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18-CV-BB

November 21, 2018

Ms. Rebecca A. Womeldorf
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Rules Amendments Regarding MDL Proceedings

Dear Ms. Womeldorf:

One proposal proffered to the MDL Subcommittee of the Advisory Committee on Civil Rules is a new Fed. R. Civ. P. 23.3 that would authorize an immediate interlocutory appeal from any order denying or granting a motion that, if successful, would be dispositive of a substantial number of claims in a mass tort MDL proceeding. (*See* Lawyers for Civil Justice submission to Advisory Committee on Civil Rules (dated Sept. 14, 2018), at 4-5;[1] Agenda Book, Advisory Committee on Civil Rules ("Agenda Book"), Nov. 1, 2018 meeting, at 149-53.) As examples of the orders to which the proposed rule would apply, the proponents have pointed to rulings on summary judgment motions seeking dismissal of large numbers of actions on preemption grounds, for time-bar reasons, or for lack of admissible general causation evidence. As noted in the MDL Committee's recent report to the full Committee, some commenters have suggested that such a rule is unnecessary because 28 U.S.C. § 1292(b) provides an adequate avenue for interlocutory appeals. (Agenda Book at 150.) In response, the proponents have "urged that § 1292(b) certification is not granted sufficiently frequently in MDL proceedings." (*Id.* at 150.) According to the Subcommittee report, however, "firm data" regarding that assertion "are as yet not available." (*Id.*) This letter seeks to fill that void.

Working with Christopher Campbell and other personnel at the DLA Piper law firm, we have reviewed the dockets of 127 mass tort MDL proceedings to assess: (a) the frequency of section 1292(b) certification motions seeking appellate review of questions that, if ultimately resolved in the proponent's favor, would be dispositive of large numbers of claims in the proceeding; and (b) the frequency with which such

[1] The text of the proposed Rule 23.3 set forth in the LCJ submission is not expressly limited to mass tort MDL proceedings, but the context indicates that parameter was intended.

motions are granted. In short, we searched for the types of situations contemplated by the proposed Rule 23.3. Our research has yielded two basic findings:

- ***First***, motions seeking interlocutory appellate review of questions that may have broad dispositive effects on mass tort MDL cases appear to be relatively rare. Indeed, in the 127 dockets reviewed, we found only 15 instances in which such section 1292(b) certification requests were made. (As detailed below, 41 other section 1292(b) certification motions were located, but most did not satisfy the "broadly dispositive" criterion or were not related to mass tort claims.)

- ***Second***, when defendants make such motions in mass tort MDL proceedings, they typically are not granted. In the dockets reviewed, we found ***no*** instance in which a defendant's section 1292(b) request of the sort contemplated by proposed Rule 23.3 was approved. The only relevant section 1292(b) appeal certification we located was the grant of a ***plaintiffs'*** request for appellate review of an order concluding that large numbers of mass tort claims against certain defendants in an MDL proceeding were preempted by federal regulations. (*See* p. 7, *infra.*)

The methodology used in conducting our docket reviews and the findings of that research (including details on the section 1292(b) requests that we located) are set forth below.

I. METHODOLOGY

As noted above, we examined 127 mass tort MDL proceeding dockets to identify all section 1292(b) certification requests. More specifically, we reviewed the full PACER dockets of all 60 mass tort MDL proceedings pending as of mid-July 2018 (as listed on Exhibit 1)[2] and the 67 dockets of the mass tort MDL proceedings that were formally closed (according to postings on the MDL Panel website) during calendar years 2008 through 2018. (The 2018 review was limited to proceedings closed during January-August.) For purposes of this exercise, "mass tort MDL proceeding" was defined as any MDL proceeding in which the MDL Panel's initial transfer order noted that personal injury claims would be a substantial component.[3]

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[2] Some of these MDL proceedings were created relatively recently, so section 1292(b) certification requests in those dockets are unlikely. Nevertheless, for completeness, we checked all currently pending dockets.

[3] Defined in this manner, mass tort MDL proceedings sometimes include non-personal injury claims related to the general subject matter of the proceeding, particularly actions pursuing alleged

To locate section 1292(b) certification requests, we searched each MDL proceeding PACER docket using several search terms: "1292," "interlocutory," "permission," "leave," "certif," and "appealability."[4] When a request/motion was located through this query, we extracted from the PACER dockets the related briefing and ensuing orders to confirm that the motion/request did in fact seek a section 1292(b) certification and to assess whether the motion/request sought review of the sort of broad, dispositive questions contemplated by the interlocutory review rule proposal.

We concluded that most of the 56 section 1292(b) motions located in the searched dockets were irrelevant. Some presented issues unique to an individual case (or relevant only to a small number of cases). In other instances, the issues were not dispositive (e.g., questions regarding subject matter jurisdiction). In a few instances, the decision whether to include in our analysis a particular section 1292(b) motion was a "judgment call," often requiring examination of additional background information from the record. In any event, in the discussion below, we have accounted for all section 1292(b) certification requests in each selected mass tort MDL proceeding, explaining in footnotes our reasons for any exclusions.

In identifying the rulings discussed below, we do not mean to suggest that any were wrongly decided under prevailing section 1292(b) certification standards. Our sole purpose was to respond to the Subcommittee's expression of interest in data about the frequency and outcome of section 1292(b) motions on broadly applicable, potentially dispositive issues in mass tort MDL proceedings.

II. DOCKET REVIEW RESULTS

The results of our MDL proceeding docket reviews were as follows:

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economic loss damages arising out of transactions. When we encountered section 1292(b) certification requests that did not pertain to mass tort claims, we excluded them from our analysis.

[4] We acknowledge several limitations inherent in this search protocol. First, PACER is not an ideal tool for research of this sort, as searches are limited to the filing descriptions entered on the docket, which are not standardized. Further, section 1292(b) certifications can be made or proposed without formal motion, although we believe the PACER search terms likely would have captured evidence of such activity somewhere on the docket. Another potential limitation is that occasionally, motion activity may escape an MDL proceeding's master docket (e.g., filings are listed only on an individual case docket). Finally, as indicated below, there were a few instances in which certain materials were not available on PACER because of the docket's age.

A. Current Mass Tort MDL Proceedings

In the dockets of the 60 currently pending mass tort MDL proceedings (as of July 2018, as listed in Exhibit 1), we located three examples of efforts to obtain section 1292(b) certifications to pursue appeals of the sort contemplated by the proposed Rule 23.3:

- In MDL No. 1657 (*In re Vioxx Marketing, Sales Practices, and Products Liability Litigation*), the defendant moved for section 1292(b) certification of an order denying a preemption-based summary judgment motion that, if granted, would have been preclusive of more than 10,000 claims then pending in this MDL proceeding. (Docket No. 11658.)[5] The certification motion was fully briefed and argued (Docket No. 12003), but while still pending, it was mooted by a global settlement.[6]

- In MDL No. 2545 (*In re Testosterone Replacement Therapy Products Liability Litigation*), a defendant sought section 1292(b) review of an order denying a preemption-based motion for summary judgment as to all failure-to-warn claims it was facing. In its moving papers, the defendant asserted that if successful, the preemption arguments would have been dispositive of claims against it in more than 4,200 actions pending in the proceeding. (Docket Nos. 1974, 2139.)[7]

- In MDL No. 2592 (*In re Xarelto Products Liability Litigation*), defendants moved for section 1292(b) certification of an order denying a preemption-

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[5] Although the summary judgment motion was directed at two individual bellwether cases, the section 1292(b) certification motion stressed that the requested preemption ruling ultimately would have foreclosed most other claims in the MDL proceeding.

[6] In this MDL proceeding, the district court also denied a section 1292(b) certification motion with respect to a post-settlement attorneys' fee issue. (Docket No. 23870.) Since the issue presented was not dispositive of any claim, we have not included that motion in our analysis. The district court also denied a defendant's section 1292(b) certification request regarding an order permitting substitution of parties in an individual case. Because the question presented pertained only to a single case, we did not include it in our analysis.

[7] The question whether proposed Rule 23.3 would apply to this motion may be debatable as defendant's briefing suggests that the challenged failure-to-warn claims were the crux of plaintiffs' cases. At other junctures, however, the defendant suggests that some aspects of plaintiffs' cases may have remained for trial. The court in this proceeding also denied another the section 1292 motion of a different defendant seeking appellate review of the partial denial of a motion to dismiss. (Docket Nos. 176, 180, 182.) Since that motion was made in a non-personal injury RICO action, it was not included in our analysis.

based summary judgment motion that would have precluded most (if not all) of the more than 23,000 claims in this MDL proceeding. (Document Nos. The motion was fully briefed, but it was later withdrawn without prejudice. (Docket No. 10125.)

- In MDL No. 2641 (*In re Bard IVC Filters Products Liability Litigation*), the district court denied defendant's motion for section 1292(b) certification of an order denying a preemption-based dismissal motion. (Docket No. 9415.) In seeking certification, defendant argued that if the proposed appeal were successful, "it could completely terminate the litigation of the 3,000 personal injury cases remaining in this MDL." (Docket No. 9244.)[8]

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[8] The bases for excluding from our analysis the section 1292(b) motions from several other pending mass tort MDL proceedings should be noted:

In MDL No. 1431 (*In re Baycol Products Liability Litigation*), the district court granted a plaintiffs' motion for section 1292(b) certification of an order excluding several plaintiffs' experts. (Docket Nos. 4229, 4230, 4238.) Since we observed no indication that exclusion of that expert evidence would have foreclosed any claims, we did not include this motion in our analysis. The court in this proceeding also denied a defendant's request for a section 1292(b) certification, but from the limited information available on PACER, it does not appear relevant to our analysis and therefore has been excluded.

In MDL No. 1871 (*In re Avandia Marketing, Sales Practices and Products Liability Litigation*), the court granted defendant's motion for section 1292(b) certification of an order denying a motion to dismiss a RICO action alleging economic losses brought on behalf of union health benefit funds. (Docket Nos. 3669, 3669-1, 3865.) Because this activity was unrelated to mass tort (personal injury) claims, we have not included it in our analysis. For the same reason, we have also excluded the district court's granting of a plaintiff's motion for section 1292(b) certification of an order denying a jurisdictional remand motion in a non-personal injury economic loss action brought by a California county. (Docket Nos. 4569, 5084, 5085.)

In MDL No. 1964 (*In re NuvaRing Products Liability Litigation*), the district court denied a defense motion for section 1292(b) certification of an order rejecting a motion to dismiss the "master complaint." In ruling on the motion, the court observed that the "master complaint" was intended to be only an "administrative tool," not a "substantive pleading" subject to Rule 12 motion practice. The court mooted the issue by striking the "master complaint." (Docket Nos. 236, 237, 368.) We therefore have not included this motion in our analysis.

In MDL No. 2151 (*In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*), the district court granted defendant's motion for section 1292(b) certification of an order denying a standing-based motion to dismiss economic loss class action claims. (Docket Nos. 1568, 1596, 1622.) The court also denied a plaintiffs' motion for certification of a choice-of-law issue addressed by the same order. (Docket No. 1680.) At another juncture, the court also denied a plaintiffs' motion for section 1292(b) certification of an order holding that under Florida and New York law, a manifested product defect is a prerequisite to an economic loss action. (Docket Nos. 2563, 2726.) Because none of this activity concerned the mass tort (personal injury) aspects of this MDL proceeding, we have not included these items in our analysis.

B. Mass Tort MDL Proceedings Closed in 2018

In the five mass tort MDL proceedings closed during the January-August 2018 time period, we located no motions seeking appeals of the sort contemplated by the proposed Rule 23.3. Those MDL proceedings were: MDL No. 1789 (*In re Fosamax Products Liability Litigation*),[9] MDL No. 2004 (*In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation*), MDL No. 2299 (*In re Actos (Pioglitazone) Products Liability Litigation*), MDL No. 2342 (*In re Zoloft (Sertaline Hydrochloride) Products Liability Litigation*), and MDL No. 2497 (*In re Air Crash at San Francisco, California on July 6, 2013*).

C. Mass Tort MDL Proceedings Closed in 2017

In the six mass tort MDL proceedings closed during 2017, no appeals of the sort contemplated by the proposed Rule 23.3 were found. Those MDL proceedings were: MDL No. 1842 (*In re Kugel Mesh Hernia Patch Products Liability Litigation*), MDL No. 1943 (*In re Levaquin Products Liability Litigation*), MDL No. 2395 (*In re*

In MDL No. 2158 (*In re Zimmer Durom Hip Cup Products Liability Litigation*), several plaintiffs sought section 1292(b) certification of an order specifying that all 48 cases in the proceeding would be tried in the transferee forum, even though *Lexecon* restrictions allegedly had not been waived. (Docket Nos. 793, 816.) There is no indication on the docket that the district court ruled on plaintiffs' motion. We excluded this motion in our analysis because it did not involve a dispositive issue.

Three section 1292(b) motions (all made by defendants) were denied in MDL No. 2419 (*In re New England Compounding Pharmacy, Inc. Products Liability Litigation*). (Docket Nos. 196, 197, 212, 213, 340, 2356, 2357, 2416, 2417, 2457, 2457-1, 2584.). However, since all pertained to non-dispositive issues and apparently did not implicate large numbers of claims, we have not included them in our analysis.

In MDL No. 2428 (*In re Fresenius Granuflow/Naturalyte Dialysate Products Liability Litigation*), the defendant made an "anticipatory" request that the court include a section 1292 certification in an expected ruling remanding a state attorney general's deceptive trade practices case to state court. The court declined to include the requested appeal certification in its remand order. (Docket Nos. 55, 846.) We excluded this motion from our analysis because it was not dispositive, did not implicate multiple cases, and did not involve personal injury claims.

[9] In this MDL proceeding, the trial court granted a defendant's motion for section 1292(b) certification of a post-trial motion addressing several issues of Florida design defect law. (Docket Nos. 309, 1031.) In granting certification, the trial court noted that besides advancing resolution of the particular case in which the questions arose (which was headed for re-trial for other reasons), it might provide guidance regarding 100 or more other cases in the MDL proceeding governed by Florida law. However, because these issues did not appear potentially dispositive of any actions, we did not include this motion in our analysis.

Air Crash at Georgetown, Guyana on July 30, 2011),[10] MDL No. 2502 (*In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation*), MDL No. 2511 (*In re Neomedic Pelvic Repair System Products Liability Litigation*), and MDL No. 2654 (*In re Amtrak Train Derailment in Philadelphia, Pennsylvania on May 12, 2005*).

D. Mass Tort MDL Proceedings Closed in 2016

In the eight mass tort MDL proceedings closed in 2016, we identified one proposed appeal of the sort contemplated by the proposed Rule 23.3:

- In MDL No. 2226 (*In re Darvocet, Darvon, and Propoxyphene Products Liability Litigation*), the trial court granted a motion to dismiss claims against certain generic drug manufacturers on preemption grounds. The court denied plaintiffs' request for section 1292(b) certification of that dismissal ruling, even though reversal on appeal would have restored the claims of hundreds of claims against the generic manufacturer defendants.[11] (Docket Nos. 1597, 1597-1, 1750.)

The other seven mass tort MDL proceedings closed in 2016 were: MDL No. 1203 (*In re Diet Drugs (Phentermine/ Fenfluramine/Dexfenfluramine) Products Liability Litigation*), MDL No. 1953 (*In re Heparin Products Liability Litigation*), MDL No. 2051 (*In re Denture Cream Products Liability Litigation*),[12] MDL No. 2404 (*In re Nexium (Esomeprazole) Products Liability Litigation*), MDL No. 2434 (*In re Mirena IUD Products Liability Litigation*), MDL No. 2454 (*In re Franck's Lab, Inc., Products Liability Litigation*), and MDL No. 2652 (*In re Ethicon, Inc., Power Morcellator Products Liability Litigation*).

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[10] In this MDL proceeding, the district court denied a motion for section 1292(b) certification of a subject matter jurisdiction ruling related to three actions. (Docket No. 50, 53.) Because the underlying issue was not dispositive and because the order at issue pertained to only a few cases, we did not include it in our analysis.

[11] Although the granted motion to dismiss was explicitly directed at 34 lawsuits, plaintiffs' section 1292(b) certification motion states an appeal ultimately would have affected approximately 200 other cases. (Docket No. 1597-1.) We have therefore included this ruling in our analysis.

The district court in this MDL proceeding granted defendants' request for section 1292(b) certification of an order addressing a subject matter jurisdiction issue related to six cases. (Docket Nos. 3064, 3064-1, 3075.) Because the underlying issue was not potentially dispositive of any claims and was potentially relevant to only a few cases, we have excluded it.

[12] We found in this docket a plaintiffs' section 1292(b) certification request that was denied by the district court. (Docket Nos. 1626, 1667.) We have not included it in our analysis since it involved a non-dispositive issue – a subject matter jurisdiction challenge – involving only a single case.

E. Mass Tort MDL Proceedings Closed in 2015

In the eight mass tort MDL proceedings closed during 2015, we found one request for a section 1292(b) appeal of the sort envisioned by the proposed Rule 23.3:

- In MDL No. 1629 (*In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*), the trial court denied defendant Teva's request for section 1292(b) certification of an order rejecting a preemption motion that would have been dispositive of the hundreds of claims it faced in the MDL proceeding. (Docket No. 2245.)

The other seven mass tort MDLs closed in 2015 were: MDL No. 1507 (*In re Prempro Products Liability Litigation*), MDL No. 1626 (*In re Accutane (Isotretinoin) Products Liability Litigation*), MDL No. 1742 (*In re Ortho Evra Products Liability Litigation*), MDL No. 1909 (*In re Gadolinium Contrast Dyes Products Liability Litigation*),[13] MDL No. 1928 (*In re Trasylol Products Liability Litigation*),[14] MDL No. 2039 (*In re Chantix (Varenicline) Products Liability Litigation*), and MDL No. 2458 (*In re Effexor (Venlafaxine Hydrochloride) Products Liability Litigation*).

F. Mass Tort MDL Proceedings Closed in 2014

In the two mass tort MDL proceedings closed during 2014 (MDL No. 1760 (*In re Aredia and Zometa Products Liability Litigation*) and MDL No. 2372 (*In re Watson Fentanyl Patch Products Liability Litigation*)), no requests for appeals of the sort contemplated by the proposed Rule 23.3 were spotted.

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[13] The district court in this proceeding denied a defendant's request for section 1292(b) certification of an order excluding the opinions of certain experts. (Docket Nos. 796, 796-1, 823.) Since the appellate questions presented did not appear to be dispositive of any claims, we excluded that ruling from our analysis.

[14] In this MDL proceeding, the district court denied plaintiffs' request for section 1292(b) certification of a ruling excluding one of plaintiffs' expert witnesses. (Docket Nos. 5792, 6274.) The court also denied a plaintiffs' motion to certify a related ruling excluding at trial all evidence, testimony and argument regarding certain issues. (Docket Nos. 5914, 6278.) We have not included those rulings in our analysis because they do not appear to concern matters potentially dispositive of any clams.

G. Mass Tort MDL Proceedings Closed in 2013

In the eleven mass tort MDLs closed in 2013, we located three section 1292(b) appeal efforts of the sort envisioned by the proposed Rule 23.3:

- In MDL No. 1535 (*In re Welding Fume Products Liability Litigation*), the court denied a section 1292(b) motion seeking appellate review of an order denying a motion to dismiss all claims against certain defendants, allowing thousands of claims against those defendants to continue. (Docket Nos. 1036, 1088.)

- In MDL No. 1873 (*In re FEMA Trailer Formaldehyde Products Liability Litigation*), the district court granted plaintiffs' motion for section 1292(b) certification of an order finding that claims against certain defendants in the proceeding were preempted by federal agency regulations and therefore subject to dismissal. (Docket Nos. 1813, 1813-1, 2122.) From what we can determine in the available record, it appears the dispositive question presented by the proposed appeal was broadly applicable to the claims against certain defendants in the MDL proceeding.

- In that same MDL proceeding, the district court denied a defendant's motion for section 1292(b) certification of what appears to be the rejection of a dispositive government contractor defense. (Docket Nos. 6082, 6082-2, 13163.) Although the motion was explicitly directed only to two actions (and the district court noted that as a basis for denying certification), other arguments and information in the docket indicated that success on the questions presented would have been dispositive of many other actions against the moving defendant and other government contractor defendants.[15]

The nine mass tort MDL proceedings closed in 2013 in which we did not locate relevant section 1292(b) motions were: MDL No. 986 (*In re "Factor VII or IX Concentrate Blood Products" Products Liability Litigation*),[16] MDL No. 1355 (*In*

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[15] In this proceeding, the district court denied two other defendant motions for section 1292(b) certifications (Docket Nos. 749, 749-1, 900, 8566, 8566-2, 11209) and granted one other motion by plaintiffs (Docket Nos. 15976, 15976-1, 17325). However, since those requests concerned orders that apparently concerned non-dispositive questions and/or were relevant only to a small number of cases in the proceeding, we did not include them in our analysis.

[16] We found in this MDL proceeding a decision denying section 1292(b) certification of an order overruling objections to the designation of certain expert witnesses. (Docket No. 709.) From what we could determine from the available portions of the record, the issues presented would not have been dispositive of any claims, and we have therefore not included this motion in our analysis.

re Propulsid Products Liability Litigation), MDL No. 1699 (*In re Bextra and Celebrex Marketing, Sales Practices, and Products Liability Litigation*), MDL No. 1736 (*In re Celexa and Lexapro Products Liability Litigation*), MDL No. 1769 (*In re Seroquel Products Liability Litigation*), MDL No. 1804 (*In re Stand N' Seal Products Liability Litigation*), MDL No. 2016 (*In re Yamaha Motor Corp. Rhino ATV Products Liability Litigation*), MDL No. 2053 (*In re Helicopter Crash Near Weaverville, California on August 5, 2008*),[17] and MDL No. 2066 (*In re Oral Sodium Phosphate Solution-Based Products Liability Litigation*).

H. Mass Tort MDL Proceedings Closed in 2012

Among the eight mass tort MDL proceedings closed during 2012, one appeal of the sort described by the proposed Rule 23.3 was located:

- In MDL No. 1905 (*In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation*), the district court denied plaintiffs' motion for section 1292(b) certification of an order dismissing Plaintiffs' Master Consolidated Complaint on preemption grounds. That order apparently did not have the effect of actually dismissing all of the hundreds of individual personal injury claims in this MDL proceeding.

The other seven mass tort MDL proceedings closed during 2012 were: MDL No. 1596 (*In re Zyprexa Products Liability Litigation*),[18] MDL No. 1708 (*In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*),[19] MDL No. 1724 (*In re Viagra Products Liability Litigation*), MDL No. 1785 (*In re Bausch & Lomb Inc. Contact Lens Solution Products Liability Litigation*), MDL No. 1959 (*In re Panacryl Sutures Products Liability Litigation*), MDL No. 1968 (*In re Digitek Products Liability Litigation*), MDL No. 2120 (*In re Pamidronate Products Liability Litigation*), and MDL No. 2144 (*In re Air Crash Over the Mid-Atlantic on June 1, 2009*).

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[17] The district court in this proceeding denied a request by certain plaintiffs for section 1292(b) certification of a ruling on a state law damages cap issue. (Document No. 241.) Since this issue was not dispositive, this decision was excluded from our analysis.

[18] In this MDL proceeding, the district court granted defendant's section 1292(b) motion to certify for appeal the denial of a summary judgment motion. However, since that motion was brought regarding civil RICO, fraud, and other economic loss claims (not mass tort (personal injury) claims), we have not included it in our analysis.

[19] The district court in this MDL proceeding denied plaintiffs' motion for section 1292(b) certification of an order dismissing without prejudice the third-party payor economic loss claims of several union health fund plaintiffs. (Docket Nos. 2088, 2200, 2301, 2428, 2497.) Since no mass tort claims were involved in this motion, we have not included it in our analysis.

I. Mass Tort MDL Proceedings Closed in 2011

Section 1292(b) appeals of the sort contemplated by the proposed Rule 23.3 were sought in all three of the mass tort MDL proceedings closed in 2011:

- In MDL No. 1396 (*In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*), the trial court denied defendant's request for section 1292(b) certification of an order denying a preemption-based motion for summary judgment applicable to all personal injury claims in the proceeding. (Docket No. 323.)

- In MDL No. 1748 (*In re Profiler Products Liability Litigation*), the defendant sought review of the denial of a statute of limitations motion that apparently would have foreclosed a substantial number of actions, and the motion was denied. (Docket Nos. 117, 118, 131.)[20]

- In MDL No. 2096 (*In re Zicam Cold Remedy Marketing, Sales Practices, and Products Liability Litigation*), the court denied defendant's motion seeking review of the court's ruling on generic causation issues. In denying the certification motion, the district court acknowledged the impact of a potential appeal: "A determination that plaintiffs' failure to show the toxic dose entitles defendants to summary judgment on general causation could lead to the dismissal of the remaining cases in this MDL." (Docket Nos. 1473, 1497.)[21]

J. Mass Tort MDL Proceedings Closed in 2010

In the six mass tort MDL proceedings closed in 2010, we located no section 1292(b) certification motions pursuing an appeal of the sort described by the proposed Rule 23.3. The six MDL proceedings were: MDL No. 381 (*In re "Agent*

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[20] We have included this motion in our analysis, but it is a close call due to some uncertainty about the breadth of the limitations motion's effect. The original motion appears to have been directed at the claims of only four plaintiffs. However, comments in one brief assert that the limitations question was potentially dispositive of 28 plaintiffs' claims, and elsewhere, there are suggestions that the number was higher.

[21] The inclusion of this motion is another close call. Apparently, this dismissal motion activity began while numerous cases were pending in the MDL proceeding. However, by the time the court ruled on the section 1292 certification issue following completion of a settlement process, only 14 remained.

Orange" Products Liability Litigation),[22] MDL No. 1014 (*In re Orthopedic Bone Screw Products Liability Litigation*),[23] MDL No. 1387 (*In re ProteGen Sling and Vesica System Products Liability Litigation*), MDL No. 1649 (*In re Helicopter Crash Near Wendle Creek, British Columbia on August 8, 2002*), MDL No. 1938 (*In re Vytorin/Zetia Marketing, Sales Practices and Products Liability Litigation*), and MDL No. 1985 (*In re Total Body Formula Products Liability Litigation*).

K. Mass Tort MDL Proceedings Closed in 2009

In the six mass tort MDL proceedings closed in 2009, we located two appeal efforts of the type envisioned by Rule 23.3:

- In MDL No. 1407 (*In re PPA Products Liability Litigation*), defendants sought appellate review of the district court's denial of *Daubert* challenges seeking exclusion of proposed general causation evidence that would have been preclusive of the claims of many plaintiffs in the proceeding, particularly those alleging ischemic stroke or aneurysmal subarachnoid hemorrhages. The court denied the motion. (Docket Nos. 1897, 1909.)

- In MDL No. 1726 (*In re Medtronic, Inc. Implantable Defibrillators Products Liability Litigation*), defendant sought review of the denial of a broadly applicable preemption motion that, if successful, apparently would have precluded all of the numerous claims in the proceeding. The district court denied the motion. (Docket Nos. 310, 371.)

The other four mass tort MDL proceedings closed in 2009 were: MDL No. 1348 (*In re Rezulin Products Liability Litigation*),[24] MDL No. 1401 (*In re Sulzer Orthopedics Inc. Hip Prosthesis and Knee Prosthesis Products Liability Litigation*),

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[22] The docket indicates that a section 1292(b) certification request was denied in this MDL proceeding. But from what we can determine, it appears to have concerned a subject matter jurisdiction question and is therefore outside the scope of our analysis.

[23] Three section 1292(b) certification requests were denied in this MDL proceeding (Docket No. 150967), but based on what is available from this docket, it does not appear any were relevant to our analysis.

[24] Six section 1292(b) certification motions were made by plaintiffs in this MDL proceeding, but none appeared relevant to this analysis. We note that we had very limited access to the motion papers and orders in this docket, requiring us to rely more heavily on docket entries.

MDL No. 1574 (*In re Paxil Products Liability Litigation*), and MDL No. 1598 (*In re Ephedra Products Liability Litigation*).[25]

L. Mass Tort MDL Proceedings Closed in 2008

In 2008, four mass tort MDL proceedings were closed: MDL No. 1428 (*In re Ski Train Fire in Kaprun, Austria on November 13, 2000*),[26] MDL No. 1481 (*In re Meridia Products Liability Litigation*), MDL No. 1844 (*In re Air Crash Near Peixoto de Azeveda, Brazil on September 29, 2006*), and MDL No. 2008 (*In re Air Crash Near Kirkville, Missouri on October 19, 2004*). We did not locate in any of those proceedings section 1292(b) motions pursuing the sort of interlocutory appeal envisioned by the proposed Rule 23.3.

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In sum, the foregoing data appear to indicate that in mass tort MDL proceedings, section 1292(b) does not in practice afford a viable path for securing appellate review of the types of broad, potentially dispositive questions contemplated by the proposed Rule 23.3. Further, the data suggest that types of appeals envisioned by the proposed rule arise relatively infrequently in mass tort MDL proceedings, such that the adoption of Rule 23.3 would not add substantial new burdens to our federal courts of appeals.

We appreciate the opportunity to submit these data to the Subcommittee. If there are any questions or interest in reviewing any of the materials we assembled, please let us know.

Sincerely,

John H. Beisner

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[25] We found two section 1292(b) motions in this docket. Both concerned related bankruptcy proceedings, and we therefore deemed them irrelevant to our analysis.

[26] The PACER docket entries indicate a section 1292(b) motion was made in this case, but it does not appear to have been of the sort contemplated by the proposed Rule. We were not able to obtain on-line copies of the relevant papers, so we have been unable to confirm.

EXHIBIT 1

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
875	IN RE: Asbestos Products Liability Litigation (No. VI)	E.D. Pa. Robreno	Multiple defendants	Asbestos	30 (192,094)
1431	IN RE: Baycol Products Liability Litigation	D. Minn. Davis	Bayer	Baycol	2 (9,107)
1657	IN RE: Vioxx Marketing, Sales Practices and Products Liability Litigation	E.D. La. Fallon	Merck	Vioxx	1 (10,320)
1836	IN RE: Mirapex Products Liability Litigation	D. Minn. Davis	Boehringer Ingelheim	Mirapex	1 (441)
1871	IN RE: Avandia Marketing, Sales Practices and Products Liability Litigation	E.D. Pa. Rufe	GSK	Avandia	1 (5,299)
1964	IN RE: NuvaRing Products Liability Litigation	E.D. Mo. Sipple	Merck	NuvaRing	86 (1,991)
2100	IN RE: Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation	S.D. Ill. Herndon	Bayer	Yasmin & Yaz	56 (11,680)
2151	IN RE: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation	C.D. Cal. Selna	Toyota	Motor vehicles	21 (456)
2158	IN RE: Zimmer Durom Hip Cup Products Liability Litigation	D.N.J. Wigenton	Zimmer	Durom hip cup	260 (728)
2187	IN RE: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	C.R. Bard	Pelvic mesh	7,223 (15,690)
2197	IN RE: DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation	N.D. Ohio Helmick	DePuy Orthopaedics, Inc.; DePuy Products, Inc.; Johnson & Johnson	ASR hip implant	1,707 (10,144)
2243	IN RE: Fosamax (Alendronate Sodium) Products Liability Litigation (No. II)	D.N.J. Wolfson	Merck	Fosamax	257 (1,250)

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MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2244	IN RE: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation	N.D. Tex. Kinkeade	DePuy Orthopaedics, Inc.; DePuy Products, Inc.; DePuy International Limited; Johnson & Johnson; Johnson & Johnson Services, Inc.; Johnson & Johnson International	Pinnacle hip implant	9,605 (9,789)
2272	IN RE: Zimmer NexGen Knee Implant Products Liability Litigation	N.D. Ill. Pallmeyer	Zimmer	Knee implant components	283 (1,741)
2323	IN RE: National Football League Players' Concussion Litigation	E.D. Pa. Brody	NFL	Sports	334 (342)
2325	IN RE: American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	American Medical Systems	Pelvic mesh	3,766 (21,236)
2326	IN RE: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Boston Scientific	Pelvic mesh	18,901 (25,633)
2327	IN RE: Ethicon, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Ethicon, Inc.; Johnson & Johnson	Pelvic mesh	34,729 (40,321)
2329	IN RE: Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation	N.D. Ga. Duffey	Wright Medical	Hip implant components	206 (641)
2331	IN RE: Propecia (Finasteride) Products Liability Litigation	E.D.N.Y. Cogan	Merck	Propecia	884 (1,178)
2387	IN RE: Coloplast Corp. Pelvic Support Systems Products Liability Litigation	S.D. W. Va. Goodwin	Coloplast	Pelvic mesh	1,029 (2,671)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2391	IN RE: Biomet M2a Magnum Hip Implant Products Liability Litigation	N.D. Ind. Miller	Biomet	Hip implant	466 (2,811)
2418	IN RE: Plavix Marketing, Sales Practices and Products Liability Litigation (No. II)	D.N.J. Wolfson	Bristol Myers Squibb	Plavix	42 (346)
2419	IN RE: New England Compounding Pharmacy, Inc., Products Liability Litigation	D. Mass. Zobel	Alaunus Pharmaceutical, LLC; New England Compounding Pharmacy, Inc.	Contaminated injectable steroid	357 (733)
2428	IN RE: Fresenius GranuFlo/NaturaLyte Dialysate Products Liability Litigation	D. Mass. Woodlock	Fresenius Medical Care	GranuFlo and NaturaLyte brand dialysates	3,133 (4,368)
2433	IN RE: E.I. du Pont de Nemours and Company C-8 Personal Injury Litigation	S.D. Ohio Sargus	Du Pont	Water contamination	3,467 (3,516)
2434	IN RE: Mirena IUD Product Liability Litigation	S.D.N.Y. Seibel	Bayer HealthCare	IUD	3 (1,776)
2436	IN RE: Tylenol (Acetaminophen) Marketing, Sales Practices and Products Liability Litigation	E.D. Pa. Stengel	Johnson & Johnson; McNeil Consumer Healthcare	Tylenol	13 (233)
2440	IN RE: Cook Medical, Inc., Pelvic Repair System Products Liability Litigation	S.D. W. Va. Goodwin	Cook Medical	Pelvic mesh	68 (642)
2441	IN RE: Stryker Rejuvenate and ABG II Hip Implant Products Liability Litigation	D. Minn. Frank	Stryker	Hip implant components	1,242 (3,490)

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MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2452	IN RE: Incretin-Based Therapies Products Liability Litigation	S.D. Cal. Battaglia	Amylin Pharmaceuticals; AstraZeneca; Boehringer Ingelheim; Bristol Myers Squibb; Eli Lilly; Merck; Novo Nordisk	Diabetes medicines	944 (978)
2492	IN RE: National Collegiate Athletic Assn. Student Athlete Concussion Injury Litigation	N.D. Ill. Lee	NCAA, various conferences, various schools	Sports	125 (126)
2543	IN RE: General Motors LLC Ignition Switch Litigation	S.D.N.Y. Furman	General Motors	Motor vehicles	535 (648)
2545	IN RE: Testosterone Replacement Therapy Products Liability Litigation	N.D. Ill. Kennelly	Solvay Pharmaceuticals; AbbVie; Abbott Labs; Actavis; Auxilium Pharmaceuticals; Eli Lilly; Endo Pharmaceuticals; GSK; Pfizer; Pharmacia; Watson Pharmaceuticals	Testosterone replacement	5,984 (7,776)
2551	IN RE: National Hockey League Players' Concussion Litigation	D. Minn. Nelson	NHL	Sports	21 (21)
2570	IN RE: Cook Medical, Inc., IVC Filters Marketing, Sales Practices and Products Liability Litigation	S.D. Ind. Young	Cook Medical	IVC filters	4,350 (4,568)
2592	IN RE: Xarelto (Rivaroxaban) Products Liability Litigation	E.D. La. Fallon	Bayer; Johnson & Johnson; Janssen	Xarelto	22,319 (23,698)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2599	IN RE: Takata Airbag Products Liability Litigation	S.D. Fla. Moreno	Takata, multiple auto companies	Motor vehicle airbags	285 (321)
2606	IN RE: Benicar (Olmesartan) Products Liability Litigation	D.N.J. Kugler	Daiichi Sankyo	Benicar	1,937 (2,308)
2641	IN RE: Bard IVC Filters Products Liability Litigation	D. Ariz. Campbell	Bard	IVC filters	4,165 (4,282)
2642	IN RE: Fluoroquinolone Products Liability Litigation	D. Minn. Tunheim	Bayer; Janssen; McKesson	Fluoroquinolone antibiotics – principally, Levaquin, Avelox, and Cipro	732 (1,187)
2657	IN RE: Zofran (Ondansetron) Products Liability Litigation	D. Mass. Saylor	GSK	Zofran	469 (617)
2666	IN RE: Bair Hugger Forced Air Warming Devices Products Liability Litigation	D. Minn. Ericksen	3M	Surgical heating devices	4,623 (5,028)
2691	IN RE: Viagra (Sildenafil Citrate) and Cialis (Tadalafil) Products Liability Litigation	N.D. Cal. Seeborg	Pfizer	Viagra	740 (741)
2734	IN RE: Abilify (Aripiprazole) Products Liability Litigation	N.D. Fla. Rodgers	Bristol-Myers Squibb; Otsuka	Abilify	1,663 (1,681)
2738	IN RE: Johnson & Johnson Talcum Powder Marketing, Sales Practices, and Products Liability Litigation	D.N.J. Wolfson	Johnson & Johnson; Imerys	Powder products	8,205 (8,242)
2740	IN RE: Taxotere (Docetaxel) Products Liability Litigation	E.D. La. Milazzo	Sanofi	Taxotere	9,063 9,357)
2741	IN RE: Roundup Products Liability Litigation	N.D. Cal. Chhabria	Monsanto	Herbicide product	470 (475)
2750	IN RE: Invokana (Canagliflozin) Product Liability Litigation	D.N.J. Martinotti	Janssen Pharmaceuticals, Inc.	Invokana	1,040 (1,114)

FEDERAL MASS TORT (PERSONAL INJURY) MDL PROCEEDINGS (as of July 2018)

MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2753	IN RE: Atrium Medical Corp. C-QUR Mesh Products Liability Litigation	D.N.H. McCafferty	Atrium Medical Corp.; Maquet Cardiovascular US Sales, LLC; Getinge AB	Surgical mesh products	471 (473)
2754	IN RE: Eliquis (Apixiban) Products Liability Litigation	S.D.N.Y. Cote	Bristol-Myers Squibb; Pfizer	Eliquis	28 (283)
2767	IN RE: Mirena IUS Levonorgestral-Related Products Liability Litigaiton (No. II)	S.D.N.Y. Engelmayer	Bayer	Birth control system	593 (595)
2768	IN RE: Stryker LFIT V40 Femoral Head Products Liability Litigation	D. Mass. Talwani	Stryker	Hip replacement component	327 (335)
2775	IN RE: Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Litigation	D. Md. Blake	Smith & Nephew	Hip replacement components	387 (405)
2776	IN RE: Farxiga (Dapagliflozin) Products Liability Litigation	S.D.N.Y. Schofield	Bristol-Myers Squibb; AstraZeneca	Farxiga	50 (64)
2782	IN RE: Ethicon Phyiomesh Flexible Composite Hernia Mesh Products Liability Litigation	N.D. Ga. Storey	Ethicon; Johnson & Johnson	Hernia mesh product	1,279 (1,299)
2789	IN RE: Proton-Pump Inhibitor Product Liability Litigation (No. II)	D.N.J. Cecchi	AstraZeneca; Pfizer; Takeda; Procter & Gamble; Novartis	PPIs	4,618 (4,644)
2809	IN RE: Onglyza (Saxaglyptin) and Kombiglyze XR (Saxaglyptin and Metformin) Products Liability Litigation	E.D. Ky. Kentucky	Bristol-Myers Squibb; AstraZeneca; McKesson	Diabetes medicines	210 (210)
2816	IN RE: Sorin 3T Heater-Cooler System Products Liability Litigation	M.D. Pa. Jones	Sorin Group USA; related entities	Surgical heating-cooling system	61 (63)

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MDL NUMBER	NAME	DISTRICT/ JUDGE	PRIMARY DEFENDANT(S)	PRODUCT/ EXPOSURE TYPE	PENDING CASES (cumulative total)
2841	IN RE: Monat Hair Care Products Marketing, Sales Practices, and Products Liability Litigation	S.D. Fla. Gayles	Monat Global Corp.; Alcora Corp.	Hair care products	9 (9)
					TOTAL PENDING CASES: 163,876