PLAC
MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

COMMENT
TO THE
ADVISORY COMMITTEE ON CIVIL RULES
AND ITS MDL SUBCOMMITTEE

The Product Liability Advisory Council ("PLAC") respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee ("Subcommittee").

I. INTRODUCTION

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and the reform of the law in the United States and elsewhere, with an emphasis on the law governing the liability of product manufacturers and related companies in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including the United States Supreme Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management. Similarly, over the years, PLAC has offered comments on proposed legislation and rulemaking that could potentially impact the legal liability of the manufacturing sector.

PLAC and its membership have a keen interest in the present work of the MDL Subcommittee and its evaluation of possible rule amendments to improve the MDL process. A number of PLAC's corporate members are currently the targeted defendants in mass tort MDL's, including some of the largest MDL's pending on the federal docket. Taken together, the MDL cases filed against those manufacturers number in the thousands, and in all likelihood, comprise more than half of the MDL cases currently active. Further, a number of other PLAC corporate members have been involved in past MDL proceedings that have now resolved.

In short, many of PLAC's corporate members will be directly impacted by the Subcommittee's recommendations.

[1] A list of PLAC's corporate members is attached as Exhibit "A".

II. THE SUBCOMMITTEE'S PRESENT SCOPE

PLAC has reviewed the Subcommittee's recent discussion of proposed rule changes related to the MDL process, contained in its May 13, 2022 report to the Standing Committee.[2] That report indicated that the Subcommittee was considering at that time changes to Rules 16 and 26 of the Federal Rules of Civil Procedure. As formulated, those revisions would have (1) encouraged the early exchange of information about individual cases providing a sort of "census" of the MDL's inventory of actions; and (2) encouraged the early appointment of plaintiffs' leadership counsel.

PLAC has also reviewed the Subcommittee's June 2022 Supplemental Report to the Standing Committee.[3] That supplemental report outlined a different approach, proposing a new "freestanding" Rule 16.1 for MDL proceedings. The Subcommittee articulated two different versions of the proposed rule, with Alternative 1 providing a more detailed list of pre-trial topics for a newly designated MDL judge to consider addressing early in the proceedings. The more abbreviated Version 2 more closely mirrors the previously considered revisions to Rules 16 and 26, focusing on a possible early exchange of information among the parties, and the appointment of plaintiffs' leadership counsel. Both the May and June reports emphasized the Subcommittee's intent to further evaluate those possible additions to the rule.

III. EARLY EXCHANGE OF INFORMATION

PLAC and its corporate members believe that a procedural mechanism is sorely needed to screen claims at an early stage in an MDL. In the experience of many of our members, the influx of dubious claims in the MDL setting is a very real and significant problem. As this Subcommittee itself has recognized, there seems to be "fairly widespread agreement" among experienced practitioners and judges that the problem exists in many MDL's.[4] The Subcommittee noted reports that 20-30% of claims in some centralized proceedings (and maybe as high as 40-50% of cases) involve "unsupportable claims."[5] Those meritless claims involve plaintiffs who did not use the product at issue; plaintiffs who have not suffered a legally cognizable injury; and/or claims barred by the statute of limitations.[6]

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[2] *See* Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure at 10 (May 13, 2022) in Committee on Rules of Practice and Procedure Agenda Book at 731 (June 7, 2022) [hereinafter "June 2022 Standing Committee Agenda Book"], *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (last visited Sept. 12, 2022).

[3] *See* Supplemental Report of the MDL Subcommittee of the Advisory Committee on Civil Rules (June 2022) [hereinafter "MDL Subcommittee Supplemental Report"] in June 2022 Standing Committee Agenda Book, *supra* note 2, at 1067.

[4] MDL Subcommittee Report in Advisory Committee on Civil Rules Agenda Book at 142-43 (Nov. 1, 2018) [hereinafter "Nov. 2018 Advisory Committee Agenda Book"], *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf (last visited Sept. 12, 2022).

[5] *Id.* at 142.

[6] *Id.*

An experienced judge who presided over a large MDL has identified the proliferation of "non-meritorious cases" as one of the "unintended consequences" of MDL centralization.[7] Some commentators, as well as this Subcommittee, have referred to the multiplication of dubious claims in an MDL proceeding as the "Field of Dreams' problem – 'if you build it, they will come.'"[8]

One of the principal drivers explaining the significant number of meritless claims is the widespread escalation of attorney advertising in recent years. A respected arm of the United States Chamber of Commerce (the Institute for Legal Reform) calculates that plaintiffs' interests (attorneys, lead generations, and third-party funders) spend roughly $1 billion annually on television advertising soliciting mass tort clients.[9] In its case study, the Institute found that plaintiffs' interests spent $94 million in advertising in the Pradaxa litigation; $122 million in the Xarelto litigation; $63 million in talcum powder litigation; and $103 million in the Roundup litigation.[10] At least one MDL judge has directly associated an "onslaught of lawyer television solicitations" as contributing to an explosion of new filings in the MDL he was overseeing.[11]

The addition of so many meritless claims to an MDL's inventory has immediate and prejudicial consequences for companies targeted in an MDL and places great burdens on MDL courts. Unless and until defendants receive concrete information about individual actions, they have no means to accurately assess the magnitude of the risk and effectively prepare to manage that risk. The uncertainty created by the absence of an early screening mechanism presents many challenges for a corporate defendant, including developing adequate staffing and properly meeting financial reporting obligations. And despite the economies arguably created by centralized proceedings, there are nonetheless incremental costs associated with processing, tracking, and defending each individual case. Early screening mechanisms should also ease the burden on the MDL court's docket, either through earlier dismissals of cases or through plaintiffs' counsel choosing not to file unsupported cases.

In addition, the absence of a meaningful early disclosure requirement for plaintiffs creates an uneven playing field between the parties. Defendants are invariably required to produce information bearing on the liability issues early in the proceedings. By contrast, it is often years before plaintiffs are required to produce anything more than the cursory information included in fact sheets, and in many instances, they are never required to do so at all. The present imbalance in the parties' respective disclosure obligations would be remedied by the adoption of an early screening procedure.

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[7] *See In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08:MD-2004 (CDL), 2016 WL4705827, at *1 (M.D. Ga. Sept. 7, 2016).

[8] Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 413-14 (2014); MDL Subcommittee Report in Nov. 2018 Advisory Committee Agenda Book, *supra* note 4, at 142-43.

[9] *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Gaming the System: How Lawsuit Advertising Drives the Litigation Lifecycle* at 1 (2020), *available at* https://instituteforlegalreform.com/wp-content/uploads/2020/04/Lawsuit-Advertising-Paper_web.pdf (last visited Sept. 12, 2022).

[10] *Id.*

[11] *See, In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at *1 n.2 (noting that "onslaught of lawyer television solicitations" contributed to an explosion of cases in that MDL).

For those reasons, PLAC strongly believes that rulemaking – whether embodied in a freestanding Rule 16.1 or with revisions to Rules 16 and 26 – needs to be more "muscular" than the present proposal. As currently worded, the proposals reference an "exchange" of information, without specifying the specific information or documents that should be disclosed. Moreover, the language in the proposed rule is permissive, leaving the adoption of such a procedure completely to the discretion of the presiding judge.

In a March 8, 2022 comment to the Advisory Committee, Lawyers for Civil Justice "(LCJ") proposed a more detailed rule requiring plaintiffs (in personal injury actions) to provide documentation of product use or exposure and of an alleged injury at an early point in the MDL proceeding.[12] PLAC agrees with the approach advocated by LCJ, and fully endorses that organization's proposal. Only with the routine required disclosure of such information can the courts and the parties meaningfully screen MDL inventories for marginal claims.

IV. SELECTION OF PLAINTIFF'S LEADERSHIP COUNSEL

PLAC endorses the Subcommittee's proposal to encourage MDL judges to appoint leadership counsel for plaintiffs and define their responsibilities at an early stage of the proceedings. As a practical matter, in the experience of PLAC's members, the early appointment of leadership is already occurring in many MDL's. Particularly in large MDL's, the prompt identification of leaders to speak on behalf of plaintiffs benefits not only the plaintiffs themselves, but also the MDL courts and the defendants.

V. OTHER PROPOSED REVISIONS

The more detailed "sketch" (Version 1) of a new Rule 16.1, set forth in the Subcommittee's June 2022 supplemental report, includes several additional topics for MDL judges to address early in the proceeding. As a practical matter, most of those topics are routine and recurring issues invariably addressed in the early days of most MDL's. PLAC does note, however, that the appointment of a special master is not an issue that arises in the majority of MDL's. Many judges assigned an MDL choose to handle all aspects of the proceedings themselves. Others choose to employ the assistance of magistrates in their district. While some judges do appoint special masters for specific tasks, the practice is by no means standard. PLAC therefore believes the reference to special masters should be eliminated, as the issue is not one generally applicable to most MDL's.

VI. FUTURE COMMENTS

The Subcommittee has expressly stated on several occasions that its work is evolving, and that it "may significantly modify or abandon this new approach" based on further input.[13]

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[12] *See* Comment of Lawyers for Civil Justice to the Advisory Committee on Civil Rules and MDL Subcommittee (Mar. 8, 2022), *available at* https://www.uscourts.gov/sites/default/files/22-cv-d_suggestion_from_lcj_-_mdls_0.pdf (last visited Sept. 12, 2022).

[13] MDL Subcommittee Supplemental Report in June 2022 Standing Committee Agenda Book, *supra* note 2, at 1067.

Given the importance of the topics to its membership, PLAC will continue to monitor the Subcommittee's deliberations and proposals. PLAC respectfully requests the opportunity to submit additional comments in the future, as the process continues.

Exhibit "A"

PLAC

MANAGING PRODUCT RISK FROM DESIGN TO LITIGATION

Corporate Member List

September 2022

3M

Altec, Inc.

Altria Client Services LLC

APYX Medical

Bayer Corporation

Becton Dickinson

BIC Corporation

Biro Manufacturing Company, Inc.

BMW of North America, LLC

Bradford White Corporation

Bridgestone Americas, Inc.

CC Industries, Inc.

Daimler Trucks North America LLC

Deere & Company

DISH Network L.L.C.

Emerson Electric Co.

Ford Motor Company

General Motors LLC

Gilead Sciences, Inc.

GlaxoSmithKline

GLOCK, Inc.

Goodman Global Group, Inc.

Google LLC

Great Dane LLC

Hankook Tire America Corp.

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works Inc.

Isuzu North America Corporation

James Hardie Building Products Inc.

Johnson & Johnson

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kubota Tractor Corporation

LG Electronics USA, Inc.

Magna International Inc.

Mazak Corporation

Mazda Motor of America, Inc.

Merck & Co., Inc.

Meta Platforms, Inc.

Microsoft Corporation

Mueller Water Products

Newell Brands Inc.

Novartis Pharmaceuticals Corporation

Novo Nordisk, Inc.

PACCAR Inc.

Pfizer Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Rheem Manufacturing Company

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Corporate Member List

September 2022

RJ Reynolds Tobacco Company

Robert Bosch LLC

Stihl Incorporated

Subaru of America, Inc.

Suzuki Motor USA, LLC

Textron Inc.

The Boeing Company

The Goodyear Tire & Rubber Company

The Home Depot

The Sherwin-Williams Company

The Viking Corporation

Toyota Motor Sales, USA, Inc.

Tristar Products, Inc.

U-Haul International, Inc.

Vermeer Corporation

Volkswagen Group of America, Inc.

Volvo Cars USA, LLC

Waymo LLC

Whirlpool Corporation

Yokohama Tire Corporation

ZF TRW

Zoox, Inc.

Total Members: 72