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INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

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October 30, 2019

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

Re: Need for FRCP Amendments Concerning Multidistrict Litigation (MDL) Cases

Dear Ms. Womeldorf:

The International Association of Defense Counsel (IADC)[1] has served a distinguished membership of corporate and insurance defense attorneys and insurance executives since 1920. One of the IADC's core values is to respect the rule of law and improve civil justice. To that end, we offer the following comments on the current state of multidistrict litigation (MDL) and the role of the Federal Rules of Civil Procedure in improving it.

Multidistrict litigation faces a crisis of legitimacy. The number of federal court MDLs has surged—constituting between one-third and one-half of the active civil docket. At the same time, public confidence in the ability of MDLs to fairly serve individual plaintiffs and defendants has faltered. As University of Georgia Law School Professor Elizabeth Chamblee Burch recently observed, "All is not well in the mass tort world."[2] Observers of MDLs, from the judiciary, the practice of law, and academia, have noted the prevalence of meritless claims in MDLs, the lack of predictability for basic litigation tasks like discovery and motions practice, and the obscurity of any mechanisms for dispute resolution. In particular, these observers have noted how the current lack of rational, predictable rules favors repeat players who are insiders to the process over parties new to the process.[3]

[1] The IADC is an invitation-only, peer-reviewed membership organization of approximately 2,500 of the world's leading lawyers who primarily represent the interest of defendants in civil litigation. The IADC has been serving its members since the 1920s. Its activities benefit the civil justice system and the legal profession. The IADC has substantive committees that cover over 20 different areas of law.

[2] ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 4 (2019).

[3] Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, & the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 114 (2015) (criticizing "shockingly sloppy, informal, and often secretive process"); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1448 (2017) (noting that MDLs' "prevalence of norms over formal, legal precedent affords repeat players" critical advantages).

The Advisory Committee sits in a unique position to resolve the legitimacy problems that plague MDLs. By undertaking a thorough, deliberative, and inclusive rulemaking process, the Advisory Committee can draft FRCP amendments that address the most pressing threats to the values enshrined in Rule 1. We ask the Rules Committee to develop recommendations for rules governing MDLs in at least three vital areas: (1) initial vetting (or census) of claims; (2) interlocutory appellate review; and (3) disclosure of third-party litigation funding.

Initial vetting

The most pressing problem with MDLs is that they are filled with what can only be called "junk" claims.[4] Indeed, numerous judges who have overseen MDLs have written about some of the most shocking examples of claim abuse in multidistrict litigation. Federal asbestos MDL Judge Eduardo Robreno noted that litigation screening companies hired to support asbestos claims for nonmalignant conditions found "startlingly high" rates of pleural abnormalities, "suggesting that the readings may not be neutral or legitimate."[5] Silica MDL Judge Janis Graham Jack found that "Plaintiff's counsel … filed scores of claims without a reliable basis for believing their clients had a compensable injury."[6]

Self-policing is not an adequate mechanism for screening junk claims. Because positions on steering committees are often tied to volume, lawyers with leadership ambitions have little incentive to reduce the prevalence of weak or meritless filings.[7]

It is possible to fight the onslaught of nonviable claims. As Judge Robreno has advised, establishing a "toll gate" of merits review at the entrance to litigation can prevent non-meritorious cases from clogging up the judicial pipeline.[8] The Committee's consideration of an "initial census" rule could also mitigate the problem by requiring evidence of exposure to the alleged harm and evidence of injury to be produced within 60 days. This standard—easily met by actually-injured plaintiffs with competent counsel—would deter meritless filings. In fact, the approach bears little difference from the current Rule 11, but would not carry the same stigma that deters judges from employing it.

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[4] *See* Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Inst. for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, *available at* https://www.instituteforlegalreform.com/resource/gumming-up-the-works-multi-plaintiff-mass-torts; *see also In re Mentor Corp. Transobturator Sling Prods.,* MDL No. 2004, 2016 U.S. Dist. LEXIS 121608, at *6-7 n.2 (M.D. Ga. Sept. 7, 2016) (noting that of 850 cases filed, 100 were decided against plaintiffs on summary judgment, 458 were dismissed by stipulation of parties, and 74 were dismissed voluntarily).

[5] Hon. Eduardo C. Robreno, *The Federal Asbestos Products Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 121 (2013).

[6] *In re Silica Prods. Liab. Litig.,* 398 F. Supp. 2d 563, 677 (S.D. Tex. 2005).

[7] *See, e.g., In re Gen. Motors LLC Ignition Switch Litig.,* No. 14-MD-2543, 2016 WL 1441804, at *9 n.4 (S,D.N.Y. Apr. 12, 2016) (plaintiffs' counsel accused Lead Counsel of "flood[ing] the MDL with meritless cases" to gain position, a contention which the Court suggested had "some credence").

[8] Robreno, *supra*, 23 WIDENER L.J. at 186-87; *see also* Linda S. Mullenix, *Reflections of a Recovering Aggregationist,* 15 NEV. L.J. 1455, 1475 (2015).

The important consideration is that the standard have the transparency and predictability of a rule, rather than the uncertain, murky application of a "best practice." Best practices may or may not be applied in a given case. That uncertainty invites meritless claims that might survive without scrutiny. The certainty of a rule would deter filings that would not survive the required scrutiny, ironically leading to less need for extensive vetting or discovery enforcement orders later in the process.

Interlocutory appellate review

MDL proceedings are rarely subject to interlocutory review. Consequently, "little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across jurisdictions."[9] The lack of review has several causes: judges do not often certify cases for review under § 1292, a focus on settlement often precludes testing legal issues, and—ironically—defendants often win bellwether trials involving controversial legal theories that have driven years and millions of dollars of pre-trial litigation.

Allowing some type of expedited review for contested legal questions that affect large numbers of individual claims could avoid unjust and expensive proceedings and lead to more consistent law for future proceedings.

Disclosing third-party funding

Third-party litigation funders have a substantial effect on the number and quality of claims filed in multidistrict litigations. Equally importantly, the presence of third-party litigation funders complicates settlement negotiations, changing what was essentially a two-party negotiation into a multi-party settlement.[10] Funders add an extra dimension to the settlement because they add a "behind the table" constituent who must be satisfied, even if their particular needs (such as meeting a specific return on investment) are not known to everyone involved.[11]

The Advisory Committee's recent conference call notes for July 1, 2019 highlight a number of the issues that require more information, including the prevalence of consumer- versus non-consumer funding and the presence of recourse versus non-recourse loans.[12] The best way to gain more information about the presence and effect of funders is to require their involvement to be disclosed.

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[9] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure,* 165 U. PA. L. REV. 1669, 1706 (2017).

[10] ANDREW TRASK & ANDREW DEGUIRE, BETTING THE COMPANY: COMPLEX NEGOTIATION STRATEGIES IN LAW & BUSINESS 63-66 (2013).

[11] *Id*. at 69-70.

[12] *See* Civil Rules Agenda Book, Oct. 2019, at 222.

Conclusion

The IADC has watched with great interest the Committee's study of MDL practices, particularly at a time when those practices are so poorly understood by so many participants in civil justice. We are concerned that without firm and predictable guidance in the form of rulemaking, MDL practice will continue to evolve into a process that is considered unjust by most observers. We urge the Committee to move forward with drafting amendments to the Federal Rules that would provide rationality, transparency, and predictability for MDLs.

Thank you for your consideration.

Sincerely,

Amy Sherry Fischer
IADC President