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EARLY VETTING: A SIMPLE PLAN TO SHED MDL DOCKET BLOAT

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I. INTRODUCTION

The scales of justice are clearly tipping. Even the most cursory review of Multidistrict Litigation ("MDL") statistics reflects a docket imbalance which cannot be ignored. There can be little dispute that "the number of federal cases swept into an MDL" has "exploded."[1] As of the end of fiscal year 2019, there were a total of 134,462 individual actions in nearly 200 pending MDL proceedings.[2] By the end of fiscal year 2020, that number had ballooned to 327,204 individual actions in 176 MDL proceedings.[3] The burgeoning MDL dockets are particularly acute in product liability and other personal injury MDLs ("Product Liability/Personal Injury MDLs"), where the creation of an MDL (or even the mere filing of an MDL petition) is inevitably followed by a jump in the number of new cases. In fact, some MDL judges recognize that creation of an MDL often leads to the filing of claims with questionable merit.[4]

The current system enables plaintiffs to file claims with ease, at a low cost and without a procedure in place to quickly determine whether the case should

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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).

[2] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2019*, www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf. *See also* Hudson et al., *supra* note 1; Alan Rothman, *And Now a Word from the Panel: MDLs Continue to Thrive*, LAW360 (Feb. 21, 2020).

[3] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2020*, www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. In early 2021, MDLs surpassed a new milestone. Since the inception of MDL proceedings, there have now been more than one million individual actions in those litigations. Alison Frankel, *As MDL Cases Surpass 1 Million, Defense Group's Push for Early Vetting Heats Up*, Reuters (Mar. 17, 2021).

[4] *In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016) ("MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise"). *See also* Alan Rothman, *Managing MDL Mania: A Modest Early Vetting Proposal*, NEW YORK L. J. (2019).

even be on the docket. There are two gateway questions that should be asked and answered every time a case is filed: Did the plaintiff ingest, use (or was the plaintiff otherwise exposed to) the named defendant's (or defendants') product? Did the plaintiff sustain an injury subsequent to use of that product? Absent an affirmative answer to those two basic questions, with at least some documentation as support, there would be no good faith basis to file an action. Thus, this information should be readily available to plaintiffs' counsel. The time has come to adopt and implement a simple early vetting remedy to support the *bona fides* of these MDL actions.

With these principles in mind, we are prepared to delve deeper into the underpinnings of the docket bloat, what efforts have previously been made and why they have fallen short of the mark. Section II examines the data behind the explosion of case filings in MDLs. Section III provides an explanation as to why MDLs facilitate a surge in case filings, cases that would never have been filed outside of the MDL context. Section IV provides an historical overview of approaches taken by MDL courts to screen cases before them, as well as recent MDL reform efforts with respect to early vetting. Thereafter, Section V explains why a streamlined early vetting process with limited information offers a quick, efficient solution, whereas other winnowing tools used by MDL courts do not provide the essential relief required to quickly "reduce the waistline" and bring MDLs back into shape.

II. EXPLODING MDL DOCKETS: DELVING INTO THE DATA

MDLs comprise a large portion of the federal civil caseload. In recent years, the number of individual actions in MDL proceedings have comprised more than 50% of the overall federal civil docket.[5] As noted above, by the end of FY 2020, there were 327,204 individual actions pending in MDL proceedings.[6] It is the spiraling number of individual actions in a particular type of MDL proceeding (namely, Product Liability/Personal Injury MDLs) which should raise eyebrows.

Product liability and personal injury cases occupy a large portion of the MDL population. Based on a review of the MDL dockets, approximately only one-third of the pending MDL proceedings involve this genre of litigation, but those MDLs include the vast majority of the individual actions in all of the MDL proceedings.[7]

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[5] *See* Hudson et al., *supra* note 1. For purposes of this analysis, the overall federal civil docket figure (the denominator) excludes habeas corpus and social security cases.

[6] *See* United States Panel on Multidistrict Litigation, *supra* note 2.

[7] *See* Hudson et al., *supra* note 1, at 803 (top 10 MDL proceedings alone by number of actions, which each included product liability and/or personal injury claims, embodied most of the individual actions in MDL proceedings); *see also* United States Judicial Panel on Multidistrict Litigation, *Calendar Year Statistics,* www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (61 of the 185 pending MDL proceeding were product liability MDLs). Even the most cursory review of more current MDL data reflects that individual actions continue to flood Product Liability/Personal MDLs. United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report-Distribution of*

Another unusual feature of MDL proceedings is the rapid pace with which individual actions surge at the outset of those proceedings. In the six Product Liability/Personal Injury MDLs created after January 1, 2019 through the end of FY 2019, 203,706 individual actions were pending by the end of the following fiscal year (FY 2020).[8]

III. FUELING THE FIRE: WHY MDLs FACILITATE A SURGE IN CASES

Before addressing a solution to MDL docket bloat, it is important to understand what is fueling this growth within Product Liability/Personal Injury MDLs, not seen in mill-run litigations. A key reason for the increase in the number of cases in MDL proceedings is the ease with which plaintiffs are able to add their cases to the MDL and avoid individual scrutiny. But why is it so easy to file cases in an MDL proceeding as compared to the overall federal docket? And why does the system appear to enable the filing of meritless cases?

First and foremost, an MDL proceeding creates a "piggyback" effect. In many MDLs, a plaintiffs' leadership group is appointed by the court with responsibility for spearheading the litigation on behalf of plaintiffs. This allows for other plaintiffs' counsel who are willing to sit on the sidelines (and later pay a "common benefit" fee from any ultimate recovery to be divided among plaintiffs' leadership)[9] to file a case and leave the heavy lifting to others. Moreover, the ensuing growth in cases encourages even more filings – often fueled by plaintiffs' attorney advertising – because the more cases are filed, the less likely it is that any individual complaint from among the growing pool of cases will be subject to early challenges, whether via a motion to dismiss or otherwise.

In addition, there are also two often utilized devices in MDL litigation which can be drivers of the increase: (1) Master Complaints; and (2) Direct Filing Orders. These factors, even if they have value for other purposes, minimize the marginal cost of adding a case to the MDL. A Master Complaint is an omnibus complaint filed by plaintiffs' leadership which includes all of the common allegations, including causes of actions, against the defendants. New plaintiffs can adopt the Master Complaint and file a Short-Form Complaint which includes

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Pending MDL Dockets by Actions Pending, www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-15-2021.pdf.

(almost all of MDL proceedings with 500 or more individual actions are Product Liability/Personal Injury MDL proceedings). Product Liability/Personal Injury MDLs consisting primarily of class actions generally have few actions due to the collective nature of a putative class (often embodying thousands or more class members).

[8] This data is based on a review of the MDL statistical data as of the end of FY 2020 for the six Product Liability and Personal Injury MDLs created between January 1, 2019 and September 30, 2019 (including MDL Nos., 2875, 2885, 2886, 2887, 2903 and 2905), available at www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. (which includes data regarding the number of cases filed in, and transferred to, MDL proceedings).

[9] *See* Hudson et al., *supra* note 1, at 809.

certain information about their case (but with no proof to support their claim required), without spending the time to prepare their own detailed complaints. Moreover, to avoid the need to file cases in plaintiffs' home states – where personal jurisdiction and venue would likely be proper – and avoid the costs of retaining local counsel and MDL transfer, MDL courts often enter a Direct Filing Order. Such orders enable plaintiffs from around the country to file their cases directly in the MDL forum, even if personal jurisdiction and venue are improper there. (Defendants preserve personal jurisdiction and venue objections until the conclusion of pretrial proceedings.)

Moreover, the data suggests that the attraction of filing directly in an MDL proceeding is fueling the increase in cases. As of the end of FY 2020, more than 200,000 of the 203,706 individual actions pending in Product Liability/Personal Injury MDLs created since January 1, 2019 through the end of FY 2019, had been filed directly in the transferee court.[10]

IV. HISTORICAL AND CURRENT APPROACHES

a. The Historical Approach: Modified MDL Discovery

Historically, attempts to deal with information relating to individual cases within an MDL have taken the form of modified discovery, albeit by different names. The goal has been to create a uniform set of questions and streamline the discovery process so as to avoid the need for typical individual case-specific discovery. The most common form of that substitute discovery has been the use of a "Plaintiff Fact Sheet" ("PFS").[11] The PFS has commonly been a lengthy questionnaire, often consisting of dozens of pages, with numerous questions (including subparts and charts) ranging from personal background (residence, education, employment) to medical histories of the plaintiff and family members, identity of physicians, prior litigations filed by the plaintiff, insurance coverage and damages sought. Tucked away are numerous questions relating to product use (or exposure) and its duration. The typical PFS also includes document requests to support the answers to the wide range of information sought, including a request for medical authorizations to release a slew of records.

In practice, the PFS questions are a result of a heavily negotiated, protracted process. Although the bidding often begins with using a template PFS from another MDL, that does little to avoid what is usually months of negotiations among counsel before finalizing the treatise of questions ultimately used in a given MDL proceeding.

Moreover, the PFS is hardly an expeditious process. Once a PFS is agreed upon, which is often months (and in some instances more than a year) after creation of the MDL, there is a drawn-out timeline for information to be provided and for

[10] United States Panel on Multidistrict Litigation, *supra* note 3.

[11] In cases with a PFS, a Defendant Fact Sheet ("DFS"), requiring defendants to respond to a set of case-specific questions (often relating to contact between sales representatives and plaintiffs' physicians) is typically negotiated and ordered as to certain actions within the MDL as well.

deficiencies to be challenged. That process often takes many months. When a plaintiff fails to provide information, the plaintiff is offered an opportunity to cure the defects. Fighting over the sufficiency of a PFS itself can become a litigation within a litigation.[12]

While the hope of some may have been that the PFS process would identify and eliminate meritless claims, the process is so tortured and protracted that it in no way resembles an early vetting process. Nor is the PFS simple enough to provide just the basic information necessary to determine whether a plaintiff has an initial basis to file a case.

A limited number of courts have used shorter questionnaires at the outset of an MDL proceeding, well before the PFS process, to specifically target the bona fides of plaintiffs' allegations of exposure to the product and/or a relevant injury.[13] This approach is much more useful as a gateway function at "an early stage" to "help resolve certain issues in this litigation in a timely manner."[14] But such targeted efforts at the outset of an MDL are exceedingly rare.

b. Help Is on the Way?: Recent MDL Reform Efforts

Over the past several years, there have been a number of MDL reform efforts to tackle the surge in MDL case filings (among other issues). The subject of early vetting has been on the agenda of the MDL Subcommittee of the Advisory Committee on Civil Rules (the "MDL Subcommittee") for potential amendment of the Federal Rules. The MDL Subcommittee has acknowledged that "the early vetting proposals have been in response to the 'Field of Dreams' problem -- sometimes JPML centralization of litigation is followed by the filing of a large number of new claims," but "how to best address the issue has evolved [and] [t]hat evolution continues."[15]

In 2017, a House bill included a provision to require evidentiary support of exposure and injury within forty-five days and for the court to thereafter rule on the sufficiency of that evidence. That bill died in Congress and "the focus of the [MDL] Subcommittee turned to the [PFS]."[16] As part of the "evolution" of the process, "[i]n place of reliance on PFS/DFS practice, the more promising idea came to be known as a 'census,' an effort to gain some basic details on the claims

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[12] In fairness, the most effective use of the PFS to whittle down cases is not in determining whether a case is meritless, but in enabling a defendant to ultimately seek dismissal of a case for failure to complete the PFS.

[13] *See, e.g.*, *In re* Zofran (Ondansetron) Prod. Liab. Litig., No. 1:15-cv-2657-FDS, 2016 WL 3058475 (D. Mass.
May 26, 2016) (early disclosure order requiring each plaintiff to provide certain product identification information, with supporting records identifying the manufacturer of the product, within thirty days).

[14] *Id.*

[15] Advisory Committee on Civil Rules, *Agenda Book*, 145-46 https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf (April 2, 2020) (citing Fairness in Class Action Act (H.R. 985)).

[16] *Id.* at 147.

presented -- evidence of exposure to the product at issue -- so as to permit an initial assessment."[17] Recently, a few MDL courts have entered a "census order," but the "census" includes a considerable number of questions, as well as topics not exclusively limited to proof of exposure and injury. The length of that process suggests that while it may ultimately have value to obtain case-specific information, it (like the PFS) is not an early vetting solution to quickly identify meritless claims.

V. MDL EARLY VETTING: SHORT, SWEET, AND EFFECTIVE

To put it all together, there appears to be an evolving consensus that there must be a system for an initial assessment of claims. Precisely as the MDL Subcommittee articulated, "there should be a beginning for an information exchange."[18] But the processes adopted in MDL proceedings have not facilitated the necessary immediate exchange of information. What is needed is effective and simple early vetting that is truly a "beginning," consisting of the limited information that counsel should have had the moment a case is filed. And what is that information? Answers to two questions which could fit on a postcard:

> **Proof of Exposure**: Did you ingest, use or were you otherwise exposed to the named defendant's/defendants' product?
> **Proof of Injury**: Did you sustain an injury subsequent to that ingestion, use or exposure?

And what documentation is needed? Two pieces of paper: One page of a record documenting and identifying the exposure (ingestion or use) to a named defendant's product, and one page of a record reflecting the alleged injury subsequent to the date of exposure (ingestion or use). This is a form of an initial disclosure, which the Federal Rules should require be provided in every case within an MDL proceeding. It will winnow the cases which should never have been filed and reduce the bloat that meritless cases create on an MDL court's docket. In multiple defendant cases, it will enable defendants who do not belong to be dismissed at the outset.

Some might (and in fact do) argue that the system cannot sustain such early scrutiny in the context of a large MDL because there are simply too many cases. But such an argument is circular. There are so many cases in an MDL because it is too easy to file a case which can fly under the scrutiny radar for months, if not years. We have reached a point where a rule to address the spike in MDL cases is critical.

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[17] *Id.*
[18] *Id.*

VI. CONCLUSION

Keep it simple and start early. With these two critical ingredients, a realistic early vetting procedure will have the best chance to succeed across all Product Liability/Personal Injury MDL proceedings. At the same time, it will enable MDL courts and the parties to thereafter fashion discovery best suited for the particular needs of that MDL (whether as a PFS, census order or otherwise) without the bloat of clearly meritless claims. Even more importantly, this proposed early vetting is a sustainable "weight loss" program which can readily be applied as new cases are filed, leaving a more fit, manageable docket for the benefit of all.