BURGSIMPSON

BURG | SIMPSON | ELDREDGE | HERSH | JARDINE PC

ATTORNEYS & COUNSELORS AT LAW

OHIO 201 East Fifth Street Suite 1340 Cincinnati, OH 45202
P: 513.852.5600 F: 513.852.5611

PHOENIX, ARIZONA
ENGLEWOOD, COLORADO
SARASOTA, FLORIDA
WEST PALM BEACH, FLORIDA

LAS VEGAS, NEVADA
ALBUQUERQUE, NEW MEXICO
CINCINNATI, OHIO
CODY, WYOMING

www.burgsimpson.com

June 16, 2020

Hon. Robert M. Dow Jr. and Members of the MDL Subcommittee
Advisory Committee on Civil Rules
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Response to Proposal for Interlocutory Appeal of Dispositive Motions in Mass Tort MDLs

Dear MDL Subcommittee Members:

The Proposals you have received[1] that suggest abrogating the final appealable order doctrine for multidistrict litigation involving pharmaceutical products and medical devices would significantly impair the interests of injured consumers. The Proposals address a problem that does not exist and provide a remedy that will substantially impede justice.

While it is true that certain orders in MDL cases may have broad applicability, it is not true that immediate appeal is necessary. The typical course of a mass tort MDL is for a handful of cases to be selected for trial as "bellwether" cases. While the bellwether cases move forward, the MDL court customarily stays all other cases. Bellwether cases result in a final judgment - just as in any other case. All orders issued during the course of the bellwether litigation are subject to review on appeal - just as in any other case. Therefore, interlocutory orders that theoretically impact large numbers

[1] The Proposals referenced herein primarily come from Lawyers for Civil Justice and other corporate trade groups representing defense interests, and are referred to collectively as "Proposals." *See, i.e.,* Lawyers for Civil Justice, *What MDL Problems Need To Be Solved With Amendments To The Federal Rules Of Civil Procedure?* (Mar. 30, 2020), *available at* https://www.uscourts.gov/sites/default/files/20-cv-e_suggestion_from_lcj_-_mdl_proceedings_0.pdf.

Michael S. Burg
Peter W. Burg
Hon. Alan K. Simpson*
Scott J. Eldredge
David P. Hersh
Kerry N. Jardine
David K. TeSelle
Seth A. Katz
Stephen J. Burg
Nick D. Fogel
Janet G. Abaray†
Scott A. Ambrose**
Melanie S. Bailey¥
D. Dean Batchelder
Nelson P. Boyle
Jacob M. Burg
David J. Crough
Kenneth M. Daly¥
Brian C. Dault**
Jack F. DeGree§
Jessica L. Derakhshanian
Paul D. Friedman
Marshall Fogel
Shane C. Fulton
Andrew L. Gartman**
David C. Harman†
Thomas W. Henderson
Michael J. Heydt
Jennifer S. Jensen*
Marc C. Johnson
Larry Jones*
Holly Baer Kammerer
Dimitri Kotzamanis
Ronda M. Kelso**
Lindsey Krause Crandall*
Kirsten N. Kube
Emily Lubarsky
Penny J. Manship
Lisa R. Marks
Stephan J. Marsh
Brian K. Matise
Michael A. Mauro
Angela E. McGraw
Charles R. Mendez
Michael C. Menghini
Nicole C. Moskowitz
Joseph F. Nistico
Craig S. Nuss
Lewis A. Osterman
Ryan L. Pardue
Mari K. Perczak
Christopher Post**
Jessica L. Powell¥
Jessica Prochaska
Meghan C. Quinlivan
Travis K. Riley
John Roberts†
Diana A. Sada
Colin M. Simpson*
Joseph F. Smith, III
J. Tyrrell Taber
Alisha Taibo Coombe
Leslie A. Tuft

OF COUNSEL
John M. Connell
Dale J. Coplan, P.C.
James G. Heckbert
Ronald M. Sandgrund
Jennifer A. Seidman
Curt T. Sullan
Valerie M. Sullan

IN MEMORIAM
Milward L. Simpson 1897-1993
Joseph J. Branney 1938-2001
Irwin L. Sandler 1945-2006
Jerry R. Dunn 1935-2019

GOOD LAWYERS. CHANGING LIVES.®

STATE LICENSES: Arizona, California, Colorado, Florida, Kentucky, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, Virginia, Wisconsin, Wyoming
**LICENSED only in Arizona †LICENSED only in Ohio ¥LICENSED in Ohio and Kentucky *LICENSED only in Wyoming §LICENSED only in Nevada

of cases do not create unfair prejudice to defendants, because appellate review is available after final judgment is reached in the bellwether cases, and in the meantime the other cases on the MDL docket remain stayed.[2]

Federal law has long established that it is not unfairly prejudicial to require a party to defend at trial and reserve issues for appeal. The claim of prejudice in the Proposals defies this premise, and arises from an assumption that the district courts are wrong and that reversible errors occur with such frequency that the final judgment rule must be abrogated. The interlocutory appeal remedy proposed by these groups to correct these supposed injustices would stymie the efforts of district courts to manage complex litigation and would encourage the filing of motions, no matter how tenuous, as a means to delay the litigation. Even unsuccessful motions would guarantee delay through an interlocutory appeal, thus encouraging the filing of frivolous motions.

In order to assess the accuracy of the Proponents' assertions that reversible error by the district courts occur with such frequency that immediate appeal is necessary, the recent experience in the Opioid MDL litigation is instructive. As the Subcommittee is undoubtedly aware, the Opioid MDL is a highly complex litigation involving some novel theories, arising from efforts by state and local governments to recoup costs expended due to the opioid epidemic. Management of the litigation has posed a unique challenge, which the United States District Court for the Northern District of Ohio has addressed through many significant orders. On four occasions, the aggrieved parties have requested that the Court certify an order for immediate appeal under 28 U.S.C. §1292(b). A district court may certify an order for immediate appeal if it finds that the decision involves a controlling question of law, that there exists a substantial ground for difference of opinion, and that immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. §1292(b); *In Re: Trump*, 874 F.3d 948, 951 (6th Cir. 2017). In the Opioid MDL, the Court denied certification of i

[2] Even if the stay is lifted and MDL cases are remanded, the cases must be set for trial on the docket of the transferor court, which typically involves another 12-18 month delay. The entire process allows ample time to appeal the bellwether cases.

nterlocutory orders for immediate appeal on two occasions, and granted certification on the third. (The fourth petition currently remains pending.) Therefore, the suggestion that district courts will not certify issues for immediate appeal is inaccurate.

It is further worth noting that in regard to the two orders which the Opioid MDL District Court refused to certify for immediate appeal, the aggrieved parties then filed mandamus petitions. In both of these situations, the Sixth Circuit Court of Appeals also denied the petitions for mandamus. Therefore, not only did the District Court find the disputed rulings unworthy of immediate review, but also the Court of Appeals found that the District Court's orders did not qualify for the issuance of an extraordinary writ. In total, aggrieved parties in the Opioid MDL have filed six petitions for mandamus, of which the Sixth Circuit granted one, denied four, and one became moot. Thus while the standard for granting a mandamus petition is obviously more stringent than that for appealing a final order, the fact that 80% of those filed in the Opioid MDL have been denied by the Court of Appeals indicates that the parties' views of the significance of the disputes was not shared by the Appellate Court in the vast majority of situations. However, the fact that the Court of Appeals did grant one mandamus petition, and that the District Court did certify one opinion for immediate appeal, indicate that both recourses remain viable remedies which the Courts sparingly invoke in appropriate circumstances.

In summary, the experience from the Opioid MDL proves many points. First, aggrieved parties have no compunction about resorting to mandamus. Second, the perception of the aggrieved parties that their rights have been horribly violated were wrong 80% of the time. Third, it is not impossible to prevail on mandamus if a true overreach by the district court has occurred, as evidenced by the one successful petition for mandamus in the Opioid MDL. Fourth, district courts will certify issues under 28 U.S.C. § 1292(b) in appropriate circumstances. And finally, even in a novel, complex and unwieldy litigation such as the Opioid MDL, the Court of Appeals has acknowledged the importance of permitting the District Court to exercise its discretion to manage pretrial and trial proceedings.

Therefore, the proposal that the parties in mass tort MDLs should have the power to immediately appeal interlocutory decisions should give this Subcommittee grave pause. The perception of litigants that district courts have committed reversible

error is most often wrong. Allowing interlocutory appeal of "dispositive" motions would interject courts of appeals into ongoing supervision of district court dockets and disrupt the district courts' ability to manage proceedings effectively.

Interlocutory appeal would not only burden appellate courts, but also force them to review multiple issues that are unsubstantial, premature, discretionary, or that could have become moot. For example, an order denying a motion to dismiss on the basis that it presents a disputed issue of fact would become automatically reviewable. Orders granting class action certification, which by definition are preliminary and can be altered at any time, would become reviewable upon each iteration. Orders permitting expert testimony under *Daubert*, which are only reviewable upon an abuse of discretion standard, would be filed and appealed as to every witness - if for no other reason than the guaranteed delay.[3] Such evidentiary orders could easily become moot if the case were permitted to proceed. For instance, the challenged expert may not even be called at trial, or the cross-examination could be extremely effective, or the objecting party could win the case. Yet the court of appeals would be forced to stop the litigation midstream to issue interlocutory decisions on all such issues.

As to orders on summary judgment, the requirement under Rule 56 that all facts and inferences must be construed in favor of the non-moving party again renders the likelihood of success on interlocutory appeal very low. Indeed, typical summary judgment motions in mass tort MDLs are based upon the argument that the expert testimony is inadmissible, which goes back to the sound discretion of the trial court. Even as to motions based upon claims of federal preemption, the issues presented are highly fact specific, and as the trier of fact on these motions, the district court's findings would only be reversible if clearly erroneous. Little would be gained by immediate appeal, but delay would be guaranteed.

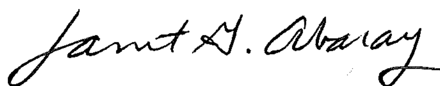
---

[3] Defendants frequently object to imminently qualified experts and non-controversial opinions. For example, in the YAZ MDL, Defendants moved to exclude to every Plaintiff expert witness under *Daubert*. The Court denied their motions, but the burden caused by over-zealous advocacy is already significant, even without interlocutory appeals.

In conclusion, the strategy of groups to eviscerate the final judgment rule in mass tort MDLs would provide defendants a privilege available to no other litigant and subject victims of defective medical products and pharmaceuticals to a burden imposed on no other party. No need exists for such a prerogative, and the potential for abuse is obvious. Defense-interest groups cannot establish a rational basis to deny victims of mass torts the right to a "just, speedy and inexpensive" trial available to all other civil litigants. Thus, the Proposals to allow interlocutory appeals in MDLs involving mass torts should be rejected.

Sincerely,

BURG SIMPSON
ELDREDGE HERSH JARDINE, P.C.



Janet G. Abaray

JGA/bmm