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

TEN OBSERVATIONS ABOUT THE MDL/TPLF SUBCOMMITTEE'S EXAMINATION INTO THE FUNCTION OF THE FEDERAL RULES OF CIVIL PROCEDURE IN CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS

April 6, 2018

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL/TPLF Subcommittee ("Subcommittee") regarding the examination of how the Federal Rules of Civil Procedure ("FRCP") function in cases that are consolidated pursuant to 28 U.S.C. § 1407 for "coordinated or consolidated pretrial proceedings" ("MDL cases").

INTRODUCTION

The examination of how the FRCP are applied—or not—in MDL cases is one of the Committee's most important undertakings since 1938. MDL cases constitute 45 percent of the federal civil docket[2] and the FRCP are not providing the same utility in MDLs as in other cases, despite the responsibility to facilitate the effective administration of justice "in all civil actions and proceedings."[3] Every thoughtful observer agrees there are problems. As Judge Sarah Vance told the Duke Conference in 2015, "[t]he MDL process is not perfect, and there is always room for improvement."[4] Fortunately, the Committee need not shoulder an overwhelming burden to

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] Excluding prisoner and social security cases. Duke Law Center for Judicial Studies, *MDL Standards and Best Practices*, xi (2014).

[3] FED. R. CIV. P. 1.

[4] Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, [hereinafter, Agenda Materials] Judge Sarah Vance, Speech at the Duke Law Conference (Oct. 8, 2015), at 204, available at http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

make meaningful improvements to the FRCP. Rather, the Committee need only adapt well-established FRCP principles to a few areas of MDL practice, including discovery disclosures, interlocutory appeals and trials. As the Committee meets to discuss the Subcommittee's initial thoughts on the task before it, we offer the following ten observations about the Subcommittee's important work.

OBSERVATION NO. 1

The scope of the Subcommittee's work should be narrowly tailored to ensuring the integrity and utility of the FRCP.

The Subcommittee's effort should not be driven by the question, "what's wrong with MDLs?" or burdened with a mission of wholesale reinvention including matters outside the Committee's purview. Rather, the Subcommittee's examination should be anchored by the Committee's responsibility to the FRCP, and therefore focused on this question: "How can we adapt the procedures and principles in the FRCP to the practical realities of MDL practice, so the FRCP can provide similar clarity and protections in MDL cases as it does for the other 55 percent of federal civil cases?" This narrow formulation comports with the Committee's ongoing duty to ensure that the FRCP facilitate the effective administration of justice "in all civil actions and proceedings."[5]

OBSERVATION NO. 2

Adapting the FRCP to MDL cases would not violate the principle of "trans-substantivity."

Since 1938, the Committee has honored the foundational principle of "trans-substantive" rules by rejecting periodic calls to create special procedures for cases relating to certain subject matters. Now the Committee is hearing an extreme version of that argument: There's a certain class of cases (MDL cases) to which *no* rules can apply.[6] But rule amendments affecting MDL cases would not offend the principle of trans-substantivity because they would apply regardless of the subject matter.

Subject matter is not what distinguishes MDLs from the other 55 percent of cases on the federal civil docket. Numerosity of parties is. The large number of parties poses real, pragmatic challenges to the administration of justice. For example, the FRCP's discovery rules that contemplate requests, motions and protective orders may be unworkable in a proceeding with 10,000 plaintiffs—and perhaps full discovery isn't even necessary in such cases. But the failure of current discovery rules does not mean there should be *no* rules or that new practices should be developed in each case. To the contrary, the FRCP's failures need to be remedied so participants in MDL cases enjoy the same clarity, principles and protections that the FRCP provide in all other cases. In the discovery example, the existing mechanism of Rule 26 could be adapted to the practical needs of MDL cases.

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[5] FED. R. CIV. P. 1.

[6] Memorandum from the AAJ MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee, *Preliminary Provisional MDL Suggestions* (Feb. 22, 2018) ("MDLs are so case-specific that 'one size fits all' rules do not make sense"), Agenda Materials at 205.

OBSERVATION NO. 3

Disclosure and discovery rules are needed in MDL cases because devices such as "plaintiff fact sheets" and *Lone Pine* orders are inconsistently applied and are inherently insufficient substitutes for the FRCP.

Procedures for disclosure and discovery should have numbers, not names. Clear rules requiring disclosure of essential information and/or enabling streamlined discovery into plaintiffs' claims would remedy the FRCP's most vivid failure: the well-known fact that many MDL cases are replete with meritless claims (30 to 40 percent of claims in some MDL cases[7]). The lack of information about plaintiffs' claims undermines the ability of MDL cases to achieve the statutory goals of "the just and efficient conduct"[8] of "coordinated or consolidated pretrial proceedings,"[9] particularly when it comes to the mandate that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[10] What's needed is an FRCP amendment that supersedes plaintiff fact sheets and *Lone Pine* orders by outlining basic disclosure requirements that apply early in the proceedings, along with procedures for enforcing them, that do not rely upon individual discovery requests, motions and protective orders where such procedures are unworkable due to the numerosity of parties.

OBSERVATION NO. 4

A mechanism for identifying and removing meritless claims from MDL dockets is critical even when there is general awareness of their existence.

Ignoring meritless claims on the courts' docket is not only unfair to the defendants facing unsupportable litigation but also is incompatible with the fundamental integrity of the judicial system. The idea that meritless claims don't matter is used to justify one-sided discovery in a way that is incompatible with the FRCP. Protecting the judicial system from non-meritorious claims serves several purposes, and "[c]hief among these is avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement."[11]

Additionally, it is common if not universal for everyone involved in an MDL case to refer to the number of plaintiffs ostensibly involved—a practice that almost certainly has a harmful "anchoring" effect. Anchoring is a powerful cognitive bias that has been proven to exert strong effects on people's judgment even when they know the number is wrong and understand the psychological phenomenon of anchoring.[12] Referring to a 5,000-plaintiff case causes people (including judges and lawyers) to make judgments about the merits of the claims even if they

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[7] Malini Moorthy, *Gumming Up the Works: Multi-Plaintiff Mass Torts*, U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, *The Litigation Machine*, *available at* http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase.

[8] 28 U.S.C. § 1407.

[9] *Id*.

[10] *Id.*

[11] *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (The Hon. J. Skelly Wright).

[12] David Kahneman, *Thinking, Fast and Slow*, (2011).

know the number 5,000 has no statistically relevant relationship to the true number of legitimate claims. It also affects customer decisions regarding the product, media interest, public reaction, advertising, financial analysis about companies and very likely the interest of third-party litigation funding (TPLF) firms in supporting continued litigation.

OBSERVATION NO. 5

Bellwether trials cannot provide information useful to the resolution of an MDL in the absence of sufficient discovery to establish that the particular trial is a reasonable representation of other plaintiffs' claims.

Bellwether trials, when selected carefully and handled appropriately, can provide courts and parties important information about the claims at issue and the overall inventory of cases. The main reason that bellwethers often fail to be useful, however, is that the selection of cases is not based upon good information or genuine consent of the parties. The utility of a bellwether is contingent upon the plaintiff's representativeness to the other cases, or at least a definable subset of them. So there's no way to know if a bellwether will provide useful information without understanding all the other plaintiffs' cases. The only way to ensure meaningful bellwethers is to require sufficient disclosures about all individual plaintiffs' cases and ensure genuine consent to each individual trial.

OBSERVATION NO. 6

Providing interlocutory review of a few key decisions in MDL cases is more important than avoiding the short-term delays it might cause.

Appellate review is fundamental to the American judicial system because it ensures three essential judicial goals: "(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants' sense that their dispute has been fully and fairly heard."[13] These goals are just as critical in MDL proceedings as in other cases—perhaps even more so given that one ruling by one judge can have great significance to the large the number of people whose rights are at stake, and also because appellate review can drive resolution. An FRCP amendment listing a few discrete issues appropriate for interlocutory review including pre-emption and *Daubert* motions would have a profound effect on the development of case law without causing a significant increase in workload at the Circuit Courts (the Rule 23(f) experience could be instructive here because the fears of a crushing burden of appeals proved unfounded). Appellate review could take time, but that should not be the reason to deny it. If timing becomes a stumbling block to drafting a potential FRCP amendment, then perhaps the Committee should explore the possibility of expedited review with the Advisory Committee on Appellate Rules.

[13] Andrew Pollis, *The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1644, 1646 (2011) (citing Professor Cassandra Burke Robertson of Case Western Reserve University School of Law, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006)).

OBSERVATION NO. 7

The "repeat player" problem in MDL cases is related to the FRCP's shortcomings.

The well-described fact that the same handful of lawyers is involved in many MDL proceedings[14] is rooted in the FRCP's failure to prescribe transparent and generally accessible procedures. The "repeat player" problem—which has led to a call for greater inclusion in MDL cases by women, minorities and other new entrants—exists because only a small, exclusive group of people is allowed to learn how the game is played. As one scholar puts it: "Because hard-and-fast formal rules are scarce when multidistrict litigation is not certified as a class action, transferee judges tend to seek guidance from predecessors, peers, and lawyers who have litigated other multidistrict proceedings."[15] The FRCP can help solve the repeat-player problem by providing clear and accessible procedures that judges and lawyers can look up, read and learn for themselves.

OBSERVATION NO. 8

The Subcommittee should protect against undue deference to repeat players when deciding whether FRCP amendments could improve the administration of justice in MDL cases.

The Subcommittee should, of course, consult with the small group of judges, practitioners and academics with inside knowledge about today's variety of MDL practices. But the Subcommittee's investigation would also benefit from "jootsing," an acronym for "jumping out of the system,"[16] which is a powerful problem-solving technique. Jootsing is useful when the people who are most knowledgeable about a particular matter realize there's a problem but cannot see the solution. Successful jootsing often reveals a "shared false assumption"[17] that everyone within the system agrees with so strongly they consider it obvious. Perhaps, with respect to MDLs, the shared, unchallenged assumption among repeat players is that clear rules governing discovery, bellwethers and appellate review would harm rather than improve MDL case management. Perhaps one of the reasons that "the difficulty and work involved in managing mass tort MDLs cannot be overstated"[18] is that judges and lawyers are burdened with re-inventing discovery procedures anew for each case rather than benefitted by looking to the FRCP and appellate decisions for guidance, as occurs in the other 55 percent of federal civil cases.

[14] Elizabeth Chamblee Burch, *Repeat Players in Multidistrict Litigation*, 102 Cornell L. Rev. 1445 (2017) (with Margaret S. Williams).
[15] *Id*. at 1447.
[16] Daniel C. Dennett, *Intuition Pumps and Other Tools for Thinking* 45 (2013).
[17] *Id*. at 46.
[18] Judge Sarah Vance, Speech at the Duke Law Conference, Agenda Materials at 204.

OBSERVATION NO. 9

The landscape of local rules requiring disclosure of third-party litigation funding (TPLF) presents a compelling case for the Committee to undertake a rulemaking effort.

The fact that "[s]ix U.S. Courts of Appeals have local rules which require identifying litigation funders," [19] and "24—or roughly 25% of all U.S. District Courts—require disclosure of the identity of litigation funders in a civil case"[20] presents a compelling reason for the Committee to undertake a rulemaking effort on this topic. Even though those rules were not motivated by TPLF per se, they nevertheless demonstrate a widespread consensus that non-parties who have a financial interest in the outcome of litigation should be disclosed. Moreover, the landscape of rules reveals many of the red flags that the Committee looks for to determine whether a rulemaking effort is needed: numerous jurisdictions addressing the topic;[21] a lack of uniformity in approach among federal circuits and districts;[22] a lack of clarity about compliance and enforcement;[23] and disagreement about the scope and meaning of the rules.[24] All but one of the District Court local rules are related to FRCP 7.1.[25]

The arguments presented by opponents of TPLF disclosure are incongruous with those facts:

- "No Federal Court Requires Blanket Disclosure of Litigation Finance."[26]
- "[I]t has become increasingly apparent that a rule requiring automatic disclosure of litigation finance in every civil action is not appropriate."[27]
- "The Chamber's radical proposal to invade parties' financial privacy and their attorneys' work product is inconsistent with the underlying purpose of the federal rules…."[28]
- "[O]ne district court's experimentation with disclosure…does not justify a rulemaking either. On the other hand, it incentivizes a wait-and-see approach as courts (and state ethics commissions) experiment with different approaches."[29]

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[19] Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), Agenda Materials at 209.
[20] *Id*. at 210.
[21] *Id*. at 209.
[22] *Id*. at 210-14.
[23] *Id*. at 213.
[24] *Id*.
[25] *Id*. at 212.
[26] Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital LLC, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Sept. 17, 2017) [hereinafter, Burford letter], at 6, *available at* http://www.uscourts.gov/rules-policies/archives/suggestions/burford-capital-llc-17-cv-xxxxx.
[27] Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Sept. 6, 2017) [hereinafter, Bentham IMF letter], at 1, *available at* http://www.uscourts.gov/sites/default/files/17-cv-yyyyy-suggestion_bentham_imf_0.pdf.
[28] *Id*.

- "The Proposed Rule Is Not Warranted as an Extension of Rule 7.1."[30]

- An amendment to Rule 7.1 "to require parties to disclose only the *name* of any litigation funding company paying the fees or costs in the case" would be "inappropriate because it would expand that rule beyond its carefully crafted scope."[31] (emphasis in original)

- "[A]ny concern about judicial conflict of interest is so attenuated that it cannot support a broad disclosure rule of the kind suggested by the Chamber."[32]

- "Courts would see a multiplication of motions to compel *further* disclosures regarding the funder, the source of its funds, the identities and backgrounds of its decision makers, the nature of its case-selection and due-diligence processes, its communications with its counsel and subject-matter experts, and its communications with the plaintiff, the plaintiff's counsel, and the plaintiff's experts."[33] (emphasis in original)

- "The Chamber's proposal is an attack on the sound discretion of district judges and magistrate judges, as well as on financial privacy, client confidentiality, the attorney work-product protection, the goals of the federal rules, and Rule 26's renewed emphasis on proportionality."[34]

In light of the inconsistencies and uncertainties surrounding the 30 federal local rules that require disclosure of litigation funders, these arguments fail to provide any reason for the Committee to conclude, once again, that it would be "premature" to undertake drafting a clear, uniform rule.

OBSERVATION NO. 10

The Committee should proceed with a rulemaking effort concerning MDL cases even if it finds that some MDL cases appear to be working or that the worst problems are concentrated in mass tort cases.

Even if the Committee were to conclude that some MDL cases function adequately in the absence of FRCP guidance with unwritten, *ad hoc* practices, the Committee nevertheless should undertake the effort to draft FRCP amendments that provide more clarity, uniformity and predictability for courts and parties alike. Perhaps not every MDL case will utilize every new rule provision—just as cases in the other 55 percent of proceedings do not always use every facet of the FRCP. For example, an amendment to Rule 7 acknowledging that master complaints are pleadings would not apply to an MDL in which no master complaint is filed, and a rule allowing interlocutory appeal of rulings on pre-emption motions would not apply in cases without pre-emption motions. If a particular amendment wouldn't be needed in all cases, it may nevertheless

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[29] Letter from Kathleen L Nastri, President, American Association of Justice, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Jan. 17, 2018), Agenda Materials at 233.

[30] Burford letter at 12.

[31] Bentham IMF letter at 12.

[32] Burford letter at 12.

[33] Bentham IMF letter at 6.

[34] *Id*. at 16.

serve a very important function in others, and therefore it would be an appropriate addition to the FRCP.

CONCLUSION

The FRCP can and should provide principled procedures and protections in MDL cases just as they do in the other 55 percent of federal civil cases. Leaving this task undone in the belief that the "different needs" of MDL cases means that "no rules should apply" would be a grave error. The false notion that MDLs are so special or so complex that the Committee cannot or should not undertake an effort to provide improvements risks diverting the Committee from its responsibility. Only the Committee can ensure the FRCP achieve the goal of effective administration of justice "in all civil actions and proceedings."[35] And only the Committee can undertake an examination of the FRCP in the open, thoughtful, credible manner for which it has a well-deserved reputation. Accordingly, the Committee and the Subcommittee should push forward to prepare for the task of drafting a few amendments that adapt well-established FRCP principles to the realities of MDL cases, particularly in the areas of discovery disclosures, interlocutory appeals and trials.

[35] FED. R. CIV. P. 1.