9. MULTIDISTRICT LITIGATION SUBCOMMITTEE REPORT

At the October 2020 meeting, the MDL Subcommittee reported to the full Advisory Committee that it had reached a consensus not to pursue the possibility of a new rule regarding interlocutory appellate review in MDL proceedings, and this Committee accepted that recommendation. During the January 2021 meeting of the Standing Committee, that matter was presented to the Standing Committee, which did not urge reconsideration of the decision.

The subcommittee still has pending before it another issue that remains somewhat in abeyance. Originally it was presented as “vetting” claims in MDL proceedings, based on reports that often a significant proportion of claims turn out to be unsupportable. One reaction to this concern has been to call for early completion of a plaintiff fact sheet (PFS) by each claimant, showing at least that the claimant had used the product in question and manifested the harmful condition alleged to have resulted from use of the product. (This issue seems frequently to be raised in product liability cases premised on personal injury due to use of a product.) Research by the Federal Judicial Center showed that in nearly 90% of large MDLs a PFS is already employed, and that these questionnaires are often tailored to the specific issues of the MDL proceeding, so that a uniform rule on contents did not seem promising. It also appeared that drafting a PFS is often challenging and time-consuming, so a uniform rule on time limits could cause difficulties.

Instead, a new concept of a “census,” which might be regarded as an abbreviated version of a PFS, emerged as a possible solution. This new idea has been used in three ongoing MDLs. One of those is the Zantac MDL, which is pending before Judge Rosenberg, the new Chair of this subcommittee. Early reports indicate that this method holds promise both in identifying claims that lack support and in organizing the litigation for more efficient handling in court. So this idea remains under study, though if it offers promise it may not be a suitable focus for a rule provision, but more appropriately included in a manual or instructional material from the Judicial Panel on Multidistrict Litigation.

What remains under active study at this time is the remaining issue the subcommittee has identified—rule provisions addressing judicial appointment and oversight of leadership counsel and supervising certain settlement activities. The subcommittee expects to learn more about these issues during a March 24, 2021, miniconference. Because the agenda materials for the upcoming full Committee meeting were due before that date, it is not possible here to report on the results of the conference. Below, however, is the background memo for the conferees, and the subcommittee should be able to offer a report at or before the full Committee meeting.