March 1, 2023

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: A Possible New Rule 16.1 to Govern Early Management of Multidistrict Litigation (MDL) Proceedings

Dear Mr. Byron:

As legal officers of companies that are continuously engaged with the American civil justice system, we rely on the federal judiciary to uphold the aspiration of the Federal Rules of Civil Procedure (FRCP) to promote "just, speedy and inexpensive"[1] resolutions to all actions—including cases that are consolidated into multidistrict litigation proceedings (MDLs). We understand that the MDL Subcommittee of the Advisory Committee on Civil Rules is working to draft a potential new Rule 16.1 aimed at providing guidance for early management decisions in MDLs. Such a rule is sorely needed.

The MDL Subcommittee's sketch Rule 16.1[2] holds promise for helping MDL judges and practitioners—especially first-time MDL participants—make decisions and act on important matters whose significance can be difficult to foresee at the beginning of the proceedings. At the same time, the draft rule also contains provisions that risk enshrining or even exacerbating some harmful practices.

Focus on Claims

The most important problem that a Rule 16.1 should address is the mass filing of claims that were not subject to meaningful pre-filing due diligence and are wholly unsupportable because, for example, the plaintiff either had no exposure to the product at issue or did not have an injury within the scope of the suit. In non-MDL cases, the FRCP are reasonably effective in preventing such meritless claims from being filed and continuing to reside on court dockets.[3] However, it is a well-known hallmark of mass-tort MDLs that high volumes of such unexamined and unsupportable claims are allowed to be "parked" for extended periods of time.[4] Ignoring this

[1] Fed. R. Civ. P. 1.

[2] Advisory Committee on Civil Rules, *Agenda Book, Oct. 12, 2022*, pp. 174-75, *available at* https://www.uscourts.gov/sites/default/files/civil_agenda_book_october_2022_final.pdf.

[3] Rules 8, 9, 10, 11, 12, and 26(a)(1)(A) establish and enforce pleading standards.

[4] The Subcommittee recognizes:

> There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations—perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices—a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, 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

problem not only violates the basic due process rights of defendants and undermines important FRCP protections, but also thwarts judicial management and delays the possibility of timely resolution by depriving parties of the information they need to assess litigation risks and valuation. A Rule 16.1 should help judges and parties avoid the well-known problems that unexamined claims cause in MDL proceedings by raising awareness of the problem and prompting judges to require a demonstration of basic due diligence into plaintiffs' claims, such as evidence of exposure to the alleged cause and a resulting injury, early in the case.

Avoid "Codifying" Bad Practices

Just as a new Rule 16.1 has the potential to help courts and parties avert and manage the meritless claim problem, it also presents a risk of negative unintended consequences. The rule would cause more harm than good if it were to introduce into the FRCP language which: (i) is inconsistent with other FRCP provisions; (ii) promotes controversial actions; (iii) presumes parties will waive significant rights, including constitutional due process rights; or (iv) contradicts the MDL statute.[5]

For example, a Rule 16.1 should not refer to a "master complaint" or "master answer" because Rule 7 does not allow such pleadings; mentioning them would invite or even endorse forms of pleadings that may not adhere to FRCP standards and the caselaw upholding those standards. Another example is suggesting "direct filing orders," which some courts have employed to bypass the ordinary transfer of actions, even where the court lacks personal jurisdiction over the defendants and venue is not proper. Direct filing orders require defendants to waive objections to personal jurisdiction and venue, sometimes to their surprise,[6] and have invited ongoing disputes on the scope of such waiver, as well as associated choice-of-law questions. The FRCP should not create the expectation that such orders are allowed in MDL proceedings when it is clear that, outside the context of an MDL, direct-filed complaints would be subject to a Rule 12(b)(2) (lack of personal jurisdiction) and/or Rule 12(b)(3) (improper venue) motion to dismiss.

Conclusion

We support the MDL Subcommittee's effort to draft a new Rule 16.1 that would give courts and counsel the tools they need to manage MDLs effectively in the early stages of litigation and facilitate timely resolution of cases. The need for such a rule is well-founded. We urge the Subcommittee to proceed with its development of a Rule 16.1 that includes the foremost MDL need: a prompt to require an early demonstration of counsel's due diligence before filing a claim. However, we strongly oppose any provisions that could do more harm than good by enshrining

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> statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%.

Advisory Committee on Civil Rules, *Agenda Book, Nov. 1, 2018*, p. 142, *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf (emphasis added).

[5] 28 U.S.C. § 1407.

[6] *See Looper v. Cook Inc.*, 20 F.4th 387, 394 (7th Cir. 2021) (holding that defendant "impliedly" consented to waive choice of law by agreeing to direct filing); *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 351-52 (5th Cir. 2017) (MDL judge incorrectly interpreted defendant's agreement to direct filing as waiver of personal jurisdiction defenses).

into the FRCP concepts that would undermine the foundations of existing FRCP provisions, the MDL statute, or other law.

Thank you for your consideration.

Sincerely,

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