

October 3, 2019

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: The Need for FRCP Amendments Concerning Multi-District Litigation (MDL) Cases

Dear Ms. Womeldorf:

As general counsel of major corporations that sell and distribute products and services across the United States, we are continuously and deeply engaged with the American civil justice system. Our companies and all of our stakeholders—including customers, employees, suppliers, communities, and shareholders—rely on the federal judiciary to be a just and accessible forum for the fair resolution of legal disputes on the merits.

As stewards of the Federal Rules of Civil Procedure (FRCP), the Civil Rules Advisory Committee members are entrusted with the essential task of ensuring that the FRCP anchors the judicial system to fair process and transparency while allowing adaptations that reflect changes in legal practice. We applaud the Committee's continuing commitment to achieving this balance by addressing issues that run afoul of Rule 1's admonition that the FRCP's purpose is the "just, speedy and inexpensive" resolution of all actions.

The Committee's review of the procedures used in multi-district litigation proceedings (MDLs) comes at a point of crisis. As the number of cases consolidated into MDLs has grown to approximately 50 percent of the federal civil docket, MDLs have become less and less grounded in the widely accepted principles of procedural fairness and transparency that are the FRCP's hallmarks. As a consequence, we have serious concerns about the lack of basic fairness of procedures used in those cases and doubts about the continued viability of the MDL mechanism.

Today's MDL practice—which has evolved over 50 years into something no one could have predicted—is prompting serious reflection. Should the FRCP apply to all actions and proceedings, as Rule 1 proclaims? Should procedures be written down for all stakeholders to see? Should parties in one jurisdiction or region of the country be able to expect to have the same procedural practices and protections that parties enjoy elsewhere? Parties to MDL actions and their lawyers are caught in an uncertain legal environment. Unless they have prior experience with the judge, they do not know what pleadings will be accepted or what discovery tools will be allowed; what motions the court will entertain or whether there is any pathway to appellate review; and whether there is any possible outcome other than paying to settle—even when the claims are meritless. Similar procedural uncertainties led to the 1937 adoption of the first FRCP.

We ask the Committee to honor its FRCP mandate by undertaking a thorough, deliberative, and inclusive rulemaking process to draft FRCP amendments addressing the most critical problems. We urge you to develop rules recommendations for MDLs in at least three vital areas: 1) initial census of claims; 2) interlocutory appellate review; and 3) disclosure of third-party litigation funding.

Initial census

The lack of meaningful attention to the problem of meritless claims in MDLs is a material reason why MDL procedures are perceived as unfair, *ad hoc*, and inconsistent with the basic tenets of the FRCP. It is well known that, in the largest MDLs, meritless claims can constitute at least 30 to 40 percent of claims or more. Allowing thousands of claims that have no relationship to the case (the plaintiff had no exposure to the alleged cause of harm and/or did not suffer any injury from exposure to the alleged cause of harm) to remain on the docket unexamined causes significant harm to the judicial process. Such claims convey false information to the judge, the parties, and other stakeholders; they complicate rather than clarify the risk assessments needed to understand the value of cases for settlement purposes; and they make it difficult, if not impossible, to select meaningful bellwether cases for trial. In the *Fosamax I* MDL proceeding, for example, over 50 percent of the cases that were set for trial were dismissed, and 31 percent of the cases that were selected for discovery were dismissed.¹ Plaintiff fact sheets are not the solution.

An initial census rule could solve the problem by requiring evidence of exposure to the alleged harm and evidence of injury to be produced within 60 days.² This would strongly discourage meritless claims. It is not a difficult standard. Indeed, the FRCP contemplates that any non-MDL case lacking such basic information would be subject to dismissal under Rule 11.

So long as this is a *rule*, it will deter the filing of meritless cases. But as a guideline or “best practice,” it is doomed to failure. Parties will continue to game the system because they will not know whether it will be enforced. The transferee judges will strongly benefit from a rule because it will preclude the need for any decision or attention to meritless claims.

Interlocutory appellate review

Appellate review is rare in MDL proceedings, not only because the cases frequently settle, but also because access to the appellate courts is asymmetrical. When a motion to dismiss or summary judgment based on preemption or *Daubert* is granted, plaintiffs have an appeal as of right. But when such motions are denied, defendants have no realistic pathway to review and must continue to litigate. Section 1292(b) is failing to provide a useful avenue to appeal because of its specific statutory requirements and because, as the Committee has noted, “§ 1292(b) gives the district court what amounts to a veto over immediate review.”³ Out of 14 attempts over a 10-year period to request § 1292(b) certification of a potentially dispositive motion in mass tort MDL cases, zero have been granted.⁴ Opponents of balanced appellate review cannot cite a single instance in which § 1292(b) led to appellate review of the type of motion about which the Committee is concerned.⁵

¹ *In re Fosamax Prods. Liab. Litig.*, No. 06 MD 1789 (JFK) (S.D.N.Y. Nov. 20, 2012).

² Lawyers for Civil Justice proposed this to the Committee in August 2018. The proposal is available at: https://www.uscourts.gov/sites/default/files/suggestion_18-cv-x_0.pdf.

³ Memorandum from Hon. John D. Bates, Chair, Advisory Committee on Civil Rules to Hon. David G. Campbell, Chair, Committee on Rules of Practice and Procedure, (June 4, 2019) (hereinafter “Committee’s Report”) (available at https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf) 18.

⁴ Letter from John H. Beisner, Skadden, Arps, Slate, Meagher and Flom LLP, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf. The letter analyzed the outcome of § 1292(b) motions seeking review of broadly applicable dispositive questions filed in federal mass tort MDLs that closed between 2008 and 2018, as well as in the 60 MDLs pending as of July 2018.

⁵ Letter from Brian J. Devine, Seeger Salvas & Devine LLP, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (June 25, 2019), <https://www.uscourts.gov/rules-policies/archives/suggestions/brian-devine-19-cv-p>.

The opportunity for appellate review is essential for many reasons: it is more likely to lead to just and consistent results and to provide guidance to future parties and courts. It also facilitates timely case resolution by delivering a final answer on disputed issues before enormous amounts of time and resources are spent on trials.⁶

Disclosure of third-party litigation funding

The Committee's Report observes that "litigation funding is growing by leaps and bounds" while acknowledging that "very few MDL transferee judges presently report that they are aware of TPLF in the proceedings before them."⁷ Those are two very good reasons to require disclosure, which would enable courts and parties to know whether a particular TPLF agreement:

presents any conflicts of interest or related ethical issues; whether the agreement violates any applicable laws governing champerty and maintenance; whether the plaintiff and/or class counsel in a putative class action will adequately represent the class; and whether the funder is vested with undue influence or control over prosecution of the underlying litigation.⁸

Control over the litigation is a serious issue for any judge and litigant. The Committee is aware that Bentham IMF's 2017 "best practices" guide suggests that funders should consider having the specific authority to "[m]anage a litigant's litigation expenses," "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response" and participate in settlement decisions.⁹ The Committee also is aware that numerous local rules ostensibly require TPLF disclosure, but that the requirements vary by district and adherence and enforcement are far from uniform.

Disclosure is the only way that courts, parties and the Committee will learn who is in the courtroom and understand the issues that are raised by their presence. The funders' fear of revealing privileged information should be handled just like it is for everyone else: redact it and ask for a protective order. The funders' fear of rampant discovery is misplaced; disclosure of insurance agreements (which earlier judicial rulemakers decided to require over the strong objection of defendants) has not led to any such problems.

Conclusion

We commend the Committee for the seriousness of purpose with which it is undertaking its study of MDL practices. Those practices raise fundamental questions about the principles underpinning the FRCP and are causing grave concerns about the future viability of the MDL mechanism. We are concerned that, left on its current trajectory without the Committee's guidance, MDL practice will continue to diverge from the FRCP's well-accepted tenets of fairness and transparency to such a degree that institutions such as ours will no longer seek to participate in, or agree to resolutions fashioned in, a system that lacks procedural integrity. Only the Committee can change the trajectory

⁶ Michael J. Harrington (Feb. 21, 2019) oped <https://www.law.com/corpcounsel/2019/02/21/multidistrict-litigation-needs-intensive-care/?sreturn=20190705172145>.

⁷ Committee's Report 22.

⁸ Letter from Advanced Medical Technology Association et al. to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (March 27, 2019), https://www.uscourts.gov/sites/default/files/19-cv-i-suggestion_advanced_medical_et_al_0.pdf.

⁹ Bentham IMF, Code of Best Practices (Jan. 2017), <https://www.benthamimf.ca/newsroom/bentham-publications/2017/01/08/bentham-imf-code-of-best-practices-jan-2017>.

because only the Committee can undertake a process that will honor Rule 1's aspiration that the FRCP govern "all civil actions and proceedings." We urge you to move forward with drafting FRCP amendments.

Thank you for your consideration.

Sincerely,

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