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Perspective

Managing MDL Mania: A Modest Early Vetting Proposal

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Are there too many lawsuits in this country? Perhaps, but the more relevant question is whether our system too readily facilitates the filing of meritless claims, which not only clog the judicial system, but deny those who may actually have grounds to file a lawsuit their day in court.

What few realize is that many of the lawsuits are concentrated in a particular type of litigation. As of the end of the last fiscal year, roughly 50% of the 301,766 pending lawsuits in federal court (excluding Social Security and prisoner cases, except for death penalty cases) were occupied by Multidistrict Litigation (MDL) proceedings.

Under 28 U.S.C. §1407 (the MDL statute), the Judicial Panel on Multidistrict Litigation may centralize cases pending in different federal judicial districts involving "one of more common questions of fact" for pretrial purposes before a district court judge to "serve the convenience of parties and witnesses and … promote the just and efficient conduct of such actions." When additional cases are filed—and they inevitably are—the MDL judge is tasked with managing those cases as well. The largest MDLs are mass tort proceedings, product liability and/or other personal injury cases.

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MDLs are like magnets. Just as a magnet attracts all types of metallic items—the good and the bad—so too, an MDL facilitates the filing of all types of cases, those with merit and those without. Indeed, many cases in MDLs lack proper vetting as to whether they have a basis, including whether the plaintiff was exposed to the product at issue and sustained the alleged injury thereafter. The lure of an MDL has become a particular problem across product liability/personal injury MDLs that lend themselves to lawyer advertising to recruit mass numbers of cases, including many baseless filings.

Today, the problem of dealing with such filings is left to the discretion of individual judges. But the current rules do not provide courts the necessary tools to tackle this problem. Consequently, many of these meritless lawsuits will sit for a long time in the MDL proceeding, only to be voluntarily dismissed once they move on the path to trial. As the Fosamax MDL judge observed:

> [T]he Court has reason to believe that spurious or meritless cases are lurking in the some 1,000 cases on the MDL docket . … More than 50% of the cases set for trial have been dismissed, and some 31% of cases that have

been selected for discovery have been dismissed.

In re Fosamax Prods. Liab. Litig., No. 06 MD 1789 (JFK) (S.D.N.Y. Nov. 20, 2012).

In the Vioxx MDL litigation, 15,287 claimants—nearly one-third of all claimants alleging heart attacks or ischemic strokes—failed to provide basic information. But the requirement to provide such information was in connection with settlement, years after the MDL was established, rendering them ineligible to participate. *In re Vioxx Prods. Liab. Litig.*, Tr. at 23 (E.D. La. July 27, 2010) (Claims Administrator Court Report No. 29).

As one MDL judge acknowledged: 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.

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

Thus, courts recognize the problem, but the solution has been elusive, requiring a rule. At a minimum, new rules are needed for the types of MDLs with the greatest concentration of cases. In these MDLs, the sheer volume of cases enables plaintiffs' counsel to dump cases which can fly under the radar for years absent a rule.

The Advisory Committee on Civil Rules is currently considering the possibility of an early vetting rule for MDLs. Such a rule would require limited evidence at the outset of MDL cases, including proof of exposure and injury. This would not be a heavy lift—in fact, it's the kind of information that plaintiffs' counsel should review before a case is filed.

Some question the need for rulemaking because in many personal injury MDL proceedings, plaintiffs provide a Plaintiff Fact Sheet (PFS), responding to questions negotiated by the parties with court oversight. The PFS can be a useful "discovery" tool to help facilitate selection of cases for trial, focus discovery and serve as a predicate for substantive motion practice. But the PFS suffers from several deficiencies: Crafting a PFS in a particular MDL drains the time and resources of the court, parties and counsel. Moreover, the PFS becomes a "litigation within a litigation" where the sufficiency of a particular plaintiff's PFS is itself litigated. Most fundamentally, it is a poor "vetting" device to determine the threshold question of whether plaintiff's counsel had a basis to file a case. Did plaintiff use the product? Did plaintiff suffer an injury and when? That due diligence should have been completed before a case is filed, not when an extensive, detailed PFS is completed, sometimes more than a year later. The failure to vet cases has consequences. The meritless cases clog the docket, interfere with the selection of cases for trial and preclude meaningful substantive motion practice.

A streamlined "early vetting" rule would provide what the current rules and system do not: a consistent, transparent process to eliminate meritless claims early in the case.

A streamlined "early vetting" rule would provide what the current rules and system do not: a consistent, transparent process to eliminate meritless claims early in the case. In the midst of MDL mania, it merely asks for that which is needed in all other types of cases. An early vetting rule is a modest, simple and cost-effective reform to a problem of mega proportions for the federal docket and litigants. A rule will implement—for half of the federal docket—the mandate of the first Federal Rule of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action and proceeding," giving a day in court to those who might have a claim and dismissing those who clearly do not.

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