are Related: 32 of the plaintiffs in five of the suits filed notices of related actions with respect to actions involving the different ingredients.
- Difficulties of Coordination Absent an MDL: Some of the plaintiffs objected to the cross-noticing of depositions in the various actions, making voluntary coordination among the actions more difficult.[4]

Will the second time be a charm for creating an MDL for dietary supplement cases? What MDL petitions will the panel and its new chairman face next? Stay tuned for our next edition of "And Now a Word from the Panel …," as the panel returns to its (hopefully) warm-weather venue of Miami, Florida, for the Jan. 29, 2015, session.

Panel Trivia Corner

October Trivia Question
The Third Circuit Court of Appeals is the only circuit court to have had two of its sitting judges serve as members of the panel. But which is the only district within that circuit to have had sitting judges serve on the panel?

Answer to October Trivia Question
The Eastern District of Pennsylvania, which has had four panel members—Judge Joseph S. Lord III, Judge Charles R. Weiner, Judge Louis H. Pollak and Judge Louis C. Bechtle.

[4] The distributor also argued that that plaintiffs had put it on notice that it anticipated filing "hundreds" of additional personal injury. But as we have noted in the past, the Panel has rejected arguments based on the mere possibility of additional actions. *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 MDL petition where "proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, [but] we are presented with, at most, five actions"); see "And Now a Word from the Panel," *Law360* (Dec. 3, 2013).

December Trivia Question
Who was the first panel chairman?

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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