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

As detailed in PLAC's previous Comment, submitted on October 5, 2022, 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. Many of PLAC's corporate members are currently the targeted defendants in mass tort MDLs, including some of the largest MDLs pending on the federal docket. Taken together, the MDL cases filed against these companies number in the thousands, and likely comprise more than half of all MDL cases currently active. Several other PLAC corporate members have also been involved in past MDL proceedings that have now resolved. In short, the Subcommittee's recommendations will directly impact many of PLAC's corporate members.

PLAC has reviewed the Subcommittee's recent summary of discussions with and proposed rule revisions by Lawyers for Civil Justice ("LCJ") and American Association for Justice ("AAJ") as detailed in the Subcommittee's report to the Advisory Committee.[1] While we recognize there is some resistance to formalizing an early disclosure process in Rule 16.1, PLAC respectfully submits this Comment on the Subcommittee's proposed rulemaking with the goal of improving the entire MDL process for the courts and the parties. PLAC and its members reiterate their strong belief that there is a critical need for procedural mechanisms requiring early disclosure of information and evidence substantiating individual claims in the MDL setting, and the absence of such mechanisms has far-reaching implications for the entire MDL process. A formalized process for early disclosure would (a) alleviate the tremendous burden placed on MDL courts resulting from dockets clogged with meritless claims, (b) allow plaintiffs with claims that are supported with evidence of actual use of the product or the alleged injury at issue to advance their claims in a more timely manner, and (c) permit defendants to evaluate and address—including for settlement purposes—the true magnitude and risk presented by such claims.

[1] *See* Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 172 (October 12, 2022), *available at* https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-october-2022 (last visited Feb. 6, 2023).

II. EARLY EXCHANGE OF INFORMATION

This Subcommittee has recognized that there seems to be "fairly widespread agreement" that meritless claims are a problem in many MDLs and that 20–30% (and as high as 40–50%) of claims in some centralized proceedings involve "unsupportable claims."[2] PLAC's members also have extensive experience with claims involving plaintiffs who did not use the product at issue, plaintiffs who have not suffered a legally cognizable injury, and claims barred by the statute of limitations. And as MDLs have only grown in size (along with the significant, related increase in attorney advertising), so too has the influx of unvetted and meritless claims in those MDLs. Many of these claims linger in MDLs for years and are dismissed only after defendants invariably engage in costly discovery and motion practice, and MDL courts have expended substantial time and judicial resources in determining that the challenged claims are unsupported. Those plaintiffs with claims that are supported with evidence of the actual use of the product or the alleged injury at issue often then wait years to advance their claims, given the incredible backlogs caused by meritless claims.

These meritless and unvetted claims result in significant prejudice for companies targeted in MDLs. 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 lack of an early screening mechanism presents many challenges for a corporate defendant, including developing adequate staffing and properly meeting financial reporting obligations. That uncertainty makes it far more difficult for the corporate defendant to also evaluate the actual risk of the claims in the MDL, making it also more difficult to determine early strategies, including settlement. Early screening mechanisms would also ease the tremendous burden on MDL dockets, either through earlier dismissals of cases or through plaintiffs' counsel choosing not to file unsupported cases.

In a December 22, 2022 comment to the Advisory Committee and Subcommittee, LCJ proposed a rule requiring plaintiffs in mass tort MDL proceedings to engage in basic due diligence and make "a showing that the plaintiffs belong in the litigation" at an early point in MDL proceedings.[3] This would include documentation of a plaintiff's product use or exposure and alleged injury.[4] As with LCJ's comment previously submitted on March 8, 2022, 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 meritless claims. Unfortunately, allowing for discretion in an early-disclosure requirement will result in uneven application of that requirement and will likely lead to the same position that parties and the MDL courts now find themselves in: dockets filled with unsupported and meritless claims and the far-reaching effects of those backlogs.

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[2] Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 142-43 (Nov. 1, 2018), *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf (last visited Feb. 6, 2023).

[3] *See* Comment of Lawyers for Civil Justice to the Advisory Committee on Civil Rules and MDL Subcommittee (Dec. 22, 2022), *available at* https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf (last visited Feb. 6, 2023).

[4] *Id.*

Two recent decisions highlight the large problem of meritless and unvetted claims plaguing many MDL dockets and the importance of instituting early disclosure requirements. In one MDL proceeding—more than four years after the creation of the MDL—the court issued an order "designed merely to require each plaintiff to come forward with prima facie evidence" supporting their claims that the defendant's product was the cause of their alleged injuries.[5] As the MDL court observed, it had "presided over the MDL for over four years," "extensive discovery" had taken place, and if "plaintiffs had prima facie proof of specific causation, common sense dictates that it would have surfaced by now."[6] Yet more than 1,100 plaintiffs failed to produce any such threshold evidence, thereby necessitating dismissal of their claims.[7] This occurred only after the defendant engaged in the costly production of "over 6,000,000 pages of documents" and "made nearly 40 persons available for depositions."[8] The MDL court rightfully observed that "[c]ontinuing to carry these cases on the docket" was "severely prejudicial to [the defendant] under the circumstances to say nothing of the added administrative burden to this court as it seeks to move this MDL forward."[9]

In another MDL proceeding—more than five years into the litigation—it was undisputed that 100 cases alleging "personal injury" were "filed in the names of plaintiffs who were in fact deceased at the time the complaints were filed."[10] The Plaintiff Steering Committee contended that Fed. R. Civ. P. 17 precluded dismissal "by permitting the relevant plaintiffs reasonable time to substitute the representatives of estates of the deceased plaintiffs as new plaintiffs, with appropriate amendments."[11] But the MDL court noted that Rule 17 only applied when "determination of the proper party to sue is difficult or when an understandable mistake has been made," not when, as here, "counsel could have verified whether the plaintiff was alive or deceased before filing suit."[12] Given counsel's failure to engage in such basic pre-filing vetting, the cases were summarily dismissed.[13]

Both decisions underscore the lack of basic due diligence undertaken in MDL proceedings, along with the prejudice and burden from having such non-meritorious claims remain on MDL dockets for years. PLAC respectfully submits that a mandatory early screening requirement, like the one in LCJ's proposal, is essential to ensure that this all-too-frequent phenomenon does not continue to unfairly burden both the courts and defendants.

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[5] *In re Zostavax (Zoster Vaccine Live) Prod. Liab. Litig.*, MDL No. 2848, 2022 WL 17477553, at *4 (E.D. Pa. Dec. 6, 2022).
[6] *Id.* at *5.
[7] *See id.*
[8] *Id.* at *1.
[9] *Id.* at *5.
[10] *In re Proton-Pump Inhibitor Prod. Liab. Litig.*, MDL No. 2789, 2022 WL 17850260, at *1 (D.N.J. Dec. 22, 2022).
[11] *Id.*
[12] *Id.* at *4.
[13] *See id.*

III. FUTURE COMMENTS

The Subcommittee has expressly stated several times that its work is evolving, and that it "may significantly modify or abandon this new approach" based on further input.[14] While PLAC understands there is some resistance to a formalized requirement of mandatory early disclosure, it respectfully suggests this approach is critical to reducing the burden currently placed on the MDL process as a result of the absence of such a requirement. 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.

[14] Supplemental Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 1067 (June 7, 2022), *available at* https://www.uscourts.gov/sites/default/files/2022-06_standing_committee_agenda_book_final.pdf (last visited Feb. 6, 2023).

Exhibit "A"

PLAC
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February 2023

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Bayer Corporation

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BIC Corporation

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Bridgestone Americas, Inc.

CC Industries, Inc.

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DISH Network L.L.C.

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Ford Motor Company

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Meta Platforms, Inc.

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Newell Brands Inc.

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Corporate Member List

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