

Federal Civil Rule Reform: An Update

By: Mark A. Behrens and Christopher E. Appel



Mark A. Behrens co-chairs Shook, Hardy & Bacon L.L.P.'s Washington, DC-based Public Policy Group and chairs the IADC's Civil Justice Response Committee. Mr. Behrens is active in civil justice issues on behalf of business and civil justice organizations, defendants in litigation, and insurers.



Christopher E. Appel is Of Counsel in Shook, Hardy & Bacon L.L.P.'s Public Policy Group and active in civil justice reform issues impacting the business community.

THE federal judiciary's Advisory Committees on Civil Rules and Rules of Evidence are considering reforms that could result in major changes of the federal civil docket. Proposals under review would, if approved, amend the Federal Rules of Civil Procedure ("FRCP") and Federal Rules of Evidence ("FRE") in key areas of importance to civil defendants.

This article examines four areas for potential reform: (1) depositions of corporations and other organizations pursuant to

FRCP 30(b)(6); (2) amendments to adapt the federal civil rules to cases that are consolidated pursuant to 28 U.S.C. §1407 for "coordinated or consolidated pretrial proceedings," commonly known as multidistrict litigation (MDL) cases; (3) a proposed amendment to FRCP 26(a)(1)(A) to require disclosure of third-party litigation funding (TPLF) agreements; and (4) proposed amendments to FRE 702 regarding expert testimony.

Each of these areas has been the subject of substantial discussion and debate, often beginning with

requests for rulemaking by Lawyers for Civil Justice (LCJ) with support from the IADC and its sister defense bar groups, business associations, and civil justice organizations.¹ The proposed reforms are in different stages of the Advisory Committees' evaluation and approval process. Each is the subject of ongoing discussion; some may be discussed for years.

This article provides a snapshot of the status of the proposals with some background and history. Civil defendants and their counsel should be aware of the proposed changes and be prepared to engage when opportunities arise.

I. Rule 30(b)(6) Depositions of Corporate Witnesses

In April 2019, the Advisory Committee on Civil Rules approved an amendment to Rule 30(b)(6) governing depositions of corporations and other organizations. The proposed amendment states:

Rule 30. Depositions by
Oral Examination

(b) Notice of the
Deposition; Other
Formal Requirements.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must

¹ LCJ is a national coalition of defense trial lawyer organizations, law firms, and corporations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. The IADC was

one of LCJ's founding entities. The authors wish to thank LCJ's General Counsel, Alex Dahl, for his assistance in the preparation of this article and for his significant contributions to civil justice reform.

testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.²

The proposed amendment is intended to “avoid unnecessary burdens” through “candid exchanges” by the parties “about discovery goals and organizational information structure” and “the number and description of topics.”³ It is likely to be approved by the Committee on Rules of Practice and Procedure and is on track to take effect on December 1, 2020.

Significantly, the Advisory Committee declined to adopt a controversial proposal to require parties to confer about “the identity of each person the organization will designate to testify.”⁴ That language was in the Advisory Committee’s proposal published for public comment in August 2018.⁵ As explained below, that language produced strong criticism from the defense bar and business community. The Advisory Committee also declined to require

organizations to identify their designees a certain number of days in advance of a deposition. This was not part of the proposed amendment that was published for public comment, but was considered by the Advisory Committee in light of the “intensity of the commentary” on the published proposal.⁶

The Advisory Committee declined to adopt several improvements to Rule 30(b)(6) supported by defense interests, such as a clear procedure for objecting to a Rule 30(b)(6) notice or presumptive limits on the number of topics that can be listed in a Rule 30(b)(6) notice. The reforms were not in the proposal that was published for public comment, but many on the defense side advocated for them in written comments and testimony.

The Advisory Committee’s current proposed amendment is the product of nearly 1,800 written comments and two days of testimony from 80 witnesses at public hearings in Phoenix, Arizona, and Washington, D.C. in early 2019. The IADC and many IADC members testified at the public hearings and submitted written comments, as

²Advisory Committee on Civil Rules, *Agenda Book*, Apr. 2-3, 2019, at 105, available at <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2019> (emphasis added).

³ *Id.*; see also Mark A. Behrens and Christopher E. Appel, *Federal Civil Rules*

Committee Drops Divisive Corporate Witness ID Duty, 28:9 Legal Opinion Letter (Wash. Legal Found. May 17, 2019).

⁴ *Agenda Book*, April 2-3, 2019, at 105.

⁵ See *id.* at 49.

⁶ *Id.* at 104.

did other defense bar groups and individual practitioners. Many of the comments from the defense perspective focused on the controversial language in the August 2018 published proposal to mandate conferral about “the identity of each person the organization will designate to testify.”

The IADC expressed the view that requiring parties to confer about the identity of the Rule 30(b)(6) witness would lead to attempts by plaintiff lawyers to “reshape settled law that a noticing party has no right to dictate the witness speaking for the organization.”⁷ Further, plaintiff lawyers could misuse the proposed rule to “gain a litigation advantage, such as by trying to block or challenge a witness with a reputation for being an effective spokesperson for an organization.”⁸

The IADC also cautioned that witness identification at a meet-and-confer could “restrict the

organization’s flexibility to change its proposed designee.”⁹

LCJ told the Advisory Committee that the proposal would “exacerbate, not remedy, the contentious nature of many Rule 30(b)(6) depositions.”¹⁰ LCJ said that the proposed rule change would impose an impractical requirement on organizations to disclose witness names “on the spot” at a meet-and-confer before the matters for examination have been discussed, and create an ambiguous continuing good faith duty to confer “as necessary” that would provide fertile ground for new discovery disputes and potential gamesmanship.¹¹

The President of DRI-The Voice of the Defense Bar testified that a Rule 30(b)(6) witness identification requirement would create an improper “illusion that the other side has some say” in an organization’s witness selection.¹²

He cautioned that mandatory witness identification far in advance of an organization’s

⁷ See Comment from International Association of Defense Counsel, “Proposed Rule 30(b)(6) Is Problematic and Should Be Revised to Address Problems in Rule 30(b)(6) Practice,” Jan. 24, 2019, at 1, available at <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0174>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Comment from Lawyers for Civil Justice, “The Proposed Rule 30(b)(6) Amendment Should Not Be Published with the Radical Mandate that an Organization ‘Must Confer’

About the Identity of Witnesses Who Will Testify on Its Behalf,” Aug. 24, 2018, at 4, available at <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0122>.

¹¹ *Id.*

¹² Transcript of Proceedings of the Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, Feb. 8, 2019, at 159 (Testimony of Toyja Kelley, Esq.), available at <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-1783>.

deposition could shift the focus of depositions to “personal issues with respect to that particular witness,” distorting what is really at issue in a case.¹³

In addition, nearly 140 corporations joined a February 2019 letter to the Advisory Committee expressing their opposition to mandatory conferral about “the identity of each person the organization will designate to testify.”¹⁴ According to the companies, “Imposing such a requirement would provoke time-consuming and costly new discovery disputes as counsel and courts struggle to square the change with the well-settled and well-grounded law that the responding organization has complete discretion to select the 30(b)(6) witnesses that will speak for the organization.”¹⁵ The companies also pointed out that the “clear implication of the proposed amendment is that the party noticing the deposition has the right to influence the choice of the witness(es).”¹⁶ The companies further urged the Advisory Committee to include reforms sought by LCJ to improve Rule 30(b)(6) practice from their perspective.

The proposed amendment that will likely take effect in late 2020 is a modest improvement to current practice. Defense bar and civil justice interests will be disappointed that the Advisory Committee did not include numerous suggestions to significantly improve the rule. On the other hand, defense interests should be greatly relieved that the Advisory Committee chose not to require conferral about the identity of the Rule 30(b)(6) witness or require identification of the witness in advance of the deposition. Active engagement by the defense bar likely persuaded the Advisory Committee to abandon the problematic provisions.

II. Rules Governing MDL Cases

Congress enacted the MDL statute in 1968 to provide for the “temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact.”¹⁷ The objective was to improve efficiency and consistency in the resolution of a subset of similar cases by addressing common pretrial issues

¹³ *Id.* at 160.

¹⁴ Comment from 138 Companies Opposing the Proposed Amendment to Rule 30(b)(6), Feb. 5, 2019, at 1, available at <https://www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0217>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Pub. L. No. 90-296, 82 Stat. 109 (Apr. 29, 1968); amended Pub. L. No 94-435, 90 Stat. 1396 (Sept. 30, 1976).

before transferring each case back to its originating court to be resolved through trial or other means. Half a century later, the MDL system functions very differently, and this shift has generated calls for reform.¹⁸

By the end of 2018, MDL cases accounted for more than half the federal civil caseload (excluding Social Security and prisoner cases).¹⁹ LCJ reports that MDL cases comprised 52% of the federal civil docket at the end of 2018, up from 47% in 2017.²⁰ In 2014, MDL cases made up “36% of the civil case load.”²¹ In 2002, “that number was 16%.”²²

There are currently more than 200 MDLs housing around 145,000 active cases spanning product liability, antitrust, securities litigation, intellectual property, and

consumer disputes, among other areas.²³ Nearly 90% of the individual cases subject to an MDL transfer order are concentrated in roughly two dozen MDLs.²⁴

The MDL process has become a “case-dispositive engine achieved through global settlements.”²⁵ As explained in a Duke Law School report, “[a]lthough the MDL transfer is for pretrial management only, 96% of the individual actions consolidated in MDLs are terminated by the MDL transferee judges.”²⁶

The FRCP were not created, and have not been developed, with MDLs in mind. The FRCP do not expressly govern many elements of procedure in MDL cases, and therefore, have been applied (or not) largely at the discretion of the MDL transferee judge. This situation has

¹⁸ See, e.g., David M. Bernick, *Are Existing Civil Procedure Rules Limiting the Fair Adjudication of MDLs?*, NAT'L L.J., Nov. 15, 2018, available at <https://www.law.com/nationallawjournal/2018/11/15/are-existing-civil-procedure-rules-limiting-the-fair-adjudication-of-mdls/> (“having practical rules for MDLs that provide consistency and predictability . . . is both important and urgent”).

¹⁹ See Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360, Mar. 14, 2019, available at <https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload>.

²⁰ See *MDL Cases Surge to Majority of Entire Federal Civil Caseload*, LAWYERS FOR CIVIL JUSTICE, Mar. 14, 2019, available at <https://www.rules4mdls.com/copy-of-new-data-on-products-liabil>.

²¹ Duke Law Center for Judicial Studies, *MDL Standards and Best Practices*, Sept. 11, 2014, at x, available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf.

²² *Id.*

²³ See Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, available at <https://www.jpml.uscourts.gov/pending-mdls-0> (reporting MDL statistics as of June 19, 2019).

²⁴ See *MDL Standards and Best Practices*, *supra* note 21, at ix; Simpson, *supra*, note 19.

²⁵ *MDL Standards and Best Practices*, *supra* note 21, at xi.

²⁶ *Id.*

resulted in sporadic and inconsistent treatment of key procedural issues. According to civil justice organizations such as LCJ, the effect of such ambiguity is that “judges and parties are improvising.”²⁷ As Michael Harrington, Senior Vice President and General Counsel for Eli Lilly and Company, explained:

Many MDLs today—particularly those in the products liability category—are defined by a lack of clear, fair and predictable procedural rules. This should be startling to American lawyers because, since 1938, litigation procedure in U.S. courts has been generally well defined by the Federal Rules of Civil Procedure (FRCP), which are firmly established and widely accepted as providing the structure of

litigation and the necessary protections to the parties.²⁸

LCJ has suggested six specific areas of MDL practice in need of reform: (1) early vetting of claims; (2) authorizing interlocutory appellate review of potentially case-dispositive motions; (3) requiring disclosure of TPLF agreements in all cases; 4) establishing a consent procedure for bellwether trials; (5) treating MDL “master complaints” as pleadings; and (6) providing a common standard for determining whether plaintiffs in an MDL proceeding should be joined or if, instead, a separate complaint should be submitted for each one.²⁹

The Advisory Committee on Civil Rules and its MDL Subcommittee, headed by Judge Robert Dow, Jr. of the U.S. District Court for the Northern District of Illinois, are studying these issues.³⁰ The MDL Subcommittee is also examining several related issues

²⁷ Lawyers for Civil Justice, *Reform MDLs*, available at <https://www.lfcj.com/rules-for-mdls.html>.

²⁸ Michael J. Harrington, *Multidistrict Litigation Needs Intensive Care*, CORPORATE COUNSEL, Feb. 21, 2019, available at <https://www.law.com/corpcounsel/2019/02/21/multidistrict-litigation-needs-intensive-care/?slreturn=20190521123815>.

²⁹ See Comment from Lawyers for Civil Justice, “Rules for ‘All Civil Actions and Proceedings’: A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within the Federal Rules of the Civil

Procedure,” Aug. 10, 2017, available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdls_cases_8-10-17.pdf; Comment from 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, available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl_tplf_proposals_for_discussion_9-14-18_004_.pdf.

³⁰ See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 207-221.

such as whether the joinder of claims in MDL proceedings has led to a reduction or possible circumvention of required filing fees, and whether (and to what extent) MDL transferee judges should exercise review over proposed MDL settlements.³¹

In an effort to manage the numerous issues that have been raised, as well as the varied methods of possible implementation, the MDL Subcommittee has ranked the topics it plans to address first.³² The Subcommittee's "front burner" issues are discussed below. They also include a potential TPLF disclosure requirement (not specific to MDL cases), which is discussed in the next section of this article.

A. Early Vetting of MDL Cases

One of the most significant problems with the MDL process "is its tendency to attract meritless claims."³³ Chief Judge Clay Land of the U.S. District Court for the Middle District of Georgia discussed this phenomenon in 2016 while overseeing an MDL involving a medical product.³⁴ He observed that MDLs had become "the norm

for cases involving common issues of law and fact" such that "many of the most significant civil disputes on the federal docket are being resolved in a distant venue by a hand-picked judge, typically through some type of global settlement."³⁵

Judge Land explained that the "evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements" has unintended consequences, including "incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."³⁶ He recognized that "[s]ome 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 their case being scrutinized as closely as it would if it proceeded as a separate individual action."³⁷

Judge Land cautioned that MDLs can generate a "perverse result": instead of promoting judicial economy, they can clog dockets with claims that "never would have entered the federal court system without the MDL."³⁸ "At a minimum," he said,

³¹ See *id.* at 214, 217-219.

³² See *id.* at 226-227.

³³ *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 1.

³⁴ *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2016 WL 4705807 (M.D. Ga. Sept. 7, 2016).

³⁵ *Id.* at *1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

“transferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly.”³⁹

Estimates suggest that, in some instances, meritless claims may comprise up to 40% of the total number of cases in an MDL.⁴⁰ This result may occur because the sheer volume of cases filed in an MDL makes it impractical for defendants to fully investigate and challenge suspect claims. Under currently accepted *ad hoc* MDL practices, lawyers and judges often do not have the basic information necessary to engage in a simple screening effort.⁴¹ This concern is exacerbated by the fact that plaintiffs can file additional MDL cases of little or no merit at very low cost, while the costs for a defendant to uncover information about a claim’s lack of merit can be significant.⁴²

Several proposals have been advanced to address early vetting of MDL cases. The primary approach supported by defense interests is to amend Rule 26(a) to require disclosure of evidence identifying

the “cause and nature” of the specific injury alleged by a plaintiff.⁴³ By establishing such an initial disclosure requirement, plaintiff lawyers would need to exercise greater due diligence before filing a claim and would be less able to mask meritless claims.

The MDL Subcommittee has also considered amending Plaintiff Fact Sheet (PFS) techniques.⁴⁴ Research by the Subcommittee found that judges ordered a PFS in more than 80% of MDL product liability proceedings involving more than 100 cases.⁴⁵ The Subcommittee has raised the question of whether a rule to prescribe content for PFS orders would prove effective in weeding out meritless claims early on and whether such a rule should govern all MDLs or specific types of MDLs, such as those involving personal injury claims.⁴⁶

Defense interests have criticized the approach of relying on PFS as a means of curtailing meritless claims. They have complained that the *ad hoc* use of PFS or *Lone Pine*⁴⁷ orders requiring the submission of expert support

³⁹ *Id.* at *2.

⁴⁰ See Malini Moorthy, “Gumming Up the Works: Multi-Plaintiff Mass Torts,” U.S. Chamber Inst. for Legal Reform, 2016 Speaker Showcase, *The Litigation Machine*, available at <https://www.instituteforlegalreform.com/resource/gumming-up-the-works-multi-plaintiff-mass-torts>.

⁴¹ See *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 1-2.

⁴² See *id.* at 2.

⁴³ *Id.*

⁴⁴ See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 208.

⁴⁵ See *id.* at 209.

⁴⁶ See *id.* at 209-210.

⁴⁷ See *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986).

for claims of causation have proven ineffective in eliminating or reducing the filing of meritless claims.⁴⁸ Defense interests have additionally argued that these mechanisms create too much potential for uneven application by the courts.⁴⁹

The MDL Subcommittee has looked at federal legislation to help develop possible early vetting procedures. Language included in the proposed Fairness in Class Action Litigation Act of 2017 provides a useful “starting point.”⁵⁰

The Act, which passed out of the House in 2017, would amend the MDL statute to require that counsel “demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of injury.”⁵¹ The Act also included a 45-day deadline for submitting such information to support a claim, and would have required the presiding MDL judge to rule on the sufficiency of the

information provided within 30 days of the deadline.⁵²

The MDL Subcommittee has not decided whether to draft a proposed rule addressing early vetting of MDL cases, but is expected to make a decision as soon as this Fall. The Subcommittee appears to recognize that the “warehousing” of meritless cases in MDLs presents a significant problem. Accordingly, defense interests are encouraging the Advisory Committee to move forward with a proposed FRCP amendment on this topic.

B. Interlocutory Appellate Review

The availability of appellate review for critical issues in MDL cases—such as jurisdiction, preemption, and *Daubert*⁵³ on general causation—is another major area in need of reform. Appellate review of significant motions by defendants in MDL cases is “very rare, occurring only when a trial results in a judgment for the plaintiff.”⁵⁴ Consequently,

⁴⁸ See Comment from Lawyers for Civil Justice, “Ten Observations About the MDL/TPLF Subcommittee’s Examination into the Function of the Federal Rules of Civil Procedure in Cases Consolidated for Pretrial Proceedings,” Apr. 6, 2018, at 3, available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment--ten_observations_about_md_l_rulemaking_4-6-18.pdf.

⁴⁹ See *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 3.

⁵⁰ Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 208.

⁵¹ H.R. 985 (115th Cong.).

⁵² See *id.*

⁵³ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

⁵⁴ *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 4; see also Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 243 (Letter from John H. Beisner to Rebecca Womeldorf, Secretary of Committee on Rules of Practice and

parties may be forced to make substantial strategic decisions without an opportunity to fix an incorrect ruling—or at least reach finality—on such issues. The situation is one-sided because when defendants lose a significant motion there is no practical mechanism for review, but when plaintiffs lose such motions, they have an appeal as of right.

Increasing the availability of interlocutory appellate review would enhance the probability of a correct judgment, improve procedural fairness for litigants, and assist in the proper valuation of cases. Appellate review also has the potential to save substantial judicial resources in the long-term, even if the time it takes to review a potentially case-dispositive MDL ruling produces a short delay.⁵⁵

Defense interests are urging the Advisory Committee to establish a clear process for interlocutory appellate review of a limited category of motions in MDL cases.⁵⁶ Specific types of motions that might be encompassed by an MDL rule change include *Daubert* motions on

general causation and preemption motions.⁵⁷ The Committee could develop a path for interlocutory appellate review under several of the FRCP, such as an amendment to Rule 54 to include a provision defining “judgment in cases consolidated pursuant to 28 U.S.C. §1407” in a way that provides parties the ability to obtain appellate review of material rulings or a rule modeled after Rule 23(f) (interlocutory appeal of class certification orders), but that provides appeal as of right rather than as a matter of discretion.⁵⁸

The MDL Subcommittee has studied the idea of developing a rule based on Rule 23(f) as well as 28 U.S.C. §1292(b) governing interlocutory decisions.⁵⁹ The Subcommittee has looked at the Fairness in Class Action Litigation Act of 2017 as a source of possible language to incorporate into a rule change.⁶⁰ The Act included a proposed amendment to the MDL statute with language similar to 28 U.S.C. §1292(b) that would have provided for an immediate appeal of orders that “may materially

Procedure, Nov. 21, 2018); *see also* James M. Sullivan and Gregory S. Chernack, *Managing Appeals in Multidistrict Litigation*, IN-HOUSE DEF. Q., Summer 2015, at 57, available at https://www.hollingsworthllp.com/uploads/1353/doc/Chernack&Sullivan_ManagingAppealsMultidistrict_Litig_In-House_Def_Quarterly_July2015.pdf.

⁵⁵ See “Ten Observations About the MDL/TPLF Subcommittee’s Examination into the Function of the Federal Rules of

Civil Procedure in Cases Consolidated for Pretrial Proceedings”, *supra* note 48, at 4.

⁵⁶ See *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 4-6.

⁵⁷ See *A Call to Bring Cases Consolidated for Pretrial Proceedings Back Within the Federal Rules of the Civil Procedure*, *supra* note 29, at 16.

⁵⁸ See *id.*

⁵⁹ See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 212-214.

⁶⁰ See *id.* at 212-213.

advance the ultimate termination of the proceedings.”⁶¹ The Subcommittee may reach a decision this Fall on whether to draft a potential FRCP amendment providing interlocutory appellate review of critical rulings in MDL cases.

C. Improper Joinder of Claims

The leniency toward consolidation for pretrial purposes in the MDL system means that cases are often consolidated that would not meet the Rule 20 “same transaction or occurrence” test required for joining individual cases.⁶² Plaintiffs may seek to use the MDL process to join disparate claims for a variety of reasons, such as packaging together unrelated claims where individuals cannot specify which product allegedly caused their injury⁶³ or joining claims to avoid paying separate court filing fees.⁶⁴ To curb misjoinder, defense interests have recommended amending Rule 20 to establish a uniform standard for

determining whether plaintiffs in an MDL proceeding should be joined or must file a separate complaint.⁶⁵

The MDL Subcommittee’s initial interest in this topic appears to have centered on the potential circumvention of court filing fees.⁶⁶ Researchers from the Federal Judicial Center examined some 70,000 cases filed in MDL proceedings on behalf of more than 90,000 plaintiffs and found no clear evidence of widespread abuse.⁶⁷ The Subcommittee determined that although it “appears filing fees are regularly being charged individually,” the degree of “unfounded claims is presently unknown.”⁶⁸ The Subcommittee concluded, “it is far from clear that any rulemaking on this front would promise significant improvement in screening out unfounded claims,” but posed the question whether further study and potential rule amendment is warranted.⁶⁹

D. “Master” Pleadings

Another concern of defense interests involves the use of

⁶¹ H.R. 985 (115th Cong.).

⁶² See *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 10.

⁶³ See, e.g., *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1225 (9th Cir. 2006) (identifying group of MDL cases involving “unrelated claims of numerous plaintiffs who were joined without specifying which products they allegedly ingested or the manufacturers of the

products that allegedly caused their injuries”).

⁶⁴ See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 214.

⁶⁵ See *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 10.

⁶⁶ See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 214.

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

“master complaints” to function as general pleadings in MDL cases.⁷⁰ The use of a master complaint in an MDL to guide the consolidated proceedings, particularly with respect to discovery, is now a “common practice.”⁷¹ The practice exists outside of the FRCP because master complaints and master answers are not expressly permitted pleadings under Rule 7(a) (pleadings allowed). Based on this omission, courts have refused to decide motions to dismiss consolidated or master complaints or apply other FRCP regarding pleadings—even though the courts treat such documents as pleadings for guiding the litigation.⁷²

The MDL Subcommittee has acknowledged its “limited opportunity to discuss the specific issue of master complaints.”⁷³ Nevertheless, the Subcommittee has questioned whether adding specific references in Rule 7(a) to “master” pleadings would produce significant results.⁷⁴ According to the Subcommittee, master complaints are not “unknown quantities” within the judiciary, so the absence of specific references to master complaints in Rule 7(a) may not prevent valid pleading challenges.⁷⁵ The Subcommittee is

considering the need for further study and potential rule amendment on this topic, but action seems unlikely.

E. Settlement Review

A new topic of focus for the MDL Subcommittee is whether a rule amendment is warranted that would empower MDL transferee judges to review and approve proposed settlements.⁷⁶ This issue has come up because the Advisory Committee “recently completed its extensive consideration” of settlement-approval criteria for class actions, leading to amendments to Rule 23(e) that took effect on December 1, 2018. The MDL Subcommittee is pondering whether MDL settlements also “should be subject to some supervision by rule.”⁷⁷

The MDL Subcommittee has said there is “no general authority for MDL transferee judges to scrutinize the terms of settlements,” but “[w]hether that concern really warrants rulemaking is less clear.”⁷⁸ The Subcommittee appreciates that most claimants in MDL proceedings have their own lawyers and that “nobody is suggesting that transferee judges

⁷⁰ See *id.* at 215-217.

⁷¹ *MDL Practices and the Need for FRCP Amendments*, *supra* note 29, at 11.

⁷² See *id.*

⁷³ Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 216.

⁷⁴ See *id.* at 217.

⁷⁵ *Id.* at 215.

⁷⁶ See *id.* at 217-219.

⁷⁷ *Id.* at 218.

⁷⁸ *Id.* at 217.

should be involved in reviewing the terms of individual settlements they (and their retained counsel) accept on a routine basis.”⁷⁹ Rather, the focus of any rule change would be on so-called “inventory settlements” where law firms with a portfolio of cases in an MDL proceeding negotiate a lump sum settlement of all of the cases.⁸⁰

According to the Subcommittee, inventory settlements can create an “uneasy” feeling about whether settlement proceeds are allocated properly among a potentially large number of clients or contain terms a judge would endorse.⁸¹ Nevertheless, the Subcommittee expressed reservations about developing rules to govern settlements between private parties where the “Civil Rules do not generally authorize judicial review in such settings.”⁸² The Subcommittee also recognized that the analogous situation of a judge’s class action settlement review under Rule 23(e) “stands out as an exception to the ordinary right of the parties to agree to a settlement on terms they find satisfactory,” and “comes with responsibility for judicial review” which is not part of the MDL statute.⁸³ In light of these reservations, the Subcommittee is

debating whether to continue to include the topic of settlement approval on its agenda, and if so, whether reform modeled after Rule 23(e) would be the best approach.

III. TPLF Disclosure

Over the past decade, third-party litigation funding in the United States has grown into a multi-billion industry.⁸⁴ Investor groups attracted by the prospect of substantial returns untethered to economic or market conditions are pouring unprecedented sums of money into litigation finance. The Advisory Committee has acknowledged that “TPLF is a growing field with varied subparts.”⁸⁵ The Committee has received multiple correspondence from LCJ and the U.S. Chamber Institute for Legal Reform (ILR), among others, calling for mandatory disclosure of TPLF agreements in all federal civil cases.

The basic concept of TPLF involves lenders fronting money to plaintiff law firms in exchange for an agreed-upon cut of any settlement or money judgment. The capital is almost always non-recourse, meaning that a TPLF firm’s right to

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 218.

⁸³ *Id.*

⁸⁴ See Lisa A. Rickard and Mark A. Behrens, *3rd-Party Litigation Funding Needs*

Transparency, LAW360, Oct. 17, 2016, available at <https://www.law360.com/articles/852142/opinion-3rd-party-litigation-funding-needs-transparency>.

⁸⁵ Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 30.

earn an investment return is contingent upon the litigation's success. Litigation funders view lawsuits as assets, just like any other receivables. As industry leader Burford Capital LLC has explained, "It may seem strange to think of litigation in that way, but if one strips away the drama and the collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands."⁸⁶ Burford reported a \$3.2 billion TPLF investment portfolio in 2018.⁸⁷ There are at least 30 other dedicated litigation funders.⁸⁸

Businesses and defense bar interests are concerned that TPLF may lead to speculative litigation, fuel mass torts, and both frustrate and increase the cost of

settlements.⁸⁹ Because such agreements may entitle the TPLF firm to "first cut" of any litigation proceeds, claimants may reject an otherwise acceptable settlement out of concern they will receive little or no recovery after the funder takes its share.⁹⁰ Civil justice organizations have also argued that the lack of transparency regarding TPLF agreements makes it difficult to police ethical violations and conflicts of interest.⁹¹

The main proposal under consideration by the Advisory Committee would amend Rule 26(a) to include an additional initial disclosure requirement that would cover any TPLF agreement.⁹² In 2014, the Committee considered a similar amendment, but it was not acted upon.⁹³ The explosive growth

⁸⁶ Burford Capital, *2015 Annual Report*, at 4, available at https://www.burfordcapital.com/wp-content/uploads/2016/08/25029_Burford_RA_2015_WEB_3.pdf.

⁸⁷ See Burford Capital, *2018 Annual Report*, at 8, available at <https://www.burfordcapital.com/wp-content/uploads/2019/04/BUR-31172-Annual-Report-2018-Web.pdf>.

⁸⁸ See Don Wade, *Third-Party Litigation Financing Grows into Popular, High-Stakes Trend*, MEMPHIS DAILY NEWS, Apr. 22, 2017, available at <https://www.memphisdailynews.com/news/2017/apr/22/third-party-litigation-financing-grows-into-popular-high-stakes-trend/>.

⁸⁹ See, e.g., Letter from Lisa Rickard, President of U.S. Chamber of Commerce Institute for Legal Reform, to Rebecca Womeldorf, Secretary of Committee on Rules of Practice and Procedure, June 1, 2017, available at <https://www.us>

[courts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf](https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf).

⁹⁰ See Letter from U.S. Chamber Institute for Legal Reform, American Insurance Association, American Tort Reform Association, Lawyers for Civil Justice, and National Association of Manufacturers to Jonathan Rose, Secretary of Committee on Rules of Practice and Procedure, Apr. 9, 2014, available at https://www.instituteforlegalreform.com/uploads/sites/1/4_-_FINAL_VERSION_-_TPLF_Disclosure_letter_4.9.pdf.

⁹¹ See Lawrence S. Schaner and Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, LAW360, Jan. 21, 2011, available at <https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding>.

⁹² See Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 219-220.

⁹³ See *id.* at 219.

of TPLF has prompted the Committee to revisit the topic.⁹⁴ The Committee is “looking at this issue through the MDL prism,” but appreciates that TPLF “is not a discrete MDL issue” and that a rule governing all cases may be appropriate.⁹⁵

As with developing possible solutions to address early vetting and interlocutory appeals in MDL cases, the Subcommittee has looked to proposed federal legislation as a resource.⁹⁶ The Subcommittee has reviewed provisions of the Litigation Funding Transparency Act of 2019, which would amend the MDL statute to require claimants to disclose “the identity of any commercial enterprise . . . that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action” and produce TPLF agreements for inspection and copying.⁹⁷ Language proposed by the U.S. Chamber ILR has similarly recommended disclosure of any agreement under which any person other than the attorney representing the party “has a right to receive compensation that is contingent on, and sourced

from, any proceeds of the civil action.”⁹⁸

It has been reported that six U.S. Courts of Appeals have local rules which require identifying litigation funders, and roughly 25% of all U.S. District Courts require disclosure of the identity of litigation funders in a civil case.⁹⁹ The wide divergence in rules, enforcement and practices within the federal judiciary presents a compelling reason for the Advisory Committee to develop a uniform rule.

In spite of these developments, the MDL Subcommittee has expressed reservations about proceeding with a rule amendment where “it seems that litigation funding is growing by leaps and bounds, and in many different contexts.”¹⁰⁰ The Subcommittee “does not have a clear picture of the current status or trajectory of TPLF” and has said that “very few MDL transferee judges presently report that they are aware of TPLF in the proceedings before them”—perhaps not surprising given the lack of transparency surrounding TPLF.

The Subcommittee is weighing whether to move forward with a

⁹⁴ See *id.* at 30.

⁹⁵ *Id.*

⁹⁶ See *id.* at 219.

⁹⁷ *Id.* (quoting S. 471 (116th Cong.)).

⁹⁸ *Id.* (quoting comment submitted by U.S. Chamber Institute for Legal Reform).

⁹⁹ See *Ten Observations About the MDL/TPLF Subcommittee’s Examination into the Function of the Federal Rules of Civil*

Procedure in Cases Consolidated for Pretrial Proceedings, *supra* note 48, at 6; see also Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, at 190, available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

¹⁰⁰ Advisory Committee on Civil Rules, *Agenda Book*, *supra* note 2, at 220.

potential rule amendment focused on MDL proceedings or “monitor developments with an eye to whether . . . some more general rulemaking response would be appropriate.”¹⁰¹

IV. Reliable Expert Evidence

Unrelated to the potential FRCP amendments discussed, the Advisory Committee on Rules of Evidence is contemplating changes to Rule 702 governing the testimony of expert witnesses. Rule 702 requires expert evidence to be based on “reliable principles and methods” that are “reliably applied . . . to the facts” of a given case.¹⁰² This rule formulation is the product of a 2000 amendment incorporating the U.S. Supreme Court’s charge to trial judges in *Daubert* to act as “gatekeepers” to exclude unreliable expert testimony.¹⁰³

The Advisory Committee is considering two possible amendments to Rule 702.¹⁰⁴ The first would prohibit an expert from overstating his or her conclusions. The Committee has heard specific concerns regarding the testimony of forensic experts in criminal cases

who purport to offer a “scientific” opinion that is “error free” when the methodology they employ fails to support that conclusion.¹⁰⁵ The Committee may consider an amendment to limit an expert’s testimony to the “opinions that may reasonably be drawn from the reliable application of the principles and methods.”¹⁰⁶ An alternative approach would amend Rule 702 to provide that the expert may not “overstate the opinions that result from the expert’s reliable application of the principles and methods.”¹⁰⁷

The draft Committee Note explains that the potential amendment would apply to all experts, but has “special relevance to testimony of forensic experts” because “many forensic processes do not comport with the scientific method” and thus cannot be stated or implied by an expert as empirically supported.¹⁰⁸ The draft Committee Note further states that “[c]laims that an expert expresses an opinion to a ‘reasonable degree of [scientific/medical/forensic] certainty’ should be prohibited under the amendment” because the phrase “has no scientific meaning and is misleading.”¹⁰⁹

¹⁰¹ *Id.* at 220.

¹⁰² FED. RULE OF EVID. 702.

¹⁰³ See Committee Notes on Rules--2000 Amendment, FED. RULE OF EVID. 702.

¹⁰⁴ See Advisory Committee on Rules of Evidence, *Agenda Book*, May 2019, at 14, available at <https://www.uscourts.gov/rules-policies/archives/agenda-books/>

advisory-committee-rules-evidence-may-2019.

¹⁰⁵ See *id.* at 14-15.

¹⁰⁶ *Id.* at 120.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

The second change being considered by the Committee would clarify that a trial judge must find the requirements of Rule 702 satisfied by a preponderance of the evidence.¹¹⁰ Rule 104(a) governs preliminary questions about whether a witness is qualified or evidence is admissible and incorporates a preponderance standard. The possible rule change would make clear in the text of Rule 702 or in a Committee Note that “questions of sufficiency of basis and application” of Rule 702 are questions of admissibility determined under Rule 104(a).¹¹¹ The discussion draft’s Committee Note summarizes the rationale for the potential change:

But unfortunately, many courts have held or declared that the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology, are generally questions of weight [for the jury to consider] and not admissibility. These rulings are an incorrect application of Rule 702 and 104(a) . . . In order to avoid confusion on this subject, it is useful for the trial court to specify that it is applying the Rule 104(a)

preponderance standard to all the admissibility requirements of Rule 702.¹¹²

Both draft amendments to Rule 702 could “serve a signaling function for trial judges and lawyers” in evaluating the reliability of expert testimony.¹¹³ Although the Committee has not made a decision to propose an amendment, and the precise form of any proposed amendment remains to be seen, defense interests are encouraging the Advisory Committee to move forward to clarify—and therefore increase adherence to—Rule 702 and its codification of *Daubert*.

V. Conclusion

Potential FRCP and FRE changes on the horizon could prove enormously consequential for all civil defendants. Expected changes to FRCP 30(b)(6) propose to facilitate constructive discussions among parties. Potential MDL rule changes propose to chip away at the uncertainty that comprises a substantial and ever-growing part of the federal docket. A possible TPLF disclosure rule would provide transparency into agreements that implicate a host of legal, ethical, and policy issues. Possible changes to FRE 702 would improve the

¹¹⁰ See *id.* at 15.

¹¹¹ *Id.*

¹¹² *Id.* at 123.

¹¹³ *Id.* at 16.

reliability of expert testimony. Each initiative will undoubtedly be the subject of continued discussion. Understanding how these initiatives came about, have progressed, and may continue to progress is essential to the defense bar's continuing advocacy for meaningful reform. Defense interests should monitor these issues and engage when opportunities arise.