The Review of Litigation

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SYMPOSIUM 2018 | PAGES 123 TO 240 | VOL. 37, NO. 2

Published by The University of Texas School of Law

THE REVIEW OF LITIGATION

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FOREWORD

"MDL Problems" – A Brief Introduction and Summary

Morris A. Ratner*

Multidistrict litigation ("MDL") proceedings are administrative aggregations of separately filed actions that involve "one or more common questions of fact."[1] This low bar for transfer and coordination can result in the creation of mega cases that lump together for pretrial purposes tens of thousands of individually represented plaintiffs.[2] Once considered the poor cousin of the class action, MDL proceedings now account for roughly forty percent of the federal civil docket.[3] Their impact on the litigation landscape has sparked both hope[4] and anxiety[5] among commentators.

---

*Academic Dean and Professor of Law, University of California, Hastings College of the Law, JD, Harvard Law School (1991), BA, Stanford University (1988). Dean Ratner organized and moderated the AALS Section on Litigation panel "MDL Problems" at the Annual Meeting of the AALS on January 6, 2017, in his capacity as 2017 Chair of the Section. The Section on Litigation is grateful to the editors of *The Review of Litigation* for partnering with us to publish the panelists' articles.

1. 28 U.S.C. §1407.

2. *Standards and Best Practices for Large and Mass Tort MDLs*, DUKE LAW CENTER FOR JUDICIAL STUDIES (December 19, 2014), https://perma.cc/2YJM-A2YD ("Approximately 90% of the individual actions pending in MDLs in 2014 are consolidated in 18 cases.").

3. *See* Judith Resnick, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899, 1913 n.38 (2017) (analyzing the number and percentage of federal civil cases that are part of MDLs).

4. *See, e.g.*, Morris A. Ratner, *Class Conflicts*, 92 WASH. L. REV. 785, 842-856 (2017) (describing how the federalization of mass torts via the Class Action Fairness Act and the MDL statute intersected to create conditions for managing some of worst abuses of the pre-CAFA era, including the reverse auction).

5. *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) (documenting the repeat player phenomenon among common benefit counsel and analyzing the potential for abuse); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) ("MDL involves something of a cross between the Wild West, twentieth century political smoke-filled rooms, and the *Godfather* movies.").

The following articles[6] are by a subset of presenters at the American Association of Law Schools' Section on Litigation panel, "MDL Problems," which took place on January 6, 2017, in San Francisco, California.[7] The program addressed the growth of and challenges posed by MDLs[8] in federal district courts:

> MDLs comprise an increasingly significant portion of the federal docket and account for much of the growth in the civil side of the docket in the last few years. Trial court judges to whom the Judicial Panel on Multidistrict Litigation transfers cases, operating with little guidance from the MDL statute or the Federal Rules, have improvised ways to appoint counsel to leadership positions; control pleading, motion practice and discovery; and resolve mass torts via trial or aggregate settlements in a system expressly designed for pretrial purposes only. Though creative, their solutions raise a number of concerns regarding litigant autonomy, agency costs, and the role of federal court judges in litigation. This program explores the MDL phenomenon and the problems it poses for our civil litigation system.

Panelists included scholars, practitioners, and a federal district court judge, who have all grappled directly with MDLs in their research or practice:[9]

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6. Andrew Bradt, *The Stickiness of the MDL Statute*, 37 REV. LITIG. (forthcoming 2018); Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. (forthcoming 2018); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All-Writs Act*, 37 REV. LITIG. (forthcoming 2018); Chilton Davis Varner, *The Beginning of MDL Consolidation: Should Cases be Aggregated and Where?*, 37 REV. LITIG. (forthcoming 2018).

7. AALS 111th Annual Meeting, "Why Law Matters," Program, at 43 (Jan. 3-7, 2017), https://www.aals.org/wp-content/uploads/2016/12/AM2017_Program.pdf.

8. *See* 28 U.S.C. §1407 (governing multidistrict litigation in federal courts).

9. Readers who are members of the AALS can listen to the panel presentations, which are accessible via the AALS podcasts page. https://memberaccess.aals.org/eweb/DynamicPage.aspx?Site=AALS&WebKey=75b8e4cc-2dd1-4905-be92-469210b54826. Select the 2017 Annual Meeting Podcasts, and then select "Litigation."

- Professor Andrew D. Bradt's[10] body of work includes a groundbreaking historical inquiry into the genesis and evolution of the MDL statute, 28 U.S.C. § 1407.[11] At the panel on January 6, Professor Bradt explained how the MDL statute's durability and dominance is partly attributable to strategic choices made by its drafters in the 1960s. The drafters of the MDL statute intended to insulate the device from the regular tinkering to which the Federal Rules are subjected, to protect what they knew was a radical experiment. Professor Bradt's article for this symposium issue explores this history and its implications.

- Plaintiffs' mass tort and class action litigator Elizabeth J. Cabraser[12] is an experienced member of the MDL plaintiffs' bar.[13] At the panel on January 6, Ms. Cabraser described trends in MDL practice, including the increasing prevalence of MDL trials and the emergence of particularly participatory classes. She emphasized how quickly MDL practice changes at the trial court level and predicted and hoped for even greater innovation regarding bellwether trials and the facilitation of plaintiff engagement through technological

10. Assistant Professor of Law, University of California, Berkeley School of Law (Berkeley Law). https://www.law.berkeley.edu/our-faculty/faculty-profiles/andrew-bradt/.

11. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PENN. L. REV. 831 (2017). (examining the historical origins of MDL).

12. Partner, Lieff Cabraser Heimann & Bernstein, LLP. *See* https://www.lieffcabraser.com/attorneys/elizabeth-j-cabraser/.

13. Ms. Cabraser recently served as lead plaintiffs' counsel in the Volkswagen "clean diesel" litigation which resulted in a global settlement of approximately $15 billion. *See* Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement at 3, *In re* Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig., Case No. 315-md-02672 (N.D. Cal. October 25, 2016), ECF No. 2102. Ms. Cabraser writes extensively about complex litigation. *See, e.g.*, Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 NYU L. REV. 846 (2017) (discussing the impact of the "participatory class action"). She serves on the Executive Committee of the Council of the American Law Institute (ALI), and has been an advisor to several ALI projects, including Aggregate Litigation.

advances in communication and information exchange.

- Professor Alexandra D. Lahav's[14] research focuses on procedural justice and the limits of due process in aggregate litigation. She has written extensively about how courts can better manage MDL litigation.[15] At the panel, Professor Lahav focused on the question of how MDL bellwether trials are structured. She canvassed key issues, including the sample size and mix of cases necessary to produce reliable outcomes, and some of the knotty ethical questions raised by this form of litigation. Professor Lahav's article in this symposium issue dives deeper into the topic of MDL bellwether trial best practices.

- Professor Linda S. Mullenix[16] has written widely about complex litigation in general and mass tort litigation in particular.[17] At the panel, Professor Mullenix canvassed the different methods by which aggregate settlements are typically effectuated in MDLs. She focused on non-class aggregate settlements, questioning the ability of trial court judges to police them for fairness absent an expansion of their authority to do so.

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14. Ellen Ash Peters Professor of Law, University of Connecticut School of Law. https://www.law.uconn.edu/faculty/profiles/alexandra-d-lahav.

15. *See, e.g.*, Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012) (defending district court attempts to adopt statistical methods in order to promote outcome equality); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

16. Professor of Law, Rita and Morris Atlas Chair in Advocacy, University of Texas School of Law. https://law.utexas.edu/faculty/linda-s-mullenix.

17. *See, e.g.*, Linda S. Mullenix, *Designing a Compensatory Fund: The Search for First Principles*, 3 STAN. J. COMPLEX LITIG. 1 (2015) (analyzing the goals of compensation funds and whether such funds comport with theories of justice); Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in the Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015). Professor Mullenix is an elected Life Member of the American Law Institute and has served as the Associate Reporter for the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS and a consultative member of the COMPLEX LITIGATION PROJECT.

- The Honorable Jon Tigar,[18] United Stated District Court Judge for the Northern District of California, is a member of the American Law Institute, serves as Advisor to the RESTATEMENT (THIRD) OF TORTS, and has managed MDL proceedings. At the panel presentation, Judge Tigar mused about some of the key challenges in MDLs, including the difficulty of assessing value at the front end and encouraging proportional investment in litigation by the parties.

- Complex litigation defense attorney and King & Spalding partner Chilton S. Varner[19] focused her panel presentation on how consolidation decisions are made by the Judicial Panel on Multidistrict Litigation, problems associated with filing relatively large numbers of weak claims in MDL proceedings, and the practice of having "multi-plaintiff" bellwether cases, which she suggested poses the risk of prejudice to defendants. Ms. Varner's article, included with this symposium issue, further explores those issues.

The January 6, 2017 AALS panel presentation and the articles included in this symposium issue are a window into rapidly evolving practices, the competing procedural values they implicate, and the creativity of practitioners, judges, and scholars struggling to find the right balance.

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18. http://www.cand.uscourts.gov/jst.
19. https://www.kslaw.com/people/ChiltonDavis-Varner.

ARTICLES, SYMPOSIUM EDITION

Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act

Linda S. Mullenix*

ABSTRACT

Commentators have identified that one of the most significant problems in current MDL practice is the lack of judicial authority over non-class aggregate settlements. This paper explores the use of the All Writs Act to provide MDL judges with robust authority to manage, supervise, and ultimately review non-class aggregate deals that are the object of much recent criticism. It rejects the thesis that judicial supervision of non-class settlements is unwarranted because these deals are contractual, and that oversight therefore removes claimant autonomy and damages the adversarial system. Several MDL judges already have invoked the All Writs Act to police parallel class action settlements that might jeopardize pending MDL negotiations. This paper explores and endorses the argument that MDL judges may, with equal force, exercise power pursuant to the All Writs Act to police pending non-class settlements in their jurisdiction.

As the MDL non-class settlement paradigm has evolved, some MDL judges have sought to intervene in settlement activities by invoking authority pursuant to three theories: (1) the quasi-class action, (2) the inherent powers of the court, and (3) the All Writs Act. As critics note, the quasi-class action and inherent judicial power have provided weak support for judicial intervention in non-class aggregate settlements. But to date, commentators have paid scant attention to

*Morris & Rita Atlas Chair in Advocacy, The University of Texas School of Law.

judicial power under the All Writs Act or its use in MDL proceedings.

The explosion of the MDL docket in the twenty-first century represents the most notable paradigm shift in the American legal landscape in several decades. Currently, the MDL panel assumes jurisdiction over almost all emerging aggregate mass tort and small claims consumer actions. With this marked proliferation of MDL proceedings, commentators have signaled various growing concerns with the MDL resolution of large-scale collective disputes. In particular, critics have focused on issues relating to non-class aggregate settlements accomplished under MDL auspices.

The MDL statute provides judges with authority to supervise and manage coordinated pre-trial proceedings, but little else. Historically, MDL proceedings have proven effective vehicles for resolving mass disputes through class action settlements, subject to Rule 23 requirements and constraints. Currently, however, attorneys have pivoted to resolving aggregate disputes through non-class settlements that are negotiated and consummated outside class action procedures, which relieves parties of Rule 23 judicial supervision, oversight, and review.

The MDL statute provides scant authority for judicial oversight of non-class aggregate settlements. This shift to non-class settlements has inspired concern regarding the substantive, procedural, and ethical dimensions of these deals. A major debate centers on the question of judicial authority in the non-class settlement arena and this paper seeks to provide that authority by focusing on judicial power under the All Writs Act.

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INTRODUCTION

With the advent of the twenty-first century, the American legal system has experienced a radical shift in the ways in which the judiciary resolves mass tort and other aggregate litigation. Through the mid-1970s, such large-scale litigation played a relatively minor role in the overall legal landscape. However, with the emergence of mass tort litigation in the late 1970s and early 1980s—characterized by the seminal mass tort cases involving asbestos, Agent Orange, DES, Bendectin, and the Dalkon Shield—the American legal system was confronted with a burgeoning crisis in federal and state courts. This crisis led to two decades of reform initiatives and judicial experimentation, with judges, attorneys, scholars, and institutional

reform groups all searching for efficient and workable models for resolving aggregate, complex litigation. The history of these developments has now been well-documented.[1]

During the heyday of the mass tort litigation crisis, the judiciary chiefly turned towards creative use of the class action rule, Federal Rule of Civil Procedure 23,[2] as the primary means for resolving these cases. As the courts struggled with applying Rule 23 requirements to proposed mass tort litigation classes, the judiciary quickly recognized the uneasy fit between Rule 23 and the issues embedded in mass tort cases. At the end of the 1990s, the Supreme Court entered the mass tort litigation fray, famously repudiating two massive, nationwide asbestos settlement classes.[3]

Mass tort litigation and other large-scale class litigation did not recede as a consequence of various judicial setbacks. Instead, attorneys representing claimants simply regrouped and sought other auspices for resolving these cases. From the late 1990s through 2005, a good deal of class action litigation took a detour to state courts in order to evade stringent class certification requirements imposed by many federal judicial circuits.[4] This foray into state court systems to pursue class litigation effectively subsided after Congress enacted the Class Action Fairness Act of 2005,[5] which enabled corporate defendants sued in state class actions to remove these cases to more defendant-favoring federal courts.[6]

As a result of CAFA's removal provisions, much class action litigation returned to federal courts that were not especially sympathetic to resolving mass tort and other complex disputes through class action proceedings. Although class action litigation was by no

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1. Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 U. NEV. L. REV. 1455 (2015); *Ending Class Actions As We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014).

2. Fed. R. Civ. P. 23.

3. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); Amchem Prods. Inc. v. Windsor, 521 U.S. 591 (1997).

4. *See e.g.*, Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (repudiating class certification of nationwide class of nicotine-addicted claimants); In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (repudiating nationwide certification of class of tainted blood products claimants); In re Fibreboard, 893 F.2d 706 (5th Cir. 1990) (repudiating class certification of asbestos class).

5. Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–15, Pub. L. 109-2, 119 Stat. 4-14 (2005).

6. *Id.*, 28 U.S.C. § 1453.

means abandoned,[7] many class counsel nonetheless sought other judicial auspices to resolve their aggregate cases. A perhaps unintended consequence of CAFA was that CAFA inspired a renaissance in recourse to the multidistrict litigation statute[8] as an alternative means for resolving complex litigation.

Ironically, for most of its history the MDL statute lay largely dormant as a means for resolving mass tort litigation. Indeed, through the early 1990s, various judges serving on the Judicial Panel on Multidistrict Litigation consistently declined to create mass tort MDLs.[9] With the ever-expanding litigation crisis in the federal courts, the Panel finally relented the Panel's historical resistance to mass tort MDLs with the 1991 approval of the first nationwide asbestos MDL.[10] The ascendency of MDL auspices for resolving mass tort litigation in the twenty-first century may rightly be traced to the judiciary's ultimate capitulation to create the asbestos MDL.

Plaintiffs' attorneys were not the only litigators to pivot towards use of MDL proceedings in the post-CAFA era. Defense counsel likewise realized the advantages of MDL proceedings over more conventional class litigation, and simultaneously (along with plaintiffs' attorneys) embraced the MDL platform as an alternative forum for resolving the burden of complex cases.[11] In particular, defense counsel realized that the constraints imposed by evolving class certification and settlement jurisprudence in many ways hampered their ability to control, negotiate, and finalize deals to achieve their goals.[12]

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7. *See generally* Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 EMORY L.J. 477 (2014) (concluding that class action litigation, including class settlements, is still a viable means for resolving aggregate disputes in the court systems).

8. 28 U.S.C. § 1407 (Multidistrict Litigation statute) ("MDL").

9. *See e.g.*, In re Asbestos and Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977) (declining to create an asbestos MDL proceeding).

10. In re Asbestos Prod. Liab. Litig., 771 F. Supp. 415 (J.P.M.D.L. 1991); *see also* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Transfer Power*, 82 TUL. L. REV. 2245, 2271–73 (2008) (discussing the impact of the Judicial Panel's decision to create an asbestos MDL in 1991; reversal of prior resistance to creation of mass tort MDLs).

11. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 414 (2014) (noting that "Defendants often stand to gain the most through centralization and global settlement.").

12. *Id.*

Despite the marked shift to MDL auspices,[13] traditional class action litigation has not substantially abated.[14] Attorneys still continue to seek class certification and approval of settlements in state and federal courts.[15] What has changed is the conspicuous proliferation of MDL proceedings.[16] As such, the MDL structure has empowered the expansion of a parallel, alternative universe for resolving aggregate litigation.[17]

The proliferation of MDL proceedings to resolve complex litigation has generated an array of fresh, controversial, and challenging issues. Consequently, the ever-expanding recourse to MDL proceedings has garnered increasing critical commentary.[18]

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13. *See* Calendar Year Statistics of the United States Judicial Panel on Multidistrict Litigation (2015), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2015.pdf (last visited May 13, 2016) (providing annual MDL statistics); United States Judicial Panel on Multidistrict Litigation Statistical Analysis of Multidistrict Litigation Fiscal Year 2015, http:// www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_ Multidistrict_Litigation-2015_1.pdf (last visited May 13, 2016) (providing annual statistics regarding MDL litigation).

14. *See, e.g.*, *Law360 Class Action Litigation*, https://www.law360.com/classaction (last visited May 13, 2016) (providing daily postings of class certification and settlement developments).

15. *Id.*

16. *See supra* n.10; discussion *infra* at notes 32–36.

17. *See* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 801 (2010) (discussing several MDL settlements that "suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements.").

18. *See generally* S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEVE. ST. L. REV. 391 (2013) (examining how repeat player domination is achieved through non-binding global mass tort settlements in MDL); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) (sharing empirical data showing that judges appoint a large number of repeat players to lead-lawyer positions in MDL); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87 (2011) (exploring the interdependence of the diverse principals and agents involves in complex mass litigation); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015) (exploring the history, procedures, and possible revisions of the MDL process); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014) (exploring a new settlement trend where MDL judges have begun to exercise power over litigants in order to facilitate global settlements).

As in the past, most MDL litigation is resolved during the course of MDL proceedings. MDLs are rarely disbanded with the Panel ordering that individual cases be remanded back to original transferor courts. Instead, MDL litigation is now chiefly resolved in two ways: either through conventional Rule 23 class action settlements or through contractual non-class aggregate agreements.

Both modalities have raised issues concerning the ways in which parties accomplish these settlements. Part of the problem in evaluating MDL proceedings centers on the lack of transparency in the workings of MDL courts,[19] which in turn raises questions about the legitimacy of settlements that are accomplished under these auspices.[20] Nonetheless, MDL cases that are resolved as settlement classes at least are afforded Rule 23 due process protections and judicial oversight. Despite the existence of judicial review, some critics who are troubled with aspects of MDL settlements have suggested avenues for improvement in judicial supervision and scrutiny of these MDL class action settlements.[21]

However, a substantial MDL controversy now has focused on non-class aggregate settlements. The non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation. For the most part, this tectonic shift in aggregate dispute resolution has gone largely unnoticed until fairly recently.[22]

Because of the lack of transparency in MDL proceedings—itself a troubling issue—we do not know a great deal about what goes

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19. *See* Myriam Gilles, *Tribal Rituals of the MDL*, 5 J. TORT L. 173, 176 (2012) (noting that "[a]s MDL proceedings become an even more active venue for aggregating and resolving mass litigation in the 'post-class action' era, the immense power wielded by a mere handful of lawyers will continue to raise important questions about governance structures, accountability, and transparency.").

20. *Id.*

21. *See generally* Howard M. Erichson, *Aggregation as Disempowerment*, N.Y.U. L. REV. (2016) (suggesting various issues for enhanced judicial scrutiny in MDL class settlements) (draft manuscript reviewed by author).

22. *See generally* Elizabeth Chamblee Burch, *Procedural Justice in Non-class Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) (introducing a continuum for evaluating group cohesion in nonclass aggregation litigation); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (examining consent versus closure in resolution of mass tort cases); Howard M. Erichson, *The Trouble With All-Or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010) (describing ethical problems raised by demanding fully inclusive settlements); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769 (2005) (defining types of collective settlements in terms of their key attributes).

on in MDL "litigation." In spite of this opacity, scholars have focused on an array of issues engendered by what little we do know about MDL proceedings. The Judicial Panel has been criticized for the obscurity in its decisions and for the formulaic, uninformative orders creating MDLs.[23] Some have criticized the phenomenon that many complex cases are now reflexively declared appropriate for MDL treatment.[24] Other scholars have criticized the process for selecting MDL counsel;[25] the relatively small pool of judges overseeing MDL cases;[26] controversial proposals for relaxation of the aggregate settlement rule;[27] and fee arrangements in non-class aggregate settlements.[28]

In light of this burgeoning awareness that MDL proceedings have veered into novel, unchartered dispute resolution territory, commentators have consequently called for various reforms.[29] This

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23. *See* John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 NO. 4 LITIG. 26, 28 (2012) (citing attorney criticism of lack of transparency and formulaic nature of MDL panel opinions creating MDLs).

24. *Id.* at 29.

25. *See* Burch, *Judging Multidistrict Litigation*, *supra* note 18, at 84–94 (discussing judicial appointment of repeat player counsel and the consequent effects on lack of adequate representation in MDL proceedings); Gilles, *supra* note 19, at 174 (suggesting the lack of empirical evidence to support better MDL outcomes as a consequence of repeat player representation in MDL proceedings); Redish & Karaba, *supra* note 18, at 142 n.210 (criticizing repeat player counsel appointment in MDL proceedings); *but cf.* Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391 (2014) (discussing judicial expertise in Eastern District of Louisiana in selecting MDL counsel).

26. Heyburn & McGovern, *supra* note 23, at 30–31 (examining the small pool of judges supervising MDL cases).

27. Am. Law Inst., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.15-3.18 (2010). Samuel Issacharoff, the Reporter for the ALI Principles, described the proposal on non-class aggregate settlements as "probably the single greatest contribution of [the] project." *Discussion of Principles of the Law of Aggregate Litigation*, 86 A.L.I. Proc. 229, 269 (2009); *see also* Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1187, 1190, 1206, 1247–56, 1257 (2013) (endorsing ALI proposal to relax the aggregate settlement rule).

28. *See generally* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013) (exploring how difficult questions about MDL aggregation procedures are best answered by Congress or judges, rather than indirectly from an ethics approach).

29. *See e.g.*, Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 399 (arguing in favor of more frequent remand of MDL cases back to courts of origin); Charles Silver and Geoffrey P. Miller, *The Quasi-Class Action Method of Managing*

article focuses on the sole issue of judicial authority to manage and control MDL proceedings, particularly non-class aggregate settlements. The article is premised on the thesis that MDL judges currently lack sufficient authority to oversee the most significant dimension of MDL proceedings: non-class aggregate settlements.

I. THE ASCENDENCY OF MDL PROCEEDINGS IN THE TWENTY-FIRST CENTURY

A. *Burgeoning MDL Proceedings: The Data*

The problems relating to judicial supervision of non-class aggregate settlements needs to be appreciated in the context of the rapidly burgeoning use of MDL proceedings to resolve complex cases. If MDL proceedings constituted just an occasional vehicle for resolving dispersed litigation, MDL litigation might not command much attention—or need for much scrutiny. Indeed, there has been a general lack of interest in MDL proceedings for much of the historical arc of the statute because this procedural mechanism for aggregating cases lay dormant or underutilized.[30]

As is well known, the legislative initiative for Congressional enactment of the MDL statute in 1968 was prompted by the electronics products antitrust litigation dispersed across federal courts.[31] As a consequence of this experience, Congress acted to provide a procedural vehicle for transfer and consolidation of cases sharing common questions of fact, which the reformers realized was characteristic of the electronics products cases. Thus, the original MDL statute was intended to target a specific, narrow problem then affecting the federal dockets. However, for the ensuing four decades, the Judicial Panel on Multidistrict Litigation eschewed creation of

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Multidistrict Litigations: Problems and a Proposal, 63 VAND. L. REV. 107 (2010) (proposing default rule to create plaintiffs' management committee to set compensation terms and monitor common benefit attorneys in MDL proceedings).

30. Andrew D. Brandt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012) (noting that "[a]lthough the MDL statute has been on the books for over four decades, it has never been as prominent as it is now. According to recent statistics by the Federal Judicial Center, a third of all pending federal civil cases are part of an MDL, and over ninety percent of those cases are products-liability cases—exactly the sorts of cases that might have been nationwide class actions had choice-of-law issues not emerged as such a central obstacle.").

31. *See generally* Marcus, *supra* note 10, at 2245 (discussing the history of MDL statute and MDL practice).

MDL proceedings, especially in mass tort and consumer products cases.

In contrast to this scanty chronicle, MDL proceedings have rapidly proliferated in the twenty-first century.[32] Statistics from the Administrative Office of the United States Courts, the Judicial Panel on Multidistrict Litigation, the Federal Judicial Center, and various scholars have documented the considerable increase in MDL since the 1980s, and especially during the past decade.[33]

One scholar has noted that, as of 2014, fully one-third of all federal cases were MDL matters.[34] In addition, another empirical researcher documented that between 1986 and 2013, federal courts experienced a 204% increase in transfer cases, including transfers pursuant to 29 U.S.C. § 1407.[35] This researcher noted that at the apex

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32. Richard D. Freer, *Exodus From and Transformation of American Litigation*, 65 EMORY L.J. 1491, 1510 (2016) (noting that "[a] startling percentage of all civil cases in district courts are coordinated for MDL treatment.") (citing Thomas Metzloff, *The MDL Vortex Revisited*, Judicature, Autumn 2015, at 37, 38–41, 43 (2015)).

33. Jaime Dodge, *Facilitative Judging: Organizational Design of Multidistrict Litigation*, 64 EMORY L.J. 329, 331 (2014) (stating that one-third of all federal cases are MDL matters and that 90% are coordinated into eighteen "mass-MDLs" comprised of more than 100,00 individual cases); Thomas E. Willging et al., *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 776 (2010) (discussing the substantial growth of aggregate tort litigation in MDL proceedings); Emery G. Lee, Margaret Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging, and Kevin M. Scott, *The Expanding Role of Multidistrict Litigation in Federal Civil Litigation: An Empirical Investigation* (2010); *see also* U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report—Distribution of Pending MDL Dockets by District as of October 10, 2016 (2014), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-10-2016.pdf (providing pending MDL docket statistics).

34. Dodge, *supra* note 33, at 331.

35. Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1196, 1214 (2015) (noting that "[i]n 1986, the total number of cases then pending and subjected to MDL proceedings was 1367, and tort cases represented a minority even of that small number. Over the next twenty-five years, the annual number of new cases filed and subjected to MDL proceedings grew from 531 in 1986 to 22,319 in 2012.").
Discussing the trend towards increased use of the MDL docket, Hatamyar notes:

> So if traditional tort filings such as motor vehicle and medical malpractice have declined, why have federal tort filings increased as a percentage of civil filings since 1986? Products liability cases, led by asbestos cases, have caused the overall increase in tort filings since 1986. Personal injury products liability suits grew from 29% of all federal tort filings in 1986 to 70% of all federal

of MDL transfers in 2008, the total number of individual cases pending in MDL proceedings exceeded 100,000. As of September 30, 2013, 89,123 cases were subject to MDL proceedings, or about 32% of all then-pending civil cases. Products liability and marketing/sales practices cases were the most prevalent litigation types on MDL dockets.[36]

This dramatic shift in the method for processing federal litigation has largely gone unnoticed, except for the actors involved in MDL matters and a subset of academic scholars, who largely have failed to gain much traction in their critiques of the current state of MDL litigation. Because an extraordinarily high percentage of MDL cases are resolved and never remanded to their originating courts,[37] the actors involved in MDL litigation (plaintiff, defense lawyers, and MDL judges alike) are unlikely faultfinders of MDL proceedings. These actors are generally satisfied with the state of affairs in MDL procedure precisely because they have globally resolved the

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> tort filings in 2012. But products liability cases tend to be coordinated in MDL proceedings and brought against more concentrated defendants.
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> In 1988, 41% of all asbestos cases were filed in federal court, and huge numbers of asbestos cases continue to be filed in federal district court every year. Large swings in the number of asbestos case filings in any given year affect the overall civil filing rate. In addition to asbestos, well-known conglomerations of tort cases in MDL proceedings include cases concerning breast implants, Baycol, hormone replacement drugs, diet drugs, Seroquel, the September 11, 2001 terrorist attack, Vioxx, Chinese drywall, Deepwater Horizon oil drilling rig, contraceptives, joint implants, and pelvic repair. *Id.* at 1214.

36. *Id.*; Freer, *supra* note 32, at 1509 (noting that "[a] stunning 96% of those cases pending in MDL proceedings are mass tort cases.").

37. Burch, *Judging Multidistrict Litigation*, *supra* note 18, at 73 (stating that transferee judges have remanded a scant 2.9% of cases to their original districts); Since its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,548 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. *Judicial Business 2013: Judicial Panel on Multidistrict Litigation*, Admin. Off. U.S. Courts (2013), http:// www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx; *see also* Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 400 (noting that, in 2012, 3.1% of cases were remanded to transferor courts).

litigation.[38] Similarly, MDL judges who are able to take credit for "resolving" massive litigation are unlikely critics of the MDL process that they oversee.

Hence, the proliferation of MDL proceedings, and the ways in which cases are processed through MDL proceedings, has not been accompanied by arms-length, dispassionate evaluation. Apart from academics, very few are minding the MDL store. Thus, the alacrity with which MDLs are now created and resolved, and the absence of meaningful scrutiny, has created a kind of Wild West outpost of federal litigation.

B. *Explaining the Trend*

While any number of court watchers have documented the precipitous increase in MDL proceedings,[39] few have ventured explanations for this phenomenon. At least one commentator has narrowly suggested that the increase in MDL proceedings was the consequence of plaintiffs' inability to pursue nationwide class actions in federal court, due to choice of law problems.[40] Certainly, by the end of the twenty-first century, federal class action jurisprudence made it difficult to certify nationwide class actions where applicable law problems undermined or defeated the Rule 23(b)(3) predominance requirement.[41]

But to contend that the shift to MDL proceedings was largely the consequence of applicable law problems misses a larger picture: that for an array of reasons, federal courts became unfriendly and difficult forums for resolving large-scale litigation through Rule 23.[42] And, the reasons for this inhospitality grew more legion and complicated over time.

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38. Burch, *Remanding Multidistrict Litigation*, *id.*, 75 LA. L. REV. at 414 (noting that "Defendants often stand to gain the most through centralization and global settlement.").

39. *See supra* notes 32–36 (discussing the growth of MDL proceedings).

40. Brandt, *supra* note 30, at 759.

41. *See e.g.*, *Castano, supra* note 4, at 734 (repudiating class certification of a nationwide class of nicotine-addicted claimants); *In the Matter of Rhone-Poulenc Rohrer*, *supra* note 4, at 1293 (repudiating class certification of nationwide class of tainted blood products claimants).

42. Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 414 (noting that it is becoming increasingly difficult to certify settlement classes in litigation where individual issues outnumber common ones, like in product liability or other mass tort cases).

Thus, into the twenty-first century federal courts began to ratchet up the "rigorous analysis" standard for class certification;[43] requiring heightened standards for class "ascertainability;"[44] carefully monitoring novel models for classwide liability and damage,[45] questioning expert witness testimony proffered during class certification;[46] and critically scrutinizing *cy pres* settlement provisions.[47] In addition, the Supreme Court notably tightened requirements for judicial approval of Rule 23(b)(3) settlement classes[48] and virtually extinguished the utility of Rule 23(b)(1)(B) limited fund settlements.[49]

Simply stated, by the end of the twentieth century—and into the twenty-first—it has become increasingly difficult to attempt to certify a Rule 23(b)(3) litigation class action for damages or a Rule 23(b)(1)(B) limited fund action. Moreover, when the Supreme Court announced that settlement classes had to satisfy the same requirements for certification as litigation classes,[50] it likewise became increasingly difficult to accomplish a settlement class under the rule. Not only did the settling parties' agreement have to pass muster in a Rule 23 fairness hearing,[51] but the parties also had to run the additional gauntlet of satisfying Rule 23 requirements for class certification.

Consequently, many actors involved in massive litigation decided that the class action route for resolving these cases was not worth the candle or the bother. The ability to consolidate complex, dispersed cases in MDL proceedings—with a near guarantee of global resolution—beckoned as an attractive alternative to federal class action litigation.

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43. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 309–12, 315–21 (3d Cir. 2008).

44. Carrera v. Bayer Corp., 727 F.3d 300, 306–07 (3d Cir. 2013); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–93 (3d Cir. 2012).

45. McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008); Cimino v. Raymark Industries, 151 F.3d 297 (5th Cir. 1998).

46. Hydrogen Peroxide, 552 F.3d at 323–25.

47. *See e.g.*, Sec. and Exch. Comm'n v. Bear, Stearns & Co., 626 F. Supp.2d 402, 414–17 (S.D.N.Y. 2009) (canvassing controversy over cy pres awards in settlement agreements and endorsing ALI proposal to rein in cy pres provisions); *See generally* Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 639 (2010) (analyzing cy pres in the modern-day class action lawsuit).

48. *Amchem*, *supra* note 3; *see* Burch, *Remanding Multidistrict Litigation*, *supra* note 11, at 414 (noting that settlement classes are difficult to certify).

49. *Ortiz*, *supra* note 3, at 815.

50. *Amchem*, *supra* note 3, at 591.

51. Fed. R. Civ. P. 23(e).

In a moment of almost cosmic convergence, plaintiff and defense counsel realized that MDL auspices offered a very attractive alternative to favorably resolving mass litigation, largely unshackled from the initial (and ultimate) constraints of the class action rule. And, as MDL proceedings expanded and evolved, attorneys on both sides of the docket increasingly grew to appreciate the changed role of the judge overseeing MDL proceedings, which permitted the attorneys more latitude and flexibility in resolving aggregate litigation.

II. RESOLVING MASS AGGREGATE LITIGATION THROUGH MDL PROCEEDINGS: THE EVOLVING MODEL

A. Scope of Authority in MDL Proceedings

The statutory framework governing MDL proceedings divides authority between the Judicial Panel on Multidistrict Litigation and the federal judge appointed to oversee the MDL proceedings that are authorized by the Panel.[52] In the federal court system, this division of authority is somewhat unique, and the Judicial Panel itself is a somewhat odd institution.[53] In the MDL landscape, a panel of federal judges effectively exercises discretion over another federal judge's docket and proceedings, potentially thousands of cases, and the universe of attorneys who represent the claimants in these individual cases.

1. The Powers of the Judicial Panel on Multidistrict Litigation

In discussions of MDL proceedings, the powers of the Judicial Panel are often under-recognized.[54] The Panel largely maintains control over an array of housekeeping matters, but exercises very little control over substantive aspects of MDL proceedings. And in this statutory scheme, the MDL judge likewise exercises substantial

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52. *See generally* 28 U.S.C. § 1407 (providing the governing rules for MDL) (hereinafter "Judicial Panel" or "Panel").

53. Marcus, *supra* note 10, at 2279 (noting that the Panel is unlike any other part of the judicial system).

54. The Judicial Panel has prescribed its own rules for proceedings before the Panel, authorized by 28 U.S.C. § 1407(f). These rules encompass both procedures for those seeking transfer and consolidation of cases as well as the procedures following transfer and consolidation.

housekeeping authority but relatively weak power over ultimate merits decisions.

This statutory division of authority is mandated in several ways. Initially, the Judicial Panel is vested with the power to approve or disapprove creation of an MDL.[55] The Panel may initiate proceedings to create an MDL on the Panel's own initiative and without a request from interested parties.[56] In recent years, the Panel increasingly has undertaken to create MDLs on the Panel's own initiative, without waiting for a request from parties involved in the underlying litigation.[57] The fact that the Judicial Panel progressively has taken the initiative to create MDLs is evidence of the heightened receptivity of the federal court system to sweep major complex cases into MDL auspices.

The statute requires that if the Panel undertakes consideration of creation of an MDL, the Panel must supply notice to all interested parties and conduct a hearing.[58] A transfer order must be based on the record of evidence presented at the hearing, and the court must issue an order supported by findings of fact and conclusions of law based on that record.[59]

Although the statute mandates a hearing before the Panel, in actual practice parties may be limited to a very short amount of time to present arguments on behalf of client interests.[60] Thus, it has

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55. 28 U.S.C. § 1407(a). The statute provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." *Id.* The statute requires that such a transfer may be authorized only upon a determination that such transfers "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions." *Id.*

56. 28 U.S.C. § 1407(c).

57. 28 U.S.C. § 1407(c) ("Proceedings for transfer of an action under this section may be initiated by (i) the judicial panel on multidistrict litigation upon its own initiative"); *see* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014) (noting that MDL can be created upon the judicial panel's own initiative); Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 214 (2015) (finding that as of 2013, 3% of MDLs created on the panel's own initiative); Margaret S. Williams and Tracey E. George, *Who Will Manage Complex Litigation? The Decision to Transfer Consolidated Multidistrict Litigation, Undefined*, 10 J. EMPIRICAL LEGAL STUD. 424, 426 (2013) (noting that judicial panel has authority to create MDLs on the panel's own initiative).

58. 28 U.S.C. § 1407(c).

59. 28 U.S.C. § 1407(c).

60. DAVID F. HERR, ROGER S. HAYDOCK, & JEFFREY W. STEMPEL, MOTION PRACTICE § 14.01 (7th ed. 2016) (describing MDL time limits for presentation before the MDL Panel).

become commonplace for groups of attorneys to strategize before appearing at the hearing in order to effectively lobby the Panel for specific outcomes—i.e., where the MDL should be designated and what particular judge should be appointed to oversee the MDL.[61] The crabbed and often constrained nature of MDL hearings supplies another source of contention for MDL critics. Moreover, as some commentators have pointed out, many of the Panel's orders approving MDLs tend to be short, conclusory, and opaque as to the reasons supporting creation of the MDL.[62]

The Panel has the power to designate and assign the MDL judge in the transferee district court.[63] Parties appearing at the MDL hearing have the opportunity to urge appointment of a particular judge, and attorneys involved in past MDL proceedings often have decided preferences concerning appointment of an MDL judge with whom the attorneys believe they can most comfortably work.[64] Attorney preferences for particular MDL judges include consideration of whether a judge has known party-favoring biases, as well as generous views on attorney fee awards.

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61. Gilles, *supra* note 19, at 177–78 (describing the strategizing among counsel in advance of an MDL hearing):

> Things get interesting when multiple firms have created hub-and-spoke networks of supporting firms, and then must compete against one another on §1407 transfer motions. Organizational meetings of leader firms and some of their more significant consiglieri are often called—either in advance of or at the MDL hearing—so that competing leader firms can reach out to outliers or uncommitted firms to lobby for support before the Panel. Leader firms may also reach out to one another to determine whether some deal can be struck. For example, leader firms may try to buy off opposition to their transfer motion with promises that, once the case is consolidated in their preferred jurisdiction, attorneys who have supported that transfer venue will receive substantial work and investment opportunities in the case (and, therefore, be eligible for substantial fees once the cases settle); there may even be promises of leadership positions on the eventual plaintiffs' steering committee. *Id.*

62. *See* Heyburn II & McGovern, *supra* note 26, at 28 (examining the judges supervising MDL cases).

63. 28 U.S.C. § 1407(b). The statute also provides that the Chief Justice of the Supreme Court or the chief judge of a circuit court may designate and assign a federal judge temporarily to an MDL transferee court. *Id.*

64. Redish and Karaba, *supra* note 18, at 120 (describing the process for selection of MDL judges).

The Panel designates the MDL judge based on parties' recommendations or the Panel's own knowledge of past MDL judges.[65] In recent years the Panel has shown a preference for appointing MDL judges with whom the Panel is familiar and who have demonstrated experience in handling complex litigation.[66] The pool of judges willing to supervise MDL litigation is small, and hence many MDL judges are now "repeat players" in the MDL landscape.

The Panel's other significant procedural role occurs when pretrial proceedings are concluded in the MDL forum. The Panel has the authority to determine when pretrial proceedings have been concluded,[67] and the Panel has discretion to order—or to refuse to order—remand of cases prior to the completion of pretrial proceedings. Courts will not disturb the Panel's exercise of discretion concerning remand.[68]

As noted above, almost all MDL proceedings result in termination of the cases transferred and consolidated pursuant to the statute. In reality, MDL litigation ends in the transferee MDL court, and the Panel's role in ordering statutory remand embraces a relatively minor role in the ultimate disposition of MDL litigation.

2. The Powers of the MDL Transferee Judge

As has been well-documented and often-repeated,[69] an MDL transferee judge possesses a wide range of authority over MDL proceedings. However, the MDL judge's powers largely entail an array of procedural housekeeping functions. In essence, the MDL judge serves as a kind of clearinghouse for moving things along in an efficient manner, blessing global disposition of the consolidated MDL cases, and docket-clearing complex litigation from the federal courts.

While the role of the MDL judge appears robust on paper, the MDL judge actually has weak authority to manage or control problematic substantive conduct by actors in MDL proceedings, including, but not limited to, settlements the attorneys negotiate and

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65. *Id.*

66. *Id.*

67. *See* In re Roberts, 178 F.3d 181, 184 (3d Cir. 1999) (holding that only Panel, not transferee court, has power to order remand of cases).

68. *See* In re Wilson, 451 F.3d 161, 168–73 (3d Cir. 2006) (denying mandamus that would have required Panel to order remand; timing of remand was within Panel's discretion).

69. *See e.g.*, Redish & Karaba, *supra* note 18, at 122–32 (discussing the powers of the MDL transferee judge).

consummate. While MDL judges are to be commended for their efficiency in handling complex cases, effectively they are paper tigers. MDL judges have few powers and weak authority to manage MDL proceedings regarding outcomes that matter the most for claimants swept up into MDL proceedings. Experience has demonstrated that while MDL judges are superlative housekeepers, they are relatively impotent and ineffectual platonic guardians of claimant interests in many cases.

A recitation of what MDL judges can and cannot do reinforces a portrait of the weak substantive policing authority of MDL judges. A recognition of what MDL judges are unable to do reinforces the need for reconsideration of MDL judicial power to ensure fair and adequate outcomes in MDL litigation.

Generally, an MDL transferee judge has complete control over the coordinated, consolidated proceedings in the cases transferred to the MDL forum. The MDL judge has all the pretrial powers that can be exercised by any district court under the Federal Rules of Civil Procedure.[70] MDL judges have the power to reconsider and even overrule prior orders issued by judges in the transferor courts,[71] although that power is subject to the law of the case doctrine.[72]

MDL judges have authority to establish committee structures to organize MDL proceedings.[73] Typically this involves appointing lead and liaison counsel and creating committees to coordinate motions practice, discovery, and communications among counsel and the court.[74] MDL judges seek petitions and make attorney appointments to these roles.[75] MDL judges typically order the filing

70. 28 U.S.C. § 1407(b); *See generally In re* Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 300 (1st Cir. 1995) (describing MDL judge's pretrial actions); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 112.07 (Matthew Bender 3d ed. 2007).

71. *See Firestone Tire & Rubber Co.*, 653 F.2d 671, 676–77 (D.C. Cir. 1981) (holding that MDL court had power to set aside pretrial order of transferor court); *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114, 118 (6th Cir. 1981) (setting aside of transferor court protective order by MDL court).

72. *See In re* Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 439–43 (3d Cir. 2009) (holding that transferee court erred in setting aside arbitration order of transferor court under law of case doctrine).

73. Redish & Karaba, *One Size Doesn't Fit All*, *supra* note 18, 95 B.U. L. REV. at 122–26 (discussing creation of MDL committee structure and powers and authority of attorneys participating in MDL committees).

74. *Id.* at 122–23.

75. *Id.* at 124; *See, e.g.*, In re San Juan Dupont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *6 (D.P.R. Dec. 2, 1988) (describing the nomination process for positions on Plaintiffs' Steering Committee).

of a master complaint which supersedes the pleadings in the individual transferred actions and treats individual cases as effectively merged for the duration of the pre-trial proceedings.

MDL judges have the authority to issue an array of pretrial orders, including scheduling orders, rulings on non-dispositive motions, and matters relating to discovery.[76] Regarding discovery, the MDL statute makes specific reference to the MDL judge's authority to control deposition practice,[77] including the ability of the MDL judge to supervise depositions conducted in other judicial districts.[78]

Pertinent to this Article, MDL judges have authority to enter orders granting or denying class certification and to conduct class certification hearings.[79] MDL judges may provisionally certify class actions,[80] may conduct fairness hearings on class action settlements accomplished during MDL proceedings,[81] and issue final orders approving or disapproving of MDL class action settlements.[82] MDL judges may consider and approve fee awards from attorneys seeking compensation in class litigation concluded under MDL auspices.[83]

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76. *See generally* Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.1 *et seq.* (2004) (providing sample pretrial orders); *see* Commentary, Brant C. Martin & Meredith Lewis Perry, *Update on the Deepwater Horizon Multidistrict Litigation*, 34 NO. 4 WESTLAW J. ASBESTOS 11 (Dec. 9, 2011) (discussing pretrial orders issued by Judge Carl Barbier governing the Deepwater Horizon MDL proceedings).

77. 28 U.S.C. § 1407(b).

78. *See In re* Clients & Former Clients of Baron & Budd, P.C., 478 F.3d 670, 671 (5th Cir. 2007) (finding that Pennsylvania MDL judge had authority to issue subpoena for document production to be enforced in Texas).

79. *See e.g., In re* Chocolate Confectionary Antitrust Litig., 289, 206 F.R.D. 200 (M.D. Pa. 2012) (noting that "a thorough *Daubert* analysis is appropriate at the class certification stage of this MDL in light of the court's responsibility to apply a 'rigorous analysis' to determine if the putative class has satisfied the requirements of Rule 23.").

80. *In re* Nat'l Football League Players' Concussion Injury Litig. (MDL No. 2323), 301 F.R.D. 191 (E.D. Pa. 2014) (exemplifying conditional certification of settlement class in MDL proceedings).

81. *See e.g., In re* Celexa and Lexapro Marketing and Sales Practice Litig., 2014 WL 2547543, at *1 (MDL No. 09-2067-NMG) (D. Mass. June 3, 2014) (scheduling fairness hearing on MDL class action settlement).

82. *In re* Nat'l Football League, 307 F.R.D. 351 (E.D. Pa. 2015) (issuing final approval of MDL class action settlement); In re Nat'l Football League, 961 F. Supp.2d 708 (E.D. Pa. 2014) (finding denial of preliminary approval of proposed class action settlement warranted due to concerns about fairness, reasonableness, and adequacy of settlement).

83. *See generally* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014) (determining attorney fees in MDL litigation); Ratner, *Achieving Procedural Goals Through Indirection*, supra note 28, 26 GEO. J.

MDL judges also have authority to enter pre-trial dispositive orders that terminate the litigation, such as a dismissal for failure to prosecute the litigation,[84] or summary judgment.[85] And, of course, MDL judges may enter orders settling the action and terminating the case.

Although MDL judges possess the ability to exercise the same procedural control of MDL proceedings as any district court judge, the MDL judge's powers are cabined in several unique ways. As indicated above, MDL judges lack the power to determine when coordinated pretrial proceedings are concluded. MDL judges do not have the power to order remand of individual cases to the transferor courts. And, the MDL statute specifically prohibits the MDL judge from transferring the MDL action to itself for trial.[86] However, MDL judges may conduct trials by party consent or stipulation to a full trial in the transferee court.[87]

Significantly, MDL judges lack robust authority to oversee or manage attorney conduct once a committee structure has been established and scheduling orders are in place. And, as in non-MDL complex litigation, MDL judges frequently commence their supervisory role by encouraging the MDL attorneys to settle the litigation. Furthermore, many if not most MDL judges and MDL attorneys are sophisticated actors who come into the MDL proceedings knowing that virtually all MDL litigation results in global settlement of all the consolidated actions.

MDL judges are weakest and most disarmed at the precise moment when the MDL attorneys—at the judge's prompting—go off to conduct discovery and other pretrial matters with an eye towards settlement. MDLs have sometimes been called judicial "black holes,"

LEGAL ETHICS 59 (discussing attorney fee problems in MDL litigation and proposed approach to constraining unreasonable fee awards).

84. *See* Freeman v. Wyeth, 764 F.3d 806, 809 (8th Cir. 2014) (dismissing MDL for failure to prosecute); *see also* In re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217 (9th Cir. 2006) (upholding district court dismissal for failure to comply with MDL orders).

85. *See In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) (noting that the MDL court had the power to enter order settling the action and terminating the case).

86. 28 U.S.C. § 1407(a); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40–41 (1998) (holding that MDL court may not transfer entire case to itself under 28 U.S.C. § 1404 in order to conduct trial of action; § 1407 requires remand by Panel to transferee court for trial of actions).

87. 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 112.07[3] (Matthew Bender 3d ed. 2007).

a label used to connote the disappearance of individual actions into an aggregate litigation, never to be seen again.[88] Arguably, MDL proceedings have earned this appellation for another reason: the complete lack of transparency from the time the judge sends the attorneys off to undertake coordinated pretrial efforts and the time when the attorneys return with a settlement agreement in hand.

The rights of individual claimants whose actions have been captured in MDL litigation are jeopardized during this period. As will be discussed, the vulnerability of individual claimants in MDL proceedings is mitigated if MDL attorneys seek class resolution of the MDL actions. In these instances, the global resolution of individual claims under MDL auspices are at least subject to the protections afforded by Rule 23. Rule 23 nominally ensures some measure of due process protection to absent class members, with various guardians subjecting class settlements to scrutiny.

The same cannot be said for non-class aggregate settlements accomplished under MDL auspices. There are virtually no protections afforded to individual claimants when the attorneys consummate non-class aggregate settlements. We do not and cannot know very much about what deals are cut by whom during the pre-settlement period. There simply is no effective oversight afforded by statutes, rules, precedents, or common law. Because MDL non-class aggregate settlements have evolved as a preferred modality for resolving aggregate litigation, the relative weakness of MDL judges overseeing such proceedings suggests a need for reform.

B. The Traditional Model: MDLs as Auspices for Resolving Rule 23 Class Actions

When MDL auspices gained traction as a procedural means to resolve dispersed, complex litigation at the end of the twentieth century, MDL cases followed a fairly traditional trajectory towards class-wide resolution. Individual cases were transferred and consolidated in the designated MDL forum; the judge created a

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88. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008) (noting that "[i]ndeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again."); Redish & Karaba, *supra* note 18, at 132 n.156 (citing Fallon); Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013) (discussing fears of the nationwide asbestos MDL as a judicial "black hole").

committee structure and appointed attorneys to shepherd the litigation; the attorneys filed a new master complaint for the consolidated cases; the parties conducted discovery; pretrial motions might be filed.

Typically, MDL judges encouraged parties to settle. To accomplish this end, the MDL judge might provisionally certify a settlement class.[89] If certified under Rule 23(b)(3), the MDL judge might review and order notice to class members.[90] After provisional certification, the parties would proceed to negotiate and fine-tune a final settlement agreement for submission to the MDL court for approval.[91] Pursuant to Rule 23(e), the MDL judge would schedule and conduct a fairness hearing with regard to the proposed settlement[92] and entertain objector challenges to the settlement,[93] if any. The MDL judge had authority to approve or disapprove the settlement,[94] including fee petitions from the attorneys.[95]

Nothing in this narrative description of MDL class litigation diverges significantly from class litigation conducted in non-MDL district courts. However, to focus on problems enmeshed in MDL non-class aggregate settlements, it is important to highlight the differences between these two modalities of aggregate case resolution in MDL courts.[96]

As is well known, important due process protections are embedded in Rule 23 and class action jurisprudence because class

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89. *See In re* Nat'l Football League Players' Concussion Injury Litig., 301 F.R.D. 191 (E.D. Pa. 2014) (granting preliminary approval of settlement class).

90. *Id.* at 202–04 (approving the notice plan).

91. *See In re* Nat'l Football League Players' Concussion Injury Litig., 961 F. Supp.2d 708 (E.D. Pa. 2014) (denying preliminary approval of proposed settlement in MDL due to unreasonableness and adequacy of settlement; MDL attorneys directed to re-negotiate certain terms of proposed settlement).

92. Fed. R. Civ. P. 23(e).

93. *In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 370 (E.D. Pa. 2012) (noting 205 objectors to settlement filed 83 written objections; objectors given opportunity to testify at fairness hearing).

94. *See generally* In re Nat'l Football League Players' Concussion Injury Litig., *id.* (rendering final approval of settlement class).

95. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 76, at § 14.23 (describing judicial oversight of attorney fee applications); Burch, *Judging Multidistrict Litigation*, *supra* note 18, at 101–18 (2015) (discussing attorney fee problems in MDL litigation and proposals for aligning attorney fee incentives with client interests).

96. See discussion infra at notes 112–125 (providing examples of different aggregate case resolutions); *see generally* Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1 (2014) (discussing the evolving movement from conventional class action settlements to non-class aggregate settlements).

litigation is *representational* litigation. The distinctive difference between traditional one-on-one litigation and class litigation is the aggregation of large numbers of "absent" class members who are not actually present to be informed of, and to protect, their own interests. Hence, the judicial system undertakes an important role in guarding and protecting the interests of absent class members swept up in aggregate litigation, lest the rights and interests of absent claimants be compromised by actors engaged in resolving claims in the aggregate.

Thus, in tracking traditional Rule 23 class action practice, MDL class proceedings afforded claimants all the protections provided to litigants whose claims were settled under Rule 23 in non-MDL settings. The MDL court's provisional certification of a settlement class theoretically ensures that the MDL judge conducted a "rigorous analysis" of the Rule 23 requirements for class certification.[97] This analysis includes scrutiny of whether the class proponents could satisfy the Rule 23(a) requirements demonstrating numerosity, commonality, typicality, and adequacy,[98] as well as demonstrating that the class action could be maintained under a Rule 23(b) provision.[99]

An MDL judge's early, provisional certification of an MDL settlement class further (theoretically) ensures that the MDL judge evaluates the adequacy of proposed class representatives and class counsel.[100] Studies and commentary during the early 1990s documented that attorney self-dealing and potential collusion among adversarial parties presented significant dangers embedded in class litigation.[101] Hence, at an early stage of the proceedings, Rule 23

97. *See e.g.*, *In re* Volkswagen "Clean Diesel" Marketing, Sales Practices, and Prods. Liab. Litig. (MDL No. 2672), 2016 WL 6091259, *6 (N.D. Cal. Oct. 18, 2016) (applying rigorous analysis standard and provisionally certifying settlement class).

98. *Id.* at *7–8.

99. *Id.* at * 9.

100. *See e.g., In re* Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig. (MDL No. 2492), 314 F.R.D. 580, 591–93 (N.D. Ill. 2016) (evaluating of adequacy of class representatives against challenge of conflicts of interest).

101. *See generally* John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (discussing hydraulic pressures in class litigation that contribute to collusive behavior on the part of negotiating attorneys); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (discussing allegations of attorney collusion in negotiating nationwide asbestos class action settlement).

injects a judicial officer as an independent guardian of absent class members' interests.

Rule 23 additionally protects absent class members' interests by affording class members a means for interlocutory appeal of class certification orders.[102] Thus, plaintiffs have the opportunity to challenge an alleged errant judge's denial of class certification.

The judge's role in protecting absent class members' interests permeates Rule 23 procedure. In addition to the protections afforded by the class certification process, the judge also reviews and orders notice to class members in Rule 23(b)(3) actions.[103] Judges possess an array of administrative powers pursuant to Rule 23(d) to manage the conduct of class proceedings.[104]

Perhaps the most important due process protections of absent class members' interests are afforded by Rule 23(e),[105] which requires the presiding judge to scrutinize proposed class action settlements. A class action may not be compromised or dismissed without approval from the court.[106] As part of the final approval process, the judge must revisit the judge's prior provisional class certification ruling and must finally certify the class action under Rule 23 requirements.[107] Hence, Rule 23(e) affords the judge a second opportunity to scrutinize the nature, scope, and structure of the claimants who are to be bound by the class settlement.

The judge must hold a fairness hearing and based on a record offered by the settling parties, evaluate whether the settlement is fair,

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102. Fed. R. Civ. P. 23(f). Prior to 1998, litigants had limited means to appeal class certification orders; typically through invocation of 28 U.S.C. § 1292(b), or through seeking a writ of mandamus under 28 U.S.C. § 1651. The Advisory Committee on Civil Rules amended Rule 23 in 1998 to add a provision providing for interlocutory appeal of class certification orders.

103. Fed. R. Civ. P. 23(b)(3); Fed. R. Civ. P. 23 (c)(1). Prior to 2003, notice was only required to be provided in Rule 23(b)(3) class actions. In 2003, the Advisory Committee amended the rule to permit judges, in their discretion, to order notice be given in Rule 23(b)(1) and (b)(2) class actions. Fed. R. Civ. P. 23(c)(1).

104. Fed. R. Civ. P. 23(d).

105. Fed. R. Civ. P. 23(e). Prior to 2003, there was no requirement that the judge conduct a fairness hearing. Rule 23(e) was amended in 2003 to require judges to hold fairness hearings as part of the settlement approval process.

106. *Id.*

107. *See e.g.*, *In re* Nat'l Football League Players' Concussion Injury Litig., *supra* note 80, at 191 (requiring final approval of settlement class, revisiting prior provisional certification of settlement class, with amended settlement in response to judicial directions).

adequate, and reasonable.[108] The judge may entertain objector challenges, and may order modification of settlement terms—prior to final approval—in consideration of objector challenges.[109] Finally, the judge has the authority—as part of the Rule 23(e) process, to entertain attorney fee petitions and to make attorney fee awards.[110] Judicial review of fee petitions comprises another protection of claimants' interests, ensuring that attorney fees are reasonable and not the result of attorney-self dealing or collusion, to the detriment of class members' remediation.[111]

In summary, MDL judges who resolve their MDL aggregate dockets through class litigation have—in theory, at least—afforded claimants the managerial control and oversight that characterizes class litigation in non-MDL settings. However, class action settlements in the MDL and non-MDL context are only as good as the judges who oversee the class proceedings and who carefully carry out their roles as class guardians. Rule 23 and an extensive body of class action jurisprudence provide the fundamental tenets governing fair resolution of aggregate claims pursuant to this modality. As will be discussed, the same cannot be said for non-class aggregate settlements, which seemingly are not constrained or governed by Rule 23 or class action jurisprudence.

C. *The Emerging Model: MDLs as Auspices for Resolving Non-Class Aggregate Settlements*

As indicated above, during the twenty-first century a new modality for resolving MDL litigation emerged: the so-called non-

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108. The general standard for assessing settlement agreements is captured by the concepts that a proposed settlement must be fair, adequate, and reasonable. Each federal circuit, however, has adopted its own detailed set of factors delineating how the court is to assess the fairness, adequacy, and reasonableness of a settlement. *See e.g.*, McDaniels v. Westlake Services, *LLC*, 2014 WL 556288, *8–10 (D. Md. Feb. 7, 2014) (analyzing fairness of settlement pursuant to the Fourth Circuit's *Jiffy Lube* multi-factor test).

109. *See In re* Nat'l Football League Players' Concussion Injury Litig., 961 F. Supp.2d 708 (E.D. Pa. 2014) (denying preliminary approval of proposed settlement in MDL due to unreasonableness and adequacy of settlement; MDL attorneys directed to re-negotiate certain terms of proposed settlement).

110. *See supra* note 83 (discussing attorney fees).

111. *See generally* John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983) (discussing attorney fee problems in class action litigation).

class aggregate settlement. The resolution of the *Vioxx*[112] and *Zyprexa*[113] pharmaceutical cases represented the most notorious and well-publicized examples of non-class aggregate settlements.[114] These actions came to public attention, ironically, because of judicial intercession with attorney fee arrangements, which the judges considered excessive under the circumstances.[115] But for the attorney fee controversies, problems with non-class aggregate MDL settlements might not have commanded much attention as soon as they did.

When the *Vioxx* and *Zyprexa* fee controversies emerged, scholarly commentators and others began to focus on problems entailed in these non-class global settlements.[116] It did not escape attention that non-class aggregate agreements accomplished under MDL auspices represented a new settlement modality, apart from the context of Rule 23 requirements and class action jurisprudential constraints.[117] Indeed, Judge Jack Weinstein—aware of this problem—resorted to creation of the concept of a "quasi-class action"

112. *In re* Vioxx Prods. Liab. Litig., 360 F. Supp.2d 1352 (J.P.M.L. 2005) (creating *Vioxx* MDL); *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450 (E.D. La. 2006)

113. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122 (E.D.N.Y. 2006).

114. *See generally* Burch, *Litigating Together*, *supra* note 18, at 87 (providing critical analysis of the *Vioxx* and *Zyprexa* settlements); Erichson & Zipursky, *supra* note 22 at 265 (same); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CINN. L. REV. 389 (2011) (criticizing creation of "quasi-class action" as authoritative basis for controlling attorney fees in these cases).

115. *See e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 549 (E.D. La. 2009) (addressing motion for reconsideration of attorney fee cap on contingent fee arrangements); Settlement Agreement, *In re* Vioxx Prods. Liab. Litig., MDL 1657 (E.D. La. Nov. 9, 2007), available at http:// www.browngreer.com/vioxxsettlement; *see generally* Silver & Miller, supra note 29, at 107 (criticizing MDL judicial adjustment of attorney contractual contingent fee arrangements).

116. *See supra* note 22 (discussing *Vioxx* and *Zyprexa* settlements); *see also* Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015 (2013) (exploring the role of the judge in aggregate litigation).

117. Burch, *Procedural Justice in Nonclass Aggregation*, *supra* note 22, at 4 (noting that non-class litigation affords none of the protections of Rule 23); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519; *but see* Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (arguing in favor of eliminating opportunity for judicial review in non-class settlements based on theory of litigant autonomy).

to provide a jurisprudential basis for oversight of attorney fee awards in these non-class aggregate settlements.[118]

What has become apparent is that we do not know a great deal about non-class aggregate settlements, even including data concerning the volume of MDL litigation resolved through non-class aggregate agreements. Most of what transpires during the course of the negotiation and accomplishment of non-class aggregate settlements is opaque, not transparent, and subject only to limited review. Non-class aggregate settlements do not leave records or tracks of their proceedings or results, unlike traditional class litigation.

In comparison, ordinary class litigation is subject to public scrutiny during various stages of class proceedings. MDL cases that are resolved through traditional class action procedures leave a record of proceedings that are openly exposed to public review at a variety of junctures. For example, the class certification process requires party briefing, in which briefs and arguments are a matter of public record. Hearings on provisional certification are publicly conducted. An MDL judge's ruling regarding provisional certification of an MDL class likewise is publicized, affording insight into the litigation, the judge's findings of fact and conclusions of law. Similarly, after certification of a provisional class, motion practice during the course of pretrial proceedings also provides a record of contested issues that emerge during the litigation.

Rule 23(d) provides the MDL judge with an array of managerial tools for dealing with alleged inappropriate attorney conduct during the MDL class proceedings.[119] Finally, the extensive record required for judicial approval of a settlement class—including materials relating to objector challenges and attorney fee petitions—create a substantial public record relating to the MDL class resolution of the MDL actions. The ultimate fairness hearing on MDL class settlements also are conducted openly, providing some measure of public scrutiny of the background, processes, and terms of the class settlement.

In addition to a lack of transparency, but related to this problem, the actions of attorneys negotiating and accomplishing non-class aggregate agreements are relatively unconstrained. In contrast, ordinary class litigation interposes a judicial officer at the outset of the proceedings as a consequence of the class certification process, who is able to keep tabs on the evolving class proceedings.

118. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122 (E.D.N.Y. 2006).
119. FED. R. CIV. P. 23(d).

However, after an MDL judge urges the parties to go off and settle, if the parties make no effort to seek provisional certification of a settlement class, the attorneys effectively are free agents to do whatever they prefer in consummating a deal. The MDL judge not only is disarmed but may be largely unaware of the attorneys' efforts in attempting to resolve the litigation through some agreement. Precisely because the attorneys are functioning outside the Rule 23 context, there is relatively no judicial oversight as attorneys labor to cut a deal. When an MDL action is disengaged from the class action framework, no independent guardians—either class representatives or a judge—exist to keep an eye on the interests of the individuals who populate the MDL docket.

Moreover, the processes that ordinarily would occur during class action proceedings typically do not occur during non-class aggregate settlements. Because there is no putative or provisional class, there is no requirement that individual claimants be kept apprised of case developments or the attorneys' efforts in resolving the litigation. Because there is no Rule 23(b)(3) provisional class certification, there is no requirement that individual claimants be notified of the existence of a class, the nature of the claims, or the settlements negotiations of behalf of the claimants' interests.[120] There is no requirement for notice of the non-class aggregate settlement, its terms, releases, or individual payouts. Individual claimants are apprised of the settlement only after the fact of the agreement. There is no judicial assessment concerning whether the non-class aggregate settlement is fair, adequate, and reasonable. The attorneys are at liberty to claim attorney fees on a contract basis, without judicial oversight or regard to the nature or scope of the settlement they have accomplished.

Commentators have contended that if adversarial attorneys are highly motivated to arrange a settlement favorable to their interests, then the lack of judicial oversight (or interference) during these proceedings creates an environment ripe for corruption in derogation of client interests. During the early 1990s numerous scholars articulated the dangers inherent in class litigation as a consequence of the controversy generated by the infamous *Georgine* global asbestos

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120. *See* FED. R. CIV. P. 23(b)(3) (stating that designation as a class action requires courts to both evaluate questions of common law or fact when compared to questions affecting individual class members, as well as determine whether a class action is the best vehicle for "fairly and efficiently adjudicating the controversy"); FED. R. CIV. P. 23(c)(1).

settlement.[121] Thus, it was pointed out, class counsels' interests in quickly obtaining attorney fees, coupled with defense attorneys' interests in accomplishing an inexpensive, rapid settlement, created a hydraulic pull of self-dealing and collusion among the attorneys. The class action judge, (and theoretically the class representatives) stood as the major protection against such self-dealing and potential collusive behavior of attorneys in the class action settlement arena.

Hence, the new landscape of MDL non-class aggregate settlements presents attorneys with a favorable environment for resolving massive liabilities, unconstrained by rules or judicial oversight. MDL non-class aggregate settlements undoubtedly sustain values of judicial efficiency and economy but without any of the benefits afforded by class action proceedings. MDL non-class aggregate settlements are great for the attorneys but of questionable value to the individual claimants who find themselves as part of massive MDL proceedings.

It is not surprising, therefore, to understand why attorneys involved in massive, complex litigation eventually gravitated towards the MDL non-class aggregate settlement modality for resolution of these cases. As discussed above, the paradigm shift into MDL auspices was largely inspired by the perceived difficulties in gaining class certification in unfriendly federal district courts that, by the end of the twentieth-century, were largely hostile to class litigation. Consequently, attorneys chose to go into MDL proceedings precisely because they believed that they could resolve their cases before more sympathetic MDL judges, rather than risking their clients' fate in unfavorable forums before unfriendly judges.

Ironically, the same motivations that animated the shift from federal district courts to MDL auspices eventually conspired to induce attorneys creatively to develop the non-class aggregate settlement. The shift to non-class aggregate settlements occurred once attorneys involved in MDL proceedings elected to pursue the class action route and discovered that they were required to run the same Rule 23 gauntlet as in any other federal district court, including the burdensome procedures entailed in class certification and settlement fairness hearings.

In essence, MDL attorneys involved in massive, complex litigation had a new goal: to be free of Rule 23 constraints as well as judicial meddling required or afforded by the rule. Attorneys desired a dispute resolution paradigm that afforded maximum control over the

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121. *See* sources cited *supra* note 101.

litigation and its resolution, with a minimum of judicial oversight and interference. They found this in the MDL non-class aggregate settlement.

Supporters of MDL non-aggregate settlements rationalize this modality founded on notions of contract theory and litigant autonomy.[122] In this view, claimants are adequately represented based on the individual contracts executed with their attorneys at the outset of litigation. In this fashion, individual claimants in MDL proceedings have exercised traditional litigant autonomy in their choice of attorney to represent them in dispute resolution. At the back end of MDL proceedings, their attorneys present their MDL clients with individual settlement offers, negotiated and accomplished through the MDL proceedings. Attorney fee arrangements, payable by the individual MDL clients, similarly are justified based on the contractual relationship between the individual claimants and their attorneys.[123]

While the contract rationale supporting non-class aggregate settlements has some surface appeal, this justification cannot withstand scrutiny in the context of large-scale non-class aggregate litigation. Supporters of non-class aggregate settlements attempt to superimpose a traditional model of civil litigation—the one-on-one model—onto what essentially is a pseudo-class representational litigation. By virtue of these original attorney-client contracts, we are supposed to believe that non-class aggregate settlements embrace and preserve the characteristics of traditional individual representation.

Notwithstanding the individual contracts executed by clients at the outset of litigation, once individual clients' actions have been transferred and consolidated into the MDL proceedings, these cases essentially lose their individual nature. It is creative fiction to suggest that cases transferred to MDL non-class proceedings preserve the characteristics and values of individual representation. Once the MDL has been created, the individual actions comprising the MDL lose their individual nature, and the attorneys essentially act on behalf of the aggregate. During this crucial interval, individual claimants essentially remain in the dark concerning the actions of their own attorneys and have no opportunity or ability to exercise individual oversight or control over their attorneys or the litigation. Indeed,

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122. *See, e.g.*, Silver & Miller, *supra* note 29, at 110 (summarizing justification based on freedom of contract theory); Rothman, *supra* note 117, at 321 (explaining justification based on theory of litigant autonomy).

123. Silver & Miller, *supra* note 29, at 110.

individual MDL claimants have virtually no opportunity to participate in any ongoing settlement negotiations affecting their own interests.

Thus, individual claimants involved in non-class MDL proceedings are "actually present" in the litigation at only two junctures: at the beginning when each contracts with an attorney, and at the conclusion when the attorney presents the client with a settlement agreement and a contractual bill for services. At all other times during the non-class MDL proceedings, individual claimants technically are part of a massive representation litigation, without the benefits or protections required by traditional representational litigation conducted pursuant to Rule 23.

In this regard, Judge Jack Weinstein actually got it right when he created the "quasi-class action."[124] In his efforts to exercise judicial control over attorney fee arrangements in the non-class aggregate settlement context, Judge Weinstein accurately observed that non-class aggregate settlements nominally were pseudo class actions consummated outside the class action rule. Judge Weinstein understood that non-class aggregate settlements mimicked class action settlements in all regards, but without judicial oversight or the due process protections afforded by class action jurisprudence.[125] As

124. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. at 122.

125. Judge Weinstein concedes that "avoiding formal Rule 23 class actions presents serious pitfalls." *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. at 539. Judge Weinstein notes: "One is the possibility that new cases, and attorneys, will be attracted to the honey pot of litigation after all, or almost all, of the well-founded cases have been disposed of. Only the Rule 23 class action can provide full closure in many litigations." *Id.*

However, after acknowledging that Rule 23 has its virtues, Judge Weinstein nonetheless defaults to his preferred position, which favors private settlement of mass litigation under the auspices of MDL proceedings.

In one of his earliest decisions discussing the quasi-class action, Judge Weinstein acknowledges that many of the concerns about the protection of class members should apply with equal force to aggregate settlements achieved in a non-class format. Thus, Judge Weinstein writes:

> Many of the same considerations that necessitate close judicial supervision of plaintiffs' counsel and proposed settlements in the class action context such as protecting absent class or disinterested litigants, and dealing with plaintiffs' practical inability to monitor their attorneys, some of whom represent hundreds of clients within the same litigation apply to quasi-class actions such as the instant one. Some of the conventions required when a class is certified are appropriate in quasi-class actions involving large aggregations of claims. In both contexts, the primary goal of the court is to "ensure that similarly situated individuals receive equal

discussed below, notwithstanding Judge Weinstein's insight, his creation of the quasi-class action provided weak and incomplete authority to MDL judges to manage, control, or regulate non-class aggregate settlements.

D. *Sources of Judicial Authority: Inherent Powers and the Quasi-Class Action*

Scholars who have surveyed the emerging landscape of MDL proceedings have noted the array of problems in the non-class aggregate settlement.[126] After identifying the issues entailed in this modality for complex dispute resolution, commentators invariably note the relative weakness of MDL judges in managing and overseeing non-class aggregate proceedings.[127] Indeed, as MDL non-class aggregate settlements began to emerge, MDL judges realized their relative lack of power or authority over these settlements.[128]

> fairness protections regardless of how the courts aggregated the litigation.*" In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d at 272 (quoting L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Tort Claims Creates Second-Class Settlements*, 65 LA. L. REV. 157, 241 (2004)).

However, Judge Weinstein's initial recognition of the need for Rule 23 constraints in the context of quasi-class action settlements does not re-appear in his numerous subsequent citations to the quasi-class action

126. *See, e.g.*, sources cited *supra* notes 22, 117 (detailing recent authorization on changes in non-class aggregate settlements, finding that non-class aggregate litigation is risky for plaintiffs because it is not technically governed by the rules covering individual litigation or the rules covering certified class actions).

127. *See, e.g.*, Burch, *Litigation Together: Social, Moral, and Legal Obligations*, *supra* note 18, at 71 (noting that MDL "judges are relatively powerless to police the settlements they encourage"); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 163 (2012) (discussing relative lack of judicial authority over private mass tort settlements; arguing that courts do not have and do not need authority to review such settlements).

128. *See* Rothman, *supra* note 117, at 345–49 (describing how federal Judge Alvin Hellerstein intervened in the non-class settlement in the *In re* World Trade Ctr. Disaster Site Litig., 456 F. Supp. 2d 520 (S.D.N.Y. 2006)). Rothman indicated that the *World Trade Center non-class* settlement proceedings resembled traditional MDL proceedings before Judge Hellerstein. Judge Hellerstein himself acknowledged that he stood on "untested legal grounds" to review the settlement. *Id.* at 347–48. Several scholars additionally challenged the legal basis for Judge Hellerstein taking charge of a non-class settlement. *See* Rothman, *supra* note 117, at 347 n.264 (detailing scholarly doubts regarding the legal validity of judicial intervention into settlement).

Dissatisfaction with attorney fee arrangements initially called attention to the lack of judicial authority over MDL non-class proceedings. Judge Weinstein stepped into this breach with his creative invention of the "quasi-class action," designed to provide him with a rationale to control attorney fees in a non-class aggregate settlement.[129] Precisely because the *Zyprexa* MDL was resolved through a non-class settlement, Judge Weinstein had no authority to oversee attorney fees in that litigation (which he would have possessed under Rule 23(e)).

Judge Weinstein grounded his creation of the quasi-class action in the theory of the inherent powers of judges.[130] According to Judge Weinstein, he was empowered to cap attorney fees in the *Zyprexa* non-class aggregate settlement because the non-class settlement essentially embraced the attributes of a class action, without having been resolved under the class action rule.[131] While conceding the problematic nature of an aggregate settlement accomplished outside the purview of Rule 23, Judge Weinstein nonetheless rationalized his ability to control at least this one aspect of the non-class aggregate settlement.[132]

Judge Weinstein's invention of the quasi-class action as the basis for judicial regulation of attorney fees in non-class aggregate settlements is dissatisfying for various reasons. First, there should be no distinction between a class action and a quasi-class action: in other words, once attorneys involved in an MDL engage in settlement negotiations with an eye towards settlement, the settlement proceedings should be subjected to all Rule 23 requirements. This includes, obviously, provisional class certification under Rule 23(a) and (b) requirements at the front end of proceedings, exercise of the full panoply of judicial powers accorded by Rule 23(d), and judicial oversight of the fairness of any settlement at the backend of proceedings, pursuant to Rule 23(e).

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129. *In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. at 122.

130. *Id.*; *see also In re* Zyprexa Prods. Liab. Litig., 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (noting quasi-class action subject to general equitable powers of the court).

131. *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d at 491; *see also In re* Zyprexa Prods. Liab. Litig., 467 F. Supp. 2d at 262 (noting that the characteristics of the litigation required the Court to exercise its "general equitable power" in its judicial oversight); *see also id.* at 269 (referring to the *Zyprexa* settlement as a "conglomerate mass quasi-class action . . . in the offing . . . .").

132. *See In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. at 122 (stating that when a private agreement has many of the characteristics of a class action it is "subject to the general equitable powers of the court").

If a non-class aggregate litigation essentially mimics a class action, as Judge Weinstein suggests, then it should be treated as a traditional class action for all purposes. It should not be subjected only to partial review for a limited purpose, such as judicial review of attorney fees. If there is any suggestion that claimants need protection from an unreasonable attorney fee arrangement at the back end of litigation, then there is little reason not to have afforded the same claimants judicial oversight over attorney conduct throughout the aggregate proceedings. If a judge concludes that an attorney fee agreement constitutes some sort of overreaching on the part of attorneys who have acted within the context of MDL proceedings, this raises the question of whether all attorney conduct during the course of MDL proceedings should be subjected to judicial oversight throughout those proceedings.

In other words, the concept of a "quasi-class action" is a kind of legal oxymoron: litigation proceedings cannot be said to "mimic" a class action in all respects, but evade the requirements the requirements of Rule 23, except for attorney fee awards. A litigation is, or is not, a class action. It cannot be a class action for a limited purpose only, but avoid all other class action requirements.

Second, the concept of the quasi-class action is dissatisfying, based as it is on inherent judicial authority. The theory of inherent judicial power, standing alone, ought to be broad and authoritative enough to support judicial management and control over all aspects of MDL non-class proceedings. There seems to be little reason to invent the concept of the quasi-class action and essentially bootstrap it onto judicial inherent authority for the limited purpose of controlling only attorney fee arrangements.

Judge Weinstein could just have easily decided to intervene in the *Zyprexa* fee arrangements by invoking his inherent powers, without having to create the quasi-class action to do so. Instead, by inventing the quasi-class action, Judge Weinstein ironically focused attention on the fact the *Zyprexa* settlement was a non-class aggregate settlement and that the attorneys had consummated the deal outside the requirements and constraints of Rule 23, without judicial oversight or approval.

Third, the concept of the quasi-class action as a basis for MDL judicial authority to regulate non-class aggregate settlements has failed to gain widespread judicial traction since it was first articulated in 2006. In the ensuing decade, only handful of MDL judges have invoked the concept of the quasi-class action as authority for the judge's ability to control some aspect of non-class aggregate

proceedings.[133] In this very limited universe of cases, MDL judges have followed Judge Weinstein's lead in invoking quasi-class action authority to regulated fee arrangements.[134] But, apart from problematic fee arrangements, MDL judges have not readily relied on the concept of the quasi-class action as a source of judicial power to control other aspects of MDL non-aggregate proceedings.

We cannot know why MDL judges have not embraced Judge Weinstein's creation of the quasi-class action. We may only speculate that some MDL judges, at least, recognize the concept as a dubious doctrine and therefore eschew joining those few courts that have made recourse to this source of judicial power. More troubling, however, may be the prospect that many MDL judges simply have no desire to oversee, manage, or intervene in non-class MDL proceedings, and therefore have no need to invoke any authoritative source of judicial power to do so.

Thus, there are not a lot of judicial decisions relying on the quasi-class action concept most likely because judges simply are not intervening in non-class aggregate settlements. Consequently, we cannot know how many non-class aggregate proceedings might have been in need of closer judicial scrutiny, because MDL judges simply are willing to allow these cases to be resolved without judicial interference, oversight, or approval.

It should be noted that not everyone is dissatisfied with the relative weakness of judges in overseeing MDL non-class aggregate settlements. Commentators have invoked an array of reasons approving the MDL judges' lack of robust authority to manage or control non-class proceedings. Some scholars believe that non-class aggregate settlements are a matter of contractual law between MDL attorneys and the attorneys' individual clients, and therefore MDL judges have no right to intervene to modify these underlying contractual relationships.[135]

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133. *See* Mullenix, *supra* note 114, at 391–92 (discussing relative paucity of courts citing the quasi-class action doctrine, since 1946 and post-*Zyprexa*).

134. In addition to the original *Zyprexa* and *Vioxx* cases, courts have invoked judicial supervision over attorney fees in *Guidant*. *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708, 2008 WL 682174, at *20 (D. Minn. Mar. 7, 2008).

135. *See generally* Burch, *Litigating Together: Social, Moral, and Legal Obligations*, *supra* note 18, at 104–05 (discussing contract theory in support of attorney fees in on-class aggregate settlements); Grabill, *supra* note 127, at 161-62 (same); Silver & Miller, *supra* note 29, at 110 (summarizing freedom to contract justifications for on-class aggregate settlements).

Other commentators believe that non-class aggregate proceedings actually support litigant autonomy and therefore argue against judicial oversight that might interfere with a claimant's exercise of individual autonomy.[136] Yet others suggest that the recent experience of MDL litigation has given rise to a new paradigmatic role for the judge in complex litigation.[137] In this view, the concept of the "managerial judge"—developed during the heyday of public interest class litigation—has given way to a modern concept of the judge as "facilitator."[138] The concept of the MDL judge as a facilitator embraces the judges' various housekeeping authority but eschews the type of judicial oversight characteristic of the managerial judge.[139]

Finally, other commentators support the emerging model of private, aggregate dispute resolution techniques that are conducted largely outside the auspices of judicial oversight, and that eschew judicial meddling.[140] These private, aggregate resolution techniques refer to such recent mega-settlements through so-called fund approaches, such as the World Trade Center Victims' Compensation Fund, the Gulf Coast Claims Facility, and other such privately negotiated aggregate settlements.[141] These private dispute modalities

136. *See, e.g.*, D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1188 (2013) ("And by guaranteeing individual autonomy over the decision whether to settle, the aggregate settlement rule assures each client that his or her claims cannot be compromised on terms he or she finds unacceptable. Autonomy empowers individual plaintiffs to protect themselves against opportunism on the part of their lawyers and exploitation at the hands of the majority by rejecting any settlement that would leave them worse off."); *but see* Redish & Karaba, *supra* note 18, at 146 (arguing that MDLs disrespect individual autonomy by failing to provide individual litigants the choices and control necessary to satisfy their right to a day in court); *cf.* Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (2012) (criticizing the Court's focus on individual autonomy and advancing a deterrence-centered model for evaluating due process in the mass tort setting).

137. *See generally* Dodge, *supra* note 33, at 382 (shining light on the new paradigm for judging evolving from MDL proceedings).

138. *Id.* at 333 ("Thirty years ago the managerial model took hold . . . Today, transferee judges have embraced a new role, ushering in a new generation of judges.")

139. *Id.* at 333–36.

140. *See generally* Grabill, *supra* note 127; Dodge, *supra* note 33.

141. *See generally* Myriam Gilles, *Public-Private Approaches to Mass Tort Victim Compensation: Some Thoughts on the Gulf Coast Claims Facility*, 61 DEPAUL L. REV. 419 (2012) (comparing World Trade Center Victims' Compensation Fund to the Gulf Coast Claims Facility); Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 STAN J. COMPLEX LITIG. 1 (2015) (discussing various fund approaches to resolving mass tort and mass

are analogous to non-class aggregate settlements in that they are accomplished apart from the traditional judicial system, unhindered by traditional Rule 23 class action requirements or constraints.

As such, the private aggregate settlement mechanisms, including the fund approaches, represent an abandonment of the traditional class action mechanism.[142] Consistent with the underlying rationale for the migration of complex cases into MDL proceedings—borne of attorney frustration with class action constraints—the evolution of private non-class aggregate settlement mechanisms reflects the same impulse.

III. CONFERRING JUDICIAL AUTHORITY ON MDL JUDGES THROUGH THE ALL WRITS ACT

As discussed above, MDL judges possess relatively few powers apart from the array of housekeeping functions authorized by the MDL statute.[143] MDL judges possess virtually no statutory powers to manage, oversee, or approve non-class aggregate settlements. MDL judges have weak authority over non-class aggregate proceedings derived from the doctrine of the quasi-class action or inherent judicial powers. Furthermore, very few judges have actually exercised managerial control over non-class aggregate settlements under any source of authority.

While some commentators believe this is an appropriate arrangement,[144] other critics have suggested that MDL judges ought to be empowered to better oversee and manage non-class aggregate proceedings.[145] Even the American Law Institute, which generally approved of non-class aggregate settlements in its *Principles of*

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products liability litigation); Linda S. Mullenix & Kristen B. Stewart, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 123, 126 (2002).

142. *See generally*, Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing Supreme Court jurisprudence inducing a decline in receptivity towards class litigation).

143. *See* discussion *supra* pp. 14-17.

144. *See* Dodge, *supra* note 33, at 373-381 (providing examples of how judges can use their limited authority to effectively resolve MLD cases).

145. *See, e.g.*, Elizabeth Chamblee Burch, *Unsettling Efficiency: When Non-Class Aggregation of Mass Tort Claims Creates Second Class Settlements*, 65 LA. L. REV. 157, 227–40 (2004) (reviewing various reform proposals to enhance judicial authority over MDL proceedings, including judicial control over non-class aggregate settlements).

Aggregate Litigation project,[146] proposed that some supervision of MDL non-class aggregate settlements could be accomplished through the use of a neutral, third-party outside reviewer.[147] This ALI proposal has not been implemented, but it suggests that even the ALI was cognizant of the problems of a lack of judicial oversight of MDL non-class aggregate settlements and the need for some sort of reform.

Other proposals for further empowering MDL judges with regard to non-class aggregate settlements have rested on recourse to the ethical constraints on attorney misconduct, collusion, or self-dealing.[148] As aspirational and high-minded as these suggestions are, appeals to professional conduct rules seem a weak vehicle for checking unbridled attorney conduct in MDL non-class proceedings. At a minimum, these proposals rely on attorney self-policing or, alternatively, third-party reporting of attorney misconduct. Moreover, funneling attorney misconduct allegations through state bar authorities seems a cumbersome route for policing attorney misconduct in non-class aggregate settlements and of limited utility to correcting client harms.

Perhaps the best and most efficacious method to remedy the lack of judicial power in MDL proceedings is to amend the MDL statute to delineate substantive judicial powers over MDL proceedings. Furthermore, careful delineation of judicial powers over non-class proceedings especially would provide a clear, statutory basis for managing non-class actions. The statute might make clear that non-class aggregate settlements are likewise subject to Rule 23 requirements and cannot evade those requirements by simply and magically characterizing the aggregate settlement as constituting a "non-class" (which is thereby beyond the reach of Rule 23).

Providing a statutory basis for judicial supervision and control of non-class MDL proceedings would eliminate the need for recourse to fictional doctrines such as the quasi-class action, or the need to rely on inherent judicial power.

Although amendment of the MDL statute to confer specific judicial power and authority over MDL proceedings seems the best approach to implementing reform, this course seems either unlikely or remote. Until such reform is proposed, enacted, and implemented,

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146. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.15 (AM. LAW INST. 2010).

147. *Id.* §§ 3.09, 3.15–3.18.

148. Ratner, *supra* note 28, at 73–76 (discussing problems relating to controlling attorney fees through invocation of professional responsibility rules and constraints).

another possible source for enhancing judicial control over non-class MDL proceedings is lodged in the All Writs Act.[149] This largely unexplored means for exercising judicial control in the course of MDL proceedings provides an alternative, statutory basis for supervising MDL proceedings, and for judicial intervention when necessary to intercept potential or actual attorney misconduct.

A. The All Writs Act as a Source of Judicial Power Generally

Not surprisingly, the All Writs Act is little known and not widely appreciated, especially in the class action or MDL context. The All Writs Act confers on federal courts the power to "issue all writs necessary or appropriate in aid of [its] respective jurisdiction."[150] A substantial body of precedent interprets the scope of the All Writs Act as it intersects with prohibitions embodied in the Anti-Injunction Act.[151] Indeed, both the All Writs Act and the Anti-Injunction Act contain identical language authorizing federal courts to issue injunctions when to do so would be "in aid of the court's jurisdiction." Despite the constraints on judicial power set forth in the Anti-Injunction Act, courts have construed the All Writs Act with expansive, liberal pronouncements of judicial authority to regulate and protect proceedings before the court, especially in the class action context.

Thus, courts have construed their authority under the All Writs Act to issue orders "directed at conduct which, left unchecked, would have had the practical effect of diminishing the court's power to bring the litigation to a natural conclusion."[152] Pursuant to the All Writs Act, a court may enjoin a party, and those acting in concert with it, from implementing a class action settlement and order corresponding relief to "ensure the proper administration of justice and the orderly resolution of litigation."[153]

149. 28 U.S.C. § 1651 (1949).

150. *Id.* § 1651(a); *see* U.S. v. New York Tele. Co., 434 U.S. 159, 171–73 (1977) (holding that although unreasonable burdens may not be imposed, the order at issue was authorized by the All Writ Act).

151. *See* 28 U.S.C. § 2283 (1948); *See also* discussion *infra* pp. 38-40.

152. ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978).

153. *See In re* Managed Care Litig., 236 F. Supp. 2d 1336, 1339–41 (S.D. Fla. 2002) (analyzing application of All Writs Act to personal jurisdiction in multidistrict litigation proceedings).

Furthermore, courts have determined that a judge may exercise power under the All Writs Act, in appropriate circumstances, to enjoin persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice.[154]

As will be seen, in conventional class litigation outside the MDL context, judicial deployment of All Writs power to regulate attorney conduct largely has been in efforts to constrain parallel state court proceedings that might impair or impede a pending federal class settlement.[155] However, judicial recourse to All Writs Act authority has been exercised by MDL judges in order to similarly preserve pending class action settlements negotiated under MDL auspices.[156] Thus, MDL judges already have been using authority pursuant to the All Writs Act to control settlement proceedings, as well as other attorney conduct, before their courts. Judicial recourse to the All Writs Act, then, is neither novel nor unprecedented.

It will be argued that although existing precedent for judicial authority to police MDL proceedings under the All Writs Act largely has been cabined to control parallel pending state proceedings, there is little reason not to extend the broad precedential readings of the statute to confer enhanced judicial authority to control and police *non-class* aggregate proceedings. Furthermore, authority pursuant to the All Writs Act ought to be recognized to confer power on MDL judges to regulate *all aspects* of attorney conduct in ongoing MDL proceedings, and not just settlement agreements. Indeed, at least some MDL judges already have extended reliance on the All Writs power to exercise control over parallel settlements pending in federal courts, which opens the door to consideration of a broader, more flexible application of MDL judges' All Writs authority.[157]

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154. *New York Tele. Co.*, 434 U.S. at 174 n.150.

155. *See, e.g.*, Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993); *In re* Lease Oil Antitrust Litig. No. II, 48 F. Supp. 2d 699 (S.D. Tex. 1998).

156. *See* Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998) (holding Anti-Injunction Act does not bar MDL courts from issuing injunctions to protect the integrity of their rulings); *see also* Winkler v. Eli Lilly & Co., 101 F.3d 1196 (7th Cir. 1996) (holding that preventing predatory discovery and forum shopping is a legitimate use of the Anti-Injunction Act); *In re* Lease Oil Antitrust Litig. No. II, 48 F. Supp. 2d at 699 (arguing that allowing a state court to enter a global settlement order when federal claims are still pending would deprive federal plaintiffs of certain rights).

157. *See In re* Managed Care Litig., 236 F. Supp. 2d at 1345 (granting plaintiffs' motion for preliminary injunction to prevent defendant from pursuing parallel settlement in other federal court pursuant to the All Writs Act).

B. *The All Writs Act in the Context of MDL Proceedings*

MDL judges initially started making recourse to the All Writs Act in the early 1990s as a consequence of federalism. Thus, plaintiffs and defendants who were involved in burgeoning mass tort and other class litigation often sought to file suit and pursue litigation concurrently in both state and federal courts. At times these parallel proceedings led to a "race to judgment," and the tactical maneuvering of attorneys placed federal MDL settlements in jeopardy.

For various strategic reasons, parties frequently desired to accomplish the resolution of these identical claims through state court settlements before MDL courts could approve federal settlements involving the same claimants. Needless to say, state settlements often contained terms and conditions different from those in the parallel pending federal settlements. The rush to closure in state court often was driven by the desire to ratify more party-favorable adjudication in state courts. Hence, parallel pending state court proceedings were perceived as threatening the ability of MDL courts to finalize federal settlements accomplished under MDL auspices.

In the early 1990s, an emblematic example of the problem of parallel proceedings occurred during the development of the asbestos MDL authorized by the Judicial Panel in 1991, in the Eastern District of Pennsylvania.[158] By early 1993, the parties had accomplished a nationwide settlement of personal injury asbestos claims captured by the MDL, commonly referred to as the *Carlough* settlement. Before the MDL court had the opportunity to review the federal settlement, a group of claimants involved in parallel litigation in West Virginia state court sought a ruling from the West Virginia court to permit a mass opt-out of all West Virginia claimants from the federal MDL settlement.[159] The West Virginia claimants did not want to be bound by the MDL settlement.

MDL Judge Reed, invoking the All Writs Act, enjoined the West Virginia claimants from seeking a ruling from the state court

158. *See In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991) (authorizing creation of nationwide asbestos MDL).

159. *See* Carlough v. Amchem Prods. Inc., 10 F.3d at 204 ("Injunction of that portion of the Gore suit seeking a ruling from the West Virginia court permitting a mass opting out of all West Virginia is also necessary in aid of the district court's jurisdiction.").

permitting the mass exit from the federal suit.[160] Judge Reed entered a preliminary injunction against the West Virginia claimants, enjoining them from prosecuting their claims in state court. He justified his issuance of the injunction under the All Writs Act, indicating that the injunction was necessary and in aid of the federal court's jurisdiction.[161] Judge Reed held that because "[n]o action can be further along than the one already settled," the existence of the West Virginia action would be disruptive to the plaintiffs, defendants, and the court in the attempt to manage the colossal settlement.[162]

Judge Reed's invocation of the All Writs Act as authority to restrain parallel proceedings in state court focused attention on the tension between judicial power under the All Writs Act and constraints on that power embedded in the Anti-Injunction Act.[163] The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[164]

Essentially, the Anti-Injunction Act embodies a blanket prohibition against federal interference with pending state proceedings, unless that interference can be justified within one of the Act's three exceptions. With regard to class action litigation, no Congressional act authorizes federal intrusion into parallel state litigation. The Anti-Injunction Act's third exception, which permits issuance of a federal injunction to protect or effectuate its judgments,[165] typically is unavailing because the federal settlement has yet to be reduced to a judgment when the MDL parties seek injunctive relief. [166]

Although the Anti-Injunction Act's second exception embraces language that is facially appealing as a basis for restraining

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160. Carlough v. Amchem Prods. Inc., No. CIV. A. 93-0215, 1993 WL 144901, at *9 (E.D. Pa. May 5, 1993) (issuing an injunction against West Virginia Gore plaintiffs).

161. *Id.* at *3–4.

162. *Id.*

163. 28 U.S.C. § 2283 (1948).

164. *Id.*

165. *See* Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988) (holding relitigation exception applies to protecting actions that have been actually decided by federal court).

166. *But see* Juris v. Inamed Corp., 685 F.3d 1294, 1340–41 (11th Cir. 2012) (applying All Writs Act and Anti-Injunction Act third "relitigation" exception where court held that settlement had been reduced to a judgment, thereby coming within doctrines of res judicata).

pending parallel state proceedings, courts historically have narrowly interpreted this language to apply only to parallel *in rem* proceedings and not to parallel cases *in personam*.[167] But by the mid-1980s, several federal courts either ejected this narrow construction or circumvented its constraint by determining that the existence of a settlement constituted a "*res*" within the statute's meaning.[168]

Judge Reed's reliance on the All Writs Act and the second exception to the Anti-Injunction Act was preceded by a similar conclusion in the nationwide *School Asbestos* class settlement, also negotiated under MDL auspices.[169] The Third Circuit upheld the MDL judge's issuance of an injunction preventing an absent class member from maintaining a state court suit which was based on the same subject matter pending in the federal action. The MDL judge had found that an injunction of the parallel state suit was appropriate based on the complexity of the federal class action and its pending settlement: "[T]his court's ability to oversee a possible settlement would be 'seriously impaired' by the continuing litigation of parallel state actions. . . . A stay against state proceedings is thus proper under the 'necessary in aid of jurisdiction' exception to the Anti–Injunction Act, and pursuant to the All–Writs Act."[170]

In *Carlough*, Judge Reed similarly justified issuance of the requested injunction against the West Virginia claimants pursuant to

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167. *See* Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 625 (1977) (holding in aid of jurisdiction exception does not apply when federal and state actions are *in personam*); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) (construing narrowly exceptions to the Anti-Injunction Act); Wyly v. Weiss, 697 F.3d 131, 137–38 (2d Cir. 2012) (analyzing in aid of jurisdiction exception only applies where necessary to protect a federal court's jurisdiction over a *res*); *In re* Bayshore Ford Truck Sales, Inc., 471 F.3d 1233, 1250–51 (11th Cir. 2006) ("Ordinarily, a federal court may issue an injunction 'in aid of its jurisdiction' in only two circumstances: (1) the district court has exclusive jurisdiction over the action because it had been removed from state court; or, (2) the state court entertains an *in rem* action involving a res over which the district court has been exercising jurisdiction in an *in rem* action"); *see also* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 121.07 (3d ed. 2010).

168. *See, e.g.*, *In re* Asbestos School Litigation, No. 83–0268, 1991 U.S. Dist. LEXIS 5142 (E.D. Pa. Apr. 16, 1991), *aff'd mem.*, 950 F.2d 723 (3d Cir. 1991); Battle v. Liberty Nat'l Life Ins. Co., 877 F.2d 877 (11th Cir. 1989); *In re* Baldwin–United Corp., 770 F.2d 328, 335 (2d Cir. 1985); *In re* Joint Eastern and Southern Dist. Asbestos Litig., 134 F.R.D. 32 (E & S.D.N.Y. 1990); *See also In re* Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir.1981) (justifying application of third exception based on advanced settlement as the equivalent of a res).

169. *In re* Asbestos School Litigation, 1991 U.S. Dist. LEXIS 5142, at *12–13.

170. *Id.* at *6.

the Anti-Injunction Act's second exception.[171] Judge Reed relied on the developing jurisprudence that broadly interpreted the second exception to permit federal intrusion into state proceedings to protect ongoing MDL litigation.[172] The Third Circuit affirmed this more liberal, flexible reading of the Anti-Injunction Act's second exception in the context of MDL proceedings.[173]

This expansion of judicial authority under the All Writs Act in the context of class litigation was significant because it illustrated that longstanding doctrinal barriers to exercise of the All Writs power could be eliminated through a broader, more flexible interpretation of Anti-Injunction Act constraints. By the end of the twentieth century, many federal courts had concluded that it was no longer tenable to limit the Anti-Injunction Act's "in aid of jurisdiction" language solely to parallel *in rem* proceedings. In addition, this crabbed construction of the Anti-Injunction Act's second exception simply defied a common sense reading of the statute.

The object lesson to be derived from the evolution of All Writs power as it intersected with Anti-Injunction constraints is that the law adapts to accommodate for changed litigation realities. Thus, in the same fashion that federal jurisprudence adapted to the changed class action landscape in the 1990s, so too can current restrictive views of judicial authority pursuant to the All Writs Act be flexibly interpreted to provide authority to MDL judges to better regulate party conduct in MDL non-class aggregate proceedings.

C. Expanding All Writs Authority For MDL Judges

By the mid-1990s, federal courts had established substantial precedent that permitted MDL judges to use the All Writs Act to constrain parallel state litigation that might jeopardize ongoing MDL proceedings,[174] especially if the MDL court was overseeing advanced,

171. Carlough v. Amchem Prods. Inc., No. CIV. A. 93-0215, 1993 WL 144901, at *3–4 (E.D. Pa. May 5, 1993).

172. *See* cases cited *supra* notes 168–73.

173. Carlough v. Amchem Prods. Inc., 10 F.3d 189, 204 (3d Cir. 1993) n.9.

174. *See, e.g.*, Juris v. Inamed Corp., 685 F.3d 1294, 1338–39 (11th Cir. 2012) (applying All Writs Act and Anti-Injunction Act third exception to uphold district court's issuance of injunction in aid of its jurisdiction); SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, 445 F. Supp. 2d 356, 360 (S.D.N.Y. 2006) (noting that the second exception "implies that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.").

complex settlement negotiations.[175] Notably, the All Writs power was then further extended beyond the settlement context to constrain other attorney conduct in parallel state proceedings, such as discovery matters.[176]

The extension of MDL judges' All Writs power to provide robust control over MDL proceedings has evolved incrementally. Thus, at the beginning of the twenty-first century, this judicial authority under the All Writs Act was extended to provide an MDL judge with authority to constrain a parallel proceeding in a sister federal court that might jeopardize the MDL proceedings.[177] Notably, the power of an MDL judge to enjoin conduct in parallel federal proceedings was unconstrained by the Anti-Injunction Act, which imposed restrictions on the ability of federal courts to interfere with state proceedings, but did not apply as a constraint on federal authority over parallel federal proceedings.[178]

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175. *See In re* Diet Drugs, 282 F.3d 220, 236 (3d Cir. 2002) (permitting injunction under All Writs Act as parties approached settlement); *In re* American Online Spin-Off Accounts Litig., MDL Docket No. 04-1581-RSWL, 2005 WL 574463, at *5 (C.D. Cal. May 9, 2005) (enjoining defendant American Online from proceeding with Illinois state settlement pursuant to All Writ Act); *In re* Visa Check/Mastermoney Antitrust Litig., No. 96 CV 5238(JG), 2005 WL 2100930, at *3 (E.D.N.Y. Aug. 31, 2005) ("Courts have analogized both multidistrict ("MDL") proceedings and large class actions to in rem actions."); *But cf. In re* HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig., 99 F. Supp. 3d 288, 303 (E.D.N.Y. 2015) (listing Second Circuit cases rejecting notion that MDL courts had blanket power to enjoin parallel state proceedings).

176. *See, e.g.*, Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) (issuing injunction under All Writs authority in federal court barring discovery in parallel in personam state court proceeding where "the district court quite reasonably believed that the plaintiffs were resorting to the state courts for the specific purpose of evading its ruling denying discovery of the [confidential] agreement"; further holding that "[w]here a litigant's success in a parallel state court action would make a nullity of the district court's ruling, and render ineffective its efforts effectively to manage the complex litigation at hand, injunctive relief is proper."); *In re* Ocwen Fed. Bank FSB Mortg. Servicing Litig., 397 F. Supp. 2d 957, 963 (N.D. Ill. 2005) (enjoining counsel from pursuing parallel actions in state court because it would subject the federal court's pre-trial orders, including motion for partial summary judgment, to second-guessing by state court and could result in violation of federal court's order staying discovery).

177. *See, e.g.*, *In re* Managed Care Litig., 236 F. Supp. 2d 1336, 1340-41 (S.D. Fla. 2002).

178. *See, e.g.*, *In re* Checking Account Overdraft Litig., 859 F. Supp. 2d 1313, 1322 (S.D. Fla. 2012) (granting injunction, in MDL court, under All Writs Act against parallel federal class settlement, without addressing allegations of collusion and reverse auction conduct; Anti-Injunction Act limitations did not apply because parallel actions were in federal courts); *In re* Bank of Am. Wage & Hour Emp't

This extension of All Writs power by an MDL judge was first accomplished in *In re Managed Care Litigation*.[179] In this litigation, physicians sued eight managed care insurance companies alleging that the defendants unlawfully interfered with the plaintiffs' ability to provide medical care to their patients. The Judicial Panel created an MDL in the Southern District of Florida and certified a class action.[180]

A parallel class action was filed in Illinois state court, and counsel for defendant CIGNA pursued settlement in the state court action. The MDL plaintiffs requested an injunction to prevent this.[181]

The state plaintiffs then amended their complaint to allege federal claims and expand the class to include the MDL plaintiffs. CIGNA then removed the case to the Southern District of Illinois. The following day, the plaintiffs and CIGNA moved for preliminary approval of a settlement and conditional certification of a settlement class. An hour after these motions were filed, the Illinois court conducted a hearing and granted preliminary approval to the settlement.[182]

These motions before the federal court in Illinois made no mention of the certified class action in the MDL, the pendency in the MDL of the motion for an injunction, or that a hearing was scheduled on that motion.[183]

Plaintiffs in the MDL moved to enjoin CIGNA and its counsel from proceeding with the Illinois settlement, invoking the All Writs Act. In opposition, CIGNA argued that under the Anti-Injunction Act and the All Writs Act, federal court power to enjoin other proceedings was limited only to protect a final judgment or order, or a well-advanced court-supervised settlement process.

The MDL court, relying on the All Writs Act, disagreed and granted the motion to enjoin the Illinois federal settlement.[184] In broad pronouncements, the MDL judge indicated that MDL courts must be "particularly vigilant and protective" of their jurisdiction.[185] The court

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Litig., 740 F. Supp. 2d 1207, 1208 (D. Kan. 2010) (issuing injunction pursuant to All Writs Act power to enjoin parties from proceeding with overlapping federal class action without reference to Anti-Injunction Act).

179. *In re* Managed Care Litig., 236 F. Supp. 2d at 1340.

180. *See* Multidistrict Litigation – Injunction – All Writs Act, 18 No. 3 Fed. Litigator 59 (2003) (reciting facts of the *Managed Care* litigation).

181. *Id.* at 59.

182. *Id.* at 59-60.

183. *Id.* at 60.

184. *Id.; In re* Managed Care Litig., 236 F. Supp. 2d 1336, 1337 (S.D. Fla. 2002).

185. *In re* Managed Care Litig., 236 F. Supp. 2d at 1341.

indicated that it had a responsibility to oversee pretrial proceedings in cases consolidated in the MDL and to direct their resolution. This required that CIGNA be prevented from proceeding with its parallel settlement in Illinois.[186]

The court noted that the Anti-Injunction Act did not prohibit federal courts overseeing complex MDL litigation from enjoining parallel state proceedings that threatened to disrupt the MDL litigation.[187]

The Florida MDL's judge's grant of the injunction against a parallel federal settlement in Illinois represented the first time that a federal court relied on the All Writs Act to restrain proceedings in another federal court. The MDL judge apparently was repelled by the "underhanded maneuvers" of CIGNA defense counsel to obtain a more favorable settlement in the Illinois courts: CIGNA had "snookered" the MDL court and the Illinois court in an "obvious attempt" to avoid the MDL court's jurisdiction.[188]

The facts underlying the *Managed Care* litigation raised the specter that the parties in the Illinois litigation were engaged in a "reverse auction," whereby a defendant deliberately sought an amenable plaintiffs' attorney in another forum to settle the litigation on terms more favorable to the defendant than terms entailed in the settlement pending in the federal MDL.[189] Subsequent to the *Managed Care* holding, other federal courts similarly have invoked authority under the All Writs Act to enjoin parallel federal actions where the MDL parties raised allegations of attorney collusion and reverse auction conduct in the alternative federal forum.[190]

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186. *See* Multidistrict Litigation – Injunction – All Writ Act, 18 No. 3 Fed. Litigator 59, 60 (2003) (summarizing MDL court's holding in the *Managed Care* litigation); *In re* Managed Care Litig., 236 F. Supp. 2d at 1343.

187. *In re* Managed Care Litig., 236 F. Supp. 2d at 1341 (citing Hanlon v. Chrysler Corp., 150 F.3d 1011 (9th Cir. 1998)); Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996).

188. *See* Multidistrict Litigation – Injunction – All Writs Act, 18 No. 3 Fed. Litigator 59, 60 (2003); *In re* Managed Care Litig., 236 F. Supp. 2d at 1342.

189. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.924 (2004) (including evidence of reverse auction as factor that should bar approval of a settlement; defining reverse auction as "permitting defendants to select certain plaintiffs' counsel with whom to negotiate a precertification and perhaps pre-filing a settlement class action, resulting in a settlement with the lowest bid (a so-called reverse auction)."); *see also* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280–85 (7th Cir. 2002) (discussing the practice of reverse auction settlements).

190. *See, e.g.*, *In re* Checking Account Overdraft Litig., 859 F. Supp. 2d 1313, 1322 (S.D. Fla. 2012) (granting injunction under All Writ Act against parallel federal class settlement, without addressing allegations of collusion and reverse auction

D. *The Need for Enhanced MDL Judicial Authority: A Brief Case Study*

The utilization of All Writs authority in the MDL and class action context chiefly had focused on the power of the judge to enjoin parallel state or federal proceedings that might impair the ability of the judge to resolve the litigation before the court. As discussed above, this All Writs authority has evolved and expanded since the mid-1990s.

However, attorney conduct throughout MDL proceedings ought to be subject to enhanced judicial supervision and control and not limited to the settlement context. It has been well-documented that class litigation entails hydraulic pressures creating an environment ripe for attorney misconduct, self-dealing, and collusion. These problems apply with even greater force in the non-class aggregate settlement context, which is unconstrained by Rule 23 protections.

The MDL *Home Depot, Inc. Customer Data Security Breach Litigation*[191] illustrates the problems that may develop when complex litigation is consolidated in an MDL proceeding, attorneys negotiate a *de facto* settlement apart from the class action context, alleged misconduct is ongoing, and affected parties lack the ability to police or control the alleged misconduct.

Home Depot was sued in multiple actions around the country based on alleged data security breaches at stores owned and operated by Home Depot.[192] The alleged breaches involved disclosure of payment card information of approximately 56 million credit and debit cards holders, and all the actions involved similar allegations that the customers' personal financial information was compromised as a result of the security data breaches.[193]

The plaintiffs in the various lawsuits were both individual customers as well as financial institutions issuing the cards.[194] The Judicial Panel declined to separate the consumer and financial

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conduct); *In re* Bank of Am. Wage & Hour Emp't Litig., 740 F. Supp. 2d 1207, 1208 (D. Kan. 2010) (issuing injunction pursuant to All Writ Act power to enjoin parties from proceeding with overlapping federal class action without reference to Anti-Injunction Act).

191. *See In re* The Home Depot, Inc., Customer Data Sec. Breach Litig., 65 F. Supp. 3d 1398 (J.P.M.L. Dec. 11, 2014) (authorizing creation of an MDL in the Northern District of Georgia).

192. *Id.* at 1399–1400 (consisting of eleven actions in federal courts, plus nineteen tag-along actions; many of the actions consisting of putative class actions).

193. *Id.* at 1399.

194. *Id.*

institution lawsuits, consolidating all the litigation in a unified MDL.[195]

At some point after authorization of the MDL, Home Depot reached one or more settlements with MasterCard and other payment card processors.[196] The draft settlement agreement attempted to fashion a *de facto* class settlement, apart from Rule 23, allegedly designed to severely limit or end the MDL proceedings.[197] Home Depot did not inform the court or class counsel about what it was doing.[198] The agreement contained a so-called "exploding provision" pursuant to which the deal would collapse unless MasterCard could secure the acceptance (or agreement to be bound) of 65% of the financial institutions involved in the litigation.

Before the MDL court could rule on Home Depot's motion to authorize solicitation of releases from the financial institutions of their claims arising out of the data breaches, absent class members began receiving communications asking them to sign such releases. Plaintiffs alleged that the communications to the absent claimants were both misleading and coercive.[199]

Plaintiffs filed a motion with the MDL court seeking relief under the All Writs Act to enjoin Home Depot and others acting in concert with the defendant. The plaintiffs sought an order:

> (1) vacating any releases obtained as a result of coercive and misleading communications; (2) requiring a curative notice be sent to class members undoing the impact of such communications and re-opening the period during which class members must make any decisions regarding any settlements after more fulsome information has been provided to them; and (3) preventing implementation of any settlements between Home Depot and MasterCard that interfere with the orderly resolution of this litigation.[200]

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195. *Id.* at 1399–1400.

196. Memorandum of Law in Support of Plaintiffs' Motion for Injunctive Relief, *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., No. 1:14-md-02583-TWT, 2015 WL 9437338 (N.D. Ga. Dec. 8, 2015) (No. 149).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

Characterizing Home Depot's actions as "an apparent effort at a pseudo-class settlement," the complaining plaintiffs noted the dilemma in seeking judicial control over the defendant's conduct:

> Significantly, the apparent settlement between Home Depot and MasterCard is designed to avoid the protections afforded Class members when their rights are collectively settled. Class members have not been given the basic information that Rule 23 requires and are being told they must act on incomplete, misleading, and coercive communications that are inconsistent with this Court's local rules and Rule 23 in general. Further, the apparent settlement is designed to avoid this Court's oversight, which would ensure that the information received by the Class is appropriate and that the settlement is fair, adequate, and reasonable.[201]

In seeking injunctive relief, the plaintiffs contended that Home Depot "has sown chaos;" that the releases were clearly intended to thwart the court's jurisdiction, impede the aggregation of class claims, and avoid the court's oversight.[202]

The plaintiffs argued that under the All Writs Act, the MDL court had the power to enjoin the defendant and those acting in concert from pursuing any settlement that implicated the claims without the court's express approval and settlement.[203] Citing broad precepts of judicial authority pursuant to the All Writs Act,[204] as well as the *Managed Care* opinion,[205] the plaintiffs contended that an MDL court's authority to issue such orders was rooted in the "extraordinary powers" authorized by the All Writs Act. These powers extended to

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201. Memorandum of Law in Support of Plaintiffs' Motion for Injunctive Relief, *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., No. 1:14-md-02583-TWT, 2015 WL 9437338 (N.D. Ga. Dec. 8, 2015) (No. 149).

202. *Id.*

203. *Id.* The plaintiffs further argued that the court had supervisory authority, under Rule 23, over pseudo-class actions such as the one proposed by the Home Depot settlement. *See id.* (discussing the court's supervisory authority over a pseudo-class action, relying on Judge Weinstein's doctrine of the quasi-class action articulated in the *Zyprexa* and the *Vioxx* litigations).

204. *See supra* notes 150–54.

205. *See supra* notes 150–54, 177.

MDLs and situations where a court must protect its jurisdiction over the adjudication of claims consolidated before the court.[206]

Noting that the MDL judge in the *Managed Care* litigation had issued an injunction under All Writs authority and had refused to turn a blind eye to the defendant's "under-handed maneuvers" to obtain a settlement agreement, the plaintiffs concluded:

> Here, where Home Depot has used third-party MasterCard's special relationship with issuing banks to effectuate a pseudo-class action settlement with aggregate relief, the Court can similarly enjoin such efforts. Indeed, the procedure by which Home Depot is attempting to extinguish Plaintiffs' claims is even more egregious than the circumstances in Managed Care. In *Managed Care*, the settlement would have at least undergone judicial review. Here, Home Depot attempts to settle and release the Plaintiffs' claims in this action without judicial oversight and without inviting any Plaintiffs to the negotiating table. This is a blatant attempt by Home Depot to usurp the Court's authority to resolve claims under the multidistrict litigation rules and the class action procedures in Rule 23.[207]

In response, Home Depot disputed the merits of the plaintiffs' allegations concerning the illegitimacy of its communications with MasterCard. Home Depot claimed that these communications were expressly authorized by the Case Management Order entered in the MDL.[208] Home Depot further argued that its communications with the non-party Master Card as well as the absent putative class members were entirely proper and were neither misleading nor coercive.[209]

In response to the plaintiffs' invocation of the All Writs Act as authority for enjoining the defendant, Home Depot contended that the precedents cited by the plaintiffs were inapposite; that the All Writs

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206. *See* Memorandum of Law in Support of Plaintiffs' Motion for Injunctive Relief, *supra* note 196 (citing Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1202 (7th Cir. 1996) and *In re* Checking Account Overdraft Litig., 859 F.Supp.2d 1313, 1322–24 (S.D. Fla. 2012)).

207. Memorandum of Law in Support of Plaintiffs' Motion for Injunctive Relief, *supra* note 196.

208. Home Depot U.S.A., Inc. & The Home Depot, Inc.'s Response in Opposition to The Financial Institution Plaintiffs' Motion for Injunctive Relief, No. 1:14-md-02583-TWT, 2015 WL 9437328 (N.D. Ga. Dec. 11, 2015) (No. 152).

209. *Id.*

power was designed for situations where a proposed settlement and release of claims *in another judicial district* would interfere with the MDL court's disposition of the same claims.[210] In this case, there was no class action settlement or parallel action of any kind at issue, "let alone one that threaten[ed] the Court's jurisdiction."[211]

Home Depot further claimed that even the existence of parallel proceedings did not suffice to provide a basis for enjoining proceedings under the All Writs Act; the issuance of an injunction was reserved for extraordinary circumstances, not ordinary ones.[212] Moreover, injunctions under the All Writs Act historically had issued only where a settlement was imminent in the enjoining court.[213] Home Depot further distinguished the *Managed Care* precedent as inapposite on its facts.[214]

Doubling down on the legitimacy of its conduct, Home Depot maintained that it was perfectly within its rights to negotiate a settlement with MasterCard and absent class members:

> The complete absence of any threat to the Court's jurisdiction by reason of the conditional MC settlement is also underscored by case law standing for the proposition that defendants have a right to negotiate settlements with absent class members, without involvement of class counsel or the approval of the presiding court, where, as here, no class has been certified. *See Baycol Prods. Litig.*, 2004 WL 1058105, at *3 (D. Minn. May 3, 2004). In holding that this right exists, the court in *Baycol* relied on the fact that it did not have jurisdiction over the absent putative class members at issue. Here, by the same token, because the Court does not even have jurisdiction over the non-class MC issuers that are eligible to participate in the MC settlement, there can be no argument that offers have been made to such issuers pose any threat to the Court's jurisdiction.[215]

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210. *Id.*

211. *Id.*

212. *Id.*

213. Response in Opposition to The Financial Institution Plaintiffs' Motion for Injunctive Relief, *supra* at note 208.

214. *Id.*

215. *Id.*

Finally, Home Depot objected that the MasterCard settlement was not a *de facto* settlement subject to court oversight pursuant to Rule 23.[216] Home Depot noted that the plaintiffs could not cite any authority in which a court had found a pre-certification *de facto* class action settlement to be subject to Rule 23(e).[217] Moreover, Home Depot challenged that the plaintiffs' attempts to cast the litigation as a quasi-class action also were unavailing. The plaintiffs had failed to "cite any controlling authority for the proposition that it would be appropriate for an MDL court to treat an uncertified putative class action as a quasi-class action for any purpose under Rule 23."[218]

* * *

As of this writing, the MDL court has not ruled on the plaintiffs' request for an injunction pursuant to All Writs authority. Nonetheless, the *Home Depot Customer Data Security Breach* litigation is instructive for thinking about the All Writs power, in at least four ways.

First, the development of these MDL proceedings illustrates and underscores the ways in which attorney conduct in the pre-certification, non-class aggregate settlement arena may give rise to problematic, if not abusive, attorney conduct. At the time the plaintiffs requested injunctive relief, no class had been conditionally or provisionally certified, yet the defendants had negotiated a non-class settlement and not informed the court of its actions. Hence, this litigation represents a new paradigmatic example of an MDL non-class aggregate settlement in the making.

Second, the problematic conduct in this instance focused on unauthorized communications with absent class members, seeking release of claims. Hence, the *Home Depot* litigation suggests that the

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216. *Id.*

217. *Id.*

218. *Id.* Home Depot contended:

> Thus, even if it were appropriate for a court to rely on a 'quasi-class action' theory in order to allocate attorneys' fees in cases involving a collective settlement of a large number of individual claims, that theory would have no bearing in the case of a putative class action, such as this. This action is and will remain a putative class action unless and until it becomes a certified class. 'Quasi class action' is not a third alternative nor is it an avenue for the Banks to skip past certification to avoid the fact that Rule 23, as amended, plainly rejects judicial approval of pre-certification, individual settlements.

opportunities for potential attorney misconduct extend well beyond the actual settlement itself but also on an array of activities involved in ongoing MDL proceedings. The events that transpired in the *Home Depot* MDL suggest that MDL judges need the authority to police not only non-class aggregate fee agreements after the fact of settlement, but the entire development of non-class aggregate proceedings.

Third, the *Home Depot* litigation reflects the relative impotence of MDL judges to meaningfully supervise conduct in the non-class aggregate settlement arena, largely because the judges lack authoritative support for managing these cases. Precisely because no class had been certified at the time of the alleged attorney misconduct, the plaintiffs, in seeking relief from alleged misconduct, had scant authority to appeal for judicial intervention. Hence, the plaintiffs were forced to make recourse to the dubious doctrines of a "*de facto* class" settlement, the quasi-class action, and the All Writs Act.

Fourth, the *Home Depot* litigation, in the request for an injunction restraining defense conduct, set forth the arguments and counter-arguments both in support and opposition to conferring All Writs authority on MDL judges. As such, the briefing arguments in the *Home Depot* case provide a template for advocating (or resisting) an expanded role for All Writs power. It remains to be seen whether future courts will endorse an expanded role for All Writs power in the context of MDL proceedings, similar to the judicial relaxation of the restrictive reading of the Anti-Injunction Act's second exception.

CONCLUSION

With the rapid proliferation of MDL proceedings, commentators have noted the changed judicial role in these massive litigations. At least one scholar has suggested that with the new MDL paradigm, we have shifted from the older concept of the "managerial judge" to a newer role of judicial "facilitator." In this view, the MDL judge should simply organize the MDL structure and then effectively get out of the way of the attorneys. The role of MDL judge as "facilitator" is urged as a laudatory concept.

This article does not endorse the concept of the MDL judge as mere "facilitator." Instead, it argues in favor of a more robust role for MDL judges, most especially in the new terrain of non-class aggregate proceedings. Rather than permitting attorneys to simply go off and do a deal, this article argues that the lack of judicial oversight jeopardizes and potentially compromises the interests of absent claimants. In

contemporary MDL proceedings, individual claimants who are captured in the aggregate need better guardians of their rights.

Perhaps the most significant problem entailed in contemporary MDL litigation concerns the lack of authority provided to MDL judges to aggressively monitor and police proceedings before their courts. This article suggests that the two current bases for exercising judicial power over non-class aggregate proceedings—the quasi-class action and inherent powers of the court—provide weak support for judicial control. Furthermore, appeals to professional conduct rules as a means to constrain inappropriate attorney conduct also seem a cumbersome method for protecting aggregate claimants. Instead, this article suggests that better authority for MDL judicial power might be accomplished through amendment of the MDL statute or through authority conferred by a liberal construction of the All Writs Act.

As discussed above, MDL judges already exercise substantial power under the All Writs Act to enjoin parallel state court proceedings that have to potential to impede the just adjudication of claims in the MDL court. This authority represents a reversal of longstanding precedent that inhibited federal judges from interfering with state court proceedings under the Anti-Injunction Act. MDL judges have extended their authority under the All Writs Act not only to enjoin parallel state proceedings, but parallel federal proceedings, as well. And, MDL judges have expanded All Writs power beyond the settlement context, to assume control over discovery and other litigation-related matters. This article suggests that All Writs power might be further extended to provide MDL judges with a basis for exercising more robust supervision over non-class aggregate proceedings, which are the most in need of judicial oversight.

* * *

What one ultimately thinks of the efficacy or desirability of MDL proceedings is, in the end, largely driven by one's views on the desirability of aggregation as the best possible means for resolving complex litigation. Notwithstanding the critiques of current MDL practice, aggregationists will continue to approve of MDL auspices as providing the "maximalist" solution to resolving complex litigation. This enthusiasm for MDL auspices seems the logical culmination of an aggregationist movement seeded in the mid-1980s, but its current manifestation is troubling and often problematic for individual claimants involved in these MDLs.

The fact that both plaintiffs' and defense counsel now readily embrace the MDL non-class aggregate modality—in derogation of

class litigation—ought to raise a red flag. Aggregationists who support maximalist solutions have endorsed this state of affairs, justified by a false construct. Thus, MDL non-class aggregate settlements falsely embrace the virtues of the traditional civil litigation model, while undermining the protections long-required for large-scale representational litigation.

Class action litigation has long been juxtaposed against the so-called "traditional" litigation model. This traditional model hypothesized a simple civil case, involving an individual client suing an individual defendant. The client possessed a high degree of litigant autonomy, exercised through various means. Thus, the client initially sought counsel of the client's choice. The relationship between attorney and client was contractual, but the client was actually physically present to represent his or her own interests during the course of litigation. In the traditional model, the client worked closely with counsel, directing and controlling the litigation, keeping apprised of litigation events, overseeing development of the case, and evaluating settlement strategy and terms. The client could approve or disapprove of a settlement offer. If the client agreed to a poor settlement, that was the client's personal responsibility

Advocates for MDL resolution of non-class aggregate settlements support their position by pointing to the contractual nature of the attorney-client relationship that undergirds these settlements. A corollary is that these contractual relationships comport with individual litigant autonomy. Thus, we are led to believe, attorneys involved in crafting, negotiating, and accomplishing non-class aggregate settlements are acting on behalf of each of their individual clients. Each client, through this contractual relationship, gives consent to the settlement crafted on the client's behalf. Each client has a one-on-one relationship with their MDL attorney, thereby guaranteeing litigant autonomy. Thus, MDL non-class aggregate settlements embrace the values of the traditional litigation model, transposing these values onto complex, massive cases.

It is perhaps ironic that the proponents of non-class aggregate settlements have, in effect, high-jacked the theory of litigant autonomy and engrafted it as a justification supporting these wholesale settlements. Nothing could be further from the truth.

Individual claimants need protection once they are swept up into an MDL non-class proceeding, and MDL judges have weak-to-no powers to effectively guard these interests. In conclusion, we need to rethink how to empower MDL judges to better protect the interests of the individuals in the aggregate.

A Primer on Bellwether Trials

Alexandra D. Lahav*

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INTRODUCTION

This essay describes the uses of bellwether trials in multidistrict litigation (MDL) cases and the issues this practice raises. The discussion is aimed particularly at judges who have used or are considering using this procedure. It will first define bellwether trials, then discuss (i) selection procedures and the problems with current practices, (ii) conducting the trials, and (iii) venue considerations. The overall theme is that greater attention to social science methodology in constructing such procedures is warranted.

I. DEFINITION OF BELLWETHER TRIALS

Bellwether trials are a method for moving forward the resolution of MDLs, particularly mass tort suits.[1] A subset of cases

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* Ellen Ash Peters Professor, University of Connecticut School of Law. I am grateful to Peter Siegelman and William Hubbard for their wise comments. This paper was much improved by participation at the AALS panel on Problems in Multi-District Litigation and ongoing conversations with Adam Zimmerman.

1. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 581 (2008); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315

from the pool of suits in the multidistrict litigation are selected for trial. Lawyers on both sides use the outcomes of these cases, both judicial determinations associated with trial such as motions *in limine* and the verdicts themselves, to inform negotiations in a global settlement for all or most of the cases in the MDL. The idea is that the outcomes of the bellwether cases will be used to price the remaining lawsuits in the litigation, ultimately yielding a settlement matrix for all claims.

Bellwether trial procedures in MDLs are voluntary and non-binding on other parties to the litigation.[2] As a result, they generally do not raise due process issues for the parties. This differentiates bellwether trials from similar procedures in class action litigation where defendants may claim they are denied their day in court, are denied individual defenses, or are denied their Seventh Amendment right to a jury trial. Each of these objections to mandatory bellwether trials was successfully raised in the class action context in the mid-1990s.[3] But they have not been raised in the MDL context.

Because the goal of a bellwether procedure is global peace—that is, the resolution of all the claims in the MDL through settlement—the practical problems that would accompany an analogous procedure in the class action context remain relevant in the MDL context. For example, the propensity of higher value claims to opt out, leaving few claims remaining in the collective resolution, will be a problem in either settlement through an MDL global resolution or a money damages class action. A similar problem may occur if additional plaintiffs with lower value claims file in large numbers after a settlement has been determined based on a sample that now no longer fairly reflects the makeup of the group. As is clear from these examples, the problems facing judges in bellwether trials are more practical than they are doctrinal, and the voluntary nature of the proceeding eliminates most doctrinal objections. At the same time,

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(Fed. Judicial Ctr. 2004); *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). Test cases have also been used in other contexts. *See, e.g.*, *In re:* Blue Cross Blue Shield Antitrust Litig., 2015 BL 491630 (N.D. Ala. Oct. 30, 2015) (antitrust); Massachusetts Mut. Life Ins. Co. v. DB Structured Prod., Inc., 110 F. Supp. 3d 288, 290 (D. Mass. 2015) (securities).

2. This fact does raise some selection issues. For example, some groups may exit the process. For a discussion *see* Lahav, *Bellwether Trials*, *supra* note 1, at 613 ("Because they predict that the average value will be lower than their entitlement, all litigants except for those with the very-lowest-value claims—claims that are not otherwise worth litigating—will opt out, severely limiting the value of the procedure").

3. Cimino v. Raymark Indus., Inc., 151 F.3d 297, 311 (5th Cir. 1998). For discussion *see* Lahav, *Bellwether Trials*, *supra* note 1, at 583-84.

the proceeding's dependence on voluntary compliance raises both practical and ethical issues that must be considered by judges contemplating bellwether procedures.

Even when bellwether procedures are planned, they are not always used. Sometimes the process of developing a bellwether procedure produces sufficient information to bring the parties to settlement. Even in such cases, the structure of the procedure is instrumental in facilitating settlement by collecting information used to negotiate the settlement and providing a structure of proceedings that sets time limits on negotiations. The problem with a pure settlement resolution, uninformed by any trial outcomes, is that the basis for determining the value of the individual cases is unclear. Is it past experiences of the lawyers? The rare case that went to trial prior to the centralization in the MDL or in a state court? Neither of these is as likely to yield an accurate determination of case value or to promote equitable valuation as trying a randomly selected sample of cases.[4]

II. STANDARDS FOR CHOOSING A BELLWETHER TRIAL PROCEDURE

What standards do judges apply to determine whether a bellwether trial is the appropriate procedural device? In general, judges have explained that a bellwether trial procedure is appropriate where the procedure will help the parties "evaluate the claims and defenses related to common issues in the proceeding" and "better understand the costs and burdens of subsequent litigation."[5] Five factors can be considered as part of this analysis: (1) what common issues will be resolved in the bellwether trials, [6] (2) whether the trials will materially advance the litigation "in a manner superior to other realistic procedural alternatives,"[7] (3) whether the procedure will promote enforcement of the law,[8] (4) whether the procedure will

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4. *See* Alexandra D. Lahav, *The Case for "Trial by Formula"*, 90 TEX. L. REV. 571, 594 (2012).

5. *See, e.g.*, Order Regarding Selection of Personal Injury and Wrongful Death Bellwether Cases, *In re:* General Motors LLC Ignition Switch Litigation, 1:14-md-02543 (JMF Nov. 19, 2014).

6. MANUAL FOR COMPLEX LITIGATION (FOURTH) at 222-23 (2004) (ruling on common issues should be applied to tag-along actions in multi-district litigation); *see also* 28 U.S. Code § 1407 (permitting transfer where cases share "one or more common questions of fact").

7. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 (2010).

8. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).

promote efficient use of litigation resources,[9] and (5) to what extent the procedure will facilitate a just and accurate resolution of the dispute.[10] These factors overlap with one another. For example, the efficient use of litigation resources will ordinarily be met when the procedure is also superior to other alternatives. Similarly, a well-constructed bellwether procedure that resolves common issues should also facilitate a just and accurate resolution of the dispute—ordinarily through settlement based on what is learned at the trials.

III. STRUCTURING BELLWETHER TRIAL PROCEDURES

Once a bellwether trial approach is chosen, the important decisions concern selection, structure, and venue for the bellwether trials. Each of these considerations is discussed in turn.

A. Selection of Bellwether Cases

How should bellwether cases be selected? There are two methods: random sampling and party-choice. I will discuss the costs and benefits of each of these possibilities, but my ultimate conclusion is simple: random sampling is unambiguously superior to choice-based selection because it avoids bias. Before we get to the discussion of sampling methods, some preliminary terms need to be defined: variance, distribution, and sampling.

Variance. Variance measures how far all the observations in the population are from the mean. The variance in a population is very important for making any predictions about that population using statistical tools. For example, suppose that I was told the average temperature on Mercury was 70 degrees. This is misleading unless I also know that the temperature on Mercury is -130 in the night and +270 in day; that key information is the variance.[11] A population that is very homogenous has a very low variance; a population that is very diverse has a high variance. The more diverse the population, the less likely that a simple average will provide an equitable result across that population. To illustrate, if half the population is entitled to $0 and the other half entitled to $200,000, providing everyone with the average ($100,000) would be an inequitable result.

9. *Id.*
10. *Id.*
11. This is an economists' joke—make of that what you will.

Variance is not limited to one characteristic. A population may vary across any number of different material characteristics. For example, suppose we have an urn full of marbles. The variance among our marbles could include their size, color, and weight. The urn might contain marbles of multiple colors (black, red, green), for example, as well as heavy and light marbles and large and small marbles. In lawsuits, there are likely to be any number of material variables that must be taken into account. To give a simple example, in a case where a drug is found to cause increased incidents of heart attacks, the likelihood that an individual's heart attack was caused by the drug may depend on their sex, age, weight, and cholesterol level; all these variables affect liability. With respect to damages, age, income, education level, family situation, and other variables will affect compensation. What a bellwether trial procedure is trying to test is both (i) the relevance of variables and their effect on outcomes *and* (ii) the variation among jury verdicts.

Distribution. Distribution is how often the possible values in the data set (in the mass tort case this is the value of cases) occur. For example, it may be that most of the cases fall into the middle of the distribution—this would be the familiar bell curve. Or it may be that the curve is skewed positively (there are many more high-value cases than low-value cases) or negatively (there are many more low-value cases than high-value cases). Or the curve may be bi-modal such that, for example, approximately half the cases are high-value and the other half are low-value—something like the temperature on Mercury.

Sampling. Sampling is a method for drawing conclusions about a larger population using a smaller subset of that population. In a sampling methodology, the researcher takes a small number of cases and extrapolates the information obtained from those cases to the population as a whole. To return to the urn example, in order to determine how many black marbles we have in our urn we do not need to pour out the entire urn and count all the marbles. Instead, we can pick a number of marbles randomly from the urn and extrapolate from that information the contents of the entire urn. Unlike counting each marble, when we sample we will only be able to predict the contents of the urn probabilistically. That is, there will always be a chance, even if we determine with reliability that the urn contains 50 percent black marbles, that there are in fact slightly more or fewer black marbles than our prediction, or that there is a single green marble in the jar that was undiscovered. If we count each and every marble in the urn, then we will know the distribution of marbles with certainty, but it will be significantly more time consuming and probably not

worth the effort. The same is true in the social sciences when we want, say, to understand the distribution of voters across a large population. Polling each individual is unjustifiably costly when sampling can lead to a reliable result (as it usually can).

Statistical sampling is a very effective method of predicting facts about large populations without looking at each one individually. Knowing the variance is necessary to structure the sample: a very homogenous population, for example, will need a smaller sample than a highly variable one. In an identical population, only one sample need be taken. If we have an urn that contains only one color of marble, we need only pull out a single marble to predict the color of the urn's contents. On the other hand, a population with a high variance will require a larger sample. An urn with multiple types and colors of marbles will require us to pull out more marbles to make a reliable prediction of its contents.

Sampling can yield a very accurate picture of the underlying population if done right, and this requires that the sample not be subject to selection biases. The most important issue in sampling—whether done on an anecdotal basis by an individual lawyer negotiating a settlement on behalf of a client or engineered by a court in the context of aggregate litigation—is whether the sample is *biased*. For this reason, the state of the art in statistics is to use random samples. We must always suspect that any non-random method of picking sample cases will be biased and therefore will be a systematically inaccurate estimate of the population characteristics.

Samples based on the lawyer's personal experience or the experiences of colleagues suffer from potential bias. Statisticians call these convenience samples because they are picked based on accessibility, not reliability.[12] Convenience samples are suspect because they are based on the circumstances of the lawyer. So, for example, suppose I wanted to calculate the average depth of a pond. It might be more convenient for me to measure only the edge of the pond, because then I would not have to get a boat. This method would be biased towards an estimate that is too shallow.[13] Biasing a sample does not have to be purposeful; it may be an honest belief based on incomplete, readily available information that is nonetheless wrong.

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12. 1 SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS 197 (Michael S. Lewis Beck, Alan Bryman & Tim Futing Liao, eds., 2003) (describing convenience sampling).

13. Thanks to William Hubbard for this example.

It is possible to conduct rigorous qualitative research by collecting a large, randomly selected set of cases on which to base case evaluation and using this information to develop a fine-grained theory of which variables in that sample are relevant to case outcomes. Then the population may be grouped into smaller segments (sub-classes) that are more homogenous across these variables for random sampling for the purpose of holding bellwether trials. But to create a sub-group within the population, one needs to know a fair bit about the characteristics of that population. There are statistically sound methods for obtaining such information. These methods can produce a greater chance that a smaller number of bellwether trials drawn from a more homogenous sub-class of the population will accurately reflect that sub-class. But it is important to keep in mind that when sampling from a homogenous population, because the decision-makers (juries) vary in their determinations, multiple trials must still be held to obtain a reliable result.

We now turn to the benefits and costs of the two types of sampling procedures in MDL: selection by counsel and random selection.

B. Selection by Counsel: The Standard Method

Many judges have selected bellwether cases for trial through counsel by permitting each side to pick a small number of cases. For example, in the General Motors Ignition Switch Litigation, the parties selected a group of eighteen cases for discovery and trial (each side selected nine cases).[14] The judge permitted each side to strike cases suggested by the other side, and ultimately the total number of bellwethers came to six cases. In a somewhat more sophisticated approach, the judge in the 9/11 First Responders Litigation appointed special masters who first surveyed the group of plaintiffs along a number of dimensions and created severity categories, then picked a group of 200 plaintiffs from each severity category.[15] Defendants, plaintiffs, and the court each picked two cases from this group, for a total of six cases that were to go to trial.[16] The cases settled on an aggregate basis before any trial began and it appears that the survey,

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14. *In re*: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2016 WL 1441804, at *9 (S.D.N.Y. Apr. 12, 2016).

15. Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 148 (2012).

16. *Id.*

which revealed that many of the claims were low-value, was crucial in that settlement.[17]

A selection method that allows the parties to pick has the benefit of obtaining their consent to a procedure that would otherwise be difficult or impossible to impose. It not only produces a biased sample, it will also produce an intentionally biased one that predictably consists of outlier cases.[18] Defendants and plaintiffs will both select cases that they are most likely to win and win big. If the pool from which cases are selected is picked by the parties, even if the judge picks the cases that are ultimately tried out of that pool, it is likely to be filled with these "slam dunk" cases. I suspect that is why the results of the bellwether trials in the Vioxx litigation were so extreme: a small number of multimillion-dollar plaintiff's verdicts and a larger proportion of defense verdicts.[19]

There is one condition under which the trial of outlier cases may lead to useful information. If the underlying variance of the class is known and the class has a symmetric distribution, then it may be possible to use the outliers to calculate values of the remaining cases.[20] But this is only the case if the underlying cases have a symmetric distribution, and there is no basis for assuming that an MDL has a symmetric distribution.[21] For example, in some MDL cases there have been accusations that plaintiffs have filed large numbers of meritless or low-value cases, which would skew the distribution. Importantly, in most MDL litigation, the judge does not have information regarding the probability that plaintiffs will win (and their damage awards). For this reason, a judge considering allowing parties to pick the bellwether cases should first require a survey to determine, as best as possible,

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17. *Id.* at 153.

18. *In re*: Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) ("Whatever may be said about the trial contemplated by the district court's December 19, 1996 order, one thing is clear. It is not a bellwether trial. It is simply a trial of fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation").

19. *See, e.g.*, George W. Conk, *Diving into the Wreck: BP and Kenneth Feinberg's Gulf Coast Gambit*, 17 ROGER WILLIAMS U. L. REV. 137, 151 (2012) (finding that, when counting retrials, twelve out of eighteen trials were defense wins); *see also* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2411 (2008) (describing verdicts).

20. Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 964 (2012).

21. *Id.* ("[W]hen the target is normally distributed and the population is large (five hundred cases), randomly selecting one case from the top ten percent of the population, another from the bottom ten percent, and averaging the results is statistically equivalent to a sample size of twelve from the full population").

the characteristics of the group of plaintiffs in the MDL. It is possible that plaintiffs' counsel know this information, but there is no evidence that they use statistical methods to ascertain the probability of success of all the cases in the MDL in a systematic way prior to creating a settlement matrix. Such surveys can be costly and require substantial coordination, but it is necessary for a biased sampling procedure such as this one to be useful.

Some judges believe that trying cases selected by the parties will yield a "representative" sample.[22] I think what judges mean by this that they want the lawyers to pick cases that will resemble the rest of the population of cases along the relevant variables. They hope that the lawyers, who are more familiar with the population, will be better able to determine the distribution and variance and therefore pick exemplars that will provide this information. The problem is that by using a non-random case selection process, bias will be built in. Furthermore, parties will introduce intentional bias by selecting cases on the extreme end of the distribution, assuming that they do, in fact, have a good sense of both the distribution and the variance. Party determinations are simply not a reliable method for determining variance or distribution because they are not random. The interest of the parties in an adversarial litigation to maximize their client's interests compounds the problem of bias, which is present with any non-random selection method.

Equally important, the pursuit of "representative" cases ignores the problem of variance. The unstated assumption of a process allowing lawyers to pick six or nine or even eighteen cases out of thousands for trial is that variance is low, so very few cases can be used to determine the characteristics of the remainder of the class. Indeed, a small sample may tell us a great deal about a population where variance is low—recall the example of an urn full of black marbles—but it will tell us little about a population where variance is high. Furthermore, approaching selection by asking counsel to pick

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22. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, *supra* note 1, at 2349; *In re:* Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig., No. 3:09-md-02100, 2010 WL 4024778, at *2 (S.D. Ill. Oct. 13, 2010); *see also In re:* Gen. Motors LLC Ignition Switch Litig., *supra* note 14, at *9 (S.D.N.Y. Apr. 12, 2016) (admonishing that "because the primary purpose of bellwether trials is to provide data points for settlement discussions with respect to the universe of cases, the goal is to select the 'best' representatives of the universe of cases, not outliers likely to result in victory for one side or the other. To that end, the Order setting up the bellwether selection process dictated that the bellwether selections be 'representative' claims"). The only way to do this reliably is to have a non-biased selection process, which is to say to pick randomly.

representative cases also elides the problem of variables that differ across cases. A case may be representative across one dimension (all marbles are black) but different across another dimension (the marbles are of different sizes).

So far, we have discussed the effect of party selection on accuracy, but there is another risk associated with party selection of bellwether trials. Because the parties tend to select outlier cases and the number of trials is small, each trial receives outsized attention. This can negatively affect the ability of the parties to negotiate a settlement for the run of cases, assuming that the distribution is not bimodal. What I mean is that if every case in the population falls into one or the other extreme end of the distribution, then the adverse publicity of the trial outcomes signals to the market and the participants in the litigation an accurate picture of the potential liability. But this is unlikely. It is more likely that there is some other distribution of cases; for example, there may be a skewed distribution with a lot of low-value cases and fewer high-value ones. If only very few cases are tried, and they are outliers because of bias in the selection process, undue weight may be placed on each individual trial in the press and among the parties, making a compromise more difficult than it would otherwise be, creating misleading impressions among plaintiffs, shareholders and other stakeholders in the litigation.

Consider the following example. Suppose the population consists of 1,000 cases with plaintiff verdicts of $10; 10,000 cases with plaintiff verdicts of $200; and 100 cases with plaintiff verdicts of $4,000. If the parties each pick three cases to try, the defendants will predictably pick the cases with plaintiff verdicts of $10 and the plaintiffs will pick cases with plaintiff verdicts of $4,000. If this is all the information that is available, the defendant will argue that most of the cases are worth $10, and the plaintiffs will argue that they are mostly worth $4,000. Shareholders may be concerned that in fact most cases are worth $4,000 and this may cause share prices to drop. The parties, insisting on excessively high or low valuations, may have difficulty reaching a settlement or may ultimately agree to a claiming procedure that spends a great deal of time and money on administrative costs to distinguish the $10 from $4,000 claims. Yet these decisions will be based on only 11% of the cases—all of them outliers. If the market had accurate information, the stock price might not fall. If the parties had accurate information, they might structure a lower cost and faster claims procedure.

C. *Random Sampling: The Social Science Model*

A second approach to sampling—one that is more consistent with social science methodology—is to sample randomly from the population of plaintiffs. This approach has largely fallen out of favor, although in recent years commentators have called for random sampling and the Manual on Complex Litigation recognizes its importance.[23] There are several reasons why random sampling is preferable to the more common counsel selection approach. First, random sampling will be more accurate than party-driven selection because it will not produce only outlier cases, unless of course that reflects the underlying population, because there is a bimodal distribution (that is, cases are either very high-value or defense verdicts). Second, random sampling removes the pressure on the litigation that arises when parties make mistakes in their selection, such as when the plaintiff selects a case for trial and the defendant wins or vice versa. Suppose for example that the distribution of cases is a bell curve, but the plaintiff has in error picked a case they thought was high-value, yet the defendant prevails. Since observers expect plaintiffs to pick a high-value outlier, this defense win will be understood to reflect the quality of all of plaintiffs' cases, bringing down settlement value disproportionately to what one case can in fact reveal about the plaintiff population.

One concern is that in a random sample a subset of cases might not be representative, in the sense that the randomly selected cases may not look like the remaining cases in the population. Suppose that one type of injury constitutes 10% of the class of cases. A random sample may over or under-include cases of this type if the sample is too small.[24] The best way to address this problem is to use a larger sample—one that is calculated based on the underlying variance in the class. If the variance is known, the sample can help determine both value and distribution. Allowing parties to pick cases will not solve this problem; it merely trades one problem for another because it replaces a sample of unknown representativeness with a known biased sample. A sample chosen by the lawyers will never be "representative" in the sense that it reflects the run of cases; only a

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23. Loren H. Brown, et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 682 (2014); Alexandra D. Lahav, *The Case for "Trial by Formula"*, *supra* note 4, at 628-33.

24. Brown et al., *Bellwether Trial Selection in Multi-District Litigation*, *supra* note 23, at 682.

random sample can assure that. Indeed, it is almost certain that lawyer selection will lead to a biased sample consisting of outliers.

A second concern is that true random sampling simply requires too many trials. Trials are expensive and, in a large and heterogeneous population (as is often found in mass torts), a sample of six or even eighteen cases will likely be too small. A solution to this problem is to sub-classify the class and sample randomly from those sub-groups. The more homogenous the group, the smaller the sample can be. If the court is sampling from a reference class of cases that are similar to one another with respect to the key variables, then the result of sampling should be sufficiently homogeneous to be useful in valuing other cases in the reference class. That is, we can extrapolate the results of the sample to the rest of the reference class if all the cases are reasonably similar. But to decide the parameters of the appropriate reference class, the court will need to identify the variables that are relevant to case outcomes. In other words, determining the parameters of the reference class requires taking a position regarding which variables are important. Furthermore, these variables must not only be relevant but also objectively verifiable. This means that a great deal of groundwork is required to produce a useful bellwether trial procedure. The judge must determine the variation of case value in the population, determine whether the population can be fruitfully sub-classified to yield more homogenous groups, and then decide how many trials from each sub-group are needed to determine case value.

Judges must be careful that the criteria used to sub-classify is sensible. Brown et al. gave the example of a judge using information from plaintiffs in one state to extrapolate to other states.[25] For such an extrapolation to be valid, information would need to be obtained to show that the population of cases in the two states is similar. Because each MDL is different, it is impossible to provide a specific solution for the sampling problems that will arise in every situation. The best approach for judges is to consult a statistical expert who can advise on how to use reliable social science methodology to sample cases.[26]

25. *Id.* at 684-85.

26. For a good summary of the uses of random sampling in various litigation contexts, *see generally* Joseph B. Kadane, *Probability Sampling in Litigation*, 18 CONN. INS. L.J. 297 (2012).

D. *The Number and Structure of Bellwether Trials*

How many bellwether trials ought there be in a given MDL? From a social–scientific point of view, this will depend on the characteristics of the population and the tolerance for error (how precisely values need to be determined) balanced against the cost of trials. Experience indicates that mass tort plaintiff populations tend to be characterized by significant variance across numerous relevant variables. They are also characterized by uneven distribution. This means that in most cases a significant number of trials will need to be held to obtain a valid picture of the population. Yet most bellwether trial procedures involve very few trials. Indeed, these procedures dictate at most perhaps eighteen trials, a number which is highly unlikely to lead to sufficient information to provide a statistically viable result. In reality, courts find themselves holding many fewer proceedings than this because the parties agree to settle the cases. Because reaching settlement is often considered the purpose of the bellwether trial, this is usually understood as a positive result.[27] The problem is that settled bellwethers do not provide a set of trial outcomes against which to measure the accuracy of the settlement amounts plaintiffs receive, so that other cases are not settling in the shadow of what they would have obtained at trial. Still, depending on the number of trials and pre-trial motion practice, the rulings and the presentation of evidence in even a small number of trials can provide the lawyers with some sense of the strengths and weaknesses in the run of cases, and this knowledge will inform settlement outcomes. How valuable this information is depends on the variance and distribution of the population.

Over time, as multiple courts have used bellwether trials to resolve mass tort MDLs, the biggest challenge has been the trade-off between the cost of trials, which militates in favor of fewer trials, and the need for a greater number of trials to produce sufficient information to make a valid determination as to case value across a heterogeneous population of cases. The problem of too few trials takes on a greater risk when each trial is reported in the press, driving parties to be more adversarial and aggressive in their trial tactics and potentially creating barriers to settlement. Is there a way to conduct bellwether trials without these negative effects? This is the most

27. There is also an emerging practice of serial mediations which combine alternative dispute resolution and bellwether techniques. *See* Adam Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. (forthcoming 2017). The problem with such an approach is that it is not public and lacks many of the benefits of trial.

difficult problem facing judges who are structuring bellwether procedure and more experimentation is necessary to find workable answers.

One option would be for parties to consent to bench trials with an advisory jury on discrete issues of both liability and damages.[28] This would be a form of bifurcation or polyfurcation. The judge could try the bifurcated issues across multiple cases with shortened trial times, with each case tried to a different jury.[29] For example, liability could be tried to a series of juries in a series of cases in summary proceedings, followed by trials for damages along the same lines. If the parties preferred a Seventh Amendment jury, then core aspects of the liability finding by the previous jury, including key documents, could be presented to the second jury and instructions given that the second jury is only to determine damages. Allowing bifurcation of this type would spread the jurors' time investment over a broader group of individuals, limiting the cost to jurors of participation, and provide important jury feedback on the variance and distribution of the MDL population to the judge and the parties. There is no question that such processes would be time consuming, but it may be worth the additional time if slicing the case into parts limits the pressure on individual bellwether trials since so few can be held. This process would provide more information to all participants than very few high-profile bellwether trials could.

Three obstacles stand in the way of this approach. The first is tradition. In the United States procedural systems, both state and federal, the entire case is generally understood to be determined at a single proceeding—we have, in other words, a cumulative procedural system. But other countries rely on a discontinuous system for determining outcomes in which portions of the case are tried without a jury.[30] Because breaking up the factual determinations of the case

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28. A judge may empanel an advisory jury in any action "not triable of right by a jury." Fed. R. Civ. P. 39. A narrow reading of this rule could forbid trying a case where the parties might insist on their right to a trial by jury but chose not to, but a broader reading of the rule permits empaneling an advisory jury in any case where the judge is not required to hold a jury trial, including when the parties have agreed to a bench trial with an advisory jury.

29. This would most likely not violate the Seventh Amendment's reexamination clause. *See* Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 704 (2006).

30. *See* Arthur Taylor Von Mehren, *Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules*, 63 NOTRE DAME L. REV. 609, 609-10 (1988).

into parts is not traditional, it is harder to justify than the usual approach of a cumulative trial, even though cumulative trials can put too many eggs in one basket and reduce the number of trials stakeholders are willing to have.

A second obstacle is the concern that bifurcation may unfairly disadvantage one of the parties. It is generally believed that bifurcation disadvantages plaintiffs.[31] By limiting the jury's fact-finding power, the practice may also limit the jury's ability to look at the whole case and do justice in that individual case, which is the controversial but also traditional role for the civil jury in the United States.[32] Or perhaps juries might not understand the full significance of the evidence without seeing it all because of the way people process information.[33]

The empirical evidence is inconclusive. A 1989 study of sixty-six juries found that juries hearing unitary trials found for the plaintiff more often than those in bifurcated proceedings and further found that the order of determinations (liability, causation, and general causation) affected outcomes.[34] But that study also found that those plaintiffs who prevailed in bifurcated proceedings received higher damages awards, which is not consistent with the theory.[35] This study found that deliberations were less sophisticated and based to a greater extent on heuristics in the bifurcated proceedings than in unitary

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31. Jack B. Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831, 834 (1961) (arguing that bifurcation benefits the defendant because jurors fuse liability and damages); Hans Zeisel & Thomas Callahan, *Split Trials and Time Saving: A Statistical Analysis*, 76 HARV. L. REV. 1606, 1612 tbl.3 (1963) (showing an early empirical study finding that bifurcation cut plaintiffs' win rates from 66% to 44%); Dan Cytryn, *Bifurcation in Personal Injury Cases: Should Judges Be Allowed to Use the "B" Word?*, 26 NOVA L. REV. 249, 264 (2001) (finding that plaintiff win rates were 59.5% in unitary trials but only 23.5% in bifurcated trials, but the study did not account for selection effects); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879, 894 (1995) (describing this as the "sterile trial problem"); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1325, n.210 (2010) (citing sources arguing that bifurcation advantages the defendant); *but see* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705 (2000) (arguing that bifurcation does not disadvantage plaintiffs).

32. Weinstein, *Routine Bifurcation*, *supra* note 31, at 835 (quoting a defense lawyer making this argument).

33. Thornburg, *The Managerial Judge Goes to Trial*, *supra* note 31, at 1302.

34. Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 26 (1989).

35. *Id.*

proceedings.[36] Particularly, evidence of general causation caused more difficulty for jurors in bifurcated than unitary proceedings, which may account for the differences in liability rates. But a 1998 study found that bifurcation does not negatively affect plaintiffs' win rate on liability, although the win rate for plaintiffs in both unitary and bifurcated trials was very low: around 20%.[37]

A third and final obstacle is the reexamination clause of the Seventh Amendment.[38] Some courts have held that the reexamination clause stands in the way of bifurcation of liability from damages in jury trials, but there are available readings of that clause that are more forgiving.[39]

E. *Forum for Bellwether Trials*

Once a sampling regime is determined, the judge must decide where the cases ought to be tried. There are three options for the judge: (1) send the case back to the transferor court, (2) try the case in the transferee court, or (3) try the case in the transferor court sitting by designation. Most cases have been transferred from another district into the MDL and must be sent back to their home district for trial.[40] However, parties may agree to have the case tried before the transferee court. In the alternative, the transferee judge can sit by designation in the transferor court for purposes of conducting the trial. All three of these options have been used in different cases. For example, in the Vioxx MDL, Judge Fallon sat by designation in the transferor courts. In the GM MDL, the parties agreed to try their bellwether cases in New York before Judge Furman, the MDL judge.

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36. *Id.*

37. Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 323, 342 n.85 (1998) (noting, in Table 5, that plaintiffs prevailed on liability in 18% of the unitary trials and 22% of the bifurcated trials).

38. U.S. CONST. amend VII ("no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law").

39. *See* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 502 (1998) (concluding that the reexamination clause is not an obstacle to issue class actions, which entails many of the same issues raised in bifurcated proceedings before different juries).

40. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 34 (1998); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2329 (2008) (explaining that the transferee court can enter pretrial orders that will govern the conduct of the trial but that the transferor court may depart from these orders).

Each option has its costs and benefits, but overall the better practice is to send cases back to the transferor court. If the case is returned to the transferor court for trial, the benefit is that the case is decided as it would have been if it had never been transferred. The new judge will be unfamiliar with the course of the litigation and is therefore unlikely to be affected by the conduct of the litigation up until that point. In other words, the transferee judge can bring fresh eyes to the lawsuit. That judge is also less likely to see the lawsuit as part of a larger picture and more likely to treat it as if it were a one-off case. This is beneficial to the extent that it will lead to the result that would have occurred if the case had not been transferred, which is the right input for determining a global outcome.

The problem with having the transferor court oversee the bellwether is discontinuity of decision-making. The transferee judge is familiar with the pretrial orders, the conduct of discovery, and any dispositive motions that were filed; he or she can maintain continuity in decision making. The transferee judge must make a significant investment to learn the case from the start, and therefore it may reduce judicial investment for the transferor judge to try the case. Furthermore, the transferee judge is likely to understand better how the decision in the one bellwether case will affect other bellwethers and the population as a whole. For example, the transferee judge is more likely to decide evidentiary questions consistently. While this can lead to bias, it can also allow the judge to consider important issues that would not be decided with as broad a view by a judge who is not familiar with the entire course of the litigation. Accordingly, if the case is transferred for trial, the transferor judge should endeavor to decide evidentiary issues similarly to that in the other trials; this can be done in consultation with the transferee judge.[41]

Another consideration is the jury pool. Jurors are likely to be different in different parts of the country. Accordingly, a result that accurately reflects the plaintiff's and defendant's entitlement may be more likely if the jury pool is that of the transferor court.[42] This militates in favor of judges trying bellwether cases sitting by designation in the transferor court. However, there is also a cost to varying the jury pool geographically. If the goal is to determine the relationship of this case to other cases, a consistent jury pool makes

41. The best practice may be to give parties an opportunity to address issues raised in such consultations to avoid any appearance of impropriety and to make sure that parties have an opportunity to be heard regarding evidentiary decisions.

42. Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U.L. REV. 667, 685 (2013) (arguing in favor of local determination of mass tort cases).

the comparison easier than a geographically varied one. In other words, keeping the jury pool constant eliminates an additional variable among litigants. This can most easily be done by holding the bellwether trials in one location—the transferor court. Either decision inserts some uncertainty into the extrapolation process, as there will always be variance among jurors whether they are picked from the same or different pools. To the extent one suspects that the cases would have come out differently had they been tried in their home jurisdiction, this militates in favor of trying cases in the transferor court rather than in a faraway forum which was chosen on the basis of judicial talent and experience rather than geography or jury pools.

While there is no right answer to this decision, if cases are to be extrapolated across geographic areas, then having random cases tried in their home jurisdiction is probably the best approach as it is most likely to represent the true variance in the cases. It is also the most consistent with the history of the Seventh Amendment, which was intended to provide a local counterpoint to nationally-oriented federal judges.[43] A good sampling technique can make all the parties feel confident that the bellwether cases, including the geographic variable, are selected fairly and can be used in building a settlement matrix.

A final note—choice of law should not be a serious consideration for choosing the venue for trying the case. While there will be some variations across the circuits and district courts with respect to pretrial practice, that decision-making will have already been done by the time the case is trial ready. The choice of substantive law will not be venue-dependent.

CONCLUSION

Overall, the current practice of bellwether trials, in which very few or no trials are conducted and those cases that are tried receive outsized attention, should be avoided. Instead, judges should focus on structuring equitable procedures for trying cases using social science methodology and experiment with new techniques geared towards obtaining a broader sample, both to improve reliability and reduce the outsized importance of a single verdict.

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43. Lahav, *Bellwether Trials*, *supra* note 1, at 590 (discussing the history of the jury right).

The Stickiness of the MDL Statute

Andrew Bradt*

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INTRODUCTION

On February 9, 2017, shortly after the inauguration of President Donald Trump, the Republican Party gained control of the executive branch and both houses of the legislature. Representative Bob Goodlatte, of Virginia, introduced the "Fairness in Class Action and Furthering Asbestos Litigation Act," H.R. 985.[1] Rep. Goodlatte's introducing the bill, clearly aimed at curbing mass-tort litigation, was unsurprising to those who follow procedure—Republicans in the House had pushed such legislation in the past, knowing that prospects of overcoming a Democratic filibuster in the Senate were poor, and that prospects of avoiding a veto by President Obama were non-existent.[2] With the future of the legislative filibuster in the Senate now

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1. H.R. 985, 115th Cong. (2017); *Goodlatte Introduces Major Litigation Reform Bill to Improve Access to Justice for American Consumers* (Feb. 10, 2017), http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=809 (press release from Goodlatte House office promoting introduction of bill in House Judiciary Committee).

2. *See, e.g.*, ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 151 n.1 (2017) (describing statutes proposed to prevent "frivolous lawsuits"); Lydia Wheeler & Christina Marcos, *House Passes Bill to Reform Asbestos Lawsuits*, THE HILL (Jan. 8, 2016), *available at* http://thehill.com/blogs/floor-action/house/265226-house-

uncertain, and a new President perhaps more amenable to litigation "reform," informed observers expected the reemergence of the class-action bill.[3] What was unexpected, however, was a new section of the bill devoted to changes in procedure in multidistrict litigation, changes that had not been part of the similar legislation introduced in past Congresses. Not only were the proposed changes unexpected, they are changes that go to the heart of how MDL cases are litigated — affecting the nuts and bolts of pleading, bellwether trials, appeal, and settlements.[4]

These amendments to the MDL statute are not only the most extensive ever proposed, but if passed, would also be the first changes ever made directly to the MDL statute. Other amendments to the statute have been proposed over the years, most notably the repeated attempts to overrule by statute the Supreme Court's decision in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*,[5] which prohibited MDL judges from transferring cases filed in other districts to themselves for trial.[6] But those efforts, which were by any definition more modest than those proposed in H.R. 985, failed repeatedly.[7] In short, the MDL statute has remained the same as it was when it passed nearly fifty years ago in 1968.[8]

Despite mass-tort litigation being in the crossfire for decades, the MDL statute has persisted without alteration or much outside interference. This is as its drafters hoped—they intended that the newly created Judicial Panel on Multidistrict Litigation (JPML) operate with maximum discretion. But this was not the drafters' original vision when they first began work on the statute. When the Coordinating Committee on Multiple Litigation, the small group of judges tasked in 1961 with organizing the massive antitrust litigation arising out of price-fixing in the electrical-equipment industry, began

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passes-bill-to-reform-asbestos-lawsuits (noting passage of the legislation in the House on party-line vote).

3. Perry Cooper, *Bill Targeting Class Actions, MDLs Sent to House*, BLOOMBERG BNA (Feb. 16, 2017), https://www.bna.com/bill-targeting-class-n57982083903/ (noting that an "earlier version" of the bill "stalled in the Senate").

4. H.R. 985, 115th Cong. § 5 (2017).

5. 523 U.S. 26 (1998).

6. Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the* Lexecon *Result*, 70 OHIO ST. L.J. 455, 475–79 (2009) (noting that although "Congress has been toying with the idea of reform for far too long" the efforts to legislatively reverse *Lexecon* had failed).

7. *Id.*

8. 90 CONG. REC. H4927–4928 (daily ed. March 4, 1968) (noting passage of the bill on the consent calendar).

to consider a proposal that would make their innovations a permanent part of the federal procedural system, their original idea was quite different from what we know today.

Dean Phil C. Neal of the University of Chicago Law School and Judge William H. Becker of the Western District of Missouri were deputized to develop a permanent provision for litigation pending in multiple districts. They started out with the idea that limited transfer to a single district for pretrial proceedings could be accomplished through a new Federal Rule of Civil Procedure, or a barebones statute that would delegate to the Civil Rules Advisory Committee the authority to make rules permitting MDL under certain circumstances and governing the procedure in MDL cases. For a variety of reasons discussed below, Becker and Neal eventually abandoned that idea. Instead, they opted to cut the Rules Committee out of the process entirely by seeking Congressional passage of a statute that would broadly define the circumstances under which MDL would be appropriate, and to delegate to the new JPML almost unfettered discretion to make those decisions. In the end, there would be no Federal Rules governing the availability of MDL, the identity of the transferee judges, or how MDL cases would proceed. Instead, that power would be exercised by the JPML and transferee judges, who could tailor procedure to the individual case.[9]

In this Essay, I argue that the drafters' decision to cut the rule makers out of the MDL statute was significant because it has insulated the MDL statute from amendment and scrutiny over the years. Because MDL was passed as a statute, and not a rule, and because MDL ultimately delegated control over MDL's implementation to the JPML and not the Rules Committee, it has been relatively difficult to tinker with. The new and major interventions proposed by this Congress are therefore significant not only because of the practical changes they would make on the ground in MDL cases, but because they interfere with the statute in the first place.

In their remarkable new book, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION, Stephen Burbank and Sean Farhang chronicle and illustrate with rich empirical data the nearly half-century old movement to restrict private enforcement of the substantive law through litigation.[10] That

9. *See infra* Part I (discussing the history, considerations, and development of the MDL Statute).

10. STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017). Burbank and Farhang's book follows and augments a series of articles about this subject:

movement, in their words a "counterrevolution" against the earlier enthusiasm for private enforcement expressed by the Congress, the Supreme Court, and Civil Rules Advisory Committee, has sought to "diminish or disable the infrastructure for private enforcement of federal rights."[11] The tilt against private enforcement that has emerged in recent decades has manifested itself in numerous changes to procedural rules and doctrine, which, together, as Benjamin Spencer has evocatively argued, represent a "restrictive ethos . . . A threshold skepticism that yields an interest in excluding or discouraging claims rather that supporting or encouraging them."[12]

Although Burbank and Farhang add important historical detail to this narrative, their most important contribution is their empirically supported explanation of how and why the efforts of those seeking to restrict public enforcement predominantly failed in the legislative branch and succeeded in the judicial branch. The authors use quantitative data and political-science theory to explain that while reformers had only sporadic success in Congress and the Rules Committee, "conservative majorities of the Supreme Court have transformed federal law over the past four decades, making it less and less friendly, if not hostile, to the enforcement of rights through private lawsuits."[13] Burbank and Farhang amply demonstrate that, as a structural matter, legislation dismantling the private-enforcement regime is extremely difficult to achieve; as they say "the institutional hurdles were simply too high."[14] But doing so through Supreme Court decisions that interpret federal statutes and rules is easier because "the ostensibly technical and legalistic qualities of the Court's decisions on issues affecting private enforcement, and the gradual, evolutionary nature of case-by-case decision making, opened a pathway of judicial retrenchment that was remote from public view as compared to

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Litigation Reform: An Institutional Approach, 162 U. PA. L. REV. 1543 (2014); *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559 (2015); *The Subterranean Revolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. 293 (2016).

11. BURBANK & FARHANG, *supra* note 10, at 2.

12. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 359 (2010); *see also, e.g.*, Lahav, *supra* note 2, at 145 (discussing how modern day litigation trends often focus on procedures rather than rights, which prevents otherwise legitimate cases from being litigated); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

13. BURBANK & FARHANG, *supra* note 10, at 218–19.

14. *Id.* at 219.

legislative politics, court rulemaking after the reforms of the 1980s and Supreme Court decisions on highly salient issues."[15] In short, what Burbank and Farhang show is that retrenchment is an extremely difficult task to achieve through legislation and rulemaking, but one which is possible through interpretation by judges. They write: as "the Court's posture toward private enforcement underwent a transformation from highly supportive in the 1970s to antagonistic today," it has achieved the goals of the counterrevolution more effectively than legislative reformers.[16]

My goal in this essay is not to review Burbank and Farhang's book or recap their argument. Rather, with that research as a backdrop, my aim is to suggest that the MDL statute provides another compelling example of the difficulty of achieving procedural retrenchment through legislation. The drafters' strategic decisions to pass MDL as a statute and not a rule, and to separate the JPML as a body independent from the rulemakers made MDL and the JPML especially insulated from future interference. In other words, the MDL statute and process are "sticky." And although this insulation has prevented the counterrevolution from reaching MDL, at least directly, it has also had costs, in terms of making the deficiencies in MDL practice more difficult to solve through rulemaking.

It is, however, important to note two caveats. First, the Federal Rules of Civil Procedure of course apply to MDL. To the extent those rules have been amended by the rulemakers and reinterpreted by the Supreme Court over the years, those changes have been felt in MDL cases. Second, the fact that the MDL statute was designed as it was is not the only reason for its staying power—quite the contrary is true. Numerous scholars, myself included, have argued that there are multiple explanations for MDL's success and recent ascendance to the position of dominance in the federal civil-litigation scheme that this Symposium reflects. For one thing, MDL was, as Judith Resnik memorably described it, a "sleeper" for decades,[17] a second banana to the class action, which was a subject of major controversy from the beginning. For many years, MDL was hiding in plain sight, available

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15. *Id.*

16. *Id.* at 217.

17. Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5, 47 (1991) (describing MDL as a "sleeper—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments"); *see also* Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1350 (2014) (noting that "[MDL] remains one of the least studied types of federal litigation").

when the mass-tort class action lost its somewhat short-lived status as the central mechanism for aggregate litigation in the federal courts.[18] It therefore makes sense that, while class actions have been a subject of regular debate, and indeed occasional legislation, the Congress would have generally ignored MDL.[19]

There are other reasons for the lack of attention to MDL, besides its relative obscurity. Throughout its existence, MDL has also always been shrouded by a patina of innocuousness—that it serves merely to consolidate cases for pretrial proceedings before their (purported) eventual return to their home districts for trial.[20] And one should also not overlook what is perhaps the simplest explanation for MDL's staying power: that, imperfect though it may be, it may be better than currently available alternatives at accommodating all the players' interests.[21] That is, MDL serves plaintiffs by facilitating aggregation, defendants by facilitating peace, and the courts by facilitating efficiency.[22] Certainly, it may not do any of these things as well as theoretical alternatives—for defendants, this much is demonstrated by the restrictive amendments proposed in H.R. 985—but it at least fulfills all three of these purposes sufficiently enough to

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18. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 832–33 (2017); *see also* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 155 (2015) ("The most successful step taken in the administration of aggregate litigation in the United States was the creation of the JPML in 1968.").

19. *Cf.* David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Economy*, 165 U. PA. L. REV. 1531 (2017) (discussing how, despite a period of wide interest in a proposal to modify class action lawsuits, the final proposal could not be agreed upon, causing the proposal to ultimately fail and interest in continued reform to fade); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 EMORY L.J. 293 (2014).

20. Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014) (stating that MDL "merely brings related lawsuits before one judge so that they can be organized and managed collectively to avoid the need to conduct duplicative discovery").

21. Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining that MDL "creates the perfect conditions for an aggregate settlement"); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2272 (2008) (describing how MDL "produced [settlement] out of the chaos").

22. Bradt, *supra* note 18, at 835.

muddle through. As a result, MDL has been a less enticing target for reform when the bigger class-action fish has always been there to fry.

All of these explanations are important and perhaps indispensable parts of the story. But for several reasons, MDL's statutory structure should not be ignored. As it shows, statutes are simply hard to change—they are remarkably sticky once they are passed. While Federal Rules are also difficult to amend, they are easier to change and more prone to serious scrutiny than statutes. As the history of Rule 23 demonstrates, the spotlight of Rules Committee consideration may generate more controversy than real change, but even seemingly marginal amendments to the Federal Rules, such as the provision for interlocutory appeal of class-certification decisions, can have significant impact.[23] And, as recent history has amply demonstrated, whether one likes it or not, the Federal Rules are open to major reinterpretation by the Supreme Court, which can change their meaning by judicial decision.[24] Of course, the Court can do the same with statutes, but if there had been Federal Rules for MDL, there would have been much more for the Court to interpret. Moreover, as Rule 23 also illustrates, one reason there has been a pipeline of class-action cases to the Supreme Court has been the development of appellate case law interpreting the rule. By design, the decisions of the JPML are insulated from review, except by extraordinary writ, and most decisions by MDL judges are interlocutory, meaning there are few challenges to their conduct that would garner Supreme Court attention.

How one views the insulation from amendment that the design of the MDL statute provides likely depends on how well one thinks that MDL works, or how well one thinks the rulemaking process works. Litigating either of those controversial and complicated issues

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23. Richard S. Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REFORM 637, 644 (2013) ("The public hearing process is a great boon to the Committee and produced understandable second thoughts in 1997. Only the Rule 23(f) proposal went forward, and it has indeed produced a body of appellate law on class certification that has contributed to significant changes in the way class actions are handled.").

24. Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1562 (2015) ("The stickiness of the rulemaking status quo has continued to make bold retrenchment difficult to achieve, even for those who are ideologically disposed to it, once more setting in relief the ability of a conservative majority of the Supreme Court to make potentially radical inroads on private enforcement by 'interpreting' the Federal Rules.").

is beyond the scope of this Essay.[25] But here, I hope to make three points:

First, the MDL statute's relative imperviousness to amendment has protected it from the kinds of cutbacks, large and small, achieved by the shift toward retrenchment of public enforcement of substantive law through litigation.

Second, if the MDL statute has been insulated from possible retrenchment efforts, it has also been insulated from amendments that might make MDL more powerful. For instance, as noted above, the efforts to amend the statute to reverse the Supreme Court's decision in *Lexecon* all failed, despite the fact that they did not seem to attract much opposition. Moreover, the fact that the Rules Committee does not control the rules for MDL, it has never considered rules that could solve some of the alleged problems with MDL, such as the lack of judicial power to formally approve or reject non-class aggregate settlements.

Third, despite the MDL statute's relative insulation from change, it is nevertheless not set in stone. Indeed, as H.R. 985 demonstrates, Congress may now be paying attention to MDL, and it, of course, "holds the cards" when it comes to procedure.[26] With MDL now playing such a prominent role, Congress could decide that the time for change is ripe. As could the Rules Committee, which might conclude that it ought to develop specific rules for MDL, though whether it has authority to do will be controversial.[27] But even if Congress and the Rules Committee do not amend the MDL statute or develop MDL rules, there is a lever of control that is underappreciated: the Chief Justice's control over the membership of the JPML. As other scholars have shown, the Chief Justice's appointment power over

25. *Compare* Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1535–36 (2014) (praising rulemaking in general), *with* Richard D. Freer, *The Continuing Gloom About Federal Judicial Rulemaking*, 107 NW. U. L. REV. 447, 448 (2013) (describing the debate over the rulemaking process).

26. Stephen B. Burbank, *Procedure, Politics, and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1678 (2004) ("A clear-eyed view that is informed by precedent and history leaves little doubt that Congress holds the cards and that the questions of the moment are, therefore, whether, when, and after what process of consultation, it should play them.").

27. *See Agenda Book, Advisory Committee on Civil Rules* (November 7, 2017), *available at* http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf (highlighting a pending a proposal that the Civil Rules Advisory Committee consider the possibility of making Rules for MDL during the committee's November 2017 meeting).

Judicial Conference committees means that he can populate those committees with like-minded judges.[28] If he comes to disagree with the JPML's positions on consolidation or its selections of transferee judges, the Chief Justice might decide that the membership of the Panel should be different in terms of its policy orientation.

The essay proceeds in three parts. In Part I, I briefly return to the history of the MDL statute, explaining why the drafters made the strategic decision to cut the Rules Committee out of the process. In Part II, I discuss why the drafters' design has left the MDL statute relatively insulated from change. And in Part III, I examine why the status quo is nevertheless amenable to change. I conclude by expressing hope that if, in fact, the MDL statute is entering a period of reexamination, that period is characterized by debate, empirical examination, and participation by all affected groups. If we are going to open the MDL statute to the political process that it has eluded for the last fifty years, then that process should be an open one most likely to generate rational reforms.

I. LOOKING BACKWARD—THE DEVELOPMENT OF THE MDL STATUTE

It has now been nearly fifty years since the MDL statute was passed in 1968 without a single dissenting vote in either house of Congress.[29] Since then, the JPML has operated with remarkable success and little interference. Indeed, though the currently proposed H.R. 985 may represent a shift, the counterrevolution against private enforcement has not otherwise landed on the shores of MDL. The Federal Rules of Civil Procedure of course apply to MDL cases, so the Court's recent decisions affect MDL, but, *Lexecon* aside, the Court has not had the opportunity to interpret the MDL statute itself in a restrictive way. If nothing else, the counterrevolution was a boon to MDL in the sense that it eviscerated the mass-tort class action.[30] As I

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28. *Federal Court Rulemaking*, *supra* note 10, at 1571; Spencer, *supra* note 12, at 370 ("Dominant interests retain control over the mechanisms that control civil procedure, namely the federal judiciary and derivatively the membership of the federal rulemaking committees. In turn, those controlling the development of procedure since the 1970s have tended to prefer anti-access reforms that stymie the efforts of social out-groups to use the federal courts to vindicate their interests.").

29. 90 CONG. REC. H4927–4928 (daily ed. March 4, 1968) (noting passage of the bill on the consent calendar).

30. *See* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION 132 (2015) ("After a long, steady, retreat for nearly two decades, the domain of the class action has substantially shrunk, much like a grape in the sun, drying slowly into a raisin.");

will describe below, one reason for MDL's humming along without interference is that the drafters of the statute designed it that way—the JPML is a body that makes decisions with maximum discretion, writes its own procedural rules, and faces virtually no threat of appellate review.

Although I have described the MDL statute's origins in earlier work, some context is necessary here.[31] As the small group of drafters of the statute developed their initial idea of limited transfer for pretrial proceedings into the statute we know today, they made a series of strategic decisions in order to facilitate its passage. Here, I focus on the specific decisions the drafters made that have served to insulate it from change.

As with all things MDL, the story begins with the Coordinating Committee on Multiple Litigation (CCML), which was created in 1962 by Chief Justice Warren to develop methods of handling the deluge of cases arising from revelations of price-fixing throughout the electrical-equipment industry. By 1963, the CCML was having some success at moving the nearly 2,000 electrical-equipment cases toward settlement, through an aggressive campaign of organized discovery and pretrial conferences.[32] It was at that point that the judges of the CCML—all of whom were confident proponents of the then-novel principles of active judicial management of civil cases—[33]turned toward developing a permanent procedural mechanism for coordinating cases pending in multiple districts. The judges believed that major nationwide cases, like the electrical-equipment scandal, would become increasingly common, and that the progress made in those cases, which relied on cooperation from (and in some cases acquiescence by) the involved lawyers and judges around the country would not be replicable—particularly when it came to defense counsel, who believed that consolidation had destroyed their resource advantage and had railroaded them to settle. What was necessary was

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William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 (2013) ("In the wake of *Amchem* and *Ortiz*, however MDLs have become *the* form for resolution of mass tort matters.").

31. Bradt, *supra* note 18, at 863-83; Andrew D. Bradt, *Something Less and Something More: MDL as a Class Action Alternative*, 166 U. PA. L. REV. 1711 (2017) [hereinafter *Something Less*].

32. Bradt, *supra* note 18, at 854–63.

33. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989) (describing the "major development" of the 1950s being judges starting to "see themselves . . . more as managers of a costly and complicated process"); Resnik, *supra* note 17, at note 23.

a permanent federal procedural mechanism mandating consolidation of cases pending around the country involving similar subject matter.[34]

The people on the CCML credited for making this a reality were Dean Phil C. Neal of the University of Chicago Law School and Judge William Becker of the Western District of Missouri.[35] The idea of limited transfer for pretrial proceedings followed by eventual remand for trial was Neal's brainchild, and he was given the initial drafting responsibility.[36] Early drafts of the statute demonstrate that Neal and Becker's initial vision was for the transfer provision to become part of the federal joinder rules. In the summer of 1963, when Neal and his law clerk Perry Goldberg began drafting the MDL statute, Judge Edwin Robson, the Chair of the CCML, thought it important to coordinate their activities with the Civil Rules Advisory Committee, which was simultaneously engaged in a revision of the joinder provisions of the Federal Rules, including, of course, the revamp of Rule 23 on class actions.[37] In November 1963, the Reporters for the Civil Rules Advisory Committee, Professors Benjamin Kaplan and Albert Sacks of the Harvard Law School, met with the CCML in New York City. At that meeting, Kaplan and Sacks discussed the proposed changes to the class-action rule with Neal and the judges of the CCML. That meeting significantly impacted the development of Rule 23 in several ways, including the addition of the superiority requirement and what turned out to be temporary limitations on the opt-out right.[38]

Judge Becker and Dean Neal emerged from the November 1963 meeting with the view that the Civil Rules Advisory Committee would develop the specifics of any MDL provision. But by the summer of 1964, after discussions with other judges on the CCML, Judge Becker had come to the view that any provision for limited transfer could not be enacted under the authority granted to the Supreme Court under the Rules Enabling Act.[39] A statute was necessary because issues relating to venue had traditionally been within the control of the Congress, and the Federal Rules were never

34. Bradt, *supra* note 18, at 863–82.

35. *Id.* at 863.

36. *Id.* at 864.

37. *Id.* at 866.

38. *Something Less*, *supra* note 31, at 869.

39. Bradt, *supra* note 18, at 870 ("Becker also added that even though he thought 'a substantial case could be made for the rule making authority on the theory that venue is procedural,' he believed that the reform must be accomplished through legislation in order to eliminate doubts under the Rules Enabling Act.").

intended to affect venue.[40] In Becker's view, the statute was to be a bare-bones amendment to the general federal transfer statute, 28 U.S.C. § 1404, delegating authority to the Rules Committee to create a set of rules defining (1) when multidistrict consolidation would be appropriate, (2) to which judges the consolidated cases should be sent, and (3) what rules of procedure should be followed in those cases. In his view, expressed in a memorandum to the committee, the CCML should seek "a minimum amount of legislation" and "the rule making power [was to] be employed to the maximum [to] allow greater flexibility for amendment and supplement of the procedures."[41]

By the summer of 1964, however, the CCML's enthusiasm for the Rules Committee having eventual control over multidistrict litigation had cooled. The judges had seen from afar the continuing—and still unresolved—process of amending the other joinder rules. They believed that time was of the essence in passing their proposal, in part because they believed a "litigation explosion" was coming to the federal courts, but also because other federal judges had begun to ask them to coordinate other complex cases pending around the country.[42] As a result, Becker did not want to wait for the Rules Committee to evaluate the proposal before it was presented to the Congress. Instead, the CCML would take its proposal "straight to the top" by seeking approval from the Judicial Conference, which would then officially endorse the proposal before the Judiciary Committees in the Congress.[43] To obtain such approval, however, the CCML needed to obtain the blessing of the Chairman of the Judicial Conference Committee on Revision of the Laws, Chief Judge Alfred Maris of the Third Circuit. Although Judge Maris recognized the need for some legislation to handle litigation pending in multiple districts, he was skeptical of the MDL proposal because it left promulgation of specific rules in these cases to the Rules Committee. Judge Maris was leery of any such one-size-fits-all approach to resolving such cases, making his support lukewarm.[44]

In a strange way, however, Judge Maris's objection was a source of inspiration. Judge Becker ultimately agreed that a set of procedural rules developed by the Rules Committee would be both

40. *Id.*; FED. R. CIV. P. 82.

41. *Id.*

42. *See also* Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 515 (1996) ("The crisis emerging from the electrical equipment antitrust cases in the 1950s was in part a crisis for federal judges.").

43. Bradt, *supra* note 18, at 872.

44. *Id.* at 872–75.

unnecessary and unwise. The solution he and Dean Neal developed was to eliminate the Rules Committee from MDL altogether. That is, instead of a statute authorizing the rulemakers to implement an MDL statute, Dean Neal drafted a statute that created the Judicial Panel on Multidistrict Litigation and gave *it* control over implementation. The result was the statute we know well today: one that authorizes creation of the JPML with a membership appointed by the Chief Justice, provides a standard for when cases ought to be consolidated, and ensures very limited review of decisions to consolidate.[45]

So, while the initial plan for a permanent MDL mechanism placed the Rules Committee at the center, the final result removed that Committee from MDL altogether. Instead of a set of provisions developed by the Rulemakers for when an MDL would be consolidated, where it would go, and how it would be litigated, what Congress ultimately passed instead was a statute that identified the standard for consolidating cases and left the details to the new JPML. Chief Justice Warren appointed the original JPML on May 29, 1968, and its membership should come as no surprise to one attentive to the statute's origins—it was comprised by its backers, including Chief Judge Alfred Murrah of the Tenth Circuit and Judge Becker, both former chairmen of the Coordinating Committee.[46] What emerged in the early years of the JPML, then, was quite consistent with the vision of its drafters, placing the judge at the center of coordinating pretrial proceedings.[47] The Civil Rules Advisory Committee was nowhere to be found.

II. LOOKING AROUND—THE CONSEQUENCES OF THE DRAFTERS' DECISION

The drafters' strategic decision turned out to be a good one, at least from their perspective. The statute eventually did pass; the JPML was created and populated by the drafters, who had the discretion to make decisions without much threat of appellate oversight and to make rules for their own governance. Without the specific rules for MDL practice that were originally envisioned, MDL judges were left

45. *Id.* at 878–881.

46. Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1005 n.22 (1974) (discussing the composition of the original panel).

47. Martin I. Kaminsky, *The Judicial Panel on Multidistrict Litigation: Emerging Problems and Current Trends of Decision*, 23 SYRACUSE L. REV. 817, 818 (1972).

with the ability to tailor procedure to the individual cases before them, a process guided by the evolving Manual for Complex and Multidistrict Litigation—whose primary author was Judge Becker.[48] As a matter of pure design, the drafters of the MDL statute succeeded in making their vision a reality and granting significant discretion to the JPML and transferee MDL judges.

For reasons I will describe below, the MDL statute has been difficult to amend—at least more difficult than it would have been had the drafters' original vision of MDL via Federal Rule been accomplished. This relative insulation from amendment has both protected MDL from cutbacks, and also held it back from even more expansive use. On the one hand, MDL has chugged along without being directly targeted by the movement to retrench private enforcement of the law illuminated by Burbank and Farhang's work. While other areas of procedure have been targets of this movement, MDL has escaped unscathed. But on the other hand, because MDL is not within the purview of the Federal Rules, it has been held back. Amendments that would make MDL more efficient or that would respond to criticism have not been enacted. So, ultimately, MDL's insulation has been something of a double-edged sword.

Perhaps most obviously, MDL is a statute, which can only be amended by passing another statute. This is of course difficult, in part because the legislative process is designed that way.[49] Statutes are, in short, "sticky," and especially so when a change serves to "take away rather than to confer rights."[50] As Burbank and Farhang have shown, the major legislative effort undertaken by Republicans since the Reagan administration to retrench public enforcement through legislative amendment has largely failed, except for somewhat narrow and technically drawn exceptions, such as the Private Securities

48. *See* Arthur R. Miller, *In Memoriam: Judge William H. Becker*, 807 F. Supp. *Lxxii* (W.D. Mo. 1992) ("It was Judge Becker's pen that really was reflected in the first draft of the manual."); *see also* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 294 n.26 (2013) ("The motor force behind the drafting of the Manual was the leadership of William H. Becker.").

49. BURBANK & FARHANG, *supra* note 10, at 50 ("An institutionally fragmented legislative process empowers many actors to block legislation, making legislative change difficult on contentious issues and leading to the 'stickiness' of the status quo.").

50. Burbank & Farhang, *supra* note 24, at 1560 (2015) (noting "institutional dynamics that likely account for this record of legislative failure, focusing on those contributing to 'the stickiness of the status quo, particularly when the proposal is to take away rather than to confer rights'").

Litigation Reform Act and the Class Action Fairness Act.[51] Until now, however, MDL has not been a focus for retrenchment through legislation, at least compared to the class action, which has been a target for reform since the 1970s—reform which has mostly been unsuccessful, even when support for it was bipartisan.[52] The difficulty in amending the MDL statute has actually been felt in a more restrictive way. After 1998, when the Supreme Court decided that MDL courts could not transfer cases to themselves for trial in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, there were repeated efforts to reverse that decision by statute. But despite some legislative traction and a seemingly broad base of support, each of those efforts failed, reflecting the difficulty of legislative change.[53]

Of course, as its drafters intended, the MDL statute defines the standard for creating an MDL, and leaves specific decisions on whether to consolidate cases, and where they should go, to the JPML.[54] And once a transferee judge is selected, that judge has power to oversee the case as she sees fit until pretrial proceedings are concluded and the JPML must remand the cases to their home districts.[55] Had the drafters followed their original vision, however, much of this development would have been in the hands of the Rules Committee, and therefore subject to amendment through the Enabling Act process. As Burbank and Farhang have shown, the retrenchment movement also sought to achieve their goals through amendments to the Federal Rules, but, as in Congress, this strategy also largely failed to produce results.[56] This is in part because of the 1988 amendments to the Rules Enabling Act that made the process more open to public

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51. BURBANK & FARHANG, *supra* note 10, at 48–49 (noting that "Republican successes were few" and "narrowly focused"); Stephen Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1564–67 (2014); Burbank & Farhang, *supra* note 50, at 1560 (stating that "Retrenchment bills have rarely been enacted, and that success, such as in the Private Securities Litigation Reform Act of 1995, and the Class Action Fairness Act of 2005, has been very difficult to achieve and has clustered in a few discrete policy areas.").

52. *See* Engstrom, *supra* note 19, at 1552-53.

53. Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 OHIO ST. L.J. 455, 475–79 (2009) (noting that although "Congress has been toying with the idea of reform for far too long" the efforts to legislatively reverse *Lexecon* had failed).

54. 28 U.S.C. §§ 1407(a), (b).

55. 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3866 (4th ed., updated April 2017).

56. BURBANK & FARHANG, *supra* note 10, at 67 ("The stickiness of the rulemaking status quo since the 1980s has made bold retrenchment difficult to achieve, even for those who are ideologically disposed to it.").

participation and comment—amendments sparked by the Rules Committee's efforts to go too far and too fast in the 1980s.[57]

Although amending the rules did not turn out to be an effective strategy for making massive changes to the litigation process, there have of course been important amendments to the rules.[58] Rule 23 provides a useful illustration. There have been numerous attempts to reform Rule 23 since its momentous amendment in 1966, but the major elements of the rule—the prerequisites and categories of class actions—have remained intact.[59] As Richard Marcus has noted, some of the major efforts at changing the class action were "shoes that did not drop."[60] Nevertheless, there have been some changes. Perhaps the most consequential was the addition of Rule 23(f), which provides for interlocutory appeal of class-certification decisions—a provision that the proponents of H.R. 985 seek to mimic in MDL.[61] The increased appellate activity generated by this change has mostly been detrimental to plaintiffs seeking certification.[62] Other changes

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57. *Id.* at 109 (describing the 1988 amendments to the Enabling Act); Burbank & Farhang, *supra* note 50, at 1587 ("The attempt to use the Federal Rules as the vehicle of retrenchment backfired, however, leading to major changes in the Enabling Act process—with the Advisory Committee laboring in the shadow of impending legislation for most of the decade."). To say that the PSLRA and CAFA were less momentous than other more far-reaching reforms is not to diminish their importance generally, however.

58. Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1872 ("Attempts to constrict civil litigation took place through rulemaking at the Advisory Committee, Standing Committee, and Judicial Conference levels even before reaching the Supreme Court on the way to acceptance or rejection by Congress.").

59. Edward A. Purcell, Jr., *From the Particular to the General: Three Federal Rules and the Jurisprudence of the Rehnquist and Roberts Courts*, 162 U. PA. L. REV. 1731 (2014).

60. Richard Marcus, *Shoes That Did Not Drop*, 46 U. MICH. J. L. REFORM 637, 643 (2013) (noting that the effort to reformulate Rule 23 was "shelved").

61. FED. R. CIV. P. 23(f); H.R. 985, 115th Cong. (2017).

62. BURBANK & FARHANG, *supra* note 10, at 119 (describing how Rule 23(f) "has enabled and highlighted another path to retrenchment of private enforcement by substantially expanding the opportunities for conservative federal appellate courts, including the Supreme Court, to control the course of class action jurisprudence"); Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 741 (2013) ("In terms of sheer numbers, Rule 23(f) has served primarily as a device to protect defendants."); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 322 (2013) ("Even when an attempt to block class certification does not succeed, the very elaborate Rule 23 process called for by recent decisions imposes significant additional cost and delay, particularly when

included the amendments to Rule 23(e) to clarify the circumstances of judicial approval of settlement and protections for absent class members.[63] More such changes may be on the way.[64] Had MDL been the subject of rulemaking, similar changes might have been considered with respect to the kinds of non-class aggregate settlements that are typical in MDL. Indeed, these settlements, and whether claimants are sufficiently protected by their terms, are now perhaps the largest targets of scholarly criticism of the MDL process—as Professor Mullenix's contribution to this Symposium amply demonstrates.[65] The creation out of whole cloth of the "quasi-class action" by MDL judges attempting to assert oversight over the settlement process is a consequence of there being no rules to give them the formal authority to do so.[66]

It is difficult to predict what might have happened had MDL been a subject of Rules Committee consideration over the course of its lifetime. Perhaps nothing—just as MDL did not attract much attention generally over most of its lifetime, perhaps it would never have attracted the attention of the Rules Committee. But MDL's separateness from the rulemaking process has until recently kept it largely off that committee's radar screen, unlike other subjects of major importance, like discovery.[67] How one views this state of affairs likely depends on how one views the rulemaking process generally. My intent here is not to relitigate the positive and negative features of rulemaking—a debate that continues to be well ventilated, as well it

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interlocutory appellate review of a certification decision is sought and especially when it is granted.").

63. Purcell, Jr., *supra* note 59, at 1736.

64. *See* Preliminary Draft of Amendments of the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure at 212-217 (Aug. 12, 2016), http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment (discussing proposed expansion of approval responsibility).

65. *See* Linda S. Mullenix, *Policing MDL Non-Class Aggregate Settlements: Empowering Judges Through the All Writs Act,* 37 REV. LITIG. (forthcoming 2018).

66. *See* Andrew D. Bradt & D. Theodore Rave, *The Information Forcing Role of the Judge in Multidistrict Litigation*, 105 CAL. L. REV. 1259 (2017) (discussing the role and limitations of judges in MDL settlement cases); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011); Charles Silver & Geoffrey P. Miller, *The Quasi-Class-Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–35 (2010).

67. *See, e.g.*, Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1095 (2016) (discussing amendments to discovery rules and addition of proportionality requirement).

should be. It bears mention, however, that Burbank and Farhang's data show that the vast majority of proposals for amendments in recent years have been anti-private enforcement.[68] It also bears mention that their data also show that judicial additions to the Rules Committee have skewed significantly toward judges appointed by Republican presidents.[69]

Beyond the lack of rules to create, abolish, or amend, the drafters' decision to cut the Rules Committee out of MDL has also meant that there are no rules for the Supreme Court to reinterpret through judicial decision. As Burbank and Farhang document, where legislative amendment failed for those seeking to retrench private enforcement, retrenchment by court decision has succeeded.

> [A]lthough the counterrevolution largely failed in the elected branches and was only modestly successful in the domain of court rulemaking, it flourished in the federal courts. Having learned that retrenching rights enforcement by statute was politically and electorally perilous—and unlikely to succeed—the proponents of the counterrevolution pressed federal courts to interpret or reinterpret existing federal statutes and court rules to achieve the same purpose. They found a sympathetic audience in courts that were increasingly staffed by judges appointed by Republican presidents. Some of these judges were ideologically sympathetic to the retrenchment project; some were connected to the conservative legal movement that had given birth to the counterrevolution, and some had participated in or promoted the Reagan administration's failed efforts to retrench private enforcement of federal rights through legislation. Incrementally at first, but more boldly in recent years, conservative majorities of the Supreme Court have transformed federal law over the past four decades, making it less and less friendly, if not hostile, to the enforcement of rights through private

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68. Burbank & Farhang, *supra* note 50, at 1580 ("Overall the data show that, conditional on the existence of a proposal affecting private enforcement, the predicted probability that it would favor plaintiffs went from highly likely . . . to zero.").

69. BURBANK & FARHANG, *supra* note 10, at 91; Burbank & Farhang, *supra* note 50, at 1574 ("Republican appointed judges had more than double the estimated probability of serving on the Committee.").

> lawsuits. This branch of the campaign for retrenchment achieved victories in a long succession of decisions interpreting statutory private enforcement regimes, reshaping standing and private rights of action doctrine, and interpreting the Federal Rules of Civil Procedure.[70]

This has been true with respect to statutes as well, most notably the Federal Arbitration Act[71]—and the Court did so with respect to the MDL statute on one occasion, *Lexecon*, but *Lexecon* has proven not to be terribly important, because its holding is so easy to evade.[72] But with respect to the Federal Rules, the Court seems to consider itself to have a great deal of leeway because it is the body delegated to make the rules in the first place by the Enabling Act.[73] Whether such leeway is legitimate is a difficult question, especially if, as Burbank and Farhang argue, the Congress has been making substantive law against the backdrop of a settled interpretation of the Federal Rules. Amending those Rules through Supreme Court fiat may, then, upend the Congress's intentions with respect to the ability to enforce those laws through litigation.[74] MDL—which has no implementing rules—has been immune from that process. The statute itself is so barebones that there is little for courts to interpret.

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70. BURBANK & FARHANG, *supra* note 10, at 218–19.

71. Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603 (2015); Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011).

72. Manual for Complex Litigation Section 22.93 (4th ed. 2004) ("Nothing in [*Lexecon*] precludes the transferee judge from presiding over cases that litigants filed in the transferee district originally, that transferor courts transferred by ruling on motions [to] change venue, or that the parties consented to have tried in the transferee district."); *id.* section 20.132 (stating that "evolving alternatives . . . permit the transferee court to resolve multidistrict litigation through trial while remaining faithful to the *Lexecon* limitations").

73. *See* Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 337 (2012) ("The Committee may also recognize that the Court—which still must sign off on any changes to the Rules—is unlikely to approve amendments that so quickly overturn its own decisions.").

74. BURBANK & FARHANG, *supra* note 10, at 241 (arguing that "respect for democratic values requires that existing statutory policy choices concerning private enforcement be respected. It therefore requires that changes to the Federal Rules that are potentially consequential for those policy choices be affected through rulemaking rather than (re)interpretation.").

III. LOOKING FORWARD—DANGERS AND OPPORTUNITIES

Although the MDL statute has been well insulated from amendment over the years, it is an open question whether the status quo will hold. In a world in which MDL is now so prominent, it would be rather difficult for it to escape the notice of legislators. Although rumors of the death of the class action are regularly exaggerated, as the mass-tort class action has receded into the background, its role as a perennial source of controversy may shrink as well.[75] If MDL supplants the class action, it is hard to imagine that it will not attract attention. Indeed, over the last several years, academic attention to MDL has ticked significantly upward—a phenomenon of which this Symposium is just one example.[76] While the drafters of the MDL statute intended that MDL practice would not be the province of the rulemakers, there are numerous ways in which MDL practice could face changes—from the Congress, the Supreme Court, or Chief Justice Roberts.

With respect to the Congress, of course, there is the bill that, as of this writing, has passed the House and is in the hands of the Senate Judiciary Committee. It is impossible to predict whether the legislation will emerge from that committee or the full Senate, particularly as the legislative filibuster continues to survive. But even if this version of the legislation fails or dies on the vine, it demonstrates that MDL is now very much on reformers' radar screens. While prior legislative attempts at litigation reform were focused primarily on class actions, MDL may increasingly become the cause du jour for legislators looking for a tort-reform target.[77] If such an effort were successful, it would be an exception to the decades-long trend of failure at procedural retrenchment through legislation; but there have been some exceptions, particularly in areas thought to be

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75. COFFEE, JR., *supra* note 30, at 2 (describing the "dismantling" of the class action as the "major procedural project of the conservative majority of the contemporary Supreme Court").

76. *See, e.g.*, Martin Redish & Julie Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (discussing the increased pervasiveness of MDL practice relative to class actions); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013).

77. Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 516 (1996) (noting the degree to which procedure has become a "political football").

technical or as specialized as MDL procedure.[78] Congress is the ultimate decider when it comes to procedural lawmaking, and it is always possible that, as in CAFA, the stars could align to pass legislative reform.[79]

Beyond the Congress, however, there may be other opportunities for the Supreme Court—or even Chief Justice Roberts—to significantly affect MDL practice. Indeed, although MDL is not subject to any special rules of procedure, there are numerous issues in MDL practice that could find their way to the Supreme Court. For instance, the scope of an MDL court's personal jurisdiction over plaintiffs and defendants is an area of possible controversy that would come to the Supreme Court as a question of constitutional interpretation, not an interpretation of the Federal Rules.[80] Moreover, as discussed above, the scope of an MDL judge's power to review non-class aggregate settlements and attorneys' fee awards has become a source of major disagreement, and not only among academics. The question of whether an MDL judge has the power to engage in such formal review under the aegis of "quasi-class action" raises issues of statutory and constitutional import—as Professor Mullenix's article in this Symposium notes. Ultimately, such issues could come to the Supreme Court for review, and, if they do, a majority that has continued to generally espouse Professor Spencer's "restrictive ethos" to civil procedure could also do so with respect to MDL.

Finally, Chief Justice Roberts possesses a particular power when it comes to the JPML.[81] Under the MDL statute, Chief Justice Roberts has the express authority to appoint the members of the Panel.[82] When the MDL statute was originally passed in the 1960s,

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78. BURBANK & FARHANG, *supra* note 10, at 49 (citing the PSLRA and CAFA).

79. Wasserman, *supra* note 3, at 345 (noting that "Congress has also become more active in procedural rulemaking"); Burbank, *supra* note 26, at 1678.

80. *See* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1181 (2017) (discussing the Supreme Court's role in personal jurisdiction, stating that ". . .for better or worse, the law of personal jurisdiction has developed as constitutional law expounded by the Supreme Court.").

81. Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1584–87 (2006) (describing power of Chief Justice over Judicial Conference).

82. 28 U.S.C. § 1407(d) ("The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."). Beyond the JPML, the Chief Justice has power to appoint the members of other Judicial Conference committees; Theodore W. Ruger, *The Chief Justice's Special*

there would have been little doubt among the drafters that the current Chief Justice, Earl Warren, was sympathetic to their aims. After all, Warren had created the Coordinating Committee on Multiple Litigation to manage the then-massive electrical-equipment litigation. Warren repeatedly praised the Committee's efforts in that regard and encouraged the Committee in its efforts to develop the MDL statute.[83] And after the MDL statute finally passed in 1968, Warren appointed to the original JPML mostly supporters of the statute.[84]

One might wonder, however, what might happen if a Chief Justice became less sympathetic to the JPML. This may be a fanciful hypothetical, but it is not too far fetched. If the Chief Justice were to believe that the JPML had become either too willing to consolidate cases, or not willing enough, or if the Chief Justice came to believe that the JPML's case assignments were to judges whose views did not align with his own, one could easily imagine him changing the composition of the JPML to include judges whose views aligned more closely with his own policy views. There is little doubt that Chief Justice Roberts, himself a former litigator and advocate for legislative retrenchment efforts during his early years in the Reagan administration,[85] and, according to Burbank and Farhang's data, "one of the most anti-private enforcement judges in over 50 years,"[86] pays close attention to issues of procedure.[87] And as MDL becomes ever

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Authority and the Norms of Judicial Power, 154 U. PA. L. REV. 1551, 1567 (2006) (noting the "undivided authority" of the Chief Justice to appoint committees); Patricia W. Hatamayr Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1145 (2015) (noting the Chief Justice's "unfettered" power to appoint members to Judicial Conference committees).

83. Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, *quoted in* MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION, at 6 (1969) (lauding the "monumental effort of the nine judges on this Committee").

84. Bradt, *supra* note 18, at 906 (noting that the membership of the original JPML included Judges Murrah, Becker, and Robson—the three main judicial advocates for the statute).

85. BURBANK & FARHANG, *supra* note 10, at 33–34 (describing Roberts's role as "an initiator of the proposals to amend Section 1983" and "an active participant in deliberations over the fee-cap bill").

86. *Id.* at 244.

87. *Id.* (noting Roberts's "encouragement to move ahead with rulemaking in an area of intense controversy (discovery) . . . his decision to use the Chief Justice's entire 2015 annual report on the federal judiciary to emphasize his view of (or hopes concerning) their importance and to support training designed to make sure they are effective").

more central to the federal system, his attention could be drawn to the JPML. If that happens, he possesses the tools to influence its policy.[88]

CONCLUSION

All told, while the MDL statute long persisted unchanged in relative security, that may not always be the case. With its ascendance to the limelight comes renewed scrutiny. Although the drafters of the statute made it difficult to change by insulating it from the Rules Committee, there are other means of making changes. Indeed, such change is probably inevitable. And it may be salutary. After fifty years of experience with the statute (and class actions, for that matter), we have learned much, and applying that knowledge to improve the process is all to the good. Indeed, the Rules Committee has begun to consider whether to promulgate specific rules for MDL, though the process is too new to know what will emerge.[89] But, as with all procedural change, we should be cognizant of the fact that procedural rules are not neutral. They are intensely political. As I have argued elsewhere, politics need not be a dirty word in procedure[90]—but if changes are going to be made, they should be the product of open dialogue among all affected actors, including federal judges, on whom the burdens of implementing these changes will fall.[91] They should also be informed by empirical research and spirited debate.[92] It should

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88. Ruger, *supra* note 82, at 1553 (evoking "the problematic specter of individualistic discretion in the hands of a single unelected official").

89. *See generally* Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87 (2018).

90. Bradt, *supra* note 18, at 912 ("Although one might lament the challenges associated with the new world of procedural lawmaking, 'politicization' is not an epithet."); *see also* Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1334 (2006) ("politicization is by no means an inherently negative development").

91. Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1210 (1996) ("Congress needs the judiciary's expertise to make informed legislative choices, and the judiciary needs informed legislative choices to maintain control of its dockets and preserve the integrity of the judicial process."); Robert A. Katzmann, *The Underlying Concerns* in ROBERT A. KATZMANN, JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 8 (Robert A. Katzmann, ed. 1988) (describing the dynamic of Congressional actions increasing court activity without additional appropriations).

92. Harold Hongju Koh, *The Just, Speedy, and Inexpensive Determination of Every Action?*, 162 U. PA. L. REV. 1525, 1539 (2014) (describing the need for a

not follow the process that the House used in February 2017 when considering H.R. 985—a process that included no hearings at all. A subject as complicated and important as MDL certainly deserves better than that.

"more inclusive process"); Burbank, *supra* note 26, at 1689 ("If realism about procedure and power suggests inadequate defenses against improvident lawmaking, the answer lies in custom, dialogue, compromise, and statesmanship; it lies, in a word, in politics.").

The Beginning of MDL Consolidation: Should Cases be Aggregated and Where?

Chilton Davis Varner*

ABSTRACT

After years in the shadows, the Multi-District Litigation (MDL) docket has exploded in the 21st century. Commentators have identified various reasons, among them appellate disapproval of the class action as a means of managing multiple personal injury claims; pervasive technology that facilitates solicitation of clients; and steadily-rising global settlement amounts. It is no longer in dispute that mass torts have become big business.

The Judicial Panel on Multi-District Litigation (JPML) enjoys broad authority to transfer and consolidate cases. The JPML's only limitations are that (a) common questions of fact must exist among the actions; and (b) centralization in a single district will further the convenience of the parties and witnesses, and promote the just and efficient conduct of the actions.[1] *While MDL consolidation was intended to reduce inefficiencies, actual practice—and unintended consequences—have introduced new burdens of cost, time, and uncertainty.*

This paper discusses the practices and procedures currently used in the initial stages of MDL centralization from the perspective of an MDL defendant's lawyer. The author does not argue that MDLs should be abandoned, but instead suggests there are simple improvements that can ameliorate some of

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1. 28 U.S.C. § 1407(a) (1976).

the burdens that mark the early stage of the MDL process. The paper examines how arguments are initially made to the JPML; the factors that drive the choice of the transferee court; the weight given in the consolidation decision to the number of class actions; whether multiple defendants should be joined in a single MDL; the ballooning proliferation of filings once an MDL is established; and the bundling of multiple plaintiffs in a single bellwether trial.

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DISCUSSION

With hundreds of judges managing MDL cases, case management procedures can vary. Nonetheless, certain practices have proven useful enough to be followed in many MDL transferee courts.

I. CURRENT PRACTICE: The Judicial Panel on Multi-District Litigation currently schedules oral argument on all motions for §1407 consolidation.

In the majority of cases, the odds are that petitions for consolidation will be granted. Between 2003 and 2008, for example, such motions were granted in roughly three-quarters of the petitions seeking consolidation. More recently, the current JPML began the year of 2016 more cautiously, consolidating only 14 MDLs in the first

nine months, but granted a more typical nine of thirteen petitions at its September 2016 session in Washington, D.C.[2]

Nonetheless, the JPML schedules oral argument for every §1407 petition.[3]

> *A.* *For Consideration*: The Panel should consider selecting for oral argument only those cases where (a) one or more parties objects to consolidation; (b) it believes there is a significant question about the advantages of consolidation; and/or (c) it believes that counsel can provide important input into the selection of the transferee court that has not already been conveyed in the briefing.

Because the decision to centralize is often uncontroversial, and major factors influencing the location of the transferee court may be unknown to the parties, it is unnecessary to allow every party to every petition for MDL centralization to present oral argument. Former Chief Judge of the JPML, John Heyburn, has pointed out that the Panel generally must accommodate fifty to seventy advocates during the normal two and one-half hour session.[4] In most cases, the information needed by the Panel will be available from the briefs or from its own informal contacts with potential transferee courts. And yet, counsel for the parties spend time preparing for oral arguments and incurring significant costs to present two to three minutes of oral argument that, in most cases, will have little influence on the Panel's ultimate decision. Limiting oral argument to the three categories of cases identified above would allow the parties additional time to make meaningful arguments in those cases where the briefing has revealed a realistic debate about the wisdom of consolidation.

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2. Alan Rothman, *And Now a Word From the Panel: A Year of Vanishing MDLs*, LAW360 (Jan. 24, 2017), https://www.law360.com/articles/884302/and-now-a-word-from-the-panel-a-year-of-vanishing-mdls.

3. John Heyburn, *A View From the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2225 (2008).

4. *Id.* at 2236.

II. CURRENT PRACTICE: The factors favoring venue selection include: agreement by all parties to the forum/judge; a transferee court's familiarity with the case; a judge's publicly or privately expressed interest in serving; concentration of witnesses or documents within the district; lack of docket congestion; location of a majority of the actions; the experience of the judge in the relevant area; the possibility of coordination with related state court proceedings; pendency of related qui tam, bankruptcy or grand jury proceedings in the district; location of the first-filed action; and travel and lodging convenience.[5]

In deciding which federal district judges are best situated to handle the transferred cases, the Panel exercises "considerable and largely unfettered discretion within the unique circumstances that each motion presents."[6] A review of JPML orders of consolidation indicates that certain factors are cited repeatedly: (a) the parties' headquarters; (b) the locus of the most procedurally-advanced action; and (c) nearby state court or bankruptcy proceedings.[7] Yet counsel on both sides often privately regard selection of the transferee forum as the least transparent part of the process—one largely immune to the parties' advocacy.

A. *For Consideration*: The importance of the factors varies and application of them is—and should be—highly case-specific.

For example, technology can moot the relevance of the location of documents. The ability to conduct depositions at the locus of witnesses reduces the need to select a forum near them. Jurists in diverse locations can still coordinate by phone, and an engaged jurist with less MDL experience may be preferred to the over-burdened, highly experienced one. Interestingly, the current Panel seems to be pursuing a strategy of broadening the bench of MDL judges. In more than ten of its recent decisions, the Panel has noted it was assigning

5. *Id.* at 2239–2241.

6. *Id.* at 2228.

7. Alan Rothman, *And Now A Word From The Panel: MDL Venue Choices,* LAW360 (Nov. 29, 2016), https://www.law360.com/articles/867087/and-now-a-word-from-the-panel-mdl-venue-choices.

the MDL to a jurist "who has not yet had the opportunity to preside over an MDL."[8]

III. CURRENT PRACTICE: Absent unusual circumstances, the Panel has often ordered centralization where a number of putative class actions are pending and overlapping classes are sought, largely to avoid the potential for inconsistent rulings on class certification.[9]

In a 2012 decision,[10] the JPML centralized three class action cases over the defendant's objection: a case in Florida involving one named plaintiff, in which a motion to dismiss was already pending and was subject to an expedited schedule for deciding class certification; a case in California involving two named plaintiffs, which would have been ripe for summary judgment within a few months; and, a much larger case in Ohio with about fifty named plaintiffs (including plaintiffs from California and Florida), in which discovery was almost complete. The MDL was assigned to the Ohio judge.

The defendant had already offered to provide all the discovery from the Ohio case to plaintiffs in the California and Florida cases, so there was little threat of duplicative discovery. Yet, centralization delayed the Ohio case for several months. Absent centralization, dispositive motions and class certification in the California and Florida cases could have been resolved sooner. Instead, the California and Florida cases were transferred to Ohio where they were immediately stayed.

Consolidation also imposed unnecessary burdens on the judge in Ohio. Before centralization, three judges shared the burden of determining the law applicable to multiple plaintiffs in multiple states, with the task of determining Florida and California law appropriately allocated to Florida and California judges most familiar with applicable law. As a result of centralization, one Ohio judge faced the burdensome task of both becoming familiar with the law of numerous topics and applying that law to the claims of more than fifty named plaintiffs—including plaintiffs from California and Florida. In short, sometimes sharing the burden makes sense, particularly where

8. *Id.*

9. *See, e.g.*, *In re* Natrol, Inc., 26 F. Supp. 3d 1392 (J.P.M.L. 2014).

10. *In re* Ford Motor Co. Defective Spark Plug and 3-Valve Engine Prods. Liab. Litig., 844 F. Supp. 2d 1375 (J.P.M.L. 2012). The author thanks John Thomas, formerly of the Legal Staff of Ford Motor Company, for his insight into this MDL.

knowledgeable federal judges can be expected to give appropriate weight to their colleague's decisions.

A. *For Consideration*: It is important that the Panel balance the potential for inconsistent class certification rulings against other factors, most importantly the delays that may result.

If the number of class actions is small (perhaps four or less), and if the consolidation is opposed by one or more parties, might the presumption be against centralization, with the burden on the party proposing MDL treatment to show that the benefits of consolidation outweigh the accompanying delays? The Panel might well consider allowing more time for oral argument on §1407 motions in these cases (which are relatively advanced at the time of transfer), in order to explore the balance between delay and efficiencies.

IV. CURRENT PRACTICE: The Panel occasionally grants a consolidation motion seeking to join multiple manufacturers or other corporate defendants in a single MDL, since all are alleged to have engaged in an unlawful, industry-wide practice.

In a minority of cases, centralization of claims can create important efficiencies, particularly where the matters require the district judge to become adept at highly complex regulatory and commercial practices that similarly affect many members of an industry, as well as a dense factual background. The Panel in *In Re Pharmaceutical Industry Average Wholesale Price Litigation*[11], consolidated actions against more than two dozen drug companies facing similar charges of inflating Medicaid reimbursement rates for hundreds of drugs even though the defendants were charged with separate pricing decisions involving different agencies with different state Medicaid schemes. Effective judicial management demanded detailed knowledge of arcane public and private pharmaceutical reimbursement systems. But, the development of that knowledge had a price: consolidation led to a lengthy ten-year stewardship in the transferee court.

11. 201 F. Supp. 2d 1378 (J.P.M.L. 2002).

A. For Consideration: Industry-wide centralization should be the exception, not the rule.

The already complex burden of judicial management of an extensive body of cases is exacerbated by centralization of multiple defendants facing non-overlapping claims. Organization of counsel, both for plaintiffs and defendants, is challenging. Selection of a single forum may present unfairness, at least where the actions have multiple centers of gravity. And while all the actions may raise similar, pivotal legal issues for early resolution relating to an industry-wide practice, judges in non-centralized proceedings may use—as at least persuasive, if not controlling authority—the rulings of other MDL judges.

V. CURRENT PRACTICE: MDL consolidation of individual personal injury claims—designed to promote efficiencies in handling multiple cases—nonetheless attracts numerous claims that would otherwise not have been pursued.

Considerable research now confirms that MDLs result in more cases in litigation than would be the case without consolidation. The vast majority of the actions eventually consolidated are not before the JPML when the Panel makes its decisions. The majority that are eventually consolidated are the aptly-named "tag-along" cases, filed only after the JPML has decided a set of cases will be consolidated. The JPML can transfer tag-along cases either by application by a party or by the clerk's office in the district where the tag-along is originally filed. Absent opposition to the transfer within the allowed time, the case is automatically transferred to the MDL. And, the MDL begins to grow.[12]

Presumably, this ballooning results when lawyers and claimants who, absent consolidation, would never have entered the

12. The Toyota Unintended Acceleration MDL provides an illustrative example. *See In re* Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prods. Liab. Litig., 704 F. Supp. 2d 1379 (J.P.M.L. 2010). Toyota recalled a large population of vehicles worldwide, after reports of unwanted acceleration that allegedly caused drivers to lose control. In early 2010, Toyota and several plaintiffs petitioned for MDL consolidation. The JPML agreed. In contrast to the eleven actions originally transferred and consolidated, the docket quickly metastasized to hundreds of cases, including a number of class action suits. The litigation was eventually settled when Toyota paid $1.6 billion and pledged continuing oversight over safety processes and decisions, thereby disposing of the claims of more than *22 million* class members.

tort system, see an opportunity of participating in a global settlement with only minimal investment.[13] Contrary to the detailed vetting of the plaintiff's claims that a lawyer would ordinarily do when representing an individual whose case had not been consolidated, several MDL cases are poorly investigated before they are filed, and a disappointing number—once put to active case-specific discovery—prove to have little or no merit.

These "free-rider" cases are not without cost. At a minimum, they must be reported in the defendant's SEC filings, thereby potentially affecting shareholder investment. At worst, the stakes of litigation may rise to such a level that defendants are forced to either settle or go out of business.[14] The cases must be managed by the Plaintiffs' Steering Committee, thereby complicating the committee's responsibility for the progress of all cases through the pretrial process. Finally, and perhaps most importantly from the judicial standpoint, the cases can undermine the court's schedule for the selection of bellwether trials. If selected for early trial, the poorly-investigated cases may repeatedly be summarily dismissed with prejudice by attorneys who realize, once discovery commences, the dubious merits of those bellwether candidates. This introduces further delays.

A. *For Consideration*: Practical preventive measures should be used to help filter these "free rider" cases at an earlier stage of the litigation.

A number of MDL courts have required at the outset that each personal injury claimant complete a Plaintiff's Fact Sheet under oath. Such forms are comprised of a number of interrogatories designed to ensure (a) the plaintiff was actually exposed to the challenged conduct/product; (b) potential alternative causes for the injury are identified sooner rather than later; and (c) medical and pharmacy records are readily accessible. This is the minimum that should be

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13. *See, e.g.*, Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 503 (1996) (noting that the likelihood of additional "specious" claims entering the system is high); Victor E. Schwartz, et al., *Addressing the "Elephantine Mass" of Asbestos Cases*, 31 PEPP. L. REV. 271, 284 (2003) ("Rather than making cases go away, [mass consolidation] invites new ones."); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000) (discussing 'free rider' plaintiffs, "who would never have brought a 'real' case anyway").

14. *See, e.g.*, the asbestos and silicone breast implant litigations, which bankrupted various manufacturers.

required of parties participating in MDL personal injury litigation. After appropriate notice, summary dismissal of the claims of plaintiffs who do not provide such fact sheets should follow.

Surprisingly, however, actual practice reveals that multiple errors and omissions in the sheets emerge when discovery seriously commences as to a particular plaintiff. The transferee court should consider including in its initial scheduling order(s) its expectation that plaintiffs' counsel's duties to investigate their clients' medical histories and claims are not limited, stayed or terminated by transfer to the MDL, and (b) a requirement that, on a regular basis, the Plaintiff's Fact Sheet be updated or certified to assure current accuracy. If no further information has been acquired, the plaintiff's lawyer should be required to certify her investigative efforts and indicate that no additional information was discovered.

Another way to attack the problem is, after a short period of initial generic discovery, the court then divides cases into sequential tiers for case-specific "limited core discovery." In a pharmaceutical case, this may include depositions of the plaintiff, treating physicians, and the defendant's sales representative if requested. This requires the parties to focus on the merits of their cases and has resulted in early dismissal of weaker claims.[15]

VI. CURRENT PRACTICE: Several MDL courts have recently "bundled" multiple cases for a single bellwether trial, over the defendant's objection.

These judges have done so in the belief that such bundling will ultimately advance the judicial efficiency that is the *raison d'etre* of MDL consolidation. Judge Joseph Goodwin of the U.S. District Court for the District of West Virginia charged with the stewardship of a staggering 66,000 pelvic-mesh cases against seven companies, has said bundling gives the parties a much better sense of their cases' strengths and weaknesses.[16] Judge Nancy Rosentengel of the U.S. District Court for the Northern District of Illinois, in an order in the Depakote litigation, stated, "Batching cases together along common

15. *See, e.g.*, *In re* Fosamax Litig., Civ. Action No. 282 (N.J. Super. Ct. App. Div.).

16. Cara Salvatore, *Trial Bundling Comes Under Fire in Boston Scientific Appeal*, LAW360 (Oct. 31, 2016), https://www.law360.com/articles/856589/trial-bundling-comes-under-fire-in-boston-scientific-appeal.

issues of fact and law is the only way to effectively, efficiently and justly move through the volume of cases before the court."[17]

The procedure has stirred controversy, both on the bench and off. The tension was heightened when a Texas jury in December 2016 returned a $1.04 billion verdict in a six-plaintiff bellwether trial targeting metal hip prostheses.[18] All plaintiffs were from California.

Proponents of bundling ask, "How else, shy of settling, can we manage literally thousands of cases?" Opponents argue that the process allows the weak to be assisted by the strong, in that a jury can be influenced by evidence that would never have been admitted in the individual's stand-alone case.

In October 2016, Boston Scientific asked the Eleventh Circuit to overturn a $27 million jury verdict for four women in a pelvic mesh case.[19] Johnson & Johnson asked the Fifth Circuit to stay further multi-plaintiff trials in the hip prosthesis litigation, pending rulings in the appeals of the first two MDL verdicts, but the Fifth Circuit declined the request.[20]

A. *For Consideration*: MDL courts were never intended to manage consolidated cases all the way through trials, and certainly should not be allowed to do so by bundling.[21]

With full respect for the energy and work ethic of federal trial judges, particularly those burdened with shepherding MDLs to a successful conclusion, the MDL process was intended to manage potentially duplicative generic discovery, *i.e.*, discovery applicable to each—or, at least, most—of the consolidated cases. It was not

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17. *Id.*

18. Jess Krochtengel, *3rd J&J Hip Implant Bellwether Delivers $1B Verdict*, LAW360 (Dec. 1, 2016), https://www.law360.com/articles/867121/3rd-j-j-hip-implant-bellwether-delivers-1b-verdict. The court later slashed nearly in half the more than $1 billion in punitive damages. *See* Jess Krochtengel, *J&J Gets $1B Damages Cut in Half in Hip Verdict*, LAW360 (Jan. 3, 2017), https://www.law360.com/articles/877223/j-j-gets-1b-damages-cut-in-half-in-hip-verdict.

19. Salvatore, *supra* note 16; *see also* Amal Eghnayem, et al. v. Boston Scientific Corp., No. 16-11818 (11th Cir. Apr. 15, 2016).

20. *Id.*; *see also In re* DePuy Orthopedics Inc., No. 16-10845 (5th Cir. Sept. 29, 2016) (Doc. No. 00513696886) (denying defendants' petition for writ of mandamus).

21. Lexecon, Inc. v. Milberg, 523 U.S. 26 (1998) (construing 28 U.S.C. § 1407(a) to require remand upon completion of pretrial matters).

intended to subject either party to multi-party trials that allow the consideration of evidence that never would have come in had those cases been tried individually.

In light of the due process objections being raised by defendants, the eventual answer to this question is more likely to come from the federal appellate courts than from the JPML. There are a number of arguments to be made that bundling multiple cases to be tried together in a single bellwether trial is inappropriate, given possible alternatives:

- First, MDLs were intended to preclude the same generic discovery from being repetitively taken in case after case.[22] The founders of MDLs surely never anticipated the parties would have to endure trial handcuffed to other, unrelated parties, over their objection.

- Once that generic discovery has been completed, the consolidated cases—sometimes in the hundreds or even thousands—can be remanded to the transferor courts for case-specific discovery and trial. For example, this was done in the breast implant MDL in the 1990s.[23]

- Judges have often said, "I have enough trouble trying one case without error." What about a six-plaintiff or ten-plaintiff case, which exponentially increases the chance of error?

- The risk of jury confusion in trying a multi-plaintiff case is manifest: different complaints, at different times with (possibly) different manufacturer's warnings, with different

22. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.131 (2004) ("The objective of transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts.").

23. *See, e.g.*, *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

learned intermediaries, and different advice and information imparted to the plaintiff.

- The problem is not limited simply to jury confusion; it extends to jury prejudice. Interestingly, defendants in individual trials in pharmaceutical and medical device cases are usually successful in excluding evidence of other cases and complaints in the absence of "substantial similarity." In individual trials of pharmaceutical cases (which comprise a major segment of MDLs), such exclusion of other claims is commonplace. With multi-plaintiff "bundled" trials, that protection disappears. In other words, the combination of jury confusion and prejudice inevitably places the defendant in a different position than the corporation would be in a single-plaintiff trial.

- The breath-taking verdicts awarded thus far in multiple-plaintiff "bundled" trials support concern over the procedure: $1.04 billion in the Pinnacle hip prosthesis MDL; and $27 million in a pelvic-mesh case.[24]

The bottom-line question becomes whether MDL procedures—as presently enforced and applied—are appropriately aimed primarily at driving settlement of all the cases in a "global" settlement, whatever the merits of those many cases. If such settlement is an appropriate goal for MDL procedures, then surely multi-plaintiff trials are the heaviest club to achieve it. Whether that club exacts too high a price will be decided by the appellate courts.

CONCLUSION

The fact that MDLs remain a growth industry is shown by a variety of statistics. In February 2017, there were 236 consolidations

24. Jess Krochtengel, *3rd J&J Hip Implant Bellwether Delivers $1B Verdict*, LAW360 (Dec. 1, 2016), https://www.law360.com/articles/867121/3rd-j-j-hip-implant-bellwether-delivers-1b-verdict.

pending in 53 transferee districts before 186 federal judges.[25] While the majority of MDLs consolidate a relatively small number of cases, a meaningful number of MDLs are juggernauts. Approximately 90% of the 120,000 individual actions pending in MDLs in 2014 were consolidated into only eighteen cases—sixteen product liability and two mass tort MDLs.[26] But, perhaps the most noteworthy statistic is that currently *more than one-third of the civil cases pending in the nation's federal courts are consolidated in multidistrict litigations*.[27] This obviously means that MDLs are here to stay. If that is so, it is imperative that we continuously monitor MDL practices and processes to assure that they are operating in the most efficient, beneficial and just fashion. Our judicial system deserves no less.

25. *MDL Statistics Report*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, http://www.jpml.uscourts.gov/pending-mdls-0 (last visited March 8, 2017).

26. *See Standards and Best Practices for Large and Mass Tort MDLs*, DUKE LAW CENTER FOR JUDICIAL STUDIES iv, https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf (last visited March 8, 2017).

27. *Id.* at x.