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MANDATORY EARLY VETTING IN MDLS: JUST A RED HERRING?

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I. INTRODUCTION

Early vetting in multi-district litigation (MDLs) has recently become a hot button topic, with some proponents arguing for a broadly applicable rule that would require certain forms of proof to be provided early after filing. However, the "problem" such early vetting proposals are designed to combat–that MDLs are being overrun with meritless cases–has not been established by concrete data and the proposals would do little (or nothing) to enhance the effectiveness of MDLs. Worse, an across-the-board early vetting requirement fails to recognize the nuances in proving the merits of a case and, if implemented, would unfairly bar valid claims.

While the idea of early vetting may seem helpful, implementation of a sweeping rule that applies to all MDLs would be misguided. As mentioned in the Introduction to this MDL Symposium, although MDLs have a standard structure, every MDL unfolds differently.[1] Flexibility in the organization and management of MDLs is instrumental to their success. Accordingly, early vetting should not be compulsory, effectively barring even meritorious claims, but instead should be a tool in an MDL judge's arsenal for use if and when appropriate to efficiently manage their docket.

Section II begins with a general overview of early vetting and two statutory and rule changes that have been proposed to implement across-the-board early vetting. In Section III, we discuss two weaknesses to these proposals: (1) that they do not recognize and account for the procedural barriers and inequities that would result from their implementation; and (2) that the stated rationale for early vetting—that MDLs are generally overrun with meritless cases—lacks material support, making such proposals unjustified and unnecessary. In Section IV, we propose that early vetting should be an optional tool available if it would assist with or promote docket management. We conclude in Section V that judges are in the best position to select the appropriate tools to manage their own unique dockets, and that early vetting should remain one of those optional tools.

II. WHAT IS EARLY VETTING?

Early vetting is a relatively recent concept in the MDL context and generally requires that a plaintiff produce proofs, such as product use and injury, within a specified amount of time after filing. To date, early vetting has not been adopted in the form of an official statute or rule. However, some early vetting proposals involve adoption of such statutory or rule amendments that would apply early vetting to every multidistrict consolidation, with the stated goal of combating

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[1] Ryan C. Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV 801 (2021).

an alleged problem with the filing of meritless cases. Other early vetting plans, also called censuses, implemented recently by MDL courts were created for the particular circumstances of those MDLs and have a seemingly collaborative goal of effective case management and progression of the MDL.[2]

Proposals such as an amendment to 28 U.S.C. § 1407 and an amendment to the Federal Rules of Civil Procedure ("Rule") have recommended that all personal injury MDLs be subject to an early vetting requirement.[3] The proposal to modify § 1407 was passed by the United States House of Representatives in 2017 but was not passed by the Senate.[4] This proposal would have required a "submission sufficient to demonstrate that there is evidentiary support" for the factual contentions of injury, exposure to the risk that caused the injury, and the cause of the injury within forty-five days of filing.[5] The proposal explicitly precluded any extension of this deadline and instead provided for automatic dismissal of the case if the submission was insufficient.[6] If a "sufficient" submission was made within thirty days following dismissal, the case could be re-instated.[7]

A proposed amendment to Rule 26 would mandate disclosure of evidence in multidistrict litigation that the plaintiff was exposed to the cause and suffered a related harm within sixty days of filing in a consolidation.[8] This proposal does not include a remedy for failure to comply, but the proponent of this rule implied that early dismissals should result.[9]

III. ISSUES WITH ACROSS-THE-BOARD EARLY VETTING PROPOSALS

Flexibility is necessary for successful MDL management. "Like snowflakes, no two MDLs are exactly alike . . . ."[10] Across-the-board early vetting proposals like those discussed in Section II are far too rigid and, in practice, would likely be no more effective in achieving their stated goal than current processes available to courts. A one-size-fits-all approach also has the unintended consequence of blocking access to justice by dismissing *valid* claims where obtaining certain proofs requires procedures that may not be available until after

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[2] *See, e.g.*, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-02924 (S.D. Fl. April 2, 2020) (ECF No. 547).

[3] *See* H.R. 985; Lawyers for Civil Justice, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules* (Sept. 14, 2018).

[4] H.R. 985 – Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions (last visited Jan. 20, 2021).

[5] H.R. 985.

[6] *Id.*

[7] *Id.*

[8] Lawyers for Civil Justice, *supra* note 3.

[9] *Id.*

[10] *In re* General Motors LLC Ignition Switch Litig., 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015).

the case is filed. Any arguable effectiveness of across-the-board early vetting would be outweighed by the harm inflicted.

A. Procedural Issues

There are two main procedural issues with the across-the-board early vetting proposals discussed in Section II. First, application of the proposed changes without exception would result in the unjust dismissal with prejudice of meritorious claims or other harsh penalties. Second, a close look at the application of such proposals reveals that they would achieve little to nothing toward improving MDL efficiency.

An across-the-board rule, as in the proposals above, is inflexible and thus unable to account for extenuating circumstances. For example, the adoption of the proposed changes to § 1407 or Rule 26 would require specific proof from plaintiffs prior to the availability of the regular tools of litigation, such as discovery, often necessary to obtain such information.

Multiple MDL courts have recognized that certain proofs are often not available to plaintiffs prior to or even within months of filing their lawsuit.[11] Consider the Taxotere MDL, which involves claims that a chemotherapy treatment manufactured by multiple different companies for breast cancer patients caused permanent hair loss. Obtaining proof of product identification, which would be required by both aforementioned proposals, requires production of records by treating health care facilities and has proven difficult to obtain for numerous plaintiffs despite their best efforts. For instance, many facilities refuse to provide such records without a subpoena. In acknowledgement of this obstacle, the MDL court has entered various orders and processes to assist plaintiffs in obtaining this information.[12] Even with a subpoena and additional procedures available, the plaintiffs in many cases could not have obtained product identification within the time limits in the above proposals. Such concerns are heightened where there is little to no allowance for extensions or exceptions to the deadlines proposed for production of the enumerated evidence.

Moreover, the proposed statutory and Rule changes accomplish nothing more toward their goal than providing enforcement options some months earlier than those options already otherwise arise, doing little to effectively address the alleged filing of meritless cases. The evidence described in the proposals is typically already produced by plaintiffs through mechanisms such as Plaintiff Fact Sheets and accompanying document production requirements. These procedures are commonly adopted in MDLs and accomplish the same result sought by the early vetting proposals but with flexibility to handle difficulties that can be encountered in obtaining such proofs.

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[11] *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., Case No. 3:19-md-02885-MCR-GRJ, at *1 (N.D. Fla. Feb. 13, 2020) (ECF No. 999); *In re* Taxotere (Docetaxel) Prods. Liab. Litig., Case No. 16-MD-02740 (E.D. La. Jan. 12, 2018) (ECF No. 1506); *In re* Taxotere, 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325).

[12] *See In re* Taxotere, Case No. 16-MD-02740 (E.D. La. Jan. 12, 2018) (ECF No. 1506); *In re* Taxotere, 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325).

For example, in our experience, the Plaintiff Fact Sheet process often provides plaintiffs with time and opportunity to cure any perceived deficiencies and provide a basis for any inability to comply.[13] An inflexible early vetting rule does not allow for solutions to issues that plaintiffs encounter through no fault of their own.

Additionally, the proposals create the need for additional motion practice or other involvement by the court. Both proposals would likely result in litigation regarding what constitutes a required submission, require the court to review and make determinations about the sufficiency of the submissions or disclosures, and implicate processes such as motions to dismiss for alleged failures to comply. The court would be forced to undergo this process at the outset of the MDL, even if the court does not believe such a process is necessary, potentially hindering the court's efficient management of the MDL and resulting in a needless expenditure of the court's and parties' resources.

The possible requirement of expert support further complicates the submission of certain "proofs," such as causation as proposed in H.R. 985. There is no question that, for many cases, no general discovery–and certainly no case-specific discovery–will have occurred by the time the proofs would be required under the proposals. Such a rule could potentially be interpreted as akin to a *Lone Pine* order, requiring expert support at the outset of the case. Not only would it be difficult, or even impossible, for many plaintiffs to comply, but such a requirement would all but erase one of the benefits of MDLs, which is that the high cost of retaining general experts in these cases can be spread amongst plaintiffs.

Across-the-board early vetting requirements could come at great expense without a real justification for such cost. At its best, early vetting may identify potentially meritless cases slightly earlier than current procedures. At its worst, across-the-board early vetting will increase expenses and the expenditure of resources for the courts, plaintiffs, and even defendants, and block access to justice by dismissing valid claims without allowing the usual time and tools of litigation provided by the Federal Rules of Civil Procedure. In this regard, early vetting is a wolf in sheep's clothing. While limited use of some form of earlier vetting may be useful in a particular MDL docket, imposition of inflexible requirements in all MDLs would not increase efficiency and would result in injustice for plaintiffs with valid claims.

[13] *See, e.g.*, *In re* Taxotere, Case No. 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325) (providing forty-five days for defendants to serve a notice of deficiency and thirty days from the date of notice to cure any deficiencies before being subject to an Order to Show Cause as to why the Complaint should not be dismissed with prejudice).

B. Rationale Issues

Across-the-board early vetting proposals seem to be a solution in search of a problem, as there appears to be little evidence of a rampant problem with meritless cases flooding MDLs. For example, in discussing the proposed change to 28 U.S.C. § 1407, the Committee on the Judiciary went so far as to characterize the basis for its early-vetting proposal as being to combat "abusive 'mass actions'" involving "advertising-driven, poorly investigated (and often patently invalid) personal injury claims," which "impose unfair burdens on courts and defendants[;]" yet, the Committee admittedly *heard no evidence* on this issue.[14] Instead, it allegedly relied on the past hearing of a previous bill which did not include a similar MDL early-vetting amendment or related discussion.[15]

Lawyers for Civil Justice, a national coalition of defense trial lawyer organizations, law firms, and corporations, has also argued that thirty to forty percent of claims in some MDLs are meritless and that MDLs generally attract such claims.[16] However, the sources cited by the group provide little, if any, meaningful support for those claims and certainly do not provide sufficient support for across-the-board implementation of early vetting processes.[17]

Some have argued that MDLs are "black holes" because many cases do not make it to trial, but that is not unique to MDL cases. Statistics show that most cases in the country do not proceed to trial.[18] There are many reasons why cases—

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[14] Rept. 115-25 – Fairness in Class Action Litigation Act of 2017, Mar. 7, 2017, https://www.congress.gov/congressional-report/115th-congress/house-report/25/1?overview=closed.

[15] *Id.* (referring to a hearing held during the previous Congress regarding H.R. 1927, which included and discussed the Class Action Fairness Act provisions similar to those contained in H.R. 985 but did not include or discuss an early vetting amendment).

[16] Lawyers for Civil Justice, "Fixing the Imbalance: Two Proposals for FRCP Amendments that Would Solve the Early Vetting Gap and Remedy the Appellate Review Roadblock in MDL Proceedings," Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee (Sept. 9, 2020), available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_fixing_the_imbalance_in_mdl_proceedings_9.9.20.pdf.

[17] One source is an Order entered in the Mentor ObTape vaginal mesh MDL. In the Order, Judge Land opined that cases in multi-district litigation were being filed and maintained through the summary judgment stage without a good faith basis in hopes of being included in global settlements but admitted that he did not perform an empirical analysis of that theory. *In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., 4:08-MD-2004 (M.D. Ga. Sept. 7, 2016) (ECF No. 1039). His concerns included that cases lacked expert support, but such an issue is not something that typically can be predicted or determined at the early stages of litigation and thus addressed by the early vetting as proposed in Section II.

Another source cited is a speech by an in-house defense attorney for Bayer, in which the attorney states that thirty to forty percent of cases in MDLs get zeroed out at the time of global settlement. However, the speaker provides no citation for that statistic. Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, available at http://www.instituteforlegalreform.com/legal-reformsummit/2016-speaker-showcase.

[18] *See, e.g.*, Court Review: Vol. 42, Issue 3-4 – A Profile of Settlement, Court Review: The Journal of the American Judges Association, Dec. 2006; https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1024&context

including those consolidated in MDLs—do not end up proceeding to trial. Many times, cases are settled. Other cases may be determined on dispositive motion. Sometimes, the evidence does not bear out as expected, either generally or for the case(s) specifically, for reasons including that parties or witnesses pass away, additional research or new studies change a party's analysis of some aspect of the case, or evidence is unknowingly unavailable for reasons such as a business's record retention policy. None of these reasons are cause for an assumption that a plaintiff's attorney knowingly filed a meritless claim. Each MDL judge is in the best position to determine whether there is some issue with the filing of meritless claims and should have the ability and discretion to address any such issue.

Early vetting as proposed in Section II is not the answer in large part because the problem it purports to solve is not truly an issue. Those who argue for an inflexible, one-size-fits-all rule lack support for their assertion that MDLs are overrun with meritless claims, instead overgeneralizing anecdotal evidence. Worse, under the guise of preventing the filing of meritless claims, a harsh, inflexible rule imposed without extension or other exception would have the significant cost of limiting injured parties' access to the courts.

IV. USE OF EARLY VETTING AS A TOOL FOR CREATIVE MANAGEMENT

Instead of across-the-board rules, MDL courts should be allowed continued discretion and flexibility in managing their dockets, including determining on a case-by-case basis whether to employ tailored early vetting procedures.

Certain MDL courts have recently employed a census process akin to early vetting, though these processes do not implement strict, inflexible rules like those discussed in Section II.[19] Instead, these censuses were established by carefully considering the mass tort at issue and acknowledging that certain proofs may not be attainable so early in litigation. The processes adopted allow plaintiffs and defendants to sufficiently vet claims involving information that is difficult to obtain without the harsh and unnecessary results of the strict across-the-board vetting proposals above.

For example, the Orders establishing the process for a census program in the *Zantac* MDL acknowledge there may be issues inherent in obtaining proof of usage and injury, and provide benefits to those who participate, such as shared efforts and costs to obtain proof of use.[20] In the *3M Combat Arms Earplug* MDL, an Early Vetting Subcommittee was established to oversee the collection and production of certain basic information about each plaintiff's claims.[21] The difficulties expected in that MDL, such as obtaining military records through

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[19] *See supra* Section II.

[20] *See In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-02924 (S.D. Fl. April 2, 2020) (ECF No. 547); *In re* Zantac, No. 20-MD-02924 (S.D. Fl. April 15, 2020) (ECF No. 587).

[21] *In re* 3M Combat Arms Earplug, Case No. 3:19-md-02885-MCR-GRJ, at *9 (N.D. Fla. Apr. 19, 2019) (ECF No. 76).

Touhy requests and the number of claimants (currently well over 100,000),[22] supported establishing such a process in that MDL.

These censuses support the efficiency of the MDLs by better enabling the discovery of otherwise difficult-to-obtain information. However, despite the fact that censuses and early vetting may aid in the discovery of certain information or have other benefits, these tools are not always necessary and should not be mandatory in every MDL.

For example, no census or early vetting was employed in any of the seven transvaginal mesh MDLs that were established and overseen by Judge Goodwin in the Southern District of West Virginia, each of which, at any given time, had thousands of cases pending. Instead, Judge Goodwin employed creative strategies to manage and resolve the dockets, such as the implementation of a Plaintiff Profile Form, the consolidation of bellwether trials, and the remand of cases for trial once the bellwether process had run its course. Those strategies seem to have proven effective. As an illustration, out of over 26,000 cases once pending against Boston Scientific Corporation, there are currently only 278 still encompassed in the MDL.[23]

Further, some MDL courts may not consider early screening a top priority. Instead, some judges may prefer to focus their full initial attention on general matters affecting the MDL as a whole, such as designating leadership counsel to help with efficient management of the MDL, obtaining an understanding of the common material facts and legal issues to be resolved, and prioritizing general discovery. Mandatory early vetting proposals could interfere with a court's ability to focus on such matters.

MDL courts have many tools available for docket management, and those used by one MDL court may or may not be necessary or useful to another, much less *every* other MDL court. Given that no two MDLs are exactly alike, the key to increasing the efficiency of MDLs for all involved is to continue to allow MDL judges autonomy and flexibility in employing the tools available to them as necessary or desired for the particular MDL that they are overseeing.

V. CONCLUSION

MDL courts are able to employ some version of early vetting without a harsh, across-the-board rule. Their ability to do so should continue, but a broad process should not be forced on the courts and parties, especially without justification or due regard for the consequences. The key here is that judges have previously had the ability, and should continue to have the ability, to be flexible–even creative–in their management and oversight of MDLs. Processes such as

[22] *In re* 3M, Case No. 9:19-md-02885, at *1 (Jan. 21, 2020) (ECF No. 922) (indicating that as of "December 16, 2019, there were 139,693 claimants registered in MDL Centrality in connection with the 3M litigation").

[23] MDL Statistics Report – Distribution of Pending MDL Dockets by District, United States Judicial Panel on Multidistrict Litigation, July 16, 2020, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-16-2020.pdf (last accessed July 31, 2020).

Plaintiff Profile Forms and censuses should not be compelled but should instead serve as discretionary tools. Each MDL is different, and each MDL judge should be able to select the appropriate tools to manage their docket instead of being hamstrung into enforcing unwieldy rules.