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New Rule on MDLs Should Prompt Courts to Reevaluate Involvement in Settlement

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Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

– Chief Justice John Roberts, Confirmation Hearing Opening Statement

In a major league baseball game, you don't expect the umpire to suggest a curveball to the pitcher and then tell the batter whether he should bunt or swing for the fences. As a player, you would probably feel it was not an umpire's job, and you would certainly worry that not taking the umpire's suggestion could affect the next call.

A proposed Federal Rule of Civil Procedure on multidistrict litigation—the first rule specific to MDLs—has put a spotlight on MDL judges' proper role in settlement. If adopted, proposed Rule 16.1 will govern MDL parties' initial submissions to the court and the court's resulting initial case management order. Given that MDL courts currently have no formal guidance, the stakes for the new rule are high.

When the preliminary draft of Rule 16.1 was released for public comment, defense-side commenters (including us) widely criticized the inclusion in the draft list of potential topics for the initial case management conference "whether the court should consider measures to facilitate settlement." Because the parties have no information to value plaintiffs' claims before they—and the MDL court—engage with the merits, settlement at the initial case management phase will often be the result of economic or judicial pressure without regard to fairness. Revisions to the

Courtesy photos

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preliminary draft rule and its Committee Note have at least partially addressed defense-side concerns, including by replacing "settlement" with "resolution." However, proposed Rule 16.1 brings into sharp relief the question of what role, if any, an MDL judge should have in promoting settlement between the parties.

The Constitution guarantees civil litigants the right to due process of law. No judge can legally force a settlement, even if settlement is the only rational outcome. Indeed, proposed Rule 16.1's Committee Note specifically acknowledges that "the question whether parties reach a settlement is just that—a decision made by the parties."

Perhaps a judge's direct input could be appropriate in the rare circumstance when parties are legally unsophisticated, driven by emotion, or not represented by competent counsel. But, to continue the baseball metaphor, MDLs are the big leagues. Defendants are typically sophisticated parties who hire experienced MDL counsel, and plaintiffs' attorneys picked for leadership counsel positions are almost invariably experienced, repeat players.

MDL settlement negotiations are especially susceptible to improper judicial influence because a single judge controls so many cases. The assigned judge presides over the pre-trial proceedings for the entire collection of factually related cases centralized in the MDL. The cases stay in the MDL until they are resolved by motion or remanded to their home courts for trial. Absent a *Lexecon* waiver, cases filed outside the MDL district cannot proceed toward trial until remand. As one federal judge explained, some MDL judges may "hang on to transferred cases to enhance the likelihood of settlement," essentially holding hostage the parties' day in court.

A judicial focus on settlement distracts from and delays an MDL court's engagement on the merits. In almost one-third of privately settled products liability MDLs, the judge did not rule on a single merits motion before settlement." If these settlements were not based on an evaluation of the merits, what are they based on, and how could they be just?

MDL judges can best facilitate settlement by efficiently deciding merits issues to enable the parties to better value plaintiffs' claims. When the parties' valuations of the claims are close enough that litigation is no longer worthwhile, they will reach a party-led settlement. An MDL judge offering his or her independent perspective on a potential settlement creates a risk of influencing settlement discussions. Participation in settlement discussions might also influence the judge in future rulings, even if only unconsciously.

In our view, MDL judges who decide merits questions (including magistrate judges) should eschew direct involvement with settlement discussions and avoid receiving detailed reports on the negotiations. Every case management order that includes a discussion of settlement processes under proposed Rule 16.1(b)(3)(E) should include the following guardrails:

- *Third Parties Only*. A judge's rulings in a case should flow from the legal and factual merits. Judges consciously or unconsciously changing how they manage an MDL to enhance the likelihood of settlement undercuts the fair process to which the parties are entitled. If the judge believes an independent perspective

would be beneficial, a third-party mediator without other involvement in the litigation may be appropriate. This approach avoids even the appearance of the MDL judge pushing a particular outcome.

- *Communication Protocol*. It is not much better than having the judge directly involved when third-party mediators provide detailed reports to the judge on settlement discussions and how the parties are conducting themselves. To ensure the parties' honest participation, the mediator and parties should agree on what information, if any, will be relayed to the judge. There is usually no need for the mediator and judge to communicate beyond relaying whether the mediation was successful, unsuccessful, or continuing. Communication protocols like this allow MDL parties to be confident that their decisions in the negotiating room will not affect judgment calls from the bench.
- *Separate Schedules*. Settlement should not be a planned part of a case's lifecycle. Settlement happens when the court's legal rulings provide the parties with enough information about the cases' likely value at trial that the parties can agree to a resolution. Case schedules generally should not delay merits decisions to allow procedures to facilitate settlement. These built-in delays are frequently counterproductive. Parties near settlement can always move the court for a temporary stay of proceedings. When a case is put into suspended animation before there is sufficient information to value plaintiffs' claims, the only reason to settle is to avoid the cost of maintaining the litigation. When a settlement is the result of economic pressure from the litigation, it calls into question whether the settlement reflects a fair valuation based on the merits.

If proposed Rule 16.1 is adopted, MDL courts and practitioners will be starting with a clean slate. Courts will be setting new precedent out of necessity. It is therefore the perfect moment to reevaluate MDL courts' efforts to facilitate settlement. Because of MDLs' unique characteristics, courts' involvement in settlement should be even more limited than in other cases. MDLs will produce fairer, more efficient outcomes when judges fulfill their proper role—as umpires, not players.

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