ADVISORY COMMITTEE ON CIVIL RULES
PUBLIC HEARING
OCTOBER 16, 2023

TESTIMONY OF SHERMAN JOYCE
PRESIDENT, AMERICAN TORT REFORM ASSOCIATION
REGARDING PROPOSED NEW RULE 16.1

Thank you for the opportunity to share the American Tort Reform Association's (ATRA) views regarding the preliminary draft of the proposed new Rule 16.1 of the Federal Rules of Civil Procedure, which addresses multidistrict litigation.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms. Our mission is to establish and advance a predictable, fair, and efficient civil justice system. ATRA commends the Committee for recognizing the critical need for rules governing multidistrict litigation (MDL), which has transformed the federal courts and has been misused for the mass filing of questionable and unsupportable claims. This litigation has overwhelmed both defendants and the federal courts.

Respectfully, the preliminary draft of Rule 16.1 is insufficient. It does not acknowledge these significant problems; nor does it provide needed, effective procedural safeguards for MDLs. ATRA urges the Committee to further develop the proposed rule with the goal of restoring balance to the MDL system.

The Mass Tort Litigation Environment Has Significantly Changed

Since Congress adopted the MDL statute in 1968, the mass tort litigation environment has significantly changed. An industry has developed around such litigation. Law firms and businesses known as "lead generators" spend extraordinary sums on lawsuit advertising,[1] sometimes financed by an influx of outside investment in speculative litigation by outside sources (known as third party litigation funding (TPLF)).[2] Ad campaigns to solicit claims for several mass tort litigations have *each* exceeded $100 million.[3] Call centers, sometimes in other countries, gather medical and other information from those who respond, then package and sell potential claims

[1] Between 2017 and 2021, $6.8 billion was spent on more than 77 million lawsuit ads that aired on television. *See* Am. Tort Reform Ass'n, Legal Services Advertising in the United States 2017-2021, at 4 (2022).

[2] *See* U.S. Gov't Accountability Office, GAO-23-105210, Third-Party Litigation Financing: Market Characteristics, Data, and Trends 11-12 (Dec. 2022).; *see also* Am. Tort Reform Ass'n, The Hidden Money Behind the Litigation: The Problematic Expansion of Third Party Litigation Funding (June 2022).

[3] *See* Roy Strom, *Camp Lejeune Ads Surge Amid 'Wild West' of Legal Finance, Tech*, Bloomberg Law, Jan. 30, 2023 (reporting $131 million spent on Roundup lawsuit ads, $122 million spent on Xarelto lawsuit ads, $111 million spent on talcum powder lawsuit ads, and $112 million spent on Camp Lejeune ads).

to interested law firms. In some instances, strangers have solicited individuals for lawsuits by phone, apparently through misuse of their medical records.[4]

With minimal screening, claims are filed *en masse*. Federal MDL dockets can go from zero to tens of thousands of questionable claims in only a few months. One law firm recently filed over 5,000 complaints in a mass tort docket in a single week.[5] Potentially viable claims may be buried among unsupportable ones.

In this environment, the sheer volume of cases, rather than the merits of each case, is the driving force behind the litigation. Faced with investigating the validity of thousands of dubious claims and endlessly litigating them, businesses often make the rational choice to enter a global settlement, sometimes for hundreds of millions or billions of dollars. They do so even when the claims are unsupported by sound science or would otherwise likely be dismissed if evaluated on their individual merits. In some instances, companies have settled this litigation at levels in the hundreds of millions of dollars even after prevailing in *every* bellwether trial.[6]

The MDL System is Not Functioning Properly

As the Committee knows, the percentage of cases in federal MDLs has doubled over the past decade and more than tripled over the past two decades. In 2020, for the first time in history, MDL dockets, primarily product liability mass tort cases, made up more than half of the federal civil caseload.[7] That percentage reached an astounding 73% as of the conclusion of the 2022 fiscal year.[8]

Federal judges have expressed concern with the impact that the flooding of the courts with mass tort claims has on the civil justice system. When overseeing an MDL including 850 lawsuits targeting a medical device, the Judge Clay D. Land, then serving as Chief Judge of the U.S. District Court for the Middle District of Georgia, observed that lawyers file "cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action" in an MDL because they believe clear

---

[4] *See* Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

[5] *See* David Nayer, *Analytics Show One Firm Filed Over 5,000 Lawsuits in a Week*, Law Street, Feb. 8, 2023.

[6] *See, e.g., Bayer and Johnson & Johnson Settle Lawsuits Over Xarelto, a Blood Thinner, for $775 Million*, N.Y. Times, Mar. 25, 2019.

[7] *See* Daniel S. Wittenberg, *Multidistrict Litigation Dominating the Federal Docket*, ABA J., Feb. 19, 2020.

[8] *See* Rules for MDLs, Press Release, *73% of Federal Civil Cases Are in MDLs as of Fiscal Year 2022*, Apr. 27, 2023 (reporting that 392,374 civil cases out of 536,651 civil cases in federal courts, excluding Social Security and prisoner cases, reside in MDLs as of the end of FY22).

deficiencies in their claims will not be scrutinized when the claim is swept into a global settlement.[9]

Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida, who has also overseen product liability mass tort litigations, has also observed the challenges courts face in addressing MDL litigation. She explained that it is difficult to apply the ordinary procedural safeguards used to verify claims when "the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands."[10] Judge Rogers cautioned that the "high volumes of unsupportable claims clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions."[11]

Five years ago, this Committee's MDL Subcommittee recognized "widespread agreement among experienced counsel and judges" that a significant number of claims in product liability MDLs are not viable, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.[12] The Subcommittee recognized that MDL centralization had contributed to a "Field of Dreams" problem – "if you build it, they will come." It provided a troubling estimate of the percentage of claims in federal MDLs that are unsupportable: 20% to 30% and, in some litigation, as high as 40% to 50%.[13]

Yet, even as these changes have occurred, federal MDL dockets have grown, and judges, litigants, and scholars have expressed concern, there remains no rule of civil procedure governing MDLs.[14]

An MDL Rule Should Require Transferee Courts to Actively and Promptly Evaluate Claim Viability

ATRA understands the Committee's interest in adopting an MDL rule that is uncontroversial and sufficiently flexible to accommodate different types of litigation

---

[9] *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016).

[10] Judge M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. Rev. 873, 873 (2021).

[11] *Id.*

[12] Advisory Committee on Civil Rules, Agenda Book, Nov. 1, 2018, at 142.

[13] *Id.*; *see also* Andrew J. Trask, *Ten Principles for Legitimizing MDLs*, 44 Am. J. Trial Adv. 113, 120 (2020) (estimating that "junk claims" comprise forty percent of most MDL dockets).

[14] By way of contrast, the judiciary has updated its rules for another form of aggregated litigation – class actions – several times. The more recent changes to Rule 23 include adding an permissive interlocutory appeal provision in 1988, addressing appointment of counsel and awarding of attorneys' fees in 2003, and providing for closer evaluation of proposed class action settlements in 2018.

that may be transferred to an MDL or varied needs of particular claims. That said, ATRA believes a proposed rule should recognize the extraordinary surge of mass tort litigation that now constitutes about two thirds of civil actions in the federal courts, and must respond the widely acknowledged problems that result. Given the transformation that has occurred, ATRA respectfully views the proposed rule as underwhelming and insufficient. As drafted, the rule is largely limited to suggesting that transferee courts schedule an initial management conference at which the court "should" or "may" consider various issues. The proposed rule appears to be largely a codification of basic practices that are ordinarily used in MDL proceedings, presented as non-binding recommendations.

A critical aspect of an MDL rule, in ATRA's view, is the inclusion of safeguards that require cases to be carefully screened when they are filed and that provides a mechanism for courts to dismiss speculative or otherwise nonviable claims at an early stage, as they would if litigated individually. These unsupportable cases place unnecessary costs on courts and defendants, delay resolution of meritorious claims, and undermine the fairness and effectiveness of the MDL process.[15] The MDL rule should also encourage courts to rule on dispositive legal issues as early practical in the case, such as on novel theories of liability, general causation, preemption, or statutes of limitations that can affect all or many claims. For example, in December 2022, the transferee court overseeing the Zantac litigation ruled that "no scientist outside this this litigation" had found that the heartburn medication's active ingredient causes cancer.[16] Rather, the plaintiffs' experts "systemically utilized unreliable methodologies" to support their claims, including use of a private laboratory that heated the drug to 266 degrees and adding a toxic amount of salt to generate traces of the carcinogen.[17] The ruling effectively ended an MDL that had grown to nearly 2,500 plaintiffs over two years with at least another 50,000 potential claimants in waiting.[18]

In this respect, the proposed rule provides only that "how and when the parties will exchange information about the factual bases for their claims and defenses" is among the dozen issues on a non-mandatory checklist that a transferee court *may* require the parties to address in a report submitted to the court before the initial MDL management conference. The draft Committee Note to that provision, Rule 16.1(c)(4), suggests that this provision intended to facilitate discovery, rather than require plaintiffs to make a preliminary showing that they have alleged a viable claim. In addition, the Note appears more concerned about the risk that requiring submission of "fact sheets" or other information supporting a claim would place on plaintiffs with no acknowledgment of the obvious burden that the current system of

---

[15] *See* Trask, *Ten Principles for Legitimizing MDLs*, 44 Am. J. Trial Adv. at 122.

[16] *In re: Zantac (Ranitidine) Prods. Liab. Litig*., 644 F. Supp.3d 1075, 1094 (S.D. Fla. Dec. 6, 2022).

[17] *Id*. at 1092.

[18] *Id*. at 1096, 1200 n.96.

mass filing thousands of claims – many of which are unsupportable – places on defendants and the courts.

ATRA is also concerned with the proposed rule's emphasis of facilitation of settlement as legitimate role for the court in overseeing an MDL. Under the proposed rule, consideration of settlement begins in the initial conference. *See* Rule 26.1(c)(1)(C), (c)(9). The draft Committee Notes indicate that the transferee court can facilitate settlement through mediation, alternative dispute resolution, use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection or representative bellwether trials, and coordination with state courts. The rule and the Committee Notes should place an equal, if not significantly greater, emphasis on the court's responsibility, early in the litigation, to evaluate the viability of claims and rule on dispositive motions. Only after these steps does judicial facilitation of settlement become appropriate.

Finally, ATRA respectfully disagrees with the Committee's decision to not include disclosure of TPLF in an MDL rule. While we recognize that such a proposal is proceeding (or stalled) on a separate track,[19] it is intertwined in the growth of MDLs and problems that result. The presence of TPLF to fund lead generation for a mass tort may suggest the need for a court to employ particularly rigorous screening mechanisms. In addition, the court and all parties should be aware that an outside funder's entitlement to a substantial sum or percentage of any amount recovered may complicate the ability to reach a reasonable settlement.

Conclusion

In sum, a Federal Rule of Civil Procedure addressing MDL management is long overdue. ATRA suggests that the Committee revise the preliminary draft to impart on transferee courts a responsibility to take an active role, early in the litigation, to develop mechanisms to evaluate the viability of mass-filed claims and rule on dispositive motions. ATRA also urges the Committee, as part of an MDL rule or separately, to require disclosure of TPLF, given its implications for mass tort litigation.

[19] Six years ago, ATRA was among thirty organizations that asked the Federal Advisory Committee on Civil Rules to amend the rules to require automatic disclosure of TPLF agreements in all civil actions in federal courts. *See* Letter to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A), June 1, 2017 (Document No. 17-CV-O). This proposal has remained stagnant even as the use of TPLF explodes and examples of funders influencing litigation mount.