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Submitted via regulations.gov

Honorable John D. Bates
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle Northeast
Washington, District of Columbia 20544

Re: Proposed Adoption of Rule of Civil Procedure 16.1

Judge Bates:

Washington Legal Foundation submits this comment on the proposed Federal Rule of Civil Procedure 16.1. WLF appreciates the opportunity to weigh in on whether the Committee on Rules of Practice and Procedure should submit the proposed rule to the Supreme Court for approval. As explained below, the Committee should submit the proposed rule, with some modifications.

Trying to conserve judicial resources, Congress created multi-district litigation over 55 years ago. But MDLs have not lived up to their initial promise. Transferee courts adopt procedures meant to avoid trials. The procedures exert tremendous pressure on defendants to reach a global settlement. MDLs thus encourage plaintiffs to file baseless claims. That is one reason that MDLs are now the most common way aggregate litigation is resolved in the federal courts. At the end of fiscal year 2022, 61.5% of all civil cases in federal court were in MDLs.[1] The sharp increase in the percentage of cases housed in MDLs has highlighted many MDL shortcomings. They no longer help "secure the just, speedy, and inexpensive determination of every action and proceeding."[2]

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[1] *Judicial Panel on Multidistrict Litigation — Judicial Business 2022*, U.S. Courts, https://perma.cc/A8DU-9GQC; *Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2022*, U.S. Courts, https://perma.cc/AM8B-AQ3F.

[2] Fed. R. Civ. P. 1.

Adopting a rule that addresses MDL problems is long overdue. But the Proposed Rule has several defects. For example, it encourages the appointment of leadership counsel, which could create more problems than it would solve. The Proposed Rule's ideas for new pleadings and direct filing orders do not belong in the federal rules. Nor do suggestions for how to encourage settlement or use special masters. This comment, however, does not address these issues as they are adequately discussed by other comments submitted to the Committee. Rather, this comment focuses on what WLF sees as one of the biggest problems with MDLs—the inability to quickly dismiss meritless claims.

I. WLF Has An Interest In Ensuring That MDLs Operate In An Efficient Manner.

WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. It defends free enterprise, individual rights, limited government, and the rule of law. It submitted a comment to the Advisory Committee on Civil Rules about the need for a new civil rule addressing MDL procedures.[3] WLF also appears before federal courts urging that defendants in MDLs get a fair shot.[4] WLF's Legal Studies Division, its publishing arm, often produces and distributes articles on legal issues related to MDL problems.[5]

II. Proposed Rule 16.1(c) Should Be Amended To Vet Claims Earlier.

MDLs often attract meritless claims. Because of the hydraulic pressure that defendants face to settle MDLs, plaintiffs are encouraged to file "cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[6] This is because plaintiffs' "lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of

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[3] *See* WLF Letter, *In re Multi-District Litigation Reform* (Sept. 23, 2019).

[4] *See, e.g.*, *E. I. du Pont de Nemours & Co. v. Abbott,* 144 S. Ct. 16 (2023) (per curiam).

[5] *See, e.g.*, Christopher P. Gramling et al., *Early Assessment of Claims Can Help Reduce the MDL Tax*, WLF WORKING PAPER (Mar. 2020); Mary Nold Larimore & Matthew J. Hamilton, *Cost-Shifting Can Stimulate More Focused, Efficient Discovery in MDL Proceedings*, WLF LEGAL BACKGROUNDER (June 1, 2018).

[6] *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2016 WL 4705807, *1 (M.D. Ga. Sept. 7, 2016).

their case being scrutinized as closely as it would if it proceeded as a separate individual action."[7] Plaintiffs' firms are incentivized to file many claims because it "may provide the firm some advantage in obtaining a leadership role."[8] So there is "little practical downside to building a sizeable claim portfolio, particularly for those with reasonable prospects of obtaining an appointment to the steering committee or some other lucrative role in the case."[9] This has led to a "sophisticated legal ecosystem" in which plaintiffs' attorneys drum up plaintiffs to bring claims in pending MDL actions.[10]

Data shows that between 30% and 50% of all claims in MDLs are unsupportable.[11] This means that a plaintiff "did not use the product involved," "had not suffered the adverse consequence in suit, or [] the pertinent statute of limitations had run before the claimant filed suit."[12] The number of baseless claims hurts public confidence in the fairness of the MDL process. Allowing so many meritless claims to go undetected is unfair to defendants. Many defendants, especially those in the healthcare sector, must pay an "MDL Tax." There is very little cost to plaintiffs filing claims. But defendants must pay for discovery and other costs. Besides these financial burdens, many healthcare defendants must report the existence of these claims to the Food and Drug Administration and their shareholders. The pressure to settle the claims is thus very high. The continued costs of allowing an MDL to drag on usually outweigh any benefit in defeating the meritless claims.

Baseless claims also saddle the judiciary with costs, which are ultimately borne by taxpayers. When unsubstantiated claims are allowed to linger, there are motions and other procedural issues that courts must handle. Some of the largest MDLs require a full-time law clerk to handle the flood of filings and have three magistrate judges assigned to handle different aspects of the case.[13]

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[7] *Id.*

[8] S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 Clev. St. L. Rev. 391, 412 (2013).

[9] *Id.*

[10] *See* Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, Wall St. J. (Nov. 25, 2019), https://perma.cc/7X9C-7QPN.

[11] MDL Subcommittee Report, Advisory Committee Rules of Civil Procedure, 142 (Nov. 1, 2018), https://perma.cc/36EV-CSKH.

[12] *Id.*

[13] *See, e.g.*, MDL 875 In Re: Asbestos Products Liability Litigation (No. VI), U.S. Dist. Ct. for the E.D. Pa., https://perma.cc/BL56-NTDU.

Plaintiffs' attorneys have developed tactics that help ensure that these meritless claims go undetected. They do not timely complete the fact sheets so defendants and judges lack even basic information about the plaintiffs and their claims.[14] This way, the plaintiffs' claims may survive long enough to be swept into a global settlement where they can get a piece of the pie.[15]

The best solution to this problem is a rule that allows for defendants and transferee courts to quickly identify these unsupported claims. But Proposed Rule 16.1(c)(4) fails to accomplish that goal. It mistakenly conflates the lack of a claim with a lack of adequate discovery. This problem is evidenced by Proposed Rule 16.1(c)(4) saying that the parties will exchange information. That suggests a two-way street in which both the defendant and the plaintiffs must provide each other with information about the plaintiffs' claims. That does nothing to help eliminate unsubstantiated claims and only increases the burden on defendants while further encouraging plaintiffs to file meritless claims.

The solution to the Proposed Rule's flaws is simple. Proposed Rule 16.1(c)(4) should be amended to mandate that plaintiffs alone must establish standing and the facts necessary to state a claim, including facts establishing the nature and timeframe of any use of the product in question. Plaintiffs should provide this proof soon after the case is filed or transferred to an MDL so that unsubstantiated claims can be quickly dismissed.[16] This requirement should also come with some teeth. The Proposed Rule should explicitly state that an attorney who provides false information required by Proposed Rule 16.1(c)(4) may be sanctioned under Rule 11. This would help discourage plaintiffs' counsel from filing the unsubstantiated claims and help to ensure that MDLs are more efficient for the judiciary and fairer for defendants.

The note to Proposed Rule 16.1(c)(4) should also be amended. Like the Proposed Rule, the note uses the word "exchange" five times. This too suggests that defendants have some role to play in providing information necessary to establish the viability of a claim. But worse is the note's discussion of both claims and defenses. The point of Proposed Rule 16.1(c)(4) is to weed out large

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[14] *In re Phenylpropoanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1227, 1234 (9th Cir. 2006).

[15] *See Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig.*, 2016 WL 4705807 at *1.

[16] *Cf. In re Zoloft (Sertraline Hydrochloride Prods. Liab. Litig.)*, MDL No. 2342, Doc. No. 216, 59-62. (Judge Rufe telling plaintiffs' counsel at the first status conference that they must soon make the appropriate certification).

numbers of claims that are unsubstantiated. The goal is not to burden defendants with greater disclosure requirements. Doing so would even further encourage plaintiffs to file unsubstantiated claims because defendants may decide that reaching a global settlement is better than complying with discovery. These references to exchanging information and defenses should thus be removed from the note to Proposed Rule 16.1(c)(4).

The note is also flawed because it lacks any mention of the problems that undergird the Proposed Rule. As mentioned above, the point of the proposal is to help identify unsubstantiated claims much earlier. Yet the note appears to discourage MDL courts from meaningfully enforcing Proposed Rule 16.1(c)(4) by focusing on discovery, the exact timing of which depends on many factors. In other words, the note does not encourage courts to require disclosures as soon as claims are filed.

The Subcommittee's report includes the solution to this problem. As the report states, "[t]he unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. [In normal civil litigation, defendants can] challenge individual claims one by one."[17] Explaining in the note that this early challenging of claims is impractical in the MDL process and thus the required early disclosure by plaintiffs would help courts and litigants understand Proposed Rule 16.1(c)(4)'s purpose.

To encourage MDL courts to strictly require plaintiffs to provide the necessary information, the note should also describe how early examination of claims benefits the judiciary and ensures that defendants have due process of law. This explanation would ensure that MDL courts do not see Rule 16.1(c)(4) as another requirement without an end but rather view it as a tool to eliminate baseless claims and help resolve all claims more quickly. Combined with the amendments to the Proposed Rule itself, these fixes to the note will ensure that adopting Proposed Rule 16.1(c)(4) accomplishes its goal.

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[17] MDL Subcommittee Report, *supra* n.11 at 143.

Adopting a specific rule addressing many issues present in MDLs is a good idea, and WLF applauds the Committee and the Subcommittee for their hard work on these issues. But Proposed Rule 16.1 is flawed in several respects. The Committee should fix those problems before submitting the proposal to the Supreme Court for its approval.

Respectfully submitted,

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