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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Inside The Climactic Clash Over Skyrocketing MDL Caseloads

By **Jeff Overley**

Law360 (March 8, 2024, 11:30 PM EST) -- A seven-year showdown over the nation's swelling docket of ultra-high-stakes consumer suits is hurtling toward its moment of truth, as a judicial oversight panel weighs impassioned input from big-name attorneys and judges endorsing everything from sweeping overhauls to the tiniest of tweaks.

The fast-approaching climax of a red-hot rulemaking saga will shape the future of multidistrict litigation, which centralizes vast numbers of comparable cases in a single court and frequently produces multibillion-dollar settlements involving harmful healthcare products, sketchy sales practices and other illustrations of corporate conduct gone awry.

Although MDLs debuted more than 50 years ago, their caseloads only began bulging during the past decade or so, and the steady growth inspired efforts to craft the first formal MDL rule in the Federal Rules of Civil Procedure. But the proposed addition — officially called Rule 16.1 — has spurred a war of words, many of them voiced in a comment period that ended last month and attracted scores of letters that will take center stage at a pivotal April meeting.

Key language in the draft rule "is not an improvement over the status quo and perhaps is even a step backward," said a February letter from pro-defense coalition Lawyers for Civil Justice, which is stacked with BigLaw and big business veterans from Nelson Mullins Riley & Scarborough LLP, Shook Hardy & Bacon LLP, Exxon Mobil Corp. and Ford Motor Co., among many others.

As Lawyers for Civil Justice wants a rule that does more, the plaintiffs bar is demanding the opposite, at times questioning the entire premise of the yearslong project.

"What problem are we trying to solve?" W. Mark Lanier, one of the country's most accomplished trial lawyers, wrote in a recent letter. "The proposed rule was not prompted because something is broken, and nothing needs to be fixed."

Regardless of whether anything is broken, the rulemaking project did emanate from a swift surge in MDL cases, both in raw numbers and as a portion of the nationwide civil docket. In the early 2010s, about 30% of civil cases were in MDLs. When the rulemaking work commenced in 2017, the share had grown to nearly 50%, and it now stands at more than 70%.

The spike is partly a result of decisions in the 1990s by the U.S. Supreme Court that restricted global settlements of class actions and made MDLs an easier forum to resolve huge collections of cases.

Corporate America contends that the spike is especially problematic, and that stricter guardrails are badly needed, for mega-MDLs with thousands of cases alleging individuals suffered harm from specific products.

"The concern here is that MDLs become magnets for really weak claims, [and that] plaintiffs lawyers are going to go out and file a whole bunch of weak claims and hope that they get swept up into some global settlement before anyone really looks closely at them," Teddy Rave, an MDL scholar at the University of Texas at Austin School of Law, told Law360.

The specter of flimsy filings sneaking into settlements is often called the "Fields of Dreams" phenomenon. The 1989 baseball movie has a famous line that's quoted in the MDL context as, "If you build it, they will come," the idea being that if an MDL is created, an influx of cases will inevitably materialize.

Defense lawyers have sought to substantiate that specter with statistics showing that large fractions of cases in some MDLs were ultimately tossed because of clear shortcomings. But plaintiffs attorneys have called such statistics a red herring meant to divert attention from the fact that most cases in those MDLs had merit.

In a letter last month, MCTLaw Managing Partner Ilyas Sayeg spotlighted an MDL focused on 3M Co. combat earplugs; while tens of thousands of cases were ultimately tossed, Sayeg said that more than 250,000 claims would be covered by a $6 billion deal that 3M announced in January. "The increasing numbers of MDL filings are a product of tortious misconduct, not frivolous or careless filings," Sayeg wrote.

Ahead of an April 9 meeting at which the Advisory Committee on Civil Rules is expected to discuss feedback on draft Rule 16.1, Law360 pored over scores of letters and spoke with experts for perspective on the competing views and the likely outcome.

Cardozo School of Law professor Myriam Gilles, who studies civil procedure and aggregate litigation, told Law360 that the gist of the debate is that "defense counsel wants to make MDLs harder, and plaintiffs want to maintain the status quo."

It remains to be seen which side will get what it wants, and Gilles said she's "fascinated by what the Rules Committee might do after seven years of working on the rule."

The View From the Bench

The draft rule's overarching goal is enhanced management of MDLs, and perhaps the most hotly contested issue is whether that goal would be better served by mandatory or optional provisions. Although the defense bar has been wary of too much wiggle room, judges have widely balked at the idea of rigidly adhering to one-size-fits-all playbooks.

"With the initial proposal seven years ago, a lot of the MDL judges were resistant to the idea," Rave told Law360. "They thought that it was going to really constrain their choices about case management, and they were really concerned about maintaining flexibility."

Now, as drafted, the rule says that courts "should" take certain steps, not that they "must." In a report last year, the Rules Committee acknowledged that "concerns were raised about whether use of this verb

made the proposed rule mere advice and not a genuine rule."

But sticking with suggestive language appears to have helped the rule win powerful allies — namely, judges with deep experience handling MDLs.

"My conversion to supporting such a rule can be explained by the precatory, as distinct from mandatory, nature of its recommendations," U.S. District Judge Charles R. Breyer, one of the most prolific MDL jurists ever, wrote in public comments last month.

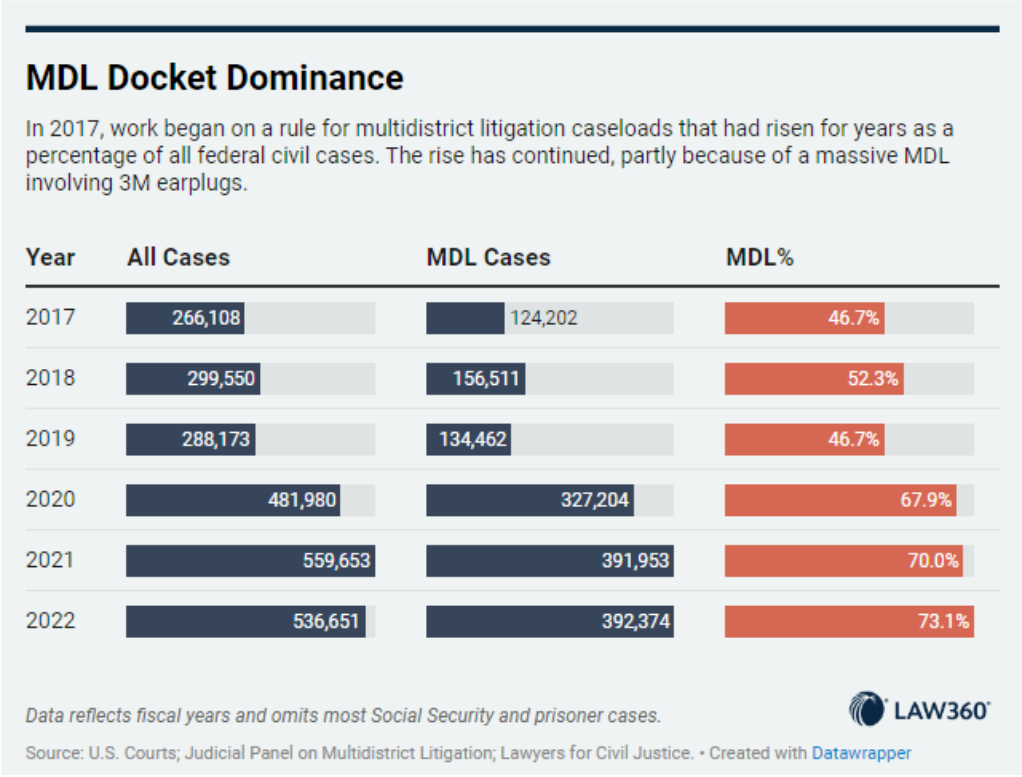
U.S. District Judge M. Casey Rodgers, who has supervised the 3M earplugs MDL, also submitted comments last month, and she echoed Judge Breyer by deriding mandatory measures to separate the wheat from the chaff.

"While it is true that mass filings of unvetted claims plague many MDLs, in my view, mandatory rules governing how and when to address the issue would not be an effective solution," Judge Rodgers wrote, adding that she would "strongly support" adoption of the draft rule.

The Federal Magistrate Judges Association chimed in with similar sentiments, writing in public comments that its members "fully endorse the new rule and its flexible approach."

But some judges have been more sympathetic to fears of frivolous cases. Last month, for example, nine California Superior Court judges specializing in complex civil litigation wrote that "the rule should prompt judges to consider adopting initial mandatory discovery disclosures before party-driven discovery."

"The plaintiff and the plaintiff's attorney typically possess critical information about any potential harm before the case commences, and the plaintiffs counsel should exercise appropriate pre-screening before filing such actions," the judges wrote.



The View From the Defense Bar

The defense bar has come out strongly against the draft rule, directing much of its anger at Section (c)(4), which deals with "how and when the parties will exchange information about the factual bases for their claims and defenses" prior to an initial management conference.

Lawyers for Civil Justice, for example, said the draft language won't do much to weed out baseless suits, while also averring that "a few modest changes would help." Those purportedly modest changes would delete all but four of 17 words in the draft section and then add 42 new words.

A letter last month from the Product Liability Advisory Council — which counts Johnson & Johnson, Microsoft Corp. and RJ Reynolds Tobacco Co. among its members — identified similar shortcomings. "The current proposed Rule 16.1, which does not formally require any early disclosure of information substantiating individual claims, will not address the growing problem of meritless claims plaguing many MDLs," the PLAC wrote.

Additional opposition has centered on the draft rule's suggestion that MDL judges might quickly "consider measures to facilitate settlement of some or all actions before the court." That sort of facilitation has sparked controversy in some MDLs, including a historic MDL involving the opioid crisis, where the presiding judge in 2018 almost immediately implored the parties to consider settling.

"We believe that the proposed rule places undue emphasis on settlement and could suggest a presumption that settlement is an appropriate or expected outcome in all MDLs," Winston & Strawn LLP partners John J. Rosenthal and Jeff Wilkerson wrote in a February letter.

Some critics even eschewed ideas for tinkering with the draft rule, instead arguing that it needs an extreme makeover. "The current proposal is so toothless that it ... will likely accomplish nothing," James M. Beck of Reed Smith LLP wrote. "The advisory committee and its MDL subcommittee should go back to the drawing board."

The View From the Plaintiffs Bar

Rather than press for changes to the draft rule, plaintiffs counsel have largely devoted their energies to supporting the proposed language and rebutting defense ideas for revisions.

"The committee should reject the suggestions made by other commentators that proposed Rule 16.1(c)(4) be revised to address an alleged epidemic of insufficient claims in MDLs," the founding partners of Burns Charest LLP wrote in a Feb. 16 letter.

A. Layne Stackhouse, a mass torts lawyer at Shrader & Associates LLP, echoed that advice and added that "we already have effective tools that are utilized [when] any particular claim should be dismissed because it is truly frivolous." Stackhouse added that the Federal Rules of Civil Procedure give judges "the requisite power to deal with bad actors and to deter inappropriate behavior" by imposing sanctions.

Some plaintiffs attorneys have, however, knocked aspects of the proposal. Motley Rice LLC member Fred Thompson III, for instance, extensively criticized the draft's vision for "coordinating counsel" to work with the litigants during early MDL proceedings.

"It smells of creating a special guild of professional coordinating counsel who doubtless will see themselves as somehow expert in MDL formation," Thompson wrote.

"While I don't doubt that our academic friends will have the confidence of ignorance that they would be well suited to lobby for such positions, they are the worst group to evaluate and organize the MDL," Thompson said. "With no experience and their institutional biases for rules and hurdles and thresholds, they invariably gravitate to bureaucratic defendants' positions."

The American Association for Justice, which advocates for trial lawyers, floated the same critique, saying it has "deep reservations about the appointment of a coordinating counsel."

The Likely Impact

Aside from letters posted to the public rulemaking docket, Law360 obtained perspectives from an array of experts familiar with the development of Rule 16.1. Cardozo Law's Gilles, for one, suggested that the rule's flexibility means the rule will ultimately have little impact, assuming it's finalized in its current form.

"Since the proposed rule basically does nothing, given that nearly all transferee judges already do what the rule suggests they 'should,' I think this is a big nothing-burger — which means that plaintiffs' lawyers are probably the victors of this particular skirmish," Gilles said.

Crowell & Moring LLP counsel Emily Tucker, who has analyzed the rule, shared a similar view, telling Law360 that "it is going to be judge-dependent, and I think the concern is that's sort of the status quo."

"There's one argument the rule isn't going to really change anything at all, because it allows so much flexibility," Tucker said. "The judge is just going to do what they were going to be predisposed to do anyway."

Rave told Law360 that many MDL judges believe it will be "very useful to have this checklist to work through." He agreed that "it's not going to really cause a major change in MDL practice," but also said that the mere existence of an official MDL rule could create an ambiance of orderliness.

"It helps counter the critique that we've heard a lot from both people on the plaintiff and defense sides that MDLs are sort of this rules-free zone, where everyone's just sort of making it up as they go," Rave said.

--Editing by Brian Baresch and Emily Kokoll.
