

MDL Panel Declines to Coordinate Spread Litigation

August 17, 2011 by [Sean Wajert](#)

The Judicial Panel on Multidistrict Litigation declined recently to consolidate three suits by plaintiffs who alleged Ferrero U.S.A. Inc. misrepresented Nutella hazelnut spread as a healthy and nutritious food. [In re Nutella Marketing and Sales Practices Litigation](#), MDL No. 2248 (J.P.M.L., 8/16/11).

We are always interested when the Panel declines to coordinate cases, but also have to admit that this is a favorite product in the *MassTortDefense* household. The spread, in its earliest form, was created in the 1940s by Mr. Pietro Ferrero, a pastry maker and founder of the Ferrero company. At the time, there was very little chocolate because cocoa was in short supply due to World War II rationing. So Mr. Ferrero used hazelnuts, which were plentiful in the Piedmont region of Italy, to extend the chocolate supply. The [region](#) is mostly mountains and hills, on the north-western border of Italy with France and Switzerland.

A plaintiff in the District of New Jersey action sought consolidation, arguing that the cases made similar allegations challenging Ferrero's marketing and advertising practices. Interestingly, movants and respondents both recommended centralization because the actions contained "similar allegations" concerning Ferrero's advertising, marketing and sale of Nutella spread and its alleged misrepresentations of Nutella as a healthy and nutritious food. All parties disagreed only as to the appropriate choice for transferee district.

However, the Panel noted that it has an institutional responsibility that goes beyond simply accommodating the particular wishes of the parties. See *In re: Equinox Fitness Wage and Hour Empl't Practices Litig.*, 764 F. Supp. 2d 1347, 1348 (J.P.M.L. 2011) (denying unopposed motion for centralization of two actions).

Here, the Panel was not persuaded that Section 1407 centralization was necessary for the convenience of the parties and witnesses or for the just and efficient conduct of this litigation. The actions may have shared some factual questions regarding the common defendant's marketing practices, but these questions did not appear complicated to the Panel. Indeed, the parties did not persuade the Panel that any common factual questions were sufficiently complex or numerous to justify Section 1407 transfer. Instead, said the Panel, cooperation among the parties and deference among the courts should minimize the possibility of duplicative discovery and inconsistent pretrial rulings. See, e.g., *In re: General Mills, Inc., Yoplus Yogurt Prods. Mktg. and Sales Practices Litig.*, 716 F. Supp. 2d 1371 (J.P.M.L. 2010).