LAW360®

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Federal MDL Rule Benefits From Public Comments

By **Robert Johnston and Gary Feldon** (April 10, 2024, 5:33 PM EDT)

Robert Johnston

Gary Feldon

For at least six years, the Advisory Committee on Civil Rules has been contemplating adding a new rule to the Federal Rules of Civil Procedure to govern multidistrict litigation.[1] In March 2023, the committee released its preliminary draft of proposed Rule 16.1, the first rule specific to MDLs.[2]

The preliminary draft of Rule 16.1 drew major attention from MDL stakeholders aligned with both plaintiffs and defendants. By the end of the public comment period on Feb. 16 of this year, the committee had held three public hearings and received nearly 70 written comments, including ours.[3]

This level of interest is an indication of just how high the stakes are for a federal rule governing MDLs. Since the creation of MDLs in 1968, the proportion of civil cases on the federal docket that are centralized in MDLs has grown steadily, peaking at more than 70% last year.[4]

If adopted, Rule 16.1 will provide MDL courts the first formal guidance on managing the logistical hurdles of this type of mass litigation.

In response to the feedback received during the public comment period, the committee twice met to revise the proposed language of Rule 16.1 and the authoritative commentary on the rule in its committee note.[5] On April 9, the committee **unanimously approved the revised language**.

Proposed Rule 16.1 will face additional review within the judiciary and from Congress before it is anticipated to go into effect on Dec. 1, 2025.[6] However, the language just adopted by the committee is very likely to become the law.

The revised draft of proposed Rule 16.1 instructs MDL courts to (1) schedule an initial case management conference, (2) order the parties to prepare a preconference report setting out their views on case management issues, and (3) issue an order after the conference that addresses appointment of leadership counsel and enters an initial case management plan.[7]

Rule 16.1(b) provides a default list of case management issues for the preconference report — although the MDL court can modify that list — and the parties can always address "any other matter the parties wish to bring to the court's attention."[8]

Plaintiffs Bar Concerns

The earlier draft of Rule 16.1 contained a provision that would allow the MDL court to designate interim "coordinating counsel" to help with the preconference report and the initial case management conference before the court addresses the question of permanent leadership counsel.[9]

However, virtually every plaintiff-side comment criticized the provision as unnecessary, and many stressed the unfair advantage in an attorney's candidacy for appointment as permanent leadership counsel.[10]

In response to these objections, the committee cut the coordinating counsel provision and imposed a requirement that MDL courts' initial case management order include a decision about "whether and how leadership counsel will be appointed."[11]

MDL courts' decisions on more substantive case management topics must wait until the resolution of the leadership counsel issue, although the required preconference report will still contain the parties' initial views on those topics.[12]

As plaintiffs attorneys are the ones really affected by the provision on coordinating counsel, defense-side commenters basically ignored it and instead advocated for revisions to the rule's substantive provisions.

Defense Bar Concerns

Although defense-side comments did not lead the committee to make obvious changes to the language of proposed Rule 16.1, revisions to the draft committee note did address many defense concerns.

For example, several comments took issue with courts' often casual enforcement of the Federal Rules of Civil Procedure in MDLs. As U.S. Circuit Judge Raymond Kethledge noted in a 2020 ruling by the U.S. Court of Appeal for the Sixth District in In re: National Prescription Opiate Litigation, without contrary guidance, many courts have treated MDLs as "some kind of judicial border country, where the rules are few and the law rarely makes an appearance."[13]

In an apparent response to this concern, the committee added new language to the draft committee note affirming that "[t]he Rules of Civil Procedure, including the pleading rules, continue to apply in MDL proceedings."[14]

The most common problem with MDLs raised by defense-side commenters is the problem of identifying and culling meritless claims.[15]

The prospect of meritless claims going undiscovered and being included in a global MDL settlement attracts multitudes of plaintiffs with claims that are either completely bogus (e.g., because they never used the product at issue, in a product liability litigation) or that would never merit individual filing (e.g., barred by a clearly expired statute of limitations).

In its supplemental comment to the committee, Lawyers for Civil Justice provided compelling evidence of the scope of the problem of meritless claims:

- 75% of cases in In re: Mentor Corp. Transobturator Sling Products Liability Litigation, in the U.S. District Court for the Middle District of Georgia, were dismissed by stipulation, dismissed voluntarily or decided against plaintiffs on summary judgment.
- More than 50% of all the cases in In re: Ethicon Inc. Pelvic Repair System Products Liability Litigation, in the U.S. District Court for the Southern District of West Virginia, were dismissed for factual defects or inability to establish an injury.
- Around 30% of plaintiffs could not make even a prima facie showing to support their claims in In re: Vioxx Products Liability Litigation, in the U.S. District Court for the Eastern District of Louisiana.
- In In re: Zofran (Ondansetron) Products Liability Litigation, in the U.S. District Court for the District of Massachusetts, roughly 40% of cases were dismissed, with the "common denominator" being that they "should never have been filed in the first place."[16]

Meritless claims like these increase the cost of litigation, make MDLs difficult to manage, create undue settlement pressure on defendants and dilute the value of legitimate plaintiffs' claims. New language in the draft committee note addresses the problem of meritless claims in two ways.

The revised committee note frames meritless claims as those that "have been asserted without the inquiry called for by Rule 11(b)."[17] Rule 11(b) obligates attorneys to undertake a reasonable inquiry before making representations to the court in complaints or other filings.[18]

Rule 11(c) empowers courts to enforce that obligation with sanctions.[19] The revised committee note framing the problem of meritless claims as a Rule 11 issue is a powerful reminder that meritless claims are all filed by attorneys or parties subject to Rule 11.

Especially given the committee's language affirming that MDL pleadings are subject to the Federal Rules of Civil Procedure, the draft committee note should put MDL attorneys on notice of the consequences of failing to exercise the diligence required by Rule 11(b).

The revised committee note now also recognizes that MDL courts may "employ expedited methods to resolve claims or defenses not supported after" early exchanges of information, such as plaintiff fact sheets.[20] These expedited methods could include so-called Lone Pine orders and similar methods of addressing meritless claims.

Under a Lone Pine order, an MDL court dismisses as meritless the claims of plaintiffs who cannot make an affirmative showing that their claims have at least prima facie merit.[21] Such methods can be effective in culling meritless cases, to minimize the injustice and inefficiency they cause.

Another widespread defense-side concern with the preliminary draft of Rule 16.1 was that it could be misread to permit MDL courts to push premature settlements.[22] Because the parties cannot value MDL claims on their merits at the litigation's outset, settlement at that time can only be the result of judicial or economic pressure divorced from the merits.

While the draft committee note has always recognized that "the question whether parties reach a settlement is just that — a decision to be made by the parties," the preliminary draft of Rule 16.1 could have been misinterpreted to undercut that principle by listing judicial efforts to facilitate settlement as a topic for the initial case management conference.[23]

The revised draft of Rule 16.1 delays consideration of more substantive issues, including attempts to facilitate settlement, until at least after the initial case management conference and the issue of leadership counsel has been decided. The draft committee note also now provides that a party's position on an issue may be that it would be premature to address it at a given point in the litigation.[24]

Together with the commitment to party-led settlement already in the committee note, these revisions will hopefully prevent MDL courts from focusing on premature settlement instead of engaging on the merits of plaintiffs' claims.

Defense-side commenters also advocated for Rule 16.1 to instruct MDL courts to regularly revisit the case management order, to ensure the MDL is proceeding efficiently.[25] This point was partially addressed by the revised draft Rule 16.1 delaying a decision on more substantive issues.

Moreover, new language in the draft committee note explains that "[t]he goal of the initial management conference is to begin to develop an initial management plan, not necessarily to adopt a final plan for the entirety of the MDL proceedings."[26]

This version of the rule therefore encourages MDL courts to engage immediately with the litigation's merits, while acknowledging that it requires time to obtain the information necessary to make efficient case management decisions.

Conclusion

The revised draft of Rule 16.1 reflects the Advisory Committee on Civil Rules' careful consideration of the public comments, and willingness to try to address them evenhandedly. Plaintiffs attorneys got their preferred process for deciding leadership counsel. MDL defendants got additional formal guidance to courts on MDL case management, especially on the problem of meritless claims.

Although it does not go as far as many commenters hoped, the current version of Rule 16.1, if adopted, would be a significant new tool in promoting efficient, merits-driven MDL case management.

Robert E. Johnston and Gary Feldon are partners at Hollingsworth LLP.

[1] Advisory Committee on Civil Rules, Minutes of March 28, 2023, Meeting, 71-76, (2023), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-march-2023.

[2] Id. at 112-118.

[3] Robert E. Johnston and Gary Feldon, 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; Rulemaking Docket, Proposed Amendments to the Federal Rules of Civil Procedure [hereinafter "Rulemaking Docket"], https://www.regulations.gov/docket/USC-RULES-CV-2023-0003/comments (last visited March 28, 2024).

[4] Multidistrict Litigation Act of 1968, codified at 28 U.S.C. §1407; U.S. Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. §1407 Fiscal Year 2023, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Fiscal_Year_2023_Report-11-29-23_0.pdf; U.S. Courts, Federal Judicial Caseload Statistics 2023, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023.

[5] Judicial Conference of the United States, Agenda for April 9, 2024, Meeting of the Advisory Committee on Civil Rules, 133 (May 22, 2024), https://www.uscourts.gov/sites/default/files/2024-04-09_agenda_book_for_civil_rules_meeting_final.pdf [hereinafter "April 9 Agenda"].

[6] See Administrative Office of the U.S. Courts, Overview for the Bench, Bar, and Public, https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public.

[7] April 9 Agenda, supra n.5, at 136-139.

[8] Id. at 136-138.

[9] Id. at 133.

[10] See, e.g., Rulemaking Docket, supra n.3, (comments of McGlamry, M., Chalos, M., Acosta, E.).

[11] See April 9 Agenda, supra n.5, at 133-136, 139.

[12] Id. at 138.

[13] In re: Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020).

[14] See April 9 Agenda, supra n.5, at 145.

[15] See Lawyers for Civil Justice, Clarity on the Two "Rules Problems": Empirical Evidence of the Insufficient Claims Problem in MDLs and Key Testimony on Much-Needed Revisions to the Proposed Rule 16.1 and Privilege Log Amendments (Feb. 16, 2024), https://www.lfcj.com/document-directory/lcj-supplementary-public-comment-on-proposed-mdl-rule-161-and-privilege-log-amendments; see also Johnston & Feldon, supra n.3, at 3, 6.

[16] Id. at 3-6.

[17] April 9 Agenda, supra n.5, at 145.

[18] Fed. R. Civ. P. 11(b).

[19] Fed. R. Civ. P. 11(c).

[20] April 9 Agenda, supra n.5, 145-146.

[21] See Bolch Jud. Inst., Duke L. Sch., Guidelines and Best Practices for Large and Mass-Tort MDLs 31, 104 (2d ed. 2018), https://perma.cc/EX84-6FHC.

[22] See Johnston & Feldon, supra n.3, at 2, 8-9; see also Rulemaking Docket, supra n.3 (comment of Washington Legal Foundation, Sept. 18, 2023 comment from Lawyers for Civil Justice).

[23] April 9 Agenda, supra n.5, at 179.

[24] Id. at 140.

[25] Johnston & Feldon, supra n.3, at 9-11.

[26] April 9 Agenda, supra n.5, at 140.
