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RULES 4 MDLs

LCJ Urges Advisory Committee on Civil Rules to Address Claim Insufficiency in MDLs

Proposed Rule 16.1 Provides Options Rather than Clear Guidelines

WASHINGTON, D.C. – September 19, 2023 – Lawyers for Civil Justice (LCJ) recommends modification of a proposed new rule on multidistrict litigation (MDL) to address the overriding problem of claim insufficiency. In a newly submitted Comment to the Advisory Committee on Civil Rules on Proposed new Federal Rule of Civil Procedure (FRCP) 16.1, the first FRCP specific to MDLs, LCJ explains why the current draft rule is inadequate and proposes a revision directed at this problem. LCJ also recommends that the rule be modified to remove content covering topics that are not suitable for rulemaking. Public hearings on the draft rule are set to begin in October.

“The mass filing of unexamined claims undermines transferee courts’ ability to manage MDLs by complicating early case management decisions, slowing the litigation, impeding bellwether case selection, and thwarting the possibility of timely resolution by depriving counsel and parties of the information they need to assess litigation risks and valuation,” said **Alex Dahl, LCJ’s General Counsel**. “Transferee courts and counsel need rule guidance because the FRCP provisions that function to enforce the basic elements of a legal claim in unconsolidated cases have proven impractical in MDLs with hundreds or thousands of claimants.” LCJ also urges the Committee to amend the rule so that it guides MDL initial management, noting that in its current form, it is merely a list of topics for transferee courts to consider.

LCJ points to the [findings](#) of the MDL Subcommittee of the Advisory Committee which noted in 2018 the widespread problem of insufficiency of claims: “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 MDL Committee also observed: “Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.”

LCJ also urges the Advisory Committee not to conflate the foundational problem of claim insufficiency, which is a threshold requirement for the filing of claims, with discovery, which is the evidence gathering process for claims that meet this requirement. The draft rule calls for the parties to discuss how and when they will “exchange” information about the factual bases for their claims and defenses. Exchange connotes discovery, prompting a discussion about mutual discovery rather than ensuring plaintiffs meet the minimum requirements for their claims.

LCJ proposes that the new 16.1(c)(4) should be revised to read:

“How and when sufficient information regarding each plaintiff will be provided to establish standing and the facts necessary to state a claim, including facts establishing the use of any products involved in the MDL proceeding, and the nature and time frame of each plaintiff’s alleged injury.”

The LCJ comment also points out that the draft note accompanying subsection 16.1(c)(4) fails to explain “why the committee is proposing the new rule, what problem it addresses or what the rule is meant to accomplish”—questions that notes accompanying proposed rules typically answer. LCJ urges the Committee to revise the note so that it explains the problem of amassing a large volume of unexamined claims and the benefits that early examination of claims sufficiency would provide by helping courts and parties understand the shape of the litigation.

“LCJ and its members will continue to work with the Committee to ensure the proposed Rule functions to provide greater structure and consistency in MDL proceedings, which will benefit all parties involved,” said **Dan Steen, LCJ’s Executive Director**. “We look forward to participating in, and listening to others, at the Committee’s hearings on the draft Rule.”

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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 36 years, LCJ has been closely engaged in reforming federal procedural 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.