March 4, 2020

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: Proposed MDL Rulemaking – Interlocutory Appellate Review**

Dear Secretary Womeldorf:

The American Association for Justice ("AAJ") hereby submits this Comment in response to proposals[1] regarding civil rules for interlocutory appeals in MDLs. AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including cases that have been consolidated into MDLs.

In general, AAJ maintains that few changes to the Federal Rules of Civil Procedure on the subject of MDLs, if any, should be made. AAJ cautions against the creation of separate rules for separate practice areas. Doing so ignores the purpose of the federal rules to be transsubstantive, and is likely to result in even more, similar requests for separate rules in other areas of law. Separate rules for MDLs, particularly on interlocutory appeals, would cause massive case delays and crowd appellate dockets. Moreover, MDLs are case-specific and "one size fits all" rules would not improve their operation. Indeed, judges' broad discretion in these diverse cases must be preserved. Furthermore, said proposals lack any reasonable justification, and Proponents' alleged rationale for this proposal proves its absurdity. On one hand, Proponents ask the Committee to "bring[] MDL cases back within the existing and well-proven

[1] The proposals referenced herein come primarily from Lawyers for Civil Justice and other corporate trade groups, including the U.S. Chamber of Commerce Institute for Legal Reform. AAJ refers to these proposals and supportive materials collectively as "comments," "Proponents," or "proposals."


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structure of the FRCP,"[2] and yet on the other hand, argue that the solution is an entirely new rule of procedure,[3] as an exception from the existing rules of procedure.[4]

This Comment addresses proposed rules related to interlocutory appeals of certain dispositive motions in MDLs, including proposed FRCP 23.3, and asks the MDL Subcommittee to reject said proposals outright. AAJ and its members' opposition is largely based on the fundamental principle that consolidation of a plaintiff's claim into an MDL, sometimes against a plaintiff's preference to remain closer to home, should never prejudice that plaintiff's claim. Indeed, it would exceed the authority of the MDL statute, 28 U.S.C. §1407, and violate a plaintiff's due process and equal protection rights to have their claim decided by a different set of rules of procedure than had their claim never been consolidated.

## I. Mandatory Interlocutory Appeals in MDLs Would Create Massive Delays and Backlogs.

Proposed Rule 23.3 would provide MDL defendants with new right of mandatory (meaning non-discretionary by transferee or appellate judge) interlocutory appeal on dispositive or *Daubert* motions. At different times, Proponents have suggested this rule be broadly applicable to all MDLs or, alternatively, just mass tort MDLs.[5] AAJ submits that this proposal in either form would provide an unjustified litigation advantage to an MDL defendant, who tend to be large, well-resourced corporate defendants. It would undoubtedly prejudice the claims of consolidated plaintiffs, and ultimately, burden federal courts and litigants with delays.

The practical ramifications of a rule creating mandatory interlocutory appeals in MDLs would be damaging to claimants. Providing liberal rights of interlocutory appeal would turn appellate courts into a nightmare of backlogged dockets. Under current wait times, § 1292(b)

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[2] Lawyers for Civil Justice, *Request for Rulemaking to the Advisory Committee on Civil Rules*, page 2 (Aug. 10, 2017); available at: https://docs.wixstatic.com/ugd/6c49d6_155a66cf4bf34d699cd480b5b24f08a3.pdf (hereinafter "LCJ REQUEST FOR RULEMAKING").

[3] Lawyers for Civil Justice, *Press Release: MDL Cases Surge to Majority of Entire Federal Civil Caseload* (March 2019) (hereinafter "LCJ PRESS RELEASE") ("The fact that the federal judiciary is now majority MDL underscores the urgency of amending the FRCP").

[4] The proposals all seek additional opportunities for mandatory interlocutory appeals in MDLs, above what is presently provided for in FRCP or § 1292. *See*, John H. Beisner, *Comment to Advisory Committee on Rules of Practice and Procedure Re: Proposed Rules Amendments Regarding MDL Proceedings* (Nov. 21, 2018); available at: https://www.uscourts.gov/rules-policies/archives/suggestions/john-h-beisner-18-cv-bb (hereinafter "BEISNER COMMENT") (Describing the MDL interlocutory appeal proposal as a "new" rule); See also, Lawyers for Civil Justice, *Press Release: The Myth of MDL Diversity*; available at: https://www.rules4mdls.com/resources (describing suggested proposals as "FRCP changes"); *See also,* Lawyers for Civil Justice, *Comment to Advisory Committee on Civil Rules Re: Ten Observations About the MDL/TPLF Subcommittee's Examination Into the Function of the FRCP in Cases Consolidated For Pretrial Proceedings*, page 4 (April 6, 2018); available at: https://www.uscourts.gov/sites/default/files/18-cv-j-suggestion_lcj_re_mdl_rulemaking_0.pdf (describing the appellate proposal as an "[a]n FRCP amendment").

[5] Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access To Interlocutory Review*, page 2 (April 24, 2019); available at: https://www.instituteforlegalreform.com/issues/mass-tort-multidistrict-litigation-mdl-proceedings (hereinafter "ILR MDL IMBALANCE") (Any "rule authorizing immediate review of interlocutory rulings should be limited to mass tort MDL proceedings, not the entire universe of all MDL rulings.").

appeals certified by an appellate court add a 23-month delay.[6] MDL plaintiffs already face delays as a result of consolidation and would now also face an additional two-year delay under this proposal. It is not hard to imagine the years-long delay to basic discovery, trial, and resolution of the claims that would be created by such a rule, because it inherently creates an appeal-by-piecemeal rule. Likewise, frequently, *Daubert* rulings are granted in part and denied in part, where the expert is allowed to testify, but the testimony might be limited in some way, and as such, this proposal could be broadly applicable if it is intended (or interpreted) to apply to *Daubert* rulings that are granted in part. As well, since the proposed rule provides for interlocutory appeal over any dispositive or *Daubert* decision, there is likely to be more than one interlocutory appeal in any one MDL consolidation, *exponentially multiplying* this years-long delay.

Since district courts would not have discretion to certify these applications – or in the alternative neither district nor appellate courts will have discretion to certify[7] – often these delays will be viewed as completely unwarranted by transferee judges themselves who would be forced to manage the massive pre-trial delays of that particular MDL. Transferee judges already face workload concerns as a result of MDL litigation,[8] but even more delays and workload requirements will likely be felt by other non-MDL litigants on that transferee judge's docket.[9]

The impact on appellate courts would be devastating. There are already many competing demands on the limited time and resources of appellate courts. Over the past year, U.S. Courts of Appeals have received nearly 48,000 appeals to review. For all litigation, the median wait time for the filing of the notice of the appeal to disposition of that appeal is 8.5 months, but it is much higher on average in particular circuits.[10] What cases will be delayed in exchange for expedited review of an MDL interlocutory appeals? Criminal appeals? Civil cases certified by district and appellate courts under the standards of § 1292(b)? Reviews of regulatory agency orders? Petitions by federal and state prisoners? Due process and other constitutional claims? There is no justification that these other appellants be burdened so corporate defendants in MDLs can be given priority of appellate courts' limited attention and review.

The delays will be felt by nearly all appellate parties and their lawyers, but the most harm will be to plaintiffs in MDLs still awaiting discovery and trial in district courts. The proposal to

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[6] Brian J. Devine, *Comment to Committee on Rules of Practice and Procedure* (CV-19-P), Appendix II (June 25, 2019); available at: https://www.uscourts.gov/rules-policies/archives/suggestions/brian-devine-19-cv-p (hereinafter "DEVINE JUNE COMMENT").

[7] *See infra* note 15. The original proposal calls for neither appellate nor transferee judge discretion to certify the appeal. However, later comments have offered in the alternative to only take discretion away from the district judge, leaving appellate courts discretion to deny appeals.

[8] Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1285 (2019) ("transferee courts (and judges) are getting more work than they are staffed to manage. Resource allocation in the federal court does not completely account for multidistrict litigation and courts have few opportunities to gather more resources quickly when they receive a large, complex proceeding").

[9] *Id.* at 1285 ("[W]orkload disparity can have an unintended and untested effect of slowing down the rest of a transferee court (or transferee judge's) docket").

[10] U.S. COURTS, *U.S. Court of Appeals - Judicial Caseload Profile: National Totals* (Mar. 2019); available at: https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0331.2019.pdf. The wait times in the D.C. Court of Appeals, 1st Circuit, 2nd Circuit, and 9th Circuit are closer to a year. Over a third of all appellate actions are in these four circuits collectively.

allow interlocutory appeal of *Daubert* decisions and any dispositive motion would grind discovery to a relentless start-and-stop, draining the limited resources of plaintiffs' counsel. Defendants in these cases typically have exclusive control of discovery, and while discovery is slow to start in mass tort MDLs, once started, it typically flows swiftly. Discovery will become even slower to initiate, and once finally initiated, at the defendant's mere motion under Proposed Rule 23.3 it will move a glacial pace. The delays in discovery will bleed into all other parts of the litigation, resulting in significant delays to trial and ultimately resolution of the claims.

Only MDL defendants would benefit from this proposal. As one scholar recently noted of this proposal, "it invites strategic abuse that would undermine judges' ability to manage cases to resolution."[11] It's not difficult to see that if Proposed Rule 23.3 is adopted, every dispositive or *Daubert* decision by a transferee judge that is not in the defense's favor will be certified for interlocutory appeal, and there will be nothing a transferee judge, or alternatively transferee or appellate judge, can do to prevent that certification. This non-discretionary interlocutory appeal proposal enhances the litigation advantage of repeat-player defendants in MDL at the expense of the lesser-resourced plaintiffs. "Mandatory interlocutory appeal enhances the defendants' resource advantage because they are more able to weather delays as cases ping pong between appellate and trial courts."[12] Clearly, this proposal provides MDL defendants a strategic advantage.

The delay on the litigation is not just measured in financial costs and time to the plaintiffs, their counsel and the courts, but often it will be measured in lives. In particular, for mass tort cases involving medical devices and pharmaceuticals, the plaintiffs very often are older and frequently in poor health. Based on the experience from MDLs, AAJ members can attest that if this proposed rule is adopted, some plaintiffs in mass tort MDLs will not survive the resolution of the defendants' interlocutory appeals and even fewer will survive until trial or resolution of their claim, which will diminish the value of the claim. Indeed, AAJ fears that this is a true motive of the Proposed Rule, and potentially a reason the Proposed Rule is alternatively addressed toward mass tort cases, that providing MDL defendants the proposed special right to mandatory interlocutory appeal will be an abuse of procedure in a lethal defense strategy to "delay-and-deny-until-they-die."

Yet, had their claim never consolidated, these plaintiffs would have otherwise survived resolution of their dispute and their constitutionally guaranteed right to their day in court. This is the height of prejudice. If the reasons stated above are not enough, then for sake of consolidated plaintiffs surviving the resolution of their claim and the efficient administration of justice, we urge rejection of Proposed Rule 23.3 and all similar proposals.

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[11] David Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 408 (2019); available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=4493&context=mlr.

[12] Andrew D. Bradt and Theodore Rave, *It's Good to Have the Haves on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEORGETOWN L. J. 73, 120 (2019).

## II. Transferee Judges Deserve, and Federal Courts Need, Deference Towards Their Discretionary Decisions as "Dispatchers."

Proponents suggest annulling the final judgement rule and § 1292(b) by creating "as of right"[13] an interlocutory appeal exclusive to MDL defendants (or alternatively mass tort MDL defendants) in proposed Rule 23.3 for dispositive and *Daubert* rulings. As proposed in written comment, Proposed Rule 23.3 would *require* an appellate court to permit an appeal of any order denying or granting a § 1292(b) or Rule 56 motion "provided that the outcome of such appeal may be dispositive of claims."[14] This proposed rule takes the discretion away from both the district judge and appellate judge and removes any showing that the appeal involves a controlling question of law or substantial ground for difference of opinion. Under this proposal, MDL defendants alone would have the authority to certify interlocutory appeals by merely filing a motion.

In later proposals, while maintaining that "mandatory review would be the better course," Proponents have offered in the alternative to only take discretion away from the district judge, leaving appellate courts discretion to deny appeals.[15] Nevertheless, in either alternative, the transferee judge would have no discretion in certifying an interlocutory appeal.

Peculiarly, these proposals offer no explanation of why a district court judge in an MDL is less deserving of deference than other trial judges, or even that same judge in non-MDL cases. Indeed, if anything, AAJ would propose the exact opposite, that district court judges managing large MDLs should be granted more deference, not less, towards their discretionary decisions. Research proves that district judges handling large MDLs are often the most seasoned jurists,[16] and experience in MDL becomes particularly important to the JPML in selecting a transferee judge for a product liability MDL.[17] Furthermore, nothing in appellate review suggests that district courts are making their decisions erroneously. Analysis submitted to the Committee shows that on appeal, district court judges in product liability MDLs are fully affirmed 87% of the time by circuit courts and partially affirmed an additional 3 percent.[18]

As the judges most experienced in the facts and law of any given case, trial judges are in the best position to determine the need for interlocutory appeal. Federal judges themselves agree,

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[13] Lawyers for Civil Justice, *Comment to the MDL/TPLF Subcommittee, MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee*, at 5 (Sept. 14, 2018); available at: https://www.uscourts.gov/sites/default/files/suggestion_18-cv-x_0.pdf (hereinafter "LCJ SEPT. 2018 COMMENT").
[14] *Id.* at 5-6.
[15] ILR MDL IMBALANCE, *supra* note 5 at 15 (The alternative is offered only with Advisory Committee Notes "urging courts of appeals to err on the side of granting review.")
[16] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, FACULTY SCHOLARSHIP SERIES, 165 YALE L. REV. 1669, 1693 (2017); available at: https://digitalcommons.law.yale.edu/fss_papers/5182 (Based on confidential interviews with twenty MDL judges "with significant experience in MDL litigation" and "[E]very judge reported that only the 'best' and 'most experienced' judges are assigned MDLs in the first place.").
[17] Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge,* 78 FORDHAM L. REV. 311, 333 ("the JPML cites to the general experience of the transferee judge more frequently in products liability cases"). *Id.* at 341 (Finding that "judges in products liability and sales practices litigation MDLs, on average, have more experience presiding over MDLs").
[18] DEVINE JUNE COMMENT, *supra* note 6 at 2 & Appendix I.

that the trial judges' role as "dispatcher" is critical in determining appropriateness of interlocutory appeals, *particularly in the context of MDL*:

> *If anything, in complex litigation like this, the role of the dispatcher is even more important. MDLs are incredibly complex and challenging to manage. Giving each individual litigant sole control of appellate timing risks creating delays and dilemmas for the District Judge and the other litigants. Progress with discovery, summary judgment, and trial may be slowed while everyone waits for the Court of Appeals to resolve an unrepresentative appeal that should never have been made the test case. Indeed, the premature trip to the Court of Appeals may pretermit the District Court from reaching a thorough and comprehensive resolution of a common legal issue in a way that takes account of all member cases in the MDL."*[19]

In this brief, the retired federal judges concluded, "[a]ll of these factors support the view that determining when a constituent case in consolidated MDL proceedings is ripe for appeal is, and should be, highly discretionary, and the District Judge presiding over the MDL is in the best position to exercise that discretion effectively."[20] AAJ whole-heartedly agrees.

It is for these same reasons, that in passing § 1292(b), Congress rejected legislative proposals that denied district court judges' discretion to certify interlocutory appeals.[21] Trial judges are indispensable and the most likely to be accurate in deciding which appellate issues are ripe for interlocutory appeal. They serve as important gate-keepers of time, resources and attention of the federal courts, particularly the appellate courts' limited time and attention. Proper deference is owed to trial judges' discretionary decisions, and there is no rational basis to remove their important discretion in certifying interlocutory appeals, particularly in MDLs.

### III. The Practice of the Discretionary Interlocutory Appeal in MDLs.

Presented with Proposed Rule 23.3 and similar proposals, the Subcommittee members have rightfully 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. Like all civil litigation, under the FRCP, interlocutory orders for MDL, as an extraordinary exception from the final judgement rule, are appealable only with leave of both the trial court and the appellate court. Under 28 U.S.C. § 1292(b), the district court may certify an interlocutory order in a civil case when it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The court of appeals "may thereupon, it its discretion, permit an appeal to be taken from such order."

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[19] *Brief amici curiae of Retired United State District Judges in Support of Respondents*, at 6, *Gelboim v. Bank of America,* No. 13-1174 (S.Ct. Oct. 22, 2014).

[20] *Id.* at 18.

[21] Tory Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. § 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS L. REV. 183, 189 (2014) (citing S. Rep. No. 85-2434, at 4 (1958), reprinted in 3 U.S.C.C.A.N. 5256-57) ("Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the future course of the litigation with any degree of accuracy.").

To date, while conflicting data has been presented, all research submitted suggests that interlocutory appeals are rare in MDLs. This is not surprising or indicative of the need for an amendment. The grant of these motions is rare generally, not just to MDL, but in all civil litigation, because it is the rare, novel or worthy case, by clear legislative intent the "exceptional case"[22] that justifies deviation from the final judgement rule. Courts intentionally grant such motions "sparingly and only in exceptional cases."[23] The final judgement rule is the "primary gatekeeper at the door to the federal courts of appeals"[24] and deviations from that rule have not been taken lightly by Congress, hence the requirement that both a district and appellate court certify an interlocutory appeal.[25]

Historically, interlocutory appeals have only been sought sparingly in civil litigation, roughly equating to two requests per circuit judgeship.[26] AAJ reviewed the most recent statistics available, and the data appears to confirm this historical trend for the most recent year. In 2018, Courts of Appeal disposed of only two interlocutory appeal requests annually per judgeship on average.[27]

By all appearances, litigants are well aware that interlocutory appeals are rarely granted. Generally, interlocutory appeals are infrequently sought. "1292(b) appears to be significantly underutilized"[28] and "has been historically utilized infrequently."[29] Under-utilization of § 1292(b) has been noted by scholars for some time, but oddly for the Subcommittee's purposes, some critics of § 1292(b) have argued that it is reserved (or at least seen as being reserved) for only "large," "complex," or "big" cases.[30] Certainly, a rule allowing non-discretionary interlocutory appeal but only in MDL (or in the alternative mass tort MDL) would further bolster this criticism, and create a real, not merely perceived, procedural dichotomy between "large complex cases" and all other civil litigation. Thus, the fact that otherwise conflicting data shows that interlocutory appeals are rarely sought, and rarely certified, in mass tort MDL means only that mass tort MDL is behaving and being treated similarly as all other civil litigation.

Moreover, Proponents have also offered the rarity of motions in mass tort MDL, and their lack of success, to imply "error" by the district court judges, suggesting they should have been granted more often, stating that interlocutory appeals have been "not granted sufficiently

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[22] *See, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 340, n. 68 (1960).
[23] S*ee e.g. In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).
[24] John Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence with Discretionary Review*, 44 DUKE L. REV. 200, 200 (1994).
[25] WEIGAND, *supra* note 21 at 273 ("Congress fully understood that any exception to the finality rule should be rare and used this understanding as the back-drop against which it debated whether to carve out a statutory exception.").
[26] Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 779 (2006).
[27] U.S COURTS, *U.S. Court of Appeals - Judicial Caseload Profile, National Totals*, page 2 (March 2019), available at: https://www.uscourts.gov/federal-court-management-statistics-march-2019.
[28] ROBERTSON, *supra* note 26 *at* 762.
[29] Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165, 1193 (1990).
[30] WEIGAND, *supra* note 21 *at* 185; *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 648 F. Supp. 988, 991 (S.D.N.Y. 1986) ("Certification may possibly be more freely granted in big cases." (citing 16 Wright, Miller, & Cooper § 3929) (internal quotation marks omitted)).

frequently in MDL," that "number of cases that should not have been brought are allowed to proceed through a costly litigation process without appellate review,"[31] and that the Proposed Rule is offered to protect against "a single judge's potentially erroneous ruling."[32]

Yet, Proponents of non-discretionary review have not identified a single error by a transferee judge. On the other hand, research submitted to the Standing Committee showed not a single, recent product liability MDL case where the transferee judge denied a request for interlocutory review of an order using the existing procedures, only to be reversed after final judgment.[33] More broadly, it is remarkable and worth repeating that on appeal, district court judges in product liability MDLs are fully affirmed 87% of the time and partially affirmed an additional 3 percent.[34] By all appearances, transferee judges in mass tort MDL appear astonishingly good at rendering decisions that survive appeal.

Proponents have further argued that opponents of non-discretionary interlocutory appeal "cannot cite a single instance in which § 1292(b) led to appellate review of the type of motion about which the Committee is concerned."[35] This is not true. Research has been submitted to the Committee listing numerous examples of district courts certifying interlocutory appeals of dispositive rulings in MDL cases.[36]

Furthermore, AAJ would reiterate a point already brought to the Subcommittee's attention, that district judges are more likely to weigh factors in favor of review in MDL because of the complexities of MDL. As an example of this favorable standing, while not a grant of a *defendant*'s interlocutory appeal under § 1292(b), AAJ would highlight a recent MDL decision granting a plaintiff's request for interlocutory appeal.[37] In this recent case, after denying the plaintiff's motion for reconsideration, in the alternative, the Court granted interlocutory review of the order, relying heavily on the fact that case was a large MDL:

> *Admittedly, had the questions decided by the Court arisen in the context of simpler, more conventional litigation, the Court would not have found the need for immediate appeal as pressing. In weighing the statutory factors, the Court is mindful that, as a result of certain structural features of large multidistrict litigation, if appellate review of the summary judgment ruling is to be had, it would likely have to be interlocutory. . . . In short, because the issue to be appealed "is a close one," [citation omitted] at the consequences of the ruling are*

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[31] LCJ SEPT. 2018 COMMENT, *supra* note 13 at 4.
[32] ILR MDL IMBALANCE, *supra* note 5 at 9.
[33] DEVINE JUNE COMMENT, *supra* note 6 at 2.
[34] *Id.* at 1.
[35] 48 General Counsel, *Comment to Advisory Committee on Rule or Practice and Procedure Re: The Need for FRCP Amendments Concerning Multi-District Litigation (MDL) Cases*, page 2 (Oct. 3, 2019) (hereinafter "48 GENERAL COUNSEL COMMENT").
[36] *See* Brian Devine, *Comment to Committee on Rules and Practice on Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases* (October 21, 2019): available at: https://www.uscourts.gov/sites/default/files/19-cv-cc-suggestion_devine_0.pdf (listing 23 cases where a MDL transferee judge granted a defendant's request to certify an order for an interlocutory appeal under § 1292(b) on a dispositive issue).
[37] *In Re General Motors Ignition Switch Litigation*, United States Dist. Court, 14-MD-2543 (JMF) (S.D.N.Y. Dec. 12, 2019).

*"dramatic," [citation omitted], and the likelihood of review after a final judgment slim — due to the pressures exerted by the realities of litigation of this size and complexity — the Court finds it appropriate to resolve doubt in favor of certification.*[38]

AAJ feels strongly that transferee judges and appellate judges are more likely to grant certification under § 1292(b) for MDLs than they are under all other types of civil litigation because MDLs are traditionally complex, unconventional, more likely to settle than go to trial, effect a large number of litigants, and as such, dramatically consequential. The federal bench is well-aware of these characteristics of MDLs, and that the intrinsic qualities of MDL weigh in favor of interlocutory appeal under the standards courts already use § 1292(b) analysis. Yet, this argument in favor of interlocutory appeal is exclusive to MDL litigants.

Taken together, the available data suggests the current rules are working well for MDLs and civil litigation generally and corroborates the Subcommittee's characterization of the summary of the Rule's Law Clerk's data.[39] However, AAJ would highlight the following important clarifications to each of the Rules Law Clerk's conclusions. First, there are not many § 1292(b) certifications in MDL proceedings, but this is typical of all civil litigation, and shows that MDLs are behaving and being treated similarly as all other civil litigation. Second, the reversal rate when review is granted in MDL is low, showing that transferee judges are generally successful in rendering decisions that survive appeal. Third, and importantly, interlocutory appeals come at significant cost of plaintiffs, roughly a two-year delay before the court of appeals rules, and this is in addition to the delay plaintiffs bear for merely being consolidated. Lastly, AAJ would second the finding of the Rules Law Clerk that federal judges already appear to acknowledge that "there may be stronger reasons fore-allowing interlocutory review because MDL proceedings are involved."[40] In summary, the data does not support any rule change specific to MDLs.

## IV. Proponents Offer Inaccurate Portrayals of MDLs and Misleading Data.

In addition to the reasons to reject Proposed Rule 23.3, AAJ would like to dispel the alleged basis for many of the MDL-specific proposals, all of which contradict the transsubstantive nature of the FRCP. The comments in support of the proposed rules have alleged MDLs to be "black holes"[41] or "vacuums"[42] operating "in absence of FRCP guidance with unwritten, ad hoc practices."[43] As such, Proponents claim that "the federal civil caseload is

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[38] *Id.*

[39] Advisory Committee on Civil Rules, Report to the Standing Committee, page 20-21 (December 26, 2019); published in the Agenda Book of the Committee on Rules of Practice and Procedure (January 28, 2020); available at: https://www.uscourts.gov/sites/default/files/2020-01_standing_agenda_book_final.pdf.

[40] *Id.* at 21.

[41] LCJ REQUEST FOR RULEMAKING, *supra* note 2 at 14; See also, Testimony of John H. Beisner, *Before the Committee on the Judiciary United States Senate The Impact of Lawsuit Abuse on American Small Businesses and Job Creators*, page 30 (Nov. 2017) available at: https://www.judiciary.senate.gov/imo/media/doc/11-08-17%20Beisner%20Testimony.pdf ("MDL proceedings are becoming black holes for large numbers of questionable cases – and some MDL judges, overwhelmed by huge numbers of cases, are engaging in questionable practices to spur settlement").

[42] LCJ REQUEST FOR RULEMAKING, *supra* note 2 at 2 & 8.

[43] LCJ TEN OBSERVATIONS COMMENT, *supra* note 4 at 7.

now a majority MDL where FRCP were designed not to apply."[44] As well, Proponents argue that MDL's alleged majority share of the federal docket[45] and "numerosity of parties"[46] alone justify special, exclusive rules particular to MDL cases, or yet an even smaller subset of just "mass tort MDL proceedings."[47]

However, these representations of MDL litigation are inaccurate and "misleading."[48] First and foremost, there is no "blackhole." MDLs, like all other civil litigation, are bound by the FRCP. The MDL statute was never intended and cannot be interpreted as a mechanism to replace procedural or evidentiary rules. Where a particular MDL has deviated from the letter or intent of a federal rule of procedure, it is by collaborative process within the MDL, with mutual agreement of the parties, under the supervision and responsiveness of the transferee judge, and only done to meet the unique needs a specific MDL. The inherent nature of complex litigation requires this collaborative approach, which is probably best summarized in the words of one scholar, "MDL procedure-making fast, collaborative, and responsive to the needs of particular cases. One judge comments: 'It's problem solving together.'"[49] While sometimes an MDL can show collaborative procedure-making, more so than other types of civil litigation, there is no misunderstanding by the court or litigants; MDLs are subject to FRCP, as all civil litigation is.

Indeed, the Proponents' arguments show the irony of these proposals. Proponents are asking for an exclusion from existing FRCP in order to correct this "blackhole" or "absence" of FRCP. AAJ fails to see the logic of how MDLs are in need an exception from FRCP, when they are already allegedly operating outside the scope of FRCP.

Second, mass tort MDLs, which appear to be the focus of the Proponents' ire, are a minority of MDL cases. As Professor Zachary D. Clopton explained to the Advisory Committee with his research, urging caution with respect to any MDL-specific rules, "[L]arge MDLs represent fewer than 10% of all pending MDLs" and, "although the mega MDLs dominate the narrative, they are not representative of MDL as a whole."[50] Regardless of the exact percent of MDL in the docket, or mass tort within the MDL docket, as Professor Clopton elaborated, MDLs, or even large mass tort MDLs, are not particularly special to the judiciary, and do not require special rules:

> *MDLs are essentially equivalent to other complex cases for which Section 1407 was not used. There may be a class of MDLs that judges treat specially, but those are few*

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[44] Lawyers for Civil Justice, *Infographic: "The Federal Civil Caseload is Now Majority MDL Where the FRCP Are Not Designed to Apply"* (March 2019); available at https://www.rules4mdls.com/copy-of-new-data-on-products-liabil.

[45] LCJ PRESS RELEASE, *supra* note 3 ("The fact that the federal judiciary is now majority MDL underscores the urgency of amending the FRCP"); 48 GENERAL COUNSEL COMMENT, *supra* note 35 at 1 ("As the number of cases consolidated into MDLs has grown to approximately 50 percent of the federal civil docket . . .").

[46] LCJ TEN OBSERVATIONS COMMENT, *supra* note 4 at 2.

[47] ILR MDL IMBALANCE, *supra* note 5 at 14; *See also*, BEISNER COMMENT, *supra* note 4 at 1 (suggesting that Proposed Rule 23.3 applies solely to "mass tort MDL proceedings").

[48] NOLL, *supra* note 11 at 406, note 12.

[49] *Id.* at 423 (citing Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1700–01 (2017)).

[50] Professor Zachary A. Clopton, *Comment to MDL/TPLF Subcommittee* (18-CV-Y)(October 26, 2018), page 2; available at: https://www.uscourts.gov/rules-policies/archives/suggestions/zachary-clopton-18-cv-y.

*and far between. . . . For one thing, there are no such special powers [of MDL judges]. For another, it may be that large and unwieldy cases demand something different from the judges handling them, but that is not a comment about MDL as a category.*[51]

Likewise, this myth of giant mass tort or consumer MDLs suffocating the federal judiciary is not novel. The JPML itself has previously disproved this myth of the "mega, time-consumer MDLs" finding:

*Among some common misconceptions about MDLs are that most are "mega-cases" and that they linger in the transferee courts for many years. To be sure, some MDLs meet the "mega-case" definition. And others, for various reasons, do remain in the transferee courts for lengthy periods of times. However, most MDLs do not fit either of these descriptions.*[52]

Additionally, the most recent study by a senior FJC researcher confirms that "mega MDLs" are only a small part of MDL cases, specifically 3.6% of total actions consolidated by the JPML.[53] This research shows that while the prevalence of mega MDLs have increased over the past fifty years, for the most recent year (2017) only two mega-cases were consolidated.[54] It is hardly surprising that mega-cases have increased over the last five decades. This trend of increasing amounts of mega cases over the decades is much more a signal of civil litigation generally, than it is of MDL case makeup specifically, as the senior FJC researcher concluded:

*While mega proceedings are more common now than in years past, so are products liability proceedings overall. Moreover, products liability proceedings are, on average, larger than other proceedings. The combination of proceeding size and frequency of centralization creates a perception of multidistrict litigation dominating civil litigation when, in fact, the largest proceedings are really in a single category of litigation and it is a category more frequently centralized than in prior years.*[55]

Third, MDL is not a majority of the federal civil caseload as Proponents claim. The senior FJC researcher concludes that for the most recent year with available data (2017) MDLs make up less than 20 percent of the civil case load, and explains:

*Clearly the number of private civil cases filed that are included in proceedings has risen since 1992, from a low of about 5% to a high of 21%. But this increase is hardly surprising given the increase in the number of motions for centralization and the number [] and of proceedings created . . . Even at its highest, 21% of filed cases are included in proceedings, not the 40% number mentioned so often.* [56]

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[51] *Id.* at 3.
[52] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2230 (2008).
[53] WILLIAMS, *supra* note 8 at 1274.
[54] *Id.* at 1275, Figure 9.
[55] *Id.* at 1275.
[56] Alison Frankel, *Defense group argues new MDL stats prove need to change rules for mass torts*, REUTERS (Oct. 4 2018); available at: https://www.reuters.com/article/legal-us-otc-mdl/defense-group-argues-new-mdl-stats-prove-need-to-change-rules-for-mass-torts-idUSKCN1ME2EJ.

## V. MDLs Are an Important Component of Resolution of Civil Claims in a Growingly Complex and Global Economy.

Regardless of differing opinions on the exact makeup of MDLs in civil caseloads, AAJ agrees with Proponents' sentiment that MDLs are an increasingly important part of federal judiciary's resolution of claims. However, this growing importance is not due to any abuse of process in the absence of procedural absence or "pro-plaintiff judicial errors"[57] as Proponents suggest, but rather merely because so many claims now share common facts and legal issues or arise out of the same disaster.

As the original drafters of the MDL statute foresaw 60 years ago in the wake of mass anti-trust claims, Americans live in an increasingly populated and globalized world where one act of corporate misconduct can have massive, wide-ranging damage to thousands – if not millions - of American consumers, patients, workers or businesses. For instance, corporations' mischaracterization of the addictiveness of prescription painkillers[58] can create a national health and welfare crisis with an economic burden of $78.5 billion, and for the first time in U.S. history, make opiate overdose the leading cause of death of young Americans.[59] An auto manufacturers fraud upon the government in emissions testing[60] can reduce of the resale value of half a million American families' cars by as much as $10,000 each.[61] The decision of an energy company to not mandate a dead-man switch on an exploratory oil rig[62] can instantaneously kill 11 men, result in the largest environmental disaster of our lifetimes, and costs millions of Gulf state businesses and families billions of dollars in lost revenue.[63]

The U.S. population has more than doubled since the passage of the MDL statute, and our consumer habits, employment, corporate sizes and economy have changed dramatically with this growth. Of course, these changes would be felt by federal courts as more litigants seek legal remedies for increasingly complex and connected wrongs. The multitude of claims and parties consolidated into any given MDL is not a symptom of an "unbalanced litigation environment"[64] in need of special procedural rules, but rather, the increase over the decades of numbers of parties and claims consolidated into MDL is proof-positive that the MDL statute is working exactly as it was designed, and but for consolidation of these cases, our federal and state courts would be drowning in the administration of claims that are factually and legally duplicative but could be decided individually, often with diverging or conflicting rulings.

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[57] ILR MDL IMBALANCE, *supra* note 5 at 11.
[58] MDL 2804, *National Prescription Opiate Litigation*, U.S. Dist. Ct. N.D. Ohio; available at: https://www.ohnd.uscourts.gov/mdl-2804.
[59] Shanley Pierce, *Odds of dying: For the first time, opioid overdoses exceed car crashes*, TMC NEWS (January 17, 2019).
[60] 15-MD-2672-CRB (JSC), *In re: Volkswagen "Clean Diesel" MDL*, U.S. Dist. Ct. N.D. Cal.; available at: https://www.cand.uscourts.gov/crb/vwmdl.
[61] Roger Perloff, *How VW Paid $25 Billion for 'Dieselgate' — and Got Off Easy*, FORBES (Feb. 6 2018)
[62] MDL – 2179, *Oil Spill by the Oil Rig "Deepwater Horizon"*, U.S. Dist. Ct. E.D. Louisiana; available at: http://www.laed.uscourts.gov/OilSpill/OilSpill.htm.
[63] Yong Gyo Lee et al., *Ultimate Costs of the Disaster: Seven Years After the Deepwater Horizon Oil Spill*, J. OF CORP. ACCOUNTING AND FINANCE, (Jan. 2018) page 72; available at: https://doi.org/10.1002/jcaf.22306.
[64] LCJ REQUEST FOR RULEMAKING, *supra* note 2 at 1-2.

The MDL statute was created for the express purpose to "promote just and efficient conduct"[65] of consolidated actions and to minimize and avoid "the possibility for conflict and duplication in discovery and other pretrial procedures in related cases."[66] It is doing just that. Legal scholars agree, "MDL currently does what its creators intended—critiques of the statute should proceed on those terms, not from the position that MDL has somehow grown beyond its modest ambitions."[67]

Given the importance and growth of the MDL, a review of procedures and statistics is prudent, but the Advisory Committee's and Subcommittee's review of MDL procedures must proceed with accurate portrayal of MDLs in the federal court system, and AAJ would submit the following, more accurate representation of MDLs in federal courts: MDLs are a minority, albeit dynamic and growing part, of the federal civil docket, and mass tort cases are an important, though only small, part of the diverse range of MDLs. The drafters of the MDL foresaw the world we live, and for the sake of our judiciary as in institution in a populated and globalized economy, these claims are, and should be, consolidated. The statute is working as it was thoughtfully designed, and it does not provide any litigant special powers to displace the FRCP. There is not an "imbalance" or "blackhole" of the FRCP in MDLs.

Most importantly, as the Supreme Court has recognized,[68] consolidation of claims should never prejudice the legal rights of parties, and their procedural rights should remain the same had their claim never been consolidated. Proposed Rule 23.3 and other requests for special MDL interlocutory appeals upend this basic principle. As such, such proposals exceed the scope and purpose of the MDL statute, alter the legal rights of litigants, and deprive MDL plaintiffs of their constitutional rights to fair trials under the same rules of procedure and evidence by which all other civil litigants are bound.

**Conclusion**

Proposed Rule 23.3 would hinder efficient administration of justice, creating an appeal-by-piecemeal process. MDL plaintiffs will suffer the most as a result, but this burden will also be felt by the appellate and district courts and impact other litigants in the federal court system. These delays would be so burdensome that many mass tort plaintiffs – many of whose claims were consolidated against their will - may not survive the appeal or resolution of their claim. Further, the transferee judge's role as dispatcher is critical to our courts as an institution. Transferee judges deserve, and our federal court system relies upon, deference to their decisions, including the significant decision of when an issue is worthy for interlocutory appeal as an exception from the final judgement rule.

MDLs are diverse and an increasingly important part of the resolution of civil claims, and review of MDL procedures and practices is laudable effort. However, many of the Proponents present misleading data and an inaccurate portrayal of MDLs and their makeup in the federal

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[65] 28 U.S.C. § 1407(a) (2012).
[66] H.R. Rep. No. 1130, at 2–3 (1968).
[67] Andrew Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PENN L. REV. 831, 832 (2017).
[68] *Hall v. Hall*, 584 U.S. ___ (2018) (slip op, at 12); and *Gelboim v. Bank of America Corp., 135 S. Ct. 897 (2015).*

civil docket. Regardless of their exact makeup of the federal docket, a one-size-fits-all rule for MDLs is unlikely to foster or support the particular, unique needs of any given MDL. Such proposals likely will only provide MDL defendants with special, strategic abuses. AAJ questions the wisdom and motive of all the MDL-specific proposals provided to date. However, to depart from the transsubstantive, discretionary rules for interlocutory appeal would undoubtedly prejudice the legal rights of MDL plaintiffs, and as such, violate their constitutional rights and exceed the authority and intent of the MDL statute. For all these reasons, the Proposed Rule 23.3, and similar proposals, should be rejected.

AAJ thanks the Civil Rules Committee and MDL Subcommittee for their continued inclusiveness in their review of this important issue. Please direct any questions regarding these comments to Susan Steinman, AAJ Senior Director of Policy and Senior Counsel, at susan.steinman@justice.org or 202.224.2885.

Sincerely,

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