COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES

Re: Proposed FRCP 16.1

October 11, 2023

SEPARATING THE WHEAT FROM THE CHAFF: THE NEED FOR A RULES-BASED SOLUTION TO ADDRESS UNSUPPORTABLE CLAIMS IN CONTEXT OF MDL PROCEEDINGS

The DRI Center for Law and Public Policy (the "Center" or "DRI") is the public policy "think tank" and advocacy voice of DRI, Inc., an international community of approximately 16,000 attorneys who represent businesses in civil litigation. The Center participates as an amicus curiae in the U.S. Supreme Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system. Given the prominence of MDL litigation in federal courts to its members, their clients, and the outsized role the MDL process plays in the current civil justice system, the Center established a working group to examine proposed Rule 16.1 and, where appropriate, to offer comments and

suggestions. The Center submits this comment specifically directed to one aspect of proposed Rule 16.1 and to suggest that Rule 16.1(c)(4) and its accompanying note be revised to more specifically address a recurring issue in MDL proceedings—"unsupportable claims"—and to call for a rules-based solution to the problems they create for all relevant stakeholders in the MDL process.

DRI'S PERSPECTIVE ON THE NEED FOR A RULES-BASED SOLUTION

The fifty years since 28 U.S.C. § 1407, the statute creating the MDL transfer process, was first enacted in 1968 have seen an exponential growth in the number of matters pending on MDL dockets in district courts around the country. As the JPML reported in its summary for fiscal year 2020, 953,641 civil actions were centralized for pretrial proceedings from the creation of the JPML from 1968 to September 30, 2020. United States Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407, Fiscal Year 2020* at 3. More than a third of that number, 327,024, were pending at the end of FY 2020 alone. By September 15, 2023, less than three years later, that number had ballooned again, to 408,636 cases pending in various MDLs. United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending* (September 15, 2023).

As discussed in some detail in the MDL subcommittee's report, an unreasonably high number of those claims—particularly in product liability actions making up the largest percentage of cases and consolidated proceedings—are "unsupportable[1]" as that term is defined

[1] DRI uses the phrase "unsupportable claim" in same sense it was defined by the MDL subcommittee in its reporting: a claim where the plaintiff did not use the product involved,

below. The MDL Subcommittee decision to offer only nonbinding guidance contained in proposed Rule 16.1(c)(4) and the Committee Notes to Rule 16.1 is disappointing because the situation will only improve with a clear, rules-based approach.[2]

DRI supports revising the proposed language with a clear rules-based approach to address the problem presented by unsupportable claims. This approach is needed, is workable, and will be beneficial to the MDL judges, the parties, and the judicial system as a whole. Unsupportable claims are relatively easy to weed out in mine-run litigation where there is little if any incentive, for example, to file a claim against a pharmaceutical manufacturer where the claimant did not actually use the drug or where the plaintiff did not develop the condition the drug allegedly causes or where the statute of limitations had plainly run. All of that information is uniquely in the hands of the party filing the claim. Without that foundation, there would be little reason to file suit. And even where an unsupportable claim is improperly filed in an individually litigated case, those deficiencies are usually exposed efficiently and can be addressed by the court in the usual course of business.

DRI submits, however, that the problem of unsupportable claims creates asymmetrical issues of scaling when applied across hundreds or thousands or tens of thousands of cases pending in an MDL. As discussed below, this unsupportable claim problem is real and adversely impacts the judicial system in a way that a rules-based solution can uniquely remedy. Accordingly, DRI suggests that proposed Rule 16.1 be amended to **require** specifically that the report called for by proposed Rule 16.1(c) include a **mandatory** proposal for addressing the

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where the plaintiff did not suffer the adverse consequence at issue, or where the claim is time-barred under applicable law.

[2] DRI notes that the Lawyers for Civil Justice submitted a comment on proposed Rule 16.1 on September 18, 2023, which suggests proposed revisions to both Rule 16.1(c)(4) and adding appropriate notes to that portion of the rule. DRI endorses the LCJ's proposed revisions and additions.

supportability of claims pending or transferred into the MDL.[3] DRI also suggests that the notes to Rule 16.1(c)(4) outline the reasons for its adoption. DRI believes these changes will discourage if not eliminate the filing of unsupportable claims to the benefit of all. And even when such claims are filed, failure to supply the required information makes their dismissal almost a ministerial task rather than the far more resource-intensive motion practice required under the existing rules.

THE EXISTENCE OF UNSUPPORTABLE CLAIMS IS REAL AND HAS EXISTED FOR SOME TIME

DRI purposefully uses the phrasing "unsupportable claims' because it mirrors the language in the MDL Subcommittee's 2018 report to the Advisory Committee:

> There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations—perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices—a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%.

MDL Subcommittee Report, Advisory Committee on Civil Rules Agenda Book at 143 (November 1, 2018).[4]

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[3] The current version of Rule 16.1(c)(4) simply refers to the "exchange of information" about the factual bases for the parties claims and defenses. But the exchange of information is really a discovery issue, more properly addressed under the initial disclosure requirements of Rule 26(a)(1) and proposed Rule 16.1(c)(6). On the other hand, the supportability of each claim is foundational issue—the very keys to the federal courthouse, if you will—which precedes any need for discovery.

[4] This is in contrast to claims that cannot survive summary judgment because for example, the plaintiffs ultimately cannot establish general or specific causation. *See, e.g.*, *In re*

Twenty-one years before that report, the Federal Judicial Center published a report, *Mass Torts Problems & Proposals, A Report to the Mass Torts Working Group* (Fed. Judicial Center January 1999), which observed that, "[t]he consequences of aggregation can be to create a mass tort. To capsulize a now-familiar metaphor, Professor McGovern has coined the mantra: 'If you build a superhighway, there will be a traffic jam.'" *Mass Torts Problems & Proposals* at 23. In discussing asbestos litigation specifically, the report offered an observation that Professor Siliciano had attributed "the asbestos problems to a failure to apply the ground rules of the tort system, allowing unmeritorious claims to clog the new superhighway." *Id.* These have proved to be more than academic and not limited to asbestos claims.

More recently, in 2016, Judge Land stated that his experience as a transferee judge in two MDLs led him to the belief that

> the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action.

In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016). Based on his experience, Judge Land added:

Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig., 227 F. Supp. 3d 452, 466 (D.S.C. 2017), *aff'd sub nom. In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624 (4th Cir. 2018) ("Plaintiffs at issue here were prescribed and ingested Lipitor is dosages of less than 80 mg prior to their diabetes diagnosis, they have no admissible expert testimony regarding general causation."). In that case, the plaintiffs covered by the motion had ingested the product at issue and had been subsequently diagnosed with the disease at issue; they were simply unable to provide sufficient expert testimony at the summary judgment/Rule 702 stage to establish a genuine issue of fact on causation. Under DRI's definition, those claims were "supportable" even if not ultimately successful.

> This phenomenon produces the perverse result that an MDL, which was established in part to manage cases more efficiently to achieve judicial economy, becomes populated with many non-meritorious cases that must nevertheless be managed by the transferee judge—cases that likely never would have entered the federal court system without the MDL.

Id. Judge Land, noting his struggle to address that problem, suggested the "robust use of Rule 11" might help. But Rule 11 comes with its own issues and requires heavy involvement from the transferee judge.[5]

Even the American Association of Justice's MDL Working Group's suggestions to the MDL subcommittee in 2018 candidly acknowledged that cases are "sometimes filed prematurely" because, it said, "plaintiffs need additional time to obtain medical records or other documentation to confirm plaintiffs' use of the product, diagnosis, date of injury, etc." *Memorandum to Judge Robert Dow and Members of the MDL Subcommittee*, AAJ's MDL Working Group at 1 (May 25, 2018). But even were that the situation in sporadic individual cases, it would not explain the 20–40 percent estimate of unsupportable claims noted by the MDL Working Group in its report. More importantly, the current MDL process all but assures that those "prematurely filed" cases will be in the MDL regardless of whether their claims are supportable or unsupportable.

THE PROBLEM OF UNSUPPORTABLE CLAIMS IS NOT A DISCOVERY ISSUE

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[5] As Judge Robreno pointed out ten years ago, "aggregation promotes the filing of cases of uncertain merit. The incentive becomes the number of cases that can be filed, *not* the relative merit of the individual case. Additionally, while the court searches for global solutions, the individual cases are not attended to by either the court or the individual lawyers." Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (Mdl-875): Black Hole or New Paradigm?* 23 Widener L.J. 97, 187 (2013).

The Supreme Court has repeatedly held that Article III standing is constitutional minimum for proceeding in federal court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (calling standing an "irreducible constitutional minimum"). As the United States Court of Appeals for the First Circuit has stated, "Standing is a threshold question in every case." *Summers v. Fin. Freedom Acquisition LLC*, 807 F.3d 351, 355 (1st Cir. 2015) (*citing* W*arth v. Seldin,* 422 U.S. 490 (1975)). It added, "[a] plaintiff suing in federal court normally must shoulder the burden of establishing standing. *Id.* Moreover, when "standing is challenged as a factual matter…, the plaintiff must come forward with 'competent proof,' showing by a preponderance of the evidence that standing exists." *EMD Crop Bioscience Inc. v. Becker Underwood, Inc.*, 750 F. Supp. 2d 1004, 1011 (W.D. Wis. 2010).

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), the Court concluded that to have Article III standing, a plaintiff must show (1) he or she suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable decision. Unsupportable claims fail the Article III standing requirement because:

1) The plaintiff did not suffer an injury in fact; and/or
2) The plaintiff's injury is not fairly traceable to the defendant's conduct; and/or
3) The claim is not likely to be redressed by a favorable decision because it was time-barred when suit was filed.

Using Rule 16.1 to require the MDL courts to establish a procedure for establishing these three minimal components of the "irreducible constitutional minimum" of standing—a "threshold question" in every case—is not a discovery issue but is foundational to whether the case belongs in federal court (and therefore in the MDL) in the first place.

UNSUPPORTABLE CLAIMS ARE PROBLEMATIC TO THE MDL COURT, THE PARTIES, AND THE JUDICIAL SYSTEM

Judge Land already pointed out the burden that unsupportable claims placed on the MDL process based on his experience. But the problem runs deeper than that for all relevant stakeholders. Once the JPML establishes an MDL, Rule 7.1(a) of the Rules of Procedure of the United States Judicial Panel on Multidistrict Litigation requires "[a]ny party or counsel in actions previously transferred under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along actions in which that party is also named or in which that counsel appears."[6] This means, in the first instance, that the JPML itself must take action to transfer (or decline to transfer) unsupportable claims filed, in any district except the one where the transferee court sits, since all potential tag-alongs must be reported to it.[7]

Once such claims are transferred into the MDL proceeding, the existing parties and the transferee court (and its staff) now have to deal with them. A large volume of unsupportable claims misleads the transferee court on the scope of the MDL they will be overseeing and prevents all proper parties from assessing the scope of the work ahead. Moreover, given the unfortunate reality that many MDL judges feel pressure to lead the parties towards a global resolution (a reality that DRI believes is inconsistent with the intent of §1407 and violative of the Rules Enabling Act and due process), the presence of so many unsupportable claims places a

[6] Rule 1.1(h) defines a "tag-along" action was "a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407."

[7] This is not to say that DRI endorses the concepts of "direct filing" orders allowing plaintiffs to bring actions directly into the MDL and skip the transfer process of 28 U.S.C. § 1407. These orders raise significant questions regarding the scope of MDL proceedings, jurisdiction (both subject matter and personal), waiver, choice-of-law, and a host of other problems. For purposes of this comment, however, DRI simply notes that any unsupportable claim subject to a § 1407 transfer will take up JPML resources in the first instance.

barrier to such global resolutions, impacting all parties' ability to assess properly the magnitude of exposure and determining who the actual stakeholders are.

EXISTING RULES ARE INADEQUATE TO ADDRESS THE PROBLEM OF UNSUPPORTABLE CLAIMS

Despite long-standing evidence that creating an MDL can result in a mass tort proceeding with large amounts of unsupportable claims, the JPML has expressed the belief that it is a problem that can be readily handled by the transferee judge. In rejecting a challenge by certain defendants to the expansion of an MDL to include additional types of claims, the JPML reasoned:

> [T]he transferee court handling several cases in an MDL likely is in a better position—and certainly is in no worse position than courts in multiple districts handling individual cases—to properly address meritless claims. There are many tools a transferee court may use to accomplish this task. And importantly, if defendants believe plaintiffs' counsel are filing frivolous claims, it is incumbent upon defense counsel to bring that concern to the attention of the transferee court, and to propose a process to identify and resolve such claims.

In re Valsartan Prod. Liab. Litig., 433 F. Supp. 3d 1349, 1352 (U.S. Jud. Pan. Mult. Lit. 2019). From DRI's perspective, there are at least two issues with this approach.

First, the wide-spread knowledge cited by the MDL committee that "a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims," is itself evidence that the existing rules are not adequately addressing the problem.[8] There is no good reason for the transferee court, the defendant(s), or the plaintiffs who do have supportable

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[8] *See, e.g.,* Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation,* 64 Emory L.J. 329, 350 (2014) ("While mass torts have notoriously generated false claims by individuals far removed from the tort, the structure of the modern MDL does not provide as strong a check upon these claims as exists in single-plaintiff litigation.")

claims to have to shoulder through claims that frankly would not have been filed except for the pendency of an MDL consolidation only to find out at some late settlement stage that many of the claims asserted in the MDL are unsupportable.[9]

Second, there is no reason to believe the transferee court would in reality be in the same sort of position as a judge in one-off case to determine whether sufficient facts exist to support Article III standing.[10] The existing pleading rules—requiring the plausible allegation of facts sufficient to state a claim—fit poorly in the context of an MDL with hundreds or thousands of aggregated claims. Take the "prematurely filed" example cited by the AAJ, where suit is filed even though "plaintiffs need additional time to obtain medical records or other documentation to confirm plaintiffs' use of the product, diagnosis, date of injury, etc." If the complaint in a prematurely filed case flatly stated that the plaintiff "may or may not" have used the defendant's product or that the plaintiff "may or may not" have been diagnosed with the condition at issue, the procedure in a mine-run case would allow the defendant to file an appropriate motion that the district court could address—if necessary—in the normal course of handling their caseload. Multiply that by hundreds of similarly pleaded complaints and similar motions and the transferee court is now overwhelmed with motions.[11] The wheels of justice grind to a halt despite Rule 1's

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[9] As Judge Robreno stated, "Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process." *Black Hole or New Paradigm? supra,* 23 Widener L.J. at 186.

[10] The JPML in the *Valsartin* decision suggested that the transferee courts are only handling "several" cases. But as the statistical analysis from that Panel shows, as of September 15, 2023, 58 of the pending 173 MDLs had at least 50 pending cases and another 27 historically had more than 50 cases, meaning that MDL judges are coordinating much more than just "several" cases in MDLs they handle.

[11] As of September 15, 2023, 23 of the 25 largest MDL proceedings (containing almost 400,000 of the pending MDL cases) were classified by the JPML as "Product Liability" cases. The other two, *In Re: National Collegiate Athletic Association Student-Athlete*

goal that the rules were intended to "secure the just, speedy, and inexpensive determination of every action and proceeding."[12]

Beyond the practical reality that no transferee court should be forced or even reasonably be expected to devote the resources necessary to rule on multiple motions addressing the threshold issue of a given claimant's Article III standing (or for putting the MDL defendant to the waste of resources necessary to bring such motions), there is the larger question of expectations. If all parties, including plaintiffs considering filing a claim that will end up in an MDL, know that the rules will require the prompt provision of information sufficient to establish Article III standing as discussed above, claims that cannot meet that threshold will not be filed in the first place.

DRI BELIEVES THE TIME HAS COME TO PUT A RULE IN PLACE TO REMEDY THE PROBLEM

As noted, the courts and parties have had 50 years of experience with the MDL process and its explosive growth as a percentage of the federal docket. DRI believes the time has come to put a rule in place to address the unique and recurring problem of unsupportable claims in MDL proceedings. That solution, in DRI's view, goes beyond the language of the current draft of Rule 16.1 to include mandatory provision at the outset of the information necessary to establish each MDL plaintiff's Article III standing: an injury-in-fact fairly traceable to the

Concussion Injury Litigation, MDL-2492, and *In Re: National Prescription Opiate Litigation*, MDL-2804, were classified as "Miscellaneous" cases by the JPML reporting and accounted for another 3,500 or so cases.

[12] And that is just where the Complaints candidly acknowledged their current lack of knowledge about "Plaintiffs' use of the product, diagnosis, date of injury, etc." When those facts are blurred or elided over, the task becomes even more overwhelming to the point that the process of eliminating unsupportable claims under the current rules simply does not happen to the detriment of every stakeholder.

defendant's conduct that would likely be remedied by a favorable resolution. That means in the vast majority of the MDL proceedings, facts establishing the use of the involved product, the nature of the claimed injury, and the date of that alleged injury.

In addition, DRI believes that the Committee Note to proposed Rule 16.1(c)(4) ought to outline in some detail the problem with unsupportable claims, explain why it is needed, and unequivocally state that the required information is not a discovery issue. It need not cast aspersions on parties. Rather, it can simply state as a fact that Article III standing requirements are a threshold issue as to whether a given plaintiff has sufficient information to support moving forward in federal court. It can further point out that rather than requiring extensive and resource-intensive motion practice, the Rule is intended to require the early submission of the minimal amount of information necessary to move to the discovery process.

A RULES-BASED SOLUTION WOULD AID THE TRANSFEREE COURT AND THE PARTIES IN A NUMBER OF WAYS

As discussed above, the current approach benefits none of the relevant stakeholders (defined as the judicial system, the transferee judge, those plaintiffs with supportable claims, and the defendants).[13] A rules-based solution would benefit all of them. DRI believes that it would benefit the JPML and transferee courts because a rules-based requirement to provide threshold information promptly will discourage if not outright eliminate the filing of unsupportable claims.[14] This means the transferee court will have a far more accurate picture of the scope of

[13] In DRI's view, parties with unsupportable claims (as defined above) simply have no relevant interest in the process. They do not have a claim and have no right to burden the judicial system and the other stakeholders with their involvement.

[14] And even where such claims are filed, the parties and the transferee court will have a far simpler task (if even necessary) of determining whether the information submitted

the MDL they are overseeing. This will inform decisions across-the-board on discovery, the nature of the claims, what sort of bellwether trials may or may not be useful, and even how to structure case management orders and conferences.

The elimination of unsupportable claims benefits the other stakeholders as well. As discussed, the defendants will have a far more accurate picture of their exposure and the true nature of the claims being asserted against them. And for plaintiffs who have supportable claims, it encourages the entire process to move forward towards a "just, speedy, and inexpensive" determination of their claims.

Respectfully submitted,

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establishes a supportable claim. No submission is little different than not filing suit in the first place and whether the information submitted meets the requirements to show the claim is supportable is a far more binary determination than most.