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COMMENT

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THE CASE AGAINST MDL RULEMAKING

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## INTRODUCTION

John Navarrete sued Hill's Pet Nutrition, a dog food manufacturer, after it voluntarily recalled some of its products for containing too much vitamin D.<sup>1</sup> The Judicial Panel on Multidistrict Litigation centralized<sup>2</sup> Navarrete's case with five other cases pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407.<sup>3</sup> All six plaintiffs claimed that their pets died or became seriously ill because they consumed the recalled products.<sup>4</sup> The centralized proceeding is currently pending in the District of Kansas, where all pretrial matters will be resolved.<sup>5</sup>

A few states to the West, Bradley Colgate, along with forty-four individuals from twenty-two different states, sued JUUL Labs, a leader in the electronic cigarette industry.<sup>6</sup> The plaintiffs alleged that JUUL used research from the tobacco industry to create a product that is more addictive than traditional cigarettes and targeted at youth.<sup>7</sup> The Panel centralized Colgate's case with nine other multiparty cases, all involving claims that JUUL marketed its products to attract minors, misrepresented or omitted that its products are more potent and addictive than traditional cigarettes, and promoted nicotine addiction.<sup>8</sup> There may be more than forty additional related actions.<sup>9</sup> The centralized proceeding is currently pending in the Northern District of California.<sup>10</sup>

Moving to the East Coast, more than 14,000 plaintiffs sued manufacturers of products containing asbestos in eighty-seven federal districts, alleging personal injury or wrongful death caused by asbestos exposure.<sup>11</sup> The litigation involved thousands of deaths, millions of injuries, and billions of dollars.<sup>12</sup> The Panel centralized 26,639 actions, all involving questions of the danger attributable to airborne asbestos in industrial materials and products.<sup>13</sup>

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<sup>1</sup> Navarrete v. Hill's Pet Nutrition, Inc., No. C 19-00767, 2019 WL 1932388, at \*1 (N.D. Cal. May 1, 2019).

<sup>2</sup> "Centralization" refers to the process of transferring civil cases pending in different federal districts that involve one or more common questions of fact to one federal district for coordinated pretrial proceedings. See *Overview of Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/overview-panel-o> [<https://perma.cc/EFM7-B4DS>].

<sup>3</sup> *In re Hill's Pet Nutrition, Inc.*, 382 F. Supp. 3d 1350, 1350-51 (J.P.M.L. 2019).

<sup>4</sup> *Id.* at 1351 & n.2.

<sup>5</sup> *Id.* at 1351.

<sup>6</sup> *Colgate v. JUUL Labs, Inc.*, 402 F. Supp. 3d 728, 736 (N.D. Cal. 2019).

<sup>7</sup> *Id.*

<sup>8</sup> *In re Juul Labs, Inc.*, 396 F. Supp. 3d 1366, 1367 (J.P.M.L. 2019).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1368.

<sup>11</sup> *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 416 (J.P.M.L. 1991).

<sup>12</sup> *Id.* at 418.

<sup>13</sup> *Id.* at 416.

The centralized proceeding is currently pending in the Eastern District of Pennsylvania—and has been since 1991.<sup>14</sup>

These three cases vary greatly, and not just in their subject matter. One involves a handful of plaintiffs, while another involves tens of thousands. One involves lawsuits originating in 2019, while another includes lawsuits that are thirty years old. These examples illustrate the enormous diversity of cases centralized in MDLs across the country. Because of this diversity, there is no uniform set of federal rules governing MDL proceedings. Instead, MDL judges craft procedure specifically suited for the particular case before them,<sup>15</sup> guided by the knowledge shared by the Panel on its website, the Manual for Complex Litigation, and the experience of seasoned MDL attorneys.<sup>16</sup> But this could soon change.

In November 2017, the Advisory Committee on Civil Rules first addressed the possibility of creating new rules specifically for MDL.<sup>17</sup> The corporate defense bar, most notably Lawyers for Civil Justice, had been urging the Committee for years to adopt MDL-specific rules, arguing that ad hoc procedures lack transparency, uniformity, and predictability, and are unfair to defendants.<sup>18</sup> At its next meeting, the Committee appointed a Subcommittee to study the need for MDL-specific rules.<sup>19</sup> Since then, the Subcommittee has gathered more information and reached out to active players in MDL

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<sup>14</sup> *Id.* at 424.

<sup>15</sup> Creative procedures deployed by judges in MDLs include the use of plaintiff and defendant fact sheets and *Lone Pine* orders; case groupings; consolidated complaints and motions sequencing; and coordination with parallel state court cases. *See generally* CATHERINE R. BORDEN, FED. JUD. CTR., MANAGING RELATED PROPOSED CLASS ACTIONS IN MULTIDISTRICT LITIGATION (2018), [https://www.fjc.gov/sites/default/files/materials/21/Managing\\_Related\\_Proposed\\_Class\\_Actions\\_in\\_Multidistrict\\_Litigation.pdf](https://www.fjc.gov/sites/default/files/materials/21/Managing_Related_Proposed_Class_Actions_in_Multidistrict_Litigation.pdf) [<https://perma.cc/6ZS4-U6YJ>] (identifying successful judicial strategies for handling multiple overlapping or conflicting class actions in multidistrict litigation proceedings); U.S. JUD. PANEL ON MULTIDISTRICT LITIG. & FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES (2d ed. 2014), <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf> [<https://perma.cc/ER7N-K4W9>] [hereinafter TEN STEPS TO BETTER CASE MANAGEMENT].

<sup>16</sup> *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov> [<https://perma.cc/J74B-H35W>] (providing links to rules and procedures governing multidistrict litigation); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22 (2004) (discussing categories of information helpful to judges managing mass tort suits).

<sup>17</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES, 469-76 (Nov. 7, 2017), [http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook\\_o.pdf](http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_o.pdf) [<https://perma.cc/KY2H-WZUN>] [hereinafter NOVEMBER 2017 MEETING].

<sup>18</sup> *Reform MDLs*, LAWS. FOR CIV. JUST., <https://www.lfcj.com/rules-for-mdls.html> [<https://perma.cc/BMV3-4EXM>].

<sup>19</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 93 (Apr. 10, 2018), <http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/MW94-VEJF>] [hereinafter APRIL 2018 MEETING].

proceedings. At its meeting in October 2019, it identified four topics as the center of its current work: early vetting to weed out meritless claims, opportunities for interlocutory appellate review, settlement review, and third-party litigation funding disclosure.<sup>20</sup> In April 2020, the Subcommittee narrowed its focus to the first three.<sup>21</sup> And in October 2020, the Subcommittee made significant progress: it decided not to pursue rulemaking for expanded interlocutory appellate review, but it is still studying potential rules for screening claims and judicial supervision of settlement.<sup>22</sup>

Although some of these topics are more appropriate for rulemaking than others, this Comment argues that the Subcommittee should decline to move forward with any rule proposal. This Comment first provides an overview of MDL in Part I. It explains the basic structure of § 1407 and the mechanics of transfer. Next, Part I offers a brief history of § 1407, starting with the considerations that prompted its passage in the first place. This history tells an important story about the reason for MDL's flexible design. The drafters of § 1407 wanted to give federal judges flexibility to handle increasingly complex litigation. They crafted § 1407 to be free from rigid, formulaic procedural requirements—despite backlash from the corporate defense bar that closely mirrors the language used to advocate for MDL-specific rules today.<sup>23</sup> Part I then describes recent MDL practice: its rise in popularity following more restrictive judicial attitudes toward Rule 23 of the Federal Rules of Civil Procedure, and the makeup of MDLs currently pending in federal district courts. Part I concludes by addressing the progress the Rules Committee has made since deciding to consider proposals for MDL-specific rules in 2017, current through its October 2020 meeting.

Part II of this Comment examines the advantages and disadvantages of MDL rulemaking. It frames the discussion in terms of the two aims of the

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<sup>20</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 102-03 (Oct. 29, 2019), [https://www.uscourts.gov/sites/default/files/2019-10\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf) [<https://perma.cc/86VJ-P4X5>] [hereinafter OCTOBER 2019 MEETING].

<sup>21</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 26-27 (Apr. 1, 2020), [https://www.uscourts.gov/sites/default/files/04-2020\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf) [<https://perma.cc/P7PA-V789>] [hereinafter APRIL 2020 MEETING].

<sup>22</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 151 (Oct. 16, 2020), [https://www.uscourts.gov/sites/default/files/2020-10\\_civil\\_rules\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf) [<https://perma.cc/97QQ-W5EV>] [hereinafter OCTOBER 2020 MEETING].

<sup>23</sup> See Andrew D. Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 831–32 (2017) (discussing how those who developed MDL were anything but modest, and developed it as a mechanism “to centralize power over nationwide litigation in the hands of individual judges committed to the principles of active case management”).

Federal Rules of Civil Procedure: efficiency and fairness.<sup>24</sup> Part II also discusses other considerations that must be weighed in deciding whether to adopt MDL-specific rules, including precautions already in place to limit bias from ad hoc procedure and the significant variation between small and large MDLs.

Part III of this Comment focuses on the four proposals the Subcommittee has decided to study: early vetting, opportunities for interlocutory appellate review, settlement review, and third-party litigation funding disclosure. Rather than providing an exhaustive description of these proposals, Part III uses them as a vehicle for examining the appropriateness of the MDL-rulemaking enterprise as a whole. It argues that balancing the costs and benefits of these four proposals reveals that MDL-specific rules will not promote efficiency and fairness and should not be adopted.

Finally, Part IV concludes with a discussion of alternatives to federal rulemaking, including action by Congress, an MDL working group, amending the current rules, and education. Although these alternatives each have their costs, many are better suited for the MDL context than promulgating an entirely new set of rules. More importantly, most current literature fails to consider possibilities for MDL reform beyond federal rulemaking, and this Comment hopes to encourage scholars and others invested in MDL procedure to expand the conversation outside the four corners of the Federal Rules of Civil Procedure.

## I. OVERVIEW OF MDL

The multidistrict litigation statute provides that “civil actions involving one or more common questions of fact . . . pending in different districts . . . may be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>25</sup> The Judicial Panel on Multidistrict Litigation, comprised of seven federal judges appointed by the Chief Justice of the United States, decides whether transfer “will promote the just and efficient conduct of such actions,” and orders transfer if it so concludes.<sup>26</sup> The Panel may only transfer cases for pretrial purposes: it may not transfer cases for consolidated trial.<sup>27</sup> Pretrial matters range from deciding class

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<sup>24</sup> See FED. R. CIV. P. 1 (“[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

<sup>25</sup> 28 U.S.C. § 1407(a).

<sup>26</sup> *Id.*

<sup>27</sup> See *id.* (“[S]uch actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”); see also *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (foreclosing self-transfer of MDLs for trial by the transferee judge). *But see Chair of Judicial Panel Sees Role as Gatekeeper*, THIRD BRANCH, (U.S. Cts., Wash., D.C.) Nov. 2005 at 1, 3 (“We’re hopeful that in this Congress . . . *Lexecon* will be a thing of the past.”).

certification motions and motions to dismiss to resolving discovery disputes and managing expert disclosures.<sup>28</sup> After pretrial proceedings are finished, the action “shall be remanded by the panel . . . to the district from which it was transferred.”<sup>29</sup> Even with this limitation, the effects of pretrial transfer are significant. Only about three percent of cases return to the transferor court—the rest are settled or resolved by dispositive motion in the MDL court.<sup>30</sup> Because trials are rare, pretrial proceedings are the “main event”—and these pretrial proceedings are squarely within the purview of the MDL judge.<sup>31</sup>

The Panel may transfer an MDL proceeding to any district, even if venue and personal jurisdiction requirements would ordinarily foreclose that forum to the parties.<sup>32</sup> Transfer may be initiated by the Panel upon its own initiative, or upon motion “filed with the panel by a party in any action in which transfer . . . may be appropriate.”<sup>33</sup> If a party opposes transfer, it may petition for an extraordinary writ in the court of appeals with jurisdiction over the transferee district court.<sup>34</sup> In contrast, an order denying transfer is not reviewable.<sup>35</sup>

Like all civil actions in federal court, MDLs are governed by the Federal Rules of Civil Procedure.<sup>36</sup> Although the Panel may prescribe rules for its

<sup>28</sup> TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 15, at 3.

<sup>29</sup> 28 U.S.C. § 1407(a).

<sup>30</sup> See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399-401 (2014) (“Multidistrict litigation has frequently been described as a ‘black hole’ because transfer is typically a one-way ticket.” (footnote omitted)); see also Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017) (“Although styled as a mechanism for only pretrial resolution of cases unamenable to class action but with sufficient similarities to justify some consolidation, it is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.” (footnote omitted)).

<sup>31</sup> See Bradt, *supra* note 23, at 834-35 (“[T]he vast majority of transferred cases are terminated or settled before pretrial proceedings conclude, that is, while they are within the control of the MDL judge. In a world where trials are exceedingly rare, pretrial proceedings are the main event.” (footnote omitted)); see also Marc Galanter & Angela M. Frozena, *A Grin Without A Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 115, 121 (“[T]he decline [in trials] has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.”).

<sup>32</sup> See, e.g., *In re Aircraft Accident*, 474 F. Supp. 996, 999 (J.P.M.L. 1979) (“The Panel’s discretion under Section 1407 is not limited by venue considerations . . . and the fact that defendants may not all be amenable to suit in the same jurisdiction does not prevent transfer to a single district for pretrial proceedings where the prerequisites of Section 1407 are otherwise satisfied.”). For an analysis of the role of personal jurisdiction in MDL, see Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165 (2018).

<sup>33</sup> 28 U.S.C. § 1407(c)(i-ii).

<sup>34</sup> *Id.* § 1407(e).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 1407(f); see also FED. R. CIV. P. 1 (“These rules govern the procedure in *all civil actions and proceedings* in the United States district courts . . .” (emphasis added)).

operations (and has done so twenty-five times<sup>37</sup>), these rules must be consistent with the Civil Rules.<sup>38</sup> Because MDL requires a higher degree of practical problem solving than “traditional” two-party civil litigation, MDL judges are emboldened to develop special MDL procedures that vary from case to case.<sup>39</sup>

This Section begins with a brief history of § 1407, focusing in particular on the considerations that prompted its creators to delegate authority to the Panel instead of promulgating a firm set of rules. It then discusses recent trends in MDL practice and the overlap between MDL and its complex litigation cousin, the class action. This section concludes with a description of the Advisory Committee on Civil Rule’s progress through its October 2020 Subcommittee meeting.

### A. A Brief History

A small group of judges, aided by scholar Phil C. Neil, invented the MDL statute in the early 1960s, predicting a “litigation explosion” as a result of the increased prevalence of mass torts.<sup>40</sup> A flood of antitrust litigation brought against electrical equipment manufacturers beginning in 1961 likely inspired the prediction.<sup>41</sup> The complaints alleged conspiracies to divide business and fix prices among virtually every American manufacturer of electrical equipment, culminating in over 1,800 cases in thirty-five federal district courts during a twelve-month period.<sup>42</sup> The judges and scholar behind the creation of the MDL statute believed that control over these cases ought not remain in the hands of the parties or their attorneys—or even in the hands of ordinary federal judges.<sup>43</sup> Instead, they recognized a need for more efficient management of complex, multiparty, multidistrict litigation.

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37 RULES OF PROCEDURE OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (2016). For a summary of these rules, see *Summary of Panel Rules*, U.S. CTS. (Oct. 4, 2010), [https://www.jpml.uscourts.gov/sites/jpml/files/Summary%20of%20Panel%20Rules\\_Revised\\_10-4-2010.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Summary%20of%20Panel%20Rules_Revised_10-4-2010.pdf) [<https://perma.cc/ZUW9-4CYX>].

38 28 U.S.C. § 1407(f).

39 See Gluck, *supra* note 30, at 1673-74 (“MDLs exemplify procedural exceptionalism. This is a type of litigation that judges insist is unique, too different from case to case to be managed by the transsubstantive values that form the very soul of the FRCP. Instead, judges develop their own special MDL procedures . . .”).

40 Bradt, *supra* note 23, at 834; see also Bradt, *supra* note 32, at 1199 (noting that MDL “was invented by an academic, Dean Phil C. Neal of the University of Chicago, and United States District Judge William H. Becker of the Western District of Missouri”).

41 See generally Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

42 Bradt, *supra* note 23, at 855.

43 *Id.* at 855-56.

In 1962, Chief Justice Warren assembled a Subcommittee of the Committee on Pretrial Procedure to consider the problems “arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits.”<sup>44</sup> Eventually, the Subcommittee decided to centralize pretrial proceedings with later remand for trial. This system enabled judges to flexibly and innovatively manage complex litigation, while still allowing plaintiffs’ lawyers to meaningfully control their cases.<sup>45</sup> Although the Subcommittee had no express authority to require judges to take specific actions, it managed to convince many judges to adopt a coordinated approach to case management.<sup>46</sup>

The Subcommittee’s success managing the electrical equipment cases led to requests that it also shepherd other litigation surges.<sup>47</sup> In addition, it prompted a proposal that Congress create a more permanent body to perform this task.<sup>48</sup> In 1968, Congress passed 28 U.S.C. § 1407, and the Panel assumed the Subcommittee’s role as centralizer.

### B. Use of the MDL Statute Today

For most of its history, attorneys, judges, and even scholars treated the MDL statute as a “little-utilized and disfavored judicial backwater,” preferring the class action for managing complex litigation, particularly in large products-liability cases.<sup>49</sup> Indeed, before 1990 the Panel centralized only six products-liability MDL proceedings.<sup>50</sup> But things have changed.

As of July 2020, MDLs account for 130,649 pending cases in federal district court.<sup>51</sup> That means that MDLs comprise more than one-third of the

<sup>44</sup> *Id.* (quoting Press Release, Admin. Off. of the U.S. Cts. 1-2 (Feb. 7, 1962)).

<sup>45</sup> *Id.* at 839 (“Such a ‘limited transfer’ structure would insulate the statute from . . . the resistance of plaintiffs’ lawyers who might fear loss of control over their cases . . . . The transfer structure might also, however, create the necessary central control for a single judge to manage the litigation.”).

<sup>46</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 140-41 (Nov. 1, 2018), [https://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_o.pdf](https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_o.pdf) [<https://perma.cc/34N9-237L>] [hereinafter NOVEMBER 2018 MEETING].

<sup>47</sup> *Id.* at 141.

<sup>48</sup> *Id.*

<sup>49</sup> Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. Rev. 511, 552 (2013); see also Bradt, *supra* note 23, at 832 (“As recently as a decade ago, it would have been reasonable to say that multidistrict litigation . . . was a second banana to the class action . . . .”); Gluck, *supra* note 30, at 1671 (describing MDL as “the quieter sibling of class actions”).

<sup>50</sup> Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 793 (2010).

<sup>51</sup> U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 3 (2020), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_Actions\\_Pending-July-16-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-16-2020.pdf) [<https://perma.cc/4HWQ-FXHM>].



approximately 340,000 pending civil cases in federal courts.<sup>52</sup> The roughly 120,000 cases pending in MDLs have been centralized into 227 actions, and the largest action contains over 20,000 cases.<sup>53</sup> It is important to recognize, however, that the large number of MDL cases in recent years “has been principally due to there being, at any given time, about two dozen MDLs with 1,000 or more cases.”<sup>54</sup> Although these cases, which are typically categorized as products-liability litigation, tend to occupy public attention, they are not representative of MDL as a whole.<sup>55</sup> Overall, the number of MDL dockets has declined by about fifty percent since 2009.<sup>56</sup> Nevertheless, MDL continues to play a significant role in the current civil litigation landscape.

One explanation for the changing perception of MDL as a tool for resolving mass litigation is changing judicial attitudes toward class certification under Rule 23.<sup>57</sup> Rule 23(f) and the Class Action Fairness Act have changed the procedural landscape, and “[n]umerous courts have become skeptical about certifying class actions.”<sup>58</sup> Although MDL centralization is “not *exactly* an alternative to class action aggregation of claims,”<sup>59</sup> it is often used to accomplish essentially the same purpose.<sup>60</sup> This centralization has many advantages. The MDL process confers benefits on plaintiffs, defendants, and even judges. Plaintiffs can band together and combine resources to achieve parity with well-resourced defendants, while defendants appreciate the value of global peace—the opportunity “to litigate all claims in a single forum where they can both efficiently perform discovery and motion practice and eventually achieve peace, whether through victory on a

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<sup>52</sup> Letter from Zachary D. Clopton, Assoc. Professor of L., Cornell L. Sch., to Members of the Subcomm. on Multidistrict Litig. 2 (Oct. 26, 2018), [https://www.uscourts.gov/sites/default/files/18-cv-y-suggestion\\_clopton\\_re\\_mdj\\_rulemaking\\_o.pdf](https://www.uscourts.gov/sites/default/files/18-cv-y-suggestion_clopton_re_mdj_rulemaking_o.pdf) [<https://perma.cc/WQ8H-2THY>].

<sup>53</sup> *Id.* at 1.

<sup>54</sup> ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 207 (Apr. 2-3, 2019), [https://www.uscourts.gov/sites/default/files/2019-04\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf) [<https://perma.cc/7S9C-9LB5>] [hereinafter APRIL 2019 MEETING].

<sup>55</sup> Letter from Zachary D. Clopton, *supra* note 52, at 2.

<sup>56</sup> APRIL 2019 MEETING, *supra* note 54, at 207.

<sup>57</sup> See *Panel Promotes Just and Efficient Conduct of Litigation*, THIRD BRANCH (U.S. Cts., Wash., D.C.) Feb. 2010, at 3 (“The advent of the Class Action Fairness Act (CAFA) and evolving judicial views of class certification under Rule 23 have coincided to make centralization under Section 1407 an often attractive alternative for resolving complex aggregated claims.”).

<sup>58</sup> Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731-32 (2013); see also Willging & Lee, *supra* note 50, at 784 (“Rule 23(f) has almost certainly contributed to the restriction in class action certification during the past decade.”); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 390 (2011) (“Because the formal class action rule became an inconvenient impediment to resolving aggregate claims favorably to both plaintiff and defense interests, actors involved in mass litigation now promote MDL procedure . . . as an entirely useful, creative legal fiction to accomplish self-interested goals.”).

<sup>59</sup> Willging & Lee, *supra* note 50, at 794.

<sup>60</sup> Bradt, *supra* note 23, at 835.

dispositive motion or through settlement.”<sup>61</sup> Judges, and the judicial system more generally, benefit from the docket-clearing and efficiency gains centralization provides, as well as from the flexibility to manage complex and novel issues using different procedures and management techniques.<sup>62</sup>

Despite its utility, MDL also presents unique challenges to judges and litigants. One judge described managing MDLs as “like Rule 16 on Steroids. In the MDL, you need to strategize more. You have to look beyond immediate deadlines and see how all the pieces fit together.”<sup>63</sup> Scholars have also expressed concern about the lack of procedural protections for plaintiffs in MDL proceedings, including the lack of an opt-out option or judicial review of settlement fairness.<sup>64</sup> In light of the strong positions taken both for and against MDL proceedings, it is unsurprising that the Rules Committee has now determined to examine them more closely.

### C. Rules Committee Progress

In November 2017, the Advisory Committee on Civil Rules first asked “whether the time has come to undertake an effort to generate rules specifically adapted to MDL proceedings.”<sup>65</sup> There are many reasons the Committee may have decided that nearly fifty years after Congress passed § 1407 it was time to take up that question. Undoubtedly, the Committee was influenced by the increasing popularity of the MDL statute for resolving mass torts.<sup>66</sup> Pressure

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<sup>61</sup> *Id.* at 836; *see also* Burch, *supra* note 30, at 414 (“Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.”).

<sup>62</sup> Bradt, *supra* note 23, at 836; *see also* *An Interview with Judge John F. Nangle: Chair of the Judicial Panel on Multidistrict Litigation*, THIRD BRANCH (Dec. 1995), <https://www.jpml.uscourts.gov/sites/jpml/files/The%20Third%20Branch%20-%20December-1995-Nangle%20Interview.pdf> [<https://perma.cc/D3VC-WVFP>] (“[C]entralization eliminates duplication of discovery; avoids inconsistent pretrial rulings; conserves the resources of the parties, their counsel and the Judiciary; and thereby expedites the entire proceeding . . . [T]he panel has, through experience, developed a very solid corps of judges who are highly skilled in handling special types of litigation.”).

<sup>63</sup> Gluck, *supra* note 30, at 1688.

<sup>64</sup> *See, e.g.*, Mullenix, *supra* note 58, at 391 (“The deployment of MDL jurisdiction . . . has stripped away protections afforded by class action requirements. Mass litigation actors may now settle complex cases largely unconstrained by law.”); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (“[T]he current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison.”).

<sup>65</sup> NOVEMBER 2017 MEETING, *supra* note 17, at 477.

<sup>66</sup> *See* Bradt, *supra* note 23, at 833 (“With the Supreme Court and lower courts cutting back the viability of the class action under Rule 23 for decades and with Congress providing for expanded jurisdiction over class actions in the federal courts, MDL has become the leading mechanism for resolving mass torts.” (footnote omitted)).

from the corporate bar, most notably from Lawyers for Civil Justice,<sup>67</sup> also likely played a role. The first proposals to the Committee for amending the rules were made in November 2017 by Lawyers for Civil Justice, the Washington Legal Foundation, and the Duke Center for Judicial Studies, represented by John Rabiej.<sup>68</sup> All three proposals reflected a concern that “[t]he felt pressures of managing MDL proceedings, particularly in those that bring together the largest numbers of cases, lead MDL judges to create imaginative procedures only loosely anchored in the Federal Rules of Civil Procedure.”<sup>69</sup>

Lawyers for Civil Justice and the Washington Legal Foundation expressed concern that “[l]arge MDL proceedings attract many claimants whose purported claims have no foundation in fact, and there is no effective means for screening them out.”<sup>70</sup> Lawyers for Civil Justice offered seven proposals: (1) master complaints; (2) particularized pleading; (3) initial evidence; (4) permissive joinder of plaintiffs; (5) required disclosures; (6) true consent for bellwether trials; and (7) appellate review.<sup>71</sup> The Washington Legal Foundation supported the proposals by Lawyers for Civil Justice, offering two papers emphasizing the potential for MDLs to become “warehouses for meritless, unvetted claims that would be quickly dismissed if brought as individualized actions.”<sup>72</sup>

The Duke Center for Judicial Studies offered a different perspective, suggesting a new Rule 23.3 limited to MDL proceedings. The rule would cover actions that include 900 or more individual cases, which account for about ninety percent of all centralized cases.<sup>73</sup> The proposal contends that these mega-cases would be better handled if, “‘at some point *after* most discovery takes place,’ and shortly after the bellwether cases have been selected, the work is divided among five judges ‘to decide whether to dispose of a case on motion, settle, or remand.’”<sup>74</sup> Unlike the proposals recommended by Lawyers for Civil Justice and the Washington Legal Foundation, the Committee has not considered this proposal further.

In April 2018, the Committee appointed a Subcommittee to gather more information on MDL and MDL-specific rules because, although “[v]aluable information has been provided . . . it is mostly from one

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<sup>67</sup> Lawyers for Civil Justice describes itself as “a partnership of leading corporate counsel and defense bar practitioners . . . forg[ing] alliances among its members and leverag[ing] the strength of those alliances to help restore and maintain balance in the civil justice system.” *About Us*, LAWS. FOR CIV. JUST., <https://www.lfcj.com/about-us.html> [<https://perma.cc/LP9E-YSG7>].

<sup>68</sup> NOVEMBER 2017 MEETING, *supra* note 17, at 469-76, 535-37.

<sup>69</sup> *Id.* at 469.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 469-74.

<sup>72</sup> *Id.* at 475-76.

<sup>73</sup> *Id.* at 476.

<sup>74</sup> *Id.*

perspective. . . . [T]he Committee needs more, particularly from the Judicial Panel.”<sup>75</sup> The Committee resolved to launch a six- to twelve-month project to gather information to inform the decision of whether to generate new rules.<sup>76</sup> It determined to seek information from the Panel,<sup>77</sup> as well as from bar groups, but did not commit to study any particular proposals.<sup>78</sup> By November 2018, little progress had been made. The Committee had gathered more information but was not yet prepared to make recommendations about whether to consider possible rule amendments.<sup>79</sup>

In October 2019, the Committee reported that “[i]t had gathered a lot of information,” but it “remains an open question whether it will be useful to propose any MDL-specific rules.”<sup>80</sup> One of the most notable features of this meeting was an increase in the number of voices heard, particularly from outside the corporate bar. In addition to proposals from Lawyers for Civil Justice, the Subcommittee gathered research from the Federal Judicial Center Research Division,<sup>81</sup> as well as materials from Professor Zachary Clopton,<sup>82</sup> John Beisner,<sup>83</sup> Bracket Denniston and twenty-five other general counsels,<sup>84</sup>

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<sup>75</sup> APRIL 2018 MEETING, *supra* note 19, at 93.

<sup>76</sup> *Id.*

<sup>77</sup> The Panel “seem[ed] to have some understandable skepticism about whether rule changes would materially improve MDL practice. Panel members . . . may be inclined to think that distinctive aspects of different MDLs make some overarching set of new rules hard to imagine.” *Id.* at 158.

<sup>78</sup> *Id.* at 148-53.

<sup>79</sup> See NOVEMBER 2018 MEETING, *supra* note 46, at 139-40 (“[The Subcommittee] continues to gather information and has not yet attempted to develop recommendations about whether to consider possible rule amendments, or what amendments, if any, should be given serious study.”).

<sup>80</sup> OCTOBER 2019 MEETING, *supra* note 20, at 102.

<sup>81</sup> *Id.* at 225. The Federal Judicial Center’s statutory mission is “to conduct and stimulate research and development for the improvement of judicial administration.” MARGARET S. WILLIAMS, EMERY G. LEE III & JASON A. CANTONE, FED. JUD. CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008-2018 (2019).

<sup>82</sup> See Letter from Zachary D. Clopton, *supra* note 52, at 1 (“The current proposals call for specialized rules for a subset of federal cases, a departure from the norm that should not be made lightly.”).

<sup>83</sup> See Letter from John H. Beisner, Litig. Partner, Skadden, Arps, Slate, Meagher & Flom LLP, to Ms. Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Nov. 21, 2018), [https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion\\_beisner\\_o.pdf](https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_o.pdf) [<https://perma.cc/7PKD-SLHV>] (responding to the proposed Rule 23.3, which would allow intermediate interlocutory appeal in some circumstances).

<sup>84</sup> See Letter from Brackett B. Denniston, III, Former Senior Vice President and Gen. Couns., Gen. Elec. et al., to Ms. Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Jan. 31, 2019), [https://www.uscourts.gov/sites/default/files/19-cv-h-suggestion\\_us\\_chamber\\_o.pdf](https://www.uscourts.gov/sites/default/files/19-cv-h-suggestion_us_chamber_o.pdf) [<https://perma.cc/6986-ZAA5>] (supporting the proposal to amend Rule 26(a)(1)(A)).

Eric Blinderman and two other representatives of litigation funders,<sup>85</sup> and Christopher Bogart of Burford, also a litigation funder.<sup>86</sup>

Also in October 2019, the Subcommittee identified four topics as the center of current work: (1) early vetting of individual cases to weed out meritless claims; (2) opportunities for interlocutory review; (3) settlement review; and (4) third-party litigation funding.<sup>87</sup> It also determined that rulemaking proposals primarily concern the mega-MDLs that aggregate thousands and tens of thousands of cases and elected to focus analysis on these proceedings.<sup>88</sup>

In April 2020, the Subcommittee reported that its work is “ongoing.”<sup>89</sup> It continued to explore the four topics it identified as central at its October 2019 meeting, but it focused primarily on early vetting and interlocutory and settlement review.<sup>90</sup> To supplement its discussion, the Subcommittee canvassed the use of census techniques in four major MDL proceedings.<sup>91</sup> As at its other meetings, the Subcommittee also outlined arguments in favor and against the adoption of each MDL rule proposal, which are explored in detail in Part III.

At its most recent meeting in October 2020, the Subcommittee determined that rulemaking should not be pursued for providing expanded interlocutory appellate review.<sup>92</sup> It based its decision on (1) the potential for significant delay if expanded appellate review is possible; (2) broad judicial opposition to expanded appellate review; and (3) difficulties defining the subset of MDL proceedings in which expanded appellate review should be available, among other factors.<sup>93</sup> The Subcommittee has not yet decided if rulemaking should be pursued for screening claims or judicial supervision of settlement.<sup>94</sup> It is collecting more information on the effectiveness of “census” techniques for identifying meritless claims and organizing MDL

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<sup>85</sup> See Letter from Eric H. Blinderman, Chief Exec. Officer, Therium Cap. Mgmt. et al., to Ms. Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Feb. 20, 2019), [https://www.uscourts.gov/sites/default/files/19-cv-e-suggestion\\_burford\\_capital\\_et\\_al\\_o.pdf](https://www.uscourts.gov/sites/default/files/19-cv-e-suggestion_burford_capital_et_al_o.pdf) [<https://perma.cc/7BMJ-9YK3>] (opposing the proposal to amend Rule 26(a)(1)(A)).

<sup>86</sup> See Letter from Christopher P. Bogart, Chief Exec. Officer, Burford Cap., to Ms. Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Feb. 20, 2019) (on file with author) (rebutting the U.S. Chamber Institute for Legal Reform’s claim that the business community does not use litigation financing).

<sup>87</sup> OCTOBER 2019 MEETING, *supra* note 20, at 103–04.

<sup>88</sup> See *id.* at 103 (“Drafting rules that distinguish the many smaller MDLs might prove difficult.”).

<sup>89</sup> APRIL 2020 MEETING, *supra* note 21, at 145.

<sup>90</sup> *Id.* at 145, 148, 154.

<sup>91</sup> *Id.* at 147–48.

<sup>92</sup> OCTOBER 2020 MEETING, *supra* note 22, at 151.

<sup>93</sup> *Id.* at 156–57.

<sup>94</sup> *Id.* at 151.

proceedings, and on the experiences of leadership counsel in global settlement negotiations.<sup>95</sup>

## II. ADVANTAGES AND DISADVANTAGES OF MDL RULEMAKING

The purpose of the Federal Rules of Civil Procedure is “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>96</sup> Any amendments to these rules or attempts to create a new set of federal rules ought to further this objective. This Part examines the advantages and disadvantages of MDL-specific rules at a big-picture level. It frames the discussion in terms of efficiency—aimed at achieving the “speedy” and “inexpensive” goals of the Civil Rules—and fairness—aimed at achieving the “just” goal of the Civil Rules. Part III provides a more focused examination of the advantages and disadvantages of the four potential rule topics the Subcommittee is most seriously considering.

In the context of federal rulemaking, “what the Advisory Committee on Civil Rules does not do is, in some ways, as important as what it does. . . . Amendments do not and should not happen often.”<sup>97</sup> Changes to procedure through rulemaking tend to be modest, but that does not make them unimportant. The class action context provides a helpful example: “[T]he repeated attempts to revise the class action rules, attempts that have resulted in relatively marginal changes, have demonstrated the difficulty of making massive changes through the rulemaking process.”<sup>98</sup> It is likely that any changes in the MDL context would be similar—evolutionary rather than revolutionary. Nevertheless, even small changes can be significant.<sup>99</sup>

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<sup>95</sup> *Id.* at 152-53, 160.

<sup>96</sup> FED. R. CIV. P. 1.

<sup>97</sup> Richard Marcus, *Shoes that Did Not Drop*, 46 U. MICH. J.L. REFORM 637, 637 (2013).

<sup>98</sup> Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 101 (2018); see also Richard Marcus, *Revolution v. Evolution in Class Action Reform*, 96 N.C. L. REV. 903, 917 (2018) (“In terms of potentially revolutionary change, the first two experiences with amending Rule 23 produced an evolution away from revolution that has continued through the most recent episode.”).

<sup>99</sup> See Bradt, *supra* note 98, at 99-100 (noting that the effects of the interlocutory appeal provision for class certification in Rule 23(f), despite being the product of “evolutionary” rather than “revolutionary” change, are “significant and important”).

The complexity of rulemaking in the MDL context<sup>100</sup> may compel rulemakers to “shy away from [it] simply as a matter of prudence.”<sup>101</sup> MDLs come in a variety of shapes and sizes, and crafting transsubstantive rules that work equally well in the largest and smallest MDLs would be difficult.<sup>102</sup> One of the reasons the drafters of the MDL statute chose to turn to Congress instead of rulemaking in the 1960s was because of the difficulty and time-consuming nature of the project.<sup>103</sup> The difficulties identified in the 1960s apply with equal force today. But even if rulemaking may be difficult and time-consuming, it should be done if the changes will better serve the goals of the Federal Rules of Civil Procedure.

The arguments for and against MDL rulemaking can be framed in terms of two litigation goals: efficiency and fairness. So far, “the battle lines are drawn; well-funded corporate defense groups in favor of rules want to limit discretion of MDL judges, while the plaintiffs’ bar and [the Panel] are copacetic with the status quo.”<sup>104</sup>

The underlying arguments for amending the rules can also be grouped into two categories: (1) “that MDL judges need to be constrained,” and (2) “that MDL attracts meritless claims that are underexamined before being folded into a global settlement.”<sup>105</sup> Proponents of MDL-specific rules argue that elevated judicial management will provide more efficient resolution of massive and unwieldy proceedings.<sup>106</sup> Pointing to data suggesting that “between 30-40

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<sup>100</sup> See NOVEMBER 2017 MEETING, *supra* note 17, at 477 (“A great deal of information must be gathered to support useful rulemaking. The information includes the character of the common elements of MDL proceedings and of the disparate elements that affect some number—perhaps most—of them. The necessary information also includes the range of practices that have emerged and the contexts in which they have emerged.”).

As Professor Clopton explained,

Looking at the full set of 227 MDLs, fewer than one third are products-liability cases. The next largest categories are antitrust and sales practice litigation, with the remaining cases including contract, disasters, employment, intellectual property, and securities. The smallest MDLs are sometimes products-liability litigation. But they also often involve cases sounding in antitrust, data security, intellectual property, marketing and sales practice, and securities law.

Letter from Zachary D. Clopton, *supra* note 52, at 2.

<sup>101</sup> Bradt, *supra* note 98, at 101.

<sup>102</sup> Just in product-liability MDL proceedings, the FJC found that the number of cases ranged from three to over 40,000. APRIL 2019 MEETING, *supra* note 54, at 210.

<sup>103</sup> See Bradt, *supra* note 98, at 101 (“Indeed, one of the main reasons why Judge Murrah and Judge Becker, at Judge Maris’s encouragement, backed away from rulemaking for MDL in the 1960s was the potential difficulty and time-consuming nature of the project.”).

<sup>104</sup> *Id.* at 99.

<sup>105</sup> *Id.* at 98.

<sup>106</sup> Letter from Zachary D. Clopton, *supra* note 52, at 3. But although “[t]his might be true for the large MDLs . . . it does not seem particularly persuasive for the scores of MDLs comprising a handful of consolidated cases.” *Id.*

percent of all filed MDL cases turn out (often at the settlement stage) to be unsupportable,” they argue that the lack of rules for MDL forces courts, and defendants, to waste time and resources on meritless claims.<sup>107</sup>

### A. Efficiency

The MDL statute was born from a desire to foster more efficient resolution of complex cases. Congress recognized that “[t]he main purpose of transfer for consolidation or coordination of pretrial proceedings is to promote the ends of efficient justice . . . .”<sup>108</sup> The drafters of the MDL statute believed that “MDLs would come in many shapes and sizes, and [that] judges would need flexibility in order to manage them.”<sup>109</sup> They feared that strict rules could interfere with the need to “adapt to changing circumstances, new laws, and different kinds of litigation.”<sup>110</sup> In order to preserve judicial flexibility and independence, the drafters of the MDL statute attempted to avoid rulemaking and kept the locus of control with the Panel.<sup>111</sup> Civil Rules for MDL proceedings would put this design at risk, potentially threatening the basic features of MDL.<sup>112</sup>

Litigation has only become more complex in the fifty years since § 1407 was passed. The increase in MDL proceedings, and in their complexity, is a reason to retain flexibility rather than “freeze procedure” through a set of specific new rules.<sup>113</sup> MDL increases litigation efficiency in many ways: it allows related multidistrict claims to be handled, even if not tried, in a single district; reduces duplicative discovery; and permits resource pooling. These benefits cut both ways: plaintiffs benefit from pooling resources, placing them on a more level playing field with well-resourced defendants, while defendants benefit from centralized discovery and the prospect of global peace if all claims can be settled jointly.

It is not apparent that adding MDL-specific rules will promote judicial efficiency. The Panel has expressed “skepticism about whether rule changes would materially improve MDL practice”—that is, whether rule changes would make MDL more efficient.<sup>114</sup> It reported that “[p]anel members are open to work on shared concerns, but may be inclined to think that distinctive

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<sup>107</sup> J. Maxwell Heckendorn & Steven E. Swaney, *Meritless Claims Create Inefficiencies in Multidistrict Litigation*, NAT'L L. REV. (Feb. 12, 2019), <https://www.natlawreview.com/article/meritless-claims-create-inefficiencies-multidistrict-litigation> [<https://perma.cc/8MJR-VK8Y>].

<sup>108</sup> S. REP. NO. 90-454, at 2 (1967).

<sup>109</sup> Bradt, *supra* note 98, at 103.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 90-91.

<sup>112</sup> *Id.* at 91.

<sup>113</sup> *Id.* at 104.

<sup>114</sup> APRIL 2018 MEETING, *supra* note 19, at 158.



aspects of different MDLs make some overarching set of new rules hard to imagine.”<sup>115</sup> Many judges insist that MDL “is unique, too different from case to case to be managed by the transsubstantive values that form the very soul of the FRCP.”<sup>116</sup> In a series of interviews conducted by Abbe Gluck, every judge asked about the proposals to create MDL-specific rules opposed the idea.<sup>117</sup> The judges insisted that each MDL is different, and “that the very hallmark of the MDL is the ability to deviate from traditional procedures—i.e., for the judge to remain flexible and creative in every case.”<sup>118</sup> The judges also emphasized that MDL procedure is constantly changing and still a work in progress—and one that may never be complete. As a result, best practices are continually evolving, and what works well now may not work well five or ten years from now. One judge noted that he “see[s] ways to change course each time, new ways to tweak [MDL procedure]. . . . If we [crafted rules] too early people would just go around them. . . . Every case is different.”<sup>119</sup>

The plaintiffs’ bar has expressed similar concerns. It questions whether a one-size-fits all approach makes sense for MDL, which is intrinsically case-specific.<sup>120</sup> It also argues that “[j]udges need to remain empowered to exercise broad discretion in any particular case rather than be constrained by formalistic preconceptions of what a vocal minority consider to be ‘best practices.’”<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> Gluck, *supra* note 30, at 1674.

<sup>117</sup> *Id.* at 1675. Gluck conducted lengthy and confidential oral interviews of twenty judges—fifteen federal and five state—each with significant experience in MDL litigation. *Id.* She interviewed each judge in person or over the phone for approximately one hour. *Id.*

Gluck asked the judges

why they think MDLs are on the rise; how MDLs compare to class actions; how MDL procedure is made; about the relationship between MDL procedure and FRCP 16; whether a separate rule for MDLs would be a positive development or whether Rule 23 could be expanded to include MDLs or make them less necessary; about relationships among judges and attorneys in MDLs; about federalism and choice of law; about relationships and coordination among federal judges and between federal and state judges; about concerns regarding access to justice, transparency, the individual case, and lack of judicial review; how MDLs differ from non-MDL cases; about the role of consent; why they think MDLs are increasing; how they learned how to conduct an MDL; about the MDL panel and its process; about requiring state-court attorneys in parallel actions to pay into the common benefit fund; and about the low remand rate.

*Id.*

<sup>118</sup> *Id.* at 1689.

<sup>119</sup> *Id.*

<sup>120</sup> APRIL 2018 MEETING, *supra* note 19, at 205.

<sup>121</sup> *Id.*

### B. Fairness

One of the driving forces behind proposals to amend the Civil Rules is perceived unfairness to defendants created by uncertainties in MDL procedure.<sup>122</sup> Lawyers for Civil Justice argues that current MDL processes lack transparency, uniformity, and predictability, resulting in an unbalanced litigation environment.<sup>123</sup> The organization has expressed concern that “[i]n practice . . . the sheer number of cases filed in MDLs means that defendants often cannot exercise their discovery rights until the litigation is well underway, at which point defendants (and courts) must expend significant resources to identify and combat these claims.”<sup>124</sup>

Scholars worry that MDL also results in unfairness to plaintiffs. Many of their concerns echo the defense side: that MDL lacks transparency, and that the absence of strict rules stunts the development of uniform procedural law.<sup>125</sup> In addition, they worry about the loss of the individual claim, and that MDL is just “another mechanism that undermines trial and the traditional class action.”<sup>126</sup>

It is true that in the MDL context plaintiffs often exercise less control over their cases than they would if the cases were being litigated independently. For one, there is the risk of settlement pressure: “An MDL judge will often lock transferred cases into the MDL forum in order to pressure settlements. When this happens and the MDL aggregation is very large, the personal control exerted by any individual plaintiff is weak.”<sup>127</sup> This threat is made all the more troubling by the potential for MDL settlements to benefit the attorneys more than the injured claimants.<sup>128</sup> Without the

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<sup>122</sup> See, e.g., LAWS FOR CIV. JUST., MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 2 (2018), [https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_memo\\_-\\_mdl\\_tplf\\_proposals\\_for\\_discussion\\_9-14-18\\_\\_004\\_.pdf](https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl_tplf_proposals_for_discussion_9-14-18__004_.pdf) [<https://perma.cc/6WN8-9N53>] (“The asymmetric nature of MDLs encourages plaintiffs to file low- or no-merit cases against defendants, because the marginal costs of adding a new case are close to zero, while the costs of uncovering information about a claim’s lack of merit can be significant.”).

<sup>123</sup> *Id.* at 1.

<sup>124</sup> *Id.*

<sup>125</sup> Gluck, *supra* note 30, at 1674.

<sup>126</sup> *Id.*

<sup>127</sup> Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 339-40 (2008); see also *id.* at 339 n.76 (“The threat of long delays and high delay costs in the MDL forum often pressures plaintiffs to settle when they would prefer to have their cases transferred back to their home forums for trial.”).

<sup>128</sup> See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2177 (2017) (“The risk that MDL settlements can include terms that benefit the negotiating parties more than claimants is well recognized. . . . [C]laimants who are sucked into an MDL have little actual control over the litigation; lawyers on the PSC [plaintiffs’ steering committee] make the important decisions.”); see also Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70 (2017) (“If leadership’s influence is unchecked, it’s possible that lead attorneys

protections of class certification, “multidistrict proceedings lack the judicial, competitive-market, and institutional checks that can help safeguard and legitimize class outcomes.”<sup>129</sup> And unlike in class actions, where Rule 23 requires judges to ensure that settlements are “fair, reasonable, and adequate,”<sup>130</sup> judges have little say in the settlement reached by MDL lawyers, who are often repeat players with the knowledge and experience to game the system for their own personal benefit.<sup>131</sup>

Others view MDL as, on the whole, benefitting plaintiffs.<sup>132</sup> Although a lack of MDL rules may result in fewer procedural protections than available in the class action,<sup>133</sup> it can also increase access to the courts. Some judges have reported that without MDL, “the courthouses would be closed to the majority of cases that currently are consolidated.”<sup>134</sup> One judge explained that “the only way we can ensure people can get lawyers is to most efficiently manage the cases. When I look at the MDL, I see more people getting some redress than it would be if it had to be litigated fully.”<sup>135</sup> Another stated that MDL is “not about closing the courthouse doors at all . . . . [The cases] never would have been able to be litigated on their own, especially for mass torts.”<sup>136</sup>

In addition to concerns about fairness and predictability, there is also some concern that adopting special procedures for MDLs will create a new brand of forum shopping. MDL-specific rules favorable to plaintiffs (or their attorneys) might encourage plaintiffs to file their cases in separate districts, hoping that the Panel will centralize them into an MDL and apply the favorable rules.<sup>137</sup> Alternatively, MDL-specific rules favorable to defendants might encourage them to seek consolidation in order to obtain those benefits, instead of to further the goals of MDL: convenience, justice, and efficiency.

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could secure generous common-benefit fees for themselves, while generating suboptimal outcomes for some or all claimants.”).

<sup>129</sup> Burch, *supra* note 128, at 70-71.

<sup>130</sup> FED. R. CIV. P. 23(e)(2).

<sup>131</sup> Burch, *supra* note 128, at 71.

<sup>132</sup> See, e.g., Gluck, *supra* note 30, at 1676 (describing how MDL opens the courthouse doors when they otherwise would be closed); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the 'Haves' on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J 73, 101-03 (“MDL allows plaintiffs to capture some of the advantages of repeat play without triggering the doctrinal tripwires of the class action.”).

<sup>133</sup> See, e.g., FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class . . . may be settled, voluntarily dismissed, or compromised *only with the court's approval*. . . . [T]he court may approve [a settlement proposal] only after a hearing and only on finding that it is fair, reasonable, and adequate . . . .” (emphasis added)).

<sup>134</sup> Gluck, *supra* note 30, at 1676.

<sup>135</sup> *Id.* at 1696-97.

<sup>136</sup> *Id.* at 1697.

<sup>137</sup> Letter from Zachary D. Clopton, *supra* note 52, at 4.

### C. Other Considerations

Beyond efficiency and fairness, there are additional considerations that must be weighed when considering MDL-specific rules. Many judges already take precautions to limit bias from “ad hoc” MDL procedure. Precautions include “put[ting] . . . MDL procedures on the record, creat[ing] case websites, transcrib[ing] all proceedings, and creat[ing] phone connections to allow lawyers, litigants, and even state court judges to listen to all proceedings.”<sup>138</sup> As a result of these measures, several judges have observed that “MDLs [are] *more* visible to the stakeholders in any particular MDL than in non-MDL proceedings.”<sup>139</sup>

Additionally, most of the proposals for amended rules focus on the “mega-MDLs” that aggregate tens of thousands of cases, and the Subcommittee has elected to focus on this subset of proceedings.<sup>140</sup> If the new MDL rules are to be transsubstantive, like the Federal Rules of Civil Procedure, this narrow focus could create problems. As the Advisory Committee on Civil Rules noted, “[i]f one thinks about rules of general application, it may be difficult to characterize rules that only bear on the two dozen largest MDLs as fitting readily in that category.”<sup>141</sup> If the new rules are not to be transsubstantive, drafting rules that distinguish smaller MDLs from these “mega-MDLs” may exacerbate the costs of information gathering, as well as threaten the efficacy of any rules that are eventually adopted. That the overall number of MDL proceedings has been consistently declining in the last decade further suggests that MDL-specific rules may be of limited utility.

David Noll argues that the push for MDL rules may be “misguided” because MDL is fundamentally different from ordinary civil litigation.<sup>142</sup> Rather, he views MDL as a form of public administration that should be subject to the same protections that have operated for decades to keep administrative agencies in check.<sup>143</sup> He points out that, by delegating authority to the Panel and to the transferee judge in § 1407, Congress suggests that “the procedures appropriate to resolve, say, the opioid litigation cannot be defined *ex ante*. If Congress could anticipate the necessary procedures, it could enact them itself.”<sup>144</sup>

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<sup>138</sup> *Id.* at 1689.

<sup>139</sup> *Id.*

<sup>140</sup> OCTOBER 2019 MEETING, *supra* note 20, at 102-03.

<sup>141</sup> APRIL 2019 MEETING, *supra* note 54, at 207.

<sup>142</sup> David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 455 (2019).

<sup>143</sup> *See id.* at 454 (“Because it evolved in parallel with modern administrative law, MDL lacks guarantees of transparency, participation, and *ex post* review applicable to administrative agencies.”).

<sup>144</sup> *Id.* at 455.

### III. MDL RULE PROPOSALS

At its October 2019 meeting, the MDL Subcommittee identified four topics as “the center of current work” on MDL rulemaking: (1) early vetting, (2) opportunities for interlocutory appellate review, (3) settlement review, and (4) third-party litigation funding disclosure.<sup>145</sup> The Subcommittee has continued to explore these four subjects in its subsequent meetings, although it has narrowed its focus to the first three.<sup>146</sup> This Part examines the appropriateness of these topics for rulemaking, not just for their individual merit but also to examine the appropriateness of the rulemaking enterprise as a whole. The purpose of this Part is not to provide a comprehensive history of all rule proposals the Subcommittee has considered and is likely to consider. Rather, this Part uses these four topics to offer more specific critiques of MDL-specific rules. The challenges presented by each of these topics reflect larger challenges in MDL rulemaking. Ultimately, this Part argues that an analysis of these four proposals shows that MDL-specific rules will not promote the two goals of the Federal Rules of Civil Procedure—efficiency and fairness—and accordingly the Rules Committee should decline to take these proposals further.

#### A. *Early Vetting*

The purpose of an early vetting rule for individual cases in an MDL is to weed out meritless claims. There is some agreement that unfounded individual cases present a problem in MDLs, but less agreement on whether the solution to that problem is new or amended MDL-specific rules.<sup>147</sup>

In the absence of any rule, courts currently employ various methods to develop information about individual claims, including fact sheets, short-form complaints, plaintiff profiles, and censuses. Defendant fact sheets are also sometimes required. One possible rule revision is to make fact sheets mandatory for all MDLs, or for a certain subset of MDLs. The use of fact sheets is authorized by Rule 16(c)(2)(L), which permits courts to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties . . . or unusual proof problems.”<sup>148</sup> Fact sheets are questionnaires that elicit a wide range of information, including the circumstances of the plaintiffs’ exposures and the severity of their injuries. Judges use fact sheets to facilitate settlement

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<sup>145</sup> OCTOBER 2019 MEETING, *supra* note 20, at 103-04.

<sup>146</sup> APRIL 2020 MEETING, *supra* note 21, at 145, 148, 154; OCTOBER 2020 MEETING, *supra* note 22, at 151.

<sup>147</sup> *See id.* at 103 (indicating that there is little agreement about the prospect of finding a solution to meritless individual cases in a court rule).

<sup>148</sup> FED. R. CIV. P. 16(c)(2)(L).

negotiations or to improve claim administration following settlement.<sup>149</sup> Recent research conducted by the Federal Judicial Center found that in proceedings covered by the study, plaintiff fact sheets were used in fifty-seven percent of MDLs.<sup>150</sup> In MDLs with over 1,000 actions, plaintiff fact sheets were ordered eighty-seven percent of the time.<sup>151</sup>

In general, plaintiff fact sheets require: (1) health records,<sup>152</sup> (2) personal identifying information,<sup>153</sup> and (3) litigation history.<sup>154</sup> Many include other information requirements, such as medical releases or disclosure of third-party litigation funding, but none requires expert testimony or sworn statements.<sup>155</sup> Plaintiff fact sheets can help winnow meritless cases by revealing claims that will be unsupportable because, for example, there is no documented injury or illness. Fifty-five percent of proceedings involving plaintiff fact sheets involved motions to dismiss for failure to file substantially complete information.<sup>156</sup> The frequency of dismissal proceedings following the use of plaintiff fact sheets suggests that, to an extent, the sheets are well suited for their purpose—eliminating meritless claims. This is because the plaintiff's failure to file a fact sheet, or to file a substantially complete fact sheet, may reveal a lack of injury, and, accordingly, an inability to provide the required information.<sup>157</sup> A plaintiff who never used a defective product, for example, may not be willing or able to provide details about when the product was used.<sup>158</sup> As a result, the use of fact sheets can “save defendants time,

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<sup>149</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.91 (2004). Plaintiff fact sheets are different than *Lone Pine* orders, which require production of case-specific, sworn expert evidence of causation. *See, e.g., In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 255 (S.D. W. Va. 2010) (“A *Lone Pine* order is designed to assist in the management of complex issues and potential burdens on defendants and the court in mass tort litigation, essentially requiring plaintiffs . . . to support their claims at the outset.”).

<sup>150</sup> WILLIAMS ET AL., *supra* note 81, at 1.

<sup>151</sup> *Id.*

<sup>152</sup> Health records include information about general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance. *Id.* at 2.

<sup>153</sup> Personal identifying information includes names, addresses, education, and employment. *Id.*

<sup>154</sup> Litigation history includes prior tort litigation, past bankruptcy, social security claims, and workers' compensation claims. *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 4. This dismissal can be ordered pursuant to Rule 41(b) (providing for dismissal for failure “to prosecute or to comply with . . . a court order”) or Rule 37(b)(2)(A) (providing for dismissal for failure “to obey an order to provide or permit discovery”). *See id.*; FED. R. CIV. P. 41(b); FED. R. CIV. P. 37(b)(2)(A).

<sup>157</sup> But note that lack of injury is not the only reason a plaintiff may be unable to complete a fact sheet. In medical device injury cases, “long waiting periods and unclear request processes” can make it difficult for plaintiffs to gather the information they need from hospitals to fully complete a fact sheet. Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J.F. 64, 81 (2019). And the requisite information about, for example, a defective product, will sometimes be in the defendant's exclusive control.

<sup>158</sup> OCTOBER 2019 MEETING, *supra* note 20, at 105.

money, and aggravation; conserve scarce judicial resources; expedite the resolution of claims; deter the filing of groundless suits; and safeguard the integrity of trial processes.”<sup>159</sup>

But because plaintiff fact sheets are already used in eighty-seven percent of large personal injury MDLs, a new rule may be unnecessary.<sup>160</sup> And because fact sheets may delay the resolution of smaller MDLs, a new transsubstantive rule could prove harmful rather than helpful if it applies across the board. Many MDL plaintiffs are facing serious, life-threatening injuries, and even a slight delay could jeopardize their chance at recovery.<sup>161</sup> Further, MDL judges have the knowledge and expertise to quickly eliminate truly frivolous claims, making the benefit for imposing the delay all the more minimal.

In addition, plaintiff fact sheets are not identical in every case in which they are used. Different courts and different judges require disclosure of different information based on the case-specific facts of the proceeding before them.<sup>162</sup> While some judges may only want basic information about the plaintiffs’ injuries, others want detailed health records, including the names of all doctors, nurses, and pharmacies consulted by the plaintiffs.<sup>163</sup> And for some MDLs, like the *Navarette* dog food litigation described in the Introduction, the “typical” human health-oriented fact sheet would be completely out of place. Because of this variety, it would be very difficult to craft a rule detailing the exact information that must be disclosed in all plaintiff fact sheets.<sup>164</sup> Any possible rule would necessarily be vague, and a vague rule may be of little more use than no rule at all. Beyond just unhelpful, a vague rule may prove actively harmful: a judge may interpret the rule based on the particular MDL being decided, setting binding precedent for future cases that may be factually dissimilar.

Requiring information disclosure through fact sheets also raises concerns about access to the courts. Forcing plaintiffs to produce evidence showing that their claims are not meritless may bar access to the courts when the necessary evidence is not in the plaintiff’s possession, either because it is

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<sup>159</sup> See Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2, 5 (2019) (discussing the benefits of *Lone Pine* orders, many of which also apply to plaintiff fact sheets).

<sup>160</sup> OCTOBER 2019 MEETING, *supra* note 20, at 205 (“Even a modest rule change, such as including a ‘nudge’ to consider the utility of PFS/DFS treatment in an MDL in Rule 26(f) and Rule 16, may be unnecessary.”).

<sup>161</sup> See ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., MEETING MINUTES OF THE ADVISORY COMMITTEE ON CIVIL RULES 22-23 (Apr. 2-3, 2019), [https://www.uscourts.gov/sites/default/files/2019-04\\_cv\\_minutes\\_final\\_o.pdf](https://www.uscourts.gov/sites/default/files/2019-04_cv_minutes_final_o.pdf) [<https://perma.cc/F9UX-YX42>] [hereinafter APRIL 2019 MEETING MINUTES] (expressing concern that elderly plaintiffs may die while an appeal is pending).

<sup>162</sup> See APRIL 2019 MEETING, *supra* note 54, at 209 (“[T]hese orders tend to be specific to the circumstances of the litigation in which they are entered.”).

<sup>163</sup> WILLIAMS ET AL., *supra* note 81, at 2.

<sup>164</sup> APRIL 2019 MEETING, *supra* note 54, at 209.

difficult or costly to obtain or because it is in the control of the defendants. While requiring only medical records, personal identifying information, and past litigation history may not present access challenges, other proposed measures have pressed further.

Consider, for example, the proposed Fairness in Class Action Litigation Act of 2017.<sup>165</sup> Although the bill languished in the Senate, it provides a guide for what an early vetting rule might look like. The bill would have added a new subsection (i) to § 1407, providing that

[i]n any coordinated or consolidated pretrial proceedings . . . counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceeding shall make a submission *sufficient to 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.<sup>166</sup>

Plaintiffs may well be able to present evidence supporting their injuries and exposure, but evidence about the alleged cause of injury is often within the defendant's exclusive control. In products-liability litigation, for example, the defendant is usually in a better position to know about the manufacturing process that produced a defective product, or about clinical trial results for a defective drug. Placing the burden on plaintiffs to affirmatively produce evidence that may be outside of their control, often before any discovery has taken place, closes the courthouse doors to deserving, injured people, or at least makes it more challenging and time-consuming for them to bring their claims.

But some rulemaking in this area may be appropriate because fact sheets, and to an even greater extent, *Lone Pine* orders, as currently employed are arguably inconsistent with the Federal Rules of Civil Procedure.<sup>167</sup> To bring these practices more in line with the Civil Rules, amendments may be necessary. While innovation is at the heart of MDL, MDL judges may not employ procedures that “stand in tension with—and permit courts to make end-runs around—certain procedural requirements.”<sup>168</sup> Depending on what the fact sheets entail, they could violate Rule 8(a)(2) by requiring more than a short and plain statement,<sup>169</sup> Rule 11(b)(3) by requiring pleadings to be verified without an opportunity for further investigation or discovery,<sup>170</sup> or Rule 56 by

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<sup>165</sup> H.R. 985, 115th Cong. (2017).

<sup>166</sup> *Id.* § 105 (emphasis added).

<sup>167</sup> For a discussion of how *Lone Pine* orders may be inconsistent with the Federal Rules of Civil Procedure, see Engstrom, *supra* note 159.

<sup>168</sup> *Id.* at 42.

<sup>169</sup> FED. R. CIV. P. 8(a)(2).

<sup>170</sup> FED. R. CIV. P. 11(b)(3).



dismissing claims without appropriate safeguards, like an opportunity for discovery and a finding that there are no genuine issues of fact.<sup>171</sup>

Rule 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>172</sup> By requiring plaintiffs to submit fact sheets with information beyond a statement of the claim, such as evidence demonstrating exposure and causation, MDL judges in essence apply a heightened pleading standard—even above the plausibility standard created by *Twombly* and *Iqbal*—without any authority in the Federal Rules of Civil Procedure to do so.<sup>173</sup> Further, using fact sheets to verify pleadings is contrary to Rule 11(b)(3), which requires only that counsel certify that the allegations “will likely have evidentiary support after a reasonable opportunity for further investigation . . . .”<sup>174</sup> Rule 11 is structured this way because “sometimes a litigant may . . . need discovery . . . to gather and confirm the evidentiary basis for the allegation.”<sup>175</sup> This is equally true in MDL. And as to Rule 56, a dissenting appellate court judge in California called a dismissal for failure to comply with a *Lone Pine* order “a bastardized process which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential.”<sup>176</sup> The Eleventh Circuit has also cautioned that *Lone Pine* orders “should not be used as (or become) the platforms for pseudo-summary judgment motions.”<sup>177</sup>

### B. Interlocutory Appellate Review

At the outset, it should be noted that the MDL Subcommittee has recommended against a new rule providing for expanded interlocutory appellate review.<sup>178</sup> It is possible, however, that the full Advisory Committee will decide to consider further rulemaking efforts.<sup>179</sup> The push for interlocutory appellate review in MDL precedes the Committee’s decision to consider MDL-specific rules.<sup>180</sup> Proponents of increased appellate review worry that the MDL statute

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<sup>171</sup> FED. R. CIV. P. 56.

<sup>172</sup> FED. R. CIV. P. 8(a)(2).

<sup>173</sup> See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (granting a motion to dismiss for failure to state a claim when the plaintiffs’ allegations merely recited the elements of the cause of action, and requiring the facts alleged to be plausible); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (same).

<sup>174</sup> FED. R. CIV. P. 11(b)(3).

<sup>175</sup> FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

<sup>176</sup> *Cottle v. Super. Ct.*, 5 Cal. Rptr. 2d 882, 897 (Ct. App. 1992) (Johnson, J., dissenting).

<sup>177</sup> *Adinolfi v. United Techs. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014).

<sup>178</sup> OCTOBER 2020 MEETING, *supra* note 22, at 154.

<sup>179</sup> See *id.* at 158 (“In case the full Advisory Committee concludes that further efforts are justified regarding interlocutory review . . .”).

<sup>180</sup> See, e.g., Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643 (2011) (presenting an argument in favor of non-discretionary interlocutory appellate review in MDL nearly a decade ago).

does not provide for meaningful supervision of district courts.<sup>181</sup> They argue that early appellate review would curb the “excess power” of the presiding MDL judge and “create a foundation for global settlement based not on the coercion of a single trial judge’s potentially erroneous view of the law, but instead on carefully considered legal principles that have been forged in the course of full-scale appellate review.”<sup>182</sup>

An early appeal does provide some efficiency gains if a court can detect mistakes early on, as legal error in pretrial rulings generates effects that extend “far beyond the mere conduct of litigation.”<sup>183</sup> These savings are amplified by the fact that MDLs often contain thousands of claims; a court’s resolution of a potentially dispositive question on appeal would save the judicial system the resources of resolving not just one case but many.

Currently, interlocutory appeal of MDL decisions is available by permission of the district court using § 1292(b):

When a district judge . . . shall be of the opinion that [an] 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, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order.<sup>184</sup>

Put another way, under § 1292(b), a district court may “certify” an issue for appeal if it identifies (1) a controlling question of law with (2) substantial ground for difference of opinion and (3) an appeal may materially advance the termination of the litigation.<sup>185</sup>

Empirical evidence suggests that § 1292(b) is not employed often, and even when it is employed, appellate review is rarely granted.<sup>186</sup> Proponents of MDL-specific interlocutory appellate review argue that these data show that in large personal injury MDL proceedings, § 1292(b) does not, in practice, afford a meaningful opportunity to secure appellate review.<sup>187</sup> They suggest that the “types of appeals envisioned by the proposed rule arise relatively infrequently in mass tort MDL proceedings, such that the adoption of [a rule authorizing immediate interlocutory appeal from orders that would

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<sup>181</sup> *Id.* at 1646.

<sup>182</sup> *Id.* at 1648.

<sup>183</sup> *Id.* at 1667 (citation omitted).

<sup>184</sup> 28 U.S.C. § 1292(b).

<sup>185</sup> *Id.*

<sup>186</sup> Beisner, *supra* note 83, at 2.

<sup>187</sup> *Id.*

be dispositive of a substantial number of claims] would not add substantial new burdens to our federal courts of appeals.”<sup>188</sup>

Interlocutory appellate review presents a particularly interesting subject for MDL rulemaking because there is already a close analogue in the class action context: Rule 23(f). Rule 23(f) authorizes a court of appeals to “permit an appeal from an order granting or denying class-action certification,” but it does not create an appeal as of right.<sup>189</sup> The court of appeals is “given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari.”<sup>190</sup> Unlike § 1292(b), Rule 23(f) does not require that district courts “certify” an issue for appeal, nor does it limit appeals to “controlling question[s] of law” with “substantial ground for difference of opinion.”<sup>191</sup>

The case for a new interlocutory appellate review rule in the MDL context is harder to make out than in the class action context. There is no clear MDL analogue to the class certification decision, which is the defining moment in class action procedure.<sup>192</sup> Proponents of a new MDL rule have suggested allowing immediate appellate review of “preemption rulings, rulings on the admissibility of expert opinion evidence, and rulings on personal jurisdiction.”<sup>193</sup> Rule 23(f) deals with an order that routinely is among the most important in a class action. It is not apparent that preemption rulings, rulings on the admissibility of expert opinion evidence, rulings on personal jurisdiction, or any one order carries similar weight in an MDL.<sup>194</sup> As the Subcommittee points out, “the range of orders that might have such significance in MDL proceedings makes it difficult to predict with confidence which might have central importance in a given MDL.”<sup>195</sup>

In addition to the difficulty of determining which decisions in an MDL ought to be covered, an immediate appeal rule may also significantly prolong litigation, undercutting the efficiency gains motivating the use of MDL in the

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<sup>188</sup> *Id.* at 13.

<sup>189</sup> FED. R. CIV. P. 23(f).

<sup>190</sup> FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment. The Committee further clarified “courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation.” *Id.* The Committee also added that “[p]ermission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive.” *Id.*

<sup>191</sup> Charles R. Flores, *Appealing Class Action Certification Decisions Under Federal Rule of Civil Procedure 23(f)*, 4 SETON HALL CIR. REV. 27, 40 (2007).

<sup>192</sup> *See, e.g.*, *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“A district court’s ruling on the certification issue is often the most significant decision rendered in these class-action proceedings.”).

<sup>193</sup> APRIL 2019 MEETING, *supra* note 54, at 213.

<sup>194</sup> *Id.* at 212.

<sup>195</sup> *Id.* at 213-14.

first place.<sup>196</sup> One judge at the April 2019 Subcommittee meeting reported that it can take two years to get an answer from a § 1292 appeal in his district.<sup>197</sup> As of 2018, the median time for federal circuit courts to resolve an appeal was eight and a half months.<sup>198</sup> For plaintiffs with serious illnesses and injuries, this may be too long.<sup>199</sup> Immediate review may also delay or defeat settlement efforts, or upset the balance between well-resourced defendants and plaintiffs who may be willing to settle for less than they deserve to avoid the hassle and delay of appeal. It will naturally increase the workload of the appellate courts and will create satellite procedural litigation concerning the appeals process.<sup>200</sup> Finally, an immediate appeal rule may “disproportionately benefit the mass-tort defendants, who tend to have greater financial resources and will use that wherewithal to manipulate the litigation process and ‘wear out’ a plaintiff with inferior economic backing.”<sup>201</sup> Because of these costs, the scales of efficiency and fairness tilt against an MDL-specific interlocutory appeal rule.

### C. Settlement Review

Although it has not yet decided whether to recommend a new rule governing settlement review and, relatedly, the appointment of leadership counsel, the Subcommittee provided a sketch for such a rule at its October 2020 meeting.<sup>202</sup> Most relevant here, the rule sketch requires that any settlement terms agreed to by lead counsel “(1) must be fair, reasonable, and adequate; (2) must treat all similarly situated plaintiffs equally; and (3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.”<sup>203</sup> It is helpful to keep this language in mind when considering the appropriateness of an MDL settlement rule.

One of the benefits of centralizing litigation through MDL is that collecting claims can promote settlement.<sup>204</sup> Settlement often benefits both parties, as well as the judicial system. It helps plaintiffs who have been harmed

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<sup>196</sup> See, e.g., *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (“Permitting piecemeal, prejudgment appeals, we have recognized, undermines ‘efficient judicial administration’ and encroaches upon the prerogatives of district court judges, who play a ‘special role’ in managing ongoing litigation.”).

<sup>197</sup> APRIL 2019 MEETING MINUTES, *supra* note 161, at 21.

<sup>198</sup> Noll, *supra* note 142, at 463.

<sup>199</sup> APRIL 2019 MEETING MINUTES, *supra* note 161, at 22 (pointing out that, in medical device cases, “[m]any plaintiffs are elderly” and “[s]ome will die while the appeal is pending.”).

<sup>200</sup> Pollis, *supra* note 180, at 1690.

<sup>201</sup> *Id.* at 1691-92 (footnote omitted).

<sup>202</sup> OCTOBER 2020 MEETING, *supra* note 22, at 171-73.

<sup>203</sup> *Id.* at 173 (footnote omitted).

<sup>204</sup> Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 906 (2001).

recover compensation for their injuries, and it helps defendants achieve global peace.<sup>205</sup> Settlement may also produce more equitable outcomes in large products-liability cases not eligible for class certification, in which there is a risk that trying cases individually will deplete the recovery available to future injured plaintiffs.<sup>206</sup> And for the judiciary, “[t]he exercise of broad settlement authority is arguably a matter of self-preservation for the federal court system: if meritorious claims do not settle, the system lacks the capacity to try *all* of the federally filed claims individually.”<sup>207</sup>

But settlement in the MDL context is also controversial. Critics of MDL settlements have argued that the law does not authorize this use of MDLs, and that this use does not fit within the purposes § 1407.<sup>208</sup> Others argue that the use of settlement in MDLs is “purposefully employed to avoid the safeguards that federal courts . . . erected to protect the rights of claimants.”<sup>209</sup> The MDL Subcommittee is especially concerned that “plaintiffs represented by lawyers who do not participate in the centralized steering committee structure are not afforded a genuine opportunity for meaningful individual settlement negotiations.”<sup>210</sup> This fear is particularly salient with inventory settlements. In an inventory settlement, the defendant agrees to pay the lawyers representing many plaintiffs and many cases a lump sum to settle all of the lawyers’ cases.<sup>211</sup> This is problematic for many reasons. For one, it can create a “race-to-the-bottom” in which the defendant agrees to settle with the first lawyer to accept their proposal (potentially reducing or eliminating the recovery available for other injured plaintiffs). In addition, plaintiffs who are more seriously injured may be disadvantageously lumped

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<sup>205</sup> See Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531, 540 (2017) (“[D]efendants are willing to pay a premium—actually *more* to settle ‘the whole batch’ of cases brought against them than they would pay for all the individual claims if they settled one by one—for a ‘global’ MDL settlement (one that covers essentially all potential claimants).”); see also Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 413-14 (2014) (describing defendants’ willingness to pay a significant amount to resolve mass litigation).

<sup>206</sup> See generally *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (discussing the recovery risks of asbestos litigation that is not eligible for class-action certification).

<sup>207</sup> Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1377 (2014).

<sup>208</sup> Mueller, *supra* note 205, at 531; see also Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2289 (2008) (“[T]here is at least some reason for institutional uneasiness about more aggressive use of MDL procedures to maximize the judicial system’s ability to achieve the most comprehensive settlements.”).

<sup>209</sup> Mueller, *supra* note 205, at 531.

<sup>210</sup> OCTOBER 2019 MEETING, *supra* note 20, at 104.

<sup>211</sup> APRIL 2019 MEETING, *supra* note 54, at 217.

together with plaintiffs suffering minimal injuries, reducing their bargaining power during settlement negotiations.<sup>212</sup>

Like interlocutory appellate review, settlement review for MDL has a class action counterpart: Rule 23(e). Rule 23(e) was significantly amended in December 2018. Relevant here, the amended Rule 23 requires courts to consider four factors when deciding whether a settlement is adequate:

- (i) [T]he costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3).<sup>213</sup>

MDL is not subject to the formal constraints of Rule 23(e). It does not require class certification, or a hearing, or equitable treatment of plaintiffs relative to each other.<sup>214</sup> Rule 23 “sets limits, establishes criteria, and authorizes a degree of judicial supervision and control that is very much out of the ordinary,” while MDL centralization “operates free of those limits, ignores those criteria, and employs the same extraordinary judicial power.”<sup>215</sup>

Some scholars and judges have likened settlement in the MDL context to a “quasi-class action,” implying that the same protections at play in Rule 23(e) should apply.<sup>216</sup> There may be good reason, however, for treating settlement differently under the class action device than under the MDL device. Unlike class actions, MDL involves individual lawsuits with separate claimants.<sup>217</sup> As a result, several courts—both federal and state—often have power over the plaintiffs, and “there may be no single court that is well positioned to facilitate and administer [a] global settlement.”<sup>218</sup> This presents a problem for adopting a rule similar to Rule 23(e): which court will assess the fairness and adequacy

<sup>212</sup> For a spirited critique of MDL product-liability settlements, see generally Mueller, *supra* note 205.

<sup>213</sup> FED. R. CIV. P. 23(e)(2)(C)(i-iv).

<sup>214</sup> See FED. R. CIV. P. 23(e) (imposing these requirements).

<sup>215</sup> Mueller, *supra* note 205, at 542-43. Linda Mullenix also noted that

[i]n the past three decades, federal courts—including the Supreme Court—have rejected collusive backroom aggregate settlement deals that do not adequately protect the interests of class members. In response, and in order to be free of formal class action constraints, self-interested actors on both sides of the docket have co-opted the [MDL] to provide a staging-ground for the private resolution of aggregate claims.

Mullenix, *supra* note 58, at 390.

<sup>216</sup> See Mullenix, *supra* note 58, at 389-91 (identifying sixty-eight federal cases citing the term “quasi-class action”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 113-143 (2010) (describing the “Quasi-Class Action Model of MDL Management”).

<sup>217</sup> Thomas, *supra* note 207, at 1347.

<sup>218</sup> *Id.*

of the settlement, if no single court has power over all the settling parties?<sup>219</sup> To overcome this hurdle, some settlement agreements have included provisions appointing the MDL transferee judge to preside over the settlement, requiring the settling parties to consent to that judge's authority.<sup>220</sup> But this strategy does not work if a party refuses to consent, nor is it clear that the drafters of the MDL statute intended to grant such a power. Settlement is much different than the pretrial procedures contemplated in § 1407.

#### D. *Third-Party Litigation Funding*

Third-party litigation funding is becoming increasingly common, and it involves increasingly large amounts of money.<sup>221</sup> It entails investments in litigation by nonparties, often hedge funds, in exchange for a percentage of any settlement or judgment entered.<sup>222</sup> The typical funding arrangement has been described as one in which

a specialist funding company or a hedge fund . . . pay[s] the lawyers' fees on an interim basis. . . . If you win, you pay a contingency fee out of the damages, usually expressed as a percentage of the damages up to an agreed cap. A typical contingency fee would be between twenty and fifty percent of the damages, with a cap of three to four times the legal costs advanced by the funder.<sup>223</sup>

There are two types of third-party litigation funding: consumer funding and commercial funding.<sup>224</sup> Consumer funding usually involves individual

<sup>219</sup> *Id.*

<sup>220</sup> Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto at 1, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), <https://www.sec.gov/Archives/edgar/data/64978/000095012307015538/y42609exv10w1.htm> [<https://perma.cc/W94D-VGE8>].

<sup>221</sup> See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN L. REV. 1268, 1270-71 (2011) ("Litigation funding, still in its infancy but steadily growing, is one of the most significant developments in civil litigation today."); Tripp Haston, *Pulling Back the Curtain: Moving Toward Disclosure of Third-Party Funding in Litigation*, BRADLEY (July 2018), <https://www.bradley.com/insights/publications/2018/07/pulling-back-the-curtain-moving-toward-disclosure-of-third-party-funding-in-litigation> [<https://perma.cc/P7JW-4676>] ("[T]he use of third-party litigation funding (TPLF) is growing at an exponential rate."); Holly Urban, *Insight: Law Firms, Clients Should Heed the Tech World, Consider Crowdfunding*, BLOOMBERG L. (Jan. 7, 2019, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-law-firms-clients-should-heed-the-tech-world-consider-crowdfunding> [<https://perma.cc/GEH3-HC8D>] ("Crowdfunding as a means of litigation funding, or to pay for otherwise expensive legal work, should be understood in much the same way as traditional forms of funding.")

<sup>222</sup> *Third Party Litigation Funding (TPLF)*, U.S. CHAMBER INST. FOR LEGAL REFORM, <https://www.instituteforlegalreform.com/issues/third-party-litigation-funding> [<https://perma.cc/K7VK-WJ75>].

<sup>223</sup> Steinitz, *supra* note 221, at 1276 (citation omitted).

<sup>224</sup> JAYME HERSCHKOPF, FED. JUD. CTR., THIRD-PARTY LITIG. FIN. 3 (2017).

plaintiffs, as in personal injury or divorce actions.<sup>225</sup> It may cover things like living expenses for plaintiffs waiting for resolution of their cases and usually does not involve much money.<sup>226</sup> Commercial funding is more often used for business-to-business disputes, class actions, and mass tort litigation.<sup>227</sup> This form of litigation funding often involves significant sums of money—potentially millions of dollars.<sup>228</sup>

Currently there are no federal rules requiring disclosure of third-party litigation funding in any context. But proposals have been made to amend the Federal Rules of Civil Procedure to include disclosure of third-party funding as part of the Rule 26 required disclosures, even outside of the MDL context.<sup>229</sup> Third-party litigation funding can be relevant to the court for many reasons: there may be financial conflicts of interest between the judge and the funder, or a judge may need to resolve allegations of financing abuses.<sup>230</sup>

While the funded party is usually the plaintiff, both plaintiffs and defendants can benefit from third-party litigation funding.<sup>231</sup> Plaintiffs can litigate cases that they otherwise could not afford to bring, and they can receive financial support for housing and other obligations while their cases are ongoing.<sup>232</sup> Likewise, defendants can shift the costs of litigation to a third-party more able to bear them and can hedge risks that they are unwilling or unable to take.<sup>233</sup>

While third-party litigation funding can help plaintiffs afford to bring their cases and allow defendants to hedge some of the risks of litigation, it also has its costs. Some courts and commentators worry that such funding will lead to increased settlement failures and interference in the attorney-client relationship.<sup>234</sup> Concerns about third-party litigation funding are not new. Champerty, defined as an “agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim,” has been restricted since the nineteenth century.<sup>235</sup> Opponents of third-party financing argue that, like champerty, it encourages excessive, unnecessary, or speculative litigation,

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<sup>225</sup> *Id.*

<sup>226</sup> APRIL 2019 MEETING, *supra* note 54, at 220.

<sup>227</sup> HERSCHKOPF, *supra* note 224, at 3.

<sup>228</sup> APRIL 2019 MEETING, *supra* note 54, at 220.

<sup>229</sup> HERSCHKOPF, *supra* note 224, at 9; *see also* FED. R. CIV. P. 26.

<sup>230</sup> HERSCHKOPF, *supra* note 224, at 9.

<sup>231</sup> *See, e.g.,* Steinitz, *supra* note 221, at 1278 (“[W]hile attorney funding and third-party funding of individual and class claims are not unprecedented, funding of corporate defendants . . . is a new phenomenon.”)

<sup>232</sup> *Id.* at 1276.

<sup>233</sup> *Id.*

<sup>234</sup> Andrew F. Daughety & Jennifer F. Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, 104 AM. ECON. REV. 2552, 2552 (2014).

<sup>235</sup> *Champerty*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see also* Steinitz, *supra* note 221, at 1287 (discussing the historical origins of the doctrine of champerty).



spurred by the desire of third parties to make a profit rather than the desire of injured plaintiffs for redress.<sup>236</sup>

As of 2019, twenty-four districts and six circuits have local rules “that seem to point toward disclosure of third-party funding.”<sup>237</sup> But third-party litigation funding is not limited to MDL proceedings—in fact, it does not appear to play a distinctive or noteworthy role in MDL proceedings as compared to other forms of litigation.<sup>238</sup> Because third-party litigation funding is not MDL-specific, an MDL-specific rule will not address all of the concerns expressed by proponents of disclosure. Additionally, because the use of third-party litigation funding is growing rapidly, and because most transferee judges have not reported being aware of its use in the MDL litigation before them, it seems that the most appropriate vehicle for further study of a disclosure rule is not the MDL.<sup>239</sup>

#### IV. ALTERNATIVES TO RULEMAKING

When deciding whether to promulgate new federal rules, it is important to also consider the alternatives to federal rulemaking. In the MDL context, advocates of change have several alternatives: Congress could pass a new statute;<sup>240</sup> the Rules Committee could amend the existing rules;<sup>241</sup> the Rules Committee could appoint a Working Group; the Panel could issue additional guidance to litigants and their attorneys;<sup>242</sup> or the Manual for Complex Litigation and similar resources could provide more education on MDL proceedings.<sup>243</sup> Like new rules, these mechanisms for procedural change come with their own costs, but they may nevertheless be better suited for the MDL context.

##### A. Action by Congress

In 2017, the House introduced the Fairness in Class Action Litigation Act, backed exclusively by Republicans, which would have significantly reformed

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<sup>236</sup> Steinitz, *supra* note 221, at 1287.

<sup>237</sup> OCTOBER 2019 MEETING, *supra* note 20, at 112.

<sup>238</sup> *See id.* at 111.

<sup>239</sup> *See id.* at 191 (“For purposes of this Subcommittee . . . the most salient point is that it has not heard that TPLF plays a substantial role in MDL proceedings. . . . Under these circumstances, the Subcommittee has concluded that rule amendments keyed to MDL litigation would not be justified.”); APRIL 2020 MEETING, *supra* note 21, at 145 (“[I]ssues regarding third-party litigation funding (TPLF) did not seem particularly pronounced in relation to MDL proceedings. To the contrary, this sort of activity seems at least equally important in a broad range of types of litigation.”).

<sup>240</sup> *See* Section IV.A.

<sup>241</sup> *See, e.g.*, LAWS FOR CIV. JUST., *supra* note 122, at 2 (arguing that amending Rule 26 would reduce the number of meritless claims filed).

<sup>242</sup> Current guidance for MDL litigants and their attorneys can be found on the Panel website, <https://www.jpml.uscourts.gov> [<https://perma.cc/J74B-H35W>].

<sup>243</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

MDL procedure.<sup>244</sup> Although the bill passed the House on party lines, it did not make it through the Senate. Many of the bill's provisions are similar or identical to proposals submitted to the MDL Subcommittee.<sup>245</sup> If passed, the bill would have included "(1) a requirement of evidentiary verification of allegations within forty-five days of filing or transfer," akin to an early vetting rule; "(2) a bar on bellwether trials without consent; (3) enhanced interlocutory review of most orders issued by the MDL judge; and (4) a requirement that personal-injury plaintiffs receive 'not less than 80 percent of any monetary recovery.'"<sup>246</sup> The House Judiciary Committee explained the purposes of these provisions: "[MDL] proceedings, often largely consisting of claims that should never have been filed, impose unfair burdens on courts and defendants and prevent plaintiffs with trial-worthy claims from timely getting their day in court."<sup>247</sup>

But procedural change through Congress has its limits. It takes time, and often reflects party ideologies.<sup>248</sup> As the history of § 1407 suggests, getting statutes passed in Congress often requires significant strategic planning and maneuvering.<sup>249</sup> Additionally, Congress may lack the MDL-specific expertise needed to draft rules that account for the nuances of MDL proceedings; the Judicial Panel on Multidistrict Litigation has worked closely with the Rules Committee in considering new rules, but it may be unable or unwilling to assist Congress in the same capacity. Because of these limitations, congressional action may not be an effective mechanism for MDL reform.

### B. Working Groups

Another alternative to new MDL rules is to set up an MDL Working Group. A Working Group could review the problems identified by proponents of new MDL rules and determine whether further action is necessary. A Working Group has some advantages over the current work being done by the Subcommittee: it could be given a finite period of time to conduct research, ensuring that the concerns of both proponents and opponents of new rules are timely addressed, and provide a formal report addressing the Group's findings.

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<sup>244</sup> H.R. 985, 115th Cong. (2017); Bradt, *supra* note 98, at 89.

<sup>245</sup> Bradt, *supra* note 98, at 89.

<sup>246</sup> *Id.* at 97.

<sup>247</sup> H.R. REP. NO. 115-25, at 3 (2017).

<sup>248</sup> Bradt, *supra* note 98, at 89.

<sup>249</sup> *Id.* at 92-97.

Such a strategy was employed in 1999 with the creation of the ad hoc Judicial Conference Working Group on Mass Torts.<sup>250</sup> The Mass Torts Working Group met four times “to identify and catalog” the most significant and pressing problems created by the increase in mass tort litigation and “to consider the full range of potential solutions,” including “legislation, rules, case management, revised practices, or education.”<sup>251</sup> The Group determined that the best solution involved “a combination of legislation, rules, and case management.”<sup>252</sup> A similar strategy might work well for MDL, as there is significant overlap between many large MDL proceedings and mass torts. At the very least, the creation of an MDL Working Group would provide an outlet for scholars and litigants to voice their concerns about ad hoc MDL procedure.

### C. Amending Current Rules

Instead of creating new MDL-specific rules, the Rules Committee could amend the current rules to include special provisions for MDLs. This was done in 2006, when the Federal Rules of Civil Procedure were amended to account for changes in litigation brought about by new technology.<sup>253</sup> The amendments “were intended to clarify the discovery rights and obligations of the parties in cases with electronic discovery and, in so doing, provide guidance to litigants, lawyers, and judges.”<sup>254</sup>

But amending the Federal Rules of Civil Procedure presents many of the same challenges as promulgating new rules. The e-discovery rule amendments were the product of over five years of work, and MDL amendments would likely require a similar—if not greater—time commitment.<sup>255</sup> Additionally, rule amendments do not resolve the efficiency problems presented by new rules: if the purpose of the MDL statute is to allow judges to flexibly resolve complex litigation, even rule amendments threaten to stifle the ability of MDL judges to craft creative solutions to novel problems.

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250 ADVISORY COMM. ON CIV. RULES, JUD. CONF. OF THE U.S., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES AND THE WORKING GROUP ON MASS TORTS TO THE CHIEF JUSTICE OF THE UNITED STATES AND TO THE JUDICIAL CONFERENCE OF THE UNITED STATES 4 (1999), [https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mass\\_tort\\_litigation\\_report\\_1999.pdf](https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mass_tort_litigation_report_1999.pdf) [<https://perma.cc/Z7TX-JKHG>].

251 *Id.* at 1-3.

252 *Id.* at 6-7.

253 *See, e.g.*, FED. R. CIV. P. 16, 26(a), 26(b), 26(f) 33, 34, 37(f) (laying out guidelines for the use of technology in trial preparation).

254 Emery G. Lee III, *Effectiveness of the 2006 Rules Amendments*, 11 SEDONA CONF. J. 191, 194 (2010).

255 Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH. 1, 2-4 (2006).

#### D. Education

The Rules Committee could also recommend increasing the amount of educational resources available about MDL proceedings and best practices, aimed at both transferee judges and MDL lawyers. It could push for modifications to the Manual for Complex Litigation, as it suggested at its April 2020 meeting,<sup>256</sup> or recommend that the Panel offer more guidance on managing MDLs. The Manual for Complex Litigation already contains extensive directives about settlement review in the MDL context—including information on coordination in multiparty litigation, organizational structures, powers and responsibilities, and compensation.<sup>257</sup> The Manual could add similar provisions on the use of fact sheets and census techniques, perhaps using research by the Federal Judicial Center as a guide.<sup>258</sup> Because the Panel has been working closely with the Rules Committee since it first began considering MDL rule proposals, it is likely that the Panel would be receptive to any recommendations that the Subcommittee finds will improve MDL procedure. The Panel already has an “active approach to educating MDL judges” and an updated website, and it seems probable that the Panel would be amendable to providing additional guidance if requested.<sup>259</sup> Using these channels, the Panel could raise awareness, for example, about the use of plaintiff fact sheets to encourage more MDL judges to employ them to screen for meritless claims. It could also provide sample fact sheets and other resources to further support MDL judges through the litigation process.<sup>260</sup>

Alternatively, the Subcommittee could recommend that standards be established to promote transparency and uniformity in MDL proceedings.<sup>261</sup> There is already “broad agreement on the general standards that should govern large-scale aggregations,” set out, for example, in the American Law Institute’s Principles of the Law of Aggregate Litigation.<sup>262</sup> The

<sup>256</sup> APRIL 2020 MEETING, *supra* note 21, at 161.

<sup>257</sup> MANUAL FOR COMPLEX LITIGATION (FOURTH) § § 10.22, 10.221, 10.222, 10.223 (2004).

<sup>258</sup> *See, e.g.*, WILLIAMS ET AL., *supra* note 81; TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 15.

<sup>259</sup> OCTOBER 2019 MEETING, *supra* note 20, at 103.

<sup>260</sup> For an example of a plaintiff fact sheet, see Plaintiff’s Fact Sheet, *In re* Benicar (Olmesartan) Prods. Liab. Litig., MDL 2606, (D.N.J.), <https://www.njd.uscourts.gov/sites/njd/files/PlaintiffFactSheet.pdf> [<https://perma.cc/32EG-8YH2>]; *see also* Burch, *supra* note 157, at 78–83 (discussing the use of plaintiff fact sheets more generally); BOLCH JUD. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 10–14 (2d ed. 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf> [<https://perma.cc/5WEQ-5GQF>] (explaining best practices for fact sheet use).

<sup>261</sup> Noll, *supra* note 142, at 456–57.

<sup>262</sup> *Id.* at 457. The ALI instructs that aggregate proceedings ought to: “(a) enforc[e] substantive rights and responsibilities; (b) promot[e] the efficient use of litigation resources; (c) facilitat[e] binding resolutions of civil disputes; and (d) facilitat[e] accurate and just resolutions of civil disputes by trial and settlement.” PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (A.L.I.

Subcommittee could seek to formally codify these standards, or at the very least to publish them on the Panel's website and to update the standards as MDL continues to evolve.

Focusing on education rather than new rules preserves the flexibility that transferee judges need to handle novel procedural challenges. It also allows judges to treat different MDLs differently and give heightened scrutiny to mega-MDLs when necessary. In terms of fairness, education reform can draw attention to meritless claims in mega-MDLs and offer specific guidance for dealing with them. The Panel or Manual could identify criteria for MDL judges to consider when deciding whether to certify an issue for appeal under § 1292(b) or criteria for approving settlements, addressing concerns about the need for appellate and settlement review.

#### CONCLUSION

The Federal Rules of Civil Procedure have two purposes: to make litigation more efficient, and to make litigation fairer. The corporate defense bar seeks to create new federal rules specifically for MDL proceedings, but not to advance either of these purposes.

A Subcommittee of the Advisory Committee on Civil Rules is currently deciding whether to undertake a more serious examination of creating new MDL-specific rules, and it should decline to take the enterprise any further. While some proposals have more merit than others, MDL-specific rules cannot be squared with either the purposes of § 1407 or the twin aims of the Federal Rules of Civil Procedure—efficiency and fairness. The judges and scholar behind the creation of § 1407 wanted to grant federal judges flexibility to develop creative solutions to novel procedural problems. They carefully crafted § 1407 to preserve this flexibility. In the fifty years since § 1407 was passed, litigation has only become more complex, and the need to preserve this flexibility is more acute than ever.

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2010); *see also* *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 340 (3d Cir. 2011) (Scirica, J., concurring) (“Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality.”).

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