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WASHINGTON LEGAL FOUNDATION
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September 29, 2017

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Request for Rulemaking for Amendments to Adapt FRCP to MDL Proceedings

Members of the Committee:

Washington Legal Foundation (WLF) writes in support of an August 10, 2017 Request for Rulemaking filed by the Lawyers for Civil Justice (LCJ) and to provide two educational documents that might inform discussions regarding LCJ's request. WLF is a nonprofit public-interest law firm and policy center that devotes a substantial portion of its resources to promoting free enterprise, individual and business civil liberties, a limited and accountable government, and the rule of law. Over the past 40 years, WLF has actively participated in efforts to update and revise the Federal Rules of Civil Procedure, most recently commenting on proposed amendments to Rule 23. We also have consistently advocated for pre-trial procedures that preserve judicial efficiency and combat litigation abuses, such as the recent amendments to the Federal Rules governing electronic discovery.

LCJ's request that the Committee amend selected Rules to adapt their application to cases consolidated for pre-trial proceedings is very timely. As the request notes, nearly half of civil-litigation cases on federal courts' docket are before a multidistrict litigation (MDL) judge. Recent decisions by the U.S. Supreme Court regarding personal jurisdiction (*Bristol-Myers Squibb v. Superior Court* and *BNSF v. Tyrrell*) and venue (*TC Heartland LLC v. Kraft Food Brands LLC*) may lead to an increase consolidation requests. The prevailing lack of clarity and consistency among the many MDL proceedings on such basic matters as what constitutes a "pleading" and the standards by which courts judge the merits of individual claims will complicate the judiciary's ability to manage more case consolidation.

To help place LCJ's Rulemaking Request in a broader context, included with this letter are two WLF Legal Studies Division publications that illuminate the challenges faced by the federal judiciary with MDL proceedings. The WORKING PAPER by Reed Smith LLP's James M. Beck, *Multidistrict Litigation Reform: The Case for Earlier Application of Federal Pleading Standards*, explains how the failure of some MDL judges to apply Rule 8's basic pleading standards has resulted in the very harm Congress sought to avoid when adopting 28 U.S.C. § 1407: meritless, unvetted claims pile up on the court's docket, complicating pre-trial matters such as discovery, and impelling unwarranted settlements.

The second paper, a WLF "CONVERSATIONS WITH," results from a moderated discussion with two leading voices on mass litigation and the consolidation of claims: Skadden, Arps, Slate, Meagher & Flom LLP partner John H. Beisner, and Novartis Pharmaceuticals Corp.'s Head of Litigation, Charna L. Gerstenhaber. Answers by Mr. Beisner and Ms. Gerstenhaber underscore several of the requests made by LCJ for amendments to the FRCP, including clarification of what constitutes a pleading and the need for plaintiffs to disclose third-party funding and lead generators to the MDL court. The paper's participants also delve into the negative consequences of claims consolidation and urge MDL judges to minimize abuses through proactive docket management.

These WLF publications identify problems with the MDL process and attempt to diagnose their root causes. They also propose solutions that rely primarily upon the initiative of individual judges and "best practices" designed by third-party organizations. That piecemeal approach, however, cannot realistically achieve consistent success over a sustained period of time. The most effective way to fill "the holes in the FRCP," as LCJ puts it in their Request for Rulemaking, is for this Committee to devise and pursue a process to amend the Rules with the unique challenges and pitfalls that arise from consolidated litigation in mind. The development and application of such Rules amendments can offer MDL litigants the consistency and reliability that court-by-court rulemaking and non-binding best practices cannot provide.

The federal judiciary has much to gain from this Committee's consideration of and action on LCJ's Request for Rulemaking, as do plaintiffs and defendants embroiled in multidistrict litigation. The proliferation of non-meritorious claims profoundly complicates the efficient and effective management of MDL proceedings, deters the eventual transfer of claims to transferor courts, and erodes financial recoveries by actually injured plaintiffs. We trust that the materials included with this letter will further the Committee members' understanding of the prevailing problems, and that WLF's support for LCJ's request will be considered.

Sincerely,

Cory L. Andrews, Senior Litigation Counsel

Glenn G. Lammi, Legal Studies Chief Counsel

Enclosures

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Critical Legal Issues: WORKING PAPER SERIES

MULTIDISTRICT LITIGATION REFORM:
THE CASE FOR EARLIER APPLICATION OF FEDERAL PLEADING STANDARDS

By
James M. Beck
Reed Smith LLP

Washington Legal Foundation
Critical Legal Issues WORKING PAPER Series

Number 204
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MULTIDISTRICT LITIGATION REFORM:
THE CASE FOR EARLIER APPLICATION OF FEDERAL PLEADING STANDARDS

INTRODUCTION: THE PROBLEM OF MDL PLEADING

In the context of multidistrict litigation (MDL), the Federal Judicial Center's *Manual for Complex Litigation* does not mention the landmark US Supreme Court decisions *Ashcroft v. Iqbal*[1] or *Bell Atlantic Corp. v. Twombly*,[2] (collectively, "*TwIqbal*"), and discusses Federal Rule of Civil Procedure 8, which governs pleading, only in the context of civil actions under the Racketeer Influenced and Corrupt Organizations Act.[3] The *MDL Standards & Best Practices* guide,[4] published by the Duke Law Center for Judicial Studies, does not discuss pleadings at all, although it does contain a two-page discussion of plaintiff fact sheets (PFS), which it characterizes as "[o]ne of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery."[5] However, the PFS as a litigation tool is not mentioned in any statute or rule, whereas *TwIqbal* and Rule 8 are binding law.

Given that complaints which are combined into an MDL vary widely based on the filing plaintiffs' law firm, especially when those complaints are originally filed in state court, some MDL judges have flinched from the amount of work that would be required to enforce the basic pleading standards of Rule 8 and *TwIqbal*. The following quotes from MDL courts support that conclusion:

- "[T]he Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented."[6]

- "With more than 549 individual actions ... [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court."[7]

- "[C]ase-specific rulings are neither the purpose, nor the forte, of a court presiding over a multi-district litigation."[8]

- "The MDL procedure is instead designed to maximize efficiency and fairness by minimizing both the sheer number of rulings required."[9]

However, such attitudes contribute to the widespread problem of MDLs becoming warehouses for meritless, unvetted claims that would be quickly dismissed if brought as individualized actions. By refusing early on to require each plaintiff to meet the minimal pleading standards necessary for a case to survive a motion to dismiss, MDL courts expand the number of plaintiffs beyond those with viable causes of action and thus distort the true scope of MDL litigation. This distortion in turn affects other disputes, such as discovery, where the proportionality analysis is skewed by the presence of hundreds or thousands of unvetted plaintiffs. A lower pleading standard empowers plaintiffs' lawyers to "park" a significant number of plaintiffs' claims in an MDL as "inventory." Such unvetted inventory causes the precise harm that the MDL statute, is intended to prevent.

I. USE OF MASTER COMPLAINTS TO AVOID THE FEDERAL RULES

One means of evading *TwIqbal* and Rule 8 has been the "master complaint." In some contexts, "master" documents have a legitimate function in aggregated litigation. The *Manual for Complex Litigation* states:

> Some courts ... have attempted to adopt techniques to facilitate trials in MDL transferee courts—for example, by the filing of a consolidated amended class action complaint, or master complaint, as an original action in the transferee forum. That complaint then may serve as the vehicle for determination of common issues.[10]

However, nothing in the federal statute authorizing MDL,[11] the MANUAL FOR COMPLEX LITIGATION, or any appellate decision governing MDL practice[12] permits an MDL transferee judge to suspend the operation of the Federal Rules of Civil Procedure.[13]

With respect to Rule 8 and MDL master complaints, the great majority of MDL decisions governing such complaints recognize the judicial obligation, when proper motion is brought, to police pleadings—including master complaints—in accordance with Rule 8 standards. In an MDL, "the master complaint is examined for its sufficiency when the defendants file a motion to dismiss."[14]

In cases involving MDL master complaints, "we are bound to apply the pleading standard articulated in [*Twombly* and *Iqbal*]."[15] The *In re Katrina Canal Breaches Litigation*[16] court affirmed judgment on the pleadings against a master complaint that "superseded" the plaintiff's previous complaint.[17] Similarly, portions of the MDL master complaint were dismissed in *Hill v. Ford Motor Co.*, because the "plaintiffs

failed the *TwIqbal* test, as their assertion constituted little more than 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action.'"[18] The *In re FEMA Trailer Formaldehyde Products Liability Litigation* court held that "sufficient facts" were not "alleged to show that standing currently does exist" in the master complaint.[19] Many other MDL proceedings have applied governing Rule 8 standards to master complaints, both before and after the Supreme Court clarified the rules of pleading in *TwIqbal*.[20]

Unfortunately, not all MDL courts have been willing to follow Rule 8 with respect to master complaints in recent years. Some courts have sought to excuse master complaints from compliance with the Federal Rules on the ground that such complaints are mere "administrative tools" or "procedural devices" to which the ordinary rules of pleading do not apply.[21] The result, in too many MDLs, has been exactly the opposite of what multidistrict proceedings are supposed to accomplish. Instead of "just and efficient" resolution[22] of pre-trial proceedings, these courts' refusal to apply the Federal Rules has resulted in thousands of MDL plaintiffs being allowed to continue with actions despite their failure to allege essential facts that are required for individual plaintiffs under the Federal Rules. The longer that meritless claims linger on MDL dockets, the more intense the pressure becomes for MDL defendants to settle.[23]

This "administrative" approach to master complaints arises from misapplication of the law. The initial decisions ascribing an "administrative" nature to master complaints did not involve pleading, or indeed anything having to do with the Federal Rules, but rather occurred in the choice-of-law context.[24] *In re Trasylol Products Liability Litigation*[25] first mentioned pleading in passing, but only as to particularity of fraud allegations under Rule 9(b).[26] With the advent of *TwIqbal*, several MDL courts sought to downgrade master complaints to mere "administrative tools" as a way to avoid applying Rule 8.

Multidistrict litigation regarding prescription medical products is perhaps the most glaring example of MDL courts' refusal to enforce Rule 8. This is no accident. Such litigation is characterized by widespread solicitation of clients through mass media, minimal pre-litigation investigation of facts, cookie-cutter multi-plaintiff complaints with a dearth of any information about each specific plaintiff's claim, and hasty applications to the Judicial Panel for Multi-District Litigation so that MDL status can be touted in future advertising. In such litigation, "the information relevant to plaintiff's condition and the causes therefore are solely available to him," and defendants "have no information as to plaintiff's medical condition, the causes of his condition, or his prognosis."[27]

II. APPLICATION OF RULE 8 TO PLAINTIFF FACT SHEETS, AS A PLEADING SUBSTITUTE

The problems that arise from inefficient application of *TwIqbal* and Rule 8 to individualized pleadings could be resolved if MDL judges look upon appropriately drafted PFS as amended complaints with respect to all plaintiffs' factual allegations. One approach MDL judges should consider is the application of *TwIqbal* and Rule 8 immediately to the legal sufficiency oftransferred causes of action, as standardized by master complaints. Conversely, the adequacy of each plaintiff's factual allegations claims could await the submission of initial PFS. These PFS would not be the 30-page comprehensive histories seen in some MDLs—those could come later where necessary as a form of discovery not governed by Rule 8—but would instead track the requirements of Rule 8, as interpreted by those courts that have applied *TwIqbal* rigorously in relevant individual cases.[28]

For example, in individual litigation involving prescription products, Rule 8 has been held to require that each plaintiff set forth the "who, what, when, and where" of their complaint against the defendants.[29] Complaints must allege: (1) plausible facts identifying the plaintiff as a citizen of a state to establish jurisdiction;[30] (2) facts establishing the identity of the product that the plaintiff used;[31] (3) the nature of the alleged product defect;[32] (4) identification of any alleged statutory or regulatory violations;[33] (5) identification of the language of any express warranty;[34] and (6) facts that plausibly establish that the claimed defect caused harm to the plaintiff.[35] Nor can

"information and belief" allegations be credited under Rule 8, where the information is accessible to the pleader.[36]

Appropriate MDL practices should set a reasonable, but prompt schedule for *TwIqbal* motions based on PFS. One such schedule is set forth in pending legislation that recently passed the House of Representatives.[37] It would require that "within the first 45 days" of the action reaching an MDL court, each MDL plaintiff must provide "a submission sufficient to demonstrate that there is evidentiary support" for her claims. Within 90 days thereafter the MDL court must determine the sufficiency of the submission. Insufficient submissions would be dismissed without prejudice pending the "tender[ing] [of] a sufficient submission" within another 30 days. A second inadequate submission would require dismissal with prejudice.[38] Under Rule 8, this may or may not be an optimal schedule, but this legislation is a strong reminder that, if the judiciary will not clean up the MDL mess, other actors may well do so.

An MDL judge's "most important function in the early stages of litigation management" is "to press the parties to identify, define, and narrow the issues."[39] MDL case management orders "should include the usual interim breakpoints, *e.g.*, filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss."[40] "[W]here a defendant moves to dismiss some but not all of the plaintiffs' claims, allow other discovery to proceed while *you decide* the motion."[41] Thus, MDL transferee courts are supposed to reduce the pleadings to those matters

actually in dispute. Use of Rule 8, in conjunction with PFS, is the type of pretrial proceeding MDLs are supposed to handle, since defendants do not have effective remedies of this sort after remand.[42] Using PFS in this way removes current excuses for ignoring Rule 8, since a properly drafted PFS would incorporate all of the facts upon which *TwIqbal* "plausibility" turns.

Currently, it is not unusual in a pharmaceutical product-liability MDL, for instance, for the court to utilize a case management order that requires completion of PFS and provides medical/pharmacy records documenting use of the defendant's product.[43] This process is typically followed by a "deficiency letter" process, under which the defendants must analyze PFS and identify their deficiencies—including such basic shortcomings as not identifying the dates the plaintiff used the defendant's prescribed product or a pharmacy that dispensed the product, and failing to assert the plaintiff suffered from the medical condition which is the subject of the litigation after the ingestion of the product. After receiving a deficiency letter, plaintiffs typically have still more time to correct the deficiencies before any issue can be brought to the court's attention. Unlike Rule 8, the deficiency letter process puts the onus, in time and expense, on defendants to police the adequacy of plaintiffs' responses. Use of Rule 8 as enforcement tool would be much more efficient.

The requirement that a PFS be completed is often accompanied by a mandated medical-record-collection process, in which plaintiffs must provide medical

authorizations. Defendants routinely hire a third-party company to obtain the medical records.[44] Once again, the burden of establishing MDL plaintiffs' claims—assigned to plaintiffs by Rule 8—is effectively shifted to the defendants, who have to pay for the collection of pharmacy and medical records.

Thus, rather than requiring plaintiff's counsel to vet their cases before filing by securing the "who, what, when, and where of their client's potential lawsuit," MDL practice currently imposes that expense on defendants. Defendants must pay for the lawyer and paralegal time to determine basic deficiencies in individual cases, and pay third-party vendors to collect plaintiff records.[45]

III. PLAINTIFF FACT SHEETS AND EQUITABLE COST ALLOCATION

While the PFS process ultimately results in numerous voluntary dismissals and successful motions to dismiss, current MDL practices impose the burden and expense of vetting the plaintiffs on the defendants, rather than requiring plaintiffs' counsel to confirm that their own clients have viable cases before bringing suit in the first instance, as mandated by Federal Rules of Civil Procedure 1, 11, and 12. Indeed, the defendant in *In re Digitek* described the "cost of determining each meritless claim on a case by case basis" as "staggering"—"[D]epletion of insurance proceeds by defense costs incurred by defending meritless cases is an interest that all parties and this Court should recognize."[46]

Ultimately, in *Digitek* the entire MDL proved to be a waste of time and resources, since no plaintiff proved that that the defendant sold any unit of the drug containing the claimed defect.[47] Had the *Digitek* plaintiffs been required to allege individualized exposure and causation, as Rule 8 requires, there would have been no need to waste years of effort in unproductive MDL discovery.

The PFS process and medical-record-collection process becomes particularly burdensome when large groups of plaintiffs are joined together in one complaint and all plaintiffs sue a number of co-defendants who have each manufactured a product in the class of products at issue, requiring defendants to ascertain which plaintiff (if any) has a plausible/viable claim against which defendant. While these cases can be sorted out and whittled down through arduous discovery, MDL courts' failure to uphold *TwIqbal* pleading standards at the outset again shifts to the defendants what should be the plaintiffs' burden to investigate their cases before filing. This is hardly a "just and efficient" result, since it prolongs and perpetuates thousands of cases that should never have been filed in the first instance. Even from a plaintiffs' perspective, current MDL practice means that defendants must expend substantial resources on meritless claims, rather than conserving them for plaintiffs with viable claims.

IV. FIXING THE PROBLEM

The MANUAL FOR COMPLEX LITIGATION should be revised to specify that Rule 8 applies to an initial PFS, and that initial PFS should be treated as a factual amendment

to each plaintiff's complaint. Such a procedure would categorize all treatment of MDL master complaints as "administrative" without violating or nullifying Rule 8,[48] and without preventing early culling of meritless actions from MDL dockets. Conversely, such a reform would allow enforcement of *Twiqbal* standards against a standardized form document, rather than wastefully against heterogeneous complaints on a one-by-one basis.

Courts should not endorse any process that implies the existence of an "MDL exception" to federal pleading standards. A lower bar for MDL litigants disregards the pleading standards required of all litigants by the US Supreme Court and by Congress, both of which approved the language of Rule 8.

This hybrid form of complaint/PFS would achieve the dual goals of (1) ensuring that Rule 8 pleading standards are uniformly applied to all cases and (2) streamlining the pleading process. Under this hybrid system, each plaintiff would still be required to set forth the "who, what when and where" of their individual complaint in a short form complaint, while adopting the general allegations of a master complaint in a check off form. This process would still require *TwIqbal* "plausibility" for each individual plaintiff's cause of action, and thus would provide defendants with enough information to assert potential applicable affirmative defenses as well as potential 12(b)(6) motions.

ENDNOTES

[1] 556 U.S. 662 (2009).

[2] 550 U.S. 544 (2007).

[3] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 35.31, at 702-07 (Fed. Jud. Cntr. 2004).

[4] MDL STANDARDS & BEST PRACTICES (Duke L. Cntr. Sept. 11, 2014).

[5] *Id.* at 11.

[6] *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2014).

[7] *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012).

[8] *In re Nuvaring Products Liability Litigation*, 2009 WL 4825170, at *2 & n.3 (E.D. Mo. Dec. 11, 2009) (refusing to rule on over 200 motions to dismiss; viewing the "goal" of the MDL solely in terms of "expeditious and efficient discovery"); *see In re Nuvaring Products Liability Litigation*, 2009 WL 2425391, at *1 (E.D. Mo. Aug. 6, 2009) (denying all individualized motions to dismiss).

[9] *In re Phenypropanolamine Products Liability Litigation*, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004).

[10] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.36, at 373. *See also id.* at § 40.52 ("Sample Orders") (allegations in master complaint "would be suitable for adoption by reference in individual cases").

[11] 21 U.S.C. § 1407.

[12] The US Supreme Court has addressed MDL master complaints only once, in a footnote. *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 905 n.3 (2015) ("Parties may elect to file a 'master complaint' and a corresponding 'consolidated answer,' which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings.").

[13] To the contrary, in Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 604-05 (1991), an experienced MDL transferee judge outlined a detailed procedure for deciding—not avoiding—motions to dismiss brought against master complaints.

[14] *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590 (6th Cir. 2013). Thus, MDL plaintiffs "may not sidestep customary jurisdictional rules by saying that the complaint at hand lacked legal effect." *Id.* at 591.

[15] *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352, 1359 (11th Cir. 2011) (affirming dismissal of all counts of MDL master complaint for failure to plead "plausible" causation and damages).

[16] 309 F. Appx. 836 (5th Cir. 2009).

[17] *Id*. at 838.

[18] 975 F. Supp. 2d 1351, 1360 (N.D. Ga. 2013) (quoting *TwIqbal*).

[19] 570 F. Supp. 2d 851, 857 (E.D. La. 2008).

[20] *In re Takata Airbag Products Liability Litigation*, 193 F. Supp. 3d 1324, 1332, 1336-42 (S.D. Fla. 2016) (applying *TwIqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig 'Deepwater Horizon' in the Gulf of Mexico, on April 20, 2010*, 168 F. Supp. 3d 908, 915-17 (E.D. La. 2016) (concluding that all "test-case" plaintiffs in master complaint "failed to plausibly allege valid claims"); *In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, 2014 WL 4322409, at *16 (D. Mass. Aug. 29, 2014) (dismissing master complaint claims under Tennessee law for improper damages); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 902 F. Supp. 2d 808, 814 (E.D. La. 2012) (MDL master complaint did not "plausibly allege facts" regarding purported economic loss); *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 838 F. Supp. 2d 497, 506-16 (E.D. La. 2012) (applying *TwIqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011) (dismissing MDL master complaint); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 664 F. Supp. 2d 752, 765-68 (E.D. Mich. 2009) (deciding motions to dismiss against master complaint under nine states' laws); *In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 592 F. Supp. 2d 1147, 1158-62 (D. Minn. 2009) (dismissing 21 counts of MDL master complaint), *aff'd*, 623 F.3d 1200 (8th Cir. 2010); *In re Digitek Products Liability Litigation*, 2009 WL 2433468, at *7, 9 (S.D. W. Va. Aug. 3, 2009) (applying *TwIqbal* standards despite "administrative device" argument; finding master complaint sufficient); *Barasich v. Shell Pipeline Co.*, 2008 WL 6468611, at *1-2 (E.D. La. June 19, 2008) (granting *TwIqbal* motion to dismiss master complaint); *In re ConAgra Peanut Butter Products Liability Litigation*, 2008 WL 2132233, at *4 (N.D. Ga. May 21, 2008) (granting in part and denying in part *Twombly*/*Iqbal* motion to dismiss master complaint); *In re World Trade Center Disaster Site Litigation*, 2008 WL 1927265, at *3 (S.D.N.Y. May 1, 2008) (dismissing master complaint), *reconsideration denied*, 2008 WL 2704317 (S.D.N.Y. July 10, 2008); *In re Katrina Canal Breaches Consolidated Litigation*, 533 F. Supp. 2d 615, 642-43 (E.D. La. 2008) (granting *TwIqbal* motion to dismiss parts of master complaint), *aff'd*, 673 F.3d 381 (5th Cir. 2012); *In re Bausch & Lomb Inc.*, 2007 WL 3046682, at *7 (D.S.C. Oct. 11, 2007) (holding "conclusory statements" concerning injury in master complaint failed *TwIqbal*); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 2007 WL 2421480, at *5-10 (E.D. Mich. Aug. 24, 2007) (granting motion to dismiss several counts of master complaint); *In re Educational Testing Service Praxis Principles of Learning & Teaching, Grades 7-12 Litigation*, 517 F. Supp. 2d 832, 840-54 (E.D. La. 2007) (state-specific adjudication of motion to dismiss master complaint); *In re Guidant Corp.*

Implantable Defibrillators Products Liability Litigation, 484 F. Supp. 2d 973, 983 (D. Minn. 2007) (dismissing several counts of master complaint); *Gray v. Derderian*, 464 F. Supp. 2d 105, 109-111 (D.R.I. 2006) (dismissing several defendants from master complaint); *Gray v. Derderian*, 371 F. Supp.2d 98, 104-08 (D.R.I. 2005) (dismissing several counts of master complaint); *In re September 11 Litigation*, 280 F. Supp. 2d 279, 295-313 (S.D.N.Y. 2003) (dismissing parts of master complaint), *interlocutory certification denied*, 2003 WL 22251325, (S.D.N.Y. Oct. 1, 2003); *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 153 F. Supp. 2d 935, 948 (S.D. Ind. 2001) (dismissing several counts of master complaint).

[21] *See*, *e.g.*, *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *3-4 (N.D. Ill. Aug. 16, 2012).

[22] 28 U.S.C. § 1407.

[23] "[M]ass tort proceedings using the MDL process have become magnets for advertising-driven, poorly investigated (and often patently invalid) personal injury claims." House Report 115-25, "Fairness in Class Action Litigation Act of 2017," at 5 (U.S. House of Rep. March 7, 2017). For example, in the *Phenypropanolamine* MDL more than 300 motions to dismiss were stricken, not because they were unmeritorious, but because they would have required "examining the plaintiffs' individual complaints and applying the applicable state law." *Phenypropanolamine*, 2004 WL 2034587, at *1. Adopting a "narrow role for an MDL transferor court," the court refused to dismiss any action, requiring instead that Rule 8 motions "be refiled with the transferor court upon remand," *id.* at *2—a remand that never took place.

[24] *See In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46, 56 (D.N.J. 2009); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 489 F. Supp. 2d 932, 935-36 (D. Minn. 2007); *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 454 (E.D. La. 2006); *In re Propulsid Products Liability Litigation*, 208 F.R.D. 133, 141-42 (E.D. La. 2002). These decisions addressed the law applicable to master complaints filed in the MDL forum, and regarded MDL master complaints as "administrative" conveniences so that issues ordinarily determined by the law of the transferor forum where individual plaintiffs originally brought their actions could not be circumvented by direct filing. More recent choice-of-law decisions do the same. *See In re Fresenius Granuflo/NaturaLyte Dialysate Products Liability Litigation*, 76 F. Supp. 3d 294, 300-05 & 314 n.11 (D. Mass. 2015).

[25] 2009 WL 577726, at *6-7 (S.D. Fla. Mar. 5, 2009).

[26] In *Trasylol*, the actual holding, as opposed to the *dictum*, was that "leniency must not overreach so as to effect a negation of the policy behind Rule 9." 2009 WL 577726, at *9. Thus, "a broad claim that a Plaintiff or a Plaintiff's physicians relied on fraudulent or misleading statements ... absent some recitation of what oral or written statement a particular drug representative made to a specific physician ..., is an insufficient basis for allowing Plaintiffs to proceed." *Ibid.* Thus, the *Trasylol* MDL judge actually decided the motion to dismiss on its merits. *See also In re Trasylol Products Liability Litigation*, 2011 WL 2784237, at *5 (S.D. Fla. July 13, 2011) (enforcing dismissal order against similarly-pleaded tag-along complaints).

[27] *Moore v. C.R. Bard, Inc.*, 217 F. Supp. 3d 990, 996 (E.D. Tenn. 2016).

[28] Since MDL judges are "charged with the responsibility of 'just and efficient conduct' of the multiplicity of actions in an MDL," *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1231 (9th Cir. 2006), it would be appropriate to apply *TwIqbal* rigorously as an early screening device to weed out meritless cases.

[29] *See*, *e.g.*, *In re Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, 701 F. Supp. 2d 356, 366 (E.D.N.Y. 2010); *In re Actimmune Marketing Litigation*, 2010 WL 3463491, at *10 (N.D. Cal. Sept. 1, 2010), *aff'd*, 464 F. Appx. 651 (9th Cir. 2011).

[30] "A party's citizenship is determined by her domicile, and the domicile of an individual is his true, fixed and permanent home and place of habitation." *Washington v. Hovensa LLC*, 652 F.3d 340, 344 (3d Cir. 2011) (citation and quotation marks omitted). "[A] party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties." *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Citizenship, like every other basis for jurisdiction, must be affirmatively pleaded under *TwIqbal*. *See, e.g.*, *Antonacci v. City of Chicago*, 640 F. Appx. 553, 556 (7th Cir. 2016); *Young-Gibson v. Patel*, 476 F. Appx. 482, 483 (2d Cir. 2012); *Farmer v. Fisher*, 386 F. Appx. 554, 558 (6th Cir. 2010); *Vis Vires Group, Inc. v. Endonovo Therapeutics, Inc.*, 149 F. Supp. 3d 376, 390 (E.D.N.Y. 2016).

[31] *Patterson v. Novartis Pharmaceuticals Corp.*, 451 F. Appx. 495, 497-98 (6th Cir. 2011); *Moore*, 217 F. Supp. 3d at 996; *Weddle v. Smith & Nephew, Inc.*, 2016 WL 1407634, at *5 (N.D. Ill. April 11, 2016); *Shells v. X-Spine Systems, Inc.*, 2015 WL 736981, at *3 (W.D. Okla. Feb. 20, 2015); *Henderson v. Sun Pharmaceuticals Industries, Ltd.*, 809 F. Supp. 2d 1373, 1378-79 (N.D. Ga. 2011); *Timmons v. Linvatec Corp.*, 263 F.R.D. 582, 584–85 (C.D. Cal. 2010); *Gilmore v. DJO Inc.*, 663 F. Supp. 2d 856, 860-61 (D. Ariz. 2009).

[32] *Rodman v. Stryker Sales Corp.*, 604 F. Appx. 81, 82 (2d Cir. 2015); *Jeffries v. Boston Scientific Corp.*, 2017 WL 2645723, at *4 (D. Md. June 20, 2017); *Lussan v. Merck Sharp & Dohme Corp.*, 2017 WL 2377504, at *2 (E.D. La. June 1, 2017); *House v. Bristol-Myers Squibb Co.*, 2017 WL 55876, at *4 (W.D. Ky. Jan. 4, 2017); *Moore*, 217 F. Supp. 3d at 995; *Scianneaux v. St. Jude Medical S.C., Inc.*, 961 F. Supp.2d 808, 813 (E.D. La. 2013); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 494 (W.D. Pa. 2012); *Moore v. Mylan Inc.*, 840 F. Supp. 2d 1337, 1345 (N.D. Ga. 2012); *Mills v. Bristol-Myers Squibb Co.*, 2011 WL 4708850, at *3 (D. Ariz. Oct. 7, 2011); *Gelber v. Stryker Corp.*, 752 F. Supp. 2d 328, 334 (S.D.N.Y. 2010); *Maness v. Boston Scientific*, 751 F. Supp. 2d 962, 969 (E.D. Tenn. 2010); *Ilarraza v. Medtronic, Inc.*, 677 F. Supp. 2d 582, 589 (E.D.N.Y. 2009).

[33] *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1341 (10th Cir. 2015) (Gorsuch, J.); *Rodriguez v. American Medical Systems, Inc.*, 597 F. Appx. 226, 229 (5th Cir. 2014); *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1301 (11th Cir. 2011); *Lawrence v. Medtronic*, 2017 WL 826963, at *1 (C.D. Cal. Feb. 27, 2017); *Yosowitz v. Covidien LP*, 182 F. Supp. 3d 683, 691-92 (S.D. Tex. 2016); *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 598 (D.N.J. June 11, 2015); *Sprint Fidelis Leads*, 592 F. Supp. 2d at 1158.

[34] *Rodriguez*, 597 F. Appx. at 231; *Jeffries*, 2017 WL 2645723, at *5; *Lussan*, 2017 WL 2377504, at *3; *House*, 2017 WL 55876, at *6; *Spier v. Coloplast Corp.*, 121 F. Supp. 3d 809, 818 (E.D. Tenn. 2015); *Clements*, 111 F. Supp. 3d at 602; *Byrnes v. Small*, 60 F. Supp. 3d 1289, 1301 (M.D. Fla. 2015); *Martin v. Medtronic, Inc.*, 63 F. Supp. 3d 1050, 1060-61 (D. Ariz. 2014); *McConologue v. Smith & Nephew, Inc.*, 8 F. Supp. 3d 93, 114-15 (D. Conn. 2014); *Lindler v. Mentor Worldwide LLC*, 2014 WL 6390307, at *2 (D.S.C. Oct. 23, 2014); *Gelber* 752 F. Supp. 2d at 335; *Williams v. Cyberonics, Inc.*, 654 F. Supp. 2d 301, 308 (E.D. Pa. Sept. 10, 2009), *aff'd*, 388 F. Appx. 169 (3d Cir. 2010).

[35] *Rollins v. Wackenhut Services, Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012); *Funk v. Stryker Corp.*, 631 F.3d 777, 782 (5th Cir. 2011); *Rodman*, 604 F. Appx. at 82; *McElroy v. Amylin Pharmaceuticals, Inc.*, 573 F. Appx. 545, 546 (6th Cir. 2014); *Bailey v. Janssen Pharmaceutica, Inc.*, 288 F. Appx. 597, 608-09 (11th Cir. 2008); *Jeffries*, 2017 WL 2645723, at *3; *Becker v. Smith & Nephew, Inc.*, 2015 WL 268857, at *4 (D.N.J. Jan. 20, 2015); *Kennedy v. Pfizer, Inc.*, 2014 WL 4093065, at *5 (W.D. La. Aug. 15, 2014); *Gonzalez v. Bayer Healthcare Pharmaceuticals, Inc.*, 930 F. Supp. 2d 808, 813-14 (S.D. Tex. 2013); *Bergstresser v. Bristol-Myers Squibb Co.*, 2013 WL 6230489, at *8 (M.D. Pa. Dec. 2, 2013); *Mills*, 2011 WL 4708850, at *3. Most prescription-medical-product liability suits involve warning claims under the learned intermediary rule, so many of these cases require pleading that a different warning would have changed the relevant physician's prescription decision. *E.g.*, *Lussan*, 2017 WL 2377504, at *3 (applying *TwIqbal* to causation in warning context); *Moore*, 217 F. Supp. 3d at 995 (same).

[36] *In re Darvocet, Darvon, & Propoxyphene Products Liability Litigation*, 756 F.3d 917, 931 (6th Cir. 2014); *Aston v. Johnson & Johnson*, 2017 WL 1214399, at *7 (D.D.C. Mar. 31, 2017); *Teixeria v. St. Jude Medical S.C., Inc.*, 193 F. Supp. 3d 218, 225-26 (W.D.N.Y. 2016); *Stephens v. Teva Pharmaceuticals, U.S.A., Inc.*, 70 F. Supp. 3d 1246, 1249 (N.D. Ala. 2014); *Mills*, 2011 WL 4708850, at *2; *Berkowitz v. Metwest Inc.*, 2010 WL 5395777, at *3 n.6 (D. Colo. Dec. 23, 2010); *Funk v. Stryker Corp.*, 673 F. Supp. 2d 522, 525 (S.D. Tex. 2009), *aff'd*, 631 F.3d 777 (5th Cir. 2011).

[37] *See* H.R. 985, the "Fairness in Class Action Litigation & Furthering Asbestos Claim Transparency Act of 2017.

[38] *Id. at* § 105.

[39] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.13, at 42.

[40] TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES, at 4 (J.P.M.D.L. & Fed. Jud. Cntr. 2009).

[41] *Id.* (emphasis added).

[42] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.37, at 376 (transferor courts only hear "dispositive motions" after "the MDL pretrial proceedings are concluded and individual cases are remanded").

[43] *See*, *e.g.*, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1224-25 (9th Cir. 2006) (describing fact sheet procedure in detail); *In re Guidant Corp. Implantable*

Defibrillators Products Liability Litigation, 496 F.3d 863, 866 (8th Cir. 2007); *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 576-77 (S.D. Tex. 2005).

[44] *See*, *e.g.*, *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 412 F. Appx. 527, 529 (3d Cir. 2011) (litigation over records production); *In re Accutane Products Liability Litigation*, 2006 WL 1281598, at *1-2 (M.D. Fla. May 9, 2006) (same); *In Re Serzone Products Liability Litigation*, 2003 WL 22319060 (S.D.W. Va. July 11, 2003) (medical records production order); *In re Norplant Contraceptive Products Liability Litigation*, 1997 WL 28427 (E.D. Tex. Jan. 17, 1997) (same).

[45] *See In re Digiteck Product Liability Litigation*, 264 F.R.D. 249 (S.D. W. Va. 2010), in which the Defendants reported to the court that they would soon exceed $100,000 in medical-record-production expenses, and that "[d]efendants are spending money and resources to evaluate these cases, collect records and analyze records which only ultimately serve to prove that these cases should never have been filed." *Id.* at 254.

[46] *Digitek*, 264 F.R.D. at 254.

[47] *In re Digitek Products Liability Litigation*, 821 F. Supp. 2d 822, 836 (S.D. W. Va. 2011) (granting summary judgment because "not a single double-thick Digitek was ever found outside the plant").

[48] *See Gelboim*, 135 S. Ct. at 904 n.3 ("[N]o merger occurs, however, when the master complaint is not meant to be a pleading with legal effect but only an administrative summary.") (citation and quotation marks omitted); *Refrigerant Compressors*, 731 F.3d at 590-91 (holding that MDL master complaint that was an "operative pleading" could "supersede[] any prior individual complaints," but not a mere "administrative summary"); *In re General Motors LLC Ignition Switch Litigation*, 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015) ("Whether to treat such a complaint as 'administrative' or 'superseding' will depend on the particulars of a given MDL."); *Fresenius Granuflo/NaturaLyte*, 76 F. Supp. 3d at 314 n.11 ("noting that the previously applicable long form complaint is not necessarily superseded for purposes of motion to dismiss practice" by "administrative" MDL master complaint) .

Conversations With...

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Multidistrict Litigation: Reducing Incentives for Abuse

The Honorable Jay B. Stephens
Charna L. Gerstenhaber
John H. Beisner

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, the Chairman of WLF's Legal Policy Advisory Board, **Jay B. Stephens**, directs a discussion with **Charna L. Gerstenhaber**, Vice President and Head of Litigation for Novartis Pharmaceuticals Corporation, and **John H. Beisner**, a Partner with Skadden, Arps, Slate, Meagher & Flom LLP, on multidistrict litigation (MDL) and how judges can reduce systemic incentives for procedural abuse.

Introduction

A 1968 federal law facilitated the use of MDL proceedings to combine cases involving "one or more common questions of fact" before a single court for pretrial proceedings. The law created a Judicial Panel on Multidistrict Litigation (JPML), which, on its own initiative or upon the request of a party, can order the transfer of a lawsuit from federal court to an MDL proceeding. The responsibility of the MDL judge—a federal district court judge chosen by the JPML to oversee a group of cases—is to manage pretrial matters such as discovery. Once the MDL judge has addressed those preliminary issues, the "transferee" court returns each case to the JPML, which then sends the case back to the "transferor" court for trial.

Today, 45% of all civil-litigation cases pending in federal court are consolidated in MDLs. Ten years ago, however, only 15% of federal civil cases were in MDLs. And rather than act as a temporary way-station on the road to trial, MDL courts have become permanent homes for the vast majority of transferred cases. MDL judges have returned a mere 2.9% of cases to the JPML for transfer.

Instead of improving judicial efficiency and achieving just resolution of litigation as Congress intended, the MDL device has developed into a black hole that attracts and warehouses claims. The device creates incentives for plaintiffs' lawyers to build up inventories of lawsuits with little consideration of their legal merit. This aggregation imposes enormous pressure on MDL defendants to settle—an outcome that MDL judges strongly encourage.

Jay Stephens: Charna, why has the number of claims consolidated into the MDL process increased so dramatically over the last decade?

Charna Gerstenhaber: Plaintiffs' counsel have looked for ways to aggregate claims for years; that part is not new. In the recent past, developments such as the Class Action Fairness Act (CAFA) and other procedural changes have helped

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lessen the abuse of aggregated filings in state and federal courts. In many types of cases, such as personal-injury litigation, it is now significantly easier to get MDL treatment than class-certification treatment.

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And we cannot underestimate the role litigation funding is playing in increasing the aggregation of claims. The availability of easy money has allowed certain plaintiffs' attorneys to take huge risks on less meritorious claims without having much, or maybe any, of their own money at stake. In that circumstance, there is no immediate financial disincentive to grouping together hundreds of dubious claims into an MDL with the hope of attracting even more claims and eventually pressuring defendants to settle.

The increase in advertising spending also pairs with the increased number of claims. To the extent that mass inventory is the end-game, advertising helps move the needle. We also see increased media involvement with MDLs. Plaintiffs' counsel may release unsealed documents to plaintiff-friendly outlets or the media may follow the litigation independently. In tandem with the advertising spend and the corresponding social-media activity, the publicity attracts filings.

Certain procedural mechanisms common in MDLs also invite claims. For example, some courts use a so-called "Master Complaint" in which cases are filed with little more effort than checking a series of boxes and pushing the button. Add to that the reluctance of many courts to consider screening mechanisms such as *Lone Pine* orders or to enforce Federal Rule of Civil Procedure 11's provisions regarding sanctions for bringing baseless causes of action, and it's easy to see how the number of claims can quickly multiply.

In addition, the case management of certain MDLs can invite more and more filings. For instance, if the MDL court allows plaintiffs' counsel to park inventory without work-up so that there is little risk to plaintiffs' counsel, and/or if the MDL court is intent on inventory resolution within the MDL so that certain meritorious defenses are not timely reached, the old "build-it-and-they-will-come" adage becomes reality.

Mr. Stephens: Some academics attribute the rise in MDL claims to an increase in federal courts' rejection of motions to certify class actions. Do you see a connection between these two trends?

Ms. Gerstenhaber: There is no question that some state-court aggregation efforts have been thwarted, in-part, by defendants' ability to remove some mass filings under CAFA. As a result, there are more cases in federal court, where the more stringent application of Rule 23 has made it more difficult to pursue aggregation through class actions, especially for personal injuries. Although both developments are beneficial for defendants, they also have made MDL treatment a more attractive option for plaintiffs because aggregation often is in plaintiffs' counsels' interests, as I've noted.

But it's not just that—some companies/defendants themselves ask or join in the request for creation of MDLs. This often is driven primarily by the cost/expense/effort that goes into discovery, given the rise of email and other electronic data. E-discovery is a huge expense. One school of thought is that an MDL ensures that a defendant only incurs e-discovery costs

once. But unfortunately there are often parallel state-court actions that may not simply follow the MDL discovery rulings. Also, efficiencies collapse if companies don't successfully resist the argument that MDL treatment requires the broadest discovery possible. The procedural vehicle should not open the door more widely than the individual cases would; but that principle sometimes gets lost.

We have noticed, by the way, that although the number of requests for MDL treatment may be increasing, the percentage of requests granted has declined. This may be a sign that the JPML is aware of the potential for MDL abuse and is increasingly open to other types of case coordination.

Mr. Stephens: John, do you have any thoughts on what's been behind the increase?

John Beisner: Several factors are at work. Fundamentally, the increase results from plaintiffs' counsel astutely observing that if they create and file enough claims in an MDL proceeding, there's a likelihood that those claims won't get much individualized scrutiny. Counsel can simply "warehouse" those claims in the proceeding, never having to justify their legitimacy or expend significant energy prosecuting them. Counsel then encourage the MDL transferee court to pressure the defendant(s) to clear away the mountain of claims with a global settlement that will allow plaintiffs to collect on those claims with little or no further examination of their individual merit. This phenomenon was well described in an opinion by Chief Judge Clay Land of the US District Court for the Middle District of Georgia:

> [T]he evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action. This attitude explains why many cases are filed with little regard for the statute of limitations and with so little pre-filing preparation that counsel apparently has no idea where or how she will prove causation.

In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig., MDL Docket No. 2004, 4:08-MD-2004, slip op. at 3-4 (M.D. Ga. Sept. 7, 2016).

I agree with Charna that attorney advertising has also played a major role in the expansion of MDL cases. Once a potential mass tort is identified, plaintiffs' counsel invest enormous resources to locate potential claimants. Because of the indiscriminate trawling that occurs, many (if not most) "leads" generated by these ads involve individuals who had no exposure to the alleged risk or didn't experience any manifestation thereof. Many of these people respond primarily to the ads' references to substantial recoveries.

Also, to elaborate on third-party litigation funding, millions of dollars are now being invested in lawsuits. This money flows from hedge funds, private investors, and even "crowd funders." Once it becomes apparent that a mass-tort proceeding will

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advance, funders sometimes team with lawyers who have little or no interest in actually litigating the matter and who won't (or can't) invest their own cash in advertising. The business model such lawyers follow is to give funders part of their 33-40% contingency-fee interest in each client's claims in exchange for money to finance advertising campaigns to generate more claims (or counsel may simply keep all or part of the money as an "advance").

Under this model, counsel file the claims but devote little or no effort to litigating them; they simply wait for settlement money. In short, the goal is quantity, not quality. The lawyers want to file as many claims as possible, hoping they'll eventually be paid a large sum for their "bucket" of claims with minimal individual case scrutiny. Thus, although the problem of inadequately investigated claims pervades MDL proceedings, it appears to be particularly acute among counsel who have adopted this third-party-funding business model.

Mr. Stephens: What criteria does the JPML apply when it considers transfer of a lawsuit? Have those criteria, or the panel's application of them, contributed to the rise in case consolidation?

Mr. Beisner: Consistent with the MDL statute, the JPML seeks to create efficient MDL proceedings for claims that have common factual elements. At the end of the day, the real question is whether the claims will require substantially common discovery that would benefit from coordination.

In my view, there really hasn't been a major shift in those criteria that has contributed to the rise in case consolidation. The explanation lies more in the fact that historically, it was the *defendant* that usually moved for creation of MDL proceedings, typically at a point when it began experiencing difficulties coping with multiple, conflicting discovery demands from cases pending in multiple federal courts. In short, defendants made the motions when they needed coordination.

In recent years, however, that pattern has shifted. Now, *plaintiffs'* counsel normally make the motion, usually before any mass tort has really taken shape. Presumably, they do so in the hope that creation of an MDL proceeding will attract large numbers of claims that will facilitate the "warehousing" I mentioned previously. Put another way, plaintiffs' counsel seek creation of MDL proceedings at a stage when the coordination need is much more speculative. Such early motions pose a special challenge for the JPML, which must figure out whether it is confronting a controversy that—absent an MDL proceeding—would otherwise develop into a real mass tort warranting formal coordination. Recently, the JPML has been probing more deeply to ensure that MDL proceedings are created only where a real need exists.

Mr. Stephens: Do the criteria that MDL judges utilize when selecting a matter's lead counsel and steering committee also inspire plaintiff recruitment?

Mr. Beisner: To some extent, yes. In appointing plaintiffs' leadership, MDL judges logically prefer counsel who have enough clients involved to warrant a substantial time investment. The most aggressive claims-gatherers are often counsel who have no interest in assuming any leadership role—or in expending substantial effort on the litigation. They

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are pleased to let other counsel do most of the work, while they simply wait for the defendant to settle their "warehoused" claims.

Mr. Stephens: With regard to the selection of counsel, University of Georgia Law School Professor Elizabeth Chamblee Burch has written that MDL judges often favor repeat players, which leads to "homogeneous thinking" and creates "hierarchies of influence." Charna, are those accurate criticisms?

Ms. Gerstenhaber: They are somewhat accurate. One of the criteria for an MDL leadership position is experience in MDL leadership, so it can be hard for anyone to break into that group. And experience does matter. We absolutely benefit when dealing with counsel who have participated in major litigations. There is, however, a shift toward greater diversity in MDL leadership developing; recent reports and studies indicate that we're seeing more and more MDLs with women or minorities in key leadership roles. We certainly support that change at Novartis in terms of our own representation. Of course the profession is not where it needs to be yet, but the value of diversity is gaining strength.

Mr. Stephens: As noted in the introduction, only 2.9% of cases transferred into the MDL process are being sent back to the transferor court. What impact does an MDL court's warehousing of unresolved claims have on a corporate defendant like Novartis?

Ms. Gerstenhaber: One major reason plaintiffs' counsel seek to aggregate claims is to gain leverage for settlement. As discussed earlier, the increased role of litigation funding allows attorneys to bring large groups of claims without much risk. This discourages careful vetting of claims on their merits. Going into an MDL now, defendants know a large number of the claims could lack any legal and/or factual legitimacy.

Also, an MDL may allow aggregation without counsel necessarily having to work up huge numbers of claims. Plaintiffs may seek bellwethers, and defendants may seek resolution of certain common legal issues first, before discovery. So, again, it's possible to have a lot of claims creating risk/exposure without an ability to assess their individual merits.

As a corporate defendant, it is important to have a long-term strategy specific to the issues of a litigation, and that includes considerations of possible approaches both on how to win certain cases or issues that are heard by the MDL court, and how to make sure cases are moving toward remand and resolution in other courts, such as by multi-track discovery plans, etc.

Defendants also need to consider strategies ensuring that all their trial eggs are not in the bellwether/MDL jurisdiction basket. For example, we recently defended the *Zometa* MDL in part by refusing to waive the rights derived from the US Supreme Court's *Lexecon v. Milberg Weiss* case, which can be an effective way to get cases remanded out of an MDL and back to home jurisdictions for trial. As a result, 100% of the cases were transferred back to the transferor courts. We made that decision based upon our belief that we could be successful at trial and with case-specific summary judgment motions that the MDL court could not realistically entertain.

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"The desire to avoid remands can't justify using pressure tactics to achieve global settlements without regard to the strengths and weaknesses of the individual claims in the proceeding—particularly the high likelihood that many (if not most) of the claims should never have been filed in the first place or have only marginal value."

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Mr. Stephens: What factors discourage MDL judges from returning individual cases back to their original courts?

Mr. Beisner: I fear that in recent years, the MDL community has been prone to award "gold stars" to judges who are able to quickly conclude MDL proceedings without remanding any (or many) cases to transferor courts. To some degree, that's perfectly understandable. Who would want to be the jurist who dumps 30,000 cases back on his or her colleagues, particularly when those cases would likely be at the stage when they present the thorniest case-specific discovery issues and may be ready for trial dates in the short term?

To be sure, in some controversies, it's possible to achieve such resolutions through deft, balanced case management practices. But where that outcome isn't possible, the desire to avoid remands can't justify using pressure tactics to achieve global settlements without regard to the strengths and weaknesses of the individual claims in the proceeding—particularly the high likelihood that many (if not most) of the claims should never have been filed in the first place or have only marginal value.

Indeed, full resolution of most MDL proceedings would probably occur more quickly if the transferee courts pressured *both* sides on points that would encourage overall resolution. For example, MDL courts could demand that plaintiffs' counsel proffer hard, claim-by-claim evidence that their individual cases are each settlement-worthy and to self-winnow their claims (that is, to dismiss without payment claims they would be unwilling to take to trial or that should never have been filed in the first place.)

Mr. Stephens: Once claims are aggregated into MDL, and discovery begins, courts often find the docket is laden with meritless claims. What can MDL courts do to eliminate such claims earlier in the process?

Mr. Beisner: Let me start by saying that there is strong evidence that in most MDL proceedings, a significant percentage of the claims lack merit. For example, when parties reached a global settlement regarding Vioxx personal-injury claims several years ago, plaintiffs were required prove that they (a) had been prescribed the product and (b) had experienced the alleged risk (heart attack or stroke) before payment.

Obviously, before asserting such claims, counsel at a minimum should have confirmed that their clients could demonstrate those two points. Yet, astoundingly, close to 30% of the claimants in the pool were unable to muster such basic evidence, suggesting their claims should not have been brought in the first place.

As outlined in a 2009 WLF Monograph that Jessica Miller and I authored, transferee courts in mass-tort MDL proceedings should establish an upfront procedure that requires each claimant to provide a basic justification for his/her claim. One option in personal-injury cases is to require early production of a "notice of diagnosis"—documentation confirming that a qualified medical practitioner has seen the patient and determined that he or she is manifesting (or has manifested) the symptoms alleged in the proceeding. Another approach (not mutually exclusive) is to require each plaintiff to provide a plaintiff fact sheet—basically responses to a set of standard interrogatories and document requests.

Fortunately, plaintiff fact sheet requirements have become commonplace in mass-tort MDL proceedings. Some MDL courts are adamant about fact-sheet compliance, dismissing claimants who do not timely submit full responses. However, in other proceedings, the fundamental purposes of fact sheets are not fulfilled. Response protocols aren't enforced rigorously, and/or the required fact-sheet content doesn't really force claimants to justify their claims.

Plaintiff fact sheets should require proffering of clear evidence that before filing, counsel have subjected each claim to a thorough investigation of the relevant facts consistent with the requirements of Rule 11. In short, counsel should be required to "show their homework."

At minimum, the fact sheet should require production of medical records confirming that the claimant experienced the allegedly causative exposure alleged in the litigation (*e.g.*, proof that the claimant was prescribed the medicine at issue) and the alleged harmful effect (*e.g.*, the side effect that the medicine is alleged to cause). Those are matters that responsible counsel should have confirmed before filing a claim.

Such upfront justifications should be required because mass-tort MDL proceedings largely suspend the mechanisms courts use to ensure plaintiffs can justify their claims. Even though defendants typically are required to produce enormous amounts of discovery on factual issues generally applicable to the claims in the proceeding, MDL courts typically don't allow defendants to utilize the federal rules that permit them to test individual claims.

In many MDL proceedings, the defendant doesn't receive a complaint pled with the detail required by Rule 8. Instead, all claims are premised on a "master complaint." For that reason, the defendant typically is deprived of the opportunity to use Rule 12(b) motions to challenge the adequacy of each plaintiff's case-specific allegations. Plaintiffs normally aren't required to make the initial disclosures mandated under Rule 26.

Except in the few cases that may be designated for "bellwether" trial preparation (many of which are hand-picked by plaintiffs' counsel), the defendant isn't permitted to: depose the claimant (or other fact witnesses) under Rule 3; to pose interrogatories under Rule 32; to make document requests under Rule 34; or seek admissions under Rule 36. And because they are unable to take claimant-specific discovery, defendants also usually can't challenge individual claims with Rule 56 summary judgment motions.

Particularly in mass-tort proceedings in which individual plaintiffs' general causation theories and/or injury allegations may vary, *Lone Pine* orders may also be beneficial.

Mr. Stephens: What are *Lone Pine* orders, and how can they discourage the stockpiling of meritless claims?

Ms. Gerstenhaber: With *Lone Pine* motions, or similar requests, defendants ask the court to require plaintiffs to put up evidence that substantiates an essential element of their claims. *Lone Pine* orders are not new and there are many variations, but generally we've argued for them when dealing with claims that are inconsistent with well-established science or medicine, claims of multiple plaintiffs

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Charna Gerstenhaber

alleging identical injuries (often against many defendants), or claims that lack clear evidence of exposure. The idea, in the right case, is to streamline and narrow claims, or even eliminate them altogether. For example, in the *Zometa* MDL, many cases involved a question of product identification—generic or brand? It would have been very wasteful to pursue discovery without some threshold proof on product identification. Depending on the timing, *Lone Pine* orders can discourage the filing of junk claims and in any event will allow all parties to better assess the inventory and its possible litigation value.

Mr. Stephens: Can defendants file summary judgment motions or seek formal review of the plaintiffs' scientific evidence through evidentiary motions?

Ms. Gerstenhaber: Yes. They can and they should—in the appropriate case. Once a decision is made to litigate cases on their merits, it is crucial that corporate defendants hold plaintiffs to their burdens of proof. This includes challenges to the scientific bases underpinning the claims. But it needs to be an informed choice, not just a check-the-box rote filing. Understandably, courts deny motions that appear to be filed as a routine matter, and that tends to undermine the pursuit of meritorious *Daubert* motions.

To be successful, challenges to scientific evidence require attorneys who truly understand not only the law but also the science, and then courts must take time and be willing to judge the experts' methodology against the crucible of the scientific method—and the court must do so, notwithstanding a large aggregation of cases. The Supreme Court has asked a lot of our federal judges.

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The upside of course can be significant. Early *Daubert* successes can end an MDL or, at the least, drastically reduce the value of remaining cases. *See, e.g.*, *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 968 (D. Minn. 2009) (granting summary judgment in bifurcated proceedings after simultaneously-issued order excluded plaintiffs' sole remaining general causation expert and noting "[t]hat decision effectively ended the current litigation, because ... absent an admissible general causation opinion, Plaintiffs' claims necessarily fail"); *In re Zoloft (Sertralinehydrochloride) Prods. Liab. Litig.*, No. 12-MD-2342, 2016 WL 1320799, at *5, 11 (E.D. Pa. Apr. 5, 2016) (granting summary judgment in favor of defendant Pfizer in all MDL actions after finding plaintiffs failed to present admissible expert testimony with respect to general causation).

Mr. Stephens: If a select number of plaintiffs' claims are found to be legally or factually without merit as a result of a defendant's motion, does that create an opportunity to similarly challenge the other plaintiffs' claims?

Mr. Beisner: Yes, it should. When MDL courts conclude in one or more test cases that there is a flaw requiring dismissal (*e.g.*, inadmissible scientific evidence, preemption), they will sometimes issue an order to show cause why some or all other cases in the proceeding should not be dismissed on the same grounds. Each claimant is then allowed to step forward with counter-arguments. Often, however, there is really nothing more to say—and many more claims are properly dismissed on the basis of the ruling in the test case.

Mr. Stephens: Recently, a judge dismissed all claims in one particular MDL, *In re*

Mirena IUD Products Liability Litigation. What lessons can defendants draw from that outcome in terms of motions practice in MDLs?

Mr. Beisner: Where possible, defendants should aggressively probe for one or more flaws that pervade the claims in the MDL proceeding. Sometimes we're talking about whether plaintiffs' science case—the causation proof—can meet *Daubert* standards. In other matters, preemption arguments are the key (*e.g.*, there is "clear evidence" that the Food and Drug Administration would not have approved the labeling warnings that plaintiffs contend should have been given). And in some, arbitration clauses may bar litigation. But whatever the flaw, it's important to seek an early opportunity for the court to consider the challenge.

Mr. Stephens: Are there other examples you can point to where rather than simply pressuring the defendants to settle, the presiding judge proactively sought to weed out meritless or even fraudulent claims?

Mr. Beisner: Yes, there have actually been several recent outcomes like the *Mirena* MDL proceeding. In that litigation, the MDL court dismissed all 1,200 cases due to deficiencies in plaintiffs' science/causation evidence. Similarly, in the *Incretin Mimetics* MDL proceeding, hundreds of failure-to-warn claims were dismissed on preemption grounds. And in the *Zoloft* MDL, the court dismissed over 300 claims due to plaintiffs' inability to present scientific evidence that could pass muster under *Daubert*.

My concern is that courts are less likely to weed out meritless/fraudulent claims where claimants in the MDL proceeding assert varying liability theories, which requires sorting claims into various categories. And a similar problem exists where the flaws must be assessed more on a case-by-case basis, such as where individual claims are fraudulent (*e.g.*, the claimant never used the product at issue) or poorly investigated (*e.g.*, there is clear evidence of an alternative cause of the alleged injury). To be sure, eliminating dubious claims in that setting is a more daunting task for the MDL court. But that claims-winnowing process could be facilitated through use of the upfront claims justification methods described previously. As Chief Judge Land noted in the *Mentor Corp.* ruling quoted previously:

> MDL consolidation for product liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise. ... [T]ransferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly. The undersigned has struggled with the best way to accomplish that. Hopefully, the robust use of Rule 11 will help.

Mentor Corp., slip op. at 4-5.

Further, where claims require highly individualized legitimacy assessments or advance widely varying liability theories, MDL courts should be more willing to remand cases to allow transferor courts to deal with these case-specific problems. Once an MDL court has completed its common discovery tasks, there's much less reason for it to assume the burden of addressing individualized claim challenges.

"Where claims require highly individualized legitimacy assessments or advance widely varying liability theories, MDL courts should be more willing to remand cases to allow transferor courts to deal with these case-specific problems."

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"It is important for MDL judges to understand not only the benefits but also the negative consequences of aggregation. This could help to level the playing field so that aggregation is not a weapon."

Charna Gerstenhaber

Mr. Stephens: What lessons can be derived from the *Zometa* MDL in which you were involved?

Ms. Gerstenhaber: The primary lesson is that the litigation plan must fit the litigation that is presented. We chose to defend on the merits because we believed strongly in the extraordinary value of the medicine and the strength of our defenses, even though we recognized that the winning defenses were case-specific and so the litigation would take years to conclude, which it did.

We had a highly experienced team of defense counsel leading the MDL and national defense. We also had an aggressive discovery plan that included the work-up of hundreds of cases, not just bellwethers, which provided a better sense of the inventory.

We filed certain motions across the inventory, such as *Lone Pine*-style motions on product identification and Rule 25-style motions forcing compliance on certain procedural party-substitution issues important to the litigation.

We used targeted motion practice in and out of the MDL to resolve individual cases. For example, we prevailed on more than 100 summary judgment motions or contested motions to dismiss. We also secured more than 156 expert-witness exclusions, either in whole or in part, under *Daubert*.

We did not waive our *Lexecon* rights, ensuring that we would have all trials held outside the MDL. We had teams of trial attorneys ready to take cases to trial once remanded. We also took cases to trial in a parallel state court mass-tort docket.

Mr. Stephens: The Manual for Complex Litigation, which nominally guides judges' management of MDLs, hasn't been updated since 2004. Would an update benefit MDL parties and the judges who oversee them?

Mr. Beisner: Yes, an update of the Manual (which I understand is in progress) would be very beneficial. In particular, the discovery portions of the Manual should more fully reflect current practice regarding e-discovery, including the import of the recent Federal Rules amendments.

Mr. Stephens: In addition to utilizing some of the tools that you mentioned earlier, what else can MDL judges do to achieve the goals that Congress intended for multidistrict litigation? We'd welcome thoughts from you both on that.

Ms. Gerstenhaber: It is important for MDL judges to understand not only the benefits but also the negative consequences of aggregation. This could help to level the playing field so that aggregation is not a weapon. A few other concluding thoughts:

- Evaluating the inventory should require both sides to have equal roles in picking cases for work-up (or trial, as appropriate). Plaintiffs' tactic of immediately dismissing defense picks should result in another defense pick, not leaving only plaintiffs' picks in play.
- Courts should meaningfully limit discovery based on the core case issues, and efficiently manage discovery with cost-sharing.
- Courts should facilitate coordination without abandoning tools that require some level of case screening by plaintiffs' counsel.

- Courts should understand that settlement (in the MDL or later) is not always the appropriate answer in litigation, and aggregation doesn't trump that point.

- Finally, courts should recognize that remanding cases out of the MDL in some instances can be the best way to resolve them.

Mr. Beisner: We need to get back to the basics in MDL proceedings. As the Supreme Court observed in *Lexecon,* MDL proceedings should rigorously adhere to the congressional intent that MDL proceedings are intended to deal solely with pretrial matters—getting discovery completed and resolving pre-trial motions. If the parties decide to settle while the MDL proceeding is in process, that's fine. But settlement shouldn't be the MDL court's primary goal. And there's no indication that Congress intended to authorize an array of ad hoc procedures in MDL proceedings that effectively ignore the Federal Rules of Civil Procedure.

It's gratifying that in some MDL proceedings, courts have been more focused on identifying and resolving issues pertinent to many (if not all of) the constituent cases—preemption questions, science/*Daubert* issues, statute of limitations questions. That approach warrants applause and should be emulated in more MDL proceedings.

And rather than (or at least before) channeling the parties' resources into bellwether trials, it would be beneficial if MDL courts spent substantially more time testing the viability of individual claims—to separate the wheat from the chaff. As noted previously, there's a desperate need, particularly in the larger mass-tort MDL proceedings, to winnow the claims inventory down to those that are actually trialworthy.

I applaud Charna's point that defendants should remember that they are under no obligation to participate in bellwether trials and that in some MDL proceedings, it would be best for the defendant to "just say no" and to allow individual claims to be tested on remand with the rigor normally afforded to non-MDL claims. And where a defendant concludes that one or more bellwether trials might be beneficial in an MDL proceeding, it has the right to waive *Lexecon* only if its terms for a bellwether trial are met—for example, if the specific case proposed for trial is acceptable and is limited to a single plaintiff's claims.

Finally, many of the abuses and excesses regularly observed in MDL proceedings are largely a product of their seemingly boundless fee-generating potential. To be sure, the plaintiffs' counsel who take lead roles in litigating mass-tort matters (that is, those who legitimately invest substantial time and resources) are entitled to reasonable compensation for any successes achieved for their clients.

But particularly given the efficiencies that MDL proceedings are supposed to (and do) foster, how can one justify payment of the standard 33-40% contingency on each individual claim? That's a particularly troubling question for those counsel who operate under the four-step MDL business model discussed previously: (1) advertise for claims (possibly with third-party litigation funding); (2) file claims; (3) wait (avoiding any real involvement in litigating claims) and then (4) accept settlement money. What is the basis for imposing a 33-40% fee on clients when you never set foot in a courtroom on their behalf and when you assumed little or no financial risk?

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Some MDL courts have taken the relatively bold step of capping such contingency-fee payments, and those moves should be applauded. Such reductions, however, should become standard practice and should more directly target counsel who embrace the "no effort" business model.

Mr. Stephens: Charna, John, thank you for participating in this discussion.

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