COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

WHAT MDL PROBLEMS NEED TO BE SOLVED WITH AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE?

March 30, 2020

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee").

I. An "Initial Census" Rule is Necessary to Remedy the FRCP's Failure to Address the Meritless Claims Problem in MDLs

Discussion of MDL practices for vetting claims should focus on the problem meant to be addressed: the rampant filing of meritless individual claims.[2] This is a rules-based problem that requires a rules-based solution.

The FRCP lack a useful way to address tens of thousands of meritless claims that today sit on federal dockets in MDLs. In non-MDL cases, such claims are disposed of by Rule 12(b)(6), aided occasionally by Rule 11. In MDL cases, however, those rules are deemed impractical or otherwise ill-suited to the problem. In other words, despite Rule 1's admonition that the FRCP should "govern all actions and proceedings," the FRCP do not provide a procedure in MDL cases for the fundamental need to prevent meritless claims from accumulating on the docket. This void in the rules is leading to inconsistent, *ad hoc* practices as well as to a default of simply not doing anything to identify and dispose of meritless claims. The existence of meritless claims has great consequence to the litigation and the parties.

Plaintiff fact sheets (PFS) do not solve this problem. If they could, the problem would already be solved because, as the Subcommittee has noted, PFS are already being used in most large mass tort MDLs.[3] PFS do not deter the filing of meritless claims because there is too much variability in what they require

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[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 30 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] Advisory Committee on Civil Rules, *Agenda Book, April 1, 2020* (hereinafter "Agenda Book"), p. 145-46, *available at* https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf.

[3] Agenda Book at 146.

(often written responses rather than actual evidence), when they are employed (often many months into in the litigation), and how and when they are enforced (if at all).

Monitoring new MDLs also will not curtail the systemic, unbridled filing of meritless claims in MDL cases. For example, as the Subcommittee acknowledges, the census in the *Juul* case "was not primarily designed as a vetting device."[4]

Only a *rule* can address meritless MDL case filings as rules 12(b)(6) and 11 do in all other cases. The FRCP should require, soon after filing, evidence of exposure to the alleged harm and injury from that exposure. The clarity and uniformity of such a rule would discourage meritless filings by establishing a procedure that everyone understands will be followed in each new MDL.[5]

Amending the FRCP to include such an initial census rule will not add to the transferee court's workload, but almost certainly will lessen it by averting the entire topic of how to screen for, and what to do about, the substantial number of meritless cases. Nor will it infringe upon the transferee judges' ability to manage their MDL matters any more than Rule 12(b)(6) could be claimed to do so in non-MDL cases. Further, if at some point the MDL proceeding moves toward consideration of settlement, it will make that process far more efficient because inventories will be less cluttered with claims that fail to meet basic standards. And it will not impose a new or significant burden on counsel or parties, requiring only minimal evidence of causation and damages that would be part of any lawyer's pre-filing investigation to comply with Rule 11.

II. A New Pathway to Interlocutory Review is Necessary to Remedy Inadequate and Unequal Access to Appellate Courts in MDLs

An amendment to the FRCP providing a pathway to interlocutory review, at the discretion of the appellate court, with input (but not a veto) from district courts if they choose to provide it, would solve the problem the Subcommittee has identified: the dearth of, and unequal access to, appellate review in MDLs. This is a rules-based problem because the final judgment rule embodied by Rule 54 is at odds with modern MDL practice, which forces parties to undertake multiple resource-intensive "bellwether" trials before appellate review is available that may undo years of judicial process undertaken at enormous expense.

Interlocutory appeal under 28 U.S.C. 1292(b) does not solve this problem. Very few 1292(b) petitions are filed concerning potentially dispositive motions in MDLs, and almost none have been granted.[6] The "district court veto" is the predominant reason for the rule's uselessness in this context, along with the narrow legal standards of 1292(b), including the requirement for a "controlling question of law," which often does not fit the types of motions that should be reviewed. The suggestion to incorporate a similar district court veto into a new FRCP appellate pathway for MDLs[7] would materially undercut the practical value of a new rule.

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[4] Agenda Book at 147.

[5] Agenda Book at 147 ("a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur").

[6] Letter from John H. Beisner, Skadden, Arps, Slate, Meagher and Flom LLP, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf. The letter analyzed the outcome of § 1292(b) motions seeking review of broadly applicable dispositive questions filed in federal mass tort MDLs that closed between 2008 and 2018, as well as in the 60 MDLs pending as of July 2018.

[7] Agenda Book at 154.

The observation that successful 1292(b) petitions have a similar reversal rate as other appeals is not meaningful. No apples-to-apples comparison exists because so few 1292(b) petitions have been granted as to the types of motions under discussion. And the fact that interlocutory appeals enjoy the same success rate as other appeals weighs in favor of, not against, expanding their availability in MDLs.

III. What is the Problem for which a Settlement Rule Could Be a Solution?

The Subcommittee's motivation for contemplating "some judicial supervision regarding settlement like that provided in Rule 23 for class actions"[8] is unclear from the Agenda Book discussion. The lack of support for a new rule in this area among judges and practicing lawyers alike suggests there is no actual problem here for the rules to address. The issues that have been raised concerning settlements in MDLs are largely hypothetical and so fraught with complexity that any proposed rulemaking solution seems more likely to have negative unintended consequences than to solve any real-life problem.

Conclusion

The Subcommittee has done exceptional work over two and a half years to understand the ways in which MDL practices vary from FRCP procedures. It has narrowed its focus to two areas where rules-based problems have rules-based solutions: early census and interlocutory review. The Subcommittee should apply its accumulated understanding of these two problems by proceeding to draft possible rule solutions. Doing so would benefit all stakeholders while restoring meaning to Rule 1's description of the FRCP as governing "all actions and proceedings." Such action would be in keeping with the original purpose of the FRCP to end the individualized practices in different courts by different judges by creating one uniform set of rules that judges, litigants, and attorneys can rely on in all federal courts.

[8] Agenda Book at 154.