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# Need for reform highlighted in multidistrict litigation cases

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As the power that the federal judiciary has aggrandized to itself arguably eclipses that of the political branches, much attention has rightly been given to the breakneck pace at which the Senate has confirmed President Donald Trump's judicial nominees. One of the principal powers that courts exercise in the United States is handling mass tort and products liability claims, in contrast to the administrative state that largely serves a regulatory function in Europe. In the federal system, the principal manner in which that power is exercised in these types of cases is through the multidistrict litigation, or MDL, procedures.

Some statistics will illustrate the scope of MDLs in federal court that place entire industries in the palm of the hand of a single federal judge without any meaningful process for review. At the end of the fiscal year 2019, 46.7% of 288,173 civil cases pending in federal court were in 194 MDLs. The 22 largest MDLs contained 121,295 cases, or 42% of the total number of civil cases, and were overseen by just 21, or 3.1% of the 677 federal district court judges. That is a concentration of substantial power in a small group of judges.

As an example, the opiate MDL, which is pending before Judge Dan A. Polster of the Northern District of Ohio, consists of 2,700 individual cases brought by 34,448 cities, counties and municipalities against drug manufacturers and distributors.

The MDL process was developed in the 1960s culminating in the enactment of 28 USC Sec. 1407 in 1968 that created the Judicial Panel on Multidistrict Litigation, which has the authority to determine whether civil actions pending in two or more federal judicial districts should be transferred to a single federal district court for pretrial proceedings. If it is determined that the cases involve one or more common questions of fact and are transferred, the MDL panel will then select the district court and assign a judge or judges to oversee the litigation. The purpose is to conserve the resources of the parties and the court, and to avoid duplication of discovery and prevent inconsistent pretrial rulings.

Despite these efficiencies, problems with the process have arisen, and there has been a continuing 2½-year process to reform MDL procedures. Those reform proceedings are pending before the Advisory Committee on Civil Rules, which recommends rule changes to the Judicial Conference's Committee on Rules of Practice and Procedure. This reform process, principally

advanced by the defense bar, has recently focused on three potential reforms: an "initial census" rule to address potentially meritless claims, a procedure for interlocutory review, and a process, similar to Rule 23, to give judicial oversight of settlements. The first two issues have gained the most attention and are of the greatest importance.

There is currently no effective manner to address the merit of individual claims in an MDL because Rules 12(b)(6) and 11, the usual way meritless claims are dealt with in individual cases, are not available as they are deemed impractical in the MDL context. However, this is in derogation of Rule 1's requirement that the Federal Rules of Civil Procedure "govern all actions and proceedings" and thus leads to inconsistent and ad hoc procedures for handling these issues in cases transferred to an MDL. A rule that requires some evidence by the plaintiff of exposure to the alleged harm and damages therefrom would be an appropriate reform.

Just as important, and as a check on the power of an individual federal judge in an MDL, is the need for a meaningful process of interlocutory review. Under the current rules, an appeal of an adverse discovery ruling or other similar interlocutory order, can only be taken by defendants at the end of the case, as the alternatives of filing a petition for writ of mandamus or a petition under 28 USC Sec.1292(b), which is similar to Illinois Supreme Court Rule 308(a), are not likely to succeed. In an individual case such restriction on appeal of interlocutory orders be may appropriate, but when one considers that a single discovery ruling in an MDL could impact thousands of cases and the outlay of an extraordinary amount of expense for what might be an erroneous ruling, a meaningful appellate review process is appropriate.

Given the difficulty in obtaining mandamus relief that is often not a realistic option for defendants. Likewise, it is often futile to seek certification under Section 1292(b) from the district court judge of interlocutory issue for review. A proposal that has been made is by Professor Brian Fitzpatrick of Vanderbilt Law School that each side in an MDL be permitted one interlocutory appeal, similar to coaches in the NFL that have a limited number of challenges. The parties are in the best position to determine what is important enough to appeal and would then efficiently decide when to use their appeal. While the matter was on appeal, the case could continue otherwise.

A recent decision from the 6th U.S. Circuit Court of Appeals in the opiate MDL, though favorable to the defendants, illustrates the issues. *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838 (6th Cir. 2020). The district court allowed two Ohio counties to amend their complaints to add "dispensary" claims against the pharmacy defendants even though the deadline to amend the pleadings had passed by 19 months.

The district court refused to adjudicate motions to dismiss and, based upon an assertion that the data would be available for future trials in the MDL, the court ordered nationwide prescription data to be produced despite the claims being limited to only two counties. In granting the writ, the court found that no "good cause" had been made, much less shown for the delay, and reasoned that efficiencies in the MDL are "no substitute for the showing of diligence."

The 6th Circuit stated that MDL litigation is "not some kind of judicial border country, where the rules are few and the law rarely makes an appearance … [n]or can a party's rights in one case be impinged to create efficiencies in the MDL generally." This ruling is an exception that shows the need for rules revisions in MDLs.

Concentration of power in any one person or branch of government is anathema to the order erected by the federal Constitution. The rules need amendment to bring MDLs more in line with procedures applicable to individual cases while maintaining the efficiencies that benefit all involved.