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Proposed Rule Misses The Mark On Improving MDLs

By **Emily Tucker, Daniel Campbell and Andrew Kaplan** (January 25, 2024, 5:27 PM EST)


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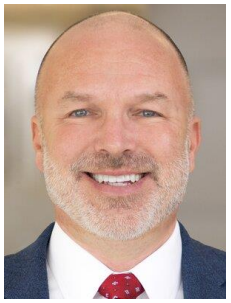
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In recent years, multidistrict litigation has continued to significantly increase, now accounting for almost 80% of all pending federal cases.[1] Yet the Federal Rules of Civil Procedure do not so much as mention MDL proceedings, leaving judges with little to no formal guidance on how to manage these often massive and complex cases.

As a result, the MDL Subcommittee of the Advisory Committee on Civil Rules developed a proposed Federal Rule of Civil Procedure 16.1, titled "Multidistrict Litigation," which is intended to guide district courts' management of MDLs.

The language of proposed Rule 16.1 does not create hard-and-fast rules, but instead provides several issues and factors an MDL court "may" or "should" consider for case management purposes, such as:

- "[H]ow and when the parties will exchange information about the factual bases for their claims and defenses";
- "[W]hether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings"; and
- "[W]hether the court should consider measures to facilitate settlement of some or all actions before the court."

While the proposed rule provides some guidance for MDL courts, without any express requirements or mandatory provisions, it is unclear at this point how helpful the proposed rule will be.

In particular, the proposed rule does not impose any requirement for the early vetting of claims — such as requiring that each plaintiff submit evidence early on in the case that they used the defendant's product, or were diagnosed with an injury as a result. This is particularly unhelpful for MDL defendants in pharmaceutical and product liability cases, who stand to benefit from weeding out meritless claims at the outset of the litigation.

Additionally, the suggestion that MDL courts should consider whether to facilitate settlement of "all actions" may place additional pressure on MDL defendants to settle claims that lack merit.

The good news is that there is still time for stakeholders to advocate for a more robust Rule 16.1 that will help remove meritless claims and streamline MDL proceedings for all parties involved. The proposed rule is open for comment until Feb. 16.[2]

Below, we offer a brief background on MDL proceedings, and an analysis of the key provisions in proposed Rule 16.1.

Background

In 1968, Congress enacted the Multidistrict Litigation Act, Title 28 of the U.S. Code, Section 1407, which authorizes the Judicial Panel on Multidistrict Litigation to transfer "civil actions involving one or more common questions of fact … to any district for coordinated or consolidated pretrial proceedings."

The number of cases transferred to a chosen MDL court varies significantly depending on the litigation, but the largest MDLs have hundreds of thousands of cases transferred for pretrial proceedings.[3]

At the end of the consolidated pretrial proceedings, including discovery, each action transferred to the MDL should be remanded to the district from which it was transferred, unless it was terminated during the MDL proceedings, or the parties waived their Lexecon rights, as established by the U.S. Supreme Court's 1998 decision in Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach.[4]

While MDL proceedings are intended to "promote the just and efficient conduct" of the consolidated cases, there are no procedural rules governing MDLs. This lack of procedural rules has become even more problematic because of the skyrocketing number of cases transferred or filed in MDLs in recent years, adding complexity and manageability hurdles for MDL courts.

As a result, the Advisory Committee on Civil Rules appointed the MDL Subcommittee in 2017 to find an "appropriate way to address MDL proceedings in the Civil Rules."[5] The subcommittee is chaired by U.S. District Judge R. David Proctor, chief judge of the U.S. District Court for the Northern District of Alabama.[6] Proctor also served as a member of the Judicial Panel on Multidistrict Litigation from 2014 to 2020.[7]

Proposed Rule 16.1

The result of the MDL Subcommittee's efforts is Proposed Rule 16.1. According to the Advisory Committee on Civil Rules, "Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings."[8]

The proposed rule is divided into four subsections:

- (a) Initial MDL Management Conference;
- (b) Designating Coordinating Counsel for the Conference;
- (c) Preparing a Report for the Conference; and
- (d) Initial Case Management Order.

Subsections (a), (b) and (d) are brief and straightforward, while the bulk of the proposed rule is contained in Subsection (c).

Subsection (a) provides that the MDL court "should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings." Subsection (b) states

that the MDL court "may" designate coordinating counsel to assist with the initial management conference and work with the parties to draft a report for the conference. And Subsection (d) provides that after the conference, the MDL court "should" enter an initial MDL management order that controls the proceedings.

Subsection (c) provides a nonexhaustive list of matters that the parties "may" address in a report they prepare for the MDL court before the initial conference, including:

- "(1) whether leadership counsel should be appointed";
- "(4) how and when the parties will exchange information about the factual bases for their claims and defenses";
- "(5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings"; and
- "(9) whether the court should consider measures to facilitate settlement of some or all actions before the court."

Of particular interest to MDL defendants is Subsection (c)(4), regarding "how and when" the parties will vet their claims and defenses. The nonmandatory language of this provision raises serious concerns that draft Rule 16.1 does not go far enough to promote early vetting of claims.[9]

To be sure, plaintiffs benefit from including as many cases in an MDL as possible — before an initial, objective assessment of merit — to increase settlement value and leverage. But without a robust process for early vetting, MDL defendants are at a distinct disadvantage, particularly when they are required to expend significant litigation resources upfront, only to find out after defending the MDL for several years that the population of plaintiffs with viable claims is relatively small.

If substantial numbers of objectively meritless claims remain in the MDL, this can also challenge the MDL court's resources and ability to manage the litigation.

Likewise, Subsection (c)(9), which suggests the MDL court consider settlement measures, compounds the concerns about the lack of early vetting. MDL defendants have argued that the sheer size of MDLs coerces settlement, because the possibility of company-threatening liability is too significant to proceed with the litigation — even if means settling untested claims that may lack merit.[10]

However, if Rule 16.1 were drafted to require that the parties exchange evidence supporting their claims and defenses at an early stage in the litigation, such as proof that each individual plaintiff purchased or used the defendant's product, meritless claims could be eliminated at the outset.

As a result, MDL proceedings would likely become more manageable, and capable of early settlement or resolution — not because of inordinate pressure from the sheer size of claims, but because MDL defendants could accurately determine the scope of viable claims and their potential liability.

Parties that are concerned with the existing language in proposed Rule 16.1 have until Feb. 16 to submit comments to the Advisory Committee on Civil Rules.[11]

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[1] https://www.druganddevicelawblog.com/2023/12/bexis-files-public-comment-on-proposed-mdl-federal-rule-16-1.html; https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-16-2023.pdf; https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023.

[2] https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.

[3] https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-November-16-2023.pdf.

[4] 28 U.S.C. § 1407(a); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 37 n.1 (1998).

[5] https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[6] https://www.uscourts.gov/sites/default/files/2023-03_advisory_committee_on_civil_rules_meeting_minutes_final_1.pdf; https://www.alnd.uscourts.gov/content/chief-judge-r-david-proctor.

[7] https://www.jpml.uscourts.gov/content/panel-judges.

[8] https://www.uscourts.gov/sites/default/files/2023_preliminary_draft_final_0.pdf.

[9] See, e.g., https://www.americanbar.org/groups/litigation/resources/newsletters/mass-torts/proposed-frcp-rule-161/.

[10] See https://texaslawreview.org/multidistrict-litigation-and-the-field-of-dreams/; https://www.americanbar.org/content/dam/aba-cms-dotorg/products/inv/book/406644644/Introduction_1620800.pdf.

[11] Comments can be submitted at https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment.