February 16, 2024

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rule of Civil Procedure Related to Multidistrict Litigation and Privilege Log Practices

Dear Mr. Byron:

As lawyers for corporations that are frequently engaged with the federal civil justice system, we write to highlight our deep concerns about (1) the problems that arise in the management and resolution of mass-tort multidistrict litigation proceedings (MDLs) caused by unexamined and unsupported claims and (2) the costs and inefficiencies arising out of the expectation that producing parties must log all documents that are withheld from discovery on the basis of privilege and other protections. We urge the Advisory Committee on Civil Rules to revise the "Preliminary Draft"[1] of Federal Rules of Civil Procedure (FRCP) amendments in order to address these problems directly.

MULTIDISTRICT LITIGATION

The MDL "Rules Problem"

Compliance with the FRCP provisions designed to enforce the basic elements of a legal claim, including rules 3, 7, 8, 9, 10, 11, and 12, helps ensure that the constitutional requirements of Article III standing and an actual case or controversy are satisfied. Unfortunately, these rules are not having this effect in mass-tort MDLs. It is a well-observed phenomenon that substantial numbers of claims asserted in mass-tort MDLs do not, upon examination, satisfy the most basic elements, including whether the plaintiff was exposed to the alleged cause of harm. These insufficient claims undermine transferee courts' ability to manage MDLs by complicating early case management decisions, slowing the litigation, impeding bellwether case selection, and requiring significant and unnecessary expenditures of time and money. In addition, they can thwart the possibility of timely resolution by depriving counsel and parties of the information they need to assess litigation risks and valuation. It is fundamentally unfair and contrary to the principles of civil justice to force defendants to defend against—often for many years—claims where the plaintiff did not use the product, did not suffer an injury within the scope of the litigation, did not transact business with the defendants, or when the pertinent statute of limitations has run.

[1] *Preliminary Draft, Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure* (Aug. 2023), https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

The MDL "Rules Solution"

The proposed Rule 16.1 should include a prompt for judges and parties to prevent unexamined and unsupported claims, a new tool that does not currently exist. Unfortunately, as drafted, the proposed Rule 16.1 subsection (c)(4) is inadequate for the task, primarily because it conflates the foundational requirement of claim sufficiency with the separate and subsequent matter of procedures for exchanging discovery information. But a modest edit aimed at establishing the expectation of compliance would serve the profound prophylactic function of deterring unsupported claims. We suggest subsection (c)(4) should be revised along these lines:

> "how and when ~~the parties will exchange~~ sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff's injury ~~about the factual bases for their claims and defenses~~."

This language would not require a claim-by-claim compliance process—just as current FRCP provisions do not do so in non-MDL cases. However, requiring a discussion of the disclosure process would provide assurance that judges and parties will secure better information for making early case management decisions, including discovery, any motion practice, selection of cases for trial.

PRIVILEGE LOGS

The Privilege Log "Rules Problem"

Rule 26(b)(5)(A) requires parties who withhold information under a claim of privilege or other protection to describe the nature of the withheld items "in a manner that … will enable other parties to assess the claim."[2] Many courts and parties misconstrue Rule 26(b)(5)(A) to require document-by-document privilege logs in all cases despite the 1993 Committee Note's observation that detailed privilege logs "may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."[3] Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly, and wasteful parts of pretrial discovery in civil litigation. The costs and burdens, which can exceed $1 million for logging in a single case, are increasing dramatically as the volume of data and communications increase exponentially—and the advent of new technology (including artificial intelligence) is not appreciably lowering the costs of preparing privilege logs due to the large increase in data volume.

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[2] FED. R. CIV. P. 26(b)(5)(A)(ii).

[3] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment ("The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.")

Rule 26(b)(5)(A), which was written when most documents were retained in paper form, does not distinguish between appropriate and unduly burdensome logging, and the 1993 Committee Note gets lost in the voluminous notes to the 13 amendments to Rule 26 since 1937.[4] The misinterpretation of Rule 26(b)(5)(A) is imposing unjustifiable expenses by hindering courts and parties from making use of more efficient and less costly alternative methods to comply with the rule (including making use of advanced technology). It is also fostering ancillary disputes about privilege logs as a tactic in litigation to impose increased financial burdens on litigants to force the compromise of claims and defenses without respect to the merits. Privilege log disputes hardly ever result in the production of documents or data that are dispositive of a case or claim.

The Privilege Log "Rules Solution"

To address the Rule 26(b)(5)(A) problem, the Preliminary Draft would amend two other rules, Rule 26(f) and Rule 16(b), to require parties to discuss, and prompt judges to order, the timing and method for compliance with Rule 26(b)(5)(A). Unfortunately, this proposal will not achieve its purpose of ameliorating the excessive costs of preparing logs because it does not make any changes to the source of the problem, Rule 26(b)(5)(A).

We support the suggestion by Facciola and Redgrave[5] and Lawyers for Civil Justice[6] that the Committee should amend Rule 26(b)(5)(A) and accompany such an amendment with a Committee Note clarifying that Rule 26(b)(5)(A) does not specify the method of compliance and further that, absent unusual circumstances, there is a presumption that parties are not required to provide logs of trial-preparation documents created after the commencement of litigation, communications between counsel and client regarding the litigation after service of the complaint, or communications exclusively between a party's in-house counsel and outside counsel during litigation. This suggestion would help ensure that courts and parties turning to Rule 26(b)(5)(A) for guidance will learn that the FRCP require parties to take the initiative in addressing and reaching agreement on the scope, structure, content, and timing of privilege logs at the appropriate time in each case.

CONCLUSION

We respectfully urge the Committee to revise Rule 16.1 subsection (c)(4) to prompt MDL judges and parties to avoid the well-known problems that unexamined and unsupported claims cause in mass-tort MDL proceedings. Doing so would provide a pragmatic tool that MDL judges otherwise do not possess to prevent being overwhelmed with insufficient claims that must be dealt with further down the road. The Committee should also revise the privilege log amendments to address the Rule 26(b)(5)(A) problem by explaining that alternative methods can

[4] To find committee notes to a specific section of the rule, practitioners and courts need to know the year that section was amended. Importantly, the Committee's Proposal does not include a cross-reference in Rule 26(b)(5)(A) referring to the amendments and committee notes to Rules 16(b) and 26(f)(3)(D).

[5] Letter from Hon. John M. Facciola (ret.) and Jonathan M. Redgrave to H. Thomas Byron III, Secretary, Committee on Rules of Practice and Procedure (Jan. 31, 2023) , https://www.uscourts.gov/sites/default/files/23-cv-a_suggestion_from_facciola_and_redgrave_-_rules_16_and_26_0.pdf.

[6] Lawyers for Civil Justice, *The Direct Approach: Why Fixing the Rule 26(b)(5)(A) Problem Requires an Amendment to Rule 26(B)(5)(A)*, Oct. 4, 2023, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0007.

and should be employed to avoid significant burdens on parties, non-parties, and courts that are not worth the price. An amendment to Rule 26(b)(5)(A) referring to the new Rule 26(f) and 16(b) provisions, together with a Committee Note as described above, will inform and enable courts, parties, and non-parties to customize logging forms and procedures to ensure effective and efficient logging.

Thank you for your consideration.

Sincerely,

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