The MDL Subcommittee has been busy since the full Committee’s last meeting. It has had conference calls on September 10, 2020 and August 18, 2020. Notes on these conference calls are attached as an appendix to this report.

The subcommittee has recently had three issues pending before it. One of them — screening claims — is still under study, and awaiting further information. The second issue was whether to provide by rule for expanded interlocutory appellate review in MDL proceedings. On this issue, after much study, the subcommittee has come to a consensus that rulemaking should not be pursued at this time. The third issue — judicial supervision of the selection of leadership counsel and of settlement in MDL proceedings — remains under study.

(1) Screening and the “Census” Idea

The subcommittee’s consideration of the “screening” issue began in response to assertions that often a considerable portion of the claims asserted in MDL mass tort situations were unsupported. Problems with these claims included that the claimant in question did not use the drug or the medical device involved in the litigation, or that the claimant did not have the health condition allegedly caused by the product, or that the claimant used the product too briefly for it to cause the problem, or that the claimant developed symptoms too long after discontinuing the product for the product to be a cause of the symptoms. It seemed generally agreed that such unsupported claims were presented, though there was debate about whether they often constituted a large proportion of the cases. In addition, there was debate about why such claims would appear in MDL proceedings.

The initial proposal was that the court impose a rigorous automatic requirement that every claimant submit proof of use of the product and development of pertinent symptoms promptly at the commencement of litigation. For example, under the Fairness in Class Action Litigation Act passed by the House of Representatives in 2017 but not acted on in the Senate, not only would each claimant be required to provide proof of use and injury shortly after filing the suit, but the court would itself have the duty within a brief period to scrutinize each such submission on its own initiative (not in response to a motion by a defendant). If it determined that certain submissions were not sufficient, the court would then have to direct that the claimant either submit augmented disclosures or suffer dismissal with prejudice. For courts presiding over MDLs containing hundreds or thousands of claims, that could have been a major burden had it been adopted.

But early conferences showed that often Plaintiff Fact Sheets (PFSs) were obtained in the early stages of MDL proceedings. The subcommittee obtained research assistance from the FJC that indicated that in almost all very large MDLs the court did in fact
employ a PFS, and that courts also often required Defendant Fact
Sheets (DFSs) as well. But unlike the proposal that such early
submissions all adhere to a form prescribed in a rule, in fact
these fact sheets were ordinarily keyed to the case before the
court and took a good deal of time to draft. So it was not clear
that any rule could meaningfully prescribe what should be in each
one. And some of these documents became fairly elaborate, meaning
that providing responses was often burdensome. Some experienced
transferee judges questioned the utility of these detailed
documents, commenting that the first page or few pages of a PFS or
a DFS often will suffice. Moreover, courts did not undertake to
review the submissions on their own motion, but defendants could
call to the court’s attention deficiencies in some submissions, and
dismissal could result with little investment of court time if the
deficiencies were not cured. Given the divergences among PFS
regimes for differing MDLs, it seemed difficult to devise a rule
formula that would improve practice generally.

As these discussions moved forward, parties in various cases
began to develop a simplified alternative to a PFS that came to be
called a “census” of claims pending in the MDL court. Variations of
that method are in use in as many as four major MDL matters,
including one pending before Judge Rosenberg, a member of the
subcommittee. The “census” technique may serve several

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2 The four proceedings are:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick
directed counsel involved in the MDL proceeding In re Juul Labs,
Inc., Marketing, Sales Practices, and Product Liability Litigation
(MDL 2913) to develop a plan to “generat[e] an initial census in
this litigation,” with the assistance of Prof. Jaime Dodge of Emory
Law School, who has organized several events attended by members of
the MDL Subcommittee. The census requirements applied to all counsel
who sought appointment to leadership positions. It appears that
relatively complete responses were submitted in December 2019, after
which the judge appointed leadership counsel. Disclosures from
defendants were due during January. The census method can provide
plaintiff-side counsel with a uniform set of questions to ask
prospective clients. The census requirements under Judge Orrick’s
order apply not only to cases on file but also any other clients
with whom aspiring leadership counsel had entered into retention
agreements. Discussions are under way on the next steps in the
litigation, which may involve plaintiff profile sheets or a PFS. The
census in this case was not primarily designed as a vetting device,
but it is possible that having in hand a list of the sorts of
information the court expects from claimants may prompt some counsel
to be more focused in evaluating potential claims than would
otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged
hearing damages related to earplugs that were largely distributed
by the military. After appointment of leadership counsel, the judge
had counsel design an initial census. But that undertaking involved
obtaining military records, an effort that added a layer of
purposes in mass tort MDLs, including organizing the proceedings, providing a “jump start” to discovery, and possibly contributing to the designation of leadership counsel.

It remains unclear how effective the “census” technique has been in serving any of those purposes. When more is known about it, complexity to the census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an “administrative docket” the judge had created. As a general matter, the census was completed in December 2019.

In re Zantac (Judge Rosenberg, S.D. FL): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The Panel order for transfer was entered in February 2020. The litigation is still in the early stages of organization, but much has been done, particularly with regard to the use of census methods. There are 645 filed cases, of which 27 are putative class actions, and a substantial number (in the thousands) of unfiled cases on a registry. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There were 63 applicants for leadership positions. The court received initial census forms for all of the filed cases, including personal injury, consumer, medical monitoring claims among other claims. The Court indicated that this was helpful to her consideration of leadership applicants, which have since been appointed. The Court also created a registry, which allowed for the filing of a 4-page “census plus” form for unfiled claimants; in broad terms, registry claimants received tolling of the statute of limitations from participating defendants and certain assistance with medical/ purchase records. The census plus form, which was also required for all filed plaintiffs, required information on which product(s) were used, the injuries alleged, and a certification by the plaintiff/claimant. In addition, the form required plaintiffs/claimants to either attach documents showing proof of use and injury, state that they were already ordered privately or through the registry but not yet received, or indicate that no records are expected to exist. The census plus forms are due on a rolling basis, with the first due date (for filed plaintiffs) having passed in July; the second tranche of forms were due in August, but this was extended for certain claimants due to a technical error with a private vendor to September, and will be followed by the third main tranche in November.

In re Allergan (Judge Martinotti, D.N.J.): This litigation involves medical implant devices alleged to cause a very specific harmful medical condition in some users. Initial phases of the litigation have focused on selection of leadership counsel. It is possible, but not certain, that a census will be used once leadership counsel are appointed. In this litigation, it may be that records of implants and development of the signature medical consequence would be suitable subjects for a census. Judge Martinotti had extensive experience with complex litigation while on the New Jersey state court before appointment to the federal bench.
it may appear that it is not something appropriately included in a rule, but instead a management technique that could be included in the Manual for Complex Litigation, or disseminated by the Judicial Panel. So this first topic remains under study.

(2) Interlocutory Appellate Review — Recommendation Not to Pursue at This Time

The original proposal for a rule providing an additional route to interlocutory review in MDL proceedings, perhaps limited to mass tort proceedings, called for a right to immediate review without the “veto” that 28 U.S.C. § 1292(b) provides the district court by permitting review only when the district judge certifies that the three criteria specified in the statute are met. Under § 1292(b), the court of appeals has discretion whether to accept the appeal. But the original proposal was to remove that discretion with regard to interlocutory appeals in MDL proceedings, and require the court of appeals to accept the appeal.

From that beginning, the discussion evolved. The notion of mandatory review was dropped relatively early on, and proponents of a rule instead urged something like Rule 23(f), giving the court of appeals sole discretion whether to accept the appeal, and including no provision for input from the transferee district judge on whether an immediate appeal would be desirable. In addition, proponents of a new rule made considerable efforts to provide guidance on distinguishing among MDL proceedings (limiting the new appellate opportunity to only certain MDLs), and on distinguishing among orders, to focus the additional opportunity for interlocutory review on the situations in which it was supposedly needed.

The proponents of expanded interlocutory review came mainly from the defense side, and principally from those involved in defense of pharmaceutical or medical device litigation. The basic thrust of those favoring an additional route for interlocutory review was that interlocutory orders can sometimes have much greater importance in MDL proceedings, which may involve thousands of claims, than in individual litigation. So there might be greater urgency to get key issues resolved, particularly if they were “cross-cutting” issues that might dispose of many or most of the pending cases. One example of such issues was the possibility of preemption of state law tort claims.

Another concern was that some transferee judges might resist § 1292(b) certification when it was justified in order to promote settlement. On the other hand, some suggested that permitting expanded interlocutory review might actually further settlement; defendants unwilling to make a substantial (sometime very substantial) settlement based on one district judge’s resolution of an issue like preemption might have an entirely different attitude if a court of appeals affirmed the adverse ruling.

In addition, it was urged that the final judgment rule leads to inequality of treatment. Should defendants prevail on an issue