COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
MDL SUBCOMMITTEE

FIXING THE IMBALANCE: TWO PROPOSALS FOR FRCP AMENDMENTS THAT WOULD SOLVE THE EARLY VETTING GAP AND REMEDY THE APPELLATE REVIEW ROADBLOCK IN MDL PROCEEDINGS

September 9, 2020

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL Subcommittee ("Subcommittee").

I. Introduction

The Subcommittee's examination of common practices in multidistrict litigation ("MDL") has exposed two fundamental flaws in the Federal Rules of Civil Procedure ("FRCP"): an early vetting gap that allows hundreds of thousands of cases to circumvent procedures that protect dockets and defendants from meritless claims in non-MDL cases, and an appellate review roadblock that denies MDL participants a fair opportunity to seek finality on potentially case-dispositive rulings.[2] These FRCP deficiencies have unbalanced the MDL litigation environment and, because MDL cases constitute almost half of the federal civil docket,[3] caused uncertainty about the FRCP's adherence to the stated purpose of governing "all civil

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] There are other serious FRCP deficiencies related to MDL practice that are not the subject of this Comment. *See* Lawyers for Civil Justice, *MDL Practices And The Need For FRCP Amendments: Proposals For Discussion With The MDL/TPLF Subcommittee Of The Advisory Committee On Civil Rules*, Sept. 14, 2018, available at https://www.uscourts.gov/sites/default/files/suggestion_18-cv-x_0.pdf.

[3] At the end of fiscal year 2019, 46.7% of civil cases in the federal court system were in MDLs. This figure is based on US Courts data, JPML data, and the Duke Law Center methodology of excluding social security cases and

actions and proceedings."[4] As the Committee nears a decision on whether to draft and seek public input on potential FRCP amendments, we urge the Committee to restore much-needed balance in MDL proceedings and fulfill the FRCP's promise of providing fair presumptive procedures by moving forward with two proposals (attached) that would fill the early vetting gap and fix the appellate review roadblock.

II. The Early Vetting Gap and the "Field of Dreams" Problem

After its first year of studying MDL practices, the Subcommittee reported an important finding to the full Committee:

> 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 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%.[5]

The Subcommittee dubbed this the "Field of Dreams" problem because MDLs attract meritless claims consistent with the phrase "if you build it, they will come."[6] Analyzing the reasons behind this phenomenon for the Standing Committee, the Subcommittee contrasted traditional litigation, in which the FRCP's procedures protect dockets and defendants from meritless claims, with today's MDL mass tort environment, where such protections are lacking. The Subcommittee reported:

> In an individual litigation, they [defendants] could challenge the plaintiff's allegations as insufficiently specified about the medication/device used, or about the resulting medical condition. Alternatively, they could rely on initial disclosure and prompt discovery to support a summary judgment motion to knock out claims that can't be supported.
> But in MDL mass tort litigation, those tools may be unavailable to defendants.[7]

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prisoner cases (but including death penalty cases). *See* https://www.uscourts.gov/sites/default/files/data_tables/jb_c3a_0930.2019.pdf and https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

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

[5] 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.

[6] A number of modern MDL practices add to the Field of Dreams problem and the consequent imbalance in the litigation environment, including mass advertising campaigns, direct filing in MDL transferee courts where venue would otherwise be improper, multi-plaintiff complaints, short-form complaints, and third-party funding. All of these incentivize the filing of claims with little or no pre-suit evaluation, including many meritless claims, and these incentives or inducements to file in MDLs do not occur in individual cases. To be clear, we are not asking the Committee to address these practices directly, but rather proposing a modest rule change—an MDL initial limited disclosure—that would help rebalance the environment by acting as a stand-in for the FRCP procedures that are unavailable in MDL cases.

[7] Committee on Rules of Practice and Procedure, *Agenda Book, Jan. 3, 2019*, pp. 160-61, *available at* https://www.uscourts.gov/sites/default/files/2019-01-standing_agenda_book.pdf.

This description defines the FRCP's Early Vetting Gap, a flaw in the rules that permits claims in the MDL half of the federal civil docket that, in the Subcommittee's words, "would never be presented, or survive early motion practice, as individual actions."[8]

A. The FRCP's Early Vetting Gap Persists Despite the Use of Plaintiff Fact Sheets

As the Subcommittee sought to understand why early vetting does not occur in many large mass tort MDL proceedings, the Federal Judicial Center ("FJC") produced research showing that plaintiff fact sheets ("PFS") are "already used very frequently in larger MDL proceedings, and used in virtually all of the 'mega' MDL proceedings with more than 1,000 cases."[9] The Subcommittee (optimistically) reported that one interpretation of PFS usage is "that it is a way of screening out unsupportable claims."[10] On the other hand, since the Early Vetting Gap exists despite the frequent use of PFSs, the Subcommittee offered that "[a]nother way of looking at this practice is that it is not really a screening method…."[11]

Indeed, the PFS has not solved the FRCP's Early Vetting Gap, and for at least three reasons. First, PFSs are not used early. As the Subcommittee acknowledged, "[t]he FJC found that the average time from Panel centralization to entry of a PFS order in the proceeding it studied was over 8 months."[12] That timing reflects the fact that, unlike discovery rules, PFSs are the product of rounds of give-and-take negotiations and compromise between the parties in each case, frequently followed by motion practice and rulings on contested issues. Second, PFSs typically don't require the most basic necessity for vetting: evidence of exposure to the alleged cause and a resultant injury. Third, PFSs are used as a substitute for discovery, not vetting, and therefore have a significantly broader objective than necessary for the purpose of vetting. As the Subcommittee noted, many PFSs "tend to be extremely detailed" and there is even concern that "the consequence of the 'fact sheet' approach is to impose 'massive' discovery obligations on plaintiffs…."[13] In other words, PFSs don't facilitate early vetting because they are neither "early" nor "vetting."

A recent Fifth Circuit opinion exemplifies the inherent shortcomings of PFSs as mechanisms for prompt vetting of meritless claims.[14] Specifically, it shows how the judicial process struggles to make sense of a PFS that is both over-inclusive (for the purpose of vetting) and under-inclusive (not requiring evidence of exposure and harm). It also shows the weakness of an *ad hoc* mechanism that defines its own compliance process by a new court order in every case rather than a rule-based requirement that would provide early notice (before filing), clear timing requirements, and well-understood remedies for non-compliance. As the Fifth Circuit described the case:

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[8] Advisory Committee on Civil Rules, *Agenda Book, April 10, 2018* (hereinafter "Civil Rules Agenda Book April 2018"), p. 161, *available at* https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

[9] Advisory Committee on Civil Rules, *Agenda Book, Oct. 29, 2019* (hereinafter "Civil Rules Agenda Book Oct. 2019"), p. 192, *available at* https://www.uscourts.gov/sites/default/files/2019-10_civil_rules_agenda_book.pdf.

[10] *Id*.

[11] Committee on Rules of Practice and Procedure, *Agenda Book, June 25, 2019* (hereinafter "Standing Committee Agenda Book June 2019"), p. 236, *available at* https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf.

[12] Advisory Committee on Civil Rules, *Agenda Book, April 2-3, 2019* (hereinafter "Civil Rules Agenda Book April 2019"), p. 209, *available at* https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf.

[13] Committee on Rules of Practice and Procedure, *Agenda Book, June 12, 2018* (hereinafter "Standing Committee Agenda Book June 2018), p. 298, *available at* https://www.uscourts.gov/sites/default/files/2018-06_standing_agenda_book_final.pdf.

[14] In re Taxotere (Docetaxel) Products Liability Litigation, 966 F.3d 351 (5th Cir. 2020).

> Dorothy Kuykendall filed a short form complaint on November 29, 2018. Accordingly, her PFS was due seventy-five days later, on February 12, 2019. After she failed to file the required form by the deadline, defendants served her with a notice of non-compliance on March 26, 2019. Under Pretrial Order No. 22A, the notice of non-compliance gave Kuykendall an additional thirty days, or until April 25, 2019, to serve defendants with the necessary information.
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> When Kuykendall again failed to cure the deficiencies, the defendants placed her name on the call docket for the next court hearing, scheduled for May 21, 2019. Next to Kuykendall's name, the defendants included a notation stating "No PFS submitted."
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> The court was unable to address Kuykendall's case during the May 21 conference, so it scheduled a follow-up conference for May 29, 2019. On May 21, Kuykendall uploaded a few documents to MDL Centrality, including a signed declaration and two photographs, but she did not file a PFS. Five days later, Kuykendall finally submitted a PFS, though the document was missing responses to several important questions, including spousal information, weight and height information, and information regarding her prescribing doctor.
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> At the May 29 hearing, the defendants acknowledged that Kuykendall had submitted a PFS after the original hearing date but before the rescheduled hearing. However, defense counsel informed the court that Kuykendall's PFS contained "a significant number of blanks," including "the date of cancer diagnosis, the cancer markers that go to staging, the dates of chemotherapy treatment, the name of the prescribing oncologist, prior medication history, and a list of other medical providers." Kuykendall's counsel acknowledged that her PFS was incomplete, but reported that it was his belief that "[a]ll of the appropriate boxes have been checked." He further explained that any remaining blanks were caused by the "difficulty" of obtaining information from clients, including "health insurance information [and] identifying each pharmacy drugstore."
>
> The court gave Kuykendall an additional thirty days to cure the deficiencies identified by defendants during the hearing. On July 1, 2019, after the court's extension had expired and Kuykendall had not provided an updated PFS, the defendants sent Kuykendall a notice of deficiency that identified the continued omissions and deficiencies in her PFS. Two days later, on July 3, defendants included Kuykendall on a list of plaintiffs whose cases were subject to immediate dismissal. In a short order without analysis, the district court dismissed Kuykendall's case with prejudice on July 11, 2019.
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> That same day, Kuykendall filed a letter in which she claimed to be "blindsided" by the list of deficiencies alleged by the defendants during the May 29 hearing. The letter faulted the defendants for seeking immediate dismissal, rather than giving Kuykendall an additional thirty days to respond to the most recent notice of deficiency. Though the letter was dated July 9, it was not filed on the docket until July 11. Just a few days before filing the letter, but several days after the court's thirty-day extension had expired, Kuykendall submitted a first and second amended PFS on MDL Centrality. Those forms included some previously missing information, but they continued to omit certain information, including her children's addresses and her height.[15]

The *Kuykendall* court assessed these facts, analyzed the case law concerning sanctions for failure to comply with court orders, and affirmed the District Court's decision to dismiss Kuykendall's case with prejudice.[16]

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[15] *Id* at 355-56.

[16] *Id* at 361.

People may differ on whether this narrative ended in justice. But no one could interpret this to be a story of efficient early vetting. A great deal of judicial resources and lawyer time were consumed in defining the meaning of compliance, both substantively and procedurally, and in litigating the consequences of non-compliance. Worse yet, it is unclear whether the plaintiff was required to produce the most fundamental item needed for vetting: evidence of exposure to the alleged cause of harm and a resultant injury. Instead, the plaintiff was directed to answer, and the outcome turned upon, questions that were peripheral to the essential vetting determination including: "spousal information, weight and height information, and information regarding her prescribing doctor," "the dates of chemotherapy treatment, the name of the prescribing oncologist, prior medication history, and a list of other medical providers," and even "her children's addresses and her height." Although this type of information may be perfectly appropriate for discovery in cases that survive early vetting, the effort to gather it on all filed claims—including the 20, 30, 40 or even 50 percent of claims that have no merit—demonstrates why the PFS is failing, and will continue to fail, to achieve early vetting. There must be a better way.

B. "Initial Census" Efforts Suffer the Same Flaws as Plaintiff Fact Sheets for the Purpose of Solving the FRCP's Early Vetting Gap

The search for a better solution to the Early Vetting Gap led the Subcommittee to examine the idea of an "initial census," which "has been the focus of work since the May 2019 gathering."[17] The Subcommittee explained the idea as follows:

> In place of reliance on PFS/DFS practice, the more promising idea has come to be known as a "census," an effort to gain some basic detail on the claims presented – e.g., evidence of exposure to the product at issue – so as to permit an initial assessment of them. This need not be a substitute for a PFS, but instead an initial supplement.

Importantly, the Subcommittee's definition of "initial census" emphasized the critical feature of requiring evidence of exposure and harm early in the case. In the Subcommittee's words:

> …another idea has emerged – that there should be an "initial census" of the claims submitted in "mass" MDLs. This approach would call for claimants to make a showing of exposure to the product or item involved in the litigation, and also a showing that they have sustained an injury of the sort alleged in the proceeding.[18]

With the appropriate focus on the key to early vetting—evidence showing exposure and injury—the Subcommittee began monitoring three newly created MDL proceedings in which "initial census" protocols were undertaken: *In re 3M Combat Arms Earplugs Products Liability Litigation* (MDL No. 2885) (N.D. Fla.), *In re Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation* (MDL No. 2913) (N.D. Cal.), and *In re Zantac (Ranitidine) Products Liability Litigation* (MDL No. 2924) (S.D. Fla.). Unfortunately, despite the benefits each court's approach may offer to *discovery*, the "initial census" approach is failing to address the Field of Dreams problem and the Early Vetting Gap for the same reasons as PFSs. Specifically, these initial census efforts:

- Do not require evidence of exposure and injury—the key to early vetting—either by not asking for such proof or not requiring it. Specifically:

[17] Civil Rules Agenda Book Oct. 2019 at 193.

[18] Standing Committee Agenda Book June 2019 at 238-39.

- The *3M Earplugs* MDL census order does not require evidence of exposure and injury, but rather directs plaintiffs to answer questions under oath and to request audiology reports within particular deadlines.

- The *Juul* MDL census form does not ask for evidence of product use, allowing plaintiffs to certify exposure. Although it asks for medical records showing a diagnosis and date, it allows plaintiffs instead to state they have ordered medical records or to provide an explanation as to why no medical records have been requested.

- The *Zantac* MDL initial census does not require evidence of exposure and injury, and such evidence is not provided to defendants even if provided to the vendor. The initial census purports to require documentation of a medical diagnosis, but accepts for that purpose a statement or email from plaintiffs, and the census form allows responses including "no request for records yet submitted" and "requested but none yet received."

- Fail to satisfy the "early" element of "early vetting." The *3M Earplugs* census order was issued over six and a half months after the case was consolidated, and it allowed 60 days (for existing cases) or 90 days (for future cases) to answer the questionnaire.[19] The *Juul* census order came over six weeks after consolidation and allowed 30 days for compliance.[20] The *Zantac* census order was signed two months after consolidation and allowed 30 days to complete the Initial Census Form and 60 days to complete the Census Plus Form.[21] Although the timing of these census orders is a material improvement over the average of eight months for a PFS, they still can't accomplish the "early" notice that a rule would inherently provide by pre-existing the filing of cases (which is critical to *deterring* the filing of meritless claims, as discussed below).

- Reflect the process that created them, which is a give-and-take negotiation by repeat players that encompasses tradeoffs and lacks any pretense of standing in for the FRCP that induce early vetting in non-MDL cases, including rules 8, 9, 11, 12, and 56.

- Encourage the filing of meritless claims by failing to provide notice at the outset about whether, when, or how any meaningful vetting will occur.

- Undermine lawyers' responsibility to vet claims prior to filing by setting deadlines for *requesting* documents rather than *producing* documents that lawyers should have gathered already as part of their due diligence before filing the case.

- Seek information beyond what is necessary for early vetting, including dates of birth, social security numbers, reasons for use of the products, receipt of disability benefits, and use of other products. Although this information is no doubt important for discovery, and should be collected for legitimate claims, gathering it for tens of thousands of plaintiffs who were never exposed to, or injured by, the product at issue is an enormous waste of resources.

[19] The JPML ordered coordination of the 3M cases on April 3, 2019, and the census order was signed on October 22, 2019.

[20] The JPML created the *Juul* MDL proceeding on October 2, 2019, and the census order was signed on November 19, 2019.

[21] The JPML ordered coordination of the *Zantac* cases on February 6, 2020, and the census order was signed on April 2, 2020.

Of course, these failures don't reflect any lack of good faith or effort on the part of courts and counsel—in fact, the effort to undertake an initial census demonstrates the opposite: a determination to reform what (almost) everyone recognizes to be a serious shortcoming of modern mass tort MDL litigation. Rather, these failures demonstrate the inherent limitations of addressing the Early Vetting Gap outside the structure of the FRCP. Only a rule amendment can succeed.

C. A Multidistrict Initial Limited Disclosure Rule Would Solve the FRCP's Early Vetting Gap and Enhance the Efficiency of Plaintiff Fact Sheets and Initial Census Efforts

A simple FRCP amendment would accomplish what PFSs and initial censuses cannot: efficient, early vetting that strongly discourages the filing of meritless claims without taxing judicial resources or lawyers' time. The Multidistrict Initial Limited Disclosure proposal (the "MILD proposal"), attached as Exhibit A, would do so by requiring initial disclosure of evidence showing exposure to the alleged cause of harm and a resulting injury. This modest change to Rule 26(a)(1) would have an outsize effect; it would:

- Accomplish the "early" element of early vetting by establishing a permanent procedure that everyone will know about on day one of every proceeding;

- Deter the filing of meritless claims by putting counsel on notice that they will have to disclose the basic evidence showing their client was exposed to the product at issue and suffered an injury as a result;

- Achieve "vetting" by establishing a straightforward touchstone separating meritless cases which have no place on the federal civil docket from claims that satisfy the bare minimum requirements for proceeding;

- Free up judicial resources that are currently required to determine compliance with PFSs and initial census forms by focusing discovery on only those claims underpinned by the most basic evidentiary showing of exposure and injury;

- Solve the FRCP's Early Vetting Gap by substituting initial disclosure of key evidence as a pragmatic replacement for the FRCP tools too often unavailable in MDLs, including rules 8, 9, 11, 12 and 56;

- Eliminate the prolonged delays caused when lawyers wait to *request* the key records showing exposure and injury until after negotiation and entry of an initial census or PFS order that allows them to *request* documents in lieu of *producing* them by a deadline.

- Avoid creating any new or undue burden by requiring disclosure of only the most basic documentation already necessary to meet the fundamental precondition of good-faith pleading; and

- Eliminate the uncertainties of *ad hoc* procedures by employing the existing FRCP structure to provide clear notice, presumptive deadlines for compliance, and well-understood remedies for non-compliance.

At the same time, the MILD proposal would have a profoundly positive effect on streamlining further discovery. The Subcommittee posed this question in 2018: "Would a Civil Rules provision foster the use

of such methods [PFSs] in a helpful way?"[22] The answer is clearly yes—and the same is true for "initial census" and other discovery mechanisms. By deterring the filing of meritless claims, and efficiently identifying any such claims that reach the docket, the MILD proposal would reduce by 20, 30, 40 or even 50 percent[23] the number of claims subject to discovery, and therefore the amount of time and effort required to comply with, and oversee compliance with, that discovery. In an MDL with 30,000 claims, wouldn't it be helpful for the court and parties to know which 10,000 to 15,000 plaintiffs need not be cajoled into providing answers to a fact sheet or questionnaire because they were never exposed to the product or injured by it?

D. The MILD Proposal Would Help, Not Hinder, Transferee Judges' Ability to Manage MDL Proceedings

The Subcommittee has expressed appropriate caution that any rule-based solution should not hinder transferee judges' discretion to manage MDL proceedings. Specifically, the Subcommittee shared a concern with the Standing Committee that a rule-based solution "might create an undue risk of intruding too much on a transferee judge's latitude to devise an appropriate treatment for a given MDL proceeding."[24] The MILD proposal avoids any such intrusion. Quite to the contrary, the MILD proposal's prophylactic effect would free up time for transferee judges to manage proceedings by significantly reducing the number of meritless cases filed. The deterrent effect will operate without any judicial action; transferee judges won't have to decide how to handle meritless claims that are never filed. When counsel know in advance that meritless claims will be eliminated quickly (as occurs by operation of the FRCP in non-MDL cases), they will not file those claims. If some meritless claims are still filed, the MILD proposal would quickly identify the ones that should be removed from the docket by a straightforward test—and would not intrude upon transferee judges' latitude to devise appropriate treatment for such claims. The key to respecting transferee judges' need for discretion is a *rule* that's in place on day one because that's the only way to *prevent* the filing of meritless claims. No "best practice" or *ad hoc* discovery technique devised months after consolidation could accomplish the same result because, absent a rule, parties will not know how or when each court will handle meritless claims, and will continue to succumb to the powerful incentives of "get a name, file a claim" in the Field of Dreams.

E. The MILD Proposal Would Not Define Subsequent Discovery

The Subcommittee, after examining the FJC report about PFSs, concluded that "it appears challenging to contemplate a rule that would specify the exact contents of a required PFS in all actions covered by the rule."[25] Indeed! But an amendment to Rule 26(a)(1) requiring initial disclosures in mass tort MDL cases would not need to specify the contents of future census documents or PFS questionnaires any more than the Rule's other initial disclosure requirements need to define subsequent discovery in other cases.

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[22] Standing Committee Agenda Book June 2018 at 299.

[23] *See* note 5, above.

[24] Committee on Rules of Practice and Procedure, *Agenda Book, Jan. 3, 2019,* p. 159 *available at* https://www.uscourts.gov/sites/default/files/2019-01-standing_agenda_book.pdf.

[25] Civil Rules Agenda Book April 2019 at 210.

III. A New Pathway to Interlocutory Review Is Needed to Solve the Appellate Review Roadblock

A. The § 1292(b) Criteria Are Far Too Stringent for Mass Tort MDL Proceedings, Especially as Interpreted by Prevailing Case Law

The Committee "has received a very thorough study of actual experience with § 1292(b) review in MDL mass tort litigations, and it does appear that such review occurs only rarely."[26] Looking for the cause of this Appellate Review Roadblock, the Subcommittee observed that "there is reason to think that § 1292(b) is not ideally suited to deal with the specific question of immediate review in mega MDL proceedings."[27] The question, as posed by the Subcommittee, is "why the existing provisions of 28 U.S.C. § 1292(b) don't suffice."[28]

Section 1292(b) bars interlocutory review of potentially case-dispositive MDL rulings both because the statutory text is intentionally narrow and also because judicial interpretations have constricted its criteria even further. As the Subcommittee has observed,[29] the § 1292(b) criteria ("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"[30]) may bar important issues in MDLs because a *Daubert* ruling may not be a "question of law"; an issue that is dispositive to hundreds of claims may not be a "controlling" issue for a proceeding involving 30,000 claims; and there may not be "substantial ground for difference of opinion" on potentially critical issues such as pre-emption and personal jurisdiction. These are among the reasons that virtually no § 1292(b) motions seeking review of broadly applicable rulings in mass tort MDLs have been granted.[31]

The latest judicial interpretations demonstrate the further constriction of § 1292(b) criteria to disallow any meaningful opportunity for review of potentially dispositive mass tort MDL rulings. For example, an August 2020 decision[32] denying § 1292(b) review in the *3M Earplug* MDL referenced above articulates the extremely circumscribed circumstances in which such review can be granted:

> Certification of an interlocutory appeal under § 1292(b) is a "rare exception" to the fundamental principles underlying the final judgment rule. *See McFarlin v. Conseco Serv., LLC*, 381 F.3d 1251, 1264 (11th Cir. 2004); *see also OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1360 (11th Cir. 2008) ("Because permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy."); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266 (11th Cir. 2000) ("[I]nterlocutory appeals are inherently disruptive, time-consuming, and expensive, and consequently are generally disfavored.") (internal citations omitted). Section 1292(b) thus "sets a high threshold for certification," *see OFS Fitel*, 549 F.3d at 1359, which is met only in "exceptional cases" where early appellate review "may avoid

[26] Standing Committee Agenda Book June 2019 at 240.

[27] Civil Rules Agenda Book April 2019 at 213.

[28] Civil Rules Agenda Book April 2018 at 165.

[29] Civil Rules Agenda Book April 2019 at 212.

[30] 28 U.S.C. § 1292(b).

[31] Letter from John H. Beisner, Skadden, Arps, Slate, Meagher and Flom LLP, to Ms. Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice and Procedure (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf (analyzing the outcome of § 1292(b) motions seeking review of broadly applicable dispositive questions filed in federal mass tort MDLs that closed between 2008 and 2018, as well as in the 60 MDLs pending as of July 2018).

[32] In re 3M Combat Arms Earplug Products Liability Litigation, 2020 WL 4756326 (N.D. Fla. Aug. 17, 2020).

> protracted and expensive litigation" because "a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided," *see McFarlin*, 381 F.3d at 1256. The moving party bears the burden of demonstrating that rare or exceptional circumstances warrant certification under § 1292(b). *See CSX Transp., Inc. v. Kissimmee Util. Auth*., 153 F.3d 1283, 1286 (11th Cir. 1998). "Most interlocutory orders do not meet th[e] test." *See OFS Fitel*, 549 F.3d at 1359.[33]

As if the *three* statutory criteria in § 1292(b) weren't narrow enough, many courts constrict the test even tighter by delineating it as a *five-factor test*. The *3M Earplug* court explains:

> To certify an order for interlocutory appeal under § 1292(b), a district court must find that the moving party has satisfied five conditions: (1) the order presents a pure question of law; (2) the question is controlling of at least a substantial part of the case; (3) the question was specified in the order; (4) there are substantial grounds for difference of opinion on the question; and (5) resolution of the question may reduce the amount of litigation necessary on remand. *See Mamani v. Berzain*, 825 F.3d 1304, 1312 (11th Cir. 2016) (citing *McFarlin*, 381 F.3d at 1264).[34]

And squeezing the test even tighter, courts use a definition of "substantial difference of opinion" that rejects virtually all but the rarest rulings. The *3M Earplug* court expounds:

> The "substantial grounds for difference of opinion" condition is met where "the issue is difficult and of first impression, a difference of opinion as to the issue exists within the controlling circuit, or the circuits are split on the issue." *United States ex rel. Powell v. Am. InterContinental Univ., Inc*., 756 F. Supp. 2d 1374, 1378-79 (N.D. Ga. 2010).[35]

Additionally, in the unlikely event that these paper-thin standards lead to a close call, courts also emphasize that any questions about § 1292(b) certification should be resolved with a denial. In a June 2020 ruling in *In re National Prescription Opiate Litigation*, Judge Polster held:

> "[D]oubts regarding appealability [should be] resolved in favor of finding that the interlocutory order is not appealable." *Adell v. Cellco P'ship*, No. 1:18cv623, 2019 WL 5285627, at *1 (N.D. Ohio Oct. 18, 2019) (quoting *United States v. Stone*, 53 F.3d 141, 143–44 (6th Cir. 1995)).[36]

And for the coup de grâce, parties resisting appellate review routinely urge judges to reject § 1292(b) certification *even where all prerequisites are satisfied*, as the plaintiffs did in the *3M Earplug* MDL:

> Even if all three elements are met, the district court has "unfettered discretion" to decline to certify an interlocutory appeal. *In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007).[37]

Given the statute's unquestionable limitations, and the clarity with which the caselaw creates further constraints, the Subcommittee's conclusion that "[n]o district judge, in denying certification, did so

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[33] *Id*. at *1.

[34] *Id*. at *2.

[35] *Id*. at *3.

[36] In re National Prescription Opiate Litigation, 2020 WL 3547011, *1 (N.D. Ohio June 30, 2020).

[37] In re 3M Combat Arms Earplug Products Liability Litigation, *Plaintiffs' Response To Defendants' Motion For 28 U.S.C. § 1292(b) Certification Of The Court's Summary Judgment Order On The Government Contractor Defense* (Aug. 17, 2020) at 3.

because of inflexibility of the statutory criteria"[38] is, at best, a *non sequitur*. The Subcommittee's view conflicts with a growing recognition that § 1292(b)'s standards are simply too narrow to meet the legitimate needs of modern MDL practice. In granting § 1292(b) in the *In re General Motors LLC Ignition Switch Litigation*, Judge Furman explained:

> Admittedly, had the questions decided by the Court arisen in the context of simpler, more conventional litigation, the Court would not have found the need for immediate appeal as pressing."[39]

In other words, while § 1292(b)'s constraints may be appropriate for non-MDL cases, their unduly restrictive limits, especially as courts apply them, cause the Appellate Review Roadblock in the type of proceedings that most need appellate review.

B. MDL Proceedings Demonstrate a Greater Need for Interlocutory Review Than Other Cases

Because of the unique dynamics of mass tort MDL proceedings, interlocutory review is typically the only hope for appellate review of potentially case-dispositive rulings. Judge Furman explains:

> … the Court is mindful that, as a result of certain structural features of large multidistrict litigation, if appellate review of the summary judgment ruling is to be had, it would likely have to be interlocutory.[40]

Of course, the purposes of interlocutory review in MDLs match the goals of appellate review in conventional cases: "(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants' sense that their dispute has been fully and fairly heard."[41] The difference is that the structural features of MDLs create intense (and one-sided) pressure for settlement before final judgment,[42] greatly increasing the likelihood that district court rulings on key issues will be the last word. Judge Furman explains:

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[38] Civil Rules Agenda Book October 2019 at 194.

[39] In re General Motors LLC Ignition Switch Litigation, 427 F.Supp.3d 374 (S.D.N.Y. 2019) at 393.

[40] *Id*.

[41] Andrew Pollis, *The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1644, 1646 (2011) (citing Professor Cassandra Burke Robertson of Case Western Reserve University School of Law, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006)).

[42] *See* In re General Motors LLC Ignition Switch Litigation, 427 F.Supp.3d at 393-94:

> As others have recognized, "the usual object of MDL management, especially with bellwether trials, is to incentivize rational settlements." *In re DuPuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) (Jones, J., concurring in part and dissenting in part). And the vast majority of MDL cases are, in fact, resolved by settlement. *See Bradt*, supra, at 1206 ("[MDL cases] are almost always — in fact, over 97 percent of the time — resolved in the MDL court, either by dispositive motion or through mass-settlement agreement."). This result is due, at least in part, to the sheer magnitude of the risk, in terms of dollar value, of trials. *Cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) (recognizing that the mere "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); Judith Resnick, *Aggregation, Settlement, and Dismay*, 80 Cornell L. Rev. 918, 929 (1995) ("[L]ike Rule 23, MDL functions to aggregate cases and parties, which in turn helps propel judges toward global settlements.").

> And because settlement pressure is particularly acute in multidistrict litigation such as this, *see* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1224 (2018) ("In most large MDLs, what actually happens is that a settlement agreement is eventually negotiated by the lead lawyers, and it is likely to be one that leaves the plaintiff little practical choice but to accept."), the Court's ruling not only may be controlling but, for all intents and purposes, may also be final, *cf. Mei Xing Yu v. Hasaki Rest., Inc.*, 319 F.R.D. 111, 117 (S.D.N.Y. 2017) (certifying an interlocutory appeal and noting that "it would be difficult (although perhaps not impossible) for the issue to get to the Circuit absent an interlocutory appeal"), *rev'd on other grounds*, — F.3d —, 2019 WL 6646618 (2d Cir. Dec. 6, 2019).[43]

Equally important, interlocutory review is key to ensuring unified treatment of consolidated claims and by avoiding duplicative appeals and inconsistent results, as Judge Furman explains:

> … in the context of an MDL, the efficiencies to be gained by interlocutory appeal are particularly substantial. For example, if any of the cases affected are remanded, appeals may be taken in any of the circuits in which they originated. The likelihood of duplicative appeals and potentially conflicting conclusions is inconsistent not only with the purposes of Section 1292(b), but also the MDL procedure. *See Hill v. Henderson*, 195 F.3d 671, 678 (D.C. Cir. 1999) ("An appeal before re-transfer enhances the likelihood of achieving the coordination benefits sought by § 1407 (the 'just and efficient conduct' of multidistrict actions), as the circuit of the § 1407 transferee court can give the issues a unified treatment, and its interlocutory decision is likely to be accepted as binding law of the case once the cases are transferred back to their courts of origin."); *In re WorldCom, Inc. Sec. Litig.*. Nov. 02-CV-3288 (DLC), 2003 WL 22953644, at *8 (S.D.N.Y. Dec. 16, 2003) ("In multidistrict litigation . . . the better practice may be to allow appeal of appropriate issues before the transferred cases are returned for trial."). The fact that the Court's ruling likely impacts a large number of claims further counsels in favor of appeal. *See Klinghoffer*. 921 F.2d at 24 ("[T]he impact that an appeal will have on other cases is a factor that we may take into account in deciding whether to accept an appeal that has been properly certified by the district court."); *Long Island Lighting Co. v. Transamerica Delaval, Inc*., 648 F. Supp. 988, 991 (S.D.N.Y. 1986) ("Certification may possibly be more freely granted in big cases." (citing 16 Wright, Miller, & Cooper § 3929) (internal quotation marks omitted)).[44]

The combination of uniquely intense settlement pressure and multi-district dynamics creates serious risk of unjust MDL resolutions. As Judge Furman wrote:

> the practical reality is that a broad swath of Plaintiffs' claims are likely to be resolved by settlement, and the value of that settlement will be heavily influenced by the Court's Opinion and Order. These dynamics, along with others frequently discussed in academic literature, make final judgments rare and district court opinions largely unreviewed (if not unreviewable). *See* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1706 (2017) (noting the "lack of appellate review" of pretrial orders in MDLs and that it causes, among other things "the inability for error correction relating to pretrial rulings that can have enormous significance for many litigants"); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1673 (2011) (noting that the "likely result" of an erroneous district court ruling "is a settlement at a price that reflects a trial court's mistaken

[43] In re General Motors LLC Ignition Switch Litigation, 427 F.Supp.3d at 392.

[44] *Id* at 393.

articulation of the governing law, perhaps adjusted slightly to reflect the potential for reversal on appeal that will never come").[45]

Fortunately, there is a simple remedy for the Appellate Review Roadblock and the problems it causes. The revised rule suggestion attached as Exhibit B incorporates several features the Subcommittee has found to be important: discretionary appeals, district court input (but not a veto) if they choose to provide it, and a limited scope that allows judicial discretion in defining what issues may materially advance the ultimate termination of the proceeding. This proposal would provide litigants in mass tort MDL proceedings a much-needed and fair opportunity to seek finality on potentially case-dispositive rulings.

IV. Conclusion

The Subcommittee should proceed to draft and seek public input on potential FRCP amendments such as the attached MILD proposal and refined suggestion creating a new pathway for interlocutory review. These simple ideas, well-grounded in FRCP principles and practice, are needed to remedy the unbalanced environment of modern MDL proceedings. Closing the FRCP's Early Vetting Gap and solving the Appellate Review Roadblock would provide courts and parties fair and much-needed presumptive procedures while fulfilling the FRCP's stated purpose of governing "all civil actions and proceedings."

[45] *Id* at 394.

Exhibit A

Rule 26(a)(1)

(F) Multidistrict Initial Limited Disclosure.

(i) In General. In any action alleging personal injury pending in a coordinated or consolidated pretrial proceeding established pursuant to 28 U.S.C. § 1407, each plaintiff shall, without awaiting a discovery request, provide to the other parties documents or electronically stored information evidencing:

(a) that plaintiff used or was exposed to any product, substance or service which allegedly caused injury; and

(b) that plaintiff suffered the injury alleged in the action.

(ii) Timing. Unless otherwise ordered by the court, a plaintiff must make the initial disclosure referred to in subparagraph (F)(i) within 60 days of:

(a) the transfer, removal or assignment of the action to the coordinated or consolidated proceeding; or
(b) the filing of the action directly in the district where the coordinated or consolidated pretrial proceeding is pending.

Exhibit B

Rule 23.3 Appeals in Multidistrict Litigation Proceedings

A court of appeals may permit an appeal from an order granting or denying a motion issued in a coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b) involving allegations of personal injury, provided that an immediate appeal from the order may materially advance the ultimate termination of the proceeding. A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. The court of appeals may consider the views of the district court as to whether the requested appeal would materially advance the ultimate termination of the proceeding. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.