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REFORMING MULTIDISTRICT LITIGATION: A Proposal for Rules that Promote Transparency and Consistency in MDL Practice

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Alex Dahl

Mr. Dahl is Founder and CEO of Strategic Policy Counsel, PLLC in Washington, DC. He serves as outside General Counsel to Lawyers for Civil Justice, a national coalition of corporations, law firms, and defense lawyer organizations, promoting excellence and fairness in the civil justice system. Previously, Mr. Dahl was a Shareholder with Brownstein Hyatt Farber Schreck, served as Deputy Staff Director and Senior Counsel to the Senate Judiciary Committee, and worked as an Assistant U.S. Attorney in the District of Columbia.



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Mary Nold Larimore



Ms. Larimore is a Partner with Ice Miller LLP in the firm's Indianapolis, IN office, where she serves as co-chair of the Drug and Device Group. Ms. Larimore's primary practice concentration is in litigation, focusing on product liability, toxic tort, and commercial litigation. She was the first woman from the State of Indiana to be inducted as a Fellow in the American College of Trial Lawyers, and has served as Chair of the Supreme Court Committee on Rules of Practice and Procedure, and two five-year terms by appointment of the Chief Justice.



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Stephen A. Wood

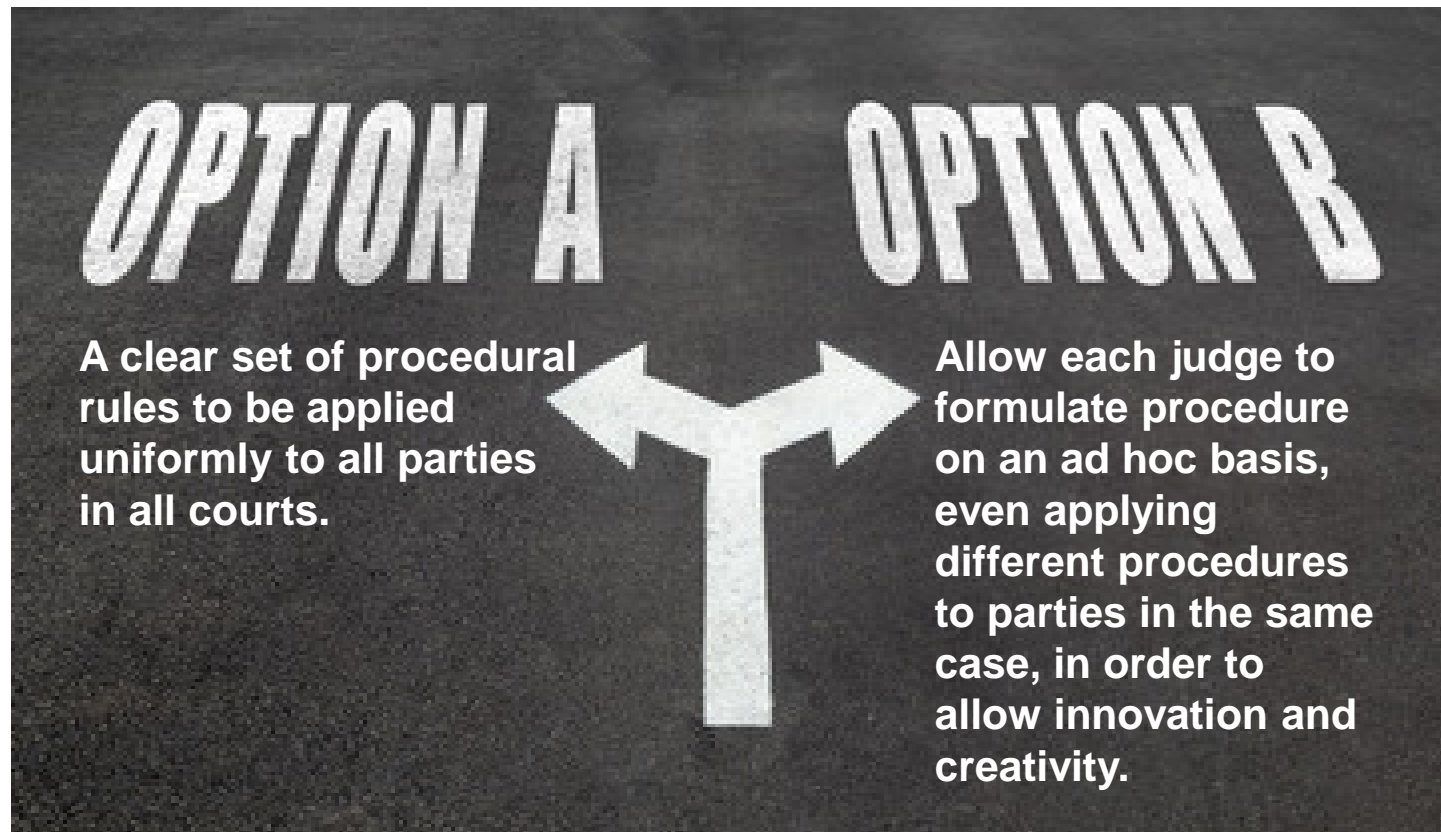


Mr. Wood is a Principal with Chuhak & Tecson, P.C. in the firm's Chicago, IL office, where he leads the litigation practice group. Mr. Wood focuses his practice on complex civil litigation, including a wide range of commercial disputes, mass tort, and products liability matters. He is active with a number of attorney organizations, including Defense Research Institute and Lawyers for Civil Justice, and recently started as a Featured Expert Contributor on the False Claims Act for Washington Legal Foundation's *WLF Legal Pulse* blog. Mr. Wood is a former captain in the U.S. Marine Corps.

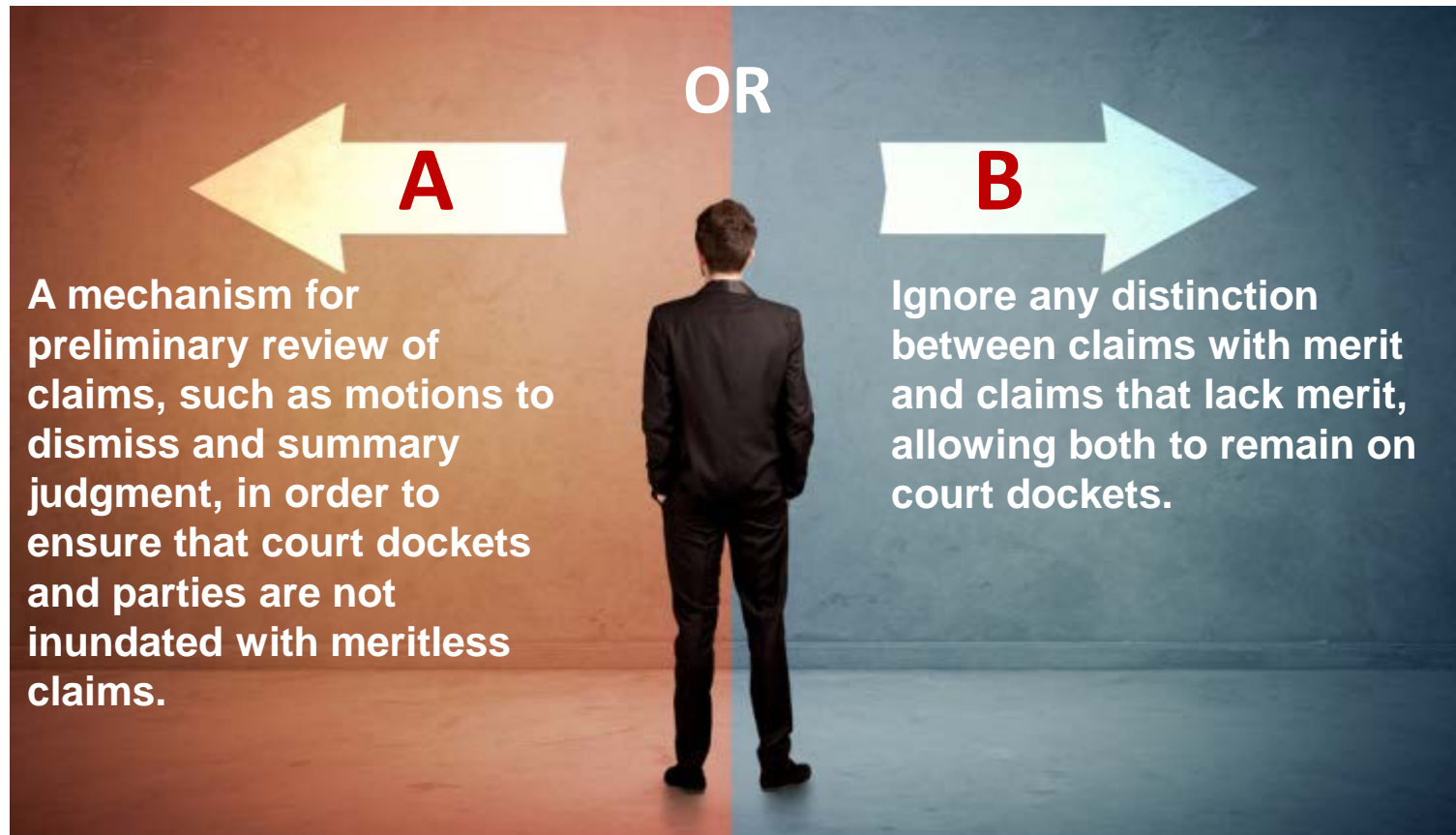
Thought Experiment



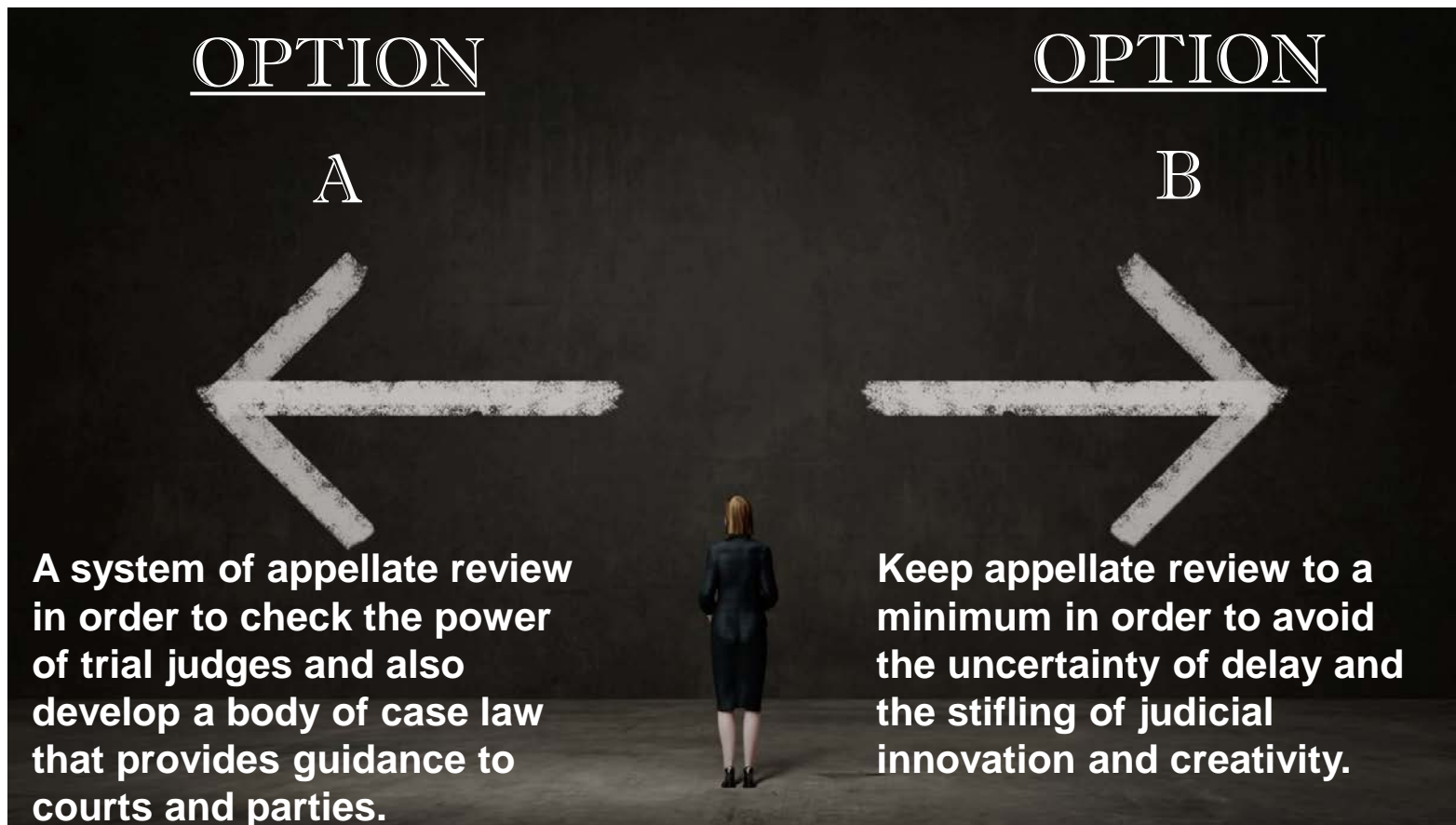
Thought Experiment



Thought Experiment



Thought Experiment



OPTION

A

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A system of appellate review in order to check the power of trial judges and also develop a body of case law that provides guidance to courts and parties.

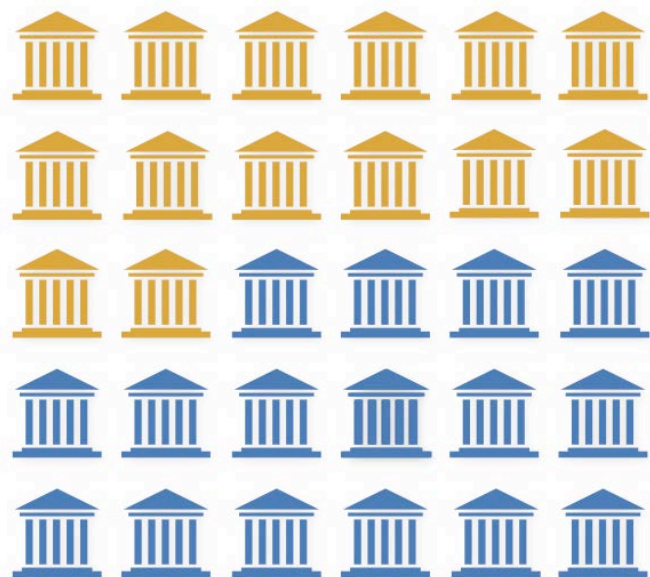
OPTION

B

→

Keep appellate review to a minimum in order to avoid the uncertainty of delay and the stifling of judicial innovation and creativity.

Cases in MDLs Represent 47% of Civil Cases

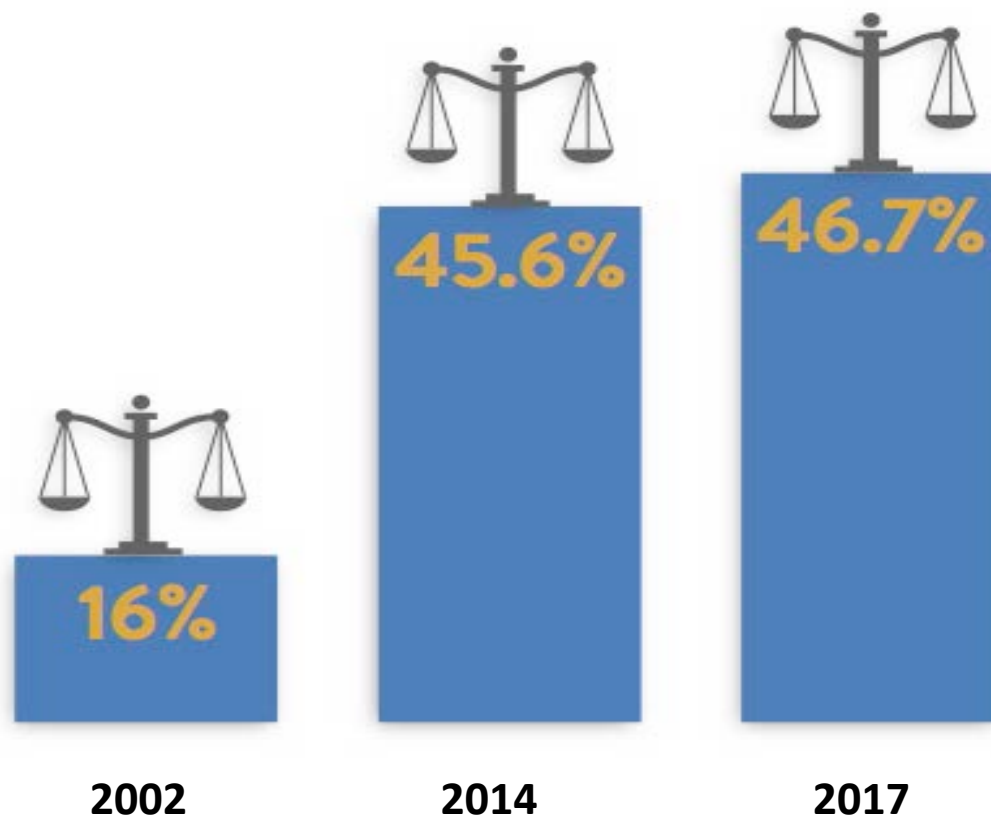


266,108 civil cases were pending in the federal court system at end of FY 2017 ¹

124,202 of these cases were pending in **256** MDLs ²

Reforming Multidistrict Litigation

Percentage of Civil Caseload in MDLs Nearly Tripled in 15 Years



Rule 1 of the Federal Rules of Civil Procedure

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

I. Pleadings

II. Early Vetting: Rule 26 Disclosures

III. Interlocutory Appellate Review

IV. Bellwether Trials

V. Third-Party Litigation Funding Disclosure

Is It Time to Change the MDL Play Book?



Master Complaints and Short Form Complaints

➔ The Problem:

- ➔ Master Complaints and Short Form Complaints are not recognized pleadings in the Federal Rules
- ➔ Courts do not consistently recognize them as pleadings from which a defendant can file a motion to dismiss

➔ The Solution:

- ➔ LCJ Proposal for Amending Pleading Rules:
- ➔ Amend Rule 7 to expressly define the documents regularly used in MDLs to include master complaints and answers and short form complaints/answers

MDLs Amass Large Inventories of Junk Cases



Why Is This a Problem?

- ➔ Plaintiff attorneys know that they do not need to vet cases
- ➔ Advertising results in thousands of bogus cases, which are improperly used to influence proportionality and the scope of discovery
- ➔ Plaintiff Fact Sheet process shifts burden of vetting cases to defendants
 - ➔ Defendants evaluate PFS, send deficiency letters
 - ➔ Defendants pay for medical record collection
 - ➔ Defendants pay to evaluate evidence
 - ➔ Defendants pay for MSJ and/or to negotiate dismissals
- ➔ Plaintiff attorneys assume global settlements will include frivolous and non-frivolous plaintiffs
- ➔ Vast numbers of pending cases impact regulatory filings, impact viability of a product or a service, and adversely impact financial picture of clients

Joinder Rules

➔ The Problem:

- ➔ Lax joinder rules permit unrelated plaintiffs from multiple states to join a complaint that facilitates the filing of large volumes of meritless claims.

➔ The Solution:

- ➔ LCJ has proposed amending Rule 20 (a) (3) to state:
- ➔ Plaintiffs Asserting Injury to Person or Property: Nothing in this subsection (a) shall permit persons to join as plaintiffs in an action that seeks recovery for injuries to a person or property unless each plaintiff's claims arise from injuries to the same person or property.

LCJ Proposal for Early Vetting

- ➔ Early disclosure by plaintiff within 60 days of filing in the MDL or transfer to the MDL that
 1. Identifies with particularity the product, service or exposure at issue **and provides documents and evidence of same**
 2. Identifies with particularity the specific injury at issue, including the date, **and provides documents evidence of same**

LCJ Appellate Review Proposal

A court of appeals **shall** permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 . . . provided that the outcome of such appeal may be dispositive of claims in 50 or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based. The court of appeals shall set any such appeal for expedited consideration.

LCJ Proposal Related to Third Party Litigation Funding

Amend Rule 26 to require, as part of initial disclosures, third party financing agreements be provided to the court and parties.

Parties would be required to produce any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

LCJ Proposal for Bellwether Trials

MDL judges “shall not conduct a trial in any action in those consolidated or coordinated proceedings unless all parties to that action consent.”

Reforming Multidistrict Litigation

In the 21st Century, we have seen a shift from class action to MDL practice

- CAFA
- *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)
- *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)
- “[C]ivil actions having one or more common questions of fact . . .” 28 U.S.C. §1407(a)

Reforming Multidistrict Litigation

“Such coordinated or consolidated pretrial proceedings shall be conducted by *a judge or judges* to whom such actions are assigned by the judicial panel on multidistrict litigation. . . . With the consent of the transferee district court, such actions may be assigned by the panel to *a judge or judges* of such district. The *judge or judges* to whom such actions are assigned . . .” 28 U.S.C. § 1407(b)

Reforming Multidistrict Litigation

- Three-Judge Court Act, 28 U.S.C. § 2284
- Requires the appointment of a three-judge panel in the district court when otherwise required by Act of Congress,
- Or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Reforming Multidistrict Litigation

“Three judges lend the dignity required to make such a decision palatable. The . . . extraordinary nature of the procedure show[s] that the federal courts recognize that important and delicate interests are at stake. More importantly, the presence of three judges also ensures greater deliberation with less chance of error or bias.”

David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 7 (1964)

Reforming Multidistrict Litigation

In re Engle Cases, No. 3:09-cv-10000-J-WGY-JBT,
2017 WL 4675652 (M. D. Fla. October 18, 2017)

- Florida Supreme Court decertifies the Engle class giving plaintiffs one year to refile individual actions
- Approximately 3,700 actions brought by 4,432 plaintiffs filed in state court and removed to the Middle District of Florida
- MDL treatment denied by the JPML
- Three judges ultimately preside jointly over these actions



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Questions

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