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

ONE STEP FORWARD, TWO STEPS BACK: WHY THE IMPROVEMENTS TO THE REVISED RULE 16.1 PROPOSAL WILL BE UNDERMINED BY RELEGATING CLAIM SUFFICIENCY TO "TIER 2"

April 3, 2024

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules (the "Committee") and its MDL Subcommittee (the "Subcommittee") concerning the Subcommittee's revised proposal[2] for a new Rule 16.1 concerning initial management of multidistrict litigation proceedings (MDLs).

INTRODUCTION

The Subcommittee's Revised Proposal contains important improvements reflecting public comments about the Preliminary Draft of Rule 16.1,[3] including the much-needed clarifications that the Federal Rules of Civil Procedure (FRCP)—in particular, the pleading rules and Rule 11(b)—apply in MDLs,[4] and that the exchange of information under Section (b)(3)(B) is not discovery.[5] However, the Revised Proposal also suggests that the fundamental question of claim

[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 36 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] Revised Proposed Rule 16.1 and Note (Redline), Advisory Committee on Civil Rules, Agenda Book, April 9, 2024, https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final.pdf ("Agenda Book"), 162-81 ("Revised Proposal").
[3] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.
[4] Revised Proposal, 176.
[5] *Id*. at 178.

sufficiency should be relegated to a list of "tier 2" issues, which "may be premature to address … in more than a preliminary way."[6] Because the central value of Section (b)(3)(B) would be its ability to help keep insufficient claims out of the litigation, it will be effective only if it prompts action early in the proceeding; putting it off to an uncertain point in the future is equivalent to doing nothing at all. Moreover, the Revised Proposal's assigning second-tier status to the insufficient claims problem undermines not only the statement that the FRCP pleading rules apply in MDLs, but also the constitutional requirement that courts must ascertain Article III jurisdiction and standing at an early point in any litigation.

The Committee should correct the erroneous classification of claims sufficiency as a "tier 2" problem by moving Section (b)(3)(B) to tier 1. Alternatively, the Committee should reject the tiered structure for Rule 16.1 not only to fix the mislabeling of Section (b)(3)(B) but also because "subdividing"[7] the rule into two tiers—a concept that was not aired during the public comment process[8]—is likely to confuse courts and counsel.

I. AVOIDING AND MANAGING INSUFFICIENT CLAIMS IS A "TIER 1" PROBLEM

The Revised Proposal suggests subdividing Rule 16.1 into two "tiers" for the purpose of distinguishing topics that "often call[] for early court action" from issues that do not.[9] Parties must "address" the tier 1 items but only "provide the court with their 'initial views'" on tier 2 matters.[10] The issue of claim sufficiency, which is addressed by Section (b)(3)(B),[11] is placed in tier 2.

Claims sufficiency should be a "tier 1" topic because it almost *always* requires early court action. The purpose of Section (b)(3)(B) is to prompt judges to order early disclosures, which enhance judicial management by curtailing insufficient claims, improving understanding of the case, expediting the information needed for resolution, and providing fairness to plaintiffs and defendants alike.[12] Insufficient claims are prevalent in mass-tort MDLs, [13] and the best way for a court to avoid insufficient claims and manage them is to make clear early on that the FRCP standards will be enforced. The *In re Paraquot Products Liability Litigation* provides the latest

[6] Revised Proposal, 176.
[7] Agenda Book, 134.
[8] The newly added two-tiered structure raises sufficient novelty to require republication for public comment.
[9] Agenda Book, 134.
[10] *Id*.; Revised Proposal, 176.
[11] Revised Proposal, 165.
[12] *See* Lawyers for Civil Justice, *A Rule, Not an Exception: How the Preliminary Draft of Rule 16.1 Should Be Modified to Provide Rules rather than Practice Advice and to Avoid the Confusion of Enshrining Practices into the FRCP that are Inconsistent with Existing Rules and Other Law* (Sept. 18, 2023), https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0004 ("LCJ Public Comment on Rule 16.1").
[13] Lawyers for Civil Justice, *Clarity on the Two "Rules Problems": Empirical Evidence of the Insufficient Claims Problem in MDLs and Key Testimony on Much-Needed Revisions to the Proposed Rule 16.1 and Privilege Log Amendments*, Feb. 16, 2024, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0054.

example of how insufficient claims cause chronic management problems that consume judicial resources.[14]

Moreover, federal courts have an independent obligation to assess their jurisdiction, the most important element of which is standing.[15] The "first and foremost of standing's three elements" is an "injury in fact,"[16] and the second requirement is a "causal connection" showing the injury is "fairly traceable to the challenged [conduct] of the defendant, and not the result of the independent action of some third party … not before the court."[17] These standards apply in MDLs.[18] Delaying the inquiry into basic standing requirements until an uncertain point—perhaps years into the litigation—is not consistent with the Supreme Court's requirements. It would be a fundamental failure for a new Rule 16.1 to promote affirmatively the idea that courts generally should not deal with the essential elements of standing and claims sufficiency at a reasonably early point in the proceedings. The FRCP should provide MDL judges a practical procedural tool, especially because rule guidance is important for newly appointed MDL judges as well as lawyers, law clerks, and litigants.[19]

The reasons for the Revised Proposal's two-tiered structure do not support relegating the issue of claim sufficiency to tier 2. According to the Subcommittee: "The matters identified by Rule 16(b)(3) [sic] are in a separate section of the rule because, in the absence of appointment of

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[14] A recent case management order in the nearly three-year-old *In re Paraquat Products Liability Litigation* is the latest example of how insufficient claims can pose long-duration management problems that require judicial attention. In her February 26, 2024, order, Chief Judge Rosenstengel reiterated her repeated observation that cases presenting "implausible or far-fetched theories of liability" and that "would not have been filed but for the availability of this multidistrict litigation" continue to populate the docket. Plaintiffs in those cases have: failed to show information concerning exposure to paraquat; failed to show evidence of a diagnosis of Parkinson's disease; claimed to have used a form of paraquat that never existed; or have "other evidentiary problems such as those that led to the voluntary dismissal of claims by bellwether plaintiffs. The Court observed that it had previously ordered "examination and clean up of the docket." Moreover, a mere "two weeks" after the Court issued its January 22, 2024, case management order "selecting certain cases for limited discovery," "nine of the 25 Plaintiffs who were selected for limited discovery voluntarily dismissed their complaints." Those dismissals "reinforced the Court's concern about the proliferation of non-meritorious claims on the docket of this MDL." The February 26, 2024, order requires parties to serve third-party subpoenas seeking "documentary evidence providing proof of use and/or exposure to paraquat." The purpose of such information is to "provide Plaintiffs an opportunity to better determine the strength of their claims, as well as expose non-meritorious claims." Case Management Order No. 21 Relating To Limited Third-Party Discovery, *In re Paraquat Products Liability Litigation*, Case No. 3:21-md-3004-NJR (S.D. Ill. Feb. 26, 2024), https://www.ilsd.uscourts.gov/sites/ilsd/files/ParaquatCMO21.pdf; Case Management Order No. 20 Relating To Limited Third-Party Discovery, *In re Paraquat Products Liability Litigation*, Case No. 3:21-md-3004-NJR (S.D. Ill. Jan. 22, 2024), https://www.ilsd.uscourts.gov/sites/ilsd/files/ParaquatCMO20.pdf; Case Management Order No. 20B Relating To Additional Third-Party Discovery, *In re Paraquat Products Liability Litigation*, Case No. 3:21-md-3004-NJR (S.D. Ill. March 7, 2024) (noting there were "a subsequent nine additional dismissals after the Court replaced the dismissed plaintiffs with nine new discovery plaintiffs" which "only reinforce the Court's concern about the proliferation of non-meritorious claims on the docket of this MDL.").

[15] *U.S. v. Hayes*, 555 U.S. 415 (2009).

[16] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

[17] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up, brackets removed).

[18] *In re Nat'l Prescription Opiate Litigation*, 2020 WL 1875174, at *3 (6th Cir. Apr. 15, 2020).

[19] Transcript of Proceedings, *In the Matter of: Proposed Amendments to the Federal Rules of Civil Procedure*, January 16, 2024, https://www.uscourts.gov/sites/default/files/jan_16_hearing_transcript.pdf, 173-75 (Rachel Hampton testimony).

leadership counsel should appointment be recommended, the parties may be able to provide only their initial views on these matters."[20] This is not a basis to delay addressing claim sufficiency. Every MDL plaintiff has counsel, and all counsel are bound by and presumably aware of the FRCP pleading rules and Rule 11(b). Adherence to those standards is a matter for all plaintiffs' lawyers from the beginning of the proceedings, not just the leadership lawyers if and when they are chosen. Delaying action to prevent insufficient claims causes the problem; it is not a solution.

Unfortunately, placing Section 16.1(b)(3)(B) in tier 2 is a step backward. The topic of claim sufficiency rightfully belongs in the first tier if Rule 16.1 is to have a tiered structure.

II. ALTERNATIVELY, THE TWO-TIERED STRUCTURE SHOULD BE DISCARDED

As an alternative to moving the topic of claim sufficiency into tier 1, the Committee should discard the Revised Proposal's tiered structure altogether. The structure was not aired during the public comment process, so the Committee does not have the benefit of knowing how controversial the tiering of the issues will be. Furthermore, the distinction between "addressing" tier 1 topics but providing only "initial views" as to the tier 2 issues is highly likely to produce confusion among courts and counsel. Creating a structural distinction between tiers is also unnecessary because, as the proposed Committee Note says, parties may report that action on any particular topic, including both tier 1 and tier 2 issues, would be premature.[21] Rule 16.1 would be clearer and more useful without the tiered structure in the Revised Proposal.

CONCLUSION

The improvements in the Revised Proposal are at risk if the Committee proceeds with the classification of the insufficient claims problem as a "tier 2" issue that does not often require the court's early action. The promise of Section (b)(3)(B) is to help *prevent* the problems of insufficient claims through an early order. Telling courts and parties that early action is most likely premature, worthy only of "initial views," would undercut the purpose of that section as well as the improvements the Subcommittee made to the Committee Note following public comments. Although reservations still exist about Rule 16.1—including that it provides more practice advice than rules guidance[22] and contains numerous provisions that no one supported during the public comment period[23]—if the Committee is going to move forward, it should amend the Revised Proposal by moving Section (b)(3)(B) to tier 1, or alternatively, by discarding the tiered structure altogether.

[20] Revised Proposal, advisory committee's note to Rule 16.1(b)(2) and (3), Agenda Book, 173.
[21] Revised Proposal, 168-69.
[22] LCJ Public Comment on Rule 16.1.
[23] Lawyers for Civil Justice, *Clarity on the Two "Rules Problems": Empirical Evidence of the Insufficient Claims Problem in MDLs and Key Testimony on Much-Needed Revisions to the Proposed Rule 16.1 and Privilege Log Amendments*, Feb. 16, 2024, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0054.