



**REQUEST FOR RULEMAKING  
to the  
ADVISORY COMMITTEE ON CIVIL RULES**

**RULES FOR “ALL CIVIL ACTIONS AND PROCEEDINGS”:  
A CALL TO BRING CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS  
BACK WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE**

August 10, 2017

Lawyers for Civil Justice (“LCJ”)<sup>1</sup> respectfully submits this Request for Rulemaking to the Advisory Committee on Civil Rules (“Committee”) requesting amendments to adapt the Federal Rules of Civil Procedure (“FRCP”) to cases that are consolidated pursuant to 28 U.S.C. § 1407 for “coordinated or consolidated pretrial proceedings” (“MDL cases”).

**I. INTRODUCTION**

According to Rule 1, the FRCP “govern the procedure in all civil actions and proceedings in the United States district courts.”<sup>2</sup> It is widely known, however, that the FRCP do not govern key elements of procedure in many MDL cases, which now constitute 45 percent of the federal docket.<sup>3</sup> The reason is straightforward: the FRCP no longer provide practical presumptive procedures in MDL cases, so judges and parties are improvising. While some *ad hoc* procedures have more merit than others, they all share the same lack of clarity, uniformity and predictability that the FRCP are supposed to remedy.<sup>4</sup> Many common practices also cause an unbalanced

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<sup>1</sup> 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.

<sup>2</sup> FED. R. CIV. P. 1.

<sup>3</sup> Excluding prisoner and social security cases. Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” xi (2014).

<sup>4</sup> The FRCP’s purpose is to provide a consistent and clear method for arriving at justice. In the words of Second Circuit Judge Martin Manton on the 1938 adoption of the Rules:

The new Federal Rules of Civil Procedure are a consistent, comprehensive, and, I might add, a successful, effort to bring judicial procedure in harmony with the tone of our economic and social life. They establish a uniform system throughout the country; they raise federal practice to the position of a real body of jurisprudence; they seek to eliminate needless delays in the disposition of cases; they free the courts and practitioners from that confusion which often resulted from the application of state rules of practice to

litigation environment by failing to provide protections inherent in the FRCP. A solution is needed, and the Committee should undertake an effort to remedy this situation by bringing MDL cases back within the existing and well-proven structure of the FRCP.<sup>5</sup>

Many MDL proceedings are governed by a “master complaint,” but courts are inconsistent on whether such documents are pleadings. In many MDL cases, there is no pretrial testing of claims because the existing FRCP mechanisms for doing so are not practical at a large scale. Many plaintiffs are joined to MDL cases despite their failure to comply with statutory requirements for filing a complaint and the courts’ lack of jurisdiction over their claims. Many MDL courts hold “bellwether trials” without obtaining the willing consent of the parties. And very, very few MDL cases get the benefit of appellate review because the FRCP has no provision for how such review can occur.

These holes in the FRCP are vacuums that others are acting to fill. In January, the U.S. House of Representatives passed the Fairness in Class Action Litigation Act of 2017 (“FICALA”),<sup>6</sup> which would supersede the FRCP in MDL cases with statutes requiring plaintiffs to demonstrate “evidentiary support” for each claim, prohibiting transferor courts from holding “bellwether” trials unless all parties consent, requiring that federal jurisdiction exist for each plaintiff, and providing mandatory appellate review. Meanwhile, the Duke Law Center for Judicial Studies and the Emory Institute for Mass Claims and Complex Litigation are each working on “best practices” as a stand-in for missing rules of procedure. Those efforts, however well intended, are not sufficient reason for the Committee to remain on the sidelines because “[t]he Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act,”<sup>7</sup> and best practices are no substitute for civil rules—especially when it comes to fundamental matters relating to the integrity of the judicial process.

Bringing MDL cases back within the FRCP is a matter of adapting well-established principles, not a *de novo* invention. The Committee could draft a handful of amendments that would furnish MDL cases with the same procedural clarity enjoyed by the other 55 percent of civil cases for the basic steps of litigation: pleadings, dismissal, joinder, required disclosures, trial and appellate review. Doing so would mean amendments in six areas:

- (1) Pleadings: Include in Rule 7 the documents that function as pleadings in MDL cases;
- (2) Dismissal: Add individual claims in MDL cases to Rule 9’s list of matters that must be pled with particularity or, alternatively, create a Rule 12(b)(8) for individual claims in MDL cases that lack meaningful evidence of a valid claim;

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federal litigation; they are clearly and concisely phrased, and seem to cover every situation which might ordinarily arise in the course of a law suit.

Judge Martin Manton, “Foreword,” MOORE’S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE, v.1 (1938).

<sup>5</sup> There are, of course, many facets of MDL practice that do not fall within the Committee’s jurisdiction, and the Committee should leave those matters to others.

<sup>6</sup> Fairness in Class Action Litigation Act of 2017, H.R. 985, 115<sup>th</sup> Cong. (2017).

<sup>7</sup> Letter from David G. Campbell, Chair, Committee on Practice and Procedure, and John D. Bates, Chair, Advisory Committee on Civil Rules, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary (Feb. 14, 2017).

(3) Joinder: Amend Rule 20 to prohibit joinder of plaintiffs who fail to abide by the statutory requirements for filing a complaint and over whose claims the MDL court lacks jurisdiction;

(4) Required disclosures: Modify Rule 26 to require plaintiffs in MDL cases to produce meaningful evidence in support of their claims, and to disclose the existence of third-party financing arrangements and the use of lead generators;

(5) Trial: Establish in Rule 42 a confidential consent procedure without which bellwether trials in consolidated trials cannot occur; and

(6) Appellate review: Create a straightforward pathway for appellate review of critical rulings in MDL cases.

These amendments, which are squarely within the Committee's core jurisdiction and responsibility, would restore the FRCP as "rules for all civil actions and proceedings" by providing MDL cases with clear, consistent and uniform procedures that presumptively govern the basic steps of litigation.

## **II. PLEADINGS: RULE 7 SHOULD ACKNOWLEDGE MDL PLEADING PRACTICES BY INCLUDING "MASTER COMPLAINTS" AND "INDIVIDUAL COMPLAINTS" AS PLEADINGS.**

It is common practice in MDL cases for a "master complaint" to function as the pleading that guides the proceedings (particularly discovery). Master complaints are an invention driven by the need for efficiency inherent in MDL cases, and they often deliver that efficiency by distilling the common allegations and enabling a master answer. Master complaints are distinguished from individual complaints, which have a different role when master complaints are used. MDL courts deal with these two types of complaints separately and even impose different legal standards. Some of the courts that give master complaints the function of pleadings ironically hold that master complaints are not pleadings when it comes to motions under Rules 8, 9, 11 or 12.<sup>8</sup> That type of inconsistency is inevitable when practice exists outside the framework of the FRCP.

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<sup>8</sup> See e.g. *In re Trayslol Prods. Liab. Litig.*, No. 08-MD-1928, 2009 U.S. Dist. Lexis 65481, at \*72-73 (S.D.F. 2009). ("The Court cannot envision the task of adequately pleading the consolidated master complaint in a manner which would satisfy the Defendants, without completely removing the compromise and attempt at efficiency the Parties and I had in mind in allowing the filing of the Consolidated Master Complaint. At this stage of the litigation I prefer to assess the sufficiency of plaintiffs' claims with substantial leniency, especially when the information that may or may not support Plaintiffs' claims is largely within the control of the Defendants."); see also *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590 (6th Cir. 2013) ("In many cases, the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs."); *In re Nuvaring Prods. Liab. Litig.*, Case No. 4:08MD1964, 2009 U.S. Dist. Lexis 70614, at \*16 (E.D.Mo. Aug. 6, 2009) (The parties acknowledged "that a master consolidated complaint does not supersede the underlying cases and that consolidation of the claims is a matter of convenience and economy in administration."); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, Case No. 11c5468, MDL No. 2272, 2012 U.S. Dist. Lexis 117239, at \*18 (E.D. Ill. Aug. 16, 2012) (noting Plaintiffs cite a number of MDL opinions which recognize that a "master" or "consolidated" complaint is a "procedural device used to promote judicial efficiency and economy," not to be "given the same effect as an ordinary complaint" or considered to "merge the suits into a single cause, or

The first step to bringing MDL cases back within the ambit of the FRCP is to acknowledge that master complaints exist, that they are pleadings, and so are master answers. Where master complaints exist, individual complaints have a different role than they do in ordinary cases, so they should be acknowledged separately as well. The following additions to Rule 7 would achieve the purpose:

- (8) a master complaint in a consolidated proceeding;
- (9) a master answer in a consolidated proceeding;
- (10) an individual complaint in a consolidated proceeding;
- (11) an individual answer in a consolidated proceeding.

### **III. DISMISSAL: RULE 9 SHOULD REQUIRE INDIVIDUAL COMPLAINTS IN CONSOLIDATED CASES TO BE PLED WITH PARTICULARITY.**

MDL cases are notoriously characterized by a very high number of meritless claims. By one estimate, approximately 30 to 40 percent of plaintiffs' claims are dismissed at the settlement stage.<sup>9</sup> The fact that so many meritless claims remain part of the proceedings until settlement indicates a significant failure of procedure.

#### **A. Current Mechanisms Are Insufficient for Testing the Merits of Claims in MDL Cases.**

A mechanism for dismissing non-meritorious claims before trial is key to a functioning judicial system. Soon after the FRCP were adopted, Chief Judge Joseph Chappell Hutcheson, Jr. of the Fifth Circuit explained:

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial; it is to carefully test this out, in advance of trial, by inquiring and determining whether such evidence exists.<sup>10</sup>

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change the rights of the parties, or make those who are parties in one suit parties in another.”) (citing *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141-42, 144 (E.D. La. 2002); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La. 2006) (“[A] master complaint is only an administrative device used to aid efficiency and economy and, thus, should not be given the status of an ordinary complaint.”); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08md01968, 2009 WL 2433468, at \*8 (S.D. W. Va. Aug. 3, 2009) (considering a motion to dismiss in light of “[t]he administrative nature of a master complaint and its focus on facilitating management of the litigation, as opposed to being a primary operative pleading.” This court agrees that ‘master’ or ‘consolidated’ complaints must be interpreted in light of the ‘primary purpose of multidistrict litigation: ‘to promote efficiency through the coordination of discovery.’”)).

<sup>9</sup> 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>.

<sup>10</sup> *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

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.”<sup>11</sup>

Although summary judgment has been granted in several MDL cases where causes of action were not supported by the facts, in many other cases, Rule 56 has proven to be of little utility because it is not an efficient mechanism for culling non-meritorious claims out of a pool of thousands. Rule 56’s requirement that the court evaluate the plaintiffs’ legal claims based on undisputed material facts means that a motion for summary judgment requires full discovery, including expert testimony on causation. In an MDL case with thousands of plaintiffs, courts and parties lack the time and resources to handle the briefing and hearings on thousands of individual claims.

For different reasons, Rules 11<sup>12</sup> and 12(b)<sup>13</sup> are also failing to provide an appropriate procedural framework for testing the sufficiency of claims in MDL cases. Although Rule 11 requires counsel to have a basis for every claim filed, the rule is neither designed for, nor capable of, serving as the routine mechanism for requiring the production of sufficient evidence and dismissal of claims for failing to meet the appropriate standard. Rule 12(b) as currently written is also ill-fitted for this purpose; its requirement that courts accept all well-pleaded factual allegations in the complaint, together with the nearly universal preference for liberal leave to amend, do not provide for the substantive testing or finality needed to focus large MDL cases on the merits of legitimate claims.<sup>14</sup>

This current rule environment allows non-meritorious claims to thrive. Judge Clay D. Land described this dynamic in an order granting summary judgment in an MDL proceeding regarding pelvic mesh implants:

The Court has spent considerable time in this MDL deciding summary judgment motions when plaintiffs’ counsel should have known that no good faith basis existed for pursuing the claim to the summary judgment stage. Some of these cases involved claims that were clearly barred by the applicable statute of limitations. In others, plaintiffs’ counsel was unable to identify a specific causation expert or point to other evidence to create a genuine factual dispute on causation. And in some cases, counsel threw in the towel and did not even bother to respond to the summary judgment motion. Nevertheless, the Court had to waste judicial resources deciding motions in cases that should have been dismissed by plaintiffs’ counsel earlier—cases that probably should never have been brought in the first place. Enough is enough.<sup>15</sup>

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

<sup>12</sup> FED. R. CIV. P. 11 (by filing a complaint (or other legal briefing) the filing attorney certifies to “[t]he best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under circumstances,” that they have a basis for the claim).

<sup>13</sup> FED. R. CIV. P. 12(b).

<sup>14</sup> See e.g. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>15</sup> *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL No. 2004 F:08-MD-2004, at \*1 (Sept. 7, 2016).

Frustrated that flawed claims had not been identified without resorting to Rule 56, Judge Land threatened plaintiffs' counsel with sanctions if he had to rule on a similar summary judgment motion in the future.<sup>16</sup> He observed that, after fifteen years on the bench and a "front row seat as an MDL transferee judge," he is convinced an unintended consequence of the MDL process is the filings of new cases with "marginal merit" that "would not have been filed otherwise."<sup>17</sup> These gaps in procedural rules should be fixed.<sup>18</sup>

### **B. Inconsistent, *Ad Hoc* Procedures are Not the Solution.**

Because the FRCP lack a practical standard for verifying plaintiffs' claims and dismissing the ones that lack merit, many MDL courts understandably take it upon themselves to invent *ad hoc* procedures for that purpose. In the *Vioxx* MDL litigation, for example, the court developed three requirements for standing: each plaintiff had to show (1) that he or she had a qualifying injury—i.e., a heart attack, an ischemic stroke or sudden cardiac death; (2) that he or she used a minimum amount of *Vioxx*; and (3) that he or she took *Vioxx* within a proximate time of the alleged medical event.<sup>19</sup> The results show both why such a requirement is necessary as well as the utility of a test that is more rigorous than Rule 12(b) but not as burdensome as Rule 56. Sixty-three percent of the plaintiffs were disqualified after failing to meet the court's requirements. Of that 63 percent, 32 percent failed to meet all of the standards, and an additional 31 percent failed even to provide all of the necessary paperwork.<sup>20</sup> Although this is a success story for an *ad hoc* pre-trial testing mechanism, the fact that this occurs only in some cases and not others demonstrates that a regular, transparent rule is needed.

The most efficient way to enforce meaningful pleading standards for MDL cases is to establish that Rule 9's clear, uniform and well-understood "particularity" requirement applies to individual complaints in MDL cases. Doing so would ensure that meritorious claims proceed to litigation and prevent non-meritorious claims from clogging the courts' dockets, distracting parties from the actual areas of contention and serving as a means of harassment or coercion.

### **C. Alternatively, Rule 12(b) Should Be Amended to Allow Dismissal of Individual Complaints that are Unsupported by Meaningful Evidence.**

In the alternative, the Committee should create a new process for judicial determination of sufficiency and for dismissal of claims that fail to meet that standard in Rule 12(b).<sup>21</sup> The

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<sup>16</sup> *Id.* at \*2.

<sup>17</sup> *Id.* at \*4-5.

<sup>18</sup> The Judicial Panel on Multidistrict Litigation has declined to consider the presence of non-meritorious claims prior to establishing an MDL proceeding. *See, e.g., In re Ethicon Physiomesher Flexible Composite Hernia Mesh Prods. Liab. Litig.*, MDL No. 2782 (J.P.M.L. June 2, 2017) ("On several occasions, the Panel has rejected the argument that we should deny centralization because creating an MDL would proliferate non-meritorious claims. . . . [W]hether particular claims are without merit is a matter "more appropriately addressed to the court which oversees those claims.") (citations omitted).

<sup>19</sup> *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Transcript of Record (E.D. La. July 27, 2007).

<sup>20</sup> U.S. Chamber of Commerce, "MDL Proceedings: Eliminating the Chaff," 11 (Sept. 2015).

<sup>21</sup> Doing so would accomplish in the FRCP, more simply, what FICALA would impose by statute. FICALA would create a statute as follows: "(i) Allegations verification.—In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceedings shall make a submission sufficient to

following might suffice:

(8) failure to provide meaningful evidence of a valid claim in a consolidated proceeding.

The rule should also set forth a timeline for rulings on such motions (90 days would be reasonable), as well as a further opportunity (perhaps 30 days following dismissal) for plaintiffs to come forth with meaningful evidence, after which the dismissal will be made with prejudice. This mechanism would benefit courts and parties alike by providing clarity and consistency. It would provide a liberal standard for access to courts while still allowing a mechanism for protecting the case and the courts from meritless claims that can be used to harass or coerce settlements.

#### **IV. JOINDER: THE FRCP SHOULD PROHIBIT JOINDER OF PARTIES WHO FAIL TO COMPLY WITH FILING REQUIREMENTS OR OVER WHOSE CLAIMS THE TRANSFEREE COURT LACKS JURISDICTION.**

A party initiating a lawsuit must pay a filing fee to cover the administrative costs of processing and assigning the claim.<sup>22</sup> It has become common practice in MDL cases, however, for plaintiffs' counsel to circumvent the rule by filing a single complaint on behalf of many plaintiffs.<sup>23</sup> This unilateral pre-consolidation maneuver not only deprives the courts of important fee revenue, but also effectively creates a loophole for pleading standards. As one court observed: "[O]ften times if a lawyer has to prepare a pleading for each individual claimant, more often than not, the lawyer will make sure that this is a valid claim or significant claim before they deal with that and file a lawsuit normally. It's easier to join multiple claimants than it is to file a specific lawsuit for each."<sup>24</sup> In other words, if Rule 20 honored 28 U.S.C. § 1914(a), it would also reinforce Rule 11, which requires attorneys to consider whether there are grounds for their client's claims.<sup>25</sup>

Rule 20 enables the circumvention of filing requirements in MDL cases because of its broad allowance of joinder and its narrow grounds for opposing it. Under Rule 20, a party may challenge joinder on the basis of "embarrassment, delay, expense, or other prejudice that arises..."<sup>26</sup> The Rule does not contemplate a challenge to joinder based on the misuse of it to avoid filing fees or other improper conduct.

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demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 90 days after the submission deadline, the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice."

<sup>22</sup> 28 U.S.C. § 1914(a).

<sup>23</sup> Seth Rothman and Michael Tiger, "Severance in Multiplaintiff Pharmaceutical Cases," LAW 360 (Oct. 18, 2011).

<sup>24</sup> *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Transcript of Record at 18 (E.D. La. July 27, 2007).

<sup>25</sup> J. Story, EQUITY PLEADINGS § 47 (1838) (Counsel's signature served to guarantee that "there is good ground for the suit in the manner in which it is framed.")

<sup>26</sup> FED. R. CIV. P. 20(b).

The Committee should amend Rule 20 to provide a common standard for determining whether plaintiffs in an MDL proceeding should be joined or if instead a separate complaint should be submitted for each one. A useful analogy exists in Rule 23, which requires the court to consider whether common issues predominate over the individual's. The following amendment to Rule 20 might suffice:

Rule 20. Permissive Joinder of Parties

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**(c) Consolidated Proceedings.** In cases consolidated pursuant to 28 U.S.C. § 1407, a defendant may move the court to require each plaintiff to submit and file a separate complaint detailing the basis for each claim. Neither the defendant's motion nor plaintiff's opposition shall exceed five (5) pages, excluding heading and certificate of service. Either party may request a hearing on this issue. The court may not waive the filing fee required by 28 U.S.C. § 1914(a).

**V. REQUIRED DISCLOSURES: RULE 26 SHOULD REQUIRE PRODUCTION OF MEANINGFUL EVIDENCE IN SUPPORT OF CLAIMS IN MDL CASES, AND SHOULD MANDATE DISCLOSURE OF THIRD-PARTY FINANCING AND THE USE OF LEAD GENERATORS AND AGGREGATORS.**

**A. Rule 26 Should Require Plaintiffs to Disclose Significant Evidence Supporting their Claims Early in the Proceeding.**

One of the FRCP's most visible and important failures in the MDL context relates to procedures governing discovery into the plaintiffs' allegations. Practices vary wildly. Some MDL judges in effect ignore such discovery by focusing instead on discovery about defendants' conduct. Others fill the rules vacuum by using *ad hoc* procedures including "plaintiff fact sheets" and "*Lone Pine*" orders (named after *Lore v. Lone Pine Corp.*<sup>27</sup>). The utility of such *ad hoc* requirements varies depending upon what the court orders and how the court enforces compliance. The best "fact sheets" ask plaintiffs to state when they used the product in question and to describe how they were injured. The best *Lone Pine* orders require plaintiffs to provide evidence such as medical records and an affidavit by a physician.<sup>28</sup> Responses are often incomplete and unverified,<sup>29</sup> so, as a practical matter, the onus to follow up and gather recalcitrant plaintiffs' responses frequently falls upon defendants. Whether effective or not, the common denominator

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<sup>27</sup> *Lore v. Lone Pine Corp.* No. L-33606-85, 1986 WL 637507 (N.J. Super. Nov. 18, 1986) at 12; see also Michelle Yeary, "Lone Pine Cheat Sheet," (Nov. 30, 2012), available at <https://www.druganddevicelawblog.com/2012/11/lone-pine-cheat-shee.html> (listing every entry of a *Lone Pine* order from 1986-2012).

<sup>28</sup> In one case, the judge required plaintiffs to submit notices of diagnoses certifying that a licensed medical doctor examined the plaintiff and diagnosed them with the complained-of condition. U.S. Chamber of Commerce, "MDL Proceedings: Eliminating the Chaff," 15-16 (Sept. 2015) (internal citations omitted).

<sup>29</sup> Duke Law Center for Judicial Studies, "MDL Standards and Best Practices," 11 (2014) (citing John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009)).



of all these *ad hoc* methods is that they lie outside the FRCP, and therefore are not uniform or transparent, and there are no clear standards.

Unclear standards and unpredictable results are inevitable when the FRCP leave it to each court to fashion a process for discovery. Therefore, Rule 26 should require plaintiffs in MDL cases to provide meaningful evidentiary support for allegations of “fact” and “injuries” at an early point in the proceeding. An amendment to Rule 26(a)(1) could look something like this:

(F) *Consolidated Proceedings*. In any action consolidated pursuant to 28 U.S.C. § 1407, each plaintiff must disclose within 45 days of transfer or filing significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant’s product or conduct.

## **B. Rule 26 Should Require Disclosure of Third-Party Finance Arrangements.**

The course of many civil cases—especially MDL cases—is strongly influenced by non-parties that are largely unknown to courts and parties despite having become fixtures in the federal justice system. Entities that provide third-party litigation finance (“TPLF”) to support lawsuits exercise significant control over litigation decisions and should be disclosed to the court, the parties and juries.

In a typical TPLF arrangement, a third-party business or individual acquires the right to receive an outcome-contingent payment from any proceeds that result from the proceeding. In exchange for that right, the TPLF provider funds some or all of the plaintiff or plaintiff’s counsel’s litigation costs. The TPLF provider also obtains the ability to exercise significant decision making authority over material litigation and settlement decisions.<sup>30</sup>

An amendment to Rule 26(a)(1) should require parties to disclose such arrangements with their initial disclosures. The amendment should provide:

“a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.” (New language underscored.)

This amendment is necessary for several reasons. First, by identifying people and entities with a stake in the outcome of the litigation, the disclosure would allow courts and counsel to ensure compliance with the parties’ ethical obligations. For example, many TPLF entities are public companies whose shareholders could include jurors, judges or parties.<sup>31</sup>

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<sup>30</sup> See Letter from U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice and the National Association of Manufacturers, submitted to Jonathan C. Rose, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, “Re: Proposed Amendment to FED. R. CIV. P. 26(a)(1)(A),” (April 9, 2014), available at <http://www.lfcj.com/disclose-third-party-litigation-funders.html>.

<sup>31</sup> Credit Suisse, for example, recently “spun off its ‘litigation risk strategies’ division into a standalone litigation financing firm.” See Bert I. Huang, “The Democratization of Mass Litigation?: Litigation Finance: What Do Judges

Second, courts applying the Rule 26(b)(1) proportionality standard concerning the scope of discovery are required to consider “the parties’ resources” as one factor. Obviously, a third-party’s agreement to fund some or all litigation expenses is material to that inquiry.

Third, knowing who is on the other side can assist a party to determine its litigation and/or settlement strategy. A party’s obligation to pay a percentage of proceeds to a TPLF entity could influence that party’s willingness and ability to resolve a litigation matter and will shape settlement negotiations. Disclosure can help a party understand the risk faced by cost-shifting or mandatory fee awards, particularly if the other side will not be constrained by the normal liquidity considerations that must be made in litigating a case.<sup>32</sup>

Lastly, the disclosure of TPLF arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs. To the extent a court eventually determines a claim lacks merit, the court may consider not only imposing sanctions against plaintiff’s counsel, who may have deep or shallow pockets, but also on the TPLF entity since it could share responsibility for the financing and encouragement of the lawsuit.<sup>33</sup>

### **C. Rule 26 Should Require Disclosure of the Use of Lead Generators and Aggregators.**

The fact that 30 to 40 percent of claims in some MDL cases are dismissed at the settlement stage<sup>34</sup> is largely a function of the way those claims enter into the judicial system: through “lead generators” and “aggregators.” A study by the Washington Legal Foundation found that the lack of merit in many mass tort claims is due to the fact that “many of the claims are not developed by the filing counsel—they effectively were purchased from other attorneys who advertised to

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Need to Know,” 45 COLUM. J.L. & SOC. PROBS. 525, 527 (2012) (citing Jennifer Smith, Credit Suisse Parts with Litigation Finance Group, WALL ST. J. L. BLOG. (Jan. 9, 2012), available at <http://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group>). In addition, Citigroup financed an investment firm that funded the multi-million dollar lawsuit brought by 9/11 ground zero workers. See Binyamin Appelbaum, “Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts,” N.Y. TIMES, Nov. 15, 2010, at A1. Burford Capital Limited raised funds from institutions that had shareholders who could have been connected to the litigation in order to bankroll a lawsuit against Chevron in Ecuador. A Special Master appointed in an ancillary proceeding to that case explained that disclosure of the TPLF arrangement was necessary to ensure that U.S. judges hearing aspects of the case had no relationship with Burford that might disqualify them from acting as neutral arbiters in the case. See Roger Parloff, “Have You Got a Piece of This Lawsuit? (June 28, 2011), available at <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>.

<sup>32</sup> See Letter from U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice and the National Association of Manufacturers, submitted to Jonathan C. Rose, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, “Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A),” (April 9, 2014), available at <http://www.lfcj.com/disclose-third-party-litigation-funders.html>.

<sup>33</sup> See *Id.*

<sup>34</sup> 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>.

attract claimants in their home markets with no intention of ever litigating the claims themselves.”<sup>35</sup>

The lead generation industry is big business. One study estimates that lead generating companies ran a total of 67,000 personal injury or mass tort commercial television spots in one year.<sup>36</sup> It has drawn the attention of the American Medical Association (“AMA”),<sup>37</sup> other health professionals and Congress, which have documented not only an increase in the number of lawsuits, but also an increase in the number of patients who abandon their prescriptions in defiance of their doctors’ orders after viewing inflammatory commercials.<sup>38</sup> The House Judiciary Committee initiated an investigation into lead-generating companies in March 2016<sup>39</sup> and held a hearing about the effects of advertising for plaintiffs in June 2017.<sup>40</sup>

Plaintiffs originating from lead generators and aggregators are different from other plaintiffs because such companies are driven by financial incentives to identify as many potential mass tort plaintiffs as possible without taking steps to verify the merits of those potential plaintiff’s claims. In one case, for example, lead generators drove mobile X-ray vans to local union halls, motels, strip mall parking lots and other locations to provide “assembly-line” X-rays at a rate of one every five to ten minutes.<sup>41</sup> The lawyers then engaged a small number of physicians to read hundreds of thousands of X-ray films generated by the screenings, who in turn diagnosed the claimants with asbestosis, lung profusions or other asbestos related injuries.<sup>42</sup> Professor Lester Brickman of the Cardozo School of Law reviewed those litigation screenings and concluded that “the vast majority of those diagnosed with asbestosis would not have been found to have an asbestos-related disease if they were examined in a clinical setting by doctors without a financial stake in the litigation.” Professor Brickman estimates that while the litigation screenings often result in diagnosis of asbestosis of 80 percent or more of individuals screened, the clinical diagnosis rate is closer to 15 to 23.2 percent.<sup>43</sup> Confirming the compelling profit motive at play, Professor Brickman concluded that the average cost of screening a potential plaintiff was \$500-

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<sup>35</sup> Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” 11 (2014) (citing John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009)).

<sup>36</sup> U.S. Chamber of Commerce, “MDL Proceedings: Eliminating the Chaff,” 4 (Sept. 2015). The authors also discuss another example of where lawyers allegedly paid neurologists \$10,000 a day to screen welders for various medical conditions, resulting in the recruitment of 10,000 welders to file lawsuits that their exposure to welding fumes had caused them various medical injuries. *Id.* at 5.

<sup>37</sup> In March 2017, the AMA adopted a resolution supporting a legislative or regulatory “requirement that attorney commercials which may cause patients to discontinue medically necessary medications have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician.” Letter to the American Bar Association from the Congress of the United States House of Representatives, Committee on the Judiciary (March 7, 2017).

<sup>38</sup> *Id.*

<sup>39</sup> Letter to The Relion Group Legal Network from the Congress of the United States House of Representatives, Committee on the Judiciary (March 7, 2017).

<sup>40</sup> Hearing before House of Representatives Judiciary Committee and the Subcommittee on the Constitution and Civil Justice, “Examining Ethical Responsibilities Regarding Attorney Advertising,” (June 23, 2017), available at <https://judiciary.house.gov/hearing/examining-ethical-responsibilities-regarding-attorney-advertising/>.

<sup>41</sup> Lester Brickman, “Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies,” 29 CARDOZO L. REV. 514, 518 (2007).

<sup>42</sup> *Id.* at 520.

<sup>43</sup> *Id.* at 521-22; 563.

\$1,000, but provides the potential of generating \$30,000-\$50,000 in attorneys' fees and expenses.<sup>44</sup>

Further proof that plaintiffs identified by such means are different from other plaintiffs is the fact that lead generators often produce serial plaintiffs. Judge Jack, who presided over the silica sand MDL proceeding discussed above, not only discovered that many of the silicosis diagnoses were fraudulent, but she also found that 60 percent of the plaintiffs previously filed asbestos related claims.<sup>45</sup> That is an extraordinary figure in light of the fact that medical experts have concluded that the diagnosis of both asbestos and silica-related conditions is a "clinical rarity."<sup>46</sup>

Courts, defendants and even the other plaintiffs should know whether the pool of plaintiffs in a particular case is likely to include a large number of suspect claims. Transparency could help inform the court about the nature and timing of discovery required in the case. It could help defendants calculate the appropriate settlement value of the case and counter the implication or appearance that a high number of plaintiffs means the defendants "must be guilty."<sup>47</sup> And it could help plaintiffs with legitimate claims avoid an unjust dismissal of their own claims hidden amongst the non-meritorious and fraudulent ones.

In order to provide transparency to courts and parties, the Committee should amend Rule 26(a)(1)(A)(i) to include the following required disclosure:

The name and, if known, the address and telephone number of each individual likely to have discoverable information... and if relevant, a disclosure of any third-party claim aggregator, lead generator, or related business or individual, who assisted in any way in identifying any potential plaintiff(s), and if relevant, the identification of any plaintiff that was recommended, referred, or otherwise directed to plaintiff's counsel based on a recommendation, referral, or other information gathered from such a third party claim aggregator, lead generator, or related business or individual. (New language underscored.)

## **VI. TRIALS: RULE 42 SHOULD ESTABLISH A CONFIDENTIAL CONSENT PROCEDURE THAT MUST BE FOLLOWED IF BELLWETHER TRIALS ARE TO OCCUR.**

The MDL statute provides for "coordinated or consolidated pretrial proceedings," not trials.<sup>48</sup> Despite the clear limit of this statutory authority, many MDL judges exercise the extraordinary power that inures to them by virtue of presiding over high stakes litigation to pressure parties to agree to a "bellwether" or test trial. Many parties feel they have no choice but go along with a judge who wants to hold a bellwether trial, even if they do not want to. A confidential

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<sup>44</sup> *Id.* at 525.

<sup>45</sup> Lester Brickman, "Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies," 29 CARDOZO L. REV. 514, 579 (2007).

<sup>46</sup> *Id.*

<sup>47</sup> Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, <http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase>.

<sup>48</sup> 28 U.S.C. §1407.

mechanism should be established so parties are free to withhold consent without fear of reprisal—perhaps one similar to the system used to determine whether all parties consent to a trial by a magistrate judge.

The idea of bellwether trials is simple enough: the parties present their evidence and the judge informs them of how he or she would rule on the legal issues, often for the purpose of informing settlement discussions.<sup>49</sup> But the reality of bellwether trials can be much different from the ideal.

The MDL proceeding concerning Pinnacle hip replacements illustrates how proceedings can go off the rails. The presiding judge conducted two multi-month bellwether trials. In the first proceeding, the manufacturer won, but the court refused to enter a judgment and called for more briefing and more bellwether trials.<sup>50</sup> This proceeding is the subject of multiple interlocutory appeals by the defendants. During the subsequent bellwether trials, according to the defendants, the court suspended the rules of evidence, admitting evidence that was hearsay, irrelevant, or purely inflammatory, including an allegation that nonparty subsidiaries made payments to “Saddam’s henchman” and assertions from a book about supposedly improper scientific articles planted in the literature by “Big Tobacco.”<sup>51</sup> Halfway through the MDL proceeding the court also *sua sponte* limited the defendant’s trial time to six more trial days without applying a corresponding time limitation for plaintiff’s counsel.<sup>52</sup> The defendants allege that following their consent to two bellwether proceedings, the court has now required the defendants to submit to 9,300 bellwether proceedings.<sup>53</sup> Given such decisions, no one should feel compelled to participate in bellwether trials.

Further complicating the issue of bellwether trials, judges often require parties to execute a so-called *Lexecon* waiver, waiving remand and jurisdiction (the legality of which, in some cases, may now be even more suspect in the wake of recent Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*<sup>54</sup>). Waiving jurisdiction and submitting to the laws of the transferee court can have important consequences, including different statutes of limitations, procedural requirements, and circuit court interpretations of federal law, etc.<sup>55</sup> Parties should not feel pressed to make such waivers.

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<sup>49</sup> Caroline U. Hollingsworth, “A Brief Overview of Multi-District Litigation,” Heninger Garrison Davis, LLC (2016); see also *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, 17-10812, at \*2 (July 25, 2017) (citing *Manual for Complex Litig.* (Fourth) (2004) (“the purpose of bellwether trials is to ‘produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis.’”))

<sup>50</sup> *See In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, No. 16-10845, at \*2 (June 23, 2016).

<sup>51</sup> *Id.* at \*2.

<sup>52</sup> *Id.* at \*9.

<sup>53</sup> *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, No. 17-10812, at \*2 (July 25, 2017).

<sup>54</sup> *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16-466 (June 19, 2017).

<sup>55</sup> MULTIDISTRICT LITIGATION MANUAL, § 9.18, “Choice of Law in the Transferee Court.”

Bellwether trials virtually insure that parties cannot return their case to the original, transferring court. Only 2.9 percent of MDL cases return to their original district court. In a recent survey of 90 lawyers who practice in MDL proceedings conducted by Professor Francis McGovern of Duke University Law School, the “single most prominent complaint about multidistrict litigation arises from counsel’s negative experience in so-called black hole cases.”<sup>56</sup> A reported 96 percent of the individual actions consolidated in MDLs are terminated by the MDL transferee judge, many if not most by settlement, meaning few cases are ever transferred back to their original court for resolution.<sup>57</sup>

The FRCP should be amended to provide express protections so parties do not feel unduly pressured to participate in bellwether trials and/or to waive jurisdiction. Adding the following language to Rule 42, which governs consolidation, might suffice:

(c) Cases consolidated pursuant to 28 U.S.C. § 1407.

(1) Trial prohibition. The judge or judges to whom an action is assigned by the Judicial Panel on Multidistrict Litigation may not conduct a trial in a civil action transferred to or directly filed in the proceedings unless all parties to that action consent via a confidential procedure;

(2) Bellwether trials. Parties shall not be required to waive jurisdiction in order to participate in bellwether trials;

(3) Remand of select cases for trial. The judge or judges to whom an action is assigned by the Judicial Panel on Multidistrict Litigation may remand select cases for trial in the transferor courts.

**VII. APPELLATE REVIEW: THE FRCP SHOULD PROVIDE A SIMPLE AND DIRECT PATHWAY FOR APPELLATE REVIEW OF CRITICAL RULINGS IN MDL CASES.**

Appellate review is fundamental to the American judicial system because it ensures three essential judicial goals, including: “(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.”<sup>58</sup> These goals are critical in all MDL cases, even those that are headed toward settlement, because the lack of timely and adequate review results in an unfair and

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<sup>56</sup> Hon. John G. Heyburn II and Francis E. McGovern, “Improving the MDL Process,” LITIGATION, Vol 38, No. 3, 31 (Spring 2012).

<sup>57</sup> Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” x (2014); *see also* “Overview of the MDL process,” 2 BUS. & COM. LITIG. FED. CTS. § 14.2 (3d ed.) (citing The Office of the Clerk, Judicial Panel on Multidistrict Litigation, (September 2014) available at [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical%20Analysis%20of%20Multidistrict%20Litigation\\_2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf)).

<sup>58</sup> 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)).

unbalanced mispricing of settlement agreements.<sup>59</sup> In contrast to the benefits of appellate review, the current MDL process can be fairly characterized as follows:

A single judge renders all the important legal decisions in each MDL, exerting outsized impact on the parties and on the evolution of the law—and does so with virtually no scrutiny from other judges. This power centralization promotes efficient case management, but it can be an anathema to our conception of decentralized justice. One instance of unreviewable pretrial error can have an immediate and sweeping impact on thousands of cases in one fell swoop.<sup>60</sup>

The Pinnacle hip replacement MDL case mentioned above<sup>61</sup> is a dramatic example of the outsized impact of unreviewable MDL decisions—the parties to that case had no means to remedy the fundamentally unfair process when the Fifth Circuit denied the petitioner’s writ.<sup>62</sup>

Insufficient appellate review is, of course, a function of inadequate rules. The need for a rule change is obvious from the current landscape of options:

- Under 28 U.S.C. § 1291, appellate jurisdiction exists only for “final” decisions that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”<sup>63</sup> This rule is of little relevance to MDL cases which, by virtue of being statutorily limited to pretrial proceedings, largely concern rulings on pretrial, non-dispositive issues. Although the collateral-order doctrine allows appeal of decisions that are “collateral to” the merits of the action and “too important” to be denied review,<sup>64</sup> in practice, courts are resistant to certify such appeals.
- Non-dispositive rulings are subject to review only through an extraordinary writ of mandamus or subsequent dismissal.<sup>65</sup> Generally, 28 U.S.C. § 1651(a) authorizes the court to “issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law.” In practice, the Supreme Court has referred to such writs as “drastic and extraordinary.”<sup>66</sup> Thus, it is rarely successfully employed and is not a reasonable avenue for appeal for MDL litigants.

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<sup>59</sup> *Id.* at 1673 (“So a defendant, aggrieved by an erroneous legal ruling, will pay more to settle, because the prospect of trial is even worse. A similarly aggrieved plaintiff will take less. And the implications of this mispriced settlement go beyond the immediate financial impact to the parties; the mispricing remains a lingering anathema to the legal system’s role in encouraging or discouraging certain behaviors through economic models.”)

<sup>60</sup> *Id.* at 1646.

<sup>61</sup> *See infra* p.13.

<sup>62</sup> *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Order, Case No. 16-10845 (Sept. 29, 2016).

<sup>63</sup> Andrew Pollis, “The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation,” 79 *FORDHAM L. REV.* 1644, 1652 (2011).

<sup>64</sup> *Id.* at 1649 (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

<sup>65</sup> *See* 28 U.S.C. § 1407(e); *see also* Elizabeth Chamblee Burch, “Article: Judging Multidistrict Litigation,” 90 *N.Y.U.L. REV.* 71, 85 (April 2015).

<sup>66</sup> Andrew Pollis, “The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation,” 79 *FORDHAM L. REV.* 1644, 1657 (2011)(citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This issue with non-reviewability is eloquently described by Professor Andrew Pollis: “Despite the growth in MDL cases and the

- Under 28 U.S.C. § 1292(b), an appeal can occur if both the district court and court of appeals believe the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”<sup>67</sup>
- Rule 54(b) permits a trial court to enter a final judgment on one or more but not all claims by “expressly determin[ing] that there is no just reason for delay.” Because this mechanism requires final resolution on one claim, it, in practice, provides no meaningful relief for MDL litigants.<sup>68</sup>

The Committee should amend Rule 54 to include a provision defining “judgment in cases consolidated pursuant to 28 U.S.C. § 1407” in a way that provides parties the ability to seek and obtain appellate review of material rulings. The Rules Enabling Act gives the Committee authority to do so.<sup>69</sup> Perhaps the best way to do so would be to list a handful of rulings that are highly impactful to the proceedings. Here are five:

- (1) *Daubert* motions;
- (2) pre-emption motions;
- (3) decisions to proceed with a bellwether trial;
- (4) judgment in a bellwether trial (to include material rulings during trial); and
- (5) any ruling that the FRCP do not apply to the proceedings.

Alternatively, the Committee could provide a mechanism similar to Rule 23(f) but that provides appeal as of right rather than as a matter of discretion.<sup>70</sup>

The precise mechanism should be studied and vetted with public comment, but these two ideas would be far better than continuing to allow a material portion of the federal civil docket to exist outside the system of appellate review.

## VIII. CONCLUSION

Although MDL proceedings have multiple cases (sometimes a staggering number of cases), they are fundamentally no different from other law suits: they involve plaintiffs and defendants who

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resulting increase in the power consolidated in individual district court judges, the MDL system has no built-in mechanism for scrutiny of any kind – even of rulings that are fairly debatable, novel, or outright wrong – until after a case reaches final judgement. A party seeking to obtain review of an interlocutory MDL decision must rely on the categories of interlocutory appellate jurisdiction that exist for all other cases.” *Id.* at 1675.

<sup>67</sup> *Id.* at 1644.

<sup>68</sup> *Id.* at 1656.

<sup>69</sup> “Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.” 28 U.S.C. § 2072(c).

<sup>70</sup> For a discussion of how discretionary appeals under Rule 23(f) are failing to meet their purpose, see Lawyers for Civil Justice, “Public Comment to the Advisory Committee on Civil Rules: Amending Rule 23: A Call for Much-Needed Reform of Class Action Procedure,” (Oct. 3, 2016) available at [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjMyojd\\_MXVAhVmxVQKHwBNA24QFggoMAA&url=http%3A%2F%2Fwww.lfcj.com%2Fuploads%2F3%2F8%2F0%2F5%2F38050985%2Ffcj\\_public\\_comment\\_on\\_rule\\_23\\_proposals\\_final\\_10-1-16.pdf&usq=AFQjCNEch4qV\\_O32hZF5beJWJG3anTQBpg](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjMyojd_MXVAhVmxVQKHwBNA24QFggoMAA&url=http%3A%2F%2Fwww.lfcj.com%2Fuploads%2F3%2F8%2F0%2F5%2F38050985%2Ffcj_public_comment_on_rule_23_proposals_final_10-1-16.pdf&usq=AFQjCNEch4qV_O32hZF5beJWJG3anTQBpg).



want and deserve a clear and credible procedure for adjudicating their claims and defenses on the merits. They should not exist outside the FRCP, but many of them do—and in material ways. The Committee should undertake an effort to provide MDL cases with clear, consistent and uniform procedures that presumptively govern the basic steps of litigation: pleadings, dismissal, joinder, required disclosures, trial and appellate review. Doing so would not only benefit all stakeholders in MDL cases, but also fulfill the Committee’s responsibility to maintain the original purpose of the FRCP as “rules for all civil actions and proceedings.”