(AGENDA BOOK)

ADVISORY COMMITTEE
ON
CIVIL RULES
Philadelphia, PA
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Excerpts of the November 7, 2017, Civil Rules Committee Meeting

rulings, retained as additional counsel a law firm that included the judge's spouse. Rather than countenance this attempt at judge shopping, the chief judge ordered that the new firm could not play any role in the litigation. Something comparable might happen with third-party financing, without the opportunity for an analogous cancellation of the financing agreement. It does not seem likely that judges will invest in enterprises that engage in third-party financing, but there may be a risk, especially with networks of related interests. Judge Bates noted that similar concerns had emerged with filing amicus briefs on appeal.

Judge Bates summarized the discussion by suggesting that a sense of caution had been expressed. Further discussion might be resumed in the discussion of MDL proposals, one of which explicitly adopts the disclosure proposal that prompted this discussion.

Rules for MDL Proceedings

Judge Bates opened the discussion of the proposals for special Multidistrict Litigation Rules by suggesting that two of the proposals are essentially the same, while the third is distinctively different.

All three proposals agree that MDL proceedings present important issues. They account for a large percentage of all the individual cases on the federal court docket. The Civil Rules do not really address many of the issues encountered in managing an MDL proceeding. Proponents of new rules suggest that courts often simply ignore the Civil Rules in managing MDL proceedings. And Congress has shown an interest. H.R. 985, which has been passed in the House, includes several amendments of the MDL statute, 28 U.S.C. § 1407.

The major concerns focus on cases with large numbers of claimants. The perception is that many of the individual claimants have no claim at all, not even any connection with the events being litigated by the real claimants. The concern is that there is no effective means of screening out the fake claimants at an early stage in the litigation. Many alternative means of early screening are proposed. But it is not clear what differences may flow from early screening as compared to screening at the final stages of the litigation if the MDL leads to resolution on terms that dispose of the component actions. Apart from the several proposals for early screening, concerns also are expressed about pressures to participate in bellwether trials and about the need to expand the opportunities to appeal rulings by the MDL court.

Several different early screening proposals are advanced. Some of them interlock with others.

An initial proposal is that Rule 7 should be amended to expressly recognize master complaints and master answers in consolidated proceedings, and also to recognize individual complaints and individual answers. Subsequent proposals focus on requirements for individual complaints or supplements to them.

A direct pleading proposal is that some version of Rule 9(b) particular pleading requirements should be adopted for individual complaints in MDL proceedings. An alternative is to create a new Rule 12(b)(8) motion to dismiss for "failure to provide meaningful evidence of a valid claim in a consolidated proceeding." The court must rule on the motion within a prescribed period, perhaps 90 days; if dismissal is indicated, the plaintiff would be allowed an additional time, perhaps 30 days, to provide "meaningful evidence." If none is provided the dismissal will be made with prejudice.

A related proposal addresses joinder of several plaintiffs in a single complaint. The suggestion is that Rule 20 be amended by adding a provision for a defense motion to require a separate complaint for each plaintiff, accompanied by the filing fee.

The next proposal is for three distinct forms of disclosure. One would require each plaintiff in a consolidated action to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant’s conduct or product." The second disclosure tracks the disclosure of third-party financing agreements as proposed in the submission already discussed. The third would require disclosure of "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiff(s) * * *." This proposal reflects concern that plaintiffs recruited by advertising are not screened by the recruiters, and often do not have any shade of a claim.

Turning to bellwether trials, the proposal is that a bellwether trial may be had only if all parties consent through a confidential procedure. In addition, it is proposed that a party should not be required to "waive jurisdiction in order to participate in" a bellwether trial. This proposal in part reflects concern with "Lexecon waivers" that waive remand to the court where the action was filed and also waive "jurisdiction." (Since subject-matter jurisdiction cannot be waived, the apparent concern seems to be personal jurisdiction in the MDL court.)

Finally, it is urged that there should be increased opportunities to appeal as a matter of right from many categories of pretrial rulings by the MDL court. The concern is both that review has inherent values and that rulings made unreviewable by the final-judgment rule result in "an unfair and unbalanced

§ 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being

ready to think about this." She is not opposed to looking into these questions, "but we must hear from all sides."

Another judge noted that she has an MDL proceeding with more than 4,000 members. She has 17 *Daubert* hearings scheduled. "It's a lot of pressure" to get things right. We should think about working with the Appellate Rules Committee. Another judge described an MDL proceeding with 3,200 claimants and 20 *Daubert* hearings.

A Committee member asked whether the Judicial Panel has accumulated information about MDL practices.

Judge Campbell described resources available to MDL judges. The Judicial Panel has a web site with a lot of helpful information and forms. The Judicial Panel staff attorneys are very helpful about model orders. The Manual for Complex litigation is useful. There are annual conferences for MDL judges. And lawyers "bring a lot to the table." Experienced MDL lawyers reach agreement much more often than they disagree. But the question of appeal opportunities is important and should be explored. It would be very hard to manage an MDL if there are multiple opportunities to appeal. As an example, in one massive securities case a § 1292(b) appeal was accepted from an order entered in August, 2015. The appeal remains pending. The case has been essentially dead while the appeal is undecided. "Managing with appeals is a tough balance."

Judge Campbell continued by taking up the question of means for early procedures to weed out frivolous cases. In his 3,200-claimant MDL four new claims are filed every day. It is impossible in this setting to have evidential showings for each claimant. It would be all the more impossible in cases with 15,000 claimants and 20 new claimants every day. The lawyers seem to know there are frivolous cases, and bargain toward settlement with this in mind. They often establish a claims process that weeds out frivolous claims. What is the need to weed them out at an earlier stage? The flow of new cases has no effect on discovery, on the day-to-day life of the case. It will be useful to learn why early screening is important.

Another judge seconded these observations. "I don't think it makes a difference to sort out the frivolous cases at the beginning. We know they're there. Weeding them out takes effort. Weeding them out before discovery is especially doubtful."

An observer from a litigation funder asked what is the overlap between MDL procedures and third-party financing? Judge Bates noted that one of the MDL submissions expressly incorporates the disclosure proposal advanced for third-party financing.

John Rabiej described his proposal. The Center for Judicial Studies has been holding conferences since 2011. Data bases show that a large share of all the federal-court case load is held by 20 judges. "This holds over time. There is a business model that will endure for the foreseeable future." They are planning a conference for April, asking lawyers to address problems in practice. The Center has prepared a set of best practices guidelines that are being updated. It is a mistake to underestimate the burden that frivolous claims impose on defendants. The problem is the frivolous cases, not the "gray-area" cases. Reliable sources suggest that in big MDLS of some types 20% or more of the claims are "zeroed out."

There is some momentum in practice for providing some minimum information about each claimant at the outset. In drug and medical products cases, for example, the information would show a prescription for the medicine, and a doctor's diagnosis.

MDL proceedings are a big part of the caseload. "The Civil Rules are not involved." Judges like the status quo because they like the discretion they have. "Plaintiffs are basically happy, although they recognize there is room for rules on some topics such as the number of lawyers on a steering committee. "The Civil Rules Committee should be involved in this."

Judge Bates agreed that the Committee needs to learn more about the basis for the positions taken than the simple facts of what plaintiffs say, what defendants say, what MDL judges say.

Responding to a question, John Rabiej said that he has not found anyone who wants to talk about third-party financing in the MDL setting. It would be difficult for the Center to devise best practices for third-party financing. "It does come up in MDL proceedings — funders even direct attorneys where to file their actions."

Susan Steinman noted that most American Association for Justice members work on contingent-fee arrangements. "They have no incentive to take cases that are not meritorious." Third-party financing is not an issue to be addressed in the Civil Rules. "It is a business option some members choose." There may be some areas of disagreement among plaintiffs, but they tend to have negative views of disclosure.

Alexander Dahl said that weeding out frivolous claims is an important part of the system. "Rules 12 and 56 are designed for this." In MDL proceedings, the weeding-out function is still more important. "It is numbers that make them complex." The numbers are inaccurate in ways that we do not know. "Numbers raise the stakes and pressures." "Some courts see MDL proceedings as a mechanism for

settlement, not truth-seeking. Settlements require a realistic understanding of what the case is worth." And there is an important regulatory aspect. A publicly traded company has to disclose litigation risks. If it loses a bellwether trial, it has to disclose the 15,000 other cases, even though many of them are bogus, inflating the exposure to risk of many losses.

Alexander Dahl also provided a reminder that the proposal to disclose litigation-financing agreements calls only for disclosure. There is no need to resolve all the mysteries that have been identified in discussing third-party financing.

A judge asked whether a "robust fact sheet" would satisfy the need for early screening? She requires them. A defendant can look at them. Alexander Dahl replied that there are a lot of cases where that does not happen. When it does happen, it can work well. What is important is uniformity of practice.

A Committee member observed that not all MDL proceedings involve drugs or medial devices.

Another Committee member asked what is the "simple disclosure" of litigation-funding that is proposed? Alexander Dahl replied that the proposal seeks the funding agreement, although "the existence of funding is the most important" thing.

Judge Campbell noted that he understands the argument for early screening. In his big MDL there is a master complaint. Each plaintiff files a fact sheet. The defendant carefully tracks the fact sheets and identifies suspect cases. "But I never see them." The defendants identify the suspect cases in bargaining. "How is it feasible for the judge to screen them"? Alexander Dahl responded that the use of fact sheets varies. Compliance varies. "Often defendants have to gather the information on their own." Defendants eventually bring motions to dismiss where that is important. Again, "uniformity in practice is important," including uniform standards for dismissal." Further, we need to know what ineffectual judges are doing. The rulemaking process would be beneficial to all sides. Rules can allow sufficient flexibility while still providing guideposts for cases where guidance is needed.

John Rabiej described an opinion focusing on a proceeding with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used in many of these cases. That is why lawyers are devising procedures to get some kind of fact information. That is all they need.

A Committee member asked why is it necessary to consider particularized pleading, or motions to dismiss for want of meaningful evidence? Why is it not sufficient to apply the pleading

standards established by the Twombly and Iqbal decisions?

Judge Bates summarized the discussion by stating that the Committee needs to gather more information. Valuable information has been provided, but it is mostly from one perspective. The Committee has learned a lot from the comments provided this day. But the Committee needs more, particularly from the Judicial Panel. The Committee should launch a six- to twelve-month project to gather information that will support a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information. For the time being, third-party financing will be part of this, at least for the MDL framework.

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions – the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.

These questions are familiar. Professor Deason notes that

filed. And there might also be the question whether the rules become inapplicable after remand by the Panel (though remand presently happens only in a small proportion of cases).

(2) Master complaints and answers: Submissions have urged that the Civil Rules explicitly address these documents. Rule provisions that do so might specify standards for evaluating their adequacy. If these are pleadings in the Rule 7 sense, they are presumably subject to Rule 12(b) motions to dismiss and Rule 12(f) motions to strike. They also presumably serve as guideposts for the scope of discovery and summary-judgment motions. Are they used only in MDL proceedings? Are they commonly treated as superseding the pleadings in individual actions? Would addressing them separately in the Civil Rules provide benefits, or raise risks? Have Committee members found that the current provisions of the Civil Rules do not adequately deal with master complaints and answers, or that some additional guidance would hold promise?

(3) More particularized pleading/"fact sheets": An abiding concern with some MDL litigation might be called the "Field of Dreams" concern - if you build it they will come. And allegedly a lot of them (plaintiffs who file actions after MDL centralization) don't really have claims. But that sort of failing may be obscured in the mass of MDL filings and discovery staging (topic (5) below), which may impede efforts to "weed" out these claims. One reaction in some cases is to enter a *Lone Pine* order or to require all claimants to fill out "fact sheets" (sometimes quite extensive). For judges, trying to evaluate hundreds or thousands of such submissions could be extremely onerous.

Have Committee members found the "fact sheet" approach useful? Would a Civil Rules provision foster the use of such methods in a helpful way? Have the current provisions of the rules interfered with use of such methods in cases where they might be useful? Would something like the pleading requirements for fraud cases under Rule 9(b) provide useful guidance for district judges considering this route? Could such a rule provide a template for a useful fact sheet?

(4) Rule 20 joinder and filing fees: To the extent that some attorneys (perhaps with the assistance of "lead generators" - see topic (6) below) file actions without sufficiently scrutinizing the validity of the claims asserted, it might be that requiring payment of a filing fee for each plaintiff could be a practical cure to a practical problem. It seems that 28 U.S.C. § 1914(a) presently requires one filing fee for a "civil action," no matter how many parties there are.

Rule 20 is broadly permissive regarding joinder of parties, so in conjunction with § 1914, it permits the filing of a single case on behalf of a large number of plaintiffs (and against a large number of defendants). See, e.g., Avila v. Willits Environmental Remediation Trust, 633 F.3d 828 (9th Cir. 2011) (action for environmental contamination on behalf of more than 1,000 individual

plaintiffs).

A defendant can move to separate a mass litigation into multiple separate actions, but to do that seemingly requires a finding that the claims do not arise out of the same "transaction or occurrence, or series of transactions or occurrences." That has been interpreted broadly in many cases. Should there be consideration of amending Rule 20(a) to narrow its application?

Unless a Rule 20(a) challenge succeeds, the action remains as filed although Rule 20(b) permits orders, including an order for separate trials, that protect parties against undue prejudice. But the problem addressed here does not seem of that sort, and a Rule 20(b) order ordinarily would not occur early in the litigation.

It seems that requiring every plaintiff properly joined under Rule 20(a) to pay a separate filing fee would overreach. Is the problem of "phantom" claims a serious one? If so, is that true only in MDL proceedings? Is a response that focuses on filing fees promising? It may be that the PLRA takes such a course with regard to prisoner litigation. Is that a model to follow? Are there other examples? And if such a requirement were imposed, could the Clerk's office readily determine how many filing fees to require in a given case? (Counting 1,000 plaintiffs could be a chore.)

If across-the-board per capita filing fees are not advisable, would such a requirement be useful if handled by court order? What standards should govern a motion for such an order?

If the separate fee example is promising, should a defendant seeking to remove a multi-plaintiff action from state court be required to pay a per-plaintiff filing fee? Should intervenors on the plaintiff side also have to pay per capita filing fees?

(5) Sequencing discovery: In general, complex litigation often benefits from orders sequencing discovery. One could say that a "fact sheet" approach is a version of that sort of thing; presumably plaintiffs normally have to satisfy this requirement before they are allowed to proceed with their cases. As a matter of rulemaking, would a prescribed sequence of discovery be more promising than a rule requiring plaintiffs in certain actions always to submit such detailed support for their claims? If there is to be a master complaint, should that be completed before the detailed discovery or disclosure is required from plaintiffs?

Have Committee members found that discovery sequencing is helpful? Is that subject discussed in Rule 26(f) conferences and/or addressed in Rule 16(b) scheduling orders? Is that technique limited to MDL proceedings, or more useful in those proceedings? Does it tend to impede attention to claims involving "outlier" defendants who may be restricted in their ability to explore grounds for summary judgment with regard to claims against them? (The notion of "outlier" defendants is that often such non-

central actors are also named as defendants in actions subject to an MDL order. See Katz v. Realty Equities Corp., 521 F.2d 1354, 1361 (2d Cir. 1975), referring to "actors on the periphery of the main activities who must defend against claims having but a remote relation to the principal issues." Do these approaches offer more promise than the "heightened" pleading ides in (3) above?

(6) TPLF and "lead generators": These topics may not intrinsically be linked, but may generate useful discussion during the April meeting. As noted in the introduction, the local rules identified in federal district courts and courts of appeals seem designed principally to focus on recusal issues. Putting that concern aside, a variety of other concerns have been urged as justifying disclosure or some other response to reportedly growing use of TPLF. Many of these could be characterized as raising "ethical" issues or conflict of interest problems that seemingly lie behind the call for inquiry into "lead generators."

In the experience of Committee members, are "lead generators" or third party funding the source of significant "ethical" issues? Would disclosure be a positive response to those issues? In class actions, in particular (often included in mass tort MDL proceedings), should this concern be more pronounced? Under Rule 23(g) is it a topic on which the court should expect to receive information? If disclosure would be a positive response, what should the court do with the information disclosed? If there is a role for such disclosure, is it important outside the "mass tort" area?

(7) Bellwether trials: Concern has been raised about undue pressure in obtaining agreement to submit to bellwether trials. Whether rulemaking on this subject would be useful is unclear. What is the experience of Committee members with such trials? Are they only used in MDL proceedings? Is it sufficiently clear what a "bellwether" trial is to permit a rule to prescribe regulations for them? Though it is true that such a trial is intended as a guide to settlement value and non-trial resolution, does that not happen without the "bellwether" designation? If issue preclusion results from a trial outcome (presumably against a defendant), does that depend on whether the case was labelled a "bellwether"?

Perhaps a more general inquiry would be whether MDL transferee judges try too hard to resolve these cases without the need for a remand. Certainly the remand rate of around 5% is rather low, but so is the trial rate for ordinary cases. Should the Subcommittee be concerned about undue pro-settlement pressure in MDL proceedings? If so, is that a matter to be addressed in a Civil Rule? Note that Rule 16(c) now authorizes the court to raise settlement issues in all cases. Should that invitation exclude MDL proceedings?

Perhaps relatedly, it has also been suggested that, when the time to try cases arrives, additional judges should be recruited to preside over those trials. The Panel did once make such a

complaint. Indeed, a good master complaint is likely to clarify and focus the claims asserted. But it may also tend toward an "everything but the kitchen sink" kind of pleading; drafters may be reluctant to exclude theories favored by some plaintiff counsel even if not embraced by a majority.

Another reaction was that master complaints can be very useful. But that does not mean that they should be the subject of a special rule provision. Perhaps the right place to provide advice about using master complaints is in the Manual for Complex Litigation. But it is worth noting that the master complaints may be very important for a variety of reasons, ranging from class definitions to questions of waiver of certain claims or defenses (assuming a master answer as well).

A different question was raised -- Are master complaints subject to the pleading requirements of *Twombly* and *Iqbal*? At least one judge has said that the "plausibility" standard does not apply to master complaints. Should a rule address that possibility?

Another point was raised -- For the Clerk's office, having master pleadings may make life much simpler. But is that true? In an era of electronic filing, it may be less true than in the past, when huge volumes of paper would arrive if separate filings were necessary in each case.

A further point was that use of master complaints may foster a problem that recurs in consolidated litigation -- what might be called the "bystander" problem. Particularly for defendants on the periphery of the litigation (not the central defendants), it may seem that actual litigation activity -- particularly discovery -- is focused on and limited to the main issues, rather than the issues important to these defendants. If the sequencing of discovery defers attention to the issues important to these peripheral parties, they may feel that they are in a sense "trapped in" the litigation, or "frozen out" of the litigation.

The consensus was that these issues should be kept on the agenda.

(3) Early streamlining devices: This topic somewhat overlaps with topic (5), on sequenced discovery. It also ties in with topic (2) on master complaints because it relates to the extent that such master complaints may prove an obstacle to focusing attention on the adequacy of individual claims and screening out those that are unsupported.

A key problem mentioned by many is the proliferation of claims by those who really don't have claims because they haven't used the product, have not suffered injury, etc. In a sense, then, this topic also connects with topic (6) on "lead generators," for the phenomenon is that some lawyers acquire large inventories of claims that they don't scrutinize very

carefully. People on the defense side are very concerned about this possibility, as are at least some on the plaintiff side.

A reaction was that judges have employed a variety of approaches to this set of problems. *Lone Pine* orders originated 30 years ago in the New Jersey state courts and something like that, or a "plaintiff fact sheet," is often an important organizing tool to determine what's really involved in the case. H.R. 985 has a particularly hard-edged requirement along these lines, which seems to impose a burden on courts to rule on the adequacy of such plaintiff submissions that could be crippling in some cases. How does a judge make such determinations in regard to hundreds or thousands of claimants in a short period of time? That seems impossible.

Despite those difficulties, it was emphasized, this topic must remain on the list as we go forward. There are simply too many claims "parked" in MDL proceedings that would never be presented, or survive early motion practice, as individual actions. This concern relates to the extent that specifics are required up front under the "plausibility" pleading standard and perhaps sometimes also Rule 9(b). It may also relate to the desirability of keying new rules to an MDL centralization order, if that serves as a magnet for such claims.

It was also noted that *Lone Pine* orders can work, but a problem surfaces when plaintiffs do not comply with them. What happens then? Perhaps the sanction of dismissal (with or without prejudice) will follow rather automatically, but that may lead to numerous appeals. And a rule compelling a court to dismiss, even without prejudice, might unduly restrict the court's authority to manage the action.

Another reaction was that there surely are problems along this line. At the same time, "atomizing all the cases" won't work. Indeed, it's inconsistent with the basic thrust of MDL combination, which is to handle large numbers of claims together. Given that, this seems like "a classic instance of individualized case management." There are already rules in place that permit judges to do this sort of thing when needed, and in a way tailored to the case before the court.

The consensus was to keep this topic on the agenda, but to recognize also that it may prove difficult or impossible to devise rules that move significantly beyond what we now have.

(4) Rule 20 and filing fees: This topic responds to suggestions that the problem of "parking" dubious claims in the sprawling MDL proceeding could be partly solved by making each plaintiff pay a separate filing fee (perhaps in addition to filling out a "fact sheet").

The starting assumption is that, as things currently stand, the filing fee need be paid only for the overall action, and that

the number of parties does not affect the amount of the filing fee. In that sense, having dozens or hundreds of plaintiffs could reduce the per-plaintiff filing fee a great deal. One might even view the idea of "unbundling" by requiring separate filing fees from each plaintiff as an income-generating measure for the courts.

In at least some kinds of litigation, there has been a focus on requiring individual payment of filing fees. Prisoner litigation is an example. But this concept pushes in the opposite direction from the broad joinder orientation reflected in Rule 20. Surely that orientation applies in lots of cases that would not be subject to any new rules we might propose. Notably also, joinder of many defendants under Rule 20 does not increase the required filing fee.

Instead, it seems that this idea stems from the same sort of concern that lies behind the "fact sheet" approach -- a desire to force lawyers to think more carefully about the individual claims before filing them. "If you have to pay for each one, you will think more carefully about each one."

One question that came up was whether the Clerk's offices would care about this. There might be something of a policing problem if the clerk has to determine how many filing fees are due based on some sort of scrutiny of the complaint. Does the Clerk's office receive special guidelines on handling MDL proceedings? That might be worth investigating.

Another point made was that a rule imposing this requirement could direct that the assessment of a per-plaintiff filing fee might depend on a motion. That would seem to mean that the Clerk's office would not need to determine how many filing fees must be paid. But it might pose new challenges for the court. What exactly would be the standards for ruling on such a motion? Perhaps the motion would have to be supported by a showing that some sort of random sampling of hordes of claims indicates that a percentage above *X* seems groundless. Making such a showing would be difficult, however.

But if it were introduced as a motion, it might be added to Rule 20(b), which already has a provision for ordering "separate trials" to deal with problems caused by overbroad joinder of parties. Perhaps that rule should also authorize directing that a case initially filed by or against many parties be split into separate cases. But if this requirement depended on a court order prompted by a motion, it would defer the assessment of additional filing fees until a good deal later in the litigation. And what would be the consequence of failure to pay at that time? Dismissal with prejudice seems unduly severe.

The consensus was that this idea should go forward, but that it presently seems less promising than some of the other ideas.

(5) Sequenced discovery and early disclosure: This topic ties in with topic (3) above. The notion is that in MDL or "mass" litigation there should be a clear roadmap for the sequence of discovery. One approach might be to focus discovery first on defendants, because that discovery would ordinarily bear on most or all plaintiffs' claims. (As noted above, that might be regarded as excluding attention to "bystander" parties.) Alternatively, one might prefer to go first with discovery regarding individual plaintiffs. But it might seem odd to say that because there are many allegedly injured people defendants need not face discovery until plaintiffs have provided discovery.

In a sense, then, this approach raises issues of staying discovery until other events have occurred. With *Lone Pine* orders, for example, perhaps it is assumed that defendants need not respond to discovery until plaintiffs have satisfied their obligations under the "fact sheet" order. But unless one assumes that none of the plaintiffs will satisfy the *Lone Pine* requirements, is there a reason to put plaintiffs' discovery on hold? Should defendants be permitted to do discovery during that period? Before 1970, a practice emerged under which a party that first served deposition notices obtained "priority" to complete those depositions before the other side could take discovery. That priority was rejected in the 1970 amendments. This approach might signal something of a return, though as an aspect of case management.

Altogether, this set of issues seemed unlikely to yield a "one size fits all" rule-based solution. The consensus was that this topic ties in with early screening devices, topic (3), and that they should "move forward together."

(6) TPLF and "lead generators": These are discrete topics, but often treated together. These topics create tension "on both sides of the v."

Regarding TPLF, we have a large body of material concerning local district and court of appeals rules and state statutory regulation. It is not immediately obvious that further information would be helpful at this point.

One reaction is that TPLF is coming up more and more frequently, and not just in MDL cases. It is "building up to be a big battleground." Indeed, it seems that innovative techniques have made something like this available on the defense side also.

There seem to be somewhat discrete TPLF settings. One is the individual claimant with what may be a high-value claim that also involves high litigation costs. That is probably not the MDL norm, and certainly not the issue that generates attention to *Lone Pine* orders or "fact sheet" requirements. Another involves a plaintiff who has already secured a big judgment that is on appeal, and seeks support during the time needed to resolve the appeal. Then there are instances in which lenders support

are surely significant other categories. Examples include data breach cases, antitrust cases, securities cases, etc. Are there really shared problems in all these kinds of cases? If securities cases present problems that are specific and particular to them, that sharpens the concern with non-transsubstantive rules, and also raises questions about whether MDL securities cases are really so different from other securities cases not subject to an MDL order that they should be governed by a special set of rules.

In addition, it is useful, at least initially, to try to identify issues that seem at the forefront, at least with regard to some types of MDL litigation. It might be said that some of these issues are important only in a single sort of MDL proceeding.

(1) Screening out frivolous or groundless claims: One recurrent theme in submissions received so far is that Rule 8 or Rule 9 or Rule 26(a) should be revised to make it more possible to screen out claims that really should not be in the aggregate proceeding because these plaintiffs did not use the product, etc. This phenomenon is sometimes called the "Field of Dreams" problem -- if you build it they will come. The 1999 Mass Torts report made the "sardonic observation" that "the aggregation process itself may induce claims representing not 20% of instances of actual liability, as is supposed to be the case with individualized tort claims, but 120%." (Report at 16-17.)

This problem raises serious concerns with many on the defense side, because it impedes meaningful discussions of the dimensions of possible liability and hobbles settlement efforts. But it was noted that it may also harm plaintiff interests. For example, at a point in the asbestos personal-injury experience there was considerable tension on the plaintiff side between the "retailers" and the "wholesalers." The former had individual plaintiffs with mesothelioma or other terminal conditions. The latter seemed to have hordes of pleural thickening cases that were crowding the docket and impeding the prosecution of the actions brought by those who were deathly ill.

Dealing with this problem could impose huge burdens on the transferee judge. One reaction would be to accelerate discovery designed to pinpoint these "free rider" cases. But practice may be evolving without any rule changes to address it. At least some indications from state courts in California suggests that various sorts of *Lone Pine* orders can go a long way toward weeding out claims in aggregate proceedings.

But *Lone Pine* orders probably are not an all-purpose panacea. Indeed, in one recent MDL proceeding, a federal judge and a state court judge had parallel proceedings, sometimes holding court together. But eventually what happened was that the state court judge granted defendants' motion for summary judgment while the federal judge denied a similar motion.