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October 21, 2019

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases

Dear Ms. Womeldorf:

I am writing to provide additional information regarding the proposal to amend Rule 23.3 to expand the availability of interlocutory appeals in MDL cases.

At a meeting on October 1, 2019, Advisory Committee members asked whether MDL courts have ever granted a defendant's request for certification under 28 U.S.C. §1292(b) to pursue an interlocutory appeal. The claimed inability of defendants to obtain interlocutory review using the existing procedures is the reason why the proponents believe it is necessary to create special appellate rights for MDL cases.

We undertook research to answer the Advisory Committee members' question: has an MDL court ever granted a defendant's request for §1292(b) certification? The answer is yes. So far, we have found **23 cases** in which an MDL court granted a defendant's request to certify an order that involved an important or dispositive issue, usually an order denying a defendant's dispositive motion, for an interlocutory appeal under §1292(b).¹ Our research is presented in detail in Appendix 1.

Our review of these cases leads us to three observations, all of which confirm that the proposed interlocutory rule is unnecessary and that existing procedures work well for all parties:

¹ Because we have not been able to search all MDL cases, our review is not intended to provide a comprehensive list of every instance where an MDL court granted a defendant's request for a §1292(b) certification; instead, it is intended to provide some examples of that occurring.

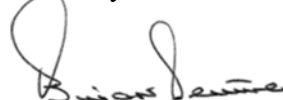
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- Contrary to the proponent's arguments, MDL judges have a history of granting defendants' requests for §1292(b) certification for interlocutory review of key decisions. MDL defendants—like all litigants—probably want their requests granted more often, but the data does not support the proponent's claim that the existing procedures do not allow defendants a meaningful opportunity to seek interlocutory review of MDL orders denying defendants' motions.
- Of the 11 cases in which the circuit court decided the appeal on the merits, **the circuit court never reversed the MDL court**. The circuit courts affirmed the MDL courts in the nine of the 11 cases. Due to an intervening change in the law, the circuit courts remanded the other two cases back to the MDL courts for further proceedings. Especially considering that each of these appeals involved—as is required by §1292(b)—an order “as to which there is substantial ground for difference of opinion,” the data confirm that MDL judges are making the right call in the first instance and do not need to be subjected to a heightened level of appellate review.
- When circuit courts permit interlocutory review under §1292(b), the average time from the granting of the §1292(b) certification to the resolution of the appeal on the merits is **27 months**. This is further evidence that interlocutory review has the potential to significantly prejudice plaintiffs by causing long delays in litigation.

The current procedures that are available to all litigants to obtain interlocutory review of certain orders—such as §1292(b)—are working well. The proposal to create special appellate rights for MDL cases seeks to fix a problem that does not exist. Creating this unnecessary new rule would strip MDL judges of the discretion they need to manage their dockets and it would cause significant harm to the judiciary, to plaintiffs, and to the efficiencies realized through MDL proceedings. For those reasons we continue to oppose the proposed new rule.

Sincerely,



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APPENDIX 1

RESULTS OF RESEARCH

We understand that the current proposed rule would create special interlocutory appeal rights for all MDLs regardless of the subject matter.² Because prior versions of their proposal have suggested that the new rule would apply to “mass tort” MDLs only, we have presented the results for “mass tort” MDLs separately from all other MDLs.

In cases where we could find the subsequent history of the appeal after the MDL court granted §1292(b) certification, we have included a summary of those proceedings in the discussion below.

“MASS TORT” MDL CASES

1. *In re Avandia Mktg.*, 804 F.3d 633 (3rd Cir. 2015) – The MDL court granted the defendant’s request to certify a §1292(b) appeal of the court’s denial of defendant’s motion to dismiss. The Third Circuit granted the petition for leave to appeal and affirmed the MDL court’s order denying the motion to dismiss. The U.S. Supreme Court denied defendant’s petition for a writ of certiorari. The interlocutory appeal took 31 months to resolve (the MDL court’s opinion denying the motion to dismiss was filed on 10/22/2013 and the Supreme Court’s denial of defendants’ petition for a writ of certiorari was filed on 6/6/2016).

2. *In re Endo Pharms. Holdings, Inc. Darvocet, Darvon and Propoxyphene Prod. Liab. Lit.*, 2015 U.S. App. LEXIS 22956 (6th Cir. 2015) – The MDL court granted defendant’s request to certify a §1292(b) appeal of the court’s order remanding hundreds of plaintiffs from the MDL to state court (although the order applied to six cases, those six cases together included more than 800 plaintiffs). The Sixth Circuit, finding that “we are not persuaded that an immediate appeal is likely to materially advance the ultimate termination of these cases,” denied the petition for leave to appeal.

3. *Bryant v. United States (In re: Camp Lejeune N.C. Water Contamination Litig.)*, 768 F.3d 1378 (11th Cir. 2014) – The MDL court granted the defendant’s request to certify a §1292(b) appeal of the court’s denial of defendant’s motion to dismiss several (potentially more than 2,600) plaintiffs’ claims as barred by the statute

² The proponents’ original draft language for a new Rule 23.3 applies to all MDL cases, regardless of subject matter. See Submission by Lawyers for Civil Justice to Advisory Committee on Civil Rules dated September 14, 2018 (18-cv-X). Proponents subsequently suggested that the proposed new rule would apply only to “mass tort cases”. See Letter from John Beisner to Rebecca Womeldorf dated November 21, 2018 (18-cv-BB). But most recently, at a meeting with members of the Advisory Committee on October 1, 2019, the proponents changed their position again and said that the proposed new rule might apply to all MDL cases, not just “mass tort” MDLs.

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of repose. The Eleventh Circuit granted the petition for leave to appeal and, while the appeal was pending, the U.S. Supreme Court decided a case that controlled the key issue in this case. The Eleventh Circuit remanded the case to the MDL court for further proceedings in light of the intervening U.S. Supreme Court decision. The interlocutory appeal took 36 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 9/29/2011 and the Eleventh Circuit's opinion was filed on 10/14/2014).

4. *In re: Fosamax Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 72123 (S.D.N.Y. 2011) - The MDL court granted the defendant's request to certify a §1292(b) appeal of an issue related to the proper risk-benefit analysis that should be used to determine whether the drug at issue is defective, an issue which potentially affected the outcome of more than 100 cases in the MDL. The Second Circuit denied the defendant's petition for leave to appeal, finding that "an immediate appeal concerning the issues presented therein is unwarranted. *Merck & Co. v. Boles*, Case No. 11-2873, (2nd Cir. 9/20/2011, ECF No. 22).

5. *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008) - The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of defendant's motion for summary judgment of several plaintiffs' claims. The Second Circuit granted the petition for leave to appeal. While the appeal was pending, the Second Circuit overturned a key decision on which the MDL court relied in denying summary judgment. Consequently, the Second Circuit remanded the case for further proceedings in light of the intervening decision. *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2nd Cir. 2010). The interlocutory appeal took 24 months to resolve (the MDL court's certification was filed on 9/5/2008 and the Second Circuit's opinion was filed on 9/10/2010).

6. *In re Air Crash off Long Island*, 209 F.3d 200 (2nd Cir. 2000) – The MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motion to dismiss 145 plaintiffs' claims for nonpecuniary damages. The Second Circuit granted the petition for leave to appeal and affirmed the MDL court's order denying the motion to dismiss. The interlocutory appeal took 22 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 6/2/1998 and the Second Circuit's opinion affirming the MDL court was filed on 3/29/2000).

ALL OTHER MDL CASES

7. *In re Blue Cross Blue Shield Antitrust Litig.*, 2018 U.S. Dist. LEXIS 113563 (N.D. Ala. 2018) – The MDL court granted the defendants' request to certify a

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§1292(b) appeal of the court's order deciding the appropriate standard of review applicable to a Sherman Act claim.

8. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL 09-2047, ECF No. 21231 (E.D. La., Mar. 6, 2018) – The MDL court granted the defendants' request to certify a §1292(b) appeal of the court's order denying defendants' motion to dismiss on personal jurisdiction.

9. *In re Domestic Drywall Antitrust Litig.*, 2018 U.S. Dist. LEXIS 174981 (E.D. Penn. 10/11/2018) – The MDL court granted the defendant's request to certify a §1292(b) appeal of the denial of defendant's motion for summary judgment. The Third Circuit, however, declined to accept the appeal.

10. *In re Aggrenox Antitrust Litig.*, 2015 U.S. Dist. LEXIS 94516 (D. Conn. 2015) - The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's partial denial of the defendants' motion to dismiss. PACER records do not show that the defendant ever filed an appeal.

11. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521 (5th Cir. 2014) - The MDL court granted the defendants' request to certify a §1292(b) appeal of the court's orders denying defendants' requests to vacate default judgments and their motions to dismiss. The Fifth Circuit granted the defendants' petition for leave to appeal and affirmed the MDL court's order. The interlocutory appeal took 20 months to resolve (the MDL court's opinion was filed on 9/4/2012 and the Fifth Circuit's opinion affirming the MDL court was filed on 5/20/2014).

12. *In re Mushroom Direct Purchaser Antitrust Litig.*, 54 F. Supp. 3d 382 (E.D. Pa. 2014) - The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion for summary judgment. The Third Circuit denied the defendant's petition for leave to file an appeal. *In re Mushroom Direct Purchaser Antitrust Litig.* (E.D. Pa., Case No. 06-0620, ECF No. 614, Dec. 2, 2014).

13. *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)*, 729 F.3d 1262 (9th Cir. 2013) - The MDL court granted the defendants' request to certify a §1292(b) appeal of the court's partial denial of defendants' motion to dismiss. The Ninth Circuit granted the petition for leave to appeal and affirmed the MDL court's order denying the motion to dismiss. The interlocutory appeal took over 26 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 6/29/2011 and the Ninth Circuit's opinion affirming the MDL court was filed on 9/10/2013).

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14. *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, And Products Liability Litigation*, 2011 U.S. Dist. LEXIS 80965 (C.D. Cal. 2011) - The MDL court granted the defendants' request to certify a §1292(b) appeal of a cross-cutting standing issue which supported the court's partial denial of defendants' motion to dismiss.

15. *Armstrong v. Lasalle Bank Nat'l Ass'n (In re: Amsted Industries, Inc.)*, 552 F.3d 613 (7th Cir. 2009) – The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's granting of plaintiffs' motion to remand the case to the transferee district. The Seventh Circuit granted the petition for leave to appeal and affirmed the MDL court. The interlocutory appeal took 22 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 3/2/2007 and the Seventh Circuit's opinion affirming the MDL court was filed on 1/13/2009).

16. *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 505 F. 3d 302 (4th Cir. 2007) – The MDL court granted the defendant's request to certify a §1292(b) appeal of the denial of defendants' motion to dismiss. The Fourth Circuit granted the petition for leave to appeal and affirmed the MDL court. The Supreme Court denied a petition for writ of certiorari. The interlocutory appeal took 39 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 6/10/2005 and the Supreme Court denied the writ of certiorari on 3/17/2008).

17. *Hepting v. AT&T Corp. (In re NSA Telcoms. Records Litig.)*, 439 F. Supp. 2d 974 (9th Cir. 2006) – The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss.

18. *In re Adelphia Communs. Corp. Sec. & Derivative Litig.*, 2006 U.S. Dist. LEXIS 11743 (S.D.N.Y. 2006) - The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss.

19. *In re Enron Corp.*, 2006 U.S. Dist. LEXIS 63223 (S.D.N.Y. 2006) - The MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss.

20. *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3rd Cir. 2004) – The MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motions to dismiss for lack of personal jurisdiction. The Third Circuit granted the petition for leave to appeal and affirmed the MDL court's order denying the motion to dismiss. The interlocutory appeal took 18 months to resolve (the MDL court's opinion denying the motion to dismiss was filed on 8/1/2002 and the Third Circuit's opinion affirming the MDL court was filed on 2/13/2004).

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21. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp. 2d 145 (D. Me. 2004) – The MDL court granted the defendant’s request to certify a §1292(b) appeal of the court’s denial of the defendants’ motion to dismiss.

22. *Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.)*, 332 F.3d 896 (6th Cir. 2003) – The MDL court granted the defendants’ request to certify a §1292(b) appeal of the court’s denial of defendants’ motion to dismiss plaintiffs’ claims and its granting of plaintiffs’ motion for summary judgment. The Sixth Circuit granted the petition for leave to appeal and affirmed the MDL court. The interlocutory appeal took 36 months to resolve (the MDL court’s opinion denying the motion to dismiss was filed on 6/6/2000 and the Sixth Circuit’s opinion affirming the MDL court was filed on 6/13/2003).

23. *In re: Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) - The MDL court granted the defendant’s request to certify a §1292(b) appeal of the court’s order compelling the disclosure of documents that the defendant claimed were protected by the attorney-client privilege. The Sixth Circuit granted the petition for leave to appeal and affirmed the MDL court. The interlocutory appeal took 24 months to resolve (the MDL court’s opinion denying the motion to dismiss was filed on 6/1/2000 and the Sixth Circuit’s opinion affirming the MDL court was filed on 6/10/2002).

REVERSAL RATE AND TIME TO APPEAL LATE DECISION

Case	Appellate Result	Months from §1292(b) Certification to Appellate Decision
<u>“Mass Tort” MDLs</u>		
<i>In re Avandia Mktg.</i> , 804 F.3d 633 (3rd Cir. 2015)	Affirmed	31 months
<i>Bryant v. United States (In re: Camp Lejeune N.C. Water Contamination Litig.)</i> , 768 F.3d 1378 (11th Cir. 2014)	Remanded	36 months
<i>In re Zyprexa Prods. Liab. Litig.</i> , 253 F.R.D. 69 (E.D.N.Y. 2008)	Remanded	24 months

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Case	Appellate Result	Months from §1292(b) Certification to Appellate Decision
<i>In re Air Crash off Long Island</i> , 209 F.3d 200 (2nd Cir. 2000)	Affirmed	22 months
<u>All Other MDLs</u>		
<i>In re Chinese-Manufactured Drywall Prods. Liab. Litig.</i>), 753 F.3d 521 (5 th Cir. 2014)	Affirmed	20 months
<i>Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)</i> , 729 F.3d 1262 (9 th Cir. 2013)	Affirmed	26 months
<i>Armstrong v. Lasalle Bank Nat'l Ass'n (In re: Amsted Industries, Inc.)</i> , 552 F.3d 613 (7 th Cir. 2009)	Affirmed	22 months
<i>Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)</i> , 505 F. 3d 302 (4 th Cir. 2007)	Affirmed	39 months
<i>In re Auto. Refinishing Paint Antitrust Litig.</i> , 358 F.3d 288 (3 rd Cir. 2004)	Affirmed	18 months
<i>Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.)</i> , 332 F.3d 896 (6 th Cir. 2003)	Affirmed	36 months
<i>In re: Columbia/HCA Healthcare Corp. Billing Practices Litig.</i> , 293 F.3d 289 (6 th Cir. 2002)	Affirmed	24 months
AVERAGE		27 months