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September 23, 2019

Advisory Committee on Civil Rules,
Committee on Rules of Practice and Procedure
The Judicial Conference of the United States
One Columbus Circle, NE
Washington, DC 20544

RE: Multi-District Litigation Reform

Dear Judge Bates and Members of the Advisory Committee,

Washington Legal Foundation (WLF) offers this comment in connection with the Committee's formal review of the procedures used in multi-district litigation proceedings (MDLs). Founded in 1977, WLF is a public-interest law firm and policy center with supporters nationwide. WLF often litigates before the federal courts to promote free enterprise, individual liberty, limited government, and the rule of law. To that end, WLF has provided the Committee with formal comment and testimony during previous overhauls of the Federal Rules of Civil Procedure (FRCP). *See* Public Comment of Washington Legal Foundation on Proposed Amendments to Rule 30(b)(6) (April 12, 2019); Public Comment of Washington Legal Foundation on Proposed Amendments to the Federal Rules of Civil Procedure (October 7, 2013).

Created by Congress in 1968 to promote efficiency and conserve finite judicial resources, MDLs have not lived up to their initial promise. By adopting ad hoc procedures calculated to avoid a trial on the merits, MDLs exert tremendous pressure—especially on defendants—for global settlement. MDLs thus encourage the filing of baseless claims. Even so, the MDL has become the most common vehicle for resolving aggregate litigation in the federal courts. At the end of fiscal year 2018, 51.9% of all civil cases in federal court were in MDLs.¹ Yet as the share of cases consolidated into MDLs has risen markedly in recent years, MDLs' many shortcomings have come into sharper focus. At bottom, MDLs undermine the FRCP's stated purpose, to "secure the just, speedy, and inexpensive determination of every action and proceeding."²

¹ United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multi-District Litigation Under 28 U.S.C. § 1407 Fiscal Year 2018*, available at <https://tinyurl.com/v5offdja>. This figure excludes all Social Security cases and prisoner cases (except death penalty cases).

Against this backdrop, the need for meaningful MDL reform is acute. WLF commends three concrete proposals to improve the efficiency and fairness of MDLs: (1) mandatory early vetting of claims, (2) the right of all parties to interlocutory appellate review, and (3) required disclosure of third-party litigation funding.

Early Claim Vetting to Discourage Baseless Claims

Rather than save judicial resources, MDLs often waste them. Perhaps the greatest source of MDL inefficiency is the tendency to attract meritless claims. MDLs' hydraulic pressure on defendants to settle has encouraged "the filing of cases that otherwise would not be filed if they had to stand on their own merits as a stand-alone action."³ In the largest MDLs, meritless claims account for between 30% to 40% of all claims.⁴ The prevalence of baseless claims erodes public confidence in the value and fairness of the MDL procedure.

Allowing so many meritless claims to go undetected for so long is also unfair. Defendants are supposed to have the same access to discovery in MDLs that they enjoy in individual litigation. But the sheer number of cases filed in MDLs ensures that many defendants cannot meaningfully exercise their discovery rights until the litigation is already well underway. Plaintiffs' "unreasonable delay in completing Facts Sheets" often prejudices a "defendants' ability to proceed with the cases effectively."⁵ As a result, at the start of MDL litigation, defense counsel (and judges) often lack even basic information about the cases and their claims.

The best solution to this problem is a uniform, clear, and accessible rule that mandates early evidentiary disclosures by plaintiffs bringing consolidated cases. Such a rule would require a plaintiff, within 45 or 60 days of removal or transfer to an MDL, to (1) identify any product, service, or exposure at issue in the suit and (2) specify the nature and cause of the alleged injury and the factual circumstances surrounding it, along with all available supporting evidence. This rule would not only ensure that MDL judges won't waste valuable time on meritless claims, but it will create a strong disincentive for plaintiffs to bring such claims in the first place.

² The FRCP's purpose is to "secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

³ *In re Mentor Corp. Obtape Transobturator Sling Prods.*, MDL Docket No. 2004, 2016 WL 4705807, *1 (M.D. Ga. Sep. 7, 2016).

⁴ 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 <https://tinyurl.com/v3azbvp3>.

⁵ *In re Phenylpropolanamine (PPA) Prods. Liab. Litig.*, 460 F.3d 12127, 1234 (9th Cir. 2006).

Interlocutory Review

Access to timely appellate review in an MDL is asymmetrical. If a defendant's dispositive motion is granted, the plaintiff is entitled to appeal immediately from that ruling. But if the defendant loses that motion, the MDL court's ruling is not immediately appealable. Typically, a defendant must wait until at least one case in the MDL has been tried to verdict before it may appeal. Although an MDL judge may certify an order for interlocutory appeal under § 1292(b), that is a rare occurrence. Indeed, "certification of dispositive MDL rulings for appeal is so rare that it is not a viable mechanism for securing appellate review of the denial of summary judgment and *Daubert* motions outside the auspices of the final judgment rule."⁶

So defendants in MDLs find themselves in an impossible bind. They can either advance to trial on the merits and await appellate review—many years and many hundreds of thousands of dollars in attorneys' fees later—or they can settle in the shadow of the MDL judge's erroneous ruling. Given the overwhelming pressure to settle, defendants' inability to obtain interlocutory appellate review can allow extreme results to go uncorrected, even unnoticed. This lack of meaningful and timely appellate review contributes to the growing perception that MDLs are both inefficient and unfair to defendants.

To address this inherent imbalance, WLF urges the Committee to adopt a rule that allows for an immediate appeal as of right from the denial of broadly applicable dispositive motions. Such a rule would permit any party to appeal from an order granting or denying a motion under Rule 12(b)(1), Rule 12(b)(2), Rule 12(b)(6), or Rule 56. This rule would help to restore public confidence by relieving MDL litigants and judges of the need to waste precious time and resources relitigating the same legal questions throughout the MDL proceeding.

Disclosure of Third-Party Financing

Third-party litigation financing, in which non-parties to a lawsuit bankroll the plaintiffs' attorneys in exchange for a pecuniary stake in the outcome of the litigation, has increased rapidly in the past two decades. As non-lawyers, litigation speculators are not subject to ethical obligations like a party's counsel, yielding strategies that benefit the investor but not necessarily the plaintiffs. These arrangements can give the lender or investor undue influence or "control over

⁶ John H. Beisner & Jordan M. Schwartz, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review*, at 8 (U.S. Chamber Institute for Legal Reform April 2018), available at <https://tinyurl.com/y5xv8m6t>.

litigation strategy or settlement decisions.”⁷ Using federal-court litigation as an investment vehicle not only distorts the purpose of the civil justice system (to resolve actual disputes), but it also heightens ethical concerns. If they cannot know the identities of all interested parties to the litigation, Judges are unable to adequately evaluate any potential conflicts of interest.

Very little is known about how third-party financing agreements affect the course of MDL litigation; both the financed plaintiffs and their financiers have adamantly opposed disclosing the details of their arrangement in any given case. As the Committee itself has recognized, although “litigation funding is growing by leaps and bounds,” “very few MDL transferee judges presently report that they are aware of TPLF in the proceedings before them.”⁸

A rule mandating disclosure of third-party financing is both appropriate and necessary. Just as the Advisory Committee originally required defendants to disclose the existence of any insurance coverage, so too should it require plaintiffs and their counsel to disclose the existence of any third-party funding agreement. Although the local rules for 24 districts and six circuits already require disclosure, these rules are inconsistent with each other and inferior to a uniform federal rule. That rule, which could be inserted into Rule 26, should mandate disclosure of any agreement under which any person has a contractual right to receive money that is contingent on, or sourced from, any proceeds of the lawsuit, by settlement, judgment, or otherwise.

Conclusion

In sum, WLF commends the Committee for recognizing the need to study MDL practices with an eye toward rulemaking. WLF appreciates the opportunity to provide feedback and urges the Committee to consider adopting the meaningful MDL reforms suggested here.

Sincerely,

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⁷ *In re Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, *1 (N.D. Ohio May 7, 2018).

⁸ Memorandum from Hon. John D. Bates, Chair, Advisory Committee on Civil Rules to Hon. David G. Campbell, Chair, Committee on Rules and Practice and Procedure, at 22 (June 4, 2019).