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55 Companies & LCJ Recommend Revisions to Draft MDL Rule to Address Unexamined Claims

Defense Bar Leaders Say Changes are Needed to Prevent Unexamined Claims from Continuing to Plague MDLs

WASHINGTON, D.C. – February 26, 2024 – senior legal officers from 55 companies [submitted a letter](#) and Lawyers for Civil Justice (LCJ) [submitted a comment](#) to the Advisory Committee on Civil Rules calling for necessary changes to draft Rule 16.1, a new proposed Federal Rule of Civil Procedure (FRCP) to specifically address Multidistrict Litigation (MDLs). The letter from the companies calls on the Civil Rules Committee to address the problems which arise in the management and resolution of MDLs caused by unexamined – and often meritless – claims, many of which do not belong in the MDLs where they are filed or transferred. The letter also notes that current rules do not require the assertion of the most basic elements for a MDL claim, such as whether a plaintiff used a product or was exposed to the alleged cause of harm.

“The widespread filing of unexamined claims undermines courts’ ability to manage MDLs by complicating early case management decisions and the remand process, and ultimately slowing the resolution of litigations – whether by settlement or the legal process” said LCJ General Counsel Alex Dahl. “Too many claims are filed without any investigation into their basis, overwhelming the MDL process, and preventing MDL judges from fulfilling their obligation to ensure standing and subject matter jurisdiction.”

[New empirical evidence](#) from LCJ shows that there are tens of thousands of cases centered on unsupported claims in a number of the largest MDLs. These unexamined claims were dismissed at later stages of these MDLs due to factual shortcomings, an inability to establish a recognizable injury, lack of compliance with early product identification orders, failure to provide plaintiffs facts, etc. Such examples include, but are not limited to:

- **Mentor Transobturator Sling** – 75 percent of the cases were dismissed
- **Pelvic Mesh** – 53 percent were dismissed
- **Zofran** – 40 percent were dismissed
- **Cymbalta** – 31 percent of the cases were dismissed

LCJ’s findings (1) demonstrate that the problem of unsupported claims is significant, (2) illuminate how such claims, if allowed, pose a management problem to MDL judges because

they must be dealt with at some point in the litigation, and (3) support the conclusion that rule guidance that serves as a prophylactic to discourage counsel from filing unsupportable claims is needed and would be a significant benefit to courts and litigants alike.

An LCJ [analysis](#) of 2022 data from the Judicial Panel on Multidistrict Litigation (JPML) also speaks to the importance of ensuring that MDLs function efficiently. It shows that 73% of the federal civil caseload resides in MDLs as of the end of fiscal year 2022, more than double the 29% in fiscal year 2012.

The draft of proposed Rule 16.1 seeks to address the need for rules-based practices and procedures applicable to MDLs – where many of the existing rules that apply to all other federal civil cases are commonly bypassed – by identifying and addressing important MDL issues that courts and parties should consider at early management conferences. However, the proposed rule is merely a suggestion for items to consider at early conferences; to ensure that all MDLs operate consistently – and that practitioners know what to expect in an MDL – a rule that clearly sets forth the process is needed.

“MDL judges and parties need support from Rule 16.1 to address the phenomenon of claim insufficiency,” said LCJ’s Executive Director, Dan Steen. “The absence of functional rules invites masses of unexamined claims, and the draft rule as currently written is ill equipped to solve the issue.”

LCJ’s new comment follows the submission of a [comment in September](#), which argued the current draft rule is inadequate and proposed a revision. LCJ also recommended that the draft rule be modified to remove content covering topics that are not suitable for rulemaking.

The Advisory Committee on Civil Rules will now review all comments submitted during the public comment period and determine whether to amend the draft rule and whether to submit the proposed rule to the Committee on Rules of Practice and Procedure. If the draft rule moves forward, that committee will in turn determine whether to approve the rule and submit it to the Judicial Conference for approval. The draft Rule 16.1 and information regarding the public comment period can be found [here](#), and information about the rulemaking process for the Federal Rules of Practice and Procedure is available [here](#).

The Judicial Conference’s Standing Committee on Rules of Practice and Procedure opened the draft rule to public comments on August 15, 2023. The comment period was open for six months, featured three hearings, and closed on February 16, 2024.

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