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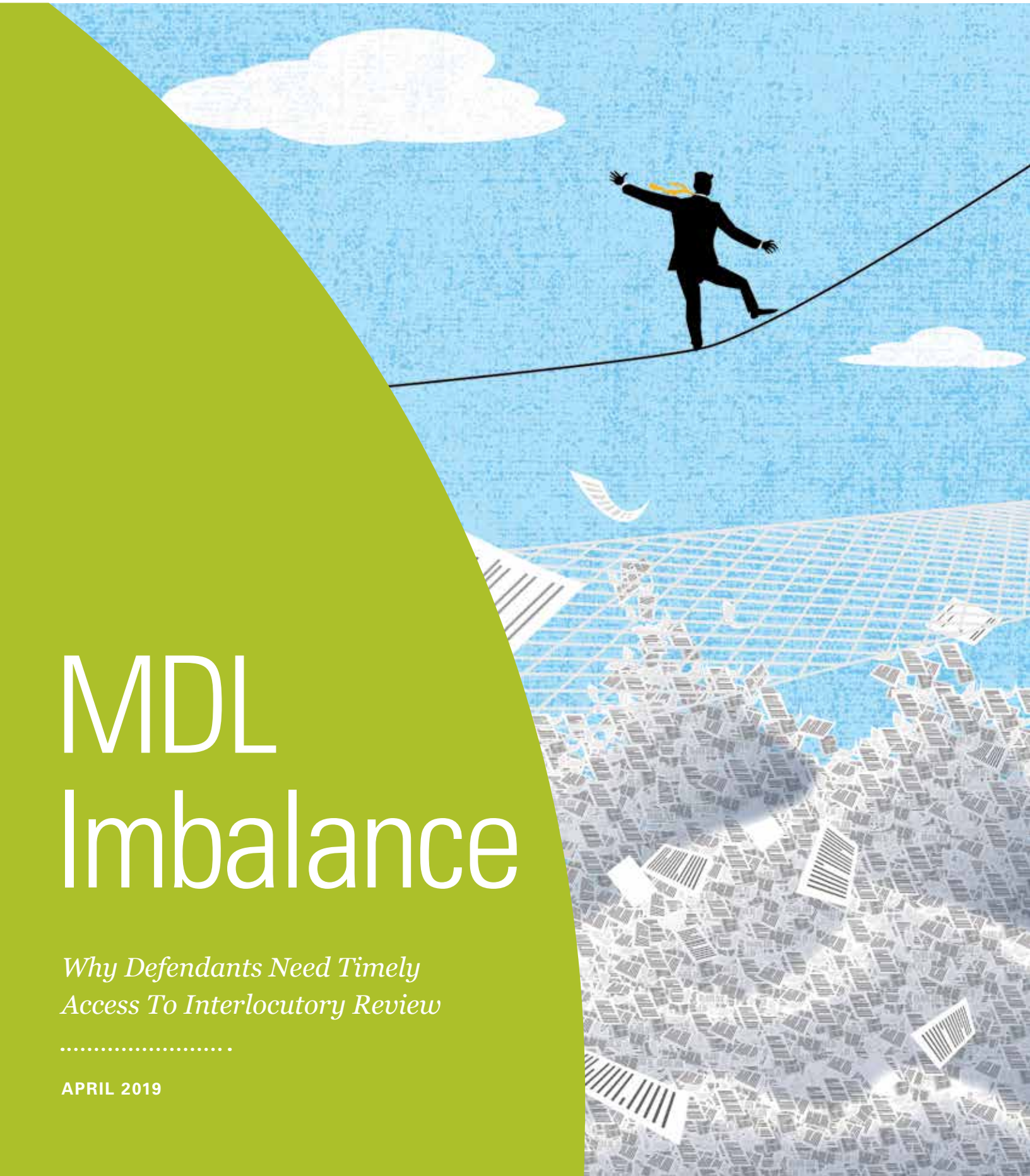

MDL Imbalance

Why Defendants Need Timely Access To Interlocutory Review

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Executive Summary

Multidistrict litigation proceedings (MDLs) were established to streamline the handling of groups of similar cases brought against the same defendant(s) by transferring all such cases temporarily to a single federal court to coordinate pretrial proceedings (e.g., discovery, pretrial motions) for the benefit of all cases.

In MDL proceedings, pretrial rulings with regard to jurisdiction, preemption, and the purported science underlying plaintiffs' claims often impact many (if not all) of the coordinated cases. If defendants win such motions and claims are dismissed as a result, the rulings are immediately appealable as final orders. On the other hand, if defendants lose such motions, the decisions are not immediately appealable. Even though such rulings may apply to thousands of cases in an MDL proceeding, defendants may appeal only after a case in the proceeding has been tried to verdict, unless the MDL judge chooses to certify the order for interlocutory appeal. As is detailed further in this paper, such certifications are rare in current MDL practice.

Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials. The settlements that ensue are often distorted because the soundness of the MDL court's dispositive motion rulings has not been tested on appeal. This troubling dynamic is not only inefficient, but also highly unfair and one-sided given that it is only the denial of broadly applicable dispositive motions that is not immediately appealable; plaintiffs are free to appeal the grants of such motions posthaste. These consequences could largely be ameliorated if dispositive interlocutory rulings against defendants by MDL judges were immediately appealable on an expedited basis, ensuring that appellate courts have an opportunity to clarify fundamental issues in MDL proceedings.

Part I of this paper addresses the significance of cross-cutting interlocutory rulings in MDL proceedings and why the current path for interlocutory appeals of rulings denying dispositive motions—28

U.S.C. § 1292(b)—is woefully inadequate. Part II addresses the tendency of interlocutory rulings in MDL proceedings to generate distorted settlements and inefficiencies that are contrary to the purpose of multidistrict litigation. Part III details potential solutions to this problem.

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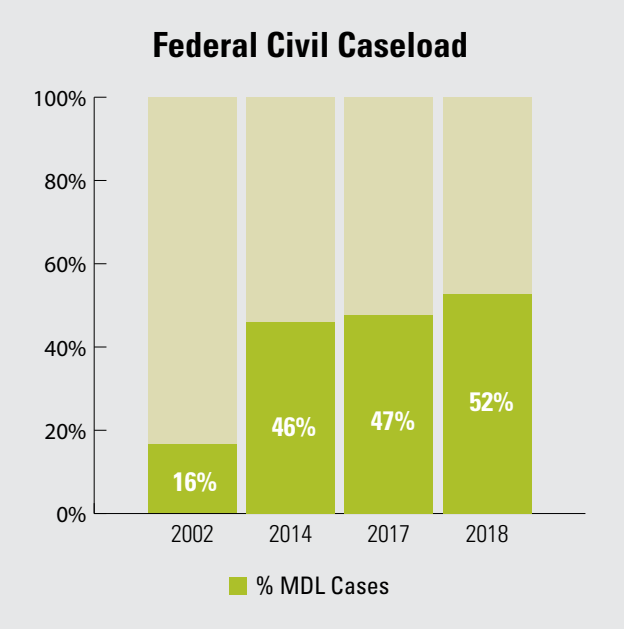
No Adequate Appeal Mechanism Exists

The supposed hallmark of multidistrict litigation is the efficiency gained from coordinating overlapping cases before a single judge for pretrial matters.

Enacted in 1968, the MDL statute authorizes coordinated pretrial proceedings before a single judge "[w]hen civil actions involving one or more common questions of fact are pending in different districts"; when "transfers for such proceedings will be for the convenience of parties and witnesses"; and when transfer "will promote the just and efficient conduct of such actions."[1]

Although multidistrict litigation has historically only comprised a small portion of all federal civil litigation, that is no longer the case. In 2002, MDL proceedings represented only 16 percent of the total federal civil docket. By 2018, however, that number had more than tripled, with MDLs comprising almost 52 percent of the total civil caseload in U.S. federal courts.[2]



This graph is based on data collected by Lawyers for Civil Justice.[3]

> *"[N]early 90 percent of those MDL proceedings are mass tort product liability actions."*

And nearly 90 percent of those MDL proceedings are mass tort product liability actions.[4]

"The actions consolidated in an MDL proceeding can number in the thousands."[5] Individual judges, for example, are handling respectively: more than 11,000 cases alleging that a chemotherapy drug causes permanent hair loss; more than 8,000 cases alleging that heartburn medications are linked to acute and chronic kidney disease; and more than 6,000 cases alleging claims for design defect and failure to warn stemming from a medical device used to prevent blood clots.[6] In short, "these vast numbers of cases are in the control of just a handful of judges: 15 judges … are in charge of more than 40 percent of the entire civil docket before U.S. district judges."[7]

The centralization of so many individual cases before just a handful of federal district court judges means that "[a] single [MDL] trial-court decision can implicate hundreds, or even thousands, of individual lawsuits."[8] "One legal ruling by one judge can reallocate liability risks in thousands of individual lawsuits."[9] As one MDL judge recently recognized after deciding a cross-cutting and purely legal question regarding the proper standard of review for certain antitrust claims under the Sherman Act, such a "pretrial ruling … has a 'dramatically larger impact' than a similar ruling would have in non-aggregated litigation."[10]

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Examples of Cross-Cutting Dispositive Motions

In the mass tort context, motions for summary judgment arguing that state tort claims are preempted by federal law can be a powerful vehicle for ending an entire MDL proceeding or, at the very least, excising certain issues from the broader MDL and streamlining the global litigation. MDL courts also routinely issue rulings on the admissibility of expert testimony, which is one means of addressing large numbers of cases—or even an entire litigation—where the proffered science is lacking.[11]

While these types of rulings are extremely effective if utilized properly, MDL judges are often reluctant to dispose of cases by way of summary judgment and *Daubert*. For example, the MDL judge presiding over hundreds of cases involving Monsanto's purportedly carcinogenic Roundup weedkiller has repeatedly denied the defendant's preemption-based motions for summary judgment.

The crux of Monsanto's most recent motion for summary judgment was two-fold: (1) the Federal Insecticide, Fungicide, and Rodenticide Act expressly preempts plaintiffs' warning-based claims because those claims impose different requirements for labeling than what is mandated by the federal statute; and (2) the warning-based and design-based claims are preempted

because the Environmental Protection Agency (EPA) requires pre-approval before Monsanto can either change the formulation or change the statements on the label, and there is "clear evidence" that the EPA would have rejected the very formulation or label changes that the plaintiffs in the MDL proceeding are seeking.[12]

The MDL judge recently denied Monsanto's motion for summary judgment, rejecting the manufacturer's argument that there was clear evidence that the EPA would have rejected any attempt by Monsanto to add a cancer warning to the applicable Roundup label or change the formulation of the product.[13]

A similar approach was taken in litigation involving the drug Abilify. The defendants in that MDL proceeding unsuccessfully moved for summary judgment on general causation on the ground that the plaintiffs lacked admissible evidence. The central allegation in that litigation is that Abilify caused uncontrollable impulsive behaviors in individuals taking the drug. The court found that most of the plaintiffs' evidence on general causation satisfied the dictates of *Daubert,* even though it conceded that the medical literature was "inconclusive on the question of whether depressive, anxiety and personality disorders are causal risk factors for pathological gambling."[14]

After describing the general causation evidence, the MDL court addressed each of the plaintiffs' experts, finding faults with many, though ultimately allowing the plaintiffs' theory of general causation based on a curiously timed study devised by an expert who contacted the plaintiffs' counsel before he even developed the research protocol for his study.[15]

The Final Judgment Rule

Despite the overwhelming importance of these summary judgment and *Daubert* rulings, they are generally not subject to immediate appellate review when they are decided against defendants. This is so because the final judgment rule limits appeals as of right until each individual case has been tried to verdict.[16] The only exception to that rule is codified at 28 U.S.C. § 1292(b), which provides that "[w]hen a district judge … shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order."[17]

"Despite the overwhelming importance of these summary judgment and Daubert *rulings, they are generally not subject to immediate appellate review when they are decided against defendants."*

If the district court certifies an order in this manner, the court of appeals may permit an appeal.[18] Importantly, "[c]ertification of an issue for interlocutory appeal is reserved for truly exceptional cases" such that "[m]ost interlocutory orders do not meet this test."[19] Indeed, "[e]ven when trial courts certify, the appellate courts typically refuse to accept the appeals."[20]

Interlocutory Appeal Motions are Rarely Made and Seldom Granted

Against this backdrop, motions seeking interlocutory appellate review of questions that may have broad dispositive effects on mass tort MDL cases appear to be relatively infrequent, and the few such motions that have been made have not succeeded. These conclusions were recently reached by one of the authors of this paper and a team of other lawyers who reviewed the dockets of 127 mass tort MDL proceedings to assess: (1) the frequency of § 1292(b) certification motions seeking appellate review of questions that, if ultimately resolved in the proponent's favor, would be dispositive of large numbers of claims in the proceeding; and (2) how often such motions are granted.[21]

Their research yielded two basic findings:

- In the 127 dockets reviewed, the lawyers found only 15 instances in which § 1292(b) certification requests of this sort were made;[22] and
- They found no instance in which a defendant's § 1292(b) request for certification of a ruling potentially dispositive of a large number of claims was granted.[23]

> *"[I]n the dockets of the 60 mass tort MDL proceedings open as of July 2018, the study located just four examples of efforts to obtain § 1292(b) certifications to pursue appeals of interlocutory rulings."*

For example, in the dockets of the 60 mass tort MDL proceedings open as of July 2018, the study located just four examples of efforts to obtain § 1292(b) certifications to pursue appeals of interlocutory rulings potentially dispositive of a large swath of other cases in the MDL proceeding:

- In MDL No. 1657 (*In re Vioxx Marketing, Sales Practices and Products Liability Litigation*), the defendant moved for § 1292(b) certification of an order denying a preemption-based summary judgment motion that, if granted, would have been preclusive of more than 10,000 claims then pending in this MDL proceeding.[24] The certification motion was fully briefed and argued,[25] but while still pending, it was mooted by a global settlement.[26]
- In MDL No. 2545 (*In re Testosterone Replacement Therapy Products Liability Litigation*), a defendant sought § 1292(b) review of an order denying a preemption-based motion for summary judgment as to all failure-to-warn claims it was facing. The defendant emphasized that a grant of its motion would dispose of more than 4,200 actions pending in the proceeding. The defendant's motion was denied.[27]

- In MDL No. 2592 (*In re Xarelto (Rivaroxaban) Products Liability Litigation*), the defendants moved for § 1292(b) certification of an order denying a preemption-based summary judgment motion that would have precluded most (if not all) of the more than 23,000 claims in this MDL proceeding. The motion was fully briefed, but it was later withdrawn in light of the U.S. Supreme Court's grant of a writ of certiorari on a preemption question in an unrelated case.[28]

- In MDL No. 2641 (*In re Bard IVC Filters Products Liability Litigation*), the district court denied the defendant's motion for § 1292(b) certification of an order denying a preemption-based dismissal motion.[29] In seeking certification, the defendant argued that if the appeal were successful, "it could completely terminate the litigation of the 3,000 personal injury cases remaining in this MDL."[30]

Similarly, in the five mass tort MDL proceedings closed during the January-August 2018 time period, there were no motions seeking appeals of dispositive or *Daubert* rulings with implications for the broader MDL. Those MDL proceedings were: MDL No. 1789 (*In re Fosamax Products Liability Litigation*), MDL No. 2004 (*In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation*), MDL No. 2299 (*In re Actos (Pioglitazone) Products Liability Litigation*), MDL No. 2342 (*In re Zoloft (Sertaline Hydrochloride) Products Liability Litigation*), and MDL No. 2497 (*In re Air Crash at San Francisco, California on July 6, 2013*).[31]

The same is true with respect to the six mass tort MDL proceedings that closed during 2017. Those MDL proceedings were: MDL No. 1842 (*In re Kugel Mesh Hernia Patch Products Liability Litigation*), MDL No. 1943 (*In re Levaquin Products Liability Litigation*), MDL No. 2395 (*In re Air Crash at Georgetown, Guyana, on July 30, 2011*), MDL No. 2502 (*In re Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation*), MDL No. 2511 (*In re Neomedic Pelvic Repair System Products Liability Litigation*), and MDL No. 2654 (*In re Amtrak Train Derailment in Philadelphia, Pennsylvania, on May 12, 2015*).[32]

In the eight mass tort MDL proceedings closed in 2016, the only motion of the kind identified above was by plaintiffs who, strangely, sought to certify a ruling dismissing claims on preemption grounds in MDL No. 2226 (*In re Darvocet, Darvon and Propoxyphene Products Liability Litigation*).[33] As the court explained, § 1292(b) certification was nonsensical since final judgments had already been entered in the cases in question, which were immediately appealable.[34] The other seven mass tort MDL proceedings closed in 2016 were: MDL No. 1203 (*In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Products Liability Litigation*), MDL No. 1953 (*In re Heparin Products Liability Litigation*), MDL No. 2051 (*In re Denture Cream Products Liability Litigation*), MDL No. 2404 (*In re Nexium (Esomeprazole) Products Liability Litigation*), MDL No. 2434 (*In re Mirena IUD Products Liability Litigation*), MDL No. 2454 (*In re Franck's Lab, Inc., Products Liability Litigation*), and MDL No. 2652 (*In re Ethicon, Inc., Power Morcellator Products Liability Litigation*).[35]

Similarly, in the eight mass tort MDL proceedings closed during 2015, only one request for a § 1292(b) appeal of a dispositive ruling potentially dispositive of other claims in the MDL could be identified:

- In MDL No. 1629 (*In re Neurontin Marketing, Sales Practices and Products Liability Litigation*), the trial court denied defendant's request for § 1292(b) certification of an order rejecting a preemption motion that would have been dispositive of the hundreds of claims it faced in the MDL proceeding.[36]

The other seven mass tort MDLs closed in 2015 were: MDL No. 1507 (*In re Prempro Products Liability Litigation*), MDL No. 1626 (*In re Accutane (Isotretinoin) Products Liability Litigation*), MDL No. 1742 (*In re Ortho Evra Products Liability Litigation*), MDL No. 1909 (*In re Gadolinium Contrast Dyes Products Liability Litigation*), MDL No. 1928 (*In re Trasylol Products Liability Litigation*), MDL No. 2092 (*In re Chantix (Varenicline) Products Liability Litigation*), and MDL No. 2458 (*In re Effexor (Venlafaxine Hydrochloride) Products Liability Litigation*).[37]

In sum, as the findings of this recent study illustrate, certification of dispositive MDL rulings for appeal is so rare that it is not a viable mechanism for securing appellate review of the denial of summary judgment and *Daubert* motions outside the auspices of the final judgment rule. As discussed in the next section, this lack of an expeditious appellate path forward creates improvident and inefficient dynamics that severely undermine the very purpose of multidistrict litigation.

> *"[C]ertification of dispositive MDL rulings for appeal is so rare that it is not a viable mechanism for securing appellate review of the denial of summary judgment and* Daubert *motions outside the auspices of the final judgment rule."*

Lack of Immediate Review Generates Distorted Settlements and Inefficient Litigation

Because there is currently no viable mechanism of appealing the denial of dispositive interlocutory MDL motions, defendants faced with such an unfavorable ruling have a Hobson's choice: they can either proceed to trial and await an appellate forum years down the road after having spent substantial sums of money, or enter into a settlement that is based on a single judge's potentially erroneous ruling.

When a defendant opts to proceed with trial instead of making sprawling litigation go away through a global settlement, the lack of an immediate appellate safety valve ensures that the claimed legal errors will be repeated in multiple trials in the MDL proceeding.

The reality is that relatively few cases that survive a *Daubert* challenge or a motion for summary judgment end up going to trial. The defendants do not want to bear the enormous costs associated with such a trial and risk a potentially ruinous verdict that might be reversed at some later date. It is also well understood that the MDL process "creates incentives for judges to treat settlement as the ultimate goal,"[38] especially when MDL courts may "struggle to deal effectively with caseloads expanding at a precipitous rate,"[39] making global resolution seem like the only plausible goal.[40]

Indeed, such pressure is analogous to the pressure that comes with class certification,[41] and that has led appellate courts to be solicitous of improvidently certified class actions.[42] But unlike class actions, MDL proceedings do not have the benefit of a procedural Rule 23 analog that can correct erroneous dispositive rulings, keep settlement pressure in check, and authorize interlocutory appellate review

where district courts go astray.[43] As a result, appellate courts rarely have an opportunity to clarify fundamental issues in an MDL, and the ensuing settlements are often distorted as a result of the uncertainty regarding the validity of the MDL judge's ruling. As one federal appeals court judge recently put it, an MDL "court's patent errors can compound into unjust settlements."[44]

For example, in the product liability MDL proceeding involving MTBE, a gasoline oxygenate, the MDL judge issued a number of interlocutory rulings pertaining to highly complex and disputed legal questions of preemption and causation. The plaintiffs alleged that gasoline containing MTBE had leaked or spilled into the ground, contaminating their water sources and raising various health concerns.[45] The MDL was created in 2000 and by 2007, "[a] single judge had 'issued thirty-six substantive opinions and orders, comprising more than one thousand pages of text …'"[46] The defendants repeatedly sought interlocutory appeal of these key dispositive rulings but were rebuffed each time by the MDL court.

> *"But unlike class actions, MDL proceedings do not have the benefit of a procedural Rule 23 analog that can correct erroneous dispositive rulings, keep settlement pressure in check, and authorize interlocutory appellate review where district courts go astray."*

Specifically, the defendants argued that imposing liability on defendants for using MTBE would interfere with EPA regulations that allowed them a choice of oxygenates, including MTBE.[47] The MDL judge rejected this argument and refused to certify the pretrial preemption decisions for immediate review under § 1292(b), finding that there was no "substantial ground for difference of opinion,"[48] even though "courts [were] split" on the fundamental preemption question.[49] Further, "[i]n response to the plaintiffs' difficulties in establishing causation, the [MDL] court 'fashioned a new collective liability' theory" that "no other court—state or federal, trial or appellate—ha[d] occasion to review."[50]

Despite "the novelty of the theory and the court's own difficulty in articulating it consistently," the court refused to certify its causation rulings for interlocutory review, once again keeping highly consequential rulings with implications for hundreds of other cases outside the reach of the Second Circuit.[51] One can only speculate what would have happened had these purely legal issues been squarely resolved by the Second Circuit. But one thing is clear: in the wake of the failed attempts to appeal, the defendants decided to settle the overwhelming majority of the cases. "It stands to reason that the cost of these settlements was higher as a result of the district court's rulings and the inability

to obtain immediate appellate review. Indeed, appellate review might have established that the defendants had no liability at all."[52]

Similarly, in the MDL proceeding involving the drug Vioxx, the court denied the pharmaceutical manufacturer's preemption-based summary judgment motion that, if granted, would have been preclusive of more than 10,000 claims.[53] The manufacturer argued that the plaintiffs' failure-to-warn claims were preempted because the Vioxx label had been approved by the FDA, relying on various FDA statements supporting the view that the comprehensive regulatory scheme established for prescription drugs would not be able to function properly if juries applying state law were permitted to "force" drug manufacturers to include additional information in their drug labeling.[54] Although cognizant of a clear split in authority among courts that had addressed this argument, the MDL judge rejected the defendant's argument, finding that "the FDA's current view on the question of immunity for prescription drug manufacturers [was] entirely unpersuasive."[55]

The defendant subsequently moved for § 1292(b) certification, which was ultimately mooted by a global settlement. While it is impossible to know whether the certification motion would have been granted—and, if so, whether the Fifth Circuit would have even accepted the appeal—the research previously discussed strongly suggests that the ruling would not have been immediately appealable. In truth, expeditious clarification of the dispositive and cross-cutting legal ruling by an appellate court would have facilitated the parties' settlement negotiations and may have even spurred a quicker global resolution of the broader litigation.[56] Notably, where defendants are unwilling to settle, the parties end up litigating the same claims of legal errors in subsequent cases and trials through duplicative and highly inefficient motion practice. MDL judges have generally declined to stay proceedings during the pendency of appeals, even where they involve issues that "may impact the cases that are not yet tried."[57]

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For example, in the Pinnacle hip implant MDL proceeding, the defendants were required to proceed with consecutive trials without the benefit of appellate review, even though similar pro-plaintiff judicial errors would likely be repeated. In one iteration of the litigation, the defendants petitioned for a writ of mandamus, requesting that the Fifth Circuit order the MDL court to vacate its order finding that the defendants had waived their personal jurisdiction and venue objections to a Texas trial involving several plaintiffs from New York.[58] While a majority of the Fifth Circuit panel formally denied the petition on the ground that the defendants would have an adequate remedy on appeal,

another majority "request[ed] the district court to vacate its ruling on waiver and to withdraw its order for a trial beginning September 5, 2017" based on the finding that the district court committed "grave error" in finding waiver.[59]

Judge Jones criticized the MDL "court's repeated refusals to slow down its processes while the appeal of [cross-cutting] jurisdiction[al] [issues] in [a] … bellwether set of cases is taking place."[60] As she recognized, "[t]here [were] numerous ongoing ramifications of the [MDL] court's erroneous decision that harm[ed] not only these petitioners but, importantly, the plaintiffs in these 9,000+ cases."[61] Nevertheless, the MDL court went forward with a multi-plaintiff trial in the face of the Fifth Circuit's finding that its waiver holding was erroneous.

Other examples abound. In *In re C. R. Bard, Inc., Pelvic Repair System Products Liability Litigation*, the defendant, a manufacturer of allegedly defective transvaginal mesh products, was unable to secure a stay of future trials in the MDL proceeding pending the appeal of the MDL judge's rulings regarding the admissibility of FDA regulatory evidence.[62] The MDL court reasoned that "Bard will not be irreparably injured by waiting until the last two bellwether trials conclude; however, considering the size and expense of this MDL, the plaintiffs might be injured by delaying these last two bellwether trials."[63]

> *"After all, the information-gathering purpose of bellwether trials cannot be served by verdicts that rest on significant evidentiary and legal errors."*

In addition, the court refused to certify its ruling for interlocutory review, summarily concluding that "[i]f Bard seeks appellate review, standard appeals from final judgment are available."[64] Although the Fourth Circuit ultimately affirmed the evidentiary rulings, the appellate ruling was not handed down until nearly 3.5 years later—long after Bard had been forced to advance its arguments in successive and inefficient fashion in multiple other cases.

Similarly, in *In re E. I. du Pont de Nemours & Co.*, the MDL judge recognized that "some issues on appeal may impact the cases that are not yet tried in th[e] MDL."[65] Nonetheless, the court declined to stay further trials pending the resolution of the appeal, reasoning that bellwether "trials are meant not only for determination of the rights and obligations of the litigants, but for a special purpose … information gathering that may lead to a global settlement."[66] This reasoning defies logic. After all, the information-gathering purpose of bellwether trials cannot be served by verdicts that rest on significant evidentiary and legal errors.

If denials of dispositive motions were immediately appealable, the fundamental issue in question would be clarified by the appellate court much sooner in the life of an MDL proceeding, likely avoiding the inefficiencies illustrated, even if the MDL

court continues with proceedings (and even trials) while that appeal is pending. Such clarification might also facilitate global settlement negotiations. Affording defendants who lose a dispositive motion with an immediate right to appeal would effectively level the playing field with plaintiffs, who are able to appeal the grant of any such motion as soon as it is entered. In short, the sooner the appellate process starts, the better.

At bottom, "the MDL disrupts traditional practices of appellate review."[67] "The fact that pretrial orders are not routinely appealable" before final judgment "is clearly an enormous factor, with a variety of implications," the "[m]ost obvious" of which is "the inability for error correction relating to pretrial rulings that can have enormous significance for many litigants."[68] "A single MDL judge's articulation of the law in essence becomes the law, with no review or input from other judges."[69] The upshot is a cycle of premature and potentially questionable settlements or needless repetition of the same legal errors in case after case. Needless to say, neither trend comports with the spirit (let alone the text) of the MDL statute, which was enacted to "promote the just and efficient conduct" of related actions.[70]

Proposals for Reform

In light of the troubling trends discussed, lawmakers, academics, and practitioners have offered various proposals that would authorize immediate, interlocutory review of certain orders in mass tort MDL proceedings.

Most notably, a bill passed by the U.S. House of Representatives in early 2017 (H.R. 985, the Fairness in Class Action Litigation Act (FICALA)) would have required a federal appeals court to accept an interlocutory appeal of an order made in a mass tort MDL proceeding if "an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings."[71]

Similar proposals have been made to the Advisory Committee on Civil Rules, which is currently exploring whether to draft an amendment to the Federal Rules of Civil Procedure authorizing prompt appellate review of key interlocutory rulings.[72] Lawyers for Civil Justice (LCJ) has proposed that a handful of specific rulings be declared immediately appealable in certain circumstances, including motions to dismiss for lack of personal jurisdiction; motions for summary judgment; and *Daubert* motions.[73] Some observers have criticized these proposals, arguing, *inter alia*, that the language defining the interlocutory orders subject to appeal was vague and overly broad.[74]

Regardless of the source of the proposal, a rule authorizing immediate review of interlocutory orders should be adopted—and should explicitly address the following key issues.

Applicability of the Authorization

A rule authorizing immediate review of interlocutory rulings should be limited to mass tort MDL proceedings, not the entire universe of all MDL rulings. After all, the research previously outlined demonstrates that the distorted settlements and inefficiencies associated with the current state of play are disproportionately concentrated in mass tort MDL proceedings, which frequently encompass thousands of individual personal injury lawsuits.

Many of the other MDL proceedings are comprised of putative class actions for which a special interlocutory review provision for the most important issue—class certification—already exists in Fed. R. Civ. P. 23(f). Some other MDL proceedings are too small in scope to warrant such prioritization. As a result, it seems logical to limit any MDL interlocutory review

provision to mass tort MDL proceedings—i.e., proceedings in which individual personal injury actions are a significant component. The interlocutory review provision in FICALA was circumscribed in that manner.[75]

Mandatory Versus Discretionary Review

Under FICALA and some of the proposals submitted to the Advisory Committee on Civil Rules, a petitioner would have a right to appellate review of certain defined categories of interlocutory MDL rulings; the court of appeals would not have discretion to decide whether a particular appeal would be heard.[76] This concept of mandatory interlocutory review has faced considerable opposition. In its most recent report, the MDL Subcommittee noted that it was "not aware of any receptivity to such a command in the rules."[77] According to that report, "[g]iven criminal appeals and 'emergency' matters of various sorts, mandatory expedited review does not seem workable."[78] Instead, the Subcommittee posited, "[a]n alternative might be to adopt a discretionary rule like Rule 23(f) for class-certification orders," which the Subcommittee suggested "would be an acceptable method of introducing more flexibility without adding unnecessary delay or requiring highly precise criteria for review."[79]

Needless to say, mandatory review would be the better course, given the possibility that appellate courts may simply decline to review sweeping, dispositive issues in some mass tort MDL proceedings. Increasingly, federal appellate courts have taken that sort of "hands-off" approach with respect to petitions for review of class-certification rulings under Fed. R. Civ. P. 23(f). It is precisely that hesitancy to grant discretionary review of class certification orders that prompted the House of Representatives to include a provision in FICALA making such appeals mandatory.[80]

While the best option, if mandatory appellate review of interlocutory mass tort MDL rulings proves to be unpalatable, a discretionary review rule should be explored. Any discretionary rule should be accompanied by an Advisory Committee note urging courts of appeals to err on the side of granting review, particularly as to broadly applicable, potentially dispositive issues.

> *"[A] rule authorizing immediate review of interlocutory orders should be adopted ..."*

Selection Criteria

Some of the proposals submitted to the Advisory Committee specifically delineated the types of rulings that would be covered by the interlocutory review rule, lest appeals be taken from discovery rulings or other non-dispositive orders that appellate courts likely would have no appetite to resolve. For example, to ensure that appeals are only taken from rulings with broader implications for an MDL proceeding, any interlocutory appeal provision should be specifically limited to rulings on dispositive and *Daubert* motions—i.e., motions to dismiss for lack of personal jurisdiction (Federal Rule of Civil Procedure 12(b)(2)); motions for summary judgment (Federal Rule of Civil Procedure 56); and *Daubert* motions (Federal Rule of Evidence 702).[81]

These are the kinds of rulings that are likely to involve cross-cutting legal issues (e.g., preemption) that will recur throughout an MDL proceeding and the appellate resolution of which will "promote the just and efficient conduct" of the proceedings.[82] To that end, appeals should be permitted only as to orders that would be applicable to a minimum number of actions (e.g., 50 cases).[83]

As noted in the latest MDL Subcommittee report, if an interlocutory appeal rule authorizes discretionary (as opposed to mandatory) appeals, "highly precise criteria for review" will be less necessary.[84] Thus, the proposals offering specific limitations on the orders eligible for review should probably be discarded in favor of a more flexible guide.

One potentially workable standard floated by Professor Ed Cooper, the Reporter for the Advisory Committee on Civil Rules, would be "modeled on the one for direct appeals to the court of appeals in bankruptcy proceedings"—i.e., whether an appeal would "materially advance the progress of the case or proceeding."[85] That standard appears to capture the basic purpose of any MDL interlocutory review process, which is to resolve cross-cutting legal questions that might dispose of large numbers of claims or facilitate settlement discussions.[86] However, the application of that standard in the bankruptcy appeal context provides few clues about what results it would yield as to interlocutory MDL orders.[87]

MDL Court Input

Some commentators have also raised the question whether the MDL court itself should be able to weigh in on whether interlocutory appellate review of one of its orders should be granted. As the MDL Subcommittee has framed the issue, "it is difficult to understand how the court of appeals would exercise [its] discretion [in allowing an appeal of a non-final MDL order] without knowing the district judge's attitude about the impact of immediate review on the conduct of the MDL proceedings."[88] On the other hand, giving a district court an explicit role in determining whether an appeal will occur "might make the court of appeals too dependent on the district court's view of what would further the goals of the MDL centralization."[89] Such a protocol could effectively reinstate the veto over appellate review that MDL

> *"[T]he notes to whatever rule is ultimately adopted should stress that the court of appeals must exercise its independent judgment about the propriety of an immediate appeal ..."*

courts have under 28 U.S. … § 1292(b), which of course is the source of the problems addressed by this paper.

On balance, the MDL court—which is charged with managing the proceeding—should probably be heard on whether immediate appellate review of an interlocutory order is advisable. However, the notes to whatever rule is ultimately adopted should stress that the court of appeals must exercise its independent judgment about the propriety of an immediate appeal, particularly since the rule will have been adopted (at least in part) in response to MDL courts' reluctance to certify rulings for interlocutory appeal under 28 U.S.C. § 1292(b).

As to procedure, the latest MDL Subcommittee report outlines two possible scenarios for affording an MDL judge the opportunity to opine on the desirability of immediate review: (a) the interlocutory review petition could be filed in the MDL court and transmitted to the court of appeals; or (b) the court of appeals could be authorized to invite the views of the MDL judge.[90] It would be advisable that any commentary by the MDL judge should be offered before the appeal is taken, perhaps by requiring the petitioner to first notify the MDL court of its intentions and asking the court to put any comments it may have on the record. Eliciting the MDL judge's input after the appeal has been filed would create an awkward situation in which the district court is effectively filing briefings before the appellate court, potentially in direct opposition to one of the parties before it. Such an approach may put the petitioner in the unfair situation of having to refute briefings from both the trial court and one or more opposing parties.

Timing Considerations

The final issue that an MDL interlocutory review rule should address is timing, including: (a) the deadline for seeking review; (b) whether mass tort MDL interlocutory appeals should be given expedited consideration; and (c) whether any or all aspects of the MDL proceeding should be stayed during the pendency of appeals.

> *"As with other interlocutory review provisions ... there should be deadlines for getting the appellate process started."*

DEADLINE FOR SEEKING REVIEW

As with other interlocutory review provisions, such as 28 U.S.C. § 1292(b) or Fed. R. Civ. P. 23(f),[91] there should be deadlines for getting the appellate process started. One approach would be to set a deadline by which the interlocutory review proponent must give notice to the district court of its intent to seek review of an order—perhaps ten days after issuance of the order for which review is proposed. The rule would then set an additional deadline by which the proponent must petition the court of appeals for an order granting permission to appeal—perhaps twenty days later. As discussed, the proponent would be obliged to include in its submission any comments issued by the MDL court, and the deadline for the petition would implicitly create a window during which the MDL court would put its comments on the record.

The most recent MDL Subcommittee report briefly addressed this aspect of timing by questioning whether there should be a "time limit on petitioning for review."[92] In particular, the report posits that a strict deadline following a particular order "might not be suitable in the MDL setting" because, among other things, "a series of rulings in separate cases might reach a crescendo showing that interlocutory review is of such moment to the MDL proceeding as to justify immediate review."[93]

From the research detailed earlier in this paper, however, that scenario does not seem to arise in mass tort MDL proceedings. Rather, the most obvious candidates for appellate review in these proceedings are orders denying motions styled as broadly applicable to the cases in the entire litigation or orders for which the importance to other cases in the MDL proceeding is readily apparent. In the end, however, establishing a firm time limit for petitioning for review may be of little consequence, as the proponent of interlocutory review will have strong incentives to proceed quickly.

EXPEDITED CONSIDERATION

The second timing issue is whether interlocutory mass tort MDL appeals should be given expedited consideration. An interlocutory mass tort MDL provision could address that issue by providing as follows: "The Court of Appeals shall set any such appeal for expedited consideration, taking into account the national interest of promoting the just and efficient administration of multidistrict litigation proceedings." Such language would mirror that used in a U.S. Code section in which

> *"[R]equiring that mass tort MDL interlocutory appeals be afforded expedited consideration is critical."*

Congress chose to mandate expedited review.[94] Although better formulations may be available,[95] requiring that mass tort MDL interlocutory appeals be afforded expedited consideration is critical.

It is well known that federal appellate courts must juggle priorities among important criminal and civil cases, and that elevating the treatment of particular classes of cases should not be done lightly. However, as previously discussed, mass tort MDL cases constitute a very substantial percentage of all civil actions pending in most circuits, and it makes sense to give some priority to appeals that may result in the dismissal of numerous civil actions or guide those cases toward prompt settlements.

STAY OF PROCEEDINGS

The final timing consideration is whether any or all aspects of the MDL proceeding should be stayed during the pendency of an interlocutory appeal. In some instances, a partial or full stay of proceedings pending appeal may be advisable, while in other instances, there may be strong reasons to continue litigating. As a result, the most prudent approach would be to leave this important question to case-by-case determinations. In adopting the interlocutory appeal provision for class certification rulings in Fed. R. Civ. P. 23(f), the framers included the following language: "An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders."[96] A similar approach seems appropriate in the mass tort MDL context.

Conclusion

At present, there is no viable, reliable path for appealing the denial of potentially dispositive pretrial motions in MDL proceedings that are of profound importance to the broader claims pool.

While any of the current proposals under consideration would go a long way towards rectifying this problem, it is essential that the ultimate rule clearly resolve various nettlesome questions—specifically, whether it applies to all MDL proceedings or a specified subset (e.g., mass tort MDL proceedings); whether appeals are mandatory or discretionary; what kinds of rulings would be covered by the provision; whether the MDL judge should have input on the advisability of an appeal; and various questions related to timing.

Overall, the most sensible rule would apply to mass tort MDL proceedings and provide for mandatory interlocutory review of summary judgment, *Daubert,* and other dispositive rulings with broader implications for other cases in the multidistrict litigation, and afford such appeals expedited consideration. Such a rule would allow for expedited review and resolution of cross-cutting legal issues, yielding more rational settlements that accurately reflect the applicable law, as opposed to a mere guess on whether the MDL judge got a particular key issue (like preemption) right.

This solution will also avoid the needless expense of litigating key dispositive issues over and over again unnecessarily, furthering the "just and efficient conduct" of pretrial proceedings, which is supposed to be the very essence of multidistrict litigation.[97]

"This solution will also avoid the needless expense of litigating key dispositive issues over and over again unnecessarily, furthering the 'just and efficient conduct' of pretrial proceedings, which is supposed to be the very essence of multidistrict litigation."

Endnotes

1 28 U.S.C. § 1407(a).

2 Dave Simpson, *MDLs Surge To Majority Of Entire Federal Civil Caseload*, Law360, Mar. 14, 2019, https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload. Based on data presented at an Emory University MDL conference in 2018, in some circuits, the percentages are even higher, with mass tort MDL proceedings accounting for more than 84 percent of all civil cases in the Fourth Circuit; more than 60 percent of all civil cases in the Fifth Circuit; and more than 56 percent of all civil cases in the Third Circuit.

3 *See* https://docs.wixstatic.com/ugd/6c49d6_a3c4965abb0c48daac1ba6ca9842cae7.pdf.

4 Lawyers for Civil Justice, Rules 4 MDLs: Calculating the Case 7 (2018).

5 Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1645-46 (2011).

6 *See* MDL Statistics Report, Mar. 15, 2019.

7 Alison Frankel, *Defense Group Argues New MDL Stats Prove Need to Change Rules for Mass Torts*, Reuters, Oct. 4, 2018.

8 *Supra* note 5 at 1648.

9 *Id.* at 1663.

10 *In re Blue Cross Blue Shield Antitrust Litig.*, No. 2:13-CV-20000-RDP, 2018 U.S. Dist. LEXIS 113563, at *29 n.2 (N.D. Ala. June 12, 2018).

11 *See, e.g.*, Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. Ann. Surv. Am. L. 589, 624 (2012) ("In some cases, a *Daubert* ruling may be dispositive for all intents and purposes.").

12 *See* Monsanto Co.'s Notice of Mot. & Mot. for Summ. J. Re: Tier 1 Plaintiffs on Non-Causation Grounds, *In re Roundup Prods. Liab. Litig.* at 3-14, MDL No., 2741, 3:16-md-02741-VC, Dkt. No. 2419 (N.D. Cal. filed Jan. 3, 2019).

13 *See In re Roundup Prods. Liab. Litig.*, MDL No. 2741, No. 16-md-02741-VC, 2019 U.S. Dist. LEXIS 37136, at *81-83 (N.D. Cal. Mar. 7, 2019).

14 *In re Abilify (Aripiprazole) Prods. Liab. Litig.*, 299 F. Supp. 3d 1291, 1323 (N.D. Fla. 2018).

15 *Id.* at 1325.

16 *Supra* note 5 at 1675.

17 28 U.S.C. § 1292(b).

18 *Id.*

19 *In re Blue Cross*, 2018 U.S. Dist. LEXIS 113563, at *23-24 (citation omitted).

20 *Supra* note 5 at 1658-59.

21 *See* Letter from J. Beisner to R. Womeldorf ("Beisner Letter") (Nov. 21, 2018), Submission 18-CV-BB, https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf. More specifically, the authors reviewed the full PACER dockets of all 60 mass tort MDL proceedings pending as of mid-July 2018 and the dockets of the 67 mass tort MDL proceedings that were formally closed during calendar years 2008 through 2018.

22 *Id.* at 1-2. Although many other § 1292(b) certification motions were located, most did not satisfy the "broadly dispositive" criterion or were not related to mass tort claims.

23 *Id.* at 2. Notably, the only relevant § 1292(b) appeal certification they uncovered was the grant of a plaintiffs' request for appellate review of an order finding that large numbers of mass tort claims against certain defendants in an MDL proceeding were preempted by federal regulations. The authors did locate some successful § 1292(b) motions; however, they presented issues unique to individual cases or were only relevant to a small number of cases.

24 *See* Docket No. 11658.

25 *See* Docket No. 12003.

26 *Supra* note 21 at 4.

27 *Id.* at 4.

28 *Id.* at 4-5.

29 *See* Docket No. 9415.

30 *Supra* note 21 at 5.

31 *Id.* at 6.

32 *Id.* at 6-7.

33 *Id.* at 7.

34 *See* Mem. Op & Order, *In re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, MDL 2226, Doc. 1570, at 4 (E.D. Ky. Apr. 27, 2012).

35 *Id.*

36 *Id.* at 8.

37 *Id.*

38 *Supra* note 5 at 1669 (quoting Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 Harv. J.L. & Pub. Pol'y 855, 883 (2005)).

39 *In re NLO, Inc.*, 5 F.3d 154, 157 (6th Cir. 1993).

40 *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1021 (5th Cir. 1997) ("We are sympathetic to the efforts of the district court to control its docket and to move this case along.").

41 *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

42 *See, e.g.*, *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not … These settlements have been referred to as judicial blackmail."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Defendants "may not wish to roll these dice … They will be under intense pressure to settle.").

43 *See generally* Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 Nev. L.J. 1455, 1468 (2015).

44 *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345, 358 (5th Cir. 2017) (Jones, J., concurring in part and dissenting in part).

45 *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 114-15 (2d Cir. 2007).

46 *Supra* note 5 at 1675-77 (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 510 F. Supp. 2d 299, 301 (S.D.N.Y. 2007)).

47 488 F.3d at 114.

48 *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 8 (S.D.N.Y. 2001).

49 Carrie L. Williamson, *"But You Said We Could Do It!": Oil Companies' Liability for the Unintended Consequences of MTBE Water Contamination*, 29 Ecology L.Q. 315, 326 (2002) (emphasis added).

50 *Supra* note 5 at 1678 (quoting M. Stuart Madden & Jamie Holian, *Defendant Indeterminacy: New Wine into Old Skins*, 67 La. L. Rev. 785, 816 (2007)).

51 *Id.* at 1680-81.

52 *Id.* at 1683.

53 *See In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776 (E.D. La. 2007).

54 *Id.* at 780.

55 *Id.* at 788 (emphasis added); *see also id.* at 786 (noting that "some courts have deferred to the FDA's current view that its requirements are 'both a minimum "floor" and a maximum "ceiling" for the content and format' of prescription drug labels") (citing, *inter alia*, *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 306-17 (E.D. Pa. 2007)).

56 Although a later Supreme Court decision on preemption in an unrelated case (*see Wyeth v. Levine*, 555 U.S. 555 (2009)) suggests that an appeal of the summary judgment ruling in Vioxx might not have been resolved in the defendant's favor, the parties lacked the kind of appellate guidance on a key legal issue that would have aided the parties in their settlement discussions.

57 *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:13-md-2433, 2016 U.S. Dist. LEXIS 43337, at *1198 (S.D. Ohio Mar. 29, 2016).

58 *In re DePuy Orthopaedics, Inc.*, 870 F.3d at 358.

59 *Id.* at 347-48, 351.

60 *Id.* at 358.

61 *Id.* at 357.

62 *In re C. R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2013 WL 4508339, at *1 (S.D. W. Va. Aug. 22, 2013).

63 *Id.*

64 *Id.* at *2.

65 2016 U.S. Dist. LEXIS 43337, at *1198.

66 *Id.* at *1198-99.

67 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understanding of Procedure*, 165 U. Pa. L. Rev. 1669, 1706 (2017).

68 *Id.*

69 *Supra* note 5 at 1686.

70 28 U.S.C. § 1407(a).

71 H.R. 985, 115th Cong. § 105 (2017) (proposed amendment to 28 U.S.C. § 1407).

72 *See* Agenda Book, Advisory Committee on Civil Rules (Apr. 2-3, 2019 meeting), at 212-13 (MDL Subcommittee Report) ("MDL Subcommittee Rep."). Notably, 28 U.S.C. § 1292(e) specifically authorizes the Supreme Court to "prescribe rules … to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." Congress enacted this provision in 1992 in response to the Federal Courts Study Report and Recommendations (April 2, 1990), which urged empowering the federal court rulemaking process with the ability to add to the list of categories of interlocutory appeals. Since enactment, section 1292(e) has been used only once—to add Fed. R. Civ. P. 23(f), permitting discretionary interlocutory appeals of class certification rulings. This authority could likewise be used to authorize interlocutory review of fundamental MDL rulings.

73 *See MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules*, at 4-6, Sept. 14, 2018 ("September 2018 LCJ Submission"); *see also Rules for "All Civil Actions and Proceedings": A Call to Bring Cases Consolidated for Pretrial Proceedings Back within the Federal Rules of Civil Procedure*, at 16, Aug. 10, 2017 ("August 2017 LCJ Proposal").

74 *See generally* MDL Subcommittee Rep. at 212-14.

75 *See* H.R. 985, Section 105 ("A federal appeals court having jurisdiction over the transferee district shall permit an appeal from an order issued in coordinated or consolidated pretrial proceedings if … the order is applicable to one or more civil actions seeking redress for personal injury …").

76 *See id.* ("A federal appeals court having jurisdiction over the transferee district shall permit an appeal from an order issued in coordinated or consolidated pretrial proceedings …"); August 2017 LCJ Proposal at 16 ("[T]he Committee could provide a mechanism similar to Rule 23(f) but that provides appeal as of right rather than as a matter of discretion.").

77 MDL Subcommittee Rep. at 213.

78 *Id.*

79 *Id.*

80 *See* H.R. 985, Section 103 ("Appeals courts must permit appeals from an order granting or denying class certification"). As the House Report on FICALA explained, "[a] study of class certification appeals filed over 7 years (from October 31, 2006 through December 31, 2013) found that less than 25 percent of the petitions to appeal were granted—a one-third decline in the grant rate from the prior 8-year period." H. Rep. No. 115-25, at 29 (2017) (citing Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* at 1 (April 2014)); *see also id.* at 29-30 ("FICALA's appeals provision helps ensure the correctness of class action certification rulings by providing that class certification decisions are appealable as of right.").

81 *See* September 2018 LCJ Submission at 4-6.

82 28 U.S.C. § 1407(a).

83 *See* September 2018 LCJ Submission at 6.

84 MDL Subcommittee Rep. at 213.

85 *Id.* at 214 (quoting 28 U.S.C. § 158(d)(2)(A)(iii)).

86 Such a standard would be less onerous than the one employed in 28 U.S.C. § 1292(b)—specifically, whether an appeal will "materially advance the ultimate termination of the litigation." *Id.* As the latest MDL Subcommittee report observes, that standard "does not seem to work in mega MDLs … where the ultimate termination of the litigation may involve thousands of individual cases." MDL Subcommittee Rep. at 214. Further, courts have struggled with applying that standard. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo. Wash. L. Rev. 1165, 1173 (1990) (explaining that the "materially advance" language "has caused some problems" because some courts narrowly construe the language to apply only to "big, exceptional" cases); *see also Kraus v. Bd. of Cty. Rd. Comm'rs for Kent Cty.*, 364 F.2d 919, 922 (6th Cir. 1966) ("This statute was not intended to authorize interlocutory appeals in ordinary suits for personal injuries or wrongful death that can be tried and disposed of on their merits in a few days.").

87 There is a dearth of court of appeals decisions explaining the rationale for allowing direct bankruptcy appeals under the "materially advance the progress of the case or proceeding" criterion of 28 U.S.C. § 158(d)(2)(A)(iii). It appears most appeals court decisions accepting appeals invoke § 158(d)(2)(A)(i), which authorizes direct review where there is "a question of law on which there is no controlling decision." *Id.* Decisions granting direct review under the "materially advance" prong typically do not discuss the criterion at length; they simply point out that a lower court certified that the condition was met and the court accepted the appeal. *See, e.g.*, *In re BFW Liquidation, LLC*, 899 F.3d 1178, 1185 (11th Cir. 2018).

88 MDL Subcommittee Rep. at 213.

89 *Id.* at 214.

90 *Id.* at 213.

91 *See* 28 U.S.C. § 1292(b) ("The Court of Appeals which would have jurisdiction of an appeal … may … in its discretion, permit an appeal to be taken from [the] order, if application is made to it within ten days after the entry of the order …"); Fed. R. Civ. P. 23(f) ("A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered …").

92 MDL Subcommittee Rep. at 213.

93 *Id.*

94 *See* 15 U.S.C. § 720e(c) ("The United States Court of Appeals for the District of Columbia Circuit shall set any action brought under subsection (a) for expedited consideration, taking into account the national interest of enhancing national energy security by providing access to the significant gas reserves in Alaska needed to meet the anticipated demand for natural gas.").

95 One alternative would be a specific deadline for rulings on such appeals. However, such a deadline may prove unreasonable regarding complicated issues involving voluminous records. Further, in other contexts, appellate courts have found ways to bypass such deadlines. *See, e.g.*, *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012) (interpreting the 60-day appeals timetable under the Class Action Fairness Act to run from the time the court accepted the appeal rather than the time the party filed the appeal); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1162 (11th Cir. 2006) ("We hold that the 60-day period begins to run from the date when the court of appeals granted the appellants' application to appeal and thus filed the appeal.").

96 Fed. R. Civ. P. 23(f).

97 28 U.S.C. § 1407(a).

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