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September 29, 2017

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Request for Rulemaking for Amendments to Adapt FRCP to MDL Proceedings

Members of the Committee:

Washington Legal Foundation (WLF) writes in support of an August 10, 2017 Request for Rulemaking filed by the Lawyers for Civil Justice (LCJ) and to provide two educational documents that might inform discussions regarding LCJ's request. WLF is a nonprofit public-interest law firm and policy center that devotes a substantial portion of its resources to promoting free enterprise, individual and business civil liberties, a limited and accountable government, and the rule of law. Over the past 40 years, WLF has actively participated in efforts to update and revise the Federal Rules of Civil Procedure, most recently commenting on proposed amendments to Rule 23. We also have consistently advocated for pre-trial procedures that preserve judicial efficiency and combat litigation abuses, such as the recent amendments to the Federal Rules governing electronic discovery.

LCJ's request that the Committee amend selected Rules to adapt their application to cases consolidated for pre-trial proceedings is very timely. As the request notes, nearly half of civil-litigation cases on federal courts' docket are before a multidistrict litigation (MDL) judge. Recent decisions by the U.S. Supreme Court regarding personal jurisdiction (*Bristol-Myers Squibb v. Superior Court* and *BNSF v. Tyrrell*) and venue (*TC Heartland LLC v. Kraft Food Brands LLC*) may lead to an increase consolidation requests. The prevailing lack of clarity and consistency among the many MDL proceedings on such basic matters as what constitutes a "pleading" and the standards by which courts judge the merits of individual claims will complicate the judiciary's ability to manage more case consolidation.

To help place LCJ's Rulemaking Request in a broader context, included with this letter are two WLF Legal Studies Division publications that illuminate the challenges faced by the federal judiciary with MDL proceedings. The WORKING PAPER by Reed Smith LLP's James M. Beck, *Multidistrict Litigation Reform: The Case for Earlier Application of Federal Pleading Standards*, explains how the failure of some MDL judges to apply Rule 8's basic pleading standards has resulted in the very harm Congress sought to avoid when adopting 28 U.S.C. § 1407: meritless, unvetted claims pile up on the court's docket, complicating pre-trial matters such as discovery, and impelling unwarranted settlements.

The second paper, a WLF “CONVERSATIONS WITH,” results from a moderated discussion with two leading voices on mass litigation and the consolidation of claims: Skadden, Arps, Slate, Meagher & Flom LLP partner John H. Beisner, and Novartis Pharmaceuticals Corp.’s Head of Litigation, Charna L. Gerstenhaber. Answers by Mr. Beisner and Ms. Gerstenhaber underscore several of the requests made by LCJ for amendments to the FRCP, including clarification of what constitutes a pleading and the need for plaintiffs to disclose third-party funding and lead generators to the MDL court. The paper’s participants also delve into the negative consequences of claims consolidation and urge MDL judges to minimize abuses through proactive docket management.

These WLF publications identify problems with the MDL process and attempt to diagnose their root causes. They also propose solutions that rely primarily upon the initiative of individual judges and “best practices” designed by third-party organizations. That piecemeal approach, however, cannot realistically achieve consistent success over a sustained period of time. The most effective way to fill “the holes in the FRCP,” as LCJ puts it in their Request for Rulemaking, is for this Committee to devise and pursue a process to amend the Rules with the unique challenges and pitfalls that arise from consolidated litigation in mind. The development and application of such Rules amendments can offer MDL litigants the consistency and reliability that court-by-court rulemaking and non-binding best practices cannot provide.

The federal judiciary has much to gain from this Committee’s consideration of and action on LCJ’s Request for Rulemaking, as do plaintiffs and defendants embroiled in multidistrict litigation. The proliferation of non-meritorious claims profoundly complicates the efficient and effective management of MDL proceedings, deters the eventual transfer of claims to transferor courts, and erodes financial recoveries by actually injured plaintiffs. We trust that the materials included with this letter will further the Committee members’ understanding of the prevailing problems, and that WLF’s support for LCJ’s request will be considered.

Sincerely,

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Glenn G. Lammi, Legal Studies Chief Counsel

Enclosures