COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES and its MDL SUBCOMMITTEE

COMMON GROUND: A NEW SURVEY OF MDL CLAIMANTS SHOWS THE REAL PARTIES IN INTEREST AGREE *AD HOC* PROCEDURAL SHORTCUTS INTENDED TO REDUCE DISCOVERY "BURDENS" UNDERMINE FAIRNESS

An Initial Disclosure Rule for MDLs is the Remedy for Problems Stemming from Failure to Develop the Factual Basis of Claims

September 29, 2021

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee.

Introduction

"*Shepherding thousands of cases through pretrial has also prompted judges to streamline pleadings, discovery, and motion practice in ways that further depersonalize plaintiffs' court experience and remove the Federal Rules of Civil Procedure's built-in protections*."[2]

"*One of the FRCP's most visible and important failures in the MDL context relates to procedures governing discovery into the plaintiffs' allegations*."[3]

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[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Burch, Elizabeth Chamblee and Williams, Margaret S., *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd* (August 6, 2021) (hereinafter "Burch/Williams Survey") at 11. Cornell Law Review, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3900527 or http://dx.doi.org/10.2139/ssrn.3900527.

[3] Lawyers for Civil Justice, Request for Rulemaking to the Advisory Committee on Civil Rules, *Rules for "All Civil Actions and Proceedings": A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within the Federal Rules of Civil Procedure*, Aug. 10, 2017, at 8, available at: https://www.uscourts.gov/sites/default/files/17-cv-rrrrr-suggestion_lcj_0.pdf.

A new survey of individual claimants whose personal injury cases were consolidated into multi-district litigation shows that "MDLs fail on nearly every fairness metric posed by existing research."[4] A top complaint: procedural shortcuts that curtail or even eliminate investigation into plaintiffs' claims, depriving claimants of the ability to share their stories and preventing courts and defendants from learning the information necessary for a fair adjudication on the merits. Fifty-one percent of claimants in the Burch/Williams Survey "strongly or somewhat disagreed" that "the judge had the necessary case information to make informed decisions."[5] The Burch/Williams Survey concludes: "we found the procedural mechanisms that judges design to make MDLs easier for them are the very things that silence and pose barriers for plaintiffs. . . ."[6] This conclusion demonstrates that MDL claimants and defendants—the real parties in interest—share more common ground on this topic than might be expected. As LCJ has written, "[t]he lack of information about plaintiffs' claims undermines the ability of MDL cases to achieve the statutory goals of 'the just and efficient conduct' of 'coordinated or consolidated pretrial proceedings.'"[7]

Claimants' Dissatisfaction with Discovery

MDL claimants' dissatisfaction with the lack of investigation into their claims is reflected in their observations about their own lawyers. According to the Burch/Williams Survey, "nearly half disagreed that their lawyer considered the facts of their case."[8] One plaintiff reported that "after having her case for five years, her lawyers never obtained her medical records."[9] She said, "If they had bothered in getting my medical records they would have had all the proper knowledge of my case."[10] Another said: "To this day I have never spoken with the attorney …. I had absolutely no input into my own case."[11] Although these comments expose the failings of individual lawyers, they also inescapably reflect judicial suspension of the rules that in non-MDL cases require lawyers to perform basic due diligence and meet discovery obligations. The abrogation of rule-based disclosures effectively excuses lawyers from developing their clients' cases and enables the MDL business model where "a single attorney may represent hundreds (perhaps thousands) of clients with various goals and injuries…."[12] It is little wonder that, when claimants were asked whether their lawyers' work justified their fees, "[a]n overwhelming 60% felt their attorneys' fees were unreasonable."[13] This sentiment, properly understood, is an

[4] Burch/Williams Survey at 52.
[5] *Id*. at 41.
[6] *Id*. at 4.
[7] Lawyers for Civil Justice, *Ten Observations about the MDL/TPLF Subcommittee's Examination into the Functions of the Federal Rules of Civil Procedure in Cases Consolidated for Pretrial Proceedings*, April 6, 2018, at 3, available at: https://www.uscourts.gov/sites/default/files/18-cv-j-suggestion_lcj_re_mdl_rulemaking_0.pdf.
[8] *Id*. at 24.
[9] *Id*. at 29.
[10] *Id*.
[11] *Id*. at 25.
[12] *Id*. at 23.
[13] *Id*. at 33. The premise of a 33 percent (or higher) contingency fee is that lawyers invest time, effort, and capital into their clients' cases, including the work required to comply with ethical obligations and the FRCP's pleading standards and discovery requirements. When judges curtail or suspend lawyers' responsibilities, claimants are justifiably upset that their lawyers demand 33 to 40 percent (or more) of the proceeds.

indictment of the lack of factual development in MDL cases, as one claimant summed up well: "I was not given the chance to tell my story or what my injuries were…."[14]

Different Sides of the Same Coin

Just as claimants want to share the facts of their claims, defendants want to learn them. The two parties, of course, have different reasons for wanting the same thing. Whereas claimants understandably want their claims to be heard, defendants want to know the facts underlying those claims in order to evaluate the merits. Defendants also need a clear standard for early disclosures, knowable at the outset of litigation, because it would deter lawyers from heedlessly filing meritless claims. As the Committee well knows, "a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit."[15] The mass filings of unsupportable claims is the inevitable result of suspending the FRCP provisions that would otherwise require plaintiffs' counsel to conduct basic due diligence.

The common ground eclipses the parties' differences; both sides agree that a process that fails to develop the case facts lacks credibility for resolving disputes on the merits. The strength of claimants' feelings on this topic surpasses even their concerns about how long MDL cases take to resolve. Incredibly, "a surprising 59.9% of participants would have been willing to wait even longer if it gave them a chance to tell their story."[16] Even worse than delay, claimants say that "no one really wanted to take the time to confirm my story."[17] This sentiment is a powerful juxtaposition to the view expressed by some MDL judges that discovery into plaintiffs' claims is an unwelcome distraction that judges must have flexibility to avoid.

To What End?

Importantly, the procedural shortcuts that are taking a toll on both real parties in interest are not achieving a countervailing benefit in judicial efficiency. "MDLs last almost four times as long as the average civil case."[18] Products liability MDLs linger for an average of 4.7 years.[19] Unsurprisingly, 73 percent of claimants find the time it took to resolve their case unreasonable, and 60.8 percent find it "extremely unreasonable,"[20] according to the Burch/Williams Survey. In other words, the cost/benefit analysis of suspending discovery rules in favor of *ad hoc* practices is clear: "Managing thousands of cases with ad hoc procedures curtails voice and participation, and yet resolving cases still takes four times as long as the average civil suit,"[21] according to the Burch/Williams Survey.

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[14] *Id*. at 32.
[15] Advisory Committee on Civil Rules, *Agenda Book, Nov. 1, 2018*, p. 142, available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.
[16] Burch/Williams Survey at 37.
[17] *Id*. at 47.
[18] *Id*. at 1.
[19] *Id*. at 35.
[20] *Id*. at 37.
[21] *Id*. at 52.

Shadow Dockets are not Helping

Attempts to manage MDL claims more efficiently by creating a "shadow docket" of unfiled claims are not the answer. Even where the process is court-approved, the advent of "unfiled claims" is further decoupling MDL practice from the principles and protections of the FRCP.[22] Unlike in any other civil proceeding, claimants can become a part of the MDL process without ever filing a complaint under Rule 3 (and adhering to the standards described in rules 7, 8, 9, 10 and 11), and without performing any of the investigation or disclosures required by the discovery rules, but rather by submitting (many months after filing or consolidation) a "census" form negotiated by the parties, which tolls the statute of limitations. Despite the good intentions behind this process, the Burch/Williams Survey points out that claimants are often shocked when, years after first contacting their lawyer, they learn (in conjunction with a settlement communication) that their case has never been filed. In the words of one plaintiff, "I was offered a small settlement … which I refused … some months later [my lawyer] called me to say that [my law firm] had NEVER filed my case."[23]

Lamentably, the experiments with initial census have lost their moorings from the original idea that *would have* been helpful to the real parties in interest. Two years ago, the MDL Subcommittee explained:

> …another idea has emerged – that there should be an "initial census" of the claims submitted in "mass" MDLs. *This approach would call for claimants to make a showing of exposure to the product or item involved in the litigation, and also a showing that they have sustained an injury of the sort alleged in the proceeding*.[24]

Unfortunately for both claimants and defendants, the key concept of early disclosure of evidence showing exposure and injury was de-emphasized or even forgotten as the number of unfiled claims took flight. Instead, the ostensible purpose of a "census," as the Subcommittee reports, became "to devise a less burdensome initial fact-gathering method."[25] But who is complaining about the burden? Not the claimants—their complaint is *not* being asked for their case facts.

An Initial Disclosure Rule is the Key

The Subcommittee is on the right track with the observation that "the absence of any mention of MDLs in the Civil Rules seems a striking omission."[26] With the number of cases consolidated into MDLs now amounting to over half of the federal civil docket, the FRCP discovery rules

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[22] Committee on Rules of Practice and Procedure, *Agenda Book, Jan. 3, 2019*, pp. 160-61 ("In an individual litigation, they [defendants] could challenge the plaintiff's allegations as insufficiently specified about the medication/device used, or about the resulting medical condition. Alternatively, they could rely on initial disclosure and prompt discovery to support a summary judgment motion to knock out claims that can't be supported. But in MDL mass tort litigation, those tools may be unavailable to defendants."), available at: *https://www.uscourts.gov/sites/default/files/2019-01-standing_agenda_book.pdf*.

[23] Burch/Williams Survey at 30.

[24] Committee on Rules of Practice and Procedure, *Agenda Book, June 25, 2019*, pp. 238-39 (emphasis added), available at: https://www.uscourts.gov/sites/default/files/2019-06_standing_agenda_book_0.pdf.

[25] Advisory Committee on Civil Rules, *Agenda Book, October 5, 2021*, at 164, available at: https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_9.16_1.pdf.

[26] *Id*. at 167.

should reflect their existence and provide meaningful guidance. If the current rules are not useful or practical in MDLs, they should be *amended*. But a statement in Rule 26 suggesting parties discuss "whether"[27] to exchange the basic information about their claims and defenses is woefully insufficient—indeed, it risks "codifying" the very practices that are failing both claimants and defendants while incentivizing the careless piling up of uninvestigated claims. Instead, Rule 26 should contain a modest but clear disclosure requirement focused on evidence of exposure to the alleged cause and resulting harm.[28] Such a rule would: address claimants' desire to share the facts of their cases by clearly articulating a basic requirement for their lawyers; help defendants evaluate the viability of the claims against them; assist MDL judges by focusing attention on the merits of cases at or even before the initiation of proceedings; eliminate the uncertainties and inherent delays of formulating and negotiating *ad hoc* practices and deadlines months after consolidation; avoid any new or undue burden on plaintiffs' counsel by requiring only the most basic documents consistent with good-faith pleading; and deter the filing of meritless claims by providing a clear definition of what is required for an initial showing of viability. Perhaps most importantly, such a rule would be a profound step in the direction of restoring trust in the judicial process, which is lacking by both parties.

Reports about Settlement Efforts

In any case, the remedy for the problems flowing from inadequate discovery into plaintiffs' claims will not be found by requiring leadership counsel to report about settlement efforts. No matter how it is designed, no rule focused on end of the case can possibly make up for the FRCP's failure to guide basic discovery into plaintiffs' claims early in the proceeding. As the Burch/Williams Survey asks: "Without the right information going in, how could we expect the right result?"[29]

Conclusion

LCJ has urged that "[c]lear rules requiring disclosure of essential information and/or enabling streamlined discovery into plaintiffs' claims would remedy the FRCP's most vivid failure."[30] Now the Burch/Williams Survey demonstrates that MDL claimants share more common ground with defendants on this topic than might have been expected. When judges set aside FRCP rules and devise new practices—even when motivated by notions of judicial efficiency or lessening the burden on claimants' counsel—they are actually hurting the parties' interests and undermining trust in the process itself. MDLs "involve plaintiffs and defendants who want and deserve a clear and credible procedure for adjudicating their claims and defenses on the

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[27] *Id*. at 172.

[28] Lawyers for Civil Justice, *Fixing The Imbalance: Two Proposals for FRCP Amendments that would Solve the Early Vetting Gap and Remedy the Appellate Review Roadblock in MDL Proceedings*, Sept. 9, 2020, (hereinafter, "Two Proposals") at 7, available at: https://www.uscourts.gov/sites/default/files/20-cv-aa_suggestion_from_lawyers_for_civil_justice_-_mdls_0.pdf.

[29] Burch/Williams Survey at 38.

[30] Lawyers for Civil Justice, *Ten Observations about the MDL/TPLF Subcommittee's Examination into the Functions of the Federal Rules of Civil Procedure in Cases Consolidated for Pretrial Proceedings*, April 6, 2018, at 3, available at: https://www.uscourts.gov/sites/default/files/18-cv-j-suggestion_lcj_re_mdl_rulemaking_0.pdf.

merits,"[31] but MDLs leave claimants feeling that no one is willing to investigate their cases and defendants being deprived of an opportunity to evaluate those claims. In the words of one claimant who participated in the Burch/Williams Survey, "[n]o one is happy with the system."[32] Fortunately, a modest amendment to Rule 26 would be a meaningful step in an area of common ground towards restoring a sense of procedural fairness for both claimants and defendants. Recapturing the key concept that the MDL Subcommittee articulated in 2019, Rule 26 should require early disclosure of evidence showing exposure to the alleged cause and a resulting harm.

[31] Lawyers for Civil Justice, Request for Rulemaking to the Advisory Committee on Civil Rules, *Rules for "All Civil Actions and Proceedings": A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within the Federal Rules of Civil Procedure*, Aug. 10, 2017, available at: https://www.uscourts.gov/sites/default/files/17-cv-rrrrr-suggestion_lcj_0.pdf.

[32] Burch/Williams Survey at 30.