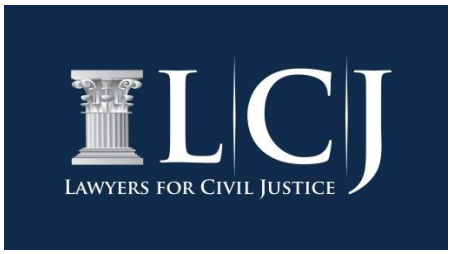

MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES

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I. Early Vetting: Rule 26

a. Background

One of the greatest problems identified with the MDL process is its tendency to attract meritless claims.[1] In some cases, meritless claims take up thirty to forty percent of the total case inventory.[2] As Judge Clay Land of the Middle District of Georgia put it: "the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[3]

In theory, since defendants have the same rights to discovery as they do in individual litigation, it should be easy to debunk meritless claims when they appear. In practice, however, 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. Rules 8, 9, 11, 12(b) and 56 are failing to meet the need for a mechanism to test and remove meritless cases from the dockets.

Under current MDL practice, defense lawyers—and judges—often do not have basic information available at the beginning of the litigation.[4] Plaintiff fact sheets are not the answer.[5] They shift

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[1] *See In re Mentor Corp. Obtape Transobturator Sling Prods.*, MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sep. 7, 2016) (Land, J.) ("based on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise").

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

[3] *In re Mentor Corp.*, 2016 U.S. Dist. LEXIS 121608, *5.

[4] *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2006) (finding "unreasonable delay in completing Fact Sheets prejudiced the defendants' ability to proceed with the cases

the cost of basic vetting of claims to the defendants, who pay through negotiating the information in fact sheets, reviewing fact sheets for lack of basic information, and then pointing out the errors to the plaintiffs. It also shifts costs to the courts, who must "waste judicial resources deciding motions in cases that should have been dismissed by plaintiff's counsel earlier."[6] In addition, *duplicate* claims—filed on behalf of the same plaintiff by different counsel—are also a serious issue in MDLs, since they require the same attention to weed out as meritless claims.[7]

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.[8] At times it also encourages plaintiffs to stay with meritless claims through motion practice.[9]

Baseless claims are harmful to the judicial system, corporate defendants and the public. For the judiciary, ignoring dockets that are overloaded with meritless complaints undermines public confidence in courts and imposes administrative burdens—matters that the drafters of Rules 8, 9, 11, 12(b) and 56 considered highly important to if not existential for the judiciary. For publicly traded corporations, baseless claims can confuse the nature of SEC reporting requirements because it can be impossible to sort out the materiality of cases when there is no information about their merit. And for the public, baseless claims subject to FDA reporting can mislead patients about the benefits and risks of the drugs and devices prescribed by their doctors, complicating important health decisions.

Fortunately, a simple rule solution exists within the present FRCP structure: a Rule 26 amendment requiring disclosure of evidence showing the cause and nature of the injury alleged. The practical effect will be that fewer meritless claims will be filed. Even if they are still filed, defendants (and the courts) will not have to expend the same resources to identify and dismiss them. Such an amendment would not create an undue burden because plaintiffs' counsel should already possess this level of evidence to satisfy the basic Rule 11 requirements. Absent such a rule, plaintiffs will continue to "park" meritless cases in an MDL, even if the Plaintiffs' Steering Committee is making an effort at due diligence.

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effectively"); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Pracs., & Prods Liab. Litig.,* 227 F. Supp. 3d 452, 460 (D.S.C. 2017) (after months of litigation and multiple notices, plaintiffs "inexplicably" argued that no one had had the opportunity to develop the facts in their case).

[5] *See, e.g., In re PPA Prods. Liab. Litig.,* 460 F.3d at1224 (9th Cir. 2006) (noting that, despite efforts of defendants and Plaintiffs' Steering Committee, "many plaintiffs had failed to comply with [the court's] requirement to complete a Plaintiff's Fact Sheet"); *In re Mentor Corp.,* 2016 U.S. Dist. LEXIS 121608 at *7-8.

[6] *In re Mentor Corp.,* 2016 U.S. Dist. LEXIS 121608, *4 (M.D. Ga. Sep. 7, 2016) (Land, J.).

[7] Jeff Lingwall, et al., *The Imitation Game: Structural Asymmetry in Multidistrict Litigation,* 87 MISS. L. REV. 131, 162-63 (2018).

[8] *See* Lingwal, *Imitation Game,* 87 Miss. L.J. at 182; *In re Mentor Corp. Obtape Transobturator Sling Prods.,* MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sep. 7, 2016) (Land, J.) ("based on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise").

[9] *See, e.g., In re Lipitor (Atorvastatin Calcium) Marketing, Sales Pracs., & Prods Liab. Litig.,* 227 F. Supp. 3d 452, 466 (D.S.C. 2017) (noting plaintiffs opposed summary judgment on specific causation despite lacking any expert evidence).

The AAJ's proposed "inactive docket"[10] for claims about which counsel has not conducted reasonable inquiry would not change or improve the status quo. Primarily, this is because a significant volume of such claims originate not as injured individuals contacting lawyers, but rather as the result of massive advertising campaigns that generate huge numbers of potential claims that counsel have not invested the proper resources to screen,[11] or even direct calls to potential plaintiffs warning them their lives are in danger.[12] Lawyers spend money to generate claims in this fashion because MDL practice rewards it—via lead counsel selection and settlement amounts—and because they are confident (with good reason) that courts will enable the practice. To take just a few examples, an inactive docket would not prevent the filings of specious claims that dogged both the Silica and Fen-Phen litigations.[13] Nor would it absolve a Judge Land of resolving summary judgment motions on claims where plaintiffs had no credible causation evidence, or had already passed the statute of limitations.[14] An "inactive docket" would not spare defendants from reporting such claims as required by regulation, which impose significant costs in terms of time and resources for many claims that have no basis in fact or law. In short, the AAJ's proposal should be viewed more as an acknowledgement that there is a problem with baseless claims than as a solution that would allow *more* parking of specious claims, without mitigating against any of the injurious consequences for courts, corporate defendants and the public. AAJ's proposal is also problematic since it essentially would use the federal rules to toll applicable statutes of limitations in the absence of the parties' agreement. The filing of a lawsuit normally tolls the statute of limitations but it does so when a claim is actively being litigated and is subject to dismissal with an early motion – not when a potentially meritless claim is essentially parked in federal court. Moreover, an "inactive docket" represents a radical departure from the fundamental need to support claims, with no accountability to plaintiffs' counsel for filing cases without the requisite due diligence generally required.

b. Specific problems:
    i. Rules 8, 9, 11, 12(b) and 56 are failing to provide sufficient procedures for early vetting, and the *ad hoc* use of mechanisms such as fact sheets and *Lone Pine* orders varies wildly and is inherently inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible;
    ii. Dockets overloaded with meritless claims harm the judiciary because they decrease public confidence in the courts and consume judicial resources;
    iii. Meritless claims distort perceptions of the value and complexity of MDL cases;
    iv. A process that denies defendants the ability to understand the claims made against them is incompatible with the American concept of justice;

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[10] Memo from AAJ's MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee, (May 25, 2018) (available at http://www.uscourts.gov/sites/default/files/18-cv-t-suggestion_aaj_re_mdl_rulemaking_0.pdf).

[11] *See, e.g.,* S. Todd Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 411 & n. 92 (2013) (describing mass-tort recruitment practices).

[12] Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, NEW YORK TIMES, April 14, 2018.

[13] *See* S. Todd Brown, *Specious Claims & Global Settlements*, 42 U. MEM. L. REV. 559, 580-86 (2012).

[14] *In re Mentor Corp. Obtape Transobturator Sling Prods.,* MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *4 (M.D. Ga. Sep. 7, 2016) (Land, J.).

v. It is unjust to apply procedural rules, including discovery rules, to one side of a case while suspending those rules as to the other party; and
vi. Overloading dockets with "inactive" cases, which may lack a basis in fact or law, increases the cost of settlement because as a practical matter, plaintiffs' counsel will likely insist that such cases be included in a global settlement, if any, and defendants will have no mechanism to eliminate such cases through motion practice because they are not on an "active docket."

c. Solution: Amend Rule 26 to provide for mandatory disclosures by plaintiffs in consolidated cases, including sufficient evidence to show plaintiff had exposure to the alleged cause and suffered a harm within the scope of the case.

d. Proposed language:

Rule 26(a)(1)

(F) Multidistrict Litigation Disclosure. Within sixty (60) days of the filing of a civil action in, or the removal or transfer of any civil action to, a multidistrict proceeding under 28 U.S.C. § 1407 in which a plaintiff alleges personal injury, plaintiff in each such action shall make an initial disclosure which:

(i) identifies with particularity any product, service, or exposure at issue in the action, and provides documents or electronically stored information evidencing same; and

(ii) identifies with particularity the specific injury at issue in the action, including the date of the injury, and provides documents or electronically stored information evidencing same.

For civil actions filed in the transferee district prior to the establishment of a multidistrict proceeding under 28 U.S.C. § 1407, the initial disclosure shall be made within sixty (60) days of the Order of the Judicial Panel on Multidistrict Litigation establishing such proceeding.

II. Appellate Review

a. Background

Certain issues—such as pre-emption, jurisdiction and Daubert on general causation—are key legal questions that affect large number of cases in an MDL proceeding.[15] However, appellate review of critical motions in MDL cases is very rare, occurring only when a trial results in judgment for the plaintiff. As a result, a large number of cases that should not have been brought are allowed to proceed through a costly litigation process without appellate review. In many

[15] See, e.g., *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig*., MDL No. 2767, Oral Argument Transcript Mar. 30, 2017, at 26:3-4 (Judge Vance: "You would agree that a favorable Daubert ruling is pretty much the game in these cases?").

MDL cases, the overall litigation is settled without ever receiving the benefit of a definitive ruling as to the legal validity of critical issues.

Discretionary appeals are failing to provide sufficient certainty and guidance. Some parties are reluctant to seek certification for interlocutory review even when there are good reasons for it, and some judges are reluctant to grant such review because they view it as needless delay of cases that might otherwise get resolved. Although mandamus is occasionally employed to get an appellate court's attention in certain situations, it is an imperfect mechanism for the purpose of seeking review of a key decision.

For example, in the *Actos* MDL, defendant Eli Lilly filed a motion to dismiss on pre-emption issues, arguing that it could not be held liable for the content of labels that federal law forbade it to change. The motion was denied. After one trial resulted in a $9 billion judgment, Eli Lilly filed an appeal. It withdrew the appeal in light of a pending settlement. However, it had to wait until after a lengthy and expensive pretrial and trial phase and a potentially ruinous verdict before it was able to seek review of this fundamental legal issue.[16]

b. Specific problems:
    i. Rulings on a handful of critical motions that are essentially case-dispositive (similar to class certifications) have very little possibility of appellate review;
    ii. The lack of appellate review deprives courts and parties of clear guidance;
    iii. Discretionary appeals are too seldom sought and granted to provide the certainty and case law development that MDL cases need and warrant;
    iv. Parties are increasingly turning to mandamus, which is an imperfect substitute for the right to appellate review on the merits; and
    v. The lack of appellate review adds to a sense of skepticism about MDL proceedings, specifically that settlement pressure has undue influence on some decisions.

c. Solution: Create a straightforward pathway for interlocutory appellate review as of right for a tightly defined category of motions that are critical in MDL cases. The rule should affect only those issues that could be dispositive of a significant number of cases in the MDL.

d. Proposed language:

<u>Rule 23.3 Multidistrict Litigation Proceedings</u>

<u>(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).</u>

[16] *See In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F. Supp. 3d 485, 495-502 (W.D. La. 2017) (describing litigation from pretrial preemption motion through appeal) (Doherty, J.).

(1) Appeals. A court of appeals shall permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based.

III. Bellwether Trials

a. Background

Although the purpose of an MDL is "coordinated or consolidated pretrial proceedings," bellwether trials are commonly conducted by the judge to whom the proceedings are transferred, and parties often feel unduly pressured to participate in trials of cases that are not appropriately representative of the case as a whole. Instead of generating useful information for the parties, bellwether trials often appear to be used for both the expense and the *in terrorem* effect of large jury verdicts to spur global settlement discussions.[17]

Having only one judge handle all trials in a large consolidated proceeding does not give an accurate picture of what different judges in different courts applying different laws would do for cases. As the Seventh Circuit observed in denying certification of a nationwide products-liability class action:

> [T]he benefits [from a representative trial] are elusive. The central planning model — one case, one court, one set of rules, one settlement price for all involved — suppresses information that is vital to accurate resolution. … One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident.[18]

Similarly, relying on a few ordered trials to produce useful settlement information in a complex, multi-state MDL would be similarly fruitless.

Several other factors also confound useful information coming from bellwether trials. First, plaintiffs will often voluntarily dismiss proposed bellwethers that might prove adverse to them, thus skewing any sample towards greater recoveries than average. Second, to the extent that courts have begun to select bellwether trials only from those cases originally filed in the jurisdiction (since those cases will not require *Lexecon* waivers), they do not represent the potential theories and liabilities available across the fifty states.

If bellwether cases are not viewed as representative, they lose their utility in the settlement process. Defendants do not often lower their expectations due to losses or adverse verdicts in

[17] *See, e.g.*, S. Todd Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 401 & n. 50 (2013) (noting settlements in World Trade Center Disaster Site Litigation and the Deepwater Horizon litigation both occurred shortly before bellwether trials were to begin).
[18] *In re Bridgestone/Firestone, Inc*., 288 F. 3d 1012, 1020 (7th Cir. 2002).

bellwether trials; in fact, the plaintiffs' use of voluntary dismissal as a tactic may in fact strengthen defendants' resolve to litigate.

Requiring explicit consent for bellwether trials returns some measure of legitimacy to the bellwether process, and it would reduce the potential *in terrorem* effects of bellwether trials ordered over one or both parties' objections. If trials do in fact reflect a range of potential outcomes, parties will be more likely to incorporate that information when settling.

In problems of national scope that involve claims under multiple states' laws, defaulting to trying cases in their original jurisdictions would help with the information-generating function of the MDL process.

b. Specific problems:
    i. Parties feel unduly pressured to participate in non-representative trials;
    ii. Selection of cases for trial is made by an unfair/unclear process;
    iii. To avoid *Lexecon*/jurisdictional waiver issues, MDL courts are trying cases filed in the court's jurisdiction, exacerbating the non-representativeness problem;
    iv. Multiple plaintiffs' claims are tried together;
    v. Delays in entering judgment after trial can thwart access to appellate review; and
    vi. A verdict in favor a plaintiff is more likely to be interpreted as proof of the merits, while a defense verdict is seen as a reason that more trials are needed.

c. Solution: Establish a consent procedure in Rule 23.3 to ensure parties' consent to each bellwether trial.

d. Proposed language:

Rule 23.3 Multidistrict Litigation Proceedings

(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).

(1) Appeals. ***

(2) Trials. In any coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S. Code § 1407, the judge or judges to whom actions are assigned by the Judicial Panel on Multidistrict Litigation shall not conduct a trial in any action in those consolidated or coordinated proceedings unless all parties to that action consent.

IV. Third-Party Funding Disclosure

a. Background

The potential risks posed by third-party litigation funding arrangements are well-documented.[19] There is a growing consensus among MDL judges in particular that review of third-party funding agreements is essential to ensuring the integrity of the judicial process. *In camera* review, however, cannot suffice as a prophylactic measure. Disclosure of the agreements to the parties is critical.

In camera review puts courts in an untenable position: vouching for one side to its opponents in an adversary process. The practical result of handling these agreements as an *ex parte* matter is not simply that the court knows about the agreements, it's that everyone in the court knows except the defendant. Defendants must know of the existence of third-party funders for a number of reasons tied to the effectiveness of MDL proceedings.

One of the most important reasons is that the existence of third-party litigation funding correlates strongly with inventories of junk cases, because funds are used for mass media recruitment of plaintiffs without sufficient due diligence into the merit of the claims. There are strong incentives (and no punishment) for filing a high volume of cases regardless of merit. Third-party funding has been tied to mistreatment of individual plaintiffs including unnecessary medical procedures.[20]

Parties also need to understand third-party litigation funding agreements because they can affect the efficient administration of mass settlements. Just recently in *In re NFL Players Concussion Injury Litigation*, Judge Anita Brody had to shut down an attempt by a third-party funder to subject the settlement agreement to a third-party arbitration.[21] The idea that such issues are a matter for the judge to deal with on an *ex parte* basis is absurd.

Disclosure of third-party litigation funding agreements is essential. First, it allows parties in the litigation to identify the real parties in interest, which is important in developing both litigation and settlement strategies. Second, it allows both the courts and the parties to focus their efforts on those parties who actually require compensation by the court, as opposed to those who bought the right to sue, possibly without doing adequate research into the merits of the claims at issue. These are the same reasons that the Advisory Committee originally required that defendants disclose the existence of any insurance coverage.

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[19] *See* Letter from Lisa Rickard, et al., to Rebecca Womeldorf (June 1, 2017) (available at: http://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf).

[20] For a recent example, see Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, NEW YORK TIMES, April 14, 2018.

[21] *See* Emma Cueto, *Ex-NFLer Dodges Arbitration Over $500K Settlement Advance*, Law360, May 23, 2018, available at TK.

b. Specific problems:
    i. Courts and parties are unaware of the people and entities with a stake in the outcome of the litigation, preventing compliance with ethical obligations;
    ii. Courts cannot apply the Rule 26(b)(1) mandate to consider "the parties' resources" as a factor in proportionality without knowing whether a third-party has agreed to fund some or all litigation expenses;
    iii. Not knowing the real parties in interest can prevent parties from determining litigation and/or settlement strategy because a party's obligation to pay a percentage of proceeds to a TPLF entity could influence that party's willingness and ability to resolve a litigation matter and will shape settlement negotiations;
    iv. Courts cannot effectively determine whether to impose sanctions or other costs absent the disclosure of TPLF arrangements;
    v. Disclosure of TPLF agreements *in camera*, and handling any issues they cause on an *ex parte* basis, puts the court in an untenable position;
    vi. Failure to disclose TPLF agreements to defendants deprives them of the right to know who is bringing the action against them, and denies them the ability to understand the dynamics of the case including the source and therefore the nature of the plaintiffs' claims;
    vii. The 24 district and six circuit local rules that require disclosure of TPLF are inconsistently written and poorly enforced; and
    viii. The few courts that are addressing TPLF are doing so in an *ad hoc* way, which is inconsistent with the FRCP's promise of clarity and uniformity.

c. Solution: Amend Rule 26 to require disclosure of third-party financing agreements to the court and parties.

d. Proposed language:

Rule 26

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. ***

<u>(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.</u>

V. Joinder

a. Background

The standard of commonality for consolidation into an MDL is intentionally not difficult to meet, and it therefore facilitates consolidation for pretrial management. This is one reason why MDLs have become such a popular tool for widespread personal-injury issues. But the leniency toward consolidation also means that cases are often consolidated that would not meet the "same transaction or occurrence" test required for joining individual cases. Indeed, as at least one appellate court has noted, in MDLs, cases are filed in which "unrelated claims of numerous plaintiffs [are] joined without specifying which products they allegedly [encountered] or the manufacturers of products that allegedly caused their injuries."[22] These are not cases that can or should be tried together in front of the same jury.

Rule 20 should make clear that cases requiring individualized proof of causation (such as two separate cases involving adverse effects of the same drug) should be tried separately, regardless of whether they properly had been consolidated for pretrial proceedings pursuant to an MDL process.

b. Specific problems:
    i. Rule 20 provides a loophole for pleading standards, effectively allowing the filing of large volumes of meritless complaints; and
    ii. The Rule 20 loophole is depriving the courts of important fee revenue

c. Solution: Amend Rule 20 to provide a common standard for determining whether plaintiffs in an MDL proceeding should be joined or if, instead, a separate complaint should be submitted for each one

d. Proposed language:

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

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(3) Plaintiffs Asserting Injury to Person or Property. Nothing in this subsection (a) shall permit persons to join as plaintiffs in an action that seeks recovery for injuries to a person or property unless each plaintiff's claims arise from injuries to the same person or property.

[22] *In re PPA*, 460 F.3d at 1225.

VI. Pleadings

a. Background

It is common practice in MDL cases for a "master complaint" to function as the pleading that guides the proceedings (particularly discovery), but numerous courts have refused to decide motions to dismiss consolidated or "master" complaints. In addition, plaintiffs' counsel in MDLs have often used master complaints as parking lots for claims, saving a space for a named individual without providing even the minimal information—such as product bought or harm encountered—required by Rule 8.

Exempting claims in an MDL from the FRCP pleading requirements further contributes to the acknowledged problem of large-scale filing of meritless claims.[23] These "generic, omnidirectional complaints" waste both defendants' and judicial resources when they become mere listing documents for large numbers of claims that are likely to be dismissed after some basic discovery is conducted.[24] Courts should not be required to monitor MDL plaintiffs to ensure they have met the bare minimum requirements of the FRCP.

Rule 7 should expressly define the documents used as pleadings in MDL cases, ensuring that they are subject to the same rules and motions as individual complaints, including the pleading requirements of Rules 8, 9, 11 and 12.

b. Specific problem: The use of master complaints leads to one-sided litigation because they are used like pleadings but not treated as pleadings under the FRCP, including when it comes to motions under Rules 8, 9, 11 or 12.

c. Solution: Amend Rule 7 to include master complaints and individual complaints in consolidated cases

d. Proposed language:

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

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(8) a master complaint in a consolidated proceeding;

(9) a master answer in a consolidated proceeding;

(10) an individual complaint, including, a short-form complaint referencing a master complaint, in a consolidated proceeding; and

(11) an individual answer, including a short-form answer responding to a short-form complaint, in a consolidated proceeding.

[23] *See generally In re Mentor Corp.*, 2016 U.S. Dist. LEXIS 121608 at *5.

[24] *See, e.g., In re Prempro Prods. Liab. Litig.*, MDL Docket No. 1507, Dkt. 6 (E.D. Ark. Jan. 14, 2009) (Wilson, J.) (slip op.).