



Proposed Federal Rule on MDLs Gives Parties Opportunity to Advance Merits-Driven Case Management

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Federal multidistrict litigation (“MDL”) was established to streamline mass litigation by centralizing related cases in one court that would address common pre-trial issues, before the cases are remanded to their original courts for individual resolution. The focus on common issues, however, means that the individual merits of most plaintiffs’ claims are not addressed so long as they are warehoused within the MDL. Plaintiffs with claims that would never merit individual filing have therefore flocked to MDLs in the hopes of benefiting from global settlements. This has led to widespread injustice and inefficiency in the MDL system.

MDL courts have tools to address these problems without abandoning their proper and intended role of efficiently moving cases toward just resolution on their merits, either by motion or on remand. Courts that engage with the merits early can cull unsupported claims before they overwhelm the litigation and intelligently plan the full lifecycle of the MDL through remand. This merits-based approach promotes efficiency without sacrificing fairness.

Sadly, many MDL courts refuse to engage with the merits and instead try to resolve the flood of claims by pushing premature global settlements. A myopic focus on settlement leads them to neglect the merits of individual MDL cases, resulting in unmanageable MDLs, unjust settlement pressure on defendants, and smaller recoveries for legitimate MDL plaintiffs.

Proponents of the merits-driven approach stand at a possible watershed moment. Proposed Federal Rule of Civil Procedure 16.1—the first Rule specific to MDLs—would govern the parties’ initial submissions to the MDL court and the court’s resulting case management order. Specifically, draft Rule 16.1 suggests to MDL courts that they: (a) schedule an initial status conference, (b) consider appointing coordinating counsel, (c) direct the parties to meet and prepare a report on court-designated topics (plus any additional topics the parties wish), and (d) enter an initial case management order.

As we expressed to the Advisory Committee on Civil Rules, the final language of Rule 16.1 should do more to direct MDL courts on implementing the merits-driven approach.¹ The final Rule should instruct that MDL case management orders should: obligate each plaintiff to support their claim with *prima facie* evidence; establish standing procedures for enforcing this obligation; and set a schedule aimed at efficiently moving cases toward resolution by motion or remand to their home courts. The Rule should also be clarified to avoid any suggestion that the Rule endorses MDL courts pushing premature settlement.

Nonetheless, the core provisions of the draft Rule and the draft Committee Note still reflect an endorsement of the merits-driven approach. The draft Rule is therefore a long-awaited reason for

¹ See Hollingsworth LLP Comments to Proposed Rule 16.1, *Rule 16.1 Should Provide Concrete Guidance on Implementing the Merits-Driven Approach to MDL Case Management Embraced by the Proposed Rule*, (Feb. 1, 2024), https://hollingsworthllp.com/wp-content/uploads/2024/02/Comment-to-Advisory-Cmte-on-FRCP-16.1_JohnstonFeldon_Feb_1_2024.pdf.

optimism for advocates for MDL fairness.

Assuming the Rule goes into effect without major revision, Rule 16.1 will represent a chance to develop a new body of case law that applies the merits-driven approach. At the very least, it will provide a new tool to dissuade MDL judges from pressuring parties into premature settlement divorced from the merits. Those invested in MDL fairness should therefore be poised to make the most of this opportunity.

What is a “Merits-Driven” Approach, and How Does It Promote Fairness and Efficiency?

A merits-driven approach focuses on efficiently enabling the parties to value cases within plaintiffs’ overall MDL inventory. Unlike in other litigation, cases within an MDL are rarely decided on their individual merits, whether by motion or trial. The vast majority are warehoused in the MDL, not subject to case-specific discovery under the Federal Rules of Civil Procedure. Without full case-specific discovery or individual judicial scrutiny, parties lack the typical methods for valuing legal claims. MDL courts typically limit themselves to addressing common issues—which usually focus almost exclusively on discovery from defendants—forcing parties to rely on limited information about a plaintiff’s claims. A merits-driven approach helps the parties overcome these challenges to valuing warehoused cases, as well as directly resolving cases within the MDL.

MDL courts’ early engagement with the merits serves two overarching goals: (1) culling meritless cases and (2) identifying representative cases for further development.

Anywhere between 20% and 50% of claims filed in MDLs are completely bogus, such as products liability actions in which the plaintiff did not use the product at issue.² Many other cases within an MDL have case-specific problems that would have deterred individual filing, such as a clearly expired statute of limitations. Judges who fail to engage with the merits of the MDL inventory leave unsupportable claims pending, which leads to inventories so bloated with junk that their sheer size creates undue settlement pressure or, alternatively, creates obstacles to fair resolutions. Plaintiffs with unsupportable claims frequently evade dismissal long enough that they may then participate in global settlements. The merits-driven approach culls illegitimate plaintiffs before they can cause further cost and delay or receive a windfall out of the pockets of MDL defendants and legitimate plaintiffs.

Once the MDL inventory contains only claims that are at least *prima facie* viable, efficient case management requires identifying representative cases for individual fact development. Merits decisions in representative cases provide information about the wider MDL inventory. It is therefore essential for MDL courts to permit the investigation necessary to identify a pool of representative cases and establish procedures for fairly picking cases from that pool. Representative case selection is particularly important in MDLs where formal bellwether cases are appropriate.

How Can Parties and Courts Use Rule 16.1 to Promote a Merits-Driven Approach?

In the inimitable words of Yogi Berra, “[i]f you don’t know where you are going, you’ll end up someplace else.” If parties want a case management strategy that efficiently addresses the merits, they need to plan for it.

Assuming no relevant changes in the final version, Rule 16.1(c) presents an unusual opportunity to practitioners. It instructs transferee courts to order parties to prepare a report prior to the initial MDL management conference, which “must address any matter designated by the court ... [and] may also address ***any other matter*** the parties wish to bring to the court’s attention.” (emphasis added). Although Rule 16.1(c) provides a list of potential topics that represent a good starting point, they should not be the last word on topics the transferee court must address to formulate a fair and efficient case management plan.

Rule 16.1(c) is literally an invitation to say anything to the transferee court. Proponents of the merits-driven approach must make the most of this invitation. Parties should prepare comprehensive

² See Advisory Committee on Civil Rules, *MDL Subcommittee Report*, at 142 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_o.pdf.

case management proposals that flag issues for early resolution and propose specifically how and when those issues can be most efficiently addressed. They should also note any necessary prerequisites for fair resolution.

Identify legal issues requiring resolution to value the MDL inventory. Draft Rule 16.1(c)(3) suggests that parties should “identify[] the principal factual and legal issues.” Under a merits-driven approach, these are the issues that, if resolved, would provide the most important information to valuing the MDL inventory. Although issues that would dispose of the entire litigation (*e.g.*, general causation or an element of liability) should obviously be included, even more limited rulings may facilitate efficient, merits-based resolution of the MDL. For example, an early summary judgment ruling establishing a date before which a defendant could not have been on notice of an alleged product defect will cleave off unmeritorious claims from the MDL inventory before the parties expend time and resources working them up. Early determinations of this kind promote efficient case management and help deter the filing of unmeritorious claims.

Propose census discovery that will cull spurious claims early and identify representative cases. Under draft Rule 16.1(c)(4), one potential topic for the initial case management reports is “how and when the parties will exchange information about the factual bases for their claims and defenses.” The draft Committee Note makes clear that this topic encompasses both case-specific discovery in individual cases and so-called “census” discovery directed to all MDL plaintiffs, like plaintiff fact sheets.

Robust census discovery is essential for the parties and the MDL court to understand the case inventory.³ Effective census discovery (1) adequately covers necessary factual issues, (2) imposes obligations equivalent to discovery under the Federal Rules of Civil Procedure, and (3) requires affirmative evidence, not merely a signed attestation. Successive rounds of census discovery are difficult and inefficient, so the Rule 16.1 phase is when parties should identify the information needed to make a preliminary merits assessment. For instance, census discovery in a product liability MDL should include (but not be limited to) information about the product used by plaintiff, the manner and timing of use/exposure, the injuries/damages plaintiff alleges and when they occurred,⁴ plaintiff’s medical history, and medical providers. When alternative causation is an issue, it should also include disclosure of plaintiff’s independent risk factors for the alleged injuries.

But the best census discovery is useless if the responses are missing, incomplete, or false. Veteran MDL practitioners know that complete and accurate plaintiff fact sheets are rarely the norm. MDL defendants are relegated to wasting time and resources to uncover information already within a plaintiff’s possession. MDL courts can limit this problem by issuing case management orders that obligate plaintiffs to comply with census discovery to the same degree as discovery under the other Federal Rules and establish standing procedures to enforce those obligations.⁵

Whether as part of census discovery or a separate *Lone Pine* order, MDL courts should require plaintiffs to provide *prima facie* evidence supporting key allegations. Such evidence can range from producing records to obligating plaintiffs to obtain medical evidence of a viable claim. For instance, MDL courts have required plaintiffs to produce case-specific expert reports or undergo medical testing to confirm they have an injury caused by a product at issue.⁶ Evidentiary requirements like this help

³ See Washington Legal Foundation, Comment Re: Proposed Rule of Civil Procedure 16.1 (Feb. 2, 2024), <https://www.wlf.org/wp-content/uploads/2024/01/WLF-Comment-MDL-Rule.pdf>.

⁴ Bolch Jud. Inst., Duke L. Sch., Guidelines and Best Practices for Large and Mass-Tort MDLs 11 (2d ed. 2018) [hereinafter MDL Guidelines], <https://perma.cc/EX84-6FHC> (discussing pharmaceutical and medical device products liability cases); see also *id.* (discussing personal injury and employment cases).

⁵ MDL Guidelines, *supra* n.4, at 10; see also *id.* at 13 (“[T]imely and substantial compliance with fact sheet requirements, including completion of ‘core criteria,’ should be the norm.”).

⁶ See, *e.g.*, *In re Zostavax (Zoster Vaccine Live) Prods. Liab. Litig.*, 2022 WL 952179 (E.D. Pa. March 30, 2022) (genetic testing); *In re Fosamax Prod. Liab. Litig.*, No. 06 MD 1789 JFK, 2012 WL 5877418, at *4 (S.D.N.Y. Nov. 20, 2012) (report by case-specific medical expert); *In re Rezulin Prods. Liab. Litig.*, No. 00 Civ. 2843(LAK), 2005 WL 1105067, at *1 (S.D.N.Y. May

filter out plaintiffs who assert junk claims or will not act to prosecute their claims.⁷

Resist attempts to push settlement before understanding the merits. The merits-driven approach facilitates fair settlement. As legal and factual issues are resolved, either within the MDL or on remand, both sides acquire information needed to value the case inventory. When their valuations get close enough that litigation is no longer worthwhile, rational parties will reach a party-led, merits-driven settlement.

Draft Rule 16.1(c)(9) suggests the court should consider whether to facilitate settlement during the initial case management phase. Despite the draft Committee Note’s admonition that “the question whether parties reach a settlement is just that—a decision to be made by the parties,” MDL courts will likely misinterpret this provision as granting *carte blanche* to push settlement before resolving key factual or legal issues.

To guard against this scenario, advocates for a merits-driven approach should consider: (1) putting settlement discussions on a separate track from the litigation to keep the litigation moving forward⁸ and/or (2) identifying for the MDL court the litigation benchmarks that must be met for the parties to have enough information to engage in meaningful, merits-driven settlement discussions.

Party-proposed informational benchmarks can include completion of census discovery, resolution of key legal issues, completion of full discovery in a subset of the inventory, or possibly verdicts from bellwether trials via a *Lexecon* waiver. Educating the court about the information parties need to fairly evaluate the claims will hopefully make the court less likely to push settlement from the MDL’s outset.

Plan for terminating the MDL and remanding pending cases for trial. Parties should address the eventual motion for remand at the case management stage, as contemplated by draft Rule 16.1(c)(7)’s proposal that “likely pretrial motions” be included in the pretrial report. Indeed, there is growing consensus around “the emerging practice of setting an end-date for the MDL, then working back into a trial schedule.”⁹ This practice helps ensure the cases will proceed toward resolutions on their merits, instead of remaining indefinitely warehoused within the MDL.

How Can Parties and Courts Promote the Merits-Driven Approach After the Rule 16.1 Initial Case Management Phase?

Dwight D. Eisenhower said, “[i]n preparing for battle I always found that plans are useless, but planning is indispensable.” While the initial case management phase is indispensable, robotically executing a plan made at the litigation’s outset fails to account for the chaotic reality of litigation. MDLs are information-generating devices; it would be a shameful waste not to use that information to make the MDL fairer and more efficient.

Course correction through motions practice. Parties cannot let courts lose sight of the merits-driven approach after the initial MDL case management stage. The draft Committee Note accompanying draft Rule 16.1(d) provides that the transferee “court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings.” Parties can best promote fairness in MDLs by holding courts to this guidance.

Additional or amended orders will be appropriate when: (1) Rule 16.1 does not result in a comprehensive merits-driven case management plan, (2) intervening circumstances thwart efficient

9, 2005) (medical testing).

⁷ MDL Guidelines, *supra* n.4, at 104 (“Lone Pine Orders can be issued at any time ... to weed out truly meritless cases and cases that claimant and counsel are not prepared to pursue, and to ensure that the transferor courts receive only viable cases.”).

⁸ See ‘Judges Feel a Lot of Pressure’: Jurists Debate Path for Unsettled MDL Cases, Am. Lawyer, Sept. 14, 2022, at 2 (U.S. District Judge Joseph Goodwin of the Southern District of West Virginia proposing separate tracks for settlement and trials).

⁹ MDL Guidelines, *supra* n.4, at 3; *id.* at 1 (explaining that remand “may be on the table from the first days of the MDL, with judges setting end-dates for resolution and working backwards to set the case-management schedule.”); *id.* at 94 (“As a mechanism to keep counsel keenly focused on moving the cases forward, some transferee judges now set end dates for their MDLs, at which point any cases not resolved are remanded.”).

case management (*e.g.*, widespread failure to provide complete, accurate census discovery),¹⁰ or (3) new common factual or legal issues arise that would be more efficiently resolved by the MDL court. Periodically revisiting the case management order can ensure that the best laid Rule 16.1 plans do not go awry.

Selecting representative cases, including possible formal bellwethers. When choosing cases for case-specific workup, courts and parties should select cases representative of the broader case inventory. Understanding the merits of a representative case educates the parties about the value of similar claims in the inventory, while atypical claims have no broader implications.

Parties should not presume that formal bellwethers are appropriate for every MDL. When there are comparatively few claims in the inventory or discovery has shown that the inventory's idiosyncrasies outweigh its commonalities, prompt remand for trial will be the most efficient approach. But, when bellwether cases are appropriate, efficiency demands selection of representative cases.

Accurate completion of robust census discovery is critical to identifying representative cases for individual case workup. Unreliable and incomplete responses obscure both the facts of individual cases that might be representative and the commonalities among the MDL case inventory. Parties invested in the merits-driven approach should therefore resist a case management order that selects bellwethers without adequate information.

Identifying the most informative cases to focus on requires more than census discovery alone. Census discovery is most effective as a basis for developing a pool of cases that can be vetted through full case-specific discovery under the Federal Rules of Civil Procedure. Discovery pools must be sufficiently large to provide a reasonable sample of the inventory. Large pools of vetted cases also limit plaintiffs' ability to manipulate the bellwether selections by strategically dismissing unfavorable cases.

If formal bellwether selection becomes appropriate, the court should remove outliers from within the pool of vetted cases, then randomly select from the remainder. Ideally, the parties would collaborate with the court to identify representative cases. However, empirical analysis shows that plaintiffs' counsel tend to pick bellwethers with claims "much stronger than a random sample."¹¹ In contrast, "defense selections were comparable to the random selections."¹² It is an open question whether this is true because MDL defendants are motivated to pick representative cases or because MDL defendants receive such bad information about plaintiffs' claims that they cannot identify defense-friendly cases. Regardless, random selection from within a larger discovery pool helps promote just MDLs by preventing unfair gamesmanship in bellwether selections.

Remanding individual cases while the MDL remains active. Whether decided at the initial case management phase under Rule 16.1(c)(7) or later in the MDL, the process and timing for remanding cases is critical to the merits-driven approach. Courts should remand individual cases as soon as it is efficient to do so.¹³ Too often, MDL courts delay remand while addressing ancillary questions better considered on remand by courts that have the benefit of a record based on full case-specific discovery.

Remand is superior to conducting trials in the MDL court under a *Lexecon* waiver because resolving individual cases under different states' laws and in front of geographically diverse juries provides more useful data to value the overall case inventory.¹⁴ Likewise, early rulings on similar issues by different trial judges, instead of just the MDL judge, reveal where there is judicial consensus and where courts reach

¹⁰ See MDL Guidelines, *supra* n.4, at 14 ("When fact sheets have been submitted with inaccurate information, the court should consider requiring that all individual parties submit some minimum quantum of evidence.").

¹¹ Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litig.: Empirical Evidence in Favor of Random Selection*, 47 Akron L. Rev. 663, 690 (2014).

¹² *Id.*

¹³ See *Hamer v. LivaNova Deutschland GmbH*, 994 F.3d 173, 180–81 (3d Cir. 2021) (Transferee courts should suggest remand as soon as remand is more efficient and must remand when no pretrial issues remain.).

¹⁴ See Report of the Co-Ordinating Committee on Multiple Litigation Recommending, New Section 1407, Title 28 (Mar. 2, 1965), reprinted in *In re Plumbing Fixture Cases*, 298 F. Supp. 484 (JPML Dec. 27, 1968).

different outcomes. If MDL courts do not have a specific end date, then limited remand for early trials can be vital to valuing the broader MDL inventory.

Conclusion

Despite the likelihood that the final language of Rule 16.1 will not go as far as it should, parties should use its adoption to push MDL courts to apply the merits-driven approach to case management. If enacted, Rule 16.1 will be the only formal guidance governing the MDL process for the foreseeable future. Courts will inevitably create a new body of case law interpreting it. Parties invested in promoting fairness and efficiency within the MDL system must seize this opportunity to shape the early development of that case law and use Rule 16.1 to further cement the merits-driven approach into the MDL system.