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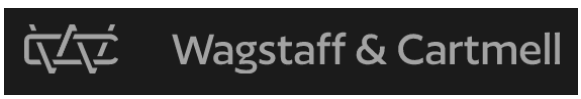

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

STEPHEN R. BOUGH, DISTRICT JUDGE

To My Judicial Colleagues and Fellow Members of the Legal Profession:

While the prevalence of multidistrict litigation ("MDL") is by no means a secret, even as a federal judge I was surprised to learn that 50% of all federal civil cases are part of an MDL. Some of the biggest, most complex, and intellectually challenging legal issues are part of an MDL. Due in part to the challenges and opportunities presented, many of the nation's best plaintiff lawyers, defense counsel, and federal judges are often attracted to this area of law.

Even though half of all federal civil cases may be part of an MDL, many are surprised to learn there is little statutory or appellate caselaw to guide lawyers and judges through the process. Just one small statute, 28 U.S.C. § 1407, allows "civil actions involving one or more common questions of fact" to "be transferred to any district for coordinated or consolidated pretrial proceedings." Even the Judicial Panel on Multidistrict Litigation only has eleven rules. Almost no cases result in circuit level opinions because the suits are either settled or remanded back to the originating court. Additionally, because many of the lawyers involved in MDLs are repeat players, breaking into the club of leadership appointees can be extremely difficult for newcomers. That leaves many judges, lawyers, litigants, and the general public in the dark when it comes to understanding the inner workings of the MDL process.

The University of Missouri-Kansas City Law Review, under the leadership of Dean Nancy Levit and Editor-in-Chief Sarah Stevens, proposed a novel solution: gather together the best and the brightest plaintiff lawyers, defense counsel, and federal judges to write accessible articles on the most crucial MDL topics. Before you is the final result of that vision: this *Multidistrict Litigation: Judicial and Practitioner Perspectives* Symposium issue. From the easy-to-comprehend introduction to the MDL process – pictures are always helpful – to an insightful conclusion, we were able to assemble a fantastic group of writers with real-world wisdom. Our gratitude belongs to the firms whose support enabled the UMKC School of Law to put a copy of this issue on the desk of every United States District Court Judge. A sincere thank you to: Lanier Law Firm; Robbins Geller Rudman & Dowd; Sharp Law; Shook, Hardy & Bacon; Stueve Siegel Hanson; and Wagstaff & Cartmell.

We are confident the wisdom contained within this Symposium issue will help all participants, whether behind or before the bench, gain a better understanding of MDLs and how this unique litigation device can be effectively used to administer justice. We hope that you enjoy this written Symposium as much as we have enjoyed putting it together.

Sincerely,

Stephen R. Bough

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UMKC LAW REVIEW

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MULTIDISTRICT LITIGATION: JUDICIAL AND PRACTITIONER PERSPECTIVES

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MDL CARTOGRAPHY: MAPPING THE FIVE STAGES OF A FEDERAL MDL

Ryan C. Hudson,* Rex Sharp,** & Nancy Levit***

I. INTRODUCTION

From afar, watching the transfer of tens, hundreds, or thousands of federal lawsuits into a single consolidated proceeding before one federal judge—known as an MDL (a multi-district litigation proceeding)—looks like chaos. It has been said to resemble a thundering herd of animals on another continent, like in the pages of *National Geographic*. We like this comparison. Exotic animal migrations and MDLs share many similarities. Take, for example, the annual wildebeest migration in East Africa. Every year, over a million wildebeest traverse hundreds of miles across Tanzania and Kenya in what "is often described as a set circuit."[1] Seeking rainfall and lush vegetation, the wildebeest (like MDL plaintiffs) travel across the Serengeti while crocodiles and lions (like MDL defendants) seek to cut their trip short.[2]

This Migration (as it is known) has countless variations depending on rainfall, vegetation, predators, and standing water.[3] As one wildebeest expert explains, it "is not a continuously forward motion. They go forwards, backwards, to the sides, they mill around, they split up, they join forces again, they walk in a line, they spread out, or they hang around together."[4] That sounds a lot like litigation, too. Indeed, when it comes to both wildebeest and MDLs: "You can never predict with certainty where they will be; the best you can do is suggest likely timing based on past experience, but you can never guarantee the Migration [or pattern of an MDL] one hundred percent."[5]

At the same time, there is a reliable pattern that the wildebeest follow every year. Despite variations, they travel the same clockwise circuit across East Africa.[6] The Migration is reliably charted, tracked, and mapped. As a result, scientists can offer increasingly accurate predictions about wildebeest behavior. They can spot trends. They can draw connections. They can see interrelationships. They can calculate how changes in one variable might make a significant difference in another. In other words, even though every Migration is different, there is a method to the madness. The Migration has a direction, a systematic pattern, and what aerial

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[1] *A Beginner's Guide to Africa's Great Wildebeest Migration*, EXTRAORDINARY JOURNEYS, https://www.extraordinaryjourneys.com/blog/a-beginners-guide-to-africas-great-wildebeest-migration/ (last visited Apr. 4, 2020).

[2] Paul Steyn, *How Does the Great Wildebeest Migration Work?*, NATIONAL GEOGRAPHIC SOC'Y NEWSROOM (Feb. 8, 2017), https://blog.nationalgeographic.org/2017/02/08/how-does-the-great-wildebeest-migration-work/.

[3] *A Beginner's Guide to Africa's Great Wildebeest Migration*, *supra* note 1 (explaining that "every year is different, and, in fact, every week can be different.").

[4] *Id.*

[5] *Id*.

[6] *Id.*

photography reveals to be "a remarkable level of organization in the structure of the wildebeest herds."[7]

MDLs, too, have a standard structure, even though every MDL unfolds differently. Individual variations of MDLs do not prevent capturing their procedural framework or from charting, tracking, and mapping their overall structure. To date, however, the MDL process has been described only textually, not visually or graphically. Simply put, nobody has mapped this increasingly important process.

Cartography is the science or process of drawing maps.[8] Importing cartography into the study of MDLs, this article maps out the five procedural stages of a federal MDL. Through our MDL cartography, we aim to make the process of working on MDLs easier, faster, and more reliable—with less confusion, anxiety, and risk of error.

We begin in Section II with a general overview and a quick recap of trends of federal MDLs for those new to MDLs. In Section III, we then offer the actual cartography and provide a visual map of the five procedural stages of a federal MDL. Next, in Section IV, we discuss the five goals we seek to meet by applying cartography to MDLs. Finally, we conclude in Section V on a note of optimism about the prospects for applying the intellectual tools of cartography and systems thinking to make the migratory process of MDLs more transparent, understandable, and predictable.

II. OVERVIEW OF FEDERAL MDLs

In a federal MDL proceeding (usually, simply called an "MDL"),[9] all cases pending in all federal district courts with at least one common question of fact are transferred to a single federal district court judge for consolidated pretrial proceedings.[10] After coordinated discovery is completed, each case is supposed to be remanded back to its home court (the one that transferred it) for trial.

The MDL process is an ecosystem and a world of its own. Many lawyers—even those who practice regularly in federal court—have never experienced an MDL. Even more lawyers—including those who have already participated in an

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[7] *How Does the Great Wildebeest Migration Work?, supra* note 2 (altered spelling of "organization").

[8] *Cartography*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/cartography (last visited Apr. 4, 2020).

[9] This article is particular to federal MDLs. A number of states have used informal mechanisms to consolidate litigation. *See generally* Martha Neil, *New Direction for Mass Torts Plaintiffs Lawyers Are Looking at State Courts as Forums for Complex Class Actions*, ABA J.E-REPORT, Mar. 22, 2002, at 6 ("Generally, state courts do not have the formal rules for class actions and multidistrict litigation that exist in the federal courts. As a result, more informal approaches have been used to get these cases consolidated in the state courts. Three different methods have been used: First, similar mass tort cases within a single state have been consolidated so they can be heard by a single judge. Second, there have been efforts among different states to work together to meld parallel litigation. And third, some federal court judges have cooperated with their colleagues on state benches on similar dockets."). It is likely that most state consolidated litigation follows the same basic structure as the federal system, but we do not undertake that exploration in this article.

[10] Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not Possible*, 82 TUL. L. REV. 2205, 2205-06 (2008) (discussing origin of the federal MDL).

MDL—are mystified by the lingo, the process, and what often turns into a procedural maze. Law schools devote sparse attention to MDLs. In fact, as Yale Law School Professor Abbe Gluck has pointed out, "[t]he average number of pages devoted to MDLs in the leading first-year civil procedure casebooks is *two*."[11]

Despite this lack of attention, the number of federal MDLs has exploded.[12] So, too, has the number of federal cases swept into an MDL, as depicted in this chart showing the total number of cases that make up each of the top ten largest MDLs as of July 2019[13]:

Actions Pending	**Docket No.**	**MDL Name**
29,290	MDL-2592	IN RE: Xarelto (Rivaroxaban) Products Liability Litigation
12, 775	MDL-2789	IN RE: Proton-Pump Inhibitor Products Liability Litigation
12,641	MDL-2738	IN RE: Johnson & Johnson Talcum Powder Products
11,396	MDL-2740	IN RE: Taxotere (Docetaxel) Products Liability Litigation
9,893	MDL-2244	IN RE: Pinnacle Hip Implant
8,423	MDL-2641	IN RE: Bard IVC Filters Products Liability Litigation
5,627	MDL-2570	IN RE: Cook Medical, Inc., IVC Filters
5,438	MDL-2545	IN RE: Testosterone Replacement Therapy Products
5,145	MDL-2666	IN RE: Bair Hugger Forced Air Warming Devices Products
2,918	MDL-2179	IN RE: Oil Spill by the Oil Rig "Deepwater Horizon"

In total, the figures are stunning: more than 50% of federal civil cases are now part of an MDL.[14] For this reason alone, the MDL process must be discussed and understood by those who practice in federal court. This is all the more true because having a case swept into an MDL is usually an involuntary occurrence; a client or lawyer does not get to choose to opt out of an MDL.[15]

The MDL process was created in 1968 in reaction to nearly 2,000 antitrust civil actions all related to the same electrical equipment.[16] Congress realized this situation would be repeated in other areas, so it created a forum where all of the

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[11] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multi-District Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017) (emphasis in original).
[12] In July 2019, for example, there were 141,536 cases that were part of 199 MDLs in 46 district courts before 158 different transferee judges. *MDL Statistics Report--Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (July 16, 2019), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-July-16-2019.pdf.
[13] *Id.*
[14] Alan Fuchsberg & Alex Dang, *MDLs Are Redefining the US Legal Landscape*, LAW360 (Oct. 30, 2019), https://www.law360.com/articles/1214276/mdls-are-redefining-the-us-legal-landscape (emphasis in original).
[15] Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375, 1390 (2019) (noting the absence of an opt-out provision in the MDL statute, 28 U.S.C. § 1407).
[16] *Id.* at 1375, 1375 n. 20.

similar civil claims could be coordinated and consolidated together in one federal district court for pre-trial proceedings (primarily to coordinate on discovery),[17] and then shipped back once pre-trial proceedings were completed. Others have explained the distinction between mass actions (individual cases accumulated) and class actions,[18] although MDLs can involve either or both mass actions and class actions. Also, "[i]n contrast to the stringent rules that govern class actions, [an] MDL is a looser and more flexible structure allowing for transfer and consolidation based on pragmatic considerations."[19]

Today, the entire MDL process is set forth in 28 U.S.C. § 1407, which explains the mechanics of how MDLs begin, operate, and conclude:

> Under the MDL statute, 28 U.S.C. § 1407, thousands of cases pending around the country that share a common question of fact can be transferred to a single district judge in any district for pretrial proceedings. The judge is chosen by a panel of judges selected by the Chief Justice of the United States called the Judicial Panel on Multidistrict Litigation (JPML). After such pretrial proceedings, the cases are to be remanded to the courts from which they came for trial, but this rarely happens--less than 3 percent of the cases ever exit the MDL court. Instead, most of the cases are either settled or resolved in the MDL proceeding, meaning that, as in most federal litigation, pretrial proceedings are the whole ballgame. While the cases are in the MDL court, the MDL judge has all of the powers that the transferor court would have, including the power to decide dispositive motions, and

[17] MDL courts have the power to decide some questions, such as whether to certify a class or compel arbitration, but the principal focus of MDL decisions are centralized and consolidated discovery. Also, it is rare that the federal appellate courts take up review of these issues. Gluck, *supra* note 10, at 1708-09.

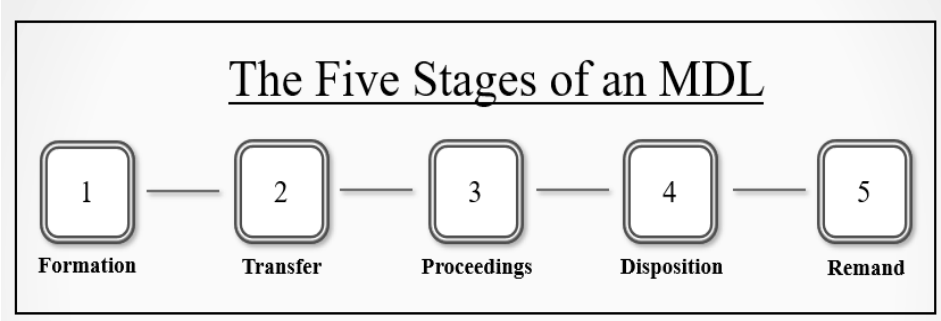
[18] *See, e.g.,* Aimee Lewis, *Limiting Justice*, 31 REV. LITIG. 209, 215 (2012) ("MDLs are not class actions. One key difference between class actions and MDL cases is that in MDL cases, all of the cases transferred to a MDL court are already pending in federal courts. This is not the case in class actions, which cover all members of a class regardless of filing.").

[19] Sherman, *supra* note 10, at 2209.

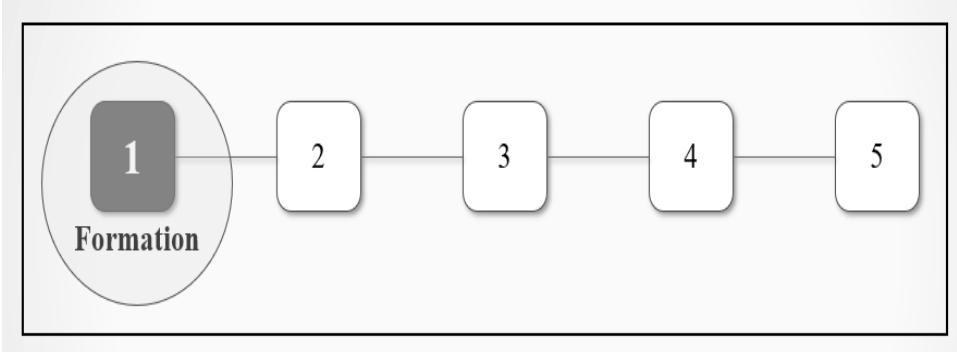
typically, the litigation is resolved by a mass-settlement agreement reached within the MDL.[20]

III. MAPPING THE FIVE STAGES OF AN MDL

There are five essential stages of an MDL:



Not every MDL will reach all five stages, but some variation of these five stages will occur in every MDL.[21] Let's take a look at each of the five stages. The first stage is **formation** of the MDL.



As set forth in 28 U.S.C. § 1407, an MDL proceeding can be formed either by a motion of a party or by the JPML. A motion to create an MDL can be filed by either a plaintiff or a defendant in one of the underlying cases. It is a common misconception that only a defendant can seek to have an MDL created.

At a minimum, there must be two or more cases in more than one federal judicial district in order for the provisions of 28 U.S.C. § 1407 to apply. If there

[20] Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168–69 (2018).

[21] As with the wildebeest migration patterns, we are not guaranteeing either 100% accuracy or a 100% prediction. Again, as with galloping wildebeest, the cases in an MDL rarely travel in a "continuously forward motion. They go forwards, backwards, to the sides, they mill around, they split up, they join forces again, they walk in a line, they spread out, or they hang around together." *A Beginner's Guide to Africa's Great Wildebeest Migration*, *supra* note 1.

are, and these cases involve "one or more common questions of fact," then an MDL proceeding might be formed to coordinate the pre-trial matters of all the cases at once. That is the essential role of an MDL—to streamline, harmonize, and expedite in one forum the discovery of multiple different cases pending in multiple federal district courts.[22] This avoids duplication of efforts in cases across the country. All the cases that are transferred from their home courts (known as the transferor courts) to the MDL court (known as the transferee or MDL court) remain open; they are stayed pending either disposition or remand back from the MDL court.

Every MDL proceeding is formed upon the review and decision of the JPML, which sits in Washington D.C. and is comprised of seven federal judges (both district court and circuit court) who each serve staggered seven-year terms.[23] The seven judges on the JPML also travel to hold hearings at locations around the country, seemingly about every two months. At these hearings, the parties have a few minutes of oral argument, following on the heels of briefing, in which they seek to persuade the JPML either to create or deny an MDL. The term "MDL" really refers to the assignment of the MDL case (given a separate case number, e.g., 19-md-3292) to a federal district court judge who receives all of the transferred cases and manages the pre-trial and discovery matters of all the transferred cases. The MDL judge might not even have one of the existing federal cases that are transferred to the MDL, and there is no requirement that the cases being transferred could be properly filed (based on personal jurisdiction or venue rules) in the MDL transferee court. (Based on comments made by judges, the JPML typically inquires whether the judge who receives the MDL cases is interested in serving as the MDL judge; the receipt of an MDL case is considered an honor reserved for the most sophisticated judges.)

In deciding whether to form an MDL, the JPML follows the statutory factors set forth in 28 U.S.C. § 1407, including "the convenience of parties and witnesses" and whether the formation of an MDL "will promote the just and efficient conduct" of the underlying cases.[24] The JPML has an extensive website that includes the rules, procedures, and other important information, such as the calendar of JPML hearings and dockets. It also issues case law that sheds light on what factors it considers when deciding whether to form an MDL. There is a definite MDL bar of attorneys who focus and specialize in this area of the law.[25]

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[22] Sherman, *supra* note 10, at 2206 ("Coordinated discovery was the principal benefit, insuring that all the cases could share discovery that would be rationally scheduled and avoid wasteful repetition.").

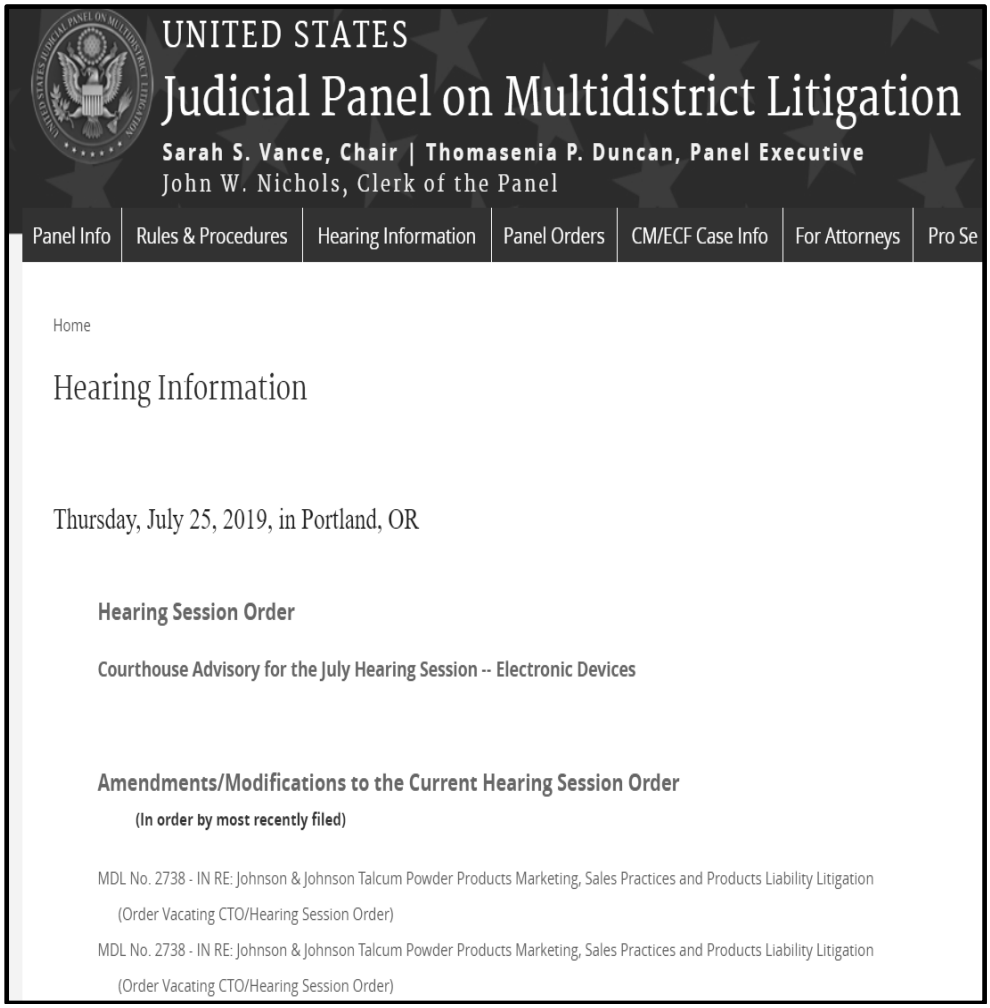
[23] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2226-27 (2008).

[24] 28 U.S.C. § 1407 (2020).

[25] See, for example, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974), which is a classic article, in which Professor Marc Galanter described the systemic disadvantages faced by individual plaintiffs without resources ("one-shotters") facing off against well-funded and experienced defendants ("repeat players"); Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

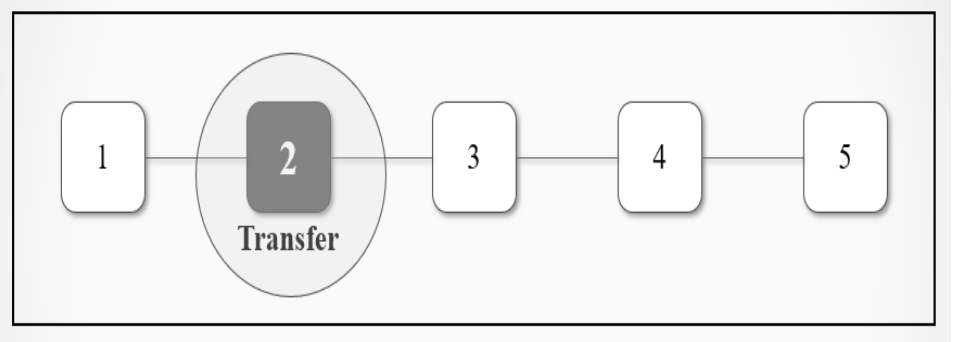
Here is a snapshot of the JPML website[26]:

FIGURE 1: **the JPML Website**



[26] *Judicial Panel on Multidistrict Litigation*, https://www.jpml.uscourts.gov/hearing-information (last visited Jan. 18, 2020).

The second stage is **transfer** of the cases into the MDL.



If the JPML decides there is a sufficient need to form an MDL to handle a docket of cases, it next has to make two decisions: where to send the case (which federal district court), and to which judge to assign it. This is a mysterious process that ultimately occurs behind the scenes knowable only to the judges involved. Much speculation goes into predicting where cases will go and who will be assigned as the judge. An empirical study of all MDL court assignments over a five-year period (2012-2016) indicates that the JPML tends to follow the preferences of the parties when they agree on where to consolidate the cases.[27] When the parties disagree, the study found that "the Panel sides with plaintiffs and defendants roughly equally."[28]

Once the MDL has a federal district court (e.g., the District of Kansas) and a judge (e.g., the Honorable John Lungstrum), the transferor courts transfer their cases to the MDL court (the transferee court). The underlying cases are stayed—not dismissed—in their home courts. Remand back to the home court following the pretrial MDL proceedings is mandatory under the 1998 Supreme Court case known as *Lexecon*.[29] Or, if a party consents to not being remanded (i.e., through a "*Lexecon* waiver") the MDL judge can adjudicate the cases in full.

Later filed cases are known as "tag-alongs." If it looks like a later filed case relates to or falls within the defined scope of the MDL, then the JPML will issue a Conditional Transfer Order ("CTO"), and these cases will be transferred into the MDL unless a party objects, in which case a briefing schedule will follow to determine whether the case should tag along and join the MDL. Another option is to "direct file" a case in the venue of the MDL court (e.g., the District of Kansas). This sometimes draws a motion to dismiss for lack of personal jurisdiction or for improper venue, depending on the zealousness of the defendant and the underlying facts (e.g., whether the case could be filed in the MDL court aside from the fact the MDL is there).[30]

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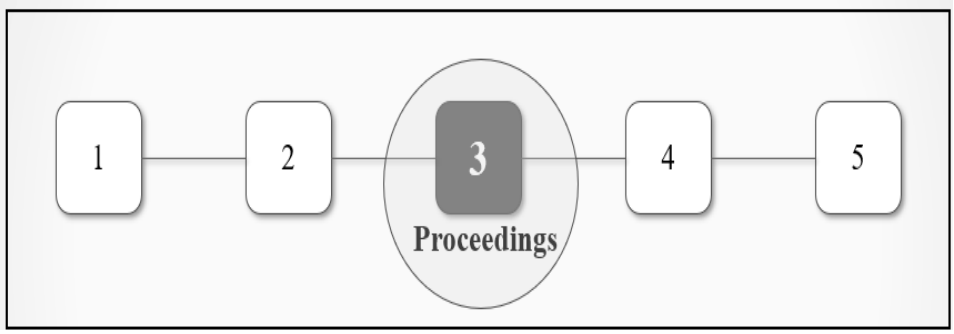
[27] Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713 (2019).
[28] *Id.* at 1745.
[29] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).
[30] *See, e.g., In re* Takata Airbag Prod. Liab. Litig., 379 F. Supp. 3d 1333, 1338 (S.D. Fla. 2019) (declining to dismiss direct file complaints to promote judicial efficiency). *See generally* Philip S.

The third stage is the MDL **proceedings** in the transferor court.



Once the MDL lands in the hands of the MDL judge, the MDL case actually ramps up and begins. The process usually begins with a Preliminary Practice and Procedure Order, in which the district court will set a hearing. The initial hearing can sometimes draw hundreds of participants as the parties and their counsel try to figure out the dynamics, who will be involved, and who will take a passive role.

The selection of leadership counsel for the plaintiffs and defendants is critical for operational reasons—both funding and staffing. The defendants get to choose their own counsel and local liaison counsel, but plaintiffs' counsel engage in a competitive selection process with the MDL court. In nearly every MDL, there is fierce competition among the various plaintiffs' counsel to decide upon lead counsel, the steering or executive committee, and the liaison counsel.[31] These roles often fluctuate and sometimes go by different names, but the functional point is that the leadership roles are critically important and determine how the case will be pursued. The leadership lawyers run the case. On top of that, if the cases later settle, the leadership group will be able to obtain a "common benefit fund" fee out of the fees awarded to every case that was part of the MDL.[32] For these reasons, the leadership battle among plaintiffs' counsel is often dramatic.

Plaintiffs' counsel in the various cases to an MDL begin jockeying for position early, as soon as each has a case on file. Plaintiffs' counsel seek to form teams or slates comprised of many cases from many states to appear to have the most plaintiffs, damages, and law firms that support their leadership request. Due to the small pool of MDL plaintiffs' lawyers, most of the competing MDL plaintiffs' lawyers know one another, often working together on other MDLs at the

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Goldberg et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51, 78 (2019) ("The MDL statute itself does not confer jurisdiction for direct MDL filings, but does provide the MDL judge or 'transferee court' with extra-jurisdictional authority to 'exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions' which could, in theory, imply broader jurisdictional authority.").

[31] *See*, *e.g.,* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1460-62 (2017) (describing selection methods for leadership counsel).

[32] *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 381-86 (2014).

time. Horse-trading positions in already pending MDLs, the MDL at issue, or future MDLs are common to get more law firms supporting a leadership slate. Of late, those slates have resulted in competitors combining into Co-Lead Counsel groups, sometimes as many as five Co-Leads and many other "executive committee" members.[33] In an effort to tip the scales, Co-Lead slates often hire local liaison counsel who may know the judge or at least local rules. The Co-Leads slates then go head-to-head vying for the appointment by the MDL court. To the winner goes the entire case, and to the loser, no part of the case: they contribute their clients from various states but rarely have any further involvement in the case.

Notably, there has been a move to diversify the Co-Lead roles to make way for younger attorneys, female attorneys, and attorneys that reflect ethnic diversity. But the duty to fund the litigation for some of those attorneys leaves them subject to having the financial strings and decisions actually being made by non-diverse repeat players, thus disserving the entire interest in diversifying leadership. Litigation funding might help solve that problem until some of these attorneys can gain the necessary experience and financial resources to compete on equal footing.

Once the leadership roles are clarified, the court will typically issue a series of scheduling orders and ask for input regarding the filing of a Consolidated Complaint or Master Complaint (under which all the plaintiffs will proceed) and the ultimate plan for how the pre-trial proceedings will occur. The defendant(s) usually will file a motion to dismiss and seek to stay discovery pending a ruling on that dispositive motion, and the plaintiffs will nearly always oppose the stay of discovery and seek to conduct full-blown discovery as soon as possible. If there are competing or similar state court cases, the court might ask the parties to enter a coordination order.

Discovery rarely begins without a discovery protective order being entered. Although discovery protective orders have been routine for decades in civil litigation, the MDL discovery protective orders tend to be longer and more complex. Defendants seek to keep most of the discovery secret by flagging almost every document as "confidential," tens of thousands documents as "highly confidential," and thousands as "privileged"—veiling these documents with a privilege log, which generates multiple briefs and hearings. Even the process of marking documents as "confidential" and "highly confidential" has developed into

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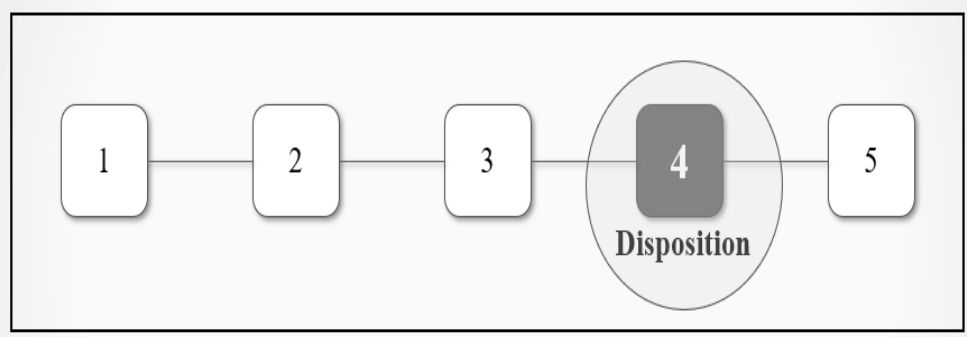
[33] As with most things, too many "leaders" can lead to inefficiency. Much of the "layering" of plaintiffs lawyers is directly attributable to fees being awarded on a lodestar basis, so that hours of inefficiency is rewarded both in the total fee awarded (or as a cross-check), and once awarded, split among leadership based on the "hours" invested. Because most MDLs are on the East or West Coast that are the hold-outs to inefficient lodestar fee model, see generally Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association*, Contingent Fees in Mass Tort Litigation*, 42 TORT TRIAL & INS. PRAC. L. J. 105, 124-28 (2006), many of the big MDL plaintiffs' firms are built on the same defense counsel pyramid structure to generate maximum lodestar and hammer out the time even in circuits that award fees on a percentage of the common fund basis—if for no other reason than to trot out the hours-invested argument at the time fees are split among leadership. Some MDL courts are appalled at the inefficiency and appoint only one Lead Counsel.

a cottage industry of attorney coding because "sealing" the documents from the public domain has become increasingly contentious—and scrutinized.

The modern-day explosion of electronically stored information (ESI) usually requires the entry of an ESI order and complex negotiations regarding how the parties will engage in discovery that involves ESI.[34] In MDLs, the most time-consuming part is the production of documents (subject, of course, to assertions of privilege and elaborate privilege logs) and the taking of depositions with these piles of documents in hand. It is common to see dozens of depositions taken, millions of pages of documents produced, and countless disputes over the scope and burdens of discovery. The district court judge and the magistrate judge both nearly always fully engage in the case, holding multiple (sometimes, dozens) of conferences and hearings either in person or by telephone.

Because of the complexity involved, many MDL judges begin the process of mediation early and add a special master to the mix to help facilitate settlement. A special master can serve many different roles, ranging from assistance in technically complex matters, to ESI and discovery issues, to settlement. Or the court might simply help the parties select a mediator.

The fourth stage is **disposition** of the MDL consolidated proceeding.



The discovery period can last roughly a year to upwards of three years (but this can be subject to far more extreme variations either way), depending on the interests and diligence of the parties. It is difficult to forecast how long discovery will take given the extreme complexity of MDL matters and the likelihood of new issues (or additional claims, defenses, or parties) popping up in the midst of discovery.

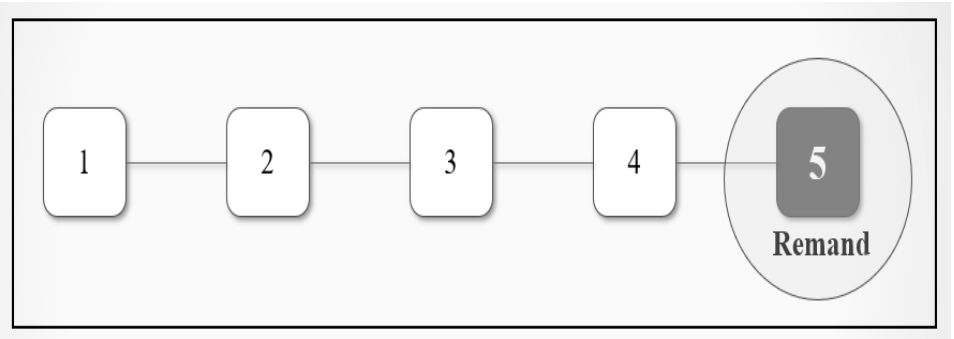
Once discovery ends, the MDL judge has the option of remanding the case or conducting summary judgment and/or holding a pretrial conference. In a mass action MDL, the summary judgment and *Daubert* motions are usually the most important point in the MDL process. In a class action MDL, the motion for class certification will also be a significant event. Whether at summary judgment or at

[34] *See, e.g., In re* Actos Prods. Liab. Litig., MDL No. 11-md-2299 (July 27, 2012), https://www.lawd.uscourts.gov/sites/lawd/files/UPLOADS/MDL_2299_Court_Orders.pdf (detailing an ESI search and production protocol).

class certification, the losing party will often approach the table for settlement once the court has made its ruling. Even though the loser can appeal, it is common to see the case settle as a result of either the decision on class certification or summary judgment. However, if this window of opportunity for settlement is not taken, more of the MDLs have been going to trial with billion-dollar verdicts.[35]

In other words, disposition means one of two things: (1) settlement (usually as a result of the MDL court ruling on summary judgment or class certification) or (2) trial (or, more accurately, trials: one or more class action trials if the MDL is a class action or series of class actions, or, for an MDL involving mass actions, a series of bellwether trials).

The fifth, and final, stage is **remand** back to the transferee courts.



If summary judgment is denied and the cases do not all settle, then the MDL judge has one final step: to remand the cases back to their home courts. With discovery completed, the *Lexecon* rule requires that the cases must return to their home courts for trial.

But this happens less than 3% of the time.[36] One reason for this, known as a *Lexecon* waiver, involves the parties consenting to trial before the MDL judge.[37] In mass action MDLs, the MDL judge will hold test case trials—known as a bellwether (note the spelling) trial – to help the parties gauge the relative strength of their cases.[38] For example, in a mass tort involving hundreds or thousands of cases filed over an allegedly defective medical device, the parties will choose two or three cases to take to trial. From those trial results, they will see, with actual jury verdicts, how their cases will be assessed by juries, not by lawyers. From there,

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[35] *See, e.g.,* Casey Sullivan, *Judge Orders Dow Chemical to Pay $1.2 Billion in Price-Fixing Case*, REUTERS (May 15, 2013), https://www.reuters.com/article/us-dowchemical-urethane-judgment/judge-orders-dow-chemical-to-pay-1-2-billion-in-price-fixing-case-idUSBRE94F03R20130516.

[36] *See* Bradt, *supra* note 18, at 1169.

[37] *See, e.g.,* Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 799 n.139 (2019) (detailing some impediments to obtaining a *Lexecon* waiver).

[38] *See, e.g.,* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2341 (2008); Melissa J. Whitney, *Bellwether Trials in MDL Proceedings, A Guide for Transferee Judges*, FEDERAL JUDICIAL CENTER (2019), https://www.fjc.gov/content/338847/bellwether-trials-mdl-proceedings-guide-transferee-judges.

settlement often occurs rapidly because the losing party does not want to risk losing hundreds or thousands of cases at trial.[39] Of course, that does not always happen. And settlement negotiations can take months or even years to resolve. Defendants can choose with whom to settle, when, and for how much. Complicating this, plaintiffs can choose to not settle—demanding their day in court, even if there are tens of thousands of plaintiffs.

But if remand does occur, then the cases are all transferred back to their home courts. The case numbers remain the same because the cases were stayed. Upon arrival back in their home courts, the cases resume their active status and proceed to trial.

IV. BENEFITS OF AN MDL CARTOGRAPHY

Through this MDL cartography, we try to provide several intellectual tools to the MDL bar, to MDL judges, to litigants, and to others in the public who might be interested in MDLs. To be more specific, we have five goals we seek to accomplish with MDL cartography.

> 1. **Visual Learning**. To ensure the benefits of visual learning and graphic design, so that MDL participants (everyone) can see how the stages of an MDL operate, interconnect, and unfold sequentially. Humans learn best not by text but through visual images (pictures), and people much more rapidly learn, retain, and recall pictures.[40]
>
> 2. **Categories and Information Design**. To create categories (each of the five MDL stages is a category) that function as mental "buckets" or "file folders" for storing existing information and adding new information. Proper categorization allows us to break things down into smaller parts, and to focus element by element, while still retaining the ability to zoom out and see the big picture.
>
> 3. **Systems Thinking**. To facilitate systems thinking,[41] in which the MDL system is viewed both holistically and in parts and stages.

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[39] Sherman, *supra* note 10, at 2208–09 (discussing the successful use of bellwether trials in Vioxx to drive resolution through a global settlement).

[40] *See, e.g.*, Robert F. DiCello, *Are You Doing It Wrong*, TRIAL, at 21-22 (July 2019) (discussing the importance of using demonstrative exhibits because research demonstrates that "visual communication" heightens jury comprehension and recall); Haig Kouyoumdjian, *Learning Through Visuals*, PSYCHOL. TODAY, July 20, 2012 ("There are countless studies that have confirmed the power of visual imagery in learning.… Various types of visuals can be effective learning tools: photos, illustrations, icons, symbols, sketches, figures, and concept maps.").

[41] Systems theory or systems thinking focuses on "a shift in attention from the part to the whole" and seeks to analyze "interacting elements" by considering the "whole" and not "simply the sum of the elementary parts." Cristina Mele, Jacqueline Pels, & Francesco Polese, *A Brief Review of Systems Theories and Their Managerial Applications*, 2(1-2) SERV. SCI. 126, 126-27 (2010). A system is "an assemblage of objects united by some form of regular interaction or interdependence." A system can be "natural (e.g., lake) or built (e.g., government), physical (e.g., space shuttle) or conceptual (e.g., plan)" and can be "closed" or "open." *Id.* at 129. Systems thinking looks to the elements, parts, or structures that make up the system. *Id.* Systems thinking is particularly applicable to law because it

> Systems thinking allows the MDL bar, judges, and others to isolate specific stages, or multiple stages taken together, with clarity based on the standard structure and design provided.
>
> 4. **Patterns and Analytics**. To make it easier to spot patterns and trends in MDLs based on the same comparisons (e.g., stage 1 or stage 4) of each MDL. These categories will enhance data analytics that flow out of cartography and consistent design from the stages and parts of MDLs.[42]
>
> 5. **Cross-Disciplinary Comparisons**. To facilitate comparisons to other systems and dynamics (like wildebeest migration patterns, but also within law), leading to greater insights and connections across areas of knowledge.

V. CONCLUSION

If the MDL process seems dizzying, that is because it is. The dollars at stake are massive, the procedural complexities are unmapped (at least until now), the starts and stops can seem endless, and the schedule can start to proceed at a breakneck pace. This rapid pace has been especially true in recent years; MDL judges have been more proactive in an attempt to shake the label that the MDL is a "black hole" from which cases never emerge.[43]

Another perspective is this: the "black hole" of MDLs is not that they drag on forever, but that the procedural ambiguity of MDLs is so baffling that a clear understanding of the proceeding never emerges. Many great lawyers have been trapped by the confusion and anxiety of not understanding what was coming next

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emphasizes that outcomes are the product of interconnected structures. *See* Tomar Pierson-Brown, *(Systems) Thinking Like a Lawyer*, 26 CLINICAL L. REV. 515 (2020). It has been applied to, among other areas, alternative dispute resolution, *see* Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 2, family law, *see* Rebecca A. Meyer. *Systems Thinking: A Practical Lens for Understanding Enterprising Families*, 58 TR. & EST. 37 (Aug. 2019), and environmental advocacy, *see* J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933 (1997).

[42] Liz Stinson, *8 Stunning Maps That Changed Cartography*, WIRED (Oct. 6, 2015), https://www.wired.com/2015/10/8-stunning-maps-changed-cartography/ (explaining that "maps are simply a way to visually present a set of data. In that way, cartography, once a highly specialized trade, is now more akin to information design. 'The lines are beginning to blur between what is big data analysis and what is cartography.'").

[43] The term "black hole" is often used in MDLs. *See, e.g.*, Gaito v. A-C Prod. Liab. Tr., 542 B.R. 155, 166 (E.D. Pa. 2015); George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 72 (2014) ("With 281 MDLs active today, a large portion of the country's federal civil cases are conducted through MDLs. With the small number of MDL judges managing such a large share of active cases, there is a tendency for some of these cases to become stagnant. When this happens, the MDL can become the proverbial 'black hole,' taking in cases with virtually no hope of fair and efficient resolution."); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*,23 WIDENER L.J. 97, 144 (2013).

in an MDL. They suffered because they did not have a map that outlined this increasingly common process.

Through this article, we hope to provide a map that solves the problems that come with not knowing how things work: for law students, lawyers, clients, litigants, judges, law clerks, media reporters, and anyone else who has to grapple with an MDL. After all, MDLs are supposed to make litigation more efficient, but with efficiency must come predictable process and real transparency. The legitimacy of courts and our civil litigation system depends on everyone (not just the insiders who have done it before) being able to participate and to know what to expect. Mapping the process and approaching MDLs through the framework of MDL Cartography can make MDLs more visual, trackable, manageable, predictable, and—ultimately—understandable.

To those who are set to face the galloping thunder of an MDL for the first time, we say: Hooves up.

JPML PROCESS: A DEFENDANT'S PERSPECTIVE

Sheila L. Birnbaum, Hayden A. Coleman, Jacqueline D. Harrington and Ashley A. Flynn*

INTRODUCTION

"Agreement is made more precious by disagreement." While this quote, attributed to Publius Syrus (fl. 85-43 B.C.), a Latin writer best known for his proverbs, certainly was not written about modern-day litigators, it could have been. Plaintiffs and defendants tend to (respectfully) disagree on most issues large and small, and yet centralization of many cases through an MDL is one area where the parties may find common ground—under the right circumstances. Defendants tend to support MDLs when many cases are anticipated, and the benefits of streamlined discovery and uniform rulings loom large. Nonetheless, coordination before an MDL sometimes does not have the intended effect of increasing efficiency, for example, when an MDL covers vastly different defendants and alleged injuries. In those circumstances, defendants may find themselves disagreeing with plaintiffs who seek centralization before the Judicial Panel on Multidistrict Litigation (JPML, or "the Panel") or trying to carve out categories of cases to avoid being swept into an overbroad MDL. To be successful, defendants must recognize that the Panel itself is a singular institution where defendants must carefully coordinate and pick their battles. Even then, making successful arguments concerning the MDL location or judge may prove challenging.

This article focuses on four key questions from the defense perspective concerning the formation of MDLs. *One*, what factors should defendants consider when faced with an MDL? *Two*, how can defendants avoid being swept into an MDL when they have determined that it is not in their interests? *Three*, what are the prospects for defendants to argue successfully in favor of a particular MDL location? *Four*, what types of arguments should defendants focus on before the Panel? While these are not the only considerations relevant to defendants, we hope that they will provide a flavor for the types of issues defendants typically consider during the initial stages of MDL formation.

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I. WHAT FACTORS SHOULD DEFENDANTS CONSIDER WHEN FACED WITH AN MDL? COPYCATS VS. EFFICIENCY

Defendants have a lot to consider in deciding whether to advocate for centralization, oppose centralization, or take no position on the issue. While MDLs can encourage the filing of additional lawsuits of dubious merit, they can also be a critical tool to help defendants manage costs, streamline discovery, and understand the value of a case for settlement purposes.

A. The Field of Dreams

We'll leave our friends from the plaintiffs' bar to explain the circumstances under which they prefer MDLs, but from a defense perspective, the reasons *not* to prefer an MDL are clear. Defendants know that once an MDL is formed, plaintiffs who might not otherwise file a claim will appear from around the country to join. Some commentators have observed that MDLs invite meritless claims because (1) lawyers anticipate that there "will be a settlement in the MDL transferee court in which they can get 'inventory value' for their claims" before remand to the original court and (2) "amassing a large inventory of claims can support a lawyer's quest for appointment to a leadership position in the MDL."[1] For this reason, MDLs are often analogized to the Field of Dreams: "If you build it, they will come."[2] Additionally, any adverse rulings or jury verdicts can be exacerbated when numerous cases are consolidated in an MDL.

Though the creation of an MDL may trigger additional filings, mere representations by counsel that more actions *will* be filed does not appear to strongly influence the Panel. In 2012, the Panel considered centralization of claims arising out of alleged defects in the da Vinci Robotic Surgical System. The Panel noted that "[w]hile proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions."[3] The Panel has also recognized that the number of cases may not always be a relevant consideration when the cases are pending in relatively few districts. This is particularly true where the cases are in the same district and/or assigned to the same judge. For example, centralization has been denied where six actions were pending in just two districts, with five of the actions in the same district and assigned to the same judge.[4] The Panel concluded "centralization [was] not

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[1] Advisory Committee on Civil Rules, *Agenda Book*, Nov. 1, 2018, p. 143, *available at* https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[2] *See, e.g.*, *id.*; James M. Beck, *Stray Thoughts from the ACI Conference*, Drug & Device Law (Dec. 17, 2007), https://www.druganddevicelawblog.com/2007/12/stray-thoughts-from-aci-conference.html.

[3] *In re* Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig., 883 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012).

[4] *See In re* SLB Enter. RICO Litig., MDL No. 2899, Order Denying Transfer at 1-2 (J.P.M.L. July 31, 2019).

necessary for the convenience of the parties and witnesses or to further the just and efficient conduct of the litigation" as there were "only two sets of pretrial proceedings to coordinate."[5]

Where only a small number of actions are at issue, the Panel has reminded practitioners that "the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate."[6] The Panel has routinely denied MDL applications where litigation involved just a small number of individual claims.[7] This tendency to deny centralization generally has been the case even when *defendants* try to use the Field of Dreams argument as a sword in *support* of centralization. In the TrueCar litigation, for example, defendants sought to centralize just two actions pending in two different jurisdictions, where the plaintiffs alleged the defendants breached their fiduciary duties (or aided and abetted such breaches) to TrueCar by causing the company to issue false and misleading statements.[8] At oral argument, the defendants argued "several other cases were likely to be filed."[9] The Panel rejected this argument, holding that it was "reluctant to grant [MDL] centralization based on the mere possibility of future actions."[10]

B. A "Precious" Moment of Agreement

If MDLs can beget more and more lawsuits, why would defendants *ever* want an MDL? For both parties, the objectives of forming an MDL are all rooted in efficiency: (1) streamline the discovery process to "eliminate duplicative discovery"; (2) "prevent inconsistent pretrial rulings"; and (3) conserve the resources of both the parties and the courts.[11] Thus, in the appropriate circumstances, both parties may find "precious" agreement that an MDL is desirable.

For example, in litigation involving thirty-two actions relating to the use of the oral contraceptives called Yaz or Yasmin, both sides (largely) supported centralization. The Panel agreed, finding the cases "involve[d] common questions

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[5] *Id.*

[6] *In re* Bernzomatic and Worthington Branded Handheld Torch Prods. Liab. Litig., MDL No. 2897, Transfer Order at 1 (J.P.M.L. July 31, 2019) (three actions in three judicial districts).

[7] *See, e.g.*, *In re* Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig., 883 F. Supp. 2d at 1340 (denying centralization of five personal injury and wrongful death actions involving alleged defects in a surgical device); *In re* Abbott Labs., Inc., Similac Prods. Liab. Litig., 763 F. Supp. 2d 1376, 1376-77 (J.P.M.L. 2011) (denying centralization of nine actions alleging injury from recalled baby formula).

[8] *See In re* TrueCar, Inc., Shareholder Derivative Litig., MDL No. 2900, Order Denying Transfer Order at 1-2 (J.P.M.L. July 3, 2019).

[9] *Id.*

[10] *Id.* (citing *In re* Intuitive Surgical, Inc., Da Vinci Robotic Surgical Sys. Prods. Liab. Litig., 883 F. Supp. 2d at 1340 ("While proponents maintain that this litigation may encompass 'hundreds' of cases or 'over a thousand' cases, we are presented with, at most, five actions.")).

[11] *See, e.g.*, *In re* Hyundai & Kia Fuel Econ. Litig., 923 F. Supp. 2d 1364, 1365 (J.P.M.L. 2013); *In re* Ford Fusion & C-Max Fuel Econ. Litig., 949 F. Supp. 2d 1368, 1369 (J.P.M.L. 2013); *In re* Land Rover LR3 Tire Wear Prods. Liab. Litig., 598 F. Supp. 2d 1384, 1385 (J.P.M.L. 2009).

of fact, and that centralization . . . will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation."[12] Similarly, in litigation related to whether Zoloft had caused birth defects in utero, Pfizer sought to consolidate fifty-nine pending actions in an MDL.[13] The briefing focused on arguments that an MDL would streamline discovery and avoid inconsistent pretrial rulings.[14] In both of these examples, the fight between the parties focused on *where* the Panel should send the MDL, not *whether* an MDL should form.

Parties are most likely to agree that an MDL is advantageous when multiple cases have already been filed or will be filed regardless of whether an MDL exists, and defendants find value in limiting the number of venues in which they will have to defend themselves. For example, 3M recently supported centralization of the more than 200 Combat Arms Earplug actions filed against it; the allegations were that defective earplug design prevented a snug fit in the wearer's ear, leading to hearing loss or tinnitus.[15] At that time, plaintiffs' counsel had signaled their intent to file "thousands" more actions.[16] As with the oral contraceptive and Zoloft litigations, the focus of the argument was on the location of an MDL as the parties were unanimous in their view that an MDL should form.

II. HOW CAN DEFENDANTS AVOID GETTING SWEPT INTO AN MDL WHEN THEY HAVE DETERMINED IT IS NOT IN THEIR BEST INTERESTS? DIFFERENTIATION IS KEY

Although the objectives of forming an MDL are rooted in efficiency, there are situations in which centralization may not achieve this goal. Defendants advocate against formation or oppose the transfer of particular actions into an MDL where there are, in our view, too many types of defendants, too many types of injuries, or both.

When arguing against centralization, defendants should focus not only on whether "common" factual issues exist, but also whether such issues are complex and burdensome enough to warrant an MDL. For example, all defendants opposed centralization sought by plaintiffs in litigation alleging injuries caused by spray polyurethane foam ("SPF") insulation products installed in plaintiffs' properties.[17] The Panel concluded that far from making the case more efficient, "placing direct competitor manufacturer defendants into the same litigation would require protecting trade secret and confidential information from disclosure to all parties

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[12] *In re* Yasmin & Yaz Mktg., 655 F. Supp. 2d 1343, 1343 (J.P.M.L. 2009).

[13] Brief in Support of Defendant Pfizer Inc.'s Motion Pursuant to 28 U.S.C § 1407 to Transfer Related Actions for Coordinated Pretrial Proc. in the S. Dist. of N.Y. at 1, *In re* Zoloft (Sertanline Hydrochloride) Prods. Liab. Litig., 856 F. Supp. 2d 1347 (J.P.M.L. 2012) (MDL No. 2342).

[14] *Id.* at 7-8.

[15] Defendant 3M Co.'s Response to Motion to Transfer Related Actions for Coordinated Pretrial Proceedings at 3, In re 3M Combat Arms Earplug Prods. Liab. Litig., 366 F. Supp. 3d 1368 (J.P.M.L. 2019) (MDL No. 2885).

[16] *Id.* at 1.

[17] *In re* Spray Polyurethane Foam Insulation Prods. Liab. Litig., 959 F. Supp. 2d. 1364, 1364 (J.P.M.L. 2013).

and complicate case management."[18] And while there were certain overlapping questions, "individualized facts concerning the chemical composition of the different products, the training and practices of each installer, and the circumstances of installation at each residence will predominate over the common factual issues alleged by plaintiffs."[19]

Similarly, in August 2020, the Panel declined to centralize hundreds of cases filed by businesses seeking insurance coverage for losses during the COVID-19 pandemic. The Panel concluded "the MDL that movants request entails very few common questions of fact, which are outweighed by the substantial convenience and efficiency challenges posed by managing a litigation involving the entire insurance industry."[20] However, the Panel indicated it might be open to the creation of smaller, "single-insurer" MDLs which "are more likely to involve insurance policies utilizing the same language, endorsements, and exclusions," and "thus would not entail the managerial problems of an industry-wide MDL involving more than a hundred insurers."[21] The Panel directed these "single-insurers" to submit briefing on an expedited basis to show cause for why those actions should not be centralized, noting "that delay should be avoided in this litigation to the extent possible."[22]

In subsequent hearings, the Panel examined proposed MDLs with respect to six particular groups of insurers, concluding that centralization was not appropriate as to four insurers because it would further complicate the litigation.[23] For example, in one of the denials, the Panel considered whether to centralize sixty-six actions brought against a single group of insurers.[24] The Panel found that centralization was a "close question" given that the insurance policies "appear to use standard forms and will involve the interpretation of common policy language."[25] But weighing against centralization, the Panel noted that "time is of the essence in this litigation" given that "[m]any plaintiffs are on the brink of bankruptcy as a result of business lost due to the COVID-19 pandemic and the government closure orders."[26] Under these circumstances, the Panel concluded that efficiency was "best obtained outside the MDL context."[27] In contrast, the Panel concluded that centralization was appropriate against two other insurers

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[18] *Id.*
[19] *Id.*
[20] *In re* COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 U.S. Dist. LEXIS 144446, at *5 (J.P.M.L. Aug. 12, 2020) (MDL No. 2942).
[21] *Id.* at *6.
[22] *Id.*
[23] *In re* Erie COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 WL 7384529, at *1 (J.P.M.L. Dec. 15, 2020) (MDL No. 2969).
[24] *In re* Hartford COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 WL 5884782, at *1 (J.P.M.L. Oct. 2, 2020) (MDL No. 2963).
[25] *Id.* at *2.
[26] *Id.*
[27] *Id.*

where the actions were likely to be more limited in geographic scope and therefore more "manageable."[28]

Likewise, in the recent case of the aqueous-film forming foams ("AFFF") litigation, some defendants successfully argued against transfer of three cases into an MDL by citing to the many factual differences between the cases in which they were named, and the other cases proposed for consolidation.[29] The AFFF cases involved the discharge of firefighting foam for training purposes by the military and other users at military bases, airports, fire training centers, and other locations. In contrast, three other cases involved the alleged presence of Perfluorooctanoic acid ("PFOA") in groundwater and municipal water, but these were not alleged to be based on claims involving AFFF or the users of AFFF.[30] Defendants in these PFOA cases successfully argued that adding these cases to the AFFF MDL would "disrupt rather than promote efficiency."[31] And the MDL panel found that it would be "devoted to scores of cases that involve particularized facts and claims wholly distinct" from the facts and claims in the three PFOA cases.[32] The Panel agreed that the actions did not belong in the MDL, noting that the cases were "different in kind from the AFFF actions and involve more varied defendants," and were "being managed effectively in their current districts."[33] In particular, the Panel acknowledged that the inclusion of such cases in the MDL would undermine the goal of efficiency and "could quickly become unwieldy."[34]

On the other hand, in considering whether to form an MDL to address alleged improper marketing and distribution of various prescription opiate medications, the Panel rejected carve out arguments made by certain plaintiffs and defendants to avoid centralization of specific cases.[35] Defendants focused on the fact that they were named in a limited number of cases with distinct allegations, or argued the claims against them were distinct because, for example, they involved captive wholesale distributors of opioids. Even though individualized factual

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[28] *In re* Erie COVID-19 Bus. Interruption Prot. Ins. Litig., 2020 WL 7384529, at *2.
[29] *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., 357 F. Supp. 3d 1391, 1392 (J.P.M.L. Oct. 19, 2018) (MDL No. 2873).
[30] *Id.*
[31] Brief in Response of Saint-Gobain Performance Plastics Corp. and Honeywell International Inc. In Opposition to 3M's Motion to Transfer Actions Pursuant to 28 U.S.C. § 1407 at 2, *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., 357 F. Supp. 3d 1391, 1392 (J.P.M.L. 2018) (MDL No. 2873).
[32] *Id.*
[33] *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., 357 F. Supp. 3d at 1396.
[34] *Id.*
[35] *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Transfer Order at 3 (J.P.M.L. 2017).

issues might arise, the Panel concluded that they did not "negate the efficiencies to be gained by centralization."[36]

III. WHAT ARE THE PROSPECTS FOR DEFENDANTS TO ARGUE SUCCESSFULLY IN FAVOR OF A PARTICULAR MDL LOCATION? NO ONE KNOWS

As many practitioners have observed, one of the "least predictable aspects of panel practice" is the selection of venue for a new MDL proceeding.[37] The Panel considers various factors in selecting the MDL district, including: the location of parties' headquarters (where witnesses and documents are likely located), districts with the most cases or most procedurally advanced case(s), and the location of the first-filed action.[38] Typically, as found in a study cited in the Introduction to this Symposium, the Panel "tends to follow the preferences of the parties when they agree on where to consolidate the cases. When the parties disagree, the study found that 'the Panel sides with plaintiffs and defendants roughly equally.'"[39]

The Panel also considers the experience of the potential MDL judge, the familiarity of the MDL judge with factual or legal issues at play, and the docket conditions of a potential transferee district or MDL judge.[40] In particularly large and complex MDLs, the Panel may choose a judge with prior experience managing an MDL.[41] But lack of MDL experience does not preclude a judge from being assigned to an MDL. In fact, the Panel has made a point to provide judges without prior MDL experience the opportunity to supervise an MDL should they want it, even in cases that might prove to have significant volume and complexity.[42]

Because of the many considerations that go into selection of an MDL location, parties can sometimes be surprised by how venues and judges are chosen. The Panel will often hear scores of arguments advocating for particular locations,

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[36] *Id.*

[37] Alan Rothman, *And Now a Word from The Panel: 5 MDL Lessons*, LAW360 (Nov. 28, 2017), https://www.law360.com/articles/988626/and-now-a-word-from-the-panel-5-mdl-lessons.

[38] *Id.*; Alan Rothman, *And Now a Word from the Panel: Spotlight on MDL Venue*, LAW360 (Mar. 25, 2020), https://www.law360.com/articles/1256760/print?section=banking.

[39] Ryan C. Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801, 808 (2021) (quoting Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713, 1714 (2019)).

[40] Kristen K. Bromberek, *MDL Strategies: Choosing a Transferee Court*, ALSTON & BIRD (Jan. 9, 2015), https://www.alston.com/en/insights/publications/2015/01/mdl-strategies-choosing-a-transferee-court-ilaw360/.

[41] *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379, Transfer Order (J.P.M.L. Dec. 5, 2017) (MDL No. 2804) (assigning Judge Dan A. Polster noting he was an "experienced transferee judge who presides over several opiate cases" with "previous MDL experience. . .which involved several hundred cases, which has provided him valuable insight into the management of complex, multidistrict litigation").

[42] *See, e.g.*, *In re* Domestic Airline Travel Antitrust Litig., MDL No. 2656, Transfer Order at 2 (J.P.M.L. Oct. 13, 2015) ("[C]entralization in this district provides us the opportunity to assign the litigation to the Honorable Colleen Kollar-Kotelly, an able and experienced jurist who has not yet had the opportunity to preside over a multidistrict litigation.").

and then a seemingly unlikely venue without broad support of the parties will be selected. Exacerbating the sense that these decisions are a bit of a black box, the Panel has even assigned MDLs to districts not requested by any party, including districts without *any* pending cases.[43] In deciding to assign an MDL to a district without any cases, the Panel may consider, for example, that "litigation is nationwide in scope, and thus almost any district would be an appropriate forum" and that the judge to whom the MDL is assigned has relevant experience that will "facilitate the just and efficient conduct" of the litigation.[44]

IV. WHAT ARGUMENTS SHOULD DEFENDANTS FOCUS ON BEFORE THE PANEL? COORDINATE AND PICK YOUR BATTLES

The Panel is always well prepared. If you are arguing in front of the Panel, you can assume that the judges have read the parties' briefs and have a list of questions prepared. As mentioned in this Symposium's Introduction, in contrast to a traditional oral argument, it is not uncommon for parties to be limited to two to three minutes at oral argument. Defendants should be guided by a few principles to use their time wisely: (1) coordinate with co-defendants; (2) don't fight on what is not in dispute; (3) don't rehash your brief; and (4) avoid sounding like a travel agent.

Coordinate with co-defendants. Coordinate with co-defendants in advance of the hearing, if possible, to use your time wisely. Indeed, the Panel advises attorneys arguing the same viewpoint to designate a single representative.[45] For example, at a recent hearing on whether to centralize hundreds of COVID-19 insurance cases, a single attorney argued on behalf of more than 30 insurers who uniformly opposed the creation of an MDL.[46] Coordinating with co-defendants in advance of the hearing allows you to aggregate your time through a single representative, maximizing the number of arguments your group will be able to make.

Pick your battles. If all parties agree on an issue, do not waste what little time you have before the Panel on a non-issue. In the 3M litigation discussed above, where all parties unanimously supported an MDL, the entire argument focused on what court was best suited to hear the cases.[47] That being said, as

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[43] *See, e.g.*, *In re* Pella Corp. Architect and Designed Series Windows Prods. Liab. Litig., 996 F. Supp. 2d 1380, 1382 (J.P.M.L. Feb. 14, 2014) (MDL No. 2514) (noting "[a]lthough no constituent action currently is pending in that district, that is no impediment to its selection as transferee district").

[44] *Id.* at 1383.

[45] Julie Zeveloff, *7 Tips for Maximizing Your Time Before the JPML*, LAW360 (Sept. 21, 2010), https://www.law360.com/articles/188341/print?section=classaction.

[46] Jeff Sistrunk, *6 Key Moments from the COVID-19 Insurance MDL Hearing*, LAW360 (July 31, 2020), https://www.law360.com/articles/1297345/print?section=classaction.

[47] *In re* 3M Combat Arms Earplug Prods. Liab. Litig., 366 F. Supp. 3d 1368, 1369 (MDL No. 2885) (J.P.M.L. Apr. 12, 2019).

previously noted, it can be difficult to predict the venue or judge that the Panel will select for the MDL.[48]

Don't rehash your brief. As noted, the Panel will come to oral argument thoroughly prepared and will have read your briefs, so make sure they are comprehensive and persuasive; there is no need to rehash the arguments in your brief. Your valuable time will best be spent updating the judges on any new developments in the litigation, answering their questions, and driving home your key points.

Avoid sounding like a travel guide. Although the Panel considers convenience in its decision on where to transfer the MDL, it does not appear to be their top priority. Instead, "[t]he arguments presented in favor of a particular transferee district should be tied to the administrative factors that are likely to influence the JPML's decision."[49] Rather than focus on the merits of a location (e.g., size of the local airport or number of nearby hotels), focus on the merits of the district court and the evidentiary reasons why the case belongs there.

CONCLUSION

The formation of an MDL is one area where there may be "precious" agreement in a litigation. Of course, any agreement at this stage of the litigation is "precious" because it is rare, and often limited. Even when the parties agree on centralization, agreement on location is usually elusive. And oftentimes, there is no agreement on whether to form an MDL at all. Before the Panel, where time is of the essence, defendants must be efficient, the hallmark goal of MDL formation itself. And once the moment of agreement on MDL formation has passed (if it occurred at all), it's off to the races on the numerous disagreements that fuel litigation.

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[48] *See* Rothman, *supra* note 37.
[49] Bromberek, *supra* note 40.

THE JPML HEARING: A PLAINTIFF'S PERSPECTIVE

Elizabeth Cabraser*

I. INTRODUCTION

The public-facing work of the Judicial Panel on Multidistrict Litigation ("JPML" or "Panel") is most evident in the Hearings it holds at least every other month, to decide whether, where, and to whom to transfer federal cases sharing common questions of fact.

Of this singular institution, the Panel Hearing, it can be said (with profuse apologies to Winston Churchill): "[N]ever in the field of human conflict have so many, come so far, to speak so briefly, on cases of such magnitude." It is true that under contemporary Panel practice, the hearing has evolved into a uniquely efficient centralization mechanism, designed to afford logistical due process to the myriad participants in the dozen or more pieces of major litigation on each hearing's docket. This is done, in the course of one morning (and sometimes into an afternoon), with what may seem like mere snippets of argument on behalf of the parties, and searching interrogation by the Panel members, occasionally leavened by humorous repartee. The Panel ensures that the advocates for or against centralization focus on the statutory mandates of 28 U.S.C. § 1407(a): convenience for the parties and witnesses, and promotion of the just and efficient conduct of the litigation. The Panel relies on presenters to assist it in the search for transfer to an appropriate district and assignment to a judge who can (in what has become a Transfer Order mantra) "steer these cases on an efficient and prudent course."[1] Above all, while promoting § 1407's objectives, arguments must avoid the topics most dear to a lawyer's heart: the merits.

A Panel argument is thus, at least on the surface, all logistics, and no law. To enhance this paradox, in the quest for the ideal transferee judge, the worthiness of any may not be impugned. While some districts may be overburdened in general, may host too many other multidistrict litigations (MDLs), or may be simply inconvenient (e.g., Alaska, which has never hosted an MDL), all districts, and all the federal judges who serve in them, are wonderful.

The fact that the Panel manages to skillfully decide the momentous questions of centralization and assignment, without the lengthier arguments on each case to which litigators are accustomed, puzzles and frustrates participants, who travel from afar to advocate for the destiny of their cases. To be, or not to be, "centralized"? And if "transferred," where? And to whom? Can the fate of one's case, and hundreds or thousands of others, truly hinge on a two-minute (or,

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[1] *In re* Evenflo Co. Mktg., Sales Pracs., and Prods. Liab. Litig., MDL No. 2938, at 2 (J.P.M.L. June 2, 2020) (assigning the matter to Hon. Denise J. Casper, "an experienced transferee judge. We are confident that she will steer these cases on an efficient and prudent course."); *accord In re*: Nine West LBO Sec. Litig., MDL No. 294, at 2 (J.P.M.L. June 2, 2020) ("Judge Jed S. Rakoff is an experienced transferee judge, and we are confident he will steer this litigation on a prudent and expeditious course to resolution.").

for respondents, often a one-minute) argument?

Over the years, in the course of representing plaintiffs in a variety of federal statutory class actions, consumer litigation, and mass tort cases, I have made multiple pilgrimages to Panel hearings. I have come to appreciate them not only as a unique forum, but as a surprisingly functional mechanism that promotes early and active case management that catalyzes the development of the relationships among counsel, which crucially achieves functional (rather than dysfunctional) coordination. If it is true that "80% of life is showing up,"[2] the genius of the Panel Hearing is existential.

The utility of the hearing to the participants transcends and justifies the inconveniences of travel by providing an invaluable opportunity for meetings among lawyers and jump-starting case management planning. The regular hearings of the Panel, in ten or so different locations each year, have created and nurtured a specific, durable, and living MDL culture that in turn has come to play an essential, albeit subjective and qualitative, role in the success of the MDL system in fulfilling § 1407's purpose.

II. WHAT THE PANEL HEARING MEANS TO THE PANEL

In 2008, an esteemed former Chair of the Panel, the late John G. Heyburn II, wrote a comprehensive article on the work of the Panel, *A View From the Panel: Part of the Solution*.[3] Although twelve years have passed since Judge Heyburn wrote it, the article remains instructive as to the history, evolution, and contemporary practices of the Panel.[4] Judge Heyburn summarized the Panel's procedures:

[2] This aphorism is most frequently tied to Woody Allen's quip that "80 percent of success is just showing up." Either way, it has become a given that success in multidistrict litigation is best enhanced by "showing up" — and being involved — in the Panel process.

[3] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225 (2008).

[4] *See id.*

> The Panel's procedures, including rules setting forth relatively short deadlines for motion practice, are designed to promote fairness, efficiency, and an opportunity to be heard. The Panel keeps its written opinions brief and to the point. Each decision follows a similar format, succinctly addressing the relevant issues. And, over the past two decades, nearly every one of those decisions has been unanimous. The straightforwardness and unanimity of the Panel's decisions are not because every decision is easy, and this dynamic is not a result of the complete absence of differences among the Panel members. The Panel devotes considerable discussion to the more complex and difficult dockets. Those discussions invariably lead to a consensus about the best course of action.[5]

The Panel is a unique and paradoxical tribunal. It is a federal tribunal tasked with organizing, coordinating, and centralizing the nation's federal civil litigation; yet it operates independently of the Federal Rules of Civil Procedure. Instead, it has devised, and periodically revises, its own Panel Rules.[6] It is not only a tribunal of first resort, but also last resort. There is no right of appeal from a Panel's order granting or denying transfer.[7] Review is possible only by petition for writ of mandate,[8] an avenue of recourse only rarely utilized. The Panel is just that: a seven-judge panel, comprised of district (and sometimes appellate) judges, each of whom must come from within a different circuit.[9] The Panel holds a number of hearings each year, at a different location each time.[10] The grant of MDL centralization is not a foregone conclusion. As an increasingly higher percentage of federal civil actions have found themselves components of multidistrict proceedings, observation of the Hearing Orders posted on the Panel's website reveals that the percentage of centralization petitions that the Panel grants has decreased, perhaps reflective of a Panel attempt to counterbalance concerns of multidistrict takeover.

The Panel considers the hearing itself a key factor in achieving its "consensus about the best course of action," because it provides a unique opportunity to hear about the litigation with a high degree of candor from the lawyers who directly prosecute and defend it.[11] As Judge Heyburn notes:

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[5] *Id.* at 2235.
[6] The Panel posts its Hearing and Panel Rules, and information on pending MDLs on its website, jpml.uscourts.gov.
[7] 28 U.S.C. § 1407(e).
[8] *Id.*
[9] 28 U.S.C. § 1407(d).
[10] *See* Heyburn, *supra* note 3, at 2235.
[11] *See id.*

> Perhaps the most remarked-upon aspect of these procedures concerns oral arguments on new § 1407 motions. These arguments are scheduled at different locations around the country every two months. During oral argument, each advocate is allowed between two and five minutes to present his or her party's position. The Panel's oral argument docket often contains fifteen to twenty § 1407 motions for creation of a new MDL, with between two and seven (or, on rare occasions, more) attorney appearances per motion. Once you do the math it becomes evident that the Panel generally must accommodate fifty to seventy lawyers during the normal two and one-half hour sessions. The Panel staff attempts to try to divide the available time fairly among the new dockets and among those advocating or contesting centralization or advocating the selection of a particular transferee district.[12]

After describing the MDL Panel's hearing practice, Judge Heyburn states the obvious: "To the uninitiated, this may seem like an entirely unreasonable procedure."[13] How, and why, then, does it work, at least from the Panel's perspective? As Judge Heyburn continues:

> In practice, it works quite well for a variety of reasons. The Panel is composed of seasoned and attentive judges who are well - versed in the details and implications involved in each docket. Oral arguments provide the unique opportunity for counsel to focus our attention on those issues that most affect the litigation and that really speak to the statutory criteria. Experienced counsel can distill the essential points of their argument within the few moments allowed. They emphasize their substantive concerns about why centralization under § 1407 will either promote or impede the just and efficient resolution of their case or the litigation as a whole. In a given docket, such arguments can be decisive.

Judge Heyburn's confidence in counsel is reassuring. But what do counsel – at least plaintiffs' counsel – think?

III. WHAT THE PANEL HEARING MEANS TO THE ADVOCATES

As practice before the Panel boils down, at least as this author perceives it, it is just this simple: in two minutes or less, make the case for centralization of the piece of necessarily complex litigation, emphasizing the § 1407 statutory factors, and avoiding all extraneous, irrelevant, or offensive matters.[14] Do plaintiffs' counsel practice our two minutes (or more frequently, our one minute) of oral arguments before presentation? You bet we do. Do we remember to be responsive to the Panel's inevitable questions that break into our carefully rehearsed, not-one-word-wasted presentations? Of course, we try. Do we often leave our carefully written and rehearsed presentations aside, preferring to live in the moment and respond, directly and candidly, to the Panel's questions about

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[12] *Id.* at 2235-36.
[13] *Id.* at 2236.
[14] *Id.*

our case (which we both hope for and dread)? Absolutely.

A Panel argument is unique (and uniquely stressful) because the destiny of a piece of litigation is at stake. It is not the where, so much: geography is not always destiny. It is, of course, the who: the identity of the transferee judge to whom the management of the litigation is to be entrusted is, as in the nature of all complex litigation, decisive. It may not be decisive as to outcome, and of course advocates studiously avoid making "merits" arguments to the Panel. The role of the Panel is not to decide who will, or should, win or lose the motions in, or who should prevail in the outcome of a particular piece of litigation. Instead, the Panel's job is judicial air traffic control.

The paradox of Panel arguments, to those who must make them, is that advocates may not speak on the matters most germane to the merits, at least on the surface. We are arguing the where and (delicately) the who of our cases, not the why. We are arguing the what of our cases to demonstrate common factual questions that will benefit from centralized pre-trial treatment. Among the "don'ts" novice advocates learn are: no judge can be disparaged; no judge may be favorably compared to another; the Panel is not interested in which judge will, or has, ruled favorably on the case from our perspective; and (at least in my observation of the Panel's reaction when such norms are violated) complaints about the misbehavior of one's adversary (or one's co-plaintiffs) must be factually addressed, if at all.

Panel arguments, within the time limits allowed, can become quite lively, if not contentious, given the stakes involved. This can be exhilarating despite, or perhaps because of, the time constraints involved. What will strike the outside observer (or, in these COVID days, the passive telephone listener) are the generally high quality of the arguments made, the Panel's familiarity with the docket, and the sophistication of the questions posed by Panel members.

Advocates appearing for oral argument before the Panel typically converge in a large ceremonial courtroom to accommodate potentially hundreds of lawyers present for oral argument, either as presenters or interested observers. The sheer number of presenters who must be accommodated has led to the typically short allowance of oral argument time. One-minute arguments are typical for presenters who do not oppose transfer but simply wish to weigh in on the identity of the transferee court. A time clock is kept, the Panel is almost invariably a "hot" bench, and questions from Panel Judges fly fast and furious. Sometimes, a presenter may be permitted extra time if the Panel has many questions or is interested in questioning the presenter regarding the status, progress, and nature of the litigation. The Panel Judges come well prepared, having actually read the briefs and submissions, and, as Judge Heyburn's article emphasizes, are intent on reaching an informed consensus as to transfer, or denial of transfer, and/or the district court—and transferee judge—to whom an MDL docket will be assigned.[15]

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[15] *See id.* at 2235.

IV. WHAT THE PANEL HEARING MEANS TO MDL CULTURE

Meanwhile, out in the hall, those whose dockets have yet to be called, or who have finished their arguments, congregate to greet familiar colleagues, meet and confer on case management or organization issues, and exchange endless predictions about the fate and destination of the matters argued that day. It is a "gathering of the tribes" of complex litigators from around the country: an unsurpassed opportunity to see and be seen, to meet, to discuss, and sometimes to bargain. Everyone wants to be "in the room where it happens."[16]

The day preceding the hearing, as the attorneys converge, is used to advantage as well: CLEs are provided by HarrisMartin, American Association for Justice, and settlement claims administration vendors; often, the class action notice and settlement administration firms sponsor their own receptions and gatherings. The day before the Panel Hearing has become a major educational and social event.

The Panel is well aware of this collateral activity. Since the Panel Judges themselves often serve as transferee judges, they know that the lawyers who have attended Panel sessions come to the initial status conferences in the resulting MDLs well-prepared to discuss discovery and case management. This preparation is every bit as valuable to the orderly and efficient conduct of multidistrict litigation as the minutes spent by each presenter on oral argument itself. Without the ability to convene and converge at the site of an MDL Panel Hearing both the day before and the day of the Hearing itself, the inestimable value of this convergence would be lost.

The Panel Hearings held in May and July 2020, during the early months of COVID-19, were markedly different. They emphasized both the commitment of the Panel to continue its essential work and the value lost when advocates cannot convene in person. For example, the July 30, 2020 hearing of the JPML was conducted via Zoom teleconference for the Judges and the arguers only. Those not presenting during a particular docket, and those accustomed to attending in person to observe were confined to telephonic listen-only mode. This second-best means of participation did not deter counsel from showing an interest in the proceedings. There is always one matter that seems to draw the lion's share of interest among attendees to a JPML Hearing. Unsurprisingly, in the time of COVID-19, at the July 30, 2020 Hearing Session, that case was MDL Docket No. 2942, *In re* COVID-19 Business Interruption Protection Insurance Litigation.[17] At one point during the COVID-19 litigation arguments, there were 478 telephonic participants on the conference line.

The Panel members were, as always, quite well-prepared. In a concession to the somewhat static and linear nature of a Zoom conference (a phenomenon with which all courts and litigators are now depressingly familiar), the Panel did not interrupt presenters by peppering them with questions, and the presenters were allowed to make their two- or three-minute presentations uninterrupted.

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[16] Apologies to Lin-Manuel Miranda's Broadway hit, *Hamilton: An American Musical*.

[17] *See In re* COVID-19 Bus. Interruption Prot. Ins. Litig., MDL No. 2942 (J.P.M.L. Aug. 12, 2020).

Although the Panelists made up for the lack of interruptions with pointed and incentive questions at the conclusion of each presentation, the excitement of real-time conversation among the panelists and lively interchange between panelists and presenters was appreciably diminished. Will that affect the quality of the outcome? Mostly likely not. The Panel members convene both before and after the oral argument sessions to discuss and reach consensus on their transfer decisions. Remote communications will not diminish their effectiveness.

But the most singular quality of a Panel Hearing from the practitioner's standpoint is missing: the profound value of being there. Complex litigation is all too often practiced remotely, via conference call and video conference—a common situation even before COVID. The in-person JPML hearing has been a gathering place, a magnet drawing practitioners from across the country to a momentous event of great interest to all, with just enough drama—and none of the trauma—of determinations on the merits that produce winners or losers. It was, and hopefully will be yet again, a uniquely valued opportunity for complex litigation practitioners of all stripes, and on both sides of "the v." to be, if only for a day or two, true colleagues. The tone and civility of complex litigation, particularly those cases of high stakes and high profile in which the Panel often deals, has been established and maintained, for the better, through the personal and human dimension of the Panel hearing as a convening mechanism.

An evolutionary note: a mass photo of those present at a Panel Hearing is a literal snapshot of the multidistrict bar. For many years, it would have looked like a group shot of an older, mostly white, mostly male club. This has begun to change, reflecting a long overdue increase in participation—including in arguments—by younger lawyers, women, and attorneys of color. Attendance at a Panel hearing and the accompanying events is a crash course in multidistrict litigation, and therefore a must for those lawyers looking to develop their litigation careers through visibility and engagement. Greater inclusion and diversity in the Panel hearing participants is both a cause and effect of the initiative by transferee judges to encourage—and appoint—more diverse plaintiffs' leadership structures. The MDL process is much the better for it.

V. CONCLUSION

This article celebrates the value of decades of recurring convergences of scores or hundreds of lawyers before a seven-judge Panel, live and in person, in real time in one real place. The live Panel hearing, like other court proceedings, fell victim to COVID-19. Pandemic-era Panel hearings have continued by necessity through Zoom. While the Panel's continuity and adaptiveness are impressive, and the Panel system certainly has not crashed, the hearings are not the same. The Panel hearing, more than most, depends for much of its vitality and utility, on "liveness." We are told that, even after the pandemic ends, many court hearings will remain remote. Convening telephonically or by video conferences is undoubtedly less expensive and more convenient than live hearings. Courts, practitioners, and their clients, will appreciate the real savings of time and money. Whenever the "new normal" arrives, many judges and

lawyers have expressed the hope and expectation that it will embrace more efficiency and less time lost, a goal that remote hearings of routine matters will foster. But it is also my hope, that when possible, the tradition of live JPML hearings will resume. If so, the long-term prospect of effective and efficient case management of complex MDLs will improve. Though the FDA has not approved this statement, live Panel hearings help support a healthy MDL system.

PROCEEDINGS BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

Judge Catherine D. Perry*

The federal system for handling multidistrict litigation was created by statute in 1968 after the judiciary's experience with more than 1,800 antitrust actions involving electrical equipment manufacturers.[1] When multiple civil lawsuits raising many of the same or similar issues are pending in multiple federal courts, it makes sense to have one judge preside over the pretrial preparation of the cases so the parties and lawyers do not have to repeat discovery or risk inconsistent rulings from judges around the country. The Judicial Panel on Multidistrict Litigation is the group of seven judges who consider whether cases should be centralized in an MDL and, if so, to what district and to what judge the cases should be transferred.

The first sentence of the Multidistrict Litigation Act of 1968, now codified at 28 U.S.C. § 1407, provides the framework for transfers under the Act:

> (a) When civil actions involving one of more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, that the panel may separate any claim, cross-claim, counter-claim or third party claim and remand any of such claims before the remainder of the action is remanded.[2]

Thus, the statute authorizes the Judicial Panel on Multidistrict Litigation to transfer or centralize cases from various district courts to a single district (the transferee court) for pretrial purposes.

The seven judges on the Panel are appointed, from the ranks of district and circuit judges, by the Chief Justice.[3] By custom, the term of service is seven years, and there are usually only one or two circuit judges, with the rest of the Panel consisting of district judges. Also, by custom, the Chief Justice designates one of the seven judges as the Chair of the Panel. Among other duties, the Chair acts as the presiding judge during Panel hearings and deliberations.

The MDL process begins when a party to a case files a motion with the

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[1] *See e.g.,* Gelboim v. Bank of Am. Corp., 574 U.S. 405, 410 (2015).

[2] 28 U.S.C. § 1407(a) (2020).

[3] *Id.* § 1407(d).

Panel[4] seeking to transfer a group of cases for centralized or consolidated pretrial proceedings. As set out in the Panel Rules, these motions to centralize are filed with the Panel itself, which will decide the motion.[5] The moving party lists all the cases it seeks to have centralized and asks for transfer to and centralization in a particular district.[6] The movant must also provide a brief stating the background of the litigation and its reasons for seeking transfer. All parties to all cases that the motion seeks to centralize are given notice and an opportunity to respond to the motion. If additional cases involving factual issues in common with the cases in the motion are filed after the motion, the parties notify the court of these "tag-along" cases.[7] Parties to tag-along cases are also allowed to file briefs responding to the motion.[8] Responding parties may join in the motion, may oppose centralization, or may agree to centralization but disagree about the appropriate transferee district or proposed scope of the MDL. The Panel then schedules the motions to centralize for oral argument.

The Panel holds hearings six times a year, generally the last Thursday of the odd-numbered months.[9] Hearings are held in different courthouses around the country, as the Panel has no official home seat.[10] It is not unusual for the Panel to sit in the largest courtroom in the courthouse and for the courtroom to be filled to capacity or overflow capacity, as many lawyers who are not arguing the motions but have an interest in the cases attend the hearings as observers. Lawyers representing the parties to the motion and lawyers in tag-along cases that are already filed at the time of the hearing are given the opportunity to argue, but multiple parties seeking the same result must usually select one counsel to argue that position. The size of the oral argument docket ranges from four or five motions to more than fifteen motions seeking new MDLs. At the hearings, counselors present very short arguments—usually no more than two or three minutes per lawyer—on the issue of whether the cases should be centralized and, if so, in which district. The Panel often finds itself asking questions regarding very technical scientific or business issues. All members of the Panel ask questions—it is generally considered a "hot bench"—so arguments frequently exceed the originally established time limits.

Following the hearing, the Panel members confer confidentially to decide whether and where to centralize cases into an MDL. The Panel must consider a multitude of factors, beginning, of course, with whether the cases present one or more common questions of fact.[11] This requires detailed consideration of the

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[4] The JPML has its own Panel Executive, Clerk of Court, staff attorneys, rules, and docketing system. Its offices are in the Thurgood Marshall Federal Judicial Building in Washington, D.C. The Panel rules may be found on its website, www.jpml.uscourts.gov, and are also published at 277 F.R.D. 480.

[5] J.P.M.L. R. 6.2.

[6] J.P.M.L. R. 6.1(b).

[7] J.P.M.L. R. 1.1(h), 6.2(d).

[8] J.P.M.L. R. 6.2(e).

[9] Hearings are usually held during the first week of December if Thanksgiving is on the last Thursday of November.

[10] During the time of restrictions caused by the COVID-19 pandemic, oral arguments have been conducted by videoconference.

[11] Section 1407(g) specifies that antitrust cases in which the United States is a party may not be

factual allegations and claims of all the complaints, as well as issues of fact raised in the briefs and during oral arguments.

The goal of centralization is to promote the just and efficient conduct of the actions, while also serving the convenience of parties and witnesses. Among the factors the Panel considers in making the decision are the number of cases (both those already pending and those reasonably likely to be filed later), whether the cases include overlapping putative class actions, the nature of the claims and defenses, the number and complexity of common issues of fact, the complexity of discovery, and how much discovery is common to all parties or is specific to individual parties. The Panel also considers the probability of duplicative motion practice and the danger of inconsistent rulings, especially on issues like class certification or admissibility of expert testimony under *Daubert*.[12] If individual issues are likely to predominate over common issues, centralization is less likely. Centralization is also less likely if cases have vastly different procedural postures, such as when some cases are nearing trial, but others are only recently filed, or when many or most cases are nearing settlement. The Panel also considers whether transfer to an MDL is necessary, or whether the parties can achieve the same efficiencies through voluntary cooperation in discovery, or through transfers between districts under 28 U.S.C. § 1404.

Once the Panel decides that centralization and transfer is appropriate, it must then determine the district and judge to whom the case will be transferred. In recent years, the Panel has implemented an annual survey of all district judges, asking them if they are interested in handling an MDL and asking if they prefer certain types of cases. Fortunately, many judges respond in the affirmative. This has increased the number of judges available to preside over MDLs and has also increased the diversity among MDL judges.

When multiple districts and multiple judges are suggested, the Panel usually looks first to those judges who are already presiding over one of the cases on the motion, or over one or more tag-along cases. Because of judicial vacancies, varying workloads, and issues specific to the case, it is not always appropriate to select one of the originating districts. The Panel must find a district that is convenient and makes sense under the facts of the case, as well as a judge who is willing and able to handle it. The Chief Judge of the district must also consent to the transfer.[13] The Panel considers when cases were filed, how advanced they are, the number of related actions pending in a particular district, and where related state-court, administrative, criminal, or bankruptcy proceedings are pending. Obviously, the Panel looks for judges who are capable of handling the particular case, which may or may not depend on the length of time judges have served on the federal bench, whether they have had previous MDL experience, or whether they had relevant experience before joining the federal bench. Some cases may be

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transferred under the MDL statute. Similarly, cases removed to federal court from state court as "mass actions" under the Class Action Fairness Act, 28 U.S.C. § 1332(d), may not be transferred to an MDL unless a majority of the plaintiffs request such transfer. 28 U.S.C. § 1332(d)(11)(C)(i) (2020).

[12] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993).

[13] 28 U.S.C. § 1407(b).

truly nationwide in scope and focus, so that any district in the country would be appropriate.[14]

The JPML issues written, published orders of its decisions in each case. No appeal or review is allowed except by extraordinary writ.[15] The Panel order is the mechanism by which the MDL is actually created. Once the order issues, the Clerks of Court in the various transferor districts transfer the cases to the selected district, and the transferee Clerk assigns the case to the designated judge and establishes a master MDL docket.

If additional cases within the scope of the MDL are later filed in other districts, the parties notify the JPML of the potential tag-along case, and the JPML Clerk, after determining whether the action is appropriate to add to the MDL,[16] issues a Conditional Transfer Order transferring the case to the transferee district.[17] Any party to the tag-along case can file a notice of objection and motion to vacate the Conditional Transfer Order. The Panel considers these motions to vacate on a non-argument docket at the time of its next hearing, and then issues orders either granting or denying the motion to vacate.

Once an order is entered creating an MDL and transferring cases to the transferee court and judge, that judge is completely in charge of all pretrial proceedings. In addition to discovery, the transferee judge has the authority to rule on all pretrial motions, including motions to dismiss, motions for summary judgment, and motions to exclude or limit expert testimony under *Daubert* or Rule 702 of the Federal Rules of Evidence. Many cases are resolved while they are pending before the transferee court, either by dispositive motion or by settlement. The transferee court may not preside over trials of any case not originally filed in the transferee district.[18] When pretrial matters are concluded, the Panel must remand the cases for trial in the originating transferor district, unless the parties consent to trial before the transferee judge by means of a *Lexecon* waiver. Sometimes the transferee judge supervises the common discovery but leaves individual discovery, such as on specific causation or individual damages, to be conducted in the transferor district. To initiate remand to the transferor court, the transferee judge sends the Panel a "suggestion of remand" explaining that the case or cases are ready to be returned to their original district.[19] The Clerk of the Panel then issues a Conditional Remand Order, to which any party to the case may object and file a motion to vacate.[20] If the Clerk does not enter a Conditional Remand

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[14] An example would be MDL 2672, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, which involved hundreds of thousands of consumers scattered across the United States, but that did not have a United States based focus of activity.
In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prods. Liab. Litig., 148 F. Supp. 3d 1367, 1369 (J.P.M.L. 2015) (MDL No. 2672).

[15] 28 U.S.C. § 1407(e).

[16] The Panel staff attorneys examine the tag-along filings to assist the Clerk in making this determination; if necessary, the staff consults with the Panel Chair.

[17] J.P.M.L. R. 7.1.

[18] *See* Lexecon Inc. v. Milbert Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28, 40 (1998).

[19] J.P.M.L. R. 10.1(b).

[20] J.P.M.L. R. 10.2(b).

Order, any party may file a motion to remand directly with the Panel.[21] The Panel also considers these motions on the non-argument docket at its next sitting.

Transferee judges apply the same case management techniques used in other cases as authorized by the Federal Rules of Civil Procedure; although, of course, the management of an MDL is more complex than the management of a routine case involving a single plaintiff and single defendant. Although from time to time there are suggestions that the courts should adopt MDL-specific rules, most judges and lawyers believe the Federal Rules are sufficient. Federal district courts are accustomed to handling complex litigation, and multiple cases with overlapping issues are often filed in a single district.[22] A district's local rules usually provide the procedures for filing motions to consolidate the cases or for requesting that the cases be considered "related" and handled by a single district judge. As with MDLs, common case management techniques in these single-district cases may include appointing lead or liaison counsel for groups of plaintiffs or defendants, establishing a procedure for assuring that electronically stored information will be accessible to all parties, requiring plaintiff fact sheets or census lists identifying or categorizing plaintiffs, conducting common science days or *Daubert* hearings, holding bellwether trials, and, of course, settlement techniques, such as mediation or appointment of special masters under Rule 53 of the Federal Rules of Civil Procedure.

The Panel does not instruct transferee judges how to handle the cases, nor does the Panel serve as an overseer or reviewing court. Instead, the Panel acts as a resource for the transferee judge by maintaining a bank of sample orders from other cases that judges may access and, perhaps most importantly, providing information to newly appointed transferee judges about other judges who may have handled similar MDLs or who may have faced similar case management issues. Federal judges have long trained one another, and the JPML process is no different.

The Panel holds an annual Transferee Judges' Conference to provide training to MDL judges. Most of the sessions are led by experienced transferee judges who speak on issues of case management, such as those listed above, as well as specific topics like expert witnesses, class certification, jurisdiction, or newly emerging issues, like third-party litigation financing. In recent years, the Panel has also invited law professors and litigators to speak on some of these topics, but the focus always remains on judges talking with other judges. From time to time, the Panel, in conjunction with the Federal Judicial Center, presents additional training–open to all judges–on handling complex litigation, which includes MDLs.

Recent years have seen an extraordinary growth in the number of federal cases involved in MDL proceedings. As of July 2020, there were 183 MDLs pending, involving more than 130,000 individual cases.[23] But the large numbers of

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[21] J.P.M.L. R. 10.3(a).

[22] For example, in the Eastern District of Missouri we have had multiple cases arising out of a casino barge accident on the Mississippi river, cases alleging water pollution affecting entire neighborhoods, and thousands of cases alleging personal injuries resulting from the operation of a lead mine.

[23] *Pending MDLs*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., www.jpml.uscourts.gov/pending-mdls.

individual cases are concentrated in a few very large MDLs, most often cases involving medical devices, drugs, or large disasters, such as those caused by the BP oil spill or the opioid epidemic. Only seventeen of the currently pending MDLs contain more than 1,000 cases.[24] Almost three-quarters of the currently pending MDLs contain 100 or fewer actions.[25]

The types of cases that become MDLs are as varied as the types of cases filed in federal court. Aside from the large products liability and disaster cases mentioned above, MDLs include patent, antitrust, securities, environmental, data breach, employment practices, air disasters, contracts, business and sales practices, and other consumer claims. In short, there is no such thing as a "typical" MDL. However, proceedings before the Judicial Panel on Multidistrict Litigation, like proceedings before individual district courts, do follow a typical pattern, as I have attempted to describe in this article.

[24] *Id.*
[25] *Id.*

DIVERSITY IN MDL LEADERSHIP: A FIELD GUIDE

Elizabeth Chamblee Burch*

I. INTRODUCTION

Multidistrict litigation (MDL) includes some of the most high-profile torts of our day—opioids, talc, and RoundUp, to name a few—but the attorneys who spearhead these proceedings often look a lot like they did fifty years ago, predominately white and predominately male. Courts seem to be missing what businesses, academics, and civil-rights lawyers have long argued: the case for diversity is multi-faceted. As the *Wall Street Journal* explained: "There is a moral case for diversity and inclusion. And there's a business case: long-term value is tied to diversity and diversity is tied to innovation. But the last few years have told us there is a democracy case, too."[1]

Picking the right lawyers to spearhead these proceedings on plaintiffs' behalf is pivotal. Those who preside over and work within MDL must grapple with some of the most pressing, complicated legal problems of our time—from cutting-edge decisions about scientific causation to federal preemption to novel applications of centuries-old public-nuisance doctrines. These questions are difficult not just because they are novel, but because they affect thousands of plaintiffs too. Moreover, because MDL requires only a single common factual question—not that common issues *predominate* as in a Rule 23(b)(3) class action—plaintiffs' interests and goals are likely to be heterogeneous.

But a debate has emerged over whether attorneys best positioned to fill MDL leadership roles are the grizzled repeat players who appear time and again—and who are largely white, older, and male—or newcomers with fresh ideas and energy who may not always look like their predecessors.[2] And if diversity is important—what *kind* of diversity matters?

For most, "diversity" brings to mind category or identity diversity, which includes race, ethnicity, age, gender, physical disabilities, and demographic dissimilarities.[3] Historically, little identity diversity has existed among the regulars selected as MDL leaders: in 2015, only eleven of the top fifty repeat

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[1] Lauren Weber, *How to Expand Diversity in the Workplace*, WALL ST. J. (Jan. 9, 2021, 9:56AM), https://www.wsj.com/articles/how-to-expand-diversity-in-the-workplace-11610204183?st=fvkwfieyx3rxc25&reflink=article_email_share.

[2] *Compare* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) (advocating for cognitively diverse newcomers) [hereinafter Burch, *Monopolies in MDL Litigation*], *with* Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

[3] Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 J. SOC. ISSUES 261, 267-68 (2009); K.A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Work Groups*, 44 ADMIN. SCI. Q. 741 (1999); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 AM. PSYCHOL. SOC'Y 31, 41-42 (2005).

players in MDL leadership were women (22%).[4] The years since have seen some improvement—in 2020, 40% of the top thirty lawyers who led three or more MDLs were women.[5]

Judges, too, tend to think of diversity in terms of demographics.[6] For instance, in July 2020, Judge James Donato made headlines when considering appointments for securities class counsel, saying:

> This Court is concerned about a lack of diversity in the proposed lead counsel. For example, all four of the proposed lead counsel are men, which is also true for the proposed seven lawyers for the "executive committee" and liaison counsel. In addition, the proposed counsel appear to be lawyers and law firms that have enjoyed a number of leadership appointments in other cases. While this experience is likely to benefit the putative class, it highlights the "repeat player" problem in class counsel appointments that has burdened class action litigation and MDL proceedings.[7]

Yet, when Judge Harold Baer, Jr. instituted diversity requirements in selecting ERISA class counsel, Justice Alito issued a rare opinion to deny a writ of certiorari, calling into question the constitutionality of Baer's practices:

> I am hard-pressed to see any ground on which Judge Baer's practice can be defended. This Court has often stressed that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." Court-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.[8]

Although the issue of diversity in counsel selection was not squarely before the Court, Justice Alito's rebuke nonetheless raises important questions about how judges should navigate diversity in leadership selection, both in nonclass MDLs

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[4] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 93 n.102 (2015) [hereinafter Burch, *Judging MDL Litigation*].

[5] Amanda Bronstad, *There Are New Faces Leading MDLs. And They Aren't All Men*, LAW.COM (July 6, 2020, 10:53 PM), https://www.law.com/2020/07/06/there-are-new-faces-leading-mdls-and-they-arent-all-men/?slreturn=20200915192502.

[6] *See, e.g.*, Pretrial Order #20 at 3, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-2924 (S.D. Fl. May 8, 2020) (hoping that the selected Zantac MDL leaders would "endeavor to build on the diversity of its team"); Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, BLOOMBERG L. (July 30, 2020), https://news.bloomberglaw.com/social-justice/calls-for-lawyer-diversity-spread-to-complex-class-litigation; Alison Frankel, *Judge in Robinhood Class Action Balks at All-Male Class Counsel Team*, REUTERS, July 15, 2020, https://www.reuters.com/article/legal-us-otc-diversity/judge-in-robinhood-class-action-balks-at-all-male-class-counsel-team-idUSKCN24G324; Alison Frankel, *Quoting Lorax and Noting Diversity, N.Y. Judge Appoints Lead Counsel in Deva Product Case*, REUTERS, July 30, 2020.

[7] Order re Consolidation and Interim Class Counsel at 3, *In re* Robinhood Outage Litig., No. 20-cv-01626-JD (N.D. Cal. July 14, 2020) (internal citations omitted).

[8] Martin v. Blessing, 572 U.S. 1040, 1042 (2013) (internal citations omitted).

without firm rules to guide them and in class actions where Rule 23(g) allows judges to consider "any . . . matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[9]

This article counsels judges caught in the middle. By broadening the definition of diversity and focusing the inquiry on a single, pivotal question—how can a plaintiffs' MDL leadership best represent a heterogeneous group of plaintiffs?—courts can navigate this quandary and put the best leadership team in place.

Part I surveys current leadership selection methods and highlights shortcomings in courts' focus on experience, cooperation, and financing abilities, which tend to empower the same attorneys time and again. Part II explains the debate over the "repeat player problem" that Judge Donato identified.[10] Although repeat players bring expertise and knowledge, the tight-knit nature of the MDL bar and the emphasis on cooperation suggest that insiders are unlikely to dissent even when doing so would be in their clients' best interests. It also means that attorney self-dealing may be ignored. Finally, Part III suggests some best practices: courts should consider conflicts of interest that are likely to emerge between plaintiffs and plaintiffs' counsel, encourage dissent and the airing of minority viewpoints, and select leaders based on attorneys' *cognitive* diversity—meaning different knowledge, skills, information, and tool kits. Building a team with diverse perspectives and knowledge steers clear of the constitutional challenges Justice Alito raised while empowering the best composite team.

To be sure, there are a number of MDLs in which normative claims about representation, fairness, and social legitimacy may make *identity* diversity among leaders key—mass torts over trans-vaginal mesh, Mirena, Yasmin/Yaz, Essure, NuvaRing, and OrthoEvra all come to mind.[11] Gender can matter where gender itself is an issue as it is in these proceedings.[12] But identity diversity proponents often argue that diversity likewise improves outcomes. Here, studies are mixed, with some suggesting that when people perceive themselves as belonging to opposing groups, they may tune each other out and that those with privately held information may be less inclined to share it for fear of being mocked or socially ostracized.[13]

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[9] FED. R. CIV. P. 23(g)(1)(B).

[10] *See* Order re Consolidation and Interim Class Counsel at 3, *In re* Robinhood Outage Litig., No. 20-cv-01626-JD (N.D. Cal. July 14, 2020).

[11] *See* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 390 (2010) (citing Charles Cameron & Craig Cummings, *Diversity and Judicial Decision Making: Evidence from Affirmative Action and Cases in the Federal Courts of Appeals, 1971-1999* (paper presented at the Crafting and Operating Institutions Conference, 2003)).

[12] Jenifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005).

[13] Marie-Élène Roberge & Rolf van Dick, *Recognizing the Benefits of Diversity: When and How Does Diversity Increase Group Performance?*, 20 HUMAN RESOURCE MGMT. REV. 295, 297 (2010) (citing studies).

The evidence is more straightforward when researchers consider *cognitive* diversity. Cognitively diverse groups consistently see "bonuses" when group members perform disjunctive, nonroutine, thought-provoking tasks like brainstorming legal strategy or identifying which issues to appeal.[14] And, as we shall see, cognitive diversity and identity diversity can overlap.

Busy judges looking for quick guidance on these matters may find the appendix to *Monopolies in Multidistrict Litigation* useful.[15] It contains a Pocket Guide for Leadership Appointment and Compensation, a Leadership Application Form, a Leadership Applicant Scoring Sheet, and sample orders for suggesting remand and replacing leaders.[16] And those looking for more detail on the ideas summarized here can look to the original works from which I excerpted this article.[17]

II. CURRENT LEADERSHIP SELECTION METHODS

To prevent the chaos that would ensue if all the plaintiffs' lawyers pooled together in an MDL tried to litigate their cases simultaneously, MDL judges appoint a handful of leaders to do all manner of things from coordinating and conducting discovery to negotiating settlements.[18] But the plaintiffs themselves have no say in whom the judge chooses; they cannot fire leaders even if leaders ignore their interests, and plaintiffs regain decision-making control only in the unlikely event that their case is remanded to their court of origin.

To pick leaders, some judges defer to plaintiffs' attorneys' "consensus" slates, where lawyers hash out leadership questions among themselves. Others conduct an open application process and formally select leaders based on attorneys' experience, financial resources, and cooperative tendencies—factors that favor repeat players.[19] The consensus method, too, favors insiders: "[T]he 'good ol' boy' network of intertwined law firms has sought to capture the case and exclude all but the usual cast of characters," explained plaintiffs' attorney Wayne Travell.[20]

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[14] SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES xiv-xv, 325-27 (paperback ed., 2007).

[15] *See* Burch, *Monopolies in MDL Litigation, supra* note 2, at 156-66.

[16] *See id.* at 160-66.

[17] *See* ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (Cambridge University Press 2019) [hereinafter BURCH, MASS TORT DEALS]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Burch, *Monopolies in MDL Litigation*, *supra* note 2; Burch, *Judging MDL Litigation*, *supra* note 4.

[18] One study on all MDLs (not just products liability) suggested that "many" orders left leadership duties undefined. David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

[19] Burch & Williams, *supra* note 17, at 1460-63.

[20] The Williams Plaintiffs' Group's Response to Other Parties' Application to Serve on Plaintiff's Steering Committee at 1, *In re* Lumber Liquidators Chinese-Manufactured Flooring Prods. Mktg, Sales Practices & Prods. Liab. Litig., No. 15-md-02627 (E.D. Va. Aug. 3, 2015).

Regardless of the method, however, outside of class actions, few MDL judges focus on adequate representation, preferring to leave those ideals to disempowered individual lawyers.[21] Yet, the Federal Judicial Center's 2004 *Manual for Complex Litigation* recognizes that leadership "[c]ommittees are most commonly needed when group members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making."[22] It suggests courts consider "whether designated counsel fairly represent the various interests in the litigation" and, "where diverse interests exist," "designate a committee of counsel representing different interests."[23]

Moreover, emphasizing cooperation (one of the factors judges do use) can dampen the advantage that insiders' experience confers and further imperil adequate representation; when cooperation is paramount, it may foster a need for attorneys to curry favor with one another to secure lucrative positions in future leadership hierarchies. Attorneys who disrupt the status quo or challenge those in power are unlikely to find themselves with support from other lawyers in new MDL beauty contests or consensus slates.

Emphasizing cooperation thus deters dissent by implicitly labeling it as something that should not be rewarded. Yet, dissent can be pivotal in protecting plaintiffs' diverse interests. With a statutory requirement that MDL cases share only a single, common question of fact,[24] plaintiffs' best interests are unlikely to be uniform. Considering adequate representation in selecting leaders and permitting dissent from non-leaders are crucial safeguards. As psychology Professor Charlan Nemeth explains, when people are afraid to speak up, "[s]ilence then becomes part of the power of the majority."[25] But, "[j]ust one person challenging the consensus can break that power and increase our ability to think independently and resist moving to erroneous judgments."[26]

III. THE DEBATE OVER REPEAT PLAYERS

As courts favor those with pre-existing leadership experience, they tend to empower high-level repeat players. In *Repeat Players in Multidistrict Litigation: The Social Network*, my co-author Margaret Williams and I offered the first (and only) empirical investigation of private plaintiff and defense attorneys' leadership appointments and their effects in MDL.[27] We found that MDL judges regularly

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[21] Burch & Williams, *supra* note 17, at 1460-63.

[22] MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.221, 10.224 (2004) ("[B]ecause appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients' interests be adequately represented.").

[23] *Id.* § 10.224.

[24] 28 U.S.C. § 1407(a).

[25] CHARLAN NEMETH, IN DEFENSE OF TROUBLEMAKERS: THE POWER OF DISSENT IN LIFE AND BUSINESS 29-32 (2018).

[26] *Id.* at 39.

[27] Burch & Williams, *supra* note 17, at 1470. One later study on all MDLs (not just products liability) suggested that "many" orders left leadership duties undefined, which is likewise troubling. David L.

appoint the same lead attorneys: on the plaintiffs' side, repeat players held 62.8% of available leadership positions, with a mere fifty attorneys occupying nearly 30% of all plaintiff-side leadership; on the defense side, where leadership appointments are rarer, the same defense firms nevertheless occupied 82.3% of all leadership roles.[28]

We used social-network analysis to reveal repeat actors' connections to one another.[29] No matter what measure of centrality we used, a key group of only *five* high-level repeat players (Richard Arsenault, Daniel Becnel, Jr., Dianne Nast, Jerrold Parker, and Christopher Seeger) consistently occupied the most powerful positions, and they seemed to have far more impact on settlement design than did the total number of repeat players.[30] This matters considerably because lead lawyers control the proceeding and negotiate settlements,[31] freeing them to bargain for what matters to them most: defendants want closure and finality, and plaintiffs' lawyers want to recover for their clients and receive high fee awards along the way.[32] Lead attorneys with few clients can benefit considerably from common-benefit fees—taxes imposed on plaintiffs' individual attorneys for work that benefits the collective.

Whether courts' reliance on repeat players is a net positive or negative development, however, has been the subject of much debate.[33] On one hand, repeat players' experience can generate positive developments that further pretrial efficiency.[34] They can capitalize on economies of scale, acquired knowledge and expertise, and benefit from a ready-made infrastructure (from discovery vendors to claims administrators).[35] Certain firms are known to intensively investigate their cases before suing, and their decision to sue, along with their reputation, may encourage others to recruit clients and prompt claims to settle more quickly than they otherwise might.[36] With previous intel about settlement values, insiders may

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Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

[28] Burch & Williams, *supra* note 17, at 1470-72.

[29] *Id.* at 1530.

[30] *See id.* at 1496.

[31] *Id.* at 1445.

[32] *Id.*

[33] *Compare* Burch & Williams, *supra* note 17 (empirically examining data on repeat play and concluding "[b]ased on the evidence available to us, we found reason to be concerned that when repeat players influence the practices and norms that govern multidistrict proceedings—when they "play for rules," so to speak—the rules they develop may principally benefit them at the expense of one-shot plaintiffs"), *with* Bradt & Rave, *supra* note 2 ("Although the risks they pose are real, we argue that repeat players add significant value when they represent one-shotter plaintiffs, and that value may be worth running the risks.").

[34] Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 85-86.

[35] *Id.*

[36] *Id.*

also help insulate clients from defense attempts to wield information asymmetries against them.[37]

On the other hand, concerns about repeat players can be broken into three categories. First, cronyism among a tight-knit bar that competes for the lucrative common-benefit fees that accompany leadership roles suggests that insiders are unlikely to dissent even if doing so is in their clients' best interests—at least if it undermines insiders' ability to play the long game. Although my off-the-record conversations with MDL attorneys suggest threats of social and financial sanctions are prevalent, those occurrences are nevertheless difficult to assess quantitatively. The best evidence is silence. Objectors rarely speak up during leadership selection, even though being chosen generates significant fees above and beyond what a lawyer receives from her own clients. Nor do most attorneys object when lead lawyers ask the judge to increase their common-benefit fees midway through the litigation, even though it reduces individual attorneys' profits.[38]

Second, when the same plaintiffs' attorneys work with the same defense attorneys time and again, self-dealing concerns can arise. Scholars like Jack Coffee have long observed that repeat play tends to regress our adversarial system from its confrontational roots toward a state of cooperation.[39] And Professor Jerome Skolnick has explained, when both sides work together routinely, those relationships can become problematic when they reach a "tipping point where cooperation may shade off into collusion, thereby subverting the ethical basis of the system."[40]

In our study, Margaret Williams and I examined the publicly available MDL settlements that repeat players designed and we identified settlement provisions that one might argue principally benefit those insiders.[41] Considering deals struck over a fourteen-year period, we were unable to find any that did not feature at least one closure provision for defendants, and likewise found that nearly all settlements contained some provision that increased lead plaintiffs' lawyers' common-benefit fees.[42]

Perhaps most telling was that in 88.8 percent of the settlements, plaintiffs' leadership negotiated some aspect of their own common-benefit attorney's fee directly with the defendant.[43] Bargaining for attorneys' fees with one's opponent is a troubling departure from conventional contingent-fee principles, which are

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[37] Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1599-1600 (2005).

[38] While 36.6 percent of the proceedings in our study included at least one objection, that number is somewhat misleading, for the most objectors were either lead lawyers complaining about common-benefit fund allocations or attorneys concerned about taxing state cases. Burch, *Monopolies in MDL Litigation, supra* note 2, at 108.

[39] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1366 (1995).

[40] Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 69 (1967).

[41] Burch & Williams, *supra* note 17, at 1445.

[42] *Id.*

[43] Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 108.

supposed to tie lawyers' fees to their clients' outcome.[44] When a defendant controls what opposing counsel is paid, "the defendant can offer 'red-carpet treatment on fees' in return for favorable terms elsewhere," note Professors Charlie Silver and Geoffrey Miller.[45] Yet, in nonclass MDLs, these exchanges receive no formal judicial review, nor is there a built-in process for objecting. Thus, based on the evidence available to us, we worry that when repeat players influence the practices and norms that govern MDLs, the rules they create and perpetuate may principally benefit them—at the expense of one-shot plaintiffs.[46]

Third and related, repeat players raise concerns about whether they will optimally represent plaintiffs' diverse interests. This broaches the subject of outcomes and how plaintiffs fare in MDLs, but unfortunately, data on who receives what (and why) is scarce in both class actions and nonclass MDLs. We did, however, find one illustration for which payout data was available—*Propulsid*. *Propulsid* appears representative of other deals: it was the earliest publicly available settlement in our dataset and its steering committee declared that it would be replicating its model in all future MDLs.[47] We were able to demonstrate that settlement designers did indeed incorporate some aspect of that deal in every subsequent settlement within the data.[48]

In *Propulsid*, 6,012 plaintiffs dismissed their lawsuit to enter into the settlement program.[49] But only thirty-seven of them (0.6 percent) recovered any money through the rigorous physician-controlled settlement process, and collectively they received little more than $6.5 million.[50] *Propulsid*'s lead lawyers negotiated their common-benefit fees directly with Johnson & Johnson (the defendant), receiving $27 million.[51] The bulk of the $84-$105 million settlement fund then reverted back to Johnson & Johnson.[52]

In sum, while repeat players can offer plenty of upside through expertise and knowledge, concerns about self-dealing and adequate representation plague MDLs. Few checks exist to police these potential pitfalls—appeals are rare in

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[44] Burch & Williams, *supra* note 17, at 1445.

[45] Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 133 (2010).

[46] Burch & Williams, *supra* note 17, at 1445.

[47] *Propulsid*'s leaders stated:

> Never before in the history of multidistrict litigation, have counsel achieved a global resolution of this proportion in the unique manner by which this Settlement Program resolves the litigation without resort to complex joinder devices or Class Certification. This remarkable approach to resolution of 'mass tort' litigation promises to become the template for similar resolution of future litigations of this kind.

Memorandum in Support of Plaintiffs' Steering Committees Motion for Award of Attorney's Fees and Reimbursement of Costs at 1, *In re* Propulsid Prods. Liab. Litig., No. 00-md-1355 (E.D. La. May 3, 2005).

[48] Burch & Williams, *supra* note 17, at 1508.

[49] BURCH, MASS TORT DEALS, *supra* note 17, at 2.

[50] *Id.*

[51] *See id.* at 39.

[52] *Id.* at 39 (providing details on where the money went). For more information on common-benefit fees, both in *Propulsid* and in other MDLs, see *id.* at 35-42, 187-207.

MDL, and in nonclass proceedings, judges do not approve settlements as fair, reasonable, and adequate. Without formal counterweights and accountability, the costs to appointing a leadership roster comprised principally of repeat players seem to outweigh the benefits.

IV. CHOOSING WISELY: A RECOMMENDED APPROACH TO LEADERSHIP SELECTION

Looking beyond the usual suspects raises the need to diversify the leadership roster—but how? What traits should courts value and what procedures best effectuate those values? This final section recommends procedural techniques that are likely to diversify the applicant pool, proposes specific questions to ask applicants to empanel a cognitively diverse team that best represents a heterogenous group of plaintiffs, and concludes with methods for harnessing the benefits of outsider dissent as a failsafe.

The touchstone for any appointment that usurps a plaintiff's chosen counsel should be whether appointed counsel will adequately represent her designated constituency, whether it is the whole group or some subset thereof.[53] In class actions, due process requires separate representation when structural conflicts of interest exist.[54] Structural conflicts are those that "present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves."[55]

Nonclass MDLs should demand no less. Judges routinely empower a few to speak on behalf of many: negotiating global settlements, developing and executing a discovery strategy, responding to *Daubert* and preemption motions, and designating bellwether trials all impact each plaintiff, and each requires adequate representation. Otherwise, attorney self-interest and investment strategy may mean sacrificing the interests of the minority for those of the majority. Thus, when structural conflicts exist between plaintiffs within a given proceeding, each group should have its own voice at the leadership table.

A. Procedural Techniques

Appointing temporary counsel and giving the litigation a few months to develop before selecting leaders may give judges a better idea as to the potential

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[53] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 627 (1997); Hansberry v. Lee, 311 U.S. 32 (1940).
[54] *Amchem*, 521 U.S. at 627; *In re* Literary Works in Electr. Databases Copyright Litig., 654 F.3d 242, 252 (2d Cir. 2011).
[55] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B); *Amchem*, 521 U.S. at 627. Separate representation matters less in certain leadership positions, like liaison counsel. Liaison counsel disseminates information and acts more as a conduit than a decision maker. But adequate representation is critically important in conducting discovery, choosing bellwether cases, and negotiating settlement.

fault lines between plaintiffs. Waiting can also expand the leadership applicant pool. Researchers at the Federal Judicial Center found that super repeat players who appeared in thirty or more MDLs tend to enter a proceeding an average of seventy-three days after centralization, whereas most attorneys do not appear until an average of 419 days post-centralization.[56] This gives insiders the upper hand early on because judges often select leaders quickly.

Although it requires more time, courts should employ a competitive process to select lead lawyers rather than rely on consensus slates or even competitive processes that resemble de facto popularity contests.[57] Application forms can be tailored for specific positions to solicit wide-ranging information on pertinent data points, shifting the inquiry away from whether attorneys will all play well together in the sandbox, and toward whether they offer diverse skills and knowledge.[58] For example, it is helpful for judges to know applicants' involvement with past (and concurrent) proceedings, including their leadership roles, work performed, the type of proceeding, the overall outcomes, their clients' outcomes, and their common-benefit fee requests versus their common-benefit recovery. That information conveys whether the applicant has time to devote to the new proceeding, how well her clients fared in previous suits, how much compensation the lawyer or firm received for past leadership service, and her experience—bearing in mind that many attorneys can have experience in the MDL trenches even if they have never been given a leadership opportunity. In some respects, these questions also serve as an indicator of client care. In the trans-vaginal mesh litigation, for instance, some firms took on an excess of 5,000 clients—a volume that made it impossible for them to complete discovery on those cases, much less prepare them for trial.[59]

For the proceeding at hand, applicants should identify the injuries and claims of their firm's current clients, likely conflicts that will arise among the plaintiffs, financing arrangements (in camera), and any relationships they or their firm have with third-party vendors or third-party funders.[60] This type of information prompts attorneys to consider possible conflicts among their clientele, take care to gain informed consent, and take steps to safeguard the rights of clients in a minority position. It likewise unearths potential conflicts between attorneys

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[56] Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 166-67 (2012).

[57] In *Volkswagen*, the court used a competitive selection process requesting the traditional criteria, but allowed applicants to indicate others' support. *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig., MDL No. 15-md-02672-CRB (N.D. Cal. Dec. 22, 2015) (Pretrial Order No. 2). Those selected essentially won the popularity contest with the support of sixty-seven other lawyers. BURCH, MASS TORT DEALS, *supra* note 17, at 93.

[58] For a sample form, see Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 162-64.

[59] Letter from Shanin Specter to Rebecca A. Womeldorf on Proposed Amendments to the Federal Rules of Civil Procedure on Multidistrict Litigation, Dec. 18, 2020, https://www.uscourts.gov/sites/default/files/20-cv-hh_suggestion_from_shanin_specter_-_mdls_0.pdf.

[60] For a sample leadership application form and scoring sheet, see Burch, *Monopolies in MDL Litigation*, *supra* note 2, at 162-64.

and outsiders, from funders to discovery service providers, to claims administrators.

Finally, applicants should disclose any skills or traits that might uniquely situate them to serve in a leadership role. Perhaps they are the attorney who discovered the defective product in an individual lawsuit, maybe they were a doctor or nurse in a previous professional life, or perhaps they have personal connections to the suit in some way. The list here is limitless and distinguished only by the characteristics of the particular lawsuit. But the idea, as explored below, is to create a team with members whose talents and knowledge make them uniquely situated to spearhead a particular proceeding.

B. Leadership Traits

The case for diversifying leadership appointments is multifaceted. There are, of course, strong moral arguments for including women and persons of color. Among other important lessons, the Black Lives Matter movement has demonstrated the need for equal opportunity and equal treatment in a sustainable democracy. And then there are the business arguments, with some workforce studies showing that diverse teams can outperform non-diverse teams[61] and others showing more mixed results.[62]

Whatever the rationale, the best leadership group for any proceeding is unlikely to be a collection of the most experienced, white-haired men who have enjoyed the role in the past. It's not that experience isn't important—it *is*—it is just not the *only* thing that's important. Think of it this way: when likeminded folks approach a problem in the same manner, they are likely to get stuck at the same point.[63] But a group with members who have unique tools and skills, who frame the problem differently, might solve it in a way that no one else considered.[64]

When courts consider applications, they should aim to compile the best team—not the best individual lawyers. In doing so, they should keep size and skills in mind. As to size, even though some circumstances will demand larger groups, empirical studies consistently show that from a decision-making standpoint, groups with five or six members are optimal.[65] As to skills, the goal is to appoint a small, cognitively diverse group whose members possess different information (aligning with clients' diverse interests and injuries), knowledge, and tools. Just as teams of doctors need skeptics to make accurate diagnoses and successful corporate boards require assertive members who are not overly deferential to the

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[61] Dieter Holger, *The Business Case for More Diversity*, WALL ST. J. (Oct. 26, 2019, 9:00AM), https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200?st=4b7yskwxgyn6gx1&reflink=article_email_share; David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV., June 26, 2019.

[62] Roberge & van Dick, *supra* note 13.

[63] *See* PAGE, *supra* note 14, at 157.

[64] *See id.*

[65] Susan A. Wheelan, *Group Size, Group Development, and Group Productivity*, 40 SMALL GRP. RES. 247, 257-58 (2009, No. 2).

CEO,[66] leadership groups in MDL need lawyers with mixed perspectives who are not afraid to openly disagree on matters of substance.

As noted, there has been a recent push for judges to appoint more women and minorities to leadership positions.[67] But gender, race, age, physical abilities, economic status, and sexual orientation are all types of *identity* (or descriptive) diversity. *Cognitive* diversity, on the other hand, considers whether people have diverse knowledge and expertise stemming from training, experiences, and, yes, identity.[68] Identity can play a role by creating experiential differences that prompt contrasting analytic tools to develop[69] even though physical characteristics alone may tell us little.[70]

As Professor Scott Page explains, "by mapping people into identity groups," "we lump a recent immigrant from Nairobi, Kenya, a grandson of a sharecropper from the Mississippi delta, and the daughter of a dentist from Barrington, Illinois, into the same category: African Americans."[71] We also "place the granddaughter of a miner from Copper Harbor, Michigan, a son of Gloria Vanderbilt (that would be Anderson Cooper), and a recently married former au pair from Lithuania into the box labeled non-Hispanic white."[72] But each lump, if disaggregated, would prove cognitively diverse.[73]

As best they can then, judges should strive to compile cognitively diverse leadership teams by seeking members whose knowledge, skills, information, and tools differ.[74] Although soliciting and assessing the relevant information I identified earlier gets judges closer to the mark, assembling a cognitively diverse group is not an exact science. It involves a bit of guesswork and warrants added safeguards.

C. Harnessing Dissent

Newcomers with relevant expertise "may be a rich source of ideas for improving group performance," explain psychologists, because they "lack strong personal ties to other members that inhibit their willingness to challenge group orthodoxy," are not already "committed to the group's task strategy," and "bring

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[66] CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE, 147-48 (2009); Jeffrey A. Sonnenfeld, *What Makes Boards Great*, HARV. BUS. REV. (Sept. 2002).
[67] *See* Chapoco, *supra* note 6; Frankel, *supra* note 6.
[68] PAGE, *supra* note 14, at 7-8, 302-12; Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 AM. PSYCHOL. SOC'Y 31, 41-42 (2005).
[69] *See* Abby L. Mello & Lisa A. Delise, *Cognitive Diversity to Team Outcomes: The Roles of Cohesion and Conflict Management*, 46 SMALL GRP. RES. 204, 204-05 (2015).
[70] *See id.*
[71] PAGE, *supra* note 14, at 363.
[72] *Id.*
[73] *Id*. at 364.
[74] These criteria are linked to adequate representation and thus avoid the constitutional challenge that Justice Alito raised to race and gender-based appointments in class actions. *See* Martin v. Blessing, 571 U.S. 1040, 1042 (2013).

fresh perspectives gained in other groups."[75] Yet, given the lengthy nature of many MDLs and the fact that heterogeneous groups can lose their edge as their thinking converges with repeated interaction, there is value in building in additional protections.[76]

The key—as uncomfortable and irritating as it may be—is to appoint a mix of cognitively diverse people, all with the relevant expertise and skills (but perhaps some with less leadership experience) *and* prize dissent. Permit and embrace it at every turn.

Dissenters can add value in three ways. First, they unravel the power of a majority's consensus and subject it to scrutiny and questioning.[77] Second, they stimulate divergent thinking. For example, studies on juries show that when there is a dissenter present and jurors must deliberate until they reach a consensus, they consider more evidence, explanations, and alternative possibilities.[78] Finally, dissenters may introduce (and prompt others to divulge) new information. As psychologists Charlan Nemeth and Jack Goncalo—two of the world's leading experts on group decisions—explain, minority views are critical "not because they may be correct but because *even when they are wrong* they stimulate thinking that on balance leads to better decisions. It stops the rush to judgment by providing a counter to the majority view."[79] Put simply, dissent staves off hastened judgment, prompts majorities to seek multiple problem-solving strategies, stimulates original thinking, and can encourage more creative solutions to emerge.[80]

MDL judges can find dissent from two sources: (1) cognitively diverse leaders who represent subgroups with structurally conflicting interests, and (2) outsiders, the bevy of nonlead lawyers on the sidelines who have much to lose or gain for their clients. As plaintiffs' aims and preferences vary, dissenters can challenge the status quo and inject previously undisclosed information into the discussion. Still, it helps to be specific about who is in charge of raising concerns on behalf of certain plaintiffs. This is where subgrouping for structural conflicts can help tremendously. When groups fail to elicit and use all of the information that each member holds privately, it is often because no one sees himself or herself as the designated expert.[81]

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[75] John M. Levine & Hoon-Seok Choi, *Minority Influence in Interacting Groups: The Impact of Newcomers*, *in* REBELS IN GROUPS 73, 78 (Jolanda Jetten & Matthew J. Hornsey eds., 2011).
[76] PAGE, *supra* note 14, at 157.
[77] NEMETH, *supra* note 25, at 29-32, 39.
[78] Charlan Nemeth, *Jury Trials: Psychology and the Law*, *in* 14 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, 309 (Leonard Berkowitz ed., 1981).
[79] Charlan J. Nemeth & Jack A. Goncalo, *Rogues and Heroes: Finding Value in Dissent*, *in* REBELS IN GROUPS: DISSENT, DEVIANCE, DIFFERENCE, AND DEFIANCE 17, 23 (Jolanda Jetten & Matthew J. Hornsey eds., 2010).
[80] *Id.* at 22; Stefan Schulz-Hardt et al., *Dissent as a Facilitator: Individual- and Group-Level Effects on Creativity and Performance*, *in* THE PSYCHOLOGY OF CONFLICT MANAGEMENT IN ORGANIZATIONS 149, 150-54, 162-63 (Carsten K.W. De Dreu & Michele J. Gelfand eds., 2008).
[81] *See* Garold Stasser & William Titus, *Hidden Profiles: A Brief History*, 14 PSYCHOL. INQUIRY 304, 310 (2003).

The goal is not to empower a bunch of cantankerous contrarians whose interpersonal conflict brings the group to a standstill. Rather, it is to foster dissent and debate over how to best approach the complex, novel legal issues that face judges and lawyers alike in MDLs. On critical issues, welcoming conflict from insiders on leadership committees as well as outsiders by opening the docket to supplemental briefing or disagreement allows judges to harness dissent's value: more information, more critical thinking, and more representation.[82]

V. CONCLUSION

Selecting cognitively diverse leaders and welcoming dissent and the information that it generates allows judges to build in additional safeguards for plaintiffs—many of whom receive little contact from their chosen attorneys. Judges may be the last line of defense, but if they are not armed with the facts, they are handicapped. Incentivizing those who hold that information—other plaintiffs' attorneys—to disclose it, wield it to their clients' benefit, and hold leaders accountable is crucial.

[82] *See* Nemeth & Goncalo, *supra* note 79, at 27-28.

FEDERAL MULTIDISTRICT LITIGATION COORDINATION WITH STATE COURTS

Dawn M. Barrios* & Julie A. Callsen**

I. INTRODUCTION

The Judicial Panel on Multidistrict Litigation ("JPML") can transfer civil actions pending in more than one district involving one or more common questions of fact to one single federal district judge for coordinated or consolidated pretrial proceedings. However, if federal jurisdiction (generally diversity of citizenship) is absent, requiring a case or cases to remain in state court involving the same common issues of fact and same defendant(s) that are named in a Multidistrict Litigation case ("MDL"), differences may arise concerning how the cases should be handled. In this article, we explore the rationale for cases to be in each jurisdiction, as well as reasons and strategies for coordination of the litigations involving cooperation of each court and party.

II. REASONS FOR FILING CASES IN STATE COURT VERSUS FEDERAL COURT

The lack of diversity between parties, required for federal jurisdiction pursuant to 28 U.S.C. Section §1332, is one of the most common reasons a plaintiff would initiate a lawsuit in state court rather than federal court. Thus, there may be numerous cases pending in the state where the central defendant resides. If one of those states also has a state- or county-wide coordinated mass tort litigation program, such as Pennsylvania (Complex Litigation Center), New Jersey (Multicounty Litigation), or California (Judicial Council Civil Case Coordination Proceeding) which involves judges assigned to preside over these coordinated state court civil cases, a plaintiff may want to litigate there. Additionally, judges in state

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court consolidated litigation may have more experience managing such "parallel litigation" proceedings and be open to collaborating with the federal MDL.

Individual plaintiff's counsel may prefer not to file in the MDL and oppose removal from state court or another federal district court to the MDL based on a perception that she may have to relinquish control of her individual cases to plaintiffs' leadership who are appointed by the MDL judge and serve as a representative of the plaintiffs' counsel as a whole. The selection of MDL Lead Counsel, Liaison Counsel, and the Plaintiffs' and Defendants' Steering Committees by the MDL judge is done for efficiency and consistency and will be the counsel the MDL court generally interacts with and looks to for decisionmaking in the case.

Further, there is a theory of the "black hole" that counsel perceive to occur with an individual case when it is joined with thousands of other cases in the MDL, as prosecution of an individual case may be delayed until remand. Plaintiff's counsel may also believe it beneficial to be in state court where it may be faster to get the plaintiff's case to trial. (In general, only a limited number of cases are actually selected for discovery workup and trial in MDL proceedings). While it is true that MDLs frequently take longer to hold their first trials than state courts, that is because centralized procedures governing discovery and other global issues, which eventually benefit all parties, must be put in place.

One of the initial orders negotiated at the commencement of the MDL is a Common Benefit Order, which is proposed by plaintiffs' leadership to the MDL Judge. Since the MDL leadership has the responsibility to handle all pre-trial proceedings and prepare a trial package for other counsel to use in trials outside the MDL, there must be a mechanism to compensate plaintiffs' MDL leadership for common benefit work performed as well as expenses paid by leadership to finance the litigation upon resolution. During the course of the MDL, plaintiffs' leadership contribute funds for expenses and handle all aspects of the MDL without any payment for expenses or legal services, all with the expectation of being reimbursed and paid at the conclusion of the MDL. After all plaintiffs' cases have been resolved, the court will set up a procedure for application by anyone who did common benefit work for reimbursement of expenses and payment for legal services, and the court will distribute the funds to those making common benefit claims.

The Common Benefit Order establishes the fund to pay for plaintiffs' legal work and expenses by imposing an assessment on all plaintiffs' attorneys, which in turn is used to form a fund to reimburse and compensate counsel who perform common benefit work. These assessments are withheld from plaintiffs' settlements or judgments and put into accounts to reimburse counsel who performed work, such as discovery, depositions, preparing experts, and conducting trials that benefit each plaintiff's case.[1] Plaintiffs' counsel then have the opportunity to apply for a common benefit fee based on the work performed and costs expended at the

[1] Generally, although the Common Benefit Orders are crafted by the plaintiffs, the defense has input in certain provisions as the order requires the defense to withhold the assessment for fees and costs from any payment made to a plaintiff.

conclusion of the MDL. On the flip side, the assessment can be a major reason plaintiffs' counsel may want to stay in state court as they may prefer to prepare and try their own case, not delegate it to a committee, and not pay an assessment.

The JPML, a panel of seven district court and circuit judges appointed by the Chief Justice of the United States Supreme Court, decides whether to create an MDL and before which district court judge the MDL will proceed.[2] One of the first steps an MDL judge takes is to begin the road to coordination. When the state courts with similar cases have been identified, generally through the cooperation of all counsel reporting cases pending in other jurisdictions, contact is usually made with the state court judge, either by federal-state liaison counsel or the MDL judge who may prefer to make the initial contact with the state court judge(s) herself. The purpose of the contact is to discuss cooperation so that the cases can be handled in a coordinated fashion. State court judges may have concerns that coordinating or cooperating with their federal counterparts may lead to a relinquishment of control of the state court litigation. Frequently, however, they may welcome the overture, as federal court judges have more resources in the way of clerks, staff, and technology, and have broader jurisdiction to handle some issues.

The leadership chosen by the MDL judge should promote effective management of litigation.[3] Generally, federal-state court liaison counsel/committee are appointed by the MDL judge with the particular responsibility of keeping abreast of and reporting on the status of state court proceedings, as well as facilitating overall coordination. Likewise, in a jurisdiction that has a coordinated state mass tort program, the judge may appoint state court lawyers to monitor the MDL.

III. COORDINATION EFFORTS WITH FEDERAL MDL

Effective coordination between the federal and state courts promotes cooperation in scheduling hearings; conducting and completing discovery; facilitating efficient distribution of and access to discovery work product; avoiding inconsistent federal and state rulings on discovery and privilege issues; and potentially accomplishing resolution of all cases nationwide.[4] Once contact is made with the state court judge(s), the stage of the litigation in state court(s) versus that in the federal litigation needs to be examined so that a plan for coordination that is best suited to the type of cases and that has the best chance of achieving coordination is established. As noted above, given the large number of cases and counsel involved in an MDL, it can take some time to establish basic case management and pretrial orders to organize standardized pleadings and discovery, determine protocols for electronically stored information, protective orders, and the like. The state court cases at a less advanced stage can adopt wholly or in part

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[2] 28 U.S.C. § 1407 (West 2003); MANUAL FOR COMPLEX LITIGATION (FOURTH), § 20 (2004) (hereinafter, MCL); *see also* Andrew K. Solow, et al., *Mastery in the MDL: Maximizing the MDL Daubert Process*, LAW360, (Jan. 27, 2016).

[3] Duke Law Ctr. for Judicial Studies, MDL STANDARDS AND BEST PRACTICES, 1 (Sept. 11, 2014).

[4] *Id*.

any of these foundational orders. This will not only foster consistency and efficiency, but may allow state court cases to move more nimbly through discovery toward trial since the MDL has implemented the orders.

The Federal Judiciary favors coordination, as reflected in the Manual for Complex Litigation developed to assist federal trial judges with mass tort proceedings.[5] The Manual sets forth strategies for each stage of litigation from aggregation and consolidation decisions to settlement.[6] Similarly, the Conference of Chief Justices directed the National Center for State Courts to "take all available and reasonable steps to promote communication between state and federal courts for the purpose of establishing best practices for the management of like-kind litigation that spans multiple state jurisdictions and federal districts."[7] Jurists have developed innovative efforts to coordinate the parallel litigations.

One of the main (and time-consuming) areas where coordination benefits both federal and state litigations is discovery. Defense counsel favors coordination to preserve resources and avoid repetition of productions and company depositions. Plaintiffs' counsel benefits from the collection and organization of company general liability documents and the ability to maintain depositions, documents, and learned treaties in a cloud-based program accessible by plaintiffs everywhere. Moreover, state court litigations in jurisdictions where company witnesses can be subpoenaed will assist MDL counsel in working with state court counsel to take witness depositions.

Most coordination efforts occur at the beginning of the MDL litigation. Since MDLs, which can involve thousands of cases, tend to have a longer life span than most civil cases, counsel in later-filed federal or state cases after discovery has begun can take advantage of the work done and discovery available to quickly inform themselves of the litigation story. An electronic document depository can be established that parties in either federal or state court, as well as the presiding judge(s), could access. If discovery masters are appointed in the MDL or coordinated state court proceedings, the parties could agree to use the same special discovery master, if independent from the court system. Discovery may even be phased to increase efficiency. For example, MDL courts may phase discovery so that expert discovery regarding generic issues will proceed before expert discovery on case-specific issues.[8]

Joint hearings or conferences can be held, in person or by video with both judges presiding over the presentation of evidence and argument on a variety of

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[5] *See* MCL, § 20.3 (Specifically, "to minimize conflicts that distract from the primary goal of resolving the parties' disputes", §20.313; and "to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation").

[6] *Id.* § 20.3.

[7] Margaret S. Thomas, *Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1357-58 (2014) (quoting *Conference of Chief Justices, Resolution 2: Directing the National Center for State Courts to Promote Communication and Best Practices for the Management of Like-Kind Litigation That Spans Multiple State Jurisdictions and Federal Districts* (Jan. 26, 2011), http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01262011-Directing-NCSC-Promote-Communication-Litigation-State-Jurisdictions.ashx).

[8] Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, (2017).

issues, including a Science Day-type presentation, class certification hearing, *Daubert* or *Daubert*-type hearing, or on any issue which is front and center in both jurisdictions. Although sitting jointly, the judges could ask questions and consider the briefings filed in their respective jurisdiction using the applicable rules and law. Since federal courtrooms generally are more technologically advanced, the federal court could host the conference with other presiding judges participating remotely. Judges oftentimes listen to their counterparts' regular case management conferences to stay abreast of the status of the litigation and to hear the issues presented. Of course, the method of coordination that lends itself to be the most successful is for each jurist to keep in regular communication with the other.

IV. CHALLENGES TO COORDINATION

The attorneys play a key role in facilitating coordination; they must be willing to work together to achieve the benefits of coordination. The ability or willingness of the federal and state court counsel to cooperate and coordinate can be one of the biggest challenges to the effort. The judge's openness to coordinate with another mass tort proceeding is another important component, especially if the proceeding or cases are at very different stages of the litigation overall. However, given the benefits of coordination, the jurist whose docket is slower than his or her counterpart can always learn from the other. Frank and open direct discussions between the two can create innovative coordination particularly suited to the facts before each.

Different civil rules, applicable standards, substantive laws, and the conflict of law inquiry may sometimes thwart or complicate the coordination effort. Varying discovery rules involving privilege, redaction of confidential, proprietary or personal information, and ever-evolving rules on electronic discovery (ESI) could differ between jurisdictions. There are a myriad of distinctions and differences between laws that can hamper coordination efforts.

One such example is the potential for confusion from the various standards under a *Daubert* or *Frye* hearing. The hearing could involve the presentation of evidence not otherwise allowed in one of these jurisdictions based on the variance in laws.

V. STRATEGIES TO ACHIEVE COORDINATION

As with any challenge, if all parties, including the presiding judges, recognize the importance of coordination and are willing to devise protocols to achieve that goal, the obstacles to coordinating proceedings can be overcome or lessened. Coordination benefits all participants in the litigation, including the court and the court staff, by achieving efficiencies and economizing resources. Almost any protocol can be adopted to make the parallel cases more efficient. For instance, the state court judge could take the lead in discovery disputes involving document production, while the federal court judge addresses deposition issues. The Manual for Complex Litigation notes, for example, that "[i]n scheduling Daubert proceedings in a dispersed mass tort case, an MDL judge should explore

opportunities to coordinate scheduling with state courts handling parallel cases" and that "[f]ederal and state judges have successfully conducted joint Daubert hearings."[9] Additionally, both parties could agree to a special master who assists with all discovery efforts or mediates disputes.

The advances in electronic discovery and availability of shared database platforms, as well as web-based sites to house case management and pretrial orders, provide readily available resources across court systems, saving the litigants time and money.

Finally, coordination of trial dates and efforts at resolution are inevitable when the same defendants are involved. The parties in different jurisdictions can work with the same special settlement master to achieve uniformity, and this special master can provide reports to the presiding judges on the progress of settlement discussions at the appropriate point in the litigation.

VI. CONCLUSION

As a rule, coordination is always beneficial to the parties and the courts. The courts can direct the parties to develop strategies for achieving it, and the parties should be encouraged to be innovative and to utilize methods developed in past MDLs, improve upon them, or forge new paths to coordination.

[9] MCL, § 22.87.

FEDERAL-STATE COORDINATION IN MULTIDISTRICT LITIGATIONS

Judge Barbara J. Rothstein*

INTRODUCTION

One of the more challenging aspects of MDL litigation is the existence of parallel state cases, often in many different states across the country. It is extremely important that cooperation takes place between the state court judges and the federal judge to whom the MDL case has been assigned. Just as important is coordination between the attorneys prosecuting the federal and state cases. Given the dispersed nature of the state cases, the lead for cooperation must come from the federal court, i.e., the transferee judge. The first order of business will be for the federal transferee judge to locate the various cases in the various states. The defendant's attorneys will be the source of this information as they are in the best position to know the geography of claims against them. Once a complete sense of the number and location of state cases, and the judges presiding over them, is obtained, various methods for cooperation can be explored.

I. SETTING A STRUCTURE

Transferee judges have used various structures for implementing cooperation. Examples include appointing a Special Master[1] with experience working with state court judges, as well as appointing attorneys with state cases to the MDL's attorney steering committee or establishing a special committee including attorneys from both the federal and state cases. Such a structure can be enormously beneficial for facilitating communication. Such committees can also streamline communication between state judges and the MDL counsel. From the federal perspective, it is important to keep in mind that when establishing and running such a committee, state attorneys do not want to yield control of their cases to the MDL. Attorneys in state court cases are often under greater pressure to try their cases quickly and without the accompanying complexity of the MDL. It is, therefore, important to include these attorneys to the greatest extent possible in the MDL.

One way to incentivize state court attorneys' participation is to ensure that the common benefit fund provisions allow compensation of state attorneys who

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[1] In the PPA MDL discussed throughout this article, I, as the presiding judge, appointed the late Professor Francis McGovern as Special Master to assist the Court in coordinating case management matters between the MDL and pending related litigation in various states. *See* Order Appointing Special Master, *In re* Phenylpropanolamine (PPA) Prods. Lib. Litig., No. 01-MD-01407 (W.D. Wash. Jan. 17, 2002).

cooperate with MDL counsel or otherwise advance the national litigation. In the Diet Drug MDL, for example, discovery proceedings were coordinated by both the MDL judge and the California state judge appointed to preside over the state-wide consolidated litigation.[2] In coordination, both judges entered orders setting contribution rates for lawyers who settled cases using coordinated federal-state discovery.[3]

II. PRETRIAL POSSIBILITIES

There are many possibilities during pretrial for coordination. When attempting coordination, it is important to bear in mind that the pace of the two systems often varies. State judges, like state attorneys, are often accustomed to moving their cases at a faster pace than the MDL and feel greater pressure to do so. Therefore, the shared benefits offered by the MDL may seem offset by the delay entailed. However, as will be discussed later in this article, the benefits in these complex cases can be substantial.

A. Discovery

The discovery stage is particularly amenable to innovative thinking regarding coordination. For example, the federal court may consider establishing an MDL website so that all court orders and rulings are readily available to all judges, attorneys, and parties. Ideas for sharing discovery are myriad and, with ever-advancing technology, more and more coordination is possible. The MDL and related state cases can create a joint document depository available in all courts to facilitate the production and accessibility of discovery and cut down on wasteful duplication. State judges can be invited to participate in the MDL's coordinated national discovery program, as facilitated by an online depository. Most state judges welcome this so long as they can retain control over local discovery. Both the MDL judge and state judges can coordinate document production orders and deadlines. Cooperation can run both directions, as discovery from earlier-filed state cases (or federal, for that matter) can be ordered included in MDL discovery.

In the ever-expanding world of e-discovery, any amount of efficiency gained in coordination can mean saving terabytes' worth of wasteful duplication. The shared use of an e-discovery management team and search terms in common is becoming key to sharing discovery. Further, attorneys will appreciate saving hundreds of attorney hours spent duplicating discovery efforts across the federal-state jurisdictional divide. The efficiencies do not, however, stop at the parties. Coordinating rulings on discovery disputes (such as assertions of privilege) using

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[2] *See generally* MDL Docket No. 1203; *See In re* Diet Drugs, 582 F.3d 524, 529-31 (3d Cir. 2009) for a discussion of the background and interplay with state courts.

[3] *See* In re *Diet Drugs*, 582 F.3d 524, 532, 532 n.10 (3d Cir. 2009); *see also* First Am. Pretrial Order No. 6 Common Benefit Order (Establishing Common Benefit Fund to Compensate and Reimburse Attorneys for Services Performed and Expenses Incurred for MDL Administration and Otherwise for Plaintiffs' General Benefit with Provisions for State Court Coordination) (ECF No. 45), *In re* Heparin Prods. Lib. Litig., No. 1:08hc60000 (N.D. Ohio Nov. 6, 2008).

parallel or joint orders can promote uniformity, give the parties clear guidance, and reduce duplicative efforts by all judges involved.

2. Depositions

In most MDLs, there are a number of key witnesses that will need to be deposed in almost all cases. These key witnesses, of course, include the experts. Cross-noticing depositions can eliminate the need for these witnesses to appear multiple times. For example, when I oversaw the PPA MDL,[4] I instituted special provisions for cross-noticing depositions. As one example, the parties in any state proceeding were permitted to cross-notice the deposition of an expert that had been noticed in the MDL before my court. Similarly, I allowed the parties in the MDL to cross-notice the deposition of any expert designated in the state court case where the same expert had been designated in both proceedings.

It was important to provide opportunity for state attorneys to share in taking expert depositions, and to allow those attorneys additional examination time on case-specific issues if the expert was also named in the state case. Many of these state attorneys preferred to turn their general causation issues over to the federal MDL attorney, recognizing the efficiency of doing so in this hybrid system.

3. Expert Selection

The use of common experts creates another opportunity for efficiencies in federal-state coordination. In sophisticated MDL-type litigation, usually a limited number of experts are available to provide pertinent opinions. Additionally, and undoubtedly, such rare expertise can be accompanied by high expert fees. This is an added incentive to consolidate federal and state expert discovery, where possible. Cutting down on the time taken for such experts to duplicate their efforts between an MDL and state court proceedings can create huge financial and time savings for the parties.

For example, in the previously mentioned PPA MDL, I developed a system of allowing plaintiffs in the individual federal actions, as well as the state court plaintiffs, the chance to choose whether to adopt the scientific experts selected by the attorney steering committee. Specifically, after Rule 26 disclosures of general causation experts, individual plaintiffs were given a two-week opt-in period to decide whether to adopt those experts for use in their respective cases.[5] Allowing the carryover of expert witnesses, and then extending that option to state proceedings, can be a great way of creating efficiency in designating and presenting expert information.

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[4] *In re* Phenylpropanolamine (PPA) Prod. Liab. Litig., 289 F. Supp. 2d 1230, 1234 (W.D. Wash. 2003).

[5] Even if an individual plaintiff adopted an expert with respect to any issues of widespread applicability, they could, nevertheless, designate a different expert to testify at trial on the same issues so long as: (1) the testifying expert relied on the same, or substantially the same, evidence, opinions, or theories; and (2) those evidence, opinions, or theories had not been previously determined to be scientifically unreliable or otherwise inadmissible.

4. *Daubert* Hearings

An additional ever-important, and thus ever-time consuming, aspect of expert evidence is ruling on its admissibility. *Daubert* motions, hearings, and orders can also be an area of fruitful federal-state coordination.

Federal and state judges have presided over joint hearings on *Daubert* motions and used joint briefing to prepare for such hearings. Such briefings can be supplemented to account for variations in the applicable laws and choice-of-law questions. In the PPA MDL, I invited state court judges with PPA cases to preside over hearings alongside me. The attorneys from the state court cases were also invited to attend. Furthermore, the hearings were videotaped to allow state judges unable to attend to use them later. And, as we all become increasingly familiar with internet conferencing programs like Zoom, the possibility of joint hearings bringing together parties from across the country only becomes greater. In the PPA MDL, eleven judges from seven states participated in person, and more did so by video. Today, it may not even have been necessary for the judges to leave their chambers.[6] The advantages of joint hearings are clear. It was so much more efficient than having substantially the same hearing in eleven or more different jurisdictions.[7]

5. Settlement

All things must come to an end, even MDLs. But there are still areas of coordination that can benefit the judicious resolution of federal and state cases. Coordinating mediation or settlement efforts is particularly important when there are pending state court cases related to an MDL. Such coordination is crucial to ensuring that settlement talks are comprehensive, and that the parties may resolve their disputes holistically. (A special area of concern is insurance coverage, as resolution of the primary litigation may depend on resolution of coverage disputes). Coordination of state cases with the MDL has provided judges with new ways to share efficiencies. Exchanging emails, arranging informal meetings or conferences, and telephone calls have proved beneficial for all involved. Overall, the areas discussed above are just examples of the way proper coordination between a federal MDL and related state court cases can create beneficial outcomes. Like the world at large, areas of coordination are limited only by our own imaginations. As technology advances, so will the opportunity to create efficient partnerships between federal and state jurisdictions.

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[6] The hearing was preceded by a one-day teaching seminar familiarizing the judges with the science and scientific terminology in the case.

[7] Of course, each judge reached her own conclusions and issued her own opinion.

MANDATORY EARLY VETTING IN MDLS: JUST A RED HERRING?

Tricia L. Campbell and O. Nicole Smith*

I. INTRODUCTION

Early vetting in multi-district litigation (MDLs) has recently become a hot button topic, with some proponents arguing for a broadly applicable rule that would require certain forms of proof to be provided early after filing. However, the "problem" such early vetting proposals are designed to combat–that MDLs are being overrun with meritless cases–has not been established by concrete data and the proposals would do little (or nothing) to enhance the effectiveness of MDLs. Worse, an across-the-board early vetting requirement fails to recognize the nuances in proving the merits of a case and, if implemented, would unfairly bar valid claims.

While the idea of early vetting may seem helpful, implementation of a sweeping rule that applies to all MDLs would be misguided. As mentioned in the Introduction to this MDL Symposium, although MDLs have a standard structure, every MDL unfolds differently.[1] Flexibility in the organization and management of MDLs is instrumental to their success. Accordingly, early vetting should not be compulsory, effectively barring even meritorious claims, but instead should be a tool in an MDL judge's arsenal for use if and when appropriate to efficiently manage their docket.

Section II begins with a general overview of early vetting and two statutory and rule changes that have been proposed to implement across-the-board early vetting. In Section III, we discuss two weaknesses to these proposals: (1) that they do not recognize and account for the procedural barriers and inequities that would result from their implementation; and (2) that the stated rationale for early vetting—that MDLs are generally overrun with meritless cases—lacks material support, making such proposals unjustified and unnecessary. In Section IV, we propose that early vetting should be an optional tool available if it would assist with or promote docket management. We conclude in Section V that judges are in the best position to select the appropriate tools to manage their own unique dockets, and that early vetting should remain one of those optional tools.

II. WHAT IS EARLY VETTING?

Early vetting is a relatively recent concept in the MDL context and generally requires that a plaintiff produce proofs, such as product use and injury, within a specified amount of time after filing. To date, early vetting has not been adopted in the form of an official statute or rule. However, some early vetting proposals involve adoption of such statutory or rule amendments that would apply early vetting to every multidistrict consolidation, with the stated goal of combating

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[1] Ryan C. Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV 801 (2021).

an alleged problem with the filing of meritless cases. Other early vetting plans, also called censuses, implemented recently by MDL courts were created for the particular circumstances of those MDLs and have a seemingly collaborative goal of effective case management and progression of the MDL.[2]

Proposals such as an amendment to 28 U.S.C. § 1407 and an amendment to the Federal Rules of Civil Procedure ("Rule") have recommended that all personal injury MDLs be subject to an early vetting requirement.[3] The proposal to modify § 1407 was passed by the United States House of Representatives in 2017 but was not passed by the Senate.[4] This proposal would have required a "submission sufficient to demonstrate that there is evidentiary support" for the factual contentions of injury, exposure to the risk that caused the injury, and the cause of the injury within forty-five days of filing.[5] The proposal explicitly precluded any extension of this deadline and instead provided for automatic dismissal of the case if the submission was insufficient.[6] If a "sufficient" submission was made within thirty days following dismissal, the case could be re-instated.[7]

A proposed amendment to Rule 26 would mandate disclosure of evidence in multidistrict litigation that the plaintiff was exposed to the cause and suffered a related harm within sixty days of filing in a consolidation.[8] This proposal does not include a remedy for failure to comply, but the proponent of this rule implied that early dismissals should result.[9]

III. ISSUES WITH ACROSS-THE-BOARD EARLY VETTING PROPOSALS

Flexibility is necessary for successful MDL management. "Like snowflakes, no two MDLs are exactly alike . . . ."[10] Across-the-board early vetting proposals like those discussed in Section II are far too rigid and, in practice, would likely be no more effective in achieving their stated goal than current processes available to courts. A one-size-fits-all approach also has the unintended consequence of blocking access to justice by dismissing *valid* claims where obtaining certain proofs requires procedures that may not be available until after

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[2] *See, e.g.*, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-02924 (S.D. Fl. April 2, 2020) (ECF No. 547).

[3] *See* H.R. 985; Lawyers for Civil Justice, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules* (Sept. 14, 2018).

[4] H.R. 985 – Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, 115th Congress (2017-2018), CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/985/all-actions (last visited Jan. 20, 2021).

[5] H.R. 985.

[6] *Id.*

[7] *Id.*

[8] Lawyers for Civil Justice, *supra* note 3.

[9] *Id.*

[10] *In re* General Motors LLC Ignition Switch Litig., 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015).

the case is filed. Any arguable effectiveness of across-the-board early vetting would be outweighed by the harm inflicted.

A. Procedural Issues

There are two main procedural issues with the across-the-board early vetting proposals discussed in Section II. First, application of the proposed changes without exception would result in the unjust dismissal with prejudice of meritorious claims or other harsh penalties. Second, a close look at the application of such proposals reveals that they would achieve little to nothing toward improving MDL efficiency.

An across-the-board rule, as in the proposals above, is inflexible and thus unable to account for extenuating circumstances. For example, the adoption of the proposed changes to § 1407 or Rule 26 would require specific proof from plaintiffs prior to the availability of the regular tools of litigation, such as discovery, often necessary to obtain such information.

Multiple MDL courts have recognized that certain proofs are often not available to plaintiffs prior to or even within months of filing their lawsuit.[11] Consider the Taxotere MDL, which involves claims that a chemotherapy treatment manufactured by multiple different companies for breast cancer patients caused permanent hair loss. Obtaining proof of product identification, which would be required by both aforementioned proposals, requires production of records by treating health care facilities and has proven difficult to obtain for numerous plaintiffs despite their best efforts. For instance, many facilities refuse to provide such records without a subpoena. In acknowledgement of this obstacle, the MDL court has entered various orders and processes to assist plaintiffs in obtaining this information.[12] Even with a subpoena and additional procedures available, the plaintiffs in many cases could not have obtained product identification within the time limits in the above proposals. Such concerns are heightened where there is little to no allowance for extensions or exceptions to the deadlines proposed for production of the enumerated evidence.

Moreover, the proposed statutory and Rule changes accomplish nothing more toward their goal than providing enforcement options some months earlier than those options already otherwise arise, doing little to effectively address the alleged filing of meritless cases. The evidence described in the proposals is typically already produced by plaintiffs through mechanisms such as Plaintiff Fact Sheets and accompanying document production requirements. These procedures are commonly adopted in MDLs and accomplish the same result sought by the early vetting proposals but with flexibility to handle difficulties that can be encountered in obtaining such proofs.

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[11] *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., Case No. 3:19-md-02885-MCR-GRJ, at *1 (N.D. Fla. Feb. 13, 2020) (ECF No. 999); *In re* Taxotere (Docetaxel) Prods. Liab. Litig., Case No. 16-MD-02740 (E.D. La. Jan. 12, 2018) (ECF No. 1506); *In re* Taxotere, 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325).

[12] *See In re* Taxotere, Case No. 16-MD-02740 (E.D. La. Jan. 12, 2018) (ECF No. 1506); *In re* Taxotere, 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325).

For example, in our experience, the Plaintiff Fact Sheet process often provides plaintiffs with time and opportunity to cure any perceived deficiencies and provide a basis for any inability to comply.[13] An inflexible early vetting rule does not allow for solutions to issues that plaintiffs encounter through no fault of their own.

Additionally, the proposals create the need for additional motion practice or other involvement by the court. Both proposals would likely result in litigation regarding what constitutes a required submission, require the court to review and make determinations about the sufficiency of the submissions or disclosures, and implicate processes such as motions to dismiss for alleged failures to comply. The court would be forced to undergo this process at the outset of the MDL, even if the court does not believe such a process is necessary, potentially hindering the court's efficient management of the MDL and resulting in a needless expenditure of the court's and parties' resources.

The possible requirement of expert support further complicates the submission of certain "proofs," such as causation as proposed in H.R. 985. There is no question that, for many cases, no general discovery–and certainly no case-specific discovery–will have occurred by the time the proofs would be required under the proposals. Such a rule could potentially be interpreted as akin to a *Lone Pine* order, requiring expert support at the outset of the case. Not only would it be difficult, or even impossible, for many plaintiffs to comply, but such a requirement would all but erase one of the benefits of MDLs, which is that the high cost of retaining general experts in these cases can be spread amongst plaintiffs.

Across-the-board early vetting requirements could come at great expense without a real justification for such cost. At its best, early vetting may identify potentially meritless cases slightly earlier than current procedures. At its worst, across-the-board early vetting will increase expenses and the expenditure of resources for the courts, plaintiffs, and even defendants, and block access to justice by dismissing valid claims without allowing the usual time and tools of litigation provided by the Federal Rules of Civil Procedure. In this regard, early vetting is a wolf in sheep's clothing. While limited use of some form of earlier vetting may be useful in a particular MDL docket, imposition of inflexible requirements in all MDLs would not increase efficiency and would result in injustice for plaintiffs with valid claims.

[13] *See, e.g.*, *In re* Taxotere, Case No. 16-MD-02740 (E.D. La. Apr. 14, 2017) (ECF No. 325) (providing forty-five days for defendants to serve a notice of deficiency and thirty days from the date of notice to cure any deficiencies before being subject to an Order to Show Cause as to why the Complaint should not be dismissed with prejudice).

B. Rationale Issues

Across-the-board early vetting proposals seem to be a solution in search of a problem, as there appears to be little evidence of a rampant problem with meritless cases flooding MDLs. For example, in discussing the proposed change to 28 U.S.C. § 1407, the Committee on the Judiciary went so far as to characterize the basis for its early-vetting proposal as being to combat "abusive 'mass actions'" involving "advertising-driven, poorly investigated (and often patently invalid) personal injury claims," which "impose unfair burdens on courts and defendants[;]" yet, the Committee admittedly *heard no evidence* on this issue.[14] Instead, it allegedly relied on the past hearing of a previous bill which did not include a similar MDL early-vetting amendment or related discussion.[15]

Lawyers for Civil Justice, a national coalition of defense trial lawyer organizations, law firms, and corporations, has also argued that thirty to forty percent of claims in some MDLs are meritless and that MDLs generally attract such claims.[16] However, the sources cited by the group provide little, if any, meaningful support for those claims and certainly do not provide sufficient support for across-the-board implementation of early vetting processes.[17]

Some have argued that MDLs are "black holes" because many cases do not make it to trial, but that is not unique to MDL cases. Statistics show that most cases in the country do not proceed to trial.[18] There are many reasons why cases—

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[14] Rept. 115-25 – Fairness in Class Action Litigation Act of 2017, Mar. 7, 2017, https://www.congress.gov/congressional-report/115th-congress/house-report/25/1?overview=closed.

[15] *Id.* (referring to a hearing held during the previous Congress regarding H.R. 1927, which included and discussed the Class Action Fairness Act provisions similar to those contained in H.R. 985 but did not include or discuss an early vetting amendment).

[16] Lawyers for Civil Justice, "Fixing the Imbalance: Two Proposals for FRCP Amendments that Would Solve the Early Vetting Gap and Remedy the Appellate Review Roadblock in MDL Proceedings," Comment to the Advisory Committee on Civil Rules and its MDL Subcommittee (Sept. 9, 2020), available at https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_fixing_the_imbalance_in_mdl_proceedings_9.9.20.pdf.

[17] One source is an Order entered in the Mentor ObTape vaginal mesh MDL. In the Order, Judge Land opined that cases in multi-district litigation were being filed and maintained through the summary judgment stage without a good faith basis in hopes of being included in global settlements but admitted that he did not perform an empirical analysis of that theory. *In re* Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig., 4:08-MD-2004 (M.D. Ga. Sept. 7, 2016) (ECF No. 1039). His concerns included that cases lacked expert support, but such an issue is not something that typically can be predicted or determined at the early stages of litigation and thus addressed by the early vetting as proposed in Section II.

Another source cited is a speech by an in-house defense attorney for Bayer, in which the attorney states that thirty to forty percent of cases in MDLs get zeroed out at the time of global settlement. However, the speaker provides no citation for that statistic. Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, available at http://www.instituteforlegalreform.com/legal-reformsummit/2016-speaker-showcase.

[18] *See, e.g.*, Court Review: Vol. 42, Issue 3-4 – A Profile of Settlement, Court Review: The Journal of the American Judges Association, Dec. 2006; https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1024&context

including those consolidated in MDLs—do not end up proceeding to trial. Many times, cases are settled. Other cases may be determined on dispositive motion. Sometimes, the evidence does not bear out as expected, either generally or for the case(s) specifically, for reasons including that parties or witnesses pass away, additional research or new studies change a party's analysis of some aspect of the case, or evidence is unknowingly unavailable for reasons such as a business's record retention policy. None of these reasons are cause for an assumption that a plaintiff's attorney knowingly filed a meritless claim. Each MDL judge is in the best position to determine whether there is some issue with the filing of meritless claims and should have the ability and discretion to address any such issue.

Early vetting as proposed in Section II is not the answer in large part because the problem it purports to solve is not truly an issue. Those who argue for an inflexible, one-size-fits-all rule lack support for their assertion that MDLs are overrun with meritless claims, instead overgeneralizing anecdotal evidence. Worse, under the guise of preventing the filing of meritless claims, a harsh, inflexible rule imposed without extension or other exception would have the significant cost of limiting injured parties' access to the courts.

IV. USE OF EARLY VETTING AS A TOOL FOR CREATIVE MANAGEMENT

Instead of across-the-board rules, MDL courts should be allowed continued discretion and flexibility in managing their dockets, including determining on a case-by-case basis whether to employ tailored early vetting procedures.

Certain MDL courts have recently employed a census process akin to early vetting, though these processes do not implement strict, inflexible rules like those discussed in Section II.[19] Instead, these censuses were established by carefully considering the mass tort at issue and acknowledging that certain proofs may not be attainable so early in litigation. The processes adopted allow plaintiffs and defendants to sufficiently vet claims involving information that is difficult to obtain without the harsh and unnecessary results of the strict across-the-board vetting proposals above.

For example, the Orders establishing the process for a census program in the *Zantac* MDL acknowledge there may be issues inherent in obtaining proof of usage and injury, and provide benefits to those who participate, such as shared efforts and costs to obtain proof of use.[20] In the *3M Combat Arms Earplug* MDL, an Early Vetting Subcommittee was established to oversee the collection and production of certain basic information about each plaintiff's claims.[21] The difficulties expected in that MDL, such as obtaining military records through

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[19] *See supra* Section II.

[20] *See In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-02924 (S.D. Fl. April 2, 2020) (ECF No. 547); *In re* Zantac, No. 20-MD-02924 (S.D. Fl. April 15, 2020) (ECF No. 587).

[21] *In re* 3M Combat Arms Earplug, Case No. 3:19-md-02885-MCR-GRJ, at *9 (N.D. Fla. Apr. 19, 2019) (ECF No. 76).

Touhy requests and the number of claimants (currently well over 100,000),[22] supported establishing such a process in that MDL.

These censuses support the efficiency of the MDLs by better enabling the discovery of otherwise difficult-to-obtain information. However, despite the fact that censuses and early vetting may aid in the discovery of certain information or have other benefits, these tools are not always necessary and should not be mandatory in every MDL.

For example, no census or early vetting was employed in any of the seven transvaginal mesh MDLs that were established and overseen by Judge Goodwin in the Southern District of West Virginia, each of which, at any given time, had thousands of cases pending. Instead, Judge Goodwin employed creative strategies to manage and resolve the dockets, such as the implementation of a Plaintiff Profile Form, the consolidation of bellwether trials, and the remand of cases for trial once the bellwether process had run its course. Those strategies seem to have proven effective. As an illustration, out of over 26,000 cases once pending against Boston Scientific Corporation, there are currently only 278 still encompassed in the MDL.[23]

Further, some MDL courts may not consider early screening a top priority. Instead, some judges may prefer to focus their full initial attention on general matters affecting the MDL as a whole, such as designating leadership counsel to help with efficient management of the MDL, obtaining an understanding of the common material facts and legal issues to be resolved, and prioritizing general discovery. Mandatory early vetting proposals could interfere with a court's ability to focus on such matters.

MDL courts have many tools available for docket management, and those used by one MDL court may or may not be necessary or useful to another, much less *every* other MDL court. Given that no two MDLs are exactly alike, the key to increasing the efficiency of MDLs for all involved is to continue to allow MDL judges autonomy and flexibility in employing the tools available to them as necessary or desired for the particular MDL that they are overseeing.

V. CONCLUSION

MDL courts are able to employ some version of early vetting without a harsh, across-the-board rule. Their ability to do so should continue, but a broad process should not be forced on the courts and parties, especially without justification or due regard for the consequences. The key here is that judges have previously had the ability, and should continue to have the ability, to be flexible–even creative–in their management and oversight of MDLs. Processes such as

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[22] *In re* 3M, Case No. 9:19-md-02885, at *1 (Jan. 21, 2020) (ECF No. 922) (indicating that as of "December 16, 2019, there were 139,693 claimants registered in MDL Centrality in connection with the 3M litigation").

[23] MDL Statistics Report – Distribution of Pending MDL Dockets by District, United States Judicial Panel on Multidistrict Litigation, July 16, 2020, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-16-2020.pdf (last accessed July 31, 2020).

Plaintiff Profile Forms and censuses should not be compelled but should instead serve as discretionary tools. Each MDL is different, and each MDL judge should be able to select the appropriate tools to manage their docket instead of being hamstrung into enforcing unwieldy rules.

VETTING THE WETHER: ONE SHEPHERD'S VIEW

Judge M. Casey Rodgers*

Multidistrict litigation (MDL) promotes fairness and efficiency by enabling coordinated discovery, minimizing the risk of inconsistent pretrial rulings by different courts on the same issues, and conserving the resources of the parties, their counsel and the judiciary. In many ways, MDLs effectively serve these fundamental goals. But the MDL system, like any other system, is not perfect. One criticism is that it can incentivize mass filings of unvetted—and, all too often, unsupportable—cases, which ultimately plague the litigation with the very inefficiencies MDLs are designed to prevent. This article offers a perspective from the bench, based on my experiences with two very different products liability MDLs: *In re Abilify Products Liability Litigation* ("In re Abilify"), MDL No. 2734, and *In re 3M Products Liability Litigation* ("In re 3M"), MDL 2885.

I. THE PROBLEM

In recent years, nearly half of all civil cases pending in federal courts have been part of an MDL.[1] A reported twenty to fifty percent of those cases involve plaintiffs with unsupportable claims.[2] In the products liability context, unsupportable claims are often a result of a plaintiff having not used the relevant product and/or having not suffered the injuries alleged, or, in some cases, the applicable statute of limitations having run.[3] MDLs have no built-in, uniform mechanism for efficiently filtering out these sorts of claims.[4] The procedural safeguards used effectively in one-off cases (e.g., federal pleading standards, discovery obligations, case-specific motions for summary judgment, and Rule 11 sanctions) are difficult to employ at scale in the MDL context, where the volume of individual cases in a single MDL can number in the hundreds, thousands, and even hundreds of thousands.[5] Left unchecked, high volumes of unsupportable claims can wreak havoc on an MDL. They clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions. And yes, as some may be loath to admit, the sheer volume of

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* United States District Judge, Northern District of Florida.

[1] *See, e.g.*, Lawyers for Civil Justice, *MDL Cases Continue to Dominate the Federal Civil Caseload*, https://351a1749-77dd-47c5-b48f-bca398eed71e.usrfiles.com/ugd/351a17_c12a92cf117a484d8ef72a1db3ab1bc9.pdf; *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2019*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf.

[2] *See* Advisory Committee on Civil Rules, MDL Subcommittee Report, 142 (Nov. 1, 2018) https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[3] *See id.*

[4] This differs from class action litigation, where the class certification process under Federal Rule of Civil Procedure 23 provides a filtering system of sorts through its requirements of numerosity, commonality, typicality, and, depending on the nature of the proposed class, predominance.

[5] For example, it would be wholly unrealistic and unduly burdensome to expect an MDL defendant to engage in a Rule 26(f) conference with every individual plaintiff in the litigation.

unsupportable claims in some MDLs can grossly distort the true merit and size of the litigation. To be sure, dealing with unsupportable claims, and with their consequences for an MDL more broadly, drains the time and resources of the parties, counsel, and the courts.

There seems to be widespread agreement that most, if not all, MDLs need a formal vetting process to address this problem. However, there is considerable disagreement on how, when, and to what extent vetting should occur. Plaintiffs generally prefer very minimal requirements, with no obligation to provide supporting documentation or supplement responses; whereas defendants tend to push for more comprehensive disclosure requirements, including proof of causation, which is, itself, a highly controversial proposition because it is seen by some as imposing an undue burden of proof much earlier than would exist in a traditional one-off case. The issue is further complicated by a fundamental tension inherent in the MDL context between the need to effectively manage *all* claims in the litigation, on the one hand, and the need to respect the autonomy of *each* individual plaintiff, on the other. In my experience, there is no one-size-fits-all solution.

II. VETTING

In the MDL context, vetting refers to the process of gathering basic information about plaintiffs' claims, often well before any case-specific discovery is complete or bellwether cases are selected for trial. Ideally, the vetting process would be purely informational, simply enabling the parties and the court to better understand and evaluate the litigation. However, in some instances—most frequently in mass tort proceedings—the vetting process becomes a necessary tool for testing the merit of the inventory of cases and for filtering out unsupportable claims.

Most court-supervised vetting is accomplished through the use of a standardized, judicially approved questionnaire that each plaintiff completes. The questionnaires are variously termed "profile forms," "supplemental profile forms," "preliminary disclosure forms," "initial census forms," or "fact sheets"; however, no matter the nomenclature used, the questionnaire is intended to serve as a straightforward disclosure that allows the parties and the court to better understand a plaintiff's claim.[6] The parties typically negotiate what information will be included on the questionnaire, with the court providing input and resolving disputes over content. Once the parties have agreed on the contents of the questionnaire, and the court has adopted it, individual plaintiffs typically have a relatively narrow window of time to complete the form and provide their responses to the defendants. Defendants then have the opportunity to review plaintiffs' responses and identify any perceived deficiencies. Deficiency disputes that the

[6] Profile forms and initial census forms are usually simplified disclosures of core information about a plaintiff's claim and the extent of his or her alleged injury, which the plaintiff's counsel should have readily available. Fact sheets generally seek more in-depth information.

parties are unable to resolve themselves may be brought to the court for resolution.[7] Unfortunately, this process can be burdensome and costly. For this reason, vetting should be approached thoughtfully with a focus on achieving a uniquely tailored balance between the parties' need for information and the resources required to obtain it.

The type and amount of information sought on a questionnaire will depend largely on the objectives of the vetting process and the nature of the plaintiffs' claims. For example, at the outset of a products liability MDL, the primary goal may be to create an initial census of the claims in the litigation. In that scenario, a vetting form might simply require plaintiffs to identify the drug or medical device used, the types of injuries alleged, and the timing of the use and injuries. The initial census form in the *3M* MDL loosely followed this approach—the form sought general identifying information about the plaintiff (e.g., name, date of birth, state of residence, counsel, branch of military service (if any)), dates and circumstances when the allegedly defective product was used, and basic details about the types and timing of alleged injuries.[8] Because the *3M* initial census forms were limited to the facts most important to the general allegations in the MDL, the completed forms effectively and efficiently informed the court's case management decisions and, more particularly, the bellwether selection process.

Sometimes the objective of vetting is to test the basis of plaintiffs' claims, in which case, more detailed information will be necessary and, where appropriate, supporting documentation required. In *Abilify*, there was a high rate of voluntary dismissals of cases in all three discovery and trial pools.[9] A similar pattern emerged each time individual plaintiffs were required to provide even the most basic information about their claims—proof of Abilify use and proof of injury.[10] At each stage, the plaintiffs were given multiple opportunities to fulfill their obligations and were advised that failure to do so would result in dismissal of a case with prejudice. Nevertheless, after three years, more than 550 cases—representing over 18% of the litigation—had been dismissed with prejudice for failure to comply with court orders, failure to prosecute, and/or failure to provide even basic

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[7] *See In re* Abilify Prods. Liab. Litig., 299 F. Supp. 3d 1291, 1332 (N.D. Fla. 2018).

[8] *See In re* 3M Combat Arms Earplug Prods. Liab. Litig., 202 U.S. Dist. LEXIS 63227, at *4 (N.D. Fla. 2019).

[9] These cases certainly provided important data points about how the broader pool of cases in the MDL might fare; however, it is not in anyone's interests for individual cases to be repeatedly worked up only to be dismissed just prior to trial.

[10] Initially, Abilify plaintiffs were required to submit a Plaintiff Profile Form within thirty days of becoming a part of the MDL. When it later became apparent that additional information was needed for use in evaluating the inventory of cases, the plaintiffs were directed to submit a Supplemental Plaintiff Profile Form, along with supporting documentation. Bellwether plaintiffs were required to submit Fact Sheets. Finally, in order to participate in the global settlement program, plaintiffs were required to support their claims with varying levels of evidence.

information regarding proof of use and/or injury. This experience underscores the importance of an early vetting process in some litigation, like *Abilify*.

III. TIMING

A word about timing: in some MDLs, an early census or vetting of cases will be the prudent course from an organizational and case management perspective. For instance, the early census may take place alongside general liability discovery and dispositive motions practice. As the litigation develops, additional information may be needed from individual plaintiffs, in which case a supplemental vetting form may be used. In appropriate MDLs, an early census may streamline the data-collection process from the start and provide critical insights into the inventory which the parties and the court can use to structure the litigation more efficiently.

In other MDLs, the time and expense of a census should await resolution of some generally applicable threshold or dispositive issues, such as federal preemption or general causation. It may also be that the unique circumstances of a particular MDL forestall any "early" vetting of claims. *3M* is a prime example of this situation. There, the plaintiffs, who are primarily current and former military personnel, claim they suffered hearing damage caused by an allegedly defective earplug used during their service. The census process established early in the litigation required them to complete a questionnaire and produce certain documents related to their military service (e.g., military separation records, audiological exams, audiograms, disability benefits) within a relatively short timeframe. Unfortunately, most plaintiffs needed their military and veterans records to complete the census form, so the lengthy process of obtaining these records from the federal government—which involved submission of so-called *Touhy* requests to the Department of Defense and Department of Veterans Affairs for, at that time, tens of thousands of plaintiffs—torpedoed the parties' efforts to accomplish an "early" census of supportable claims.[11]

IV. PARTING THOUGHTS

1. Encourage Simplicity

The longer and more detailed the vetting form, the more it will resemble a full-fledged discovery request, which will take plaintiffs longer to complete and defendants longer to review, and, in all likelihood, raise more deficiency disputes that will take even more time for the parties and the court to resolve. Relatively

[11] *See* United States ex rel. Touhy v. Regan, 340 U.S. 462, 465 (1951) (limiting a private litigant's access to government information and witnesses for use in private litigation).

short and concise forms, where appropriate, can help reduce complications and delays in the vetting process.

2. Rely on the Expertise of Litigation Management Firms

Litigation management firms are indispensable to the effective and efficient management of an MDL, and, as relevant here, to the vetting of claims. In both the *3M* and *Abilify* MDLs, the parties used a litigation database called MDL Centrality® for centralized litigation management and support, which has facilitated the gathering, organizing, accessing, and analyzing of the voluminous data associated with these cases. Regarding vetting, in particular, MDL Centrality® has enabled the plaintiffs in *3M* to securely submit their initial census forms and supporting documentation to defendants, who could then review the forms and identify any perceived deficiencies using the same platform. The use of a single entity—as opposed to dozens of different plaintiffs' firms—to house, interpret, and produce the census materials helped reduce inconsistencies and deficiencies in the plaintiffs' responses. This streamlined the early vetting process in ways that manual document production and review never could. More significantly, MDL Centrality® allowed for statistical analysis of the plaintiffs' census responses, breaking down the data by types of claims and injuries, and identifying characteristics common to the entire inventory of cases (or subsets of the inventory). When a goal of the census process is to obtain a truly representative sample of cases to proceed with bellwether discovery and trial, a platform like MDL Centrality® is crucial.

Parties have also used litigation management firms in connection with tolling agreements, i.e., agreements that extend the period within which potential claims must be filed, often in exchange for the claimants registering their claims with a litigation platform firm and providing certain basic information about those claims to the defendants.[12] In theory, this approach presents a number of benefits for an MDL: for plaintiffs, it prevents the running of statutes of limitations while common discovery and vetting of individual claims is completed; for defendants, it keeps the numbers of filed cases down and provides an opportunity to evaluate the viability of the plaintiffs' claims before lawsuits are filed. For the court, the docket is not burdened with mass filings of unvetted cases. However, there are some practical difficulties with this approach. First, the court will not have jurisdiction over plaintiffs whose claims have not yet been filed in the MDL; therefore, it cannot adjudicate disputes about deficiencies in the information supplied by plaintiffs pursuant to the tolling agreement. Similarly, the court will lack jurisdiction to enforce the terms of any global settlement of unfiled claims. Finally, there may also be legal impediments to this approach. In *3M*, the parties originally reached a tolling agreement and planned to warehouse the unfiled claims in MDL Centrality® while vetting took place. While this endeavor was promising in theory, it proved impossible in practice. As noted above, the *3M* vetting process

[12] *See, e.g., In re* Proton-Pump Inhibitor Prod. Liab. Litig. (No. II), Case No. 2:17-md-2789, ECF No. 232 (D.N.J. June 27, 2018); *In re* Vioxx Prod. Liab. Litig., ECF No. 429 (E.D. La. June 9, 2005).

depended on individual plaintiffs' ability to obtain their military and veterans records from the federal government through *Touhy* requests. Under the applicable federal regulations, *Touhy* requests were only an option for plaintiffs who were actually involved in the litigation; that is, plaintiffs with filed cases. This meant that in order to properly vet the cases, the cases had to be filed on the docket. As a result, the Court created a separate administrative docket on which all of the previously unfiled cases had to be filed to enable the submission of *Touhy* requests.[13] The MDL Centrality® platform continues to be essential to the organized and efficient filing of these cases. As of January 11, 2021, there were 222,124 cases filed on the *3M* administrative docket, with another approximately 1,500 cases currently housed in MDL Centrality® and due to be filed in the coming weeks.

3. Appoint an Early Vetting Subcommittee

Ideally, all individual plaintiffs' attorneys would properly vet every case before filing a complaint, and thereafter, timely comply with all census obligations. Unfortunately, this does not always happen. Inconsistencies and deficiencies in plaintiffs' responses to census and vetting forms can result from the fact that individual plaintiffs in an MDL are represented by dozens of different law firms, each of which has its own interpretation of the census forms and devotes varying degrees of resources to completing the forms. A dedicated subcommittee can help streamline the vetting process and minimize the number of disputes requiring resolution by the court.

In *3M*, the Early Vetting Subcommittee, which was appointed as part of the leadership structure early in the litigation, was tasked with overseeing the census process by ensuring that forms were properly completed and timely submitted, that adequate records authorizations and supporting documentation were timely provided (when required), and that core deficiencies, if any, were timely cured.[14] The Subcommittee embraced that role from the start by: (1) educating individual plaintiffs' counsel on the initial census procedures and deadlines; (2) serving as a central and accessible source for questions about the census form; (3) conferring with defense counsel on recurring deficiencies, then sharing that information with individual plaintiffs' firms to help guide them in completing the form; (4) personally reviewing individual plaintiffs' census forms for deficiencies; and (5) updating plaintiffs' leadership and the court on the status of the efforts. Moreover, the Subcommittee educated non-leadership firms on the science behind the product and the types of injuries alleged in the MDL, which helped plaintiffs' firms identify claims that would likely not succeed. The Subcommittee's work was instrumental to managing the initial census process and

[13] *In re* 3M, ECF No. 898, at *2.
[14] *See In re* 3M, ECF No. 76, at *9.

conserving judicial resources by resolving countless issues between individual plaintiff firms and defense counsel without court involvement.

V. CONCLUSION

The goal of any MDL is to achieve the fair and efficient litigation and resolution of large and complex disputes, whether through disposition or settlement in the MDL court, or remand to transferor courts. Getting one's "arms around the MDL inventory," as my friend and colleague Judge Eldon Fallon puts it, is critical to this endeavor. But the devil is in the details and census procedures that operate seamlessly in one MDL may not fit well in another. Fortunately, MDL courts have broad discretion to tailor a census or vetting process to the unique needs of a particular litigation.[15] If designed and deployed effectively as part of a broader case management plan, a vetting process can identify and winnow unsupportable claims so the resources of the parties, counsel, and the court can be focused on cases that are properly a part of the MDL proceeding.

[15] *See* Adinolfe v. United Tech. Corp., 768 F.3d 1161, 1167 (11th Cir. 2014) ("District courts have broad discretion" to adopt "special procedures for managing [the] potentially difficult or protracted" matters that may arise "involv[ing] complex issues, multiple parties, difficult legal questions, or unusual proof problems.").

EARLY VETTING: A SIMPLE PLAN TO SHED MDL DOCKET BLOAT

Alan E. Rothman* & Mallika Balachandran**

I. INTRODUCTION

The scales of justice are clearly tipping. Even the most cursory review of Multidistrict Litigation ("MDL") statistics reflects a docket imbalance which cannot be ignored. There can be little dispute that "the number of federal cases swept into an MDL" has "exploded."[1] As of the end of fiscal year 2019, there were a total of 134,462 individual actions in nearly 200 pending MDL proceedings.[2] By the end of fiscal year 2020, that number had ballooned to 327,204 individual actions in 176 MDL proceedings.[3] The burgeoning MDL dockets are particularly acute in product liability and other personal injury MDLs ("Product Liability/Personal Injury MDLs"), where the creation of an MDL (or even the mere filing of an MDL petition) is inevitably followed by a jump in the number of new cases. In fact, some MDL judges recognize that creation of an MDL often leads to the filing of claims with questionable merit.[4]

The current system enables plaintiffs to file claims with ease, at a low cost and without a procedure in place to quickly determine whether the case should

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[1] Ryan C. Hudson, Rex Sharp & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801 (2021).

[2] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2019*, www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf. *See also* Hudson et al., *supra* note 1; Alan Rothman, *And Now a Word from the Panel: MDLs Continue to Thrive*, LAW360 (Feb. 21, 2020).

[3] United States Panel on Multidistrict Litigation, *JPML Statistical Analysis of Multidistrict Litigation-FY-2020*, www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. In early 2021, MDLs surpassed a new milestone. Since the inception of MDL proceedings, there have now been more than one million individual actions in those litigations. Alison Frankel, *As MDL Cases Surpass 1 Million, Defense Group's Push for Early Vetting Heats Up*, Reuters (Mar. 17, 2021).

[4] *In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016) ("MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise"). *See also* Alan Rothman, *Managing MDL Mania: A Modest Early Vetting Proposal*, NEW YORK L. J. (2019).

even be on the docket. There are two gateway questions that should be asked and answered every time a case is filed: Did the plaintiff ingest, use (or was the plaintiff otherwise exposed to) the named defendant's (or defendants') product? Did the plaintiff sustain an injury subsequent to use of that product? Absent an affirmative answer to those two basic questions, with at least some documentation as support, there would be no good faith basis to file an action. Thus, this information should be readily available to plaintiffs' counsel. The time has come to adopt and implement a simple early vetting remedy to support the *bona fides* of these MDL actions.

With these principles in mind, we are prepared to delve deeper into the underpinnings of the docket bloat, what efforts have previously been made and why they have fallen short of the mark. Section II examines the data behind the explosion of case filings in MDLs. Section III provides an explanation as to why MDLs facilitate a surge in case filings, cases that would never have been filed outside of the MDL context. Section IV provides an historical overview of approaches taken by MDL courts to screen cases before them, as well as recent MDL reform efforts with respect to early vetting. Thereafter, Section V explains why a streamlined early vetting process with limited information offers a quick, efficient solution, whereas other winnowing tools used by MDL courts do not provide the essential relief required to quickly "reduce the waistline" and bring MDLs back into shape.

II. EXPLODING MDL DOCKETS: DELVING INTO THE DATA

MDLs comprise a large portion of the federal civil caseload. In recent years, the number of individual actions in MDL proceedings have comprised more than 50% of the overall federal civil docket.[5] As noted above, by the end of FY 2020, there were 327,204 individual actions pending in MDL proceedings.[6] It is the spiraling number of individual actions in a particular type of MDL proceeding (namely, Product Liability/Personal Injury MDLs) which should raise eyebrows.

Product liability and personal injury cases occupy a large portion of the MDL population. Based on a review of the MDL dockets, approximately only one-third of the pending MDL proceedings involve this genre of litigation, but those MDLs include the vast majority of the individual actions in all of the MDL proceedings.[7]

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[5] *See* Hudson et al., *supra* note 1. For purposes of this analysis, the overall federal civil docket figure (the denominator) excludes habeas corpus and social security cases.

[6] *See* United States Panel on Multidistrict Litigation, *supra* note 2.

[7] *See* Hudson et al., *supra* note 1, at 803 (top 10 MDL proceedings alone by number of actions, which each included product liability and/or personal injury claims, embodied most of the individual actions in MDL proceedings); *see also* United States Judicial Panel on Multidistrict Litigation, *Calendar Year Statistics,* www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf (61 of the 185 pending MDL proceeding were product liability MDLs). Even the most cursory review of more current MDL data reflects that individual actions continue to flood Product Liability/Personal MDLs. United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report-Distribution of*

Another unusual feature of MDL proceedings is the rapid pace with which individual actions surge at the outset of those proceedings. In the six Product Liability/Personal Injury MDLs created after January 1, 2019 through the end of FY 2019, 203,706 individual actions were pending by the end of the following fiscal year (FY 2020).[8]

III. FUELING THE FIRE: WHY MDLs FACILITATE A SURGE IN CASES

Before addressing a solution to MDL docket bloat, it is important to understand what is fueling this growth within Product Liability/Personal Injury MDLs, not seen in mill-run litigations. A key reason for the increase in the number of cases in MDL proceedings is the ease with which plaintiffs are able to add their cases to the MDL and avoid individual scrutiny. But why is it so easy to file cases in an MDL proceeding as compared to the overall federal docket? And why does the system appear to enable the filing of meritless cases?

First and foremost, an MDL proceeding creates a "piggyback" effect. In many MDLs, a plaintiffs' leadership group is appointed by the court with responsibility for spearheading the litigation on behalf of plaintiffs. This allows for other plaintiffs' counsel who are willing to sit on the sidelines (and later pay a "common benefit" fee from any ultimate recovery to be divided among plaintiffs' leadership)[9] to file a case and leave the heavy lifting to others. Moreover, the ensuing growth in cases encourages even more filings – often fueled by plaintiffs' attorney advertising – because the more cases are filed, the less likely it is that any individual complaint from among the growing pool of cases will be subject to early challenges, whether via a motion to dismiss or otherwise.

In addition, there are also two often utilized devices in MDL litigation which can be drivers of the increase: (1) Master Complaints; and (2) Direct Filing Orders. These factors, even if they have value for other purposes, minimize the marginal cost of adding a case to the MDL. A Master Complaint is an omnibus complaint filed by plaintiffs' leadership which includes all of the common allegations, including causes of actions, against the defendants. New plaintiffs can adopt the Master Complaint and file a Short-Form Complaint which includes

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Pending MDL Dockets by Actions Pending, www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-March-15-2021.pdf.

(almost all of MDL proceedings with 500 or more individual actions are Product Liability/Personal Injury MDL proceedings). Product Liability/Personal Injury MDLs consisting primarily of class actions generally have few actions due to the collective nature of a putative class (often embodying thousands or more class members).

[8] This data is based on a review of the MDL statistical data as of the end of FY 2020 for the six Product Liability and Personal Injury MDLs created between January 1, 2019 and September 30, 2019 (including MDL Nos., 2875, 2885, 2886, 2887, 2903 and 2905), available at www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf. (which includes data regarding the number of cases filed in, and transferred to, MDL proceedings).

[9] *See* Hudson et al., *supra* note 1, at 809.

certain information about their case (but with no proof to support their claim required), without spending the time to prepare their own detailed complaints. Moreover, to avoid the need to file cases in plaintiffs' home states – where personal jurisdiction and venue would likely be proper – and avoid the costs of retaining local counsel and MDL transfer, MDL courts often enter a Direct Filing Order. Such orders enable plaintiffs from around the country to file their cases directly in the MDL forum, even if personal jurisdiction and venue are improper there. (Defendants preserve personal jurisdiction and venue objections until the conclusion of pretrial proceedings.)

Moreover, the data suggests that the attraction of filing directly in an MDL proceeding is fueling the increase in cases. As of the end of FY 2020, more than 200,000 of the 203,706 individual actions pending in Product Liability/Personal Injury MDLs created since January 1, 2019 through the end of FY 2019, had been filed directly in the transferee court.[10]

IV. HISTORICAL AND CURRENT APPROACHES

a. The Historical Approach: Modified MDL Discovery

Historically, attempts to deal with information relating to individual cases within an MDL have taken the form of modified discovery, albeit by different names. The goal has been to create a uniform set of questions and streamline the discovery process so as to avoid the need for typical individual case-specific discovery. The most common form of that substitute discovery has been the use of a "Plaintiff Fact Sheet" ("PFS").[11] The PFS has commonly been a lengthy questionnaire, often consisting of dozens of pages, with numerous questions (including subparts and charts) ranging from personal background (residence, education, employment) to medical histories of the plaintiff and family members, identity of physicians, prior litigations filed by the plaintiff, insurance coverage and damages sought. Tucked away are numerous questions relating to product use (or exposure) and its duration. The typical PFS also includes document requests to support the answers to the wide range of information sought, including a request for medical authorizations to release a slew of records.

In practice, the PFS questions are a result of a heavily negotiated, protracted process. Although the bidding often begins with using a template PFS from another MDL, that does little to avoid what is usually months of negotiations among counsel before finalizing the treatise of questions ultimately used in a given MDL proceeding.

Moreover, the PFS is hardly an expeditious process. Once a PFS is agreed upon, which is often months (and in some instances more than a year) after creation of the MDL, there is a drawn-out timeline for information to be provided and for

[10] United States Panel on Multidistrict Litigation, *supra* note 3.

[11] In cases with a PFS, a Defendant Fact Sheet ("DFS"), requiring defendants to respond to a set of case-specific questions (often relating to contact between sales representatives and plaintiffs' physicians) is typically negotiated and ordered as to certain actions within the MDL as well.

deficiencies to be challenged. That process often takes many months. When a plaintiff fails to provide information, the plaintiff is offered an opportunity to cure the defects. Fighting over the sufficiency of a PFS itself can become a litigation within a litigation.[12]

While the hope of some may have been that the PFS process would identify and eliminate meritless claims, the process is so tortured and protracted that it in no way resembles an early vetting process. Nor is the PFS simple enough to provide just the basic information necessary to determine whether a plaintiff has an initial basis to file a case.

A limited number of courts have used shorter questionnaires at the outset of an MDL proceeding, well before the PFS process, to specifically target the bona fides of plaintiffs' allegations of exposure to the product and/or a relevant injury.[13] This approach is much more useful as a gateway function at "an early stage" to "help resolve certain issues in this litigation in a timely manner."[14] But such targeted efforts at the outset of an MDL are exceedingly rare.

b. Help Is on the Way?: Recent MDL Reform Efforts

Over the past several years, there have been a number of MDL reform efforts to tackle the surge in MDL case filings (among other issues). The subject of early vetting has been on the agenda of the MDL Subcommittee of the Advisory Committee on Civil Rules (the "MDL Subcommittee") for potential amendment of the Federal Rules. The MDL Subcommittee has acknowledged that "the early vetting proposals have been in response to the 'Field of Dreams' problem -- sometimes JPML centralization of litigation is followed by the filing of a large number of new claims," but "how to best address the issue has evolved [and] [t]hat evolution continues."[15]

In 2017, a House bill included a provision to require evidentiary support of exposure and injury within forty-five days and for the court to thereafter rule on the sufficiency of that evidence. That bill died in Congress and "the focus of the [MDL] Subcommittee turned to the [PFS]."[16] As part of the "evolution" of the process, "[i]n place of reliance on PFS/DFS practice, the more promising idea came to be known as a 'census,' an effort to gain some basic details on the claims

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[12] In fairness, the most effective use of the PFS to whittle down cases is not in determining whether a case is meritless, but in enabling a defendant to ultimately seek dismissal of a case for failure to complete the PFS.

[13] *See, e.g.*, *In re* Zofran (Ondansetron) Prod. Liab. Litig., No. 1:15-cv-2657-FDS, 2016 WL 3058475 (D. Mass.
May 26, 2016) (early disclosure order requiring each plaintiff to provide certain product identification information, with supporting records identifying the manufacturer of the product, within thirty days).

[14] *Id.*

[15] Advisory Committee on Civil Rules, *Agenda Book*, 145-46 https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf (April 2, 2020) (citing Fairness in Class Action Act (H.R. 985)).

[16] *Id.* at 147.

presented -- evidence of exposure to the product at issue -- so as to permit an initial assessment."[17] Recently, a few MDL courts have entered a "census order," but the "census" includes a considerable number of questions, as well as topics not exclusively limited to proof of exposure and injury. The length of that process suggests that while it may ultimately have value to obtain case-specific information, it (like the PFS) is not an early vetting solution to quickly identify meritless claims.

V. MDL EARLY VETTING: SHORT, SWEET, AND EFFECTIVE

To put it all together, there appears to be an evolving consensus that there must be a system for an initial assessment of claims. Precisely as the MDL Subcommittee articulated, "there should be a beginning for an information exchange."[18] But the processes adopted in MDL proceedings have not facilitated the necessary immediate exchange of information. What is needed is effective and simple early vetting that is truly a "beginning," consisting of the limited information that counsel should have had the moment a case is filed. And what is that information? Answers to two questions which could fit on a postcard:

> **Proof of Exposure**: Did you ingest, use or were you otherwise exposed to the named defendant's/defendants' product?
> **Proof of Injury**: Did you sustain an injury subsequent to that ingestion, use or exposure?

And what documentation is needed? Two pieces of paper: One page of a record documenting and identifying the exposure (ingestion or use) to a named defendant's product, and one page of a record reflecting the alleged injury subsequent to the date of exposure (ingestion or use). This is a form of an initial disclosure, which the Federal Rules should require be provided in every case within an MDL proceeding. It will winnow the cases which should never have been filed and reduce the bloat that meritless cases create on an MDL court's docket. In multiple defendant cases, it will enable defendants who do not belong to be dismissed at the outset.

Some might (and in fact do) argue that the system cannot sustain such early scrutiny in the context of a large MDL because there are simply too many cases. But such an argument is circular. There are so many cases in an MDL because it is too easy to file a case which can fly under the scrutiny radar for months, if not years. We have reached a point where a rule to address the spike in MDL cases is critical.

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[17] *Id.*
[18] *Id.*

VI. CONCLUSION

Keep it simple and start early. With these two critical ingredients, a realistic early vetting procedure will have the best chance to succeed across all Product Liability/Personal Injury MDL proceedings. At the same time, it will enable MDL courts and the parties to thereafter fashion discovery best suited for the particular needs of that MDL (whether as a PFS, census order or otherwise) without the bloat of clearly meritless claims. Even more importantly, this proposed early vetting is a sustainable "weight loss" program which can readily be applied as new cases are filed, leaving a more fit, manageable docket for the benefit of all.

ADVICE TO A NEW MDL JUDGE ON DISCOVERY MANAGEMENT

Judge David G. Campbell[*] & Jeffrey A. Kilmark[**]

So, Judge, you have agreed to preside over a multi-district litigation (MDL) proceeding, and you would like some advice on managing MDL discovery. Congratulations. Your new assignment will be interesting and challenging.

We base our advice on our experience managing a product-liability MDL of about 8,600 cases, where we were aided by some very skilled lawyers.[1] Some MDLs are larger than ours, but most are smaller. While common themes run through all MDLs, there is no single approach to discovery. Your case almost surely will require variations on our suggestions.

Begin with Rule 1 of the Federal Rules of Civil Procedure, which directs you and the parties to achieve the "just, speedy, and inexpensive determination of every action." There is no MDL exception to Rule 1. Indeed, Congress has directed you "to promote the just and efficient conduct of such actions."[2]

I. GETTING THE INFORMATION EXCHANGE STARTED

A number of cases will be included in your MDL when you receive the initial transfer order from the Judicial Panel on Multidistrict Litigation. That number surely will grow, perhaps by hundreds or even thousands. You will need an automatic procedure for the parties to exchange basic information as each new plaintiff arrives. That information may be shared in part by requiring each plaintiff to file a short-form complaint identifying the specific claims she is asserting (selected from a master complaint of all possible claims developed by the Plaintiffs' Steering Committee you will appoint), and by requiring the defendants to file a short-form answer identifying general information in their possession relevant to the plaintiffs' claims.[3]

Somewhat more detailed information can be provided by requiring the parties to exchange profile forms. Each new plaintiff can complete and share with the defendants a Plaintiff Profile Form (PPF) that states basic information about the plaintiff and her individual claims – name, date of birth, when and where she used the product, what injuries she has suffered, and whether a spouse asserts a loss of consortium claim. The defendants can be required to provide the new plaintiff with a Defendant Profile Form (DPF) that discloses readily identified information relevant to the plaintiff, such as date and place of manufacture of the

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[*] David G. Campbell is a Senior Judge for the United States District Court for the District of Arizona.
[**] Jeffrey A. Kilmark is a law clerk for Judge David G. Campbell.

[1] *See In re* Bard IVC Filters Prods. Liab. Litig., No. MDL 15-02641-PHX-DGC (D. Ariz. Aug. 17, 2015).

[2] 28 U.S.C. § 1407(a).

[3] Before appointing the leadership lawyers for your case, call judges before whom the candidates have appeared to make sure you are appointing able lawyers who know how to manage complex litigation reasonably and efficiently, with a minimum of unnecessary squabbling. I had such lawyers in my case, and it made my life much easier. And, seek to achieve diversity in your leadership selections. *See* Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841 (2021).

product, government approvals, and product recalls. You can require that these profile forms be signed under oath as would interrogatory answers, ensuring that the information the parties exchange early in the MDL is as accurate as possible.

Include an enforcement procedure to ensure that profile forms are disclosed promptly, such as specifying the time after complaint filing when the forms must be exchanged; establishing a procedure for the parties to provide notice to each other, followed by a cure period, if a profile form has not been received or is deficient; and setting a procedure for the parties to bring disputes to your attention efficiently, such as providing a chart of deficiencies monthly that you can review and rule on as part of your regular case management.

II. SETTING THE DISCOVERY SCHEDULE

Your role as an MDL judge is to conduct "coordinated or consolidated pretrial proceedings,"[4] and your primary focus should be on general, MDL-wide issues. You cannot and should not attempt to oversee plaintiff-specific discovery, except for those cases which may be candidates for bellwether trials, as discussed below. The discovery should focus on common-issue discovery: production of relevant documents from the defendants and third parties; depositions of witnesses whose testimony will be relevant to all cases; discovery on issues like preemption that could affect the entire MDL or large portions of it; and the disclosure and depositions of general experts from both sides on litigation-wide issues such as manufacturing and design defects, adequacy of product warnings, regulatory matters, and general medical causation.

After conferring with the parties, set a reasonable but firm schedule for completing common fact and then expert discovery. This schedule will be longer than the discovery period in a single case, even a complex case, but make it as short as reasonably possible. As attorneys Ryan Hudson, Rex Sharp, and Dean Nancy Levit aptly note in their Introduction, "the most time-consuming part [of an MDL] is the production of documents . . . and the taking of depositions[;]" it is common to see "millions of pages of documents produced" and scores or even hundreds of witnesses deposed.[5]

Even though your MDL is complex, remember that your discovery schedule should be modified only upon a showing of "good cause."[6] "Good cause" exists only when a deadline "cannot reasonably be met despite the diligence of the party seeking the extension."[7] Tell the parties in your case management conference and state in your case management order that the discovery deadlines are real and

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[4] 28 U.S.C. § 1407(b).

[5] Ryan C. Hudson, Rex Sharp & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801, 811 (2021).

[6] FED. R. CIV. P. 16(b)(4).

[7] FED. R. CIV. P. 16 advisory committee's note to 1983 amendment*; see* Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992) ("[T]he focus of the inquiry is upon the moving party's reasons for seeking modification. If that party was not diligent, the inquiry should end.") (internal citation omitted).

will be extended only on a showing of good cause. This warning will avoid later surprises and will encourage the parties to pursue their discovery diligently.

III. EIGHT DISCOVERY TIPS

First, hold regular status conferences, perhaps every month at the start. Require the parties to file a joint memorandum shortly before each conference reporting on the status of discovery, their progress in meeting deadlines, discovery issues, and other obstacles they have encountered. View each status conference as a problem-solving session to keep the discovery schedule on track.

Second, establish a procedure for handling already-completed common discovery. Prior to the establishment of your MDL, the parties may have conducted discovery in individual cases, including the production of documents and electronically stored information (ESI) and the deposition of defense witnesses. Require the parties to make pre-MDL general fact discovery available to all plaintiffs in the MDL, and encourage the parties to agree on the binding effect of such discovery, resolving disputes as necessary.

Third, manage ESI discovery closely. If the parties plan to use word searches for locating relevant ESI, require them to agree on search terms and custodians by a deadline early in the discovery period and to come to you if they cannot agree. If the parties intend to use some form of machine learning for their searches, require them to agree upon protocols by an early deadline and come to you if they cannot. Delaying agreement on these matters invites serious complications down the road when ESI discovery has not been completed and the deposition clock is running.

Fourth, set reasonable limits on the number and length of depositions. Consider placing an overall time limit on each side's number of deposition hours, such as 300 hours per side to be allocated among all general-discovery depositions in the case. Such time limits create a powerful incentive for efficiency in each deposition and largely eliminate time-wasting. Where a witness has been deposed on MDL-related issues before the MDL was formed, consider setting a shorter period for her MDL deposition to cover matters not addressed in the previous questioning.

Fifth, forbid written discovery motions. They waste time and money and likely will interfere with your discovery schedule. Instead, require the parties to call you when they have a discovery dispute they cannot resolve through their own good faith discussions. Take their call immediately if you are available or set a time to talk with them in the next day or two. Hold the discovery conference call on the record. Have each side explain the dispute. You usually will be able to make a decision on the spot. If issues arise during a deposition and you are not available to take the parties' call, require them to complete the deposition and make a record of the issues they wish to have you resolve when you are available.

If you find during a discovery call that certain issues require briefing, order it to occur within a week, focused on issues identified in the conference call and with page limits. Then rule on the issues within a week of receiving the briefs.

Enter your ruling in clear and direct text-only orders in your court's electronic docket – orders the lawyers will receive immediately by email.

If interrogatory answers or requests for production of documents (RFPs) are at issue, give the parties seven days to jointly prepare and submit a matrix summarizing the disputes. Allow one row of the matrix for each interrogatory or RFP at issue, and require the parties to complete four columns in each row: (1) quoting the interrogatory or RFP verbatim; (2) quoting the opposing party's response verbatim; (3) stating the propounding party's arguments on why the request is proper and the response deficient; and (4) stating the responding party's argument on why the request is improper or the response is sufficient. Rule on the issues within a week of receiving the matrix.

These practices resolve discovery disputes quickly and efficiently, and prevent disputes from interrupting the schedule you have established. They also reduce game-playing because the lawyers know you are readily available to resolve issues and keep the case moving. One more thing: require in your case management order that discovery disputes be raised before the end of the discovery period. This will avoid the months-later disputes that can interfere with motions and trial.

Sixth, require parties to notify the opposing side whenever they serve subpoenas. This already is required in Rule 45(a)(4),[8] but often is overlooked. Advance notice avoids surprises and discovery disputes that could have been resolved earlier.

Seventh, enter necessary protective orders promptly – their delay slows down discovery. Set a deadline by which an agreed-upon order will be submitted by the parties. Tell them that if they cannot agree on some provisions, they must submit an order containing everything they agree on and setting forth their respective proposed language for each paragraph or section on which they disagree. You can then enter the order promptly by selecting the most appropriate of the disputed provisions. No motions needed.

Eighth, tell the parties that if privilege disputes arise, the party seeking discovery will be permitted to select ten or fifteen entries from the opposing party's privilege log, and the opposing party will be required to submit the documents covered by the selected entries to the Court for *in camera* review and a ruling on the privilege assertion. This approach motivates parties to be reasonable in their privilege assertions. Provide rulings on those ten to fifteen entries promptly, and then require the parties to meet and confer to see if they can work out additional disagreements. Usually they can. If not, repeat the process; if a large number of privilege assertions must be resolved, appoint a special master (at the parties'

[8] FED. R. CIV. P. 45(a)(4).

expense) to complete the privilege review on an expedited basis so as not to interfere with the discovery schedule.

IV. EXPERT DISCOVERY

Require full and complete expert disclosures under Rule 26(a)(2)(B)[9] by specific dates. Tell the parties that their experts will be permitted at trial to say only what appears in their report or what has been elicited by the opposing party in the expert's deposition (a rule which makes wise lawyers more cautious and effective in their expert depositions).[10] Stand by this rule in the bellwether trials. Rule 26(a)(2)(B) is designed to present a complete picture of what the expert will say at trial; the advisory committee note states that the report should provide "the testimony the witness is expected to present during direct examination, together with the reasons therefor."[11] Advise the parties that supplemental reports will be allowed only in exceptional circumstances, thereby avoiding the piecemeal disclosures that can greatly complicate expert discovery and trial.

Consider limiting the number of experts in the case, such as one expert per issue per side, or a total number of experts per side. And tell the parties that you will entertain expert discovery disputes only during the expert discovery period, again avoiding months-later disputes that only complicate matters.

V. BELLWETHER DISCOVERY

If the parties ask you to conduct bellwether trials, as they usually do in large MDLs, you will need to establish a schedule and procedures for some plaintiff-specific discovery.[12] Courts often establish a procedure for creating an initial pool of bellwether trial candidates, such as having each side propose twenty-five plaintiffs for the initial pool.[13] You can then require the fifty identified plaintiffs to provide additional case-specific information in the form of more detailed plaintiff fact sheets, to be answered under oath, setting forth information

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[9] FED. R. CIV. P. 26(a)(2)(B).

[10] *See id.*

[11] FED. R. CIV. P. 26 advisory committee's note to 1993 amendment; *see id.*

[12] Bellwether trials or "test cases" are trials in individual cases that "can help facilitate resolution of the MDL by testing essential elements of each side's litigation strategy and establishing representative settlement values." Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., 44 (2011).

[13] *See* Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG., 19-32 (2019), https://www.fjc.gov/sites/default/files/materials/19/Bellwether%20Trials%20in%20MDL%20Proceedings.pdf (providing examples of bellwether pool selection strategies employed in MDLs); *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig., No. 3:09-MD-02100-DRH, 2011 WL 3035087, at *1 (S.D. Ill. July 25, 2011) (deciding that the initial "pool of cases, with which core discovery would be pursued and from which the bellwether trials would be drawn, would consist of fifty (50) cases").

such as when and where the plaintiff obtained the product, how it was used, what injuries resulted, the plaintiff's medical history, the identities of doctors who treated the plaintiff, relevant fact witnesses for the plaintiff's individual claims, and the amount of claimed damages. You also can require the defendants to provide similar fact sheets of plaintiff-specific information, such as when the product was placed in commerce, what warnings accompanied it, which sales representatives promoted the product, which contacts the defendants had with the plaintiff or her treating physicians, and what plaintiff-specific defenses will be asserted. Some additional, limited discovery may be warranted before the bellwether pool is narrowed, such as brief depositions of the plaintiffs and a key defendant salesperson.

On the basis of the information exchanged for these fifty bellwether candidates, the parties can narrow the pool of candidates to, say, twenty-four, by each side striking thirteen from the list. The parties will then engage in more detailed discovery with respect to the twenty-four remaining plaintiffs' cases, such as production of medical records (consider allowing the parties to use a medical records collection service), depositions of key doctors and family members, and depositions of individuals who sold the product to the plaintiff or her doctor.

With this more detailed information in hand, the bellwether trials can be selected. Require the parties to agree on (or to propose if there is disagreement) six plaintiffs for the bellwether trials (or more or less, if you decide).[14] Additional discovery will then be needed to prepare these six cases for trial, such as completing plaintiff-specific fact discovery and the disclosure and deposition of plaintiff-specific experts. Limited discovery for punitive damages claims, such as production of documents and a Rule 30(b)(6) deposition[15] concerning the defendants' net worth, may also be necessary.

When you set your initial general discovery schedule, keep in mind that this plaintiff-specific discovery will be needed for bellwether selection and trials, and that it likely will take several months to complete.

VI. DISCOVERY AFTER REMAND AND TRANSFER OF CASES FROM THE MDL

Because all common fact and expert discovery likely will have been completed in your MDL, the courts receiving cases via remand or transfer after the MDL has closed should not be concerned with facilitating general expert, corporate, and third-party discovery.[16] But you should consider allowing trial

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[14] *See In re* Bair Hugger Forced Air Warming Devices Prods. Liab. Litig., MDL No. 15-2666 (JNE/DTS), 2019 WL 4394812, at *2 n.1 (D. Minn. July 31, 2019) (noting the court chose eight of the parties' proposed cases and then the parties each struck one case to finalize the bellwether pool's six cases); *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., No. 2:18-CV-01509, 2020 WL 1158734, at *2 (S.D. Ohio Mar. 10, 2020) (discussing the expert discovery needed for "the six bellwether trial pool cases").

[15] FED R. CIV. P. 30(b)(6).

[16] *See* Bartilet v. C. R. Bard, Inc., No. CV-19-9153-SAB (PJWx), 2020 WL 3467657, at *5 (C.D. Cal. Feb. 12, 2020) ("The Court finds that reopening general discovery would be inconsistent with

testimony depositions for certain witnesses who will not be able to testify live at the trials in remanded and transferred cases.

VII. CONCLUSION

In short, be an active case manager. Control the scope and pace of discovery. Resolve discovery disputes quickly and efficiently. Take advantage of the talent and experience of the lawyers in your MDL and the valuable resources made available by the Judicial Panel on Multidistrict Litigation and the Federal Judicial Center.[17] You will enjoy this experience and do some good along the way.

Rule 1's mandate for the just, speedy, and inexpensive resolution of this case. To begin with, while these cases were being litigated in the MDL court, the parties reached an agreement regarding the scope of general issue/generic discovery. . . . Second, expanding discovery at this date would extend the case and result in additional expense, further defeating the aims of Rule 1.").

[17] *See* Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2011); *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Court Clerks*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2d ed. 2014); Melissa J. Whitney, *Bellwether Trials in MDL Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2019); Margaret S. Williams, Jason A. Cantone, & Emery G. Lee, *Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges*, FED. JUD. CTR. & JUD. PANEL ON MULTIDISTRICT LITIG. (2019); Fed. Jud. Ctr., https://www.fjc.gov/subject/multidistrict-litigation-mdl (last visited Jan. 28, 2021); U.S. Jud. Panel on Multidistrict Litig., https://www.jpml.uscourts.gov/ (last visited Jan. 28, 2021).

PLANNING FOR AGGRESSIVE MULTIPARTY DISCOVERY IN A FAST-MOVING, COMPLEX MDL: AN EXAMPLE FROM THE OPIOIDS LITIGATION

Paul J. Geller, Aelish M. Baig, Thomas E. Egler, and Matthew S. Melamed*

I. INTRODUCTION

Shakespeare's character Dick the Butcher in Henry VI suggested "[t]he first thing we do [is] kill all the lawyers."[1] Had he witnessed an MDL, he could have grown nearer to his goal in one fell swoop. Imagine a sea of faces in a crowded courtroom full of distinguished lawyers, each trying to prove his or her salt, to procure a coveted spot on the esteemed leadership committee of a national MDL. They hail from all parts of the country. You hear soft-spoken Southern drawls and brash New York quips. Armed with the leadership appointment order that follows a dog and pony show, this morass of widely varied viewpoints arranges itself into a committee charged with a singular task: handling the pretrial practice of what is inevitably a large, complex, and nationwide litigation. But in the case of the opioid litigation, "large" and "complex" are inadequate adjectives. In this matter, the Plaintiffs' Executive Committee's task is nothing short of monumental: mounting the largest and most complex litigation in United States history.

The case charges more than twenty of the most powerful multi-national drug companies, and one of this country's wealthiest families, with peddling drugs—comparable to heroin—to the masses, for billions of dollars, fueling an epidemic that has wreaked havoc and despair on every region of this country. For even the most seasoned lawyers, it is breathtaking in scope, and requires the utmost in precision, strength, and fortitude, not to mention massive infusions of cash.

How does one take twenty-plus firms, with uber-competitive, Type-A lawyers, plenty of strong personalities, and completely different perspectives (cultivated as far and wide as Seattle, San Francisco, Texas, Cleveland, Michigan, Louisiana, West Virginia, Massachusetts, New York, Charleston, and Florida), and make one seamless whole, one collaborative team, capable of taking on one of the most powerful industries in the country? One that is capable of taking 500-plus depositions and reviewing over 150 million pages of documents in less than a year?

The key is assembling those lawyers from across the country into the creation of a lean, clean, discovery machine. Discovery sits in the center of any MDL map. MDLs are initially formed because cases from federal courts around the country present "one or more common questions of fact" that can be better developed in one courtroom than in separate remote districts.[2] As the Judicial Panel on Multidistrict Litigation ("JPML") states, the core purposes of MDLs are "to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary."[3] Discovery

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[1] WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc.2.

[2] 28 U.S.C. § 1407(a) (2020).

[3] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *Overview of Panel: Origin and Purposes*, https://www.jpml.uscourts.gov/overview-panel-0.

figures prominently into each of these three factors, and creating efficiencies in the management of offensive and defensive discovery and related disputes is essential.

MDLs are designed to streamline discovery and minimize party and judicial resources, and yet they often run the risk of overextending the parties' and the court's resources due to their size and complexity. In addition, though centralizing discovery is the goal, sometimes the JPML remands cases before they are trial ready. How can an MDL court design discovery procedures to manage these issues? Particular aspects of the massive Opioids MDL currently pending in the Northern District of Ohio, *In re National Prescription Opiate Litigation*, No. 1:17-MD-2804-DAP (N.D. Ohio), provide examples of the importance of designing a discovery infrastructure that acknowledges the immense task of shepherding complex multi-party actions through discovery and of maintaining centralized control of discovery even as cases in which discovery is not complete are remanded back to transferor courts.[4]

II. BACKGROUND ON MDL DISCOVERY

Like any case in federal court, discovery in MDL cases is governed by the Federal Rules of Civil Procedure. Federal district courts, however, have wide "discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require."[5] This is because "multidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts."[6] District court judges, therefore, "must be given wide latitude with regard to case management in order to effectively achieve the goals set forth by the legislation that created the Judicial Panel on Multidistrict Litigation."[7]

As discussed in the Introduction to this Symposium, MDL courts typically identify "bellwether" cases or issues to be set for discovery and trial.[8] When employed, bellwether selections largely drive the staging and scope of discovery allowed against defendants. The *Manual for Complex Litigation* provides a thoughtful discussion on how phased, sequenced, or targeted discovery "conducted to produce critical information rapidly on one or more specific issues" may "facilitate settlement negotiations or provide the foundation for a dispositive motion," or otherwise streamline issues in complex cases.[9]

As every MDL creates its own unique discovery dynamic based on the court, the parties, and the facts presented, no single procedure will fit every case. The Opioids MDL has more challenges than most. Almost every aspect of the

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[4] Mr. Geller is a Court-appointed member of the Plaintiffs' Executive Committee in the Opioids MDL. His co-authors are integral members of the team litigating the actions, and their excellent work and assistance to him in the litigation as well as the drafting of this article are gratefully acknowledged.

[5] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (citation omitted).

[6] *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1232 (9th Cir. 2006).

[7] *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 687 F. App'x 210, 214 (3d Cir. 2017) (citation omitted).

[8] *See* Ryan Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801 (2021); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (hereinafter "MCL") (citing *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997)).

[9] MCL, § 11.422.

consolidated cases is super-sized: there are more plaintiffs, more defendants, more lawyer egos, and more claims than MDLs usually present. As such, establishing the discovery procedure presented challenges beyond the already complex discovery issues all MDLs involve.

III. DISCOVERY PROCEDURES IN THE OPIOIDS MDL

A. Litigating the Worst Drug Epidemic in Our Country's History

Starting in the early 2000s and peaking in the early 2010s, communities throughout the United States fell victim to an unprecedented prescription opioid addiction crisis. In the last few years, thousands of states, counties, cities, third-party payors, hospitals, Native American tribes, and numerous others turned to private litigation as a solution. In early December 2017, the JPML consolidated these opioid-related actions on file in federal courts to the Northern District of Ohio for pretrial purposes and instructed that all subsequent potentially related actions be sent there as well.[10]

In re: National Prescription Opiate Litigation is the most sprawling MDL since the procedure was enacted fifty-three years ago, with thousands of entities and individuals bringing cases against hundreds of defendants, including, most commonly, the manufacturers, distributors, and dispensers of prescription opioids.[11] As soon as the JPML sent the case to the Northern District of Ohio, scores of lawyers from across the country packed multiple courtrooms in Cleveland, seeking a voice for their clients during status conferences and hearings.

While the number of parties and their various claims and defenses present substantial legal and factual complexity, the transferee court immediately made clear it would focus first on efforts to remediate the ongoing nuisance harming cities, counties, and communities. At the first status conference in January 2018, the presiding Judge Dan A. Polster underlined this sense of urgency, making clear that "[a]bout 150 Americans are going to die today, just today, while we're meeting" from opioid overdoses.[12]

B. Bellwethers and Discovery

Faced with thousands of plaintiffs, hundreds of defendants, a complex web of claims and defenses, and the urgent need for speed driven by the ongoing opioid

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[10] Transfer Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 1 (N.D. Ohio, Dec. 12, 2017).

[11] *See*, *e.g.*, Melissa Healy, *Who's to Blame for the Nation's Opioid Crisis? Massive Trial May Answer That Question*, L.A. TIMES (Sept. 18, 2019) (noting that the MDL brought together "roughly 35,000 accusers against 348 named defendants"). The docket now reflects over 600 defendants have been named.

[12] Jan Hoffman, *Can This Judge Solve the Opioid Crisis?,* N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html

crisis, Judge Polster prioritized expediency. After appointing leadership counsel for the plaintiffs and liaison counsel for each category of defendants, Judge Polster quickly selected bellwether cases reflecting a small set of cases, which named a large set of representative defendant groups covering a broad set of claims.[13] Moreover, though a small subset of cases were named as bellwethers for the purposes of testing the viability of plaintiffs' different claims through motion practice, only one set of cases, filed by Cuyahoga County and Summit County–each Ohio counties over which Judge Polster had original jurisdiction and could therefore oversee through trial–were selected as bellwethers for purposes of discovery, summary judgment, and trial.[14] Fact discovery was largely completed in the Cuyahoga and Summit actions by January 2019, and the cases were set for trial in October 2019.[15]

The discovery obligations for MDL plaintiffs and defendants differed. Only the Cuyahoga County and Summit County plaintiffs participated in full discovery under the federal rules. Other plaintiffs were required to complete Plaintiff Fact Sheets detailing their claimed losses and relevant issues.[16] The Court also limited discovery from defendants to those named by Cuyahoga and Summit.[17] However, while plaintiff discovery was specific to those two counties, much of the defendant discovery was national in scope. This was both because of the manner in which the bellwether defendants operated their businesses, and also because the Court understood that advancing national discovery against a core group of defendants in the bellwether cases would advance the MDL participants' understanding of (and hopefully promote resolution of) issues in thousands of other cases.

C. The Keys to Managing the Complex Bellwether

Because defendant discovery was largely national in scope, and because the claims related to more than twenty years of conduct, the amount of fact discovery obtained from defendants was immense. Plaintiffs issued thousands of document requests and interrogatories. By the trial date, plaintiffs had reviewed more than 150 million pages of documents, taken approximately 500 depositions, filed reams of expert reports, responded to scores of dispositive motions, and filed formally, or raised informally, more than 200 discovery motions. While there is

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[13] Case Management Order One, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD- 2804, ECF 232 (N.D. Ohio, Apr. 11, 2018).

[14] Two Ohio cities, Cleveland and Akron, were also initially named but later dropped as bellwethers to proceed to trial.

[15] Case Management Order Number Four, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 485 (N.D. Ohio, May 22, 2018); Case Management Order Number Eight, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 1306 (N.D. Ohio, Jan 29, 2019).

[16] Fact Sheet Implementation Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17- MD-2804, ECF 638 (N.D. Ohio, June 19, 2018).

[17] Case Management Order Number Four, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 485 (N.D. Ohio, May 22, 2018).

likely a book to be written about the "marathon sprint" from the December 2017 creation of the Opioids MDL to the October 21, 2019 bellwether trial date, there are three keys to how plaintiffs and the Court managed to keep the Cuyahoga and Summit cases on track for trial while also developing discovery on an MDL-wide basis.

1. Dedicated Leadership

The initial caucus of plaintiffs' counsel in the Opioids MDL attracted 150 lawyers from ninety-seven law firms, representing a broad range of claims by their clients, and presenting complex management issues.[18] Eventually, hundreds more lawyers would become involved as more than 2,700 cases were consolidated into the MDL. Using the *Manual for Complex Litigation* as a guide, plaintiffs' counsel negotiated and ultimately proposed a leadership structure adopted by the transferee court: three lead attorneys, twenty-eight attorneys serving on Plaintiffs' Executive Committee, and three attorneys as liaison counsel structure.[19] Each member of the leadership structure was assigned specific responsibilities to guide the litigation and execute the goals set.[20]

The structure is not unique, nor is it surprising that members of the leadership team have diligently pursued the case, as the team includes many of the most experienced MDL counsel in the country. What distinguishes leadership in the Opioids MDL is the scale of tasks faced, which required both constant communication and the commitment to focusing on countless discrete tasks. By the end of January 2019, just over one year after the MDL was initiated and nine months after bellwether cases were selected, plaintiffs had already procured tens of millions of pages of documents from defendants and hundreds of thousands of pages from non-parties, and had taken hundreds of depositions from witnesses across the country relating both to the initial bellwether cases and to issues common to many of the other MDL actions.[21]

For certain tasks, the leadership divided to conquer. For example, firms associated with members of leadership were assigned to lead efforts against defendants on a one-to-one basis (e.g., Firm A is responsible for pursuing discovery from Defendant 1, Firm B for Defendant 2, etc.). This structure enabled individual firms to develop deep knowledge of the issues associated with each defendant, which were shared in regularly scheduled telephonic and (pre-pandemic) in-person meetings, and through thousands of e-mails. For other tasks,

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[18] Plaintiffs' Renewed Motion to Approve Co-Leads, Co-Liaisons, and Executive Committee, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 34 at 3 (N.D. Ohio, Jan. 3, 2018).
[19] MCL, § 10.221.
[20] *Id.*
[21] *See* Declaration of Peter H. Weinberger, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 3352-4 at 3 (N.D. Ohio, June 24, 2020). All told, as of June 2020, plaintiffs have received and reviewed 28,484,880 documents from defendants in the MDL, totaling 153,977,822 pages, and have also received and reviewed an additional 729,529 third party documents. *Id.*

members were drawn from across firms associated with leadership. For example, a law and briefing committee comprised of attorneys associated with approximately half of the leadership team was established to support legal arguments across the MDL. Firms on this committee were, and continue to be, on-call for certain weeks to address motions on a timely basis. Because of leadership's dedication to both individual and collective tasks, plaintiffs have avoided being washed away by the tsunami of disputes, documents, and decisions required in an MDL of this size and complexity. Instead, plaintiffs have been able to surf the wave of issues and keep the litigation moving forward.

2. Comprehensive Nationwide Data, Fast

An early understanding of the defendants' record-keeping and data systems was critical to effectively conducting discovery. One discovery issue in the MDL stands out as unique to this case. It concerns not the relevance and privilege controversies typically encountered, but rather relates to the collection of a massive database compiled by a nonparty to the litigation: the United States government.

Since the 1970s, every entity that handles a prescription opioid in the United States must report each unit it makes, sells, warehouses, distributes, or otherwise touches to the Drug Enforcement Administration ("DEA").[22] The reports are compiled in the DEA's Automated Records and Consolidated Orders System/Diversion Analysis and Detection System database ("ARCOS").[23] Due to plaintiffs' early efforts, the Court ordered the DEA and plaintiffs to negotiate the production of the ARCOS data and entered a protective order on confidentiality to streamline its production almost immediately after the MDL was first convened.[24] By April 2018, the Court had ordered production of ARCOS data from six states relevant to the bellwether trials for the years 2006 through 2014.[25] The following month, the Court ordered the DEA to produce the ARCOS data on a nationwide basis.[26] As the Court noted, "the ARCOS data is allowing both the litigation and settlement tracks of this MDL to proceed based on meaningful, objective data, not conjecture or speculation. Moreover, the ARCOS data is providing invaluable, highly-specific information regarding historic patterns of opioid sales."[27]

The Washington Post moved for public access to the ARCOS database, and, after a Sixth Circuit order striking down confidentiality of the data for the

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[22] *See generally*, Order Re: ARCOS Data Production, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD- 2804, (N.D. Ohio, Apr. 11, 2018), ECF 233.
[23] *Id.*
[24] Order Re: ARCOS/DADS Database, *In re* Nat'l Prescription Opiate Litig., No. 1:17- MD-2804, (N.D. Ohio, Feb. 2, 2018), ECF 112; Protective Order Re: ARCOS/DADS Database, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, (N.D. Ohio, Mar. 6, 2018), ECF 167.
[25] Order Re: ARCOS Data, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD- 2804 (N.D. Ohio, Apr. 11, 2018), ECF 233.
[26] Second Order Re: ARCOS Data, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, (N.D. Ohio, May 8, 2018), ECF 397.
[27] *Id.* at 2.

years 2006 through 2014, posted a massive compilation of the data on its own website.[28] Readers can now query the public data to learn the entities responsible for distributing, manufacturing, and dispensing opioids, and the number of opioids distributed, manufactured, and sold in any county in the nation.[29] It is a massively important public resource. ARCOS also provided the framework onto which plaintiffs could place their evidence regarding any municipality's claims concerning defendants' false marketing and failure to meet the legal duty of reporting suspicious orders.

3. Effective Dispute Management

Within a month of creation of the MDL, the Court appointed three Special Masters under Federal Rule of Civil Procedure 53(a)(1)(A).[30] One appointee, Special Master David R. Cohen, was tasked with resolving the parties' discovery disputes. Since his appointment, Special Master Cohen has heard more than 260 informal motions related to discovery issues in the initial bellwether cases; some were resolved via written opinions, others less formally via email or telephonic orders.[31] To resolve the issues in an orderly fashion, Special Master Cohen convened weekly telephonic conferences to address disputes and consistently made himself available on an expedited basis. Further, upon the parties' request, the Special Master comprehensively and quickly prepared detailed rulings allowing the appeal of issues important to either plaintiffs or defendants.

Because of this responsive and comprehensive procedure, and Special Master Cohen's dedication to providing clearly and concisely explained rulings, the parties were able to raise numerous issues to the Special Master, obtain formal rulings as required, and swiftly elevate issues to the transferee court's attention as needed. By way of example, in its written responses to discovery propounded by plaintiffs, the Allergan family of manufacturing defendants took the position that their generic opioids, which constituted more than 90% of their prescription opioid volume, were not relevant to any of the bellwether cases.[32] Plaintiffs filed a motion to compel production with Special Master Cohen, who issued two separate formal

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[28] *See In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939-40 (6th Cir. 2019); *see also*, *Follow the Post's Investigation of the Epidemic*, WASH. POST (Jan. 24, 2020), https://www.washingtonpost.com/national/2019/07/20/opioid-files/?arc404=true.

[29] *See Drilling into the DEA's Pain Pill Database*, WASH. POST (Updated Jan. 17, 2020), https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/#download-resources.

[30] *See* Order Appointing as Special Masters David R. Cohen, Francis McGovern and Cathy Yanni, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, (N.D. Ohio, Jan. 11, 2018), ECF 69. Professor Francis McGovern, one of the Special Masters appointed, passed away unexpectedly in February 2019.

[31] *See* Declaration of Peter H. Weinberger, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, at 3 (N.D. Ohio, June 24, 2020), ECF 3352-4.

[32] *See* Discovery Ruling No. 2, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD- 2804, ECF 693 at 3 (N.D. Ohio, June 30, 2018).

opinions in late June and early July rejecting Allergan's arguments (while also considering and ruling on numerous other parties' controversies).[33] When Allergan filed an objection to Special Master Cohen's orders, Judge Polster ordered full briefing and ruled on the issues by early August.[34] The parties received clear guidance on the issues they contested, and, as a result of collective diligence, were substantially able to meet the aggressive document production deadlines in a timely manner.

D. Moving Forward: Strategic Remand

Starting around the date summary judgment briefing was complete, and continuing up until the morning opening statements were scheduled to be heard, the defendants in the joint Cuyahoga and Summit action settled with those plaintiffs.[35] However, the settlements had no effect on the thousands of other cases in the MDL.

After consultation with the parties, the transferee court determined the best way forward would be to strategically remand geographically diverse cases bringing similarly important claims. This second set of bellwether cases involves new plaintiffs that bring claims against the same defendants as those in the first bellwether action, as well as several that were not parties in the initial action. Each of the second set of bellwether cases had been stayed, and, with limited exception, motions to dismiss had not been filed, let alone resolved. Consequently, no case-specific discovery had occurred. Thus, unlike prototypical MDL remands, these cases were not ready to be tried.

The strategic remands raise questions about the effect of discovery practice and rulings from the transferee court on the remanded actions where discovery is ongoing. Two examples illustrate the types of issues that can arise in this situation, and the importance of the transferee court maintaining active involvement in discovery that implicates its authority and concerns common to other cases consolidated in the MDL.

First, the transferee court issued a series of orders concerning "the parties' obligations to produce certain documents to the MDL Repository," i.e., a set of documents available to all litigants in the MDL.[36] When defendants recently sought to vacate the Repository Orders, Special Master Cohen rejected the motion. He initially explained that "MDL Courts routinely enter orders creating MDL

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[33] *Id.; see also* Discovery Ruling No. 3, *In re* Nat'l Prescription Opiate Litig., No. 1:17- MD-2804, ECF 762 at 6 (N.D. Ohio, July 17, 2018).

[34] Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 868 (N.D. Ohio, Aug. 8, 2018).

[35] Not all defendants settled. Insys, maker of the fentanyl spray Subsys, declared bankruptcy in June 2019, and Purdue Pharma, maker of OxyContin, declared bankruptcy in September 2019. Claims against Walgreens, the lone defendant from the first bellwether case that neither settled nor declared bankruptcy, were delayed until a second trial brought by Cuyahoga and Summit against pharmacy defendants, which is scheduled for November 2020.

[36] Nunc Pro Tunc Order Regarding Requested Modifications to Discovery Ruling No. 22, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 3291 at 1 (N.D. Ohio, May 8, 2020).

document repositories that contain discovery from all related state and federal cases, investigations, and so on."[37] He then reaffirmed the efficiencies created by the Repository Orders:

> [I]t is obvious that defendants have faced far fewer total discovery requests from far fewer total parties by virtue of the Repository; and plaintiffs in this court and other courts across the country have engaged in generous sharing of precisely the information required by the *Repository Orders* because it is broadly relevant.[38]

Thus, though the remanded cases are subject to the jurisdiction of the transferor court, such orders ensure that certain categories of discovery are available to all MDL litigants, creating efficiencies that continue after remand.

The second illustration concerns various documents that plaintiffs believe were improperly withheld from production during the first bellwether action. One of the remanded cases was an action brought by counties in West Virginia. Among other reasons for selecting that action, Judge Polster noted that "the only remaining fact discovery the parties in the West Virginia cases would need after remand was limited to localized evidence pertaining to specific jurisdiction."[39] One defendant, however, has since produced new documents that plaintiffs believe should have been produced earlier, including files pertaining to witnesses who had been deposed during the first bellwether action.[40] Though the documents were produced in the context of a selectively remanded case, Plaintiffs have moved for relief in the transferee court.[41] It not only makes sense for the transferee court to adjudicate this dispute, given its institutional knowledge, but it also furthers the goal of centralizing disputes that affect more than one of the cases in the Court presiding over the MDL. Thus, the MDL Court's ability to maintain control over certain

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[37] *Id.* at 4.
[38] *Id.* at 5.
[39] Response to Motion for Clarification, *In re* Nat'l Prescription Opiate Litig., No. 1:17- MD-2804, ECF 3263 at 2 (N.D. Ohio, Apr. 17, 2020).
[40] One such document was an email containing a parody of the theme song to the television show "The Beverly Hillbillies." Its first stanza read: "Come and listen to a story about a man named Jed / A poor mountaineer, barely kept his habit fed / Then one day he was lookin at some tube / And saw that Florida had a lax attitude / About pills that is, Hillbilly Heroin, 'OC.'" ("Hillbilly heroin" and "OC" are street names for prescription opioids generally, and OxyContin in particular.) The document, which has been declassified, was subsequently discussed by an article in The Washington Post. *See* Meryl Kornfield, *Drug Distributor Employees Emailed a Parody Song About 'Pillbillies,' Documents Show,* WASH. POST, (May 23, 2020).
[41] *Plaintiffs' Motion to Compel Defendant AmerisourceBergen to Produce Discovery Improperly Withheld and to Show Cause Why It Should Not Be Sanctioned for its Discovery Misconduct, In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, ECF 3300 (N.D. Ohio, May 21, 2020).

aspects of discovery even after remand is key to efficiency and consistency of rulings across all remanded cases.

IV. CONCLUSION

Each MDL presents unique challenges and opportunities for counsel at every stage, especially with regard to discovery. Defining and chasing down the "one or more common questions of fact" at the center of the case is just the beginning of the process. Efficiently prosecuting discovery in complex actions to balance the needs of all parties with practical time and cost limitations requires energy and imagination on the part of counsel, as well as consistent monitoring and action by the Court. The discovery processes established by the parties and the Court in the Opioids MDL are exemplary in avoiding duplication of discovery, preventing inconsistent pretrial rulings, and conserving the resources of the parties, their counsel, and the judiciary.

Shakespeare is often misquoted by those with contempt for lawyers who misconstrue the line's meaning. In fact, his Dick the Butcher character who made the kill-lawyers proclamation was a disciple of another who sought to become king by inciting a revolution. He thought if they disturbed the peace, law, and order by killing lawyers, they could bring about a revolution, conceal their true motive, and gain total control of the masses. Thus, the Bard's line actually demonstrated the highest regard for attorneys and judges, as protectors of the truth. In the context of the Opioids MDL, from our perspective, that praise is well-deserved. As of the time of this writing, the Opioids MDL shows that a massive, concentrated effort by committed counsel in a vastly complex action overseen by an astute and thoughtful court that is tenacious when it comes to staying on task, brings order to even the most unwieldly of cases–one of which we are proud to be part. Under Judge Polster's careful watch, the Opioids MDL provides a model of efficiency for discovery in complex cases, which will likely inform the progress of MDL cases for years to come.

AGAINST MDL DISCOVERY EXCEPTIONALISM: A DEFENSE PRACTITIONER'S VIEW OF MANAGING FEDERAL DISCOVERY IN LARGE-SCALE CONSOLIDATED PROCEEDINGS

Adam K. Levin & Kyle M. Druding*

INTRODUCTION

There is much about multidistrict litigation (MDL) that is unique to our legal system. Most notable—as the existence of this Symposium attests—is the rapid proliferation of MDLs and their transformative effect on federal dockets nationwide. Marking the fiftieth anniversary of the 1968 statute creating the modern MDL process, the end of 2018, for the first time, saw MDLs make up more than half (51.9%) of all federal civil litigation.[1] That growth has been exponential in recent years, with the percentage of total federal civil litigation brought in MDLs more than tripling in the past two decades.[2] And as has long been recognized, that dramatic growth stems, at least in part, from a "*Field of Dreams*" effect inherent to the growing trend to consolidate cross-jurisdictional harms: "If you build it, they will come."[3]

What is not unique to these potentially massive proceedings, however, are the baseline rules governing discovery once an MDL has been established: just as Shoeless Joe Jackson was still held to three strikes batting in that corn, so too do the Federal Rules of Civil Procedure apply with equal force in MDLs. The ultimate goal of an MDL, as in any federal civil suit, is to ensure as "just, speedy, and inexpensive" a resolution as possible.[4] Judges, parties, and their counsel should work together to craft effective, efficient, and tailored solutions for conducting MDL discovery, recognizing the particular needs of consolidated proceedings on a case-by-case basis. And in doing so, they must honor the same due process, "relevance," and "proportionality" limitations that apply in any litigation governed

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[1] Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, A.B.A. (Feb. 19, 2020), https://bit.ly/3dRYoSJ; *see also* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168 (2018) ("MDL, once thought to be an obscure, technical device, has now become the centerpiece of nationwide mass tort litigation in the wake of the decline of the tort class action.").

[2] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire civil caseload").

[3] Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG. 43, 45 (1998) ("Apart from procedural issues, the creation of an MDL proceeding may have a substantive effect on the coordinated litigation. . . . Once an MDL is in place, plaintiffs will inevitably file many new complaints.").

[4] FED. R. CIV. P. 1.

by the Federal Rules.[5] In short, there is no such thing as "MDL discovery exceptionalism."[6]

However, applying these generally applicable discovery rules in the MDL context, which often involves factually complex and highly technical issues, is no simple task. It is critical to establish efficient and workable practical solutions that respect these settled legal principles. Improperly controlled discovery across dozens, hundreds, thousands, or even tens of thousands of individual cases (with corresponding numbers of lawyers and support staff) can quickly balloon the monetary and time resources demanded, resulting in a cascade of unnecessary costs and delay for future proceedings. That in turn risks flipping "the chief virtue of MDL—the efficiencies gained from resolving pretrial matters in the aggregate—into a significant vice."[7]

To that end, this article does two things. First, this article highlights several discovery tools that, based on the authors' experience, have proven particularly effective at streamlining complex MDL proceedings. Second, this article recounts select instances of how these tools have been effectively deployed in particular cases.

I. DISCOVERY TOOLS FOR PARTICULAR CONSIDERATION IN MULTIDISTRICT LITIGATION

The Federal Rules of Civil Procedure generally permit wide latitude for the parties, subject to judicial supervision and traditional rule-of-law limits, to fashion specific-use discovery plans to best meet the needs of individual cases. That flexibility extends to MDL proceedings. The following reflects a non-exclusive set of discovery tools that, based on the authors' experience, may be useful when considering how to design MDL discovery procedures, given the practical realities of coordinating large-scale efforts across a number of individual cases. These tools are offered for illustrative purposes only, and there undoubtedly are many others that could and should be used based on the unique needs of individual centralized proceedings. Also, as with any tool, the ultimate efficacy of any of the following will depend on the particular circumstances and how they are deployed in context; these are offered as tools for consideration, not silver bullets.

For additional information and a more comprehensive treatment of the MDL discovery process, both the *Manual for Complex Litigation*[8] and the Duke Law School Bloch Judicial Institute's *Guidelines and Best Practices for Large and*

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[5] *See* FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.").

[6] *Cf.* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 401 (2014).

[7] *MDL Proceedings: Eliminating the Chaff*, U.S. CHAMBER INST. FOR LEGAL REFORM 1 (Oct. 2015), https://bit.ly/2OB14gC.

[8] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

Mass-Tort MDLs[9] are useful resources. The Federal Judicial Center and United States Judicial Panel on Multidistrict Litigation also publish targeted subject-matter guides that may be especially helpful in managing the discovery process in particular types of MDL proceedings.[10]

A. Fact Sheets

"Fact sheets," or "questionnaires," can be among the most useful and efficient discovery tools in large-scale MDL proceedings. Rather than requiring bespoke discovery requests be created for each and every party, fact sheets create a standardized and court-approved mechanism for collecting a baseline set of information, which can then be supplemented with individually targeted follow-up requests as the case progresses. In the traditional MDL scenario, such as a products liability case involving large numbers of potential claimants across multiple jurisdictions nationwide against a smaller set of defendants, completed plaintiff fact sheets can lead to the collection of various categories of highly pertinent information, such as: the date and nature of plaintiffs' alleged injuries; the scope and nature of plaintiffs' individual claims; and authorization for medical, pharmacy, and other relevant records collection. Depending on the nature of the claims and defenses at issue, the optimal length of fact sheets can be anywhere from dozens of pages to a single page. The best results follow when the parties attempt to work together to achieve consensus on what should be included.

Deploying fact sheets can be particularly valuable early in an MDL. A preliminary "census" of the case established by information from completed fact sheets can help guide later discovery, identify candidates for bellwether trials, or even allow swift resolution of particular claims or issues that can be winnowed from the rest of the case or otherwise disposed of without incurring the time and cost of further discovery. An early fact-sheet process also creates a clear, straightforward, and enforceable means to ensure that key information is being produced and disclosed at the outset of consolidated proceedings.

Plaintiff fact sheets recently played an important role in *In re Abilify (Aripipirazole) Products Liability Litigation*, MDL 2734, before the Honorable M. Casey Rodgers of the United States District Court for the Northern District of Florida.[11] That case, comprising more than 600 individual suits, involved claims that Abilify, an antipsychotic drug used to treat schizophrenia, bipolar disorder, and major depressive disorder, created risks of certain compulsive behaviors, such

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[9] BLOCH JUDICIAL INST., *Guidelines and Best Practices for Large and Mass-Tort MDLs*, DUKE LAW SCH. (Sept. 2018), https://bit.ly/3kVtEpl.

[10] *See, e.g.*, *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation Transferee Judges*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR. (2d ed. 2014), https://bit.ly/3rqxQQe; Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR. (2011), https://bit.ly/3kY69vD.

[11] *See generally* Nathan Hale, *Abilify MDL Judge Boots 149 Claimants from Settlement*, LAW360 (Sept. 24, 2019, 9:18 PM), https://bit.ly/2NULCbR.

as gambling, engaging in sexual activities, binge eating, and consuming alcohol.[12] At various stages of the litigation, the court approved a Plaintiff Fact Sheet, a Plaintiff Profile Form, and a Supplemental Profile Form that ultimately called for the production of pertinent plaintiff information, including medical, financial, and gambling records.[13] Three years after that case was filed, and following extensive discovery, the parties reached a global settlement in February 2019.

Using the information gathered from these updated fact sheets, Judge Rodgers was then able to enter a certification order to help effectuate that settlement, in light of a high number of voluntary dismissals and missing records at that point. That certification order required that counsel for potentially eligible claimants first certify that plaintiffs made a good-faith effort to obtain and review certain records, including records documenting plaintiffs' use of Abilify during the relevant time period and proof of harm sufficient to participate in the settlement.[14] Absent a timely certification, the order provided that Defendants could then seek a show-cause order requesting that noncomplying claims be dismissed with prejudice.[15]

Roughly one quarter of individual plaintiffs failed to make the required certification, despite being given a second chance to do so months later.[16] Judge Rodgers ultimately identified 149 plaintiffs who either "exhibited a clear pattern of disregarding the Court's orders regarding the settlement" or "conceded that they are unable to provide *any* evidence that they used name brand Abilify" as required for settlement eligibility.[17] Their cases were then dismissed with prejudice, as:

> at this advanced stage of the litigation, which has been pending for almost three years, it is not too much to require plaintiffs to provide proof of use in support of their claim that Abilify caused them injury, particularly where they are seeking to be compensated for taking the drug.[18]

The early adoption of plaintiff fact sheets, and updating the information requested later on, thus allowed for an orderly, efficient process to identify and eliminate a large swath of non-meritorious claims at settlement—without the unnecessary

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[12] *Id.*
[13] *In re Abilify*, No. 3:16-md-2734 (N.D. Fla. Feb. 25, 2019), ECF 1136 at 2.
[14] *See id.* at 1–3.
[15] *Id.* at 4.
[16] *In re Abilify*, No. 3:16-md-2734 (Sept. 6, 2019), ECF 1165.
[17] *In re Abilify*, No. 3:16-md-2734 (Sept. 24, 2019), ECF 1170 at 4 & Ex. A (emphasis in original).
[18] *Id.* at 4–5.

burdens and delays from individual challenges to the same lack of general causation.

B. Special Masters

Another potentially useful option in managing complex MDL discovery is to consider appointing special masters.[19] While district judges and magistrate judges are ultimately responsible for overseeing the discovery process, there may be specific purposes for which the appointment of an independent party will best suit the needs of the case. For example, it may be appropriate to appoint a special master with the requisite expertise when there are particularly voluminous or thorny privilege questions, or when extensive subject-matter knowledge in fields such as accounting, finance, and various scientific disciplines is needed. A special master may also be desirable when there are highly specialized considerations or large-scale electronic and technology-assisted discovery that would be new or unfamiliar to the court. The use of special masters in appropriate circumstances can reduce potentially large burdens on limited judicial resources while allowing the rest of the case to proceed as efficiently as possible.

There are some cautions, however. Given the potential costs of special masters and their limited authority, the scope of any assignment should be clearly delineated and limited in an appropriate order. Ideally, the parties would work together in both selecting special masters, either by agreeing on the proposed master or by providing the court a list of candidates, and in helping to define the special master's role in the discovery process. Further, when making an appointment, the court should establish procedural safeguards to ensure meaningful oversight of a special master's decisions, which could affect the overall course of proceedings.

A recent privilege-log dispute in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, MDL 2785, provides a helpful example of when and how to employ the services of a special master. In that two-track litigation before the United States District Court for the District of Kansas, the court faced a dispute over documents claimed to be privileged and thus immune from disclosure. Under the circumstances, and upon the parties' suggestion, the court "determined the best course is to have a special master review the 2,086 documents remaining in dispute" and ordered the parties to confer and agree on a special master "in short order."[20]

The parties agreed that the Honorable Margaret R. Hinkle, a former state-court justice and current JAMS neutral, should serve as special master. The court ordered her appointment for the limited purposes of resolving that discovery dispute eleven days later.[21] The special master, working with the parties, then reviewed the documents at issue and entered a report, to which neither party

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[19] *See generally* FED. R. CIV. P. 53.
[20] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Dec. 6, 2018), ECF No. 1334 at 2.
[21] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Dec. 17, 2018), ECF No. 1366.

objected, within weeks.[22] Given the limited appointment, clearly defined scope of responsibility, and cooperative approach, this example shows how special masters can be best positioned to effectively and efficiently resolve appropriate disputes.

C. Federal-State Coordination

In many cases, federal MDL proceedings run parallel to similarly complex and potentially extensive state-court actions involving the same or substantially similar claims. Because federal and state judges have distinct and independent jurisdiction such that state claims need not, and in some cases cannot, be brought in federal court, there is no formal mechanism to consolidate or mandate compliance with a single set of discovery procedures between the two systems, under 28 U.S.C. § 1407 or otherwise. To avoid unnecessary and duplicative burdens, it falls to federal and state judges to informally coordinate related proceedings in cooperative fashion. And doing so is especially important in the context of discovery, given the often enormous expense required of litigating the same issues on multiple fronts.

This federal-state coordination can take many forms, depending on the parties' and courts' willingness to participate. Among other things, federal and state judges may consider holding joint conferences and hearings, or appointing a liaison to keep apprised of ongoing developments in parallel proceedings. In the appropriate case, the judges can also order or encourage streamlined discovery efforts, avoid successive and duplicative depositions of the same witnesses, and enter protocols for topics such as electronically stored information (ESI), depositions, and expert witnesses. Moreover, given the obvious potential for abuse, strategic gamesmanship between parallel federal and state proceedings should be carefully limited.

Recent parallel consolidated litigation comprising more than 10,000 individual lawsuits shows how effective federal-state coordination can be achieved in managing similar claims in separate jurisdictions. In *In re Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation*, MDL 2428, before the United States District Court for the District of Massachusetts, and *In re Consolidated Fresenius Cases*, before the Massachusetts Superior Court,[23] Judge Douglas P. Woodlock and Justice Maynard Kirpalani were able to successfully manage the discovery process of separate complex, consolidated proceedings involving products liability claims related to a medical device used in hemodialysis treatments. Judge Woodlock and Justice Kirpalani worked together to coordinate many aspects of these cases, including holding monthly conferences in each court, using identical or substantially similar case management orders in both the federal and state proceedings, endorsing joint depositions, and sitting together in person on *Daubert/Lanigan* hearings. After instituting a bellwether-trial calendar aimed at alternating between state and federal trials and with trials occurring in both

[22] *In re EpiPen*, No. 2:17-md-02785-DDC-TJJ (D. Kan. Jan. 10, 2019), ECF No. 1396.
[23] No. MICV 2013-03400-O (Mass. Super. Ct., Middlesex Cty.).

federal and state courts, the parties ultimately agreed to a global settlement resolving a minimum of 97% of all cases, including those filed in federal and state courts.

D. Bifurcation

Sequencing various phases of the discovery process can also allow for streamlined and more efficient MDL case management. And depending on the circumstances, there are many possible options by which to bifurcate discovery. The greatest potential advantage of bifurcation involves threshold issues—such as general issues of causation or personal jurisdiction—that are potentially dispositive of some or all of the claims in an MDL and can be effectively separated from broader discovery efforts. By initially proceeding on only targeted subjects pertinent to such issues, the parties and the court may limit or entirely preclude unnecessary factual development. Coordinated proceedings may also be successfully bifurcated between discovery necessary for class certification and merits discovery.

E. Discovery Conferences and Agenda Setting

MDL case management can also benefit from regularly scheduled status conferences, including, where appropriate, discovery conferences. To make the greatest use of these periodic check-ins, the parties should submit in advance—and then follow—an agenda for the topics to be considered at each conference. Requiring the parties to first meet and confer on an agenda serves to identify, clarify, and potentially streamline or resolve any outstanding discovery disputes before they are put before the court. Setting out an agenda in advance also ensures that everyone has notice of the relevant topics to be considered and may show that a particular scheduled conference should be kept brief or even avoided altogether.

There are several pitfalls that should be avoided, however. For example, while there may be times when late-breaking events will need to be addressed in a time-sensitive fashion, there is obvious potential for gamesmanship in habitual departure from the agenda in the ordinary course. And scheduling conferences too frequently may pressure the parties to seek out and prematurely raise issues that could be avoided with additional negotiation. Depending on the circumstances, holding monthly, bimonthly, or quarterly discovery conferences should be best tailored to the needs of particular proceedings.

F. Discovery Steering Committees

The court will often appoint lead counsel and steering, management, and executive committees to coordinate various aspects of complex proceedings on plaintiffs' behalf. As part of that representation structure, it may at times be useful to consider a discovery-specific committee depending on the size and scope of the proceedings. At the same time, adding another, subordinate layer of representation

may prove administratively burdensome and financially costly, such that these considerations outweigh any benefits of appointing a discovery-specific committee.

One major potential benefit of appointing a discovery steering committee, when expending the necessary resources for such a committee is justified, is the creation of valuable leadership opportunities that can be filled by a broader, diverse, and less-senior set of counsel. A recent order from Judge Robin Rosenberg of the United States District Court for the Southern District of Florida, for example, appointed a leadership team in *In re Zantac (Ranitidine) Products Liability Litigation*, MDL 2924, including a "leadership development committee" to "provide 'mentorship and experience,'" in which Judge Rosenberg noted her hope "that all counsel and parties will be mindful in using this MDL to provide an opportunity for a broader array of attorneys to have experiences that position them to take on more senior roles in future MDLs."[24]

G. Discovery Protocols

Using protocols to govern major issues in an MDL proceeding is also often crucial for successfully coordinating and managing complex and large-scale discovery in consolidated proceedings. Given the amount of discovery material that may be sought in an MDL, establishing clear and effective baseline procedures for the handling of items such as electronically stored information (ESI) and depositions may create important guardrails to allow orderly discovery. Such protocols may be useful to address, for instance, how to limit unauthorized access to confidential and proprietary information, for how long and in what manner depositions may proceed, and whether and how particular categories of information can be sought from the parties' various experts.

CONCLUSION

The recent explosion of multidistrict litigation carries major implications for federal civil practice nationwide in numerous respects, but the ground rules governing MDL discovery are the same as in any other case. Within the established framework of the Federal Rules of Civil Procedure, there are many tools and strategies to secure an orderly and effective discovery process even in the largest consolidated proceedings. Putting these principles into practice is no easy task. Continuing to share and learn from successful—and even not so successful—experiences, as this Symposium seeks to do, helps ensure a more knowledgeable and effective MDL bar and bench, from which we will all increasingly benefit.

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[24] *See* Amanda Bronstad, *Florida Judge Appoints Diverse Legal Team to Lead Zantac Lawsuits*, LAW.COM (May 8, 2020, 8:11 PM), https://bit.ly/3e17sVJ. Given the importance of addressing and rectifying the historic lack of diversity in federal civil litigation more broadly, the Duke Law School Bloch Judicial Institute will soon be releasing its *Guidelines and Best Practices Addressing Failure to Include Women, Diverse, and LGBT Lawyers in MDL and Class Action Leadership Positions*. BLOCH JUDICIAL INST., *Publications: The Bolch-Duke Conference Guidelines and Best Practices*, DUKE LAW SCH., https://bit.ly/2NXeaS4 (last visited Mar. 8, 2021).

VOIR DIRE IN A POST-CORONAVIRUS MDL WORLD

W. Mark Lanier*

INTRODUCTION

A small analogy: I had a brand new, No. 2 pencil. Unable to find a sharpener, I used a pocketknife to whittle a writing edge. I learned three things: (1) the pencil's wood tip does not have to be pretty to work; (2) if you whittle one side too much, the pencil will lose its point; and (3) each time I sharpened the lead, I got better at getting it right.

Having tried over a dozen MDL cases around the country, all but two as plaintiffs' counsel, I have found *voir dire* analogous to my pocketknife pencil sharpening. Certain approaches, though not always pretty, work well. Other approaches have not worked so well, and the jury is still out on questions that only more time and experience will answer.

I. WHAT WORKED

Evaluating what has and has not worked must begin with an understanding of what it means to "work" in the sense of effectuating a successful *voir dire*. Mark Twain once said:

> We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.[1]

Twain's humor and cynicism misses the beauty and efficacy of both the jury system and the selection process. A successful *voir dire* should never be measured by finding people who know nothing and cannot read. To the contrary, a successful

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[1] John Greenman, Recording of Mark Twain's After-Dinner Speech at the Meeting of Americans in London (July 4, 1873), https://ia801604.us.archive.org/7/items/twainsspeechesv2_1704_librivox/twainsspeechesv2_015_twain_64kb.mp3.

voir dire is one that empanels a jury who can set aside what they may know, base their decision upon evidence, follow the instructions of the court, and read!

> The test for determining juror competency is whether a juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court.[2]

But I would suggest that a truly successful *voir dire*, especially in the MDL context, entails not only finding competent jurors, but also *doing so in an efficient manner*. Efficiency in the *voir dire* context should be measured in regard to the court's time, the lawyers' work, and the imposition on the venire panel.

Recognizing the obvious, courts have different *voir dire* practices, with state courts generally leaning more heavily on lawyer *voir dire*, while most federal judges conduct the preponderance of the *voir dire*. However, both state and federal courts are becoming much more attuned to the advantages of using questionnaires before jury selection. When I began trying cases, a juror questionnaire was a card filled out just before jury selection. The card asked only a few questions aimed at securing rudimentary information, such as prior jury service, marital status, and current employment. Courts typically handed the cards to the trial lawyers as venire members were coming in to be questioned. Over time, judges began to allow fuller questionnaires, typically prepared by the lawyers. These questionnaires often required agreement between counsel; absent agreement, the judge would "old-school" it, relegating the attorneys to primitive juror information equivalent to the old cards.

Although lawyers petitioned judges for more time to examine the fuller questionnaires, some judges were loath to give the time. These judges thought the time (generally a day, but at least an afternoon) a deterrent to efficiency. In the smaller "who ran the red light?" cases, these judges were likely correct. But MDL cases are almost always cases of a different ilk. MDL cases are often tried as bellwethers. The trials impact broader litigation for numerous plaintiffs. That numerosity makes the stakes high for both plaintiffs and defendants.

MDL jury questionnaires became a mini-practice area. I have had cases where the questionnaire was nineteen pages, and cases where it was the front-and-back of one page. Should the questionnaire be agreed to by the parties and rubber-stamped by the court? Or should the court adjust the questionnaire? A few courts have developed their own questionnaires to be used as templates by the parties, allowing for modification as a particular case might dictate.

We live in an information age. Not only is our access to information exploding through the Internet, but our hunger for information has exploded, as well. Lawyers and clients want and need that information to select juries in an optimal fashion because today's jurors will often have significant pre-existing opinions that are best revealed without having to orally state these opinions before a crowd of strangers. That makes questionnaires an efficient and even necessary tool, but they need to be used properly.

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[2] Ault v. State, 866 So. 2d 674, 683 (Fla. 2003).

In one case, the court told the parties to agree on a questionnaire, but we were unable to do so. Defendants had built into the questionnaire several loaded questions. We did the same. We believed Defendants initiated the loaded question approach; Defendants said we had. In the furor of escalating drafts, who had begun the war of loaded questions became untraceable. In the end, the judge allowed both sides' questions, except those that seemed too intrusive.

That particular *voir dire* had our team muttering, "be careful what you ask for" more than once as we read through 2,500 cumulative pages the day before jury selection, trying to glean useful information from many inane, loaded questions that no juror would have answered with any useful information.

Recently and very efficiently, an Ohio MDL judge sent the questionnaires with the jury summons, and lawyers received them a week before jury selection. This enabled all legal teams to thoroughly review and analyze the questionnaires, eliminate veniremembers who would likely be struck for cause, and then sit with the judge in court, *before the entry of the venire*, and excuse the members who were disqualified based on their answers to the questionnaires. The apex of efficiency, this set up a lean *voir dire*.

That said, we still learned how to improve the questionnaire. The case was incredibly complicated, and the list of witnesses consumed three pages of the questionnaire. We learned that no veniremember had ever heard of any of the nearly 200 potential witnesses, but we were stuck carrying a bunch of unnecessary pages of questionnaires for the entire trial. In the next trial's questionnaire, we moved the three pages of questions about witnesses to the end of the questionnaire. Our plan was to verify that the venire people have no witness knowledge, and then tear those three pages off the back of the questionnaire, making it easier to use the rest.

In addition to the jury questionnaire, I have seen the continuum of the *voir dire* process; some are handled by the judge, others by the lawyers. As a lawyer, I always prefer to conduct personal *voir dire*, although my proficiency may permanently be in doubt after a federal court trial in Louisiana. The judge there refused lawyer *voir dire*, insisting that all we needed to know about the veniremembers would be elicited by the questionnaire and the judge asking three simple questions: (1) who are you?; (2) what do you do?; and (3) can your mother make a roux?

In that case, one venireman particularly caused me heartburn, but I did not have enough strikes to excuse him. His questionnaire answers indicated that he would be cynical on the issue of damages. I implored the judge to allow me individual *voir dire* in an effort to get the venireman's commitment to be fair or to show cause for striking him. The judge finally agreed. But during individual *voir dire* I was unable to get the venireman to admit to a bias against damages that would cause him to be unfair or disregard the judge's instructions. To my temporary dismay, the man made the jury. Three months later, that same juror

became the foreman and led the jury to assessing nine billion dollars in punitive damages. I should add, his mother could make a roux.

II. WHAT DID NOT WORK

In every one of my MDL trials (those I've won and lost), the courts have always ensured a fair jury was empaneled. So, if that metric determines what works in *voir dire*, I can move on to the third section of this article. However, by my metric of efficiency as well as fairness, there are a few items of note where selection has not been so successful.

Parties need at least one full day to examine questionnaire answers. In one case, where the court gave the parties two hours to look at seventy-five answers, the process lost a great deal of efficiency. None of the lawyers could adequately digest the answers, much less discuss whether we could agree on dismissals. The parade of jurors seeking to be excused was long, and the unwinding of their individual reasons before the bench took much longer than if the parties had been allowed time to digest the answers and try to arrive at agreements on hardships or fairness.

In another trial, one in which no lawyer *voir dire* was allowed, a federal judge conducted the full examination from her bench and was thus unable to readily see each juror. The process was conducted almost perfunctorily, rather than carefully and in a probative manner. *Voir dire* only took a couple of hours, but several days into trial a juror informed the court that she could not read or write English, and she was having difficulty understanding the lawyers and witnesses. The global *voir dire*, during which some jurors never had to express more than a few words, missed that disqualification. Fortunately, there were an excess of jurors, so the trial was able to continue.

I have only had two MDL trials where the judge permitted unlimited lawyer *voir dire*. With no time restrictions, we–the lawyers–had full opportunity to use *voir dire* to examine each veniremember exhaustively. The selection process took several days. We used the time to ferret out bias, begin bonding with jurors, and even subtly argue our cases. The judge viewed it fair because each side had the same opportunity. The case worked out well for my client, but with an eye toward the ethical obligation of "candor toward the tribunal,"[3] I confess that the process failed my metric of efficiency. We lawyers could have been just as effective at empaneling a fair jury had we been given four hours per side.

In subsequent conversations with the court, I discussed whether the judge was bothered by lawyers using *voir dire* to begin bonding with jurors. The judge was nonplussed. He saw the entire trial as one where lawyers would be seeking to bond with jurors. He saw no reason to wait for that to occur in opening statements. He further believed that if lawyers were allowed to begin that process in *voir dire*, those jurors who might readily and quickly succumb to one lawyer's charms would more quickly be struck and never make it to the panel.

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[3] MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N 2020).

In a subsequent case, the federal judge allowed limited attorney *voir dire*, and was clear: "I do not want to see you lawyers use this process to try and bond with the jurors. That is *not* why I am allowing you to voir dire." I urged the federal judge to adopt the view of my prior trial, setting out the prior judge's reasoning. The federal judge at least smiled as he replied: "Nice try."

III. ADDITIONAL CONSIDERATIONS

Abusing a bad pun, where do I find the jury still out on issues of conducting an MDL *voir dire*?

Most critically, in a post-coronavirus world,[4] the need for efficiency in *voir dire* is magnified. Exposing large numbers of veniremembers to unnecessary contact in enclosed spaces can be life-threatening. Taking wise precautions can minimize the risk, but part of those wise precautions should include how *voir dire* is conducted.

More than ever before, questionnaires that are filled out at home, before jury service, can minimize the need for veniremembers to attend court only to be excused because of reasons that could have been reasonably determined before coming to court. For some courts, the process of sending out questionnaires in advance is no challenge. For other courts, it is. The court staffs need to determine what can be done to get the questionnaires sent and returned in a timely fashion. Once the questionnaires are returned, but before the venire panel comes to court, the parties can likely agree to some veniremembers who should be excused. The court can also devise criteria for objections based on the questionnaire's answers, but that still excuses veniremembers for bias or hardship. This should restrict the numbers needed to be in close contact for extended periods.

Questioning potential jurors on concerns about the virus, wearing masks, and social distancing also poses competing concerns. The parties and court need complete information; yet, asking too many questions might unnecessarily feed concerns over the virus and result in losing a number of veniremen that could otherwise serve effectively. Similarly, objections may arise from questioning potential jurors about wearing masks because some people view mask-wearing as a political issue. Nevertheless, mask-wearing, social distancing, and other means of showing consideration towards others are important safety issues. When discussing the mask issue, a lawyer friend told me about one of his trials, in which a juror, who was a veteran of war, suffered such debilitating claustrophobia that he was unable to sit in an enclosed jury room. If that ex-war veteran had been required to wear a mask, there is no telling what would have happened. So, should potential jurors be questioned about masks? Or is that too political? Can one ask whether the veniremembers has been vaccinated against COVID-19, and if not, why not? That information is highly personal, but that will likely reveal important information about one's views of pharmaceutical companies.

Masks or no masks, I have learned that more information is always better in jury selection. Before any evidence is presented, the information might indicate

[4] The term "coronavirus," as used in this article, refers to Coronavirus Disease 2019 (COVID-19).

that jurors are, perhaps even unconsciously, leaning my way or against me. Either way, gaining insight from jurors is the most important goal for me as a trial lawyer.

What else can be done to isolate the veniremembers from each other during selection? Courts will need to experiment with taking hardships first in the process, excusing *before voir dire proper* for those who cannot sit because of one reason or another. Courts will also need to determine how many extra jurors will be necessary because of certain potentialities. The potentialities would include not only ones already present—sickness, accidents, or matters not picked up in voir dire—but also some disease-specific concerns, including sickness of others that might require quarantining.

All of these factors will modify the future usage of questionnaires. Concurrently with writing this article, I am working on the questionnaire for an upcoming MDL trial. Some questions about the coronavirus epidemic will need to be asked. But there is a real debate over what is sufficient and what is too much. Too many questions about the virus might unduly increase the potential jurors' focus on hazards and cause them to unnecessarily seek excuse from service. Yet not enough questions about the pandemic might fail to find the potential jurors who will need to be excused once *voir dire* commences in person.

CONCLUSION

As I sharpen my pencil to prepare for my next *voir dire*, my attention is pointed in multiple directions. I always seek to increase my own skill set, but I also recognize the importance to the court and the venire that the system works to produce not only a fair jury, but that it does so in an efficient manner. So, my eye focuses on what can increase efficiency and drive able, fair jurors into the box.

I take offense with Mark Twain's semi-autobiographical work, *Roughing It*. He totally misses the mark in writing:

> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system . . . I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury box against idiots, blacklegs, and people who do not read newspapers.[5]

The great process of *voir dire*, at least in the form in which it is used today, demonstrates the fallacy of those concerns; a panel of qualified, unbiased jurors far surpasses the intelligence and abilities of each individual member. Those who challenge the jury system should remember that the Founding Fathers, in setting out the Declaration of Independence, pointedly explained that treason against the Crown was appropriate because *inter alia*, King George was "depriving us in many cases, of the benefits of Trial by Jury."[6]

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[5] MARK TWAIN, ROUGHING IT (American Publishing Co. 1872).
[6] THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Good and effective *voir dire* assures a fair jury, and juries continue to be the backbone of the American form of government. President Lincoln explained it best:

> Let reverence of the laws, be breathed by every American Mother, to the lisping babe that prattles on her lap – let it be taught in schools, in seminaries, and in colleges; – let it be written in Primers, spelling books and in Almanacs; – let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.[7]

[7] Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838, in* THE COLLECTED WORKS OF ABRAHAM LINCOLN, Vol. II, 112 (Roy P. Basler ed. 1953).

MDL JURY SELECTION

Bridget K. O'Connor*

The "bellwether" label for test trials in multi-district litigation (MDL) cases can very easily become a misnomer relative to its historical origin. Depending on the cases selected as bellwethers and on the manner in which those cases are tried, the thirteenth century notion of a *Bellewhether*—the docile ram who travels reliably with its herd so predictably that the shepherd could rely on the sound of a bell tied to the ram's neck to track the location of his flock[1]—may share little in common with the highly individualized test cases selected by MDL counsel to test the collective strength of the broader array of cases combined within the MDL. While some of the litigants in an MDL may present the embodiment of the plaintiffs' collective pleadings, other individual plaintiffs from within the same pool may (and often do) completely undermine the credibility of the plaintiffs' overall case theory, serving as the manifestation of defendants' defenses. If followed blindly, the bell of neither the plaintiff's plaintiff nor the defendants' poster child would lead to the center of the group of plaintiffs in an MDL case today. Accordingly, the selection of bellwether plaintiffs is a complex and important strategic exercise in the course of an MDL proceeding, and one that receives a significant amount of attention both from litigants and from legal analysts and scholars.

Jury selection in an MDL proceeding—and more specifically in the context of individual bellwether trials[2]—comes into view against this backdrop. If counsel assume the representativeness of a prospective bellwether jury, they invite the opportunity for these already significant differences between bellwether plaintiffs to be exacerbated and amplified with the potential for a deep and lasting effect on the resolution of the litigation as a whole. It is precisely because bellwethers are intended as a limited but accurate sample serving as the harbinger of the whole that the selection of a fair, impartial, and representative jury for these cases is so important to ensuring the representativeness and utility of any such trial.

Surprisingly, however, while legal scholarship on MDL-related issues predictably attends to the ***selection of bellwether cases*** (i.e., the particular plaintiffs whose cases will be used as initial test cases), it by and large neglects the ***selection of juries*** for those cases. Perhaps this is because the bellwether trial stage is commonly perceived to fall outside the technical bounds of the MDL proceeding. Relative to the types of massive case-wide and strategic decisions implicated at other stages of an MDL more commonly addressed in legal scholarship, jury selection in an individual bellwether trial may seem local and singular by comparison. Given the immense resources that go into each of the other

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[1] *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2323 (citing *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997)).

[2] This article focuses on jury selection in bellwether trials since the default in MDL proceedings would be remand, and thus juries selected by a home transferring court on remand would no longer represent practice within an MDL.

stages of an MDL, however—from the formation of the MDL through the Joint Panel on Multidistrict Litigation ("JPML"); to the transfer of cases to the selected court and judge; through the proceedings including the arduous and usually lengthy conduct of fact and expert discovery; to the disposition stage, potentially including the MDL court's decision on summary judgment; or to remand the cases to their home courts at that stage[3]—it would be short-sighted for counsel to neglect to devote the same degree of attention to jury selection as that expended on prior stages. To do so would be akin to the marathon runner who, after holding a significant lead throughout the arduous race, stops short of the finish, losing sight of the finish line and losing his lead to a competitor who maintains focus to takes the title and the purse. As Clarence Darrow long ago observed: "Never forget, almost every case has been won or lost when the jury is sworn."[4]

Despite the dearth of legal commentary on this important stage of MDL practice, there is scant reason to believe that counsel do in fact lose focus for this important stage of these cases. This article provides an overview of two recent examples of the detailed examination of different aspects of jury selection in major MDL proceedings: (1) the request by defense counsel in the "Opioids" MDL 2804[5] for extensive records and information regarding the jury selection process in the Northern District of Ohio; and (2) the announcement by the presiding judge in the *In re Roundup* MDL 2741[6] proceeding that he did not intend to permit individualized voir dire questioning of potential jurors in two upcoming bellwether trials. Ultimately, certain jury selection best practices emerge as particularly important in the MDL context, and these are described in the final section of this article.

MDL proceedings are already higher stakes than standard litigation cases on account of one or more of the following reasons: (1) the subject matter of the cases—addressing a specific layer of a complex and interwoven industry and frequently involving complex and/or novel scientific theories attendant to proof of causation; (2) the scale—often thousands of plaintiffs and frequently hundreds of defendants; (3) the procedural history—the MDL action may encompass civil litigation following years of investigations and/or multi-pronged government enforcement actions; and (4) the stakes—the potential in some MDL cases for billions of dollars of damages and still more exposure in reputational harm, with plaintiffs in the cases spanning all fifty states and all walks of life. With each of these situational accelerants comes the potential for increased media coverage and for the prospect of trial-by-press to be used as either an offensive or defensive weapon in the litigation. All of these aspects increase the potential for issues to be amplified to an extent far greater than might be seen in more discrete trials with

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[3] *See* Ryan C. Hudson, Rex Sharp, & Nancy Levit, *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. REV. 801 (2021).

[4] *Selecting a Jury Can Be Complicated During Divisive Political Times*, ABA (June 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/selecting-a-jury-can-be-complicated-during-divisive-political-ti/.

[5] Defendant's Motion for Access to Jury Selection Records and Information at 1, *In Re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 20, 2019), ECF No. 2623.

[6] *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016).

one or more jurors selected for a bellwether trial. With all of that in play, jury selection in an MDL-related trial is indeed an advanced maneuver.

I. RECENT MDL CASE ACTIVITY RELATING TO JURY SELECTION

A. Opioids Defendants Seek Court Records Regarding Jury Selection Process

Certain defense counsel in the Opioids MDL 2804 proceeding recently underscored their attention to and interest in the jury selection process in that MDL action when they filed a Motion for Access to Jury Selection Records and Information,[7] seeking access to the jury selection records in connection with an upcoming bellwether trial scheduled to take place in the United States District Court for the Northern District of Ohio. As described by the filing defendants in their Motion, the court had undertaken, in advance of the trial, a prospective juror noticing and summons process in which 1,000 summonses were issued to prospective jurors, of which 725 questionnaires had been returned, and nearly seventy percent, or "roughly 500" prospective jurors, had been "excused, deferred and/or exempted for unknown reasons."[8] The filing defendants invoked 28 U.S.C. § 1867(f)[9] of the Jury Selection and Services Act, 28 U.S.C. § 1861, *et seq*., and the Northern District of Ohio's Juror Selection Plan (adopted July 31, 2014), to argue that they had "'essentially an unqualified right to inspect jury lists,' because 'without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.'"[10] That right, the filing defendants went on, ensures "grand and petit juries selected at random from a fair cross section of the community."[11] They also distinguished their request

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[7] Defendant's Motion for Access to Jury Selection Records and Information, *supra* note 5, at 1.
[8] *Id.* at 1-2.
[9] *Id.*; *see also* 28 U.S.C. § 1867. This section provides that "[i]n civil cases, before the voir dire examination begins, or within seven days after the party discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, any party may move to stay the proceedings on the ground of substantial failure to comply with the provisions of this title in selecting the petit jury." *Id.* § 1867(c). The statute requires for any motion to stay proceedings pursuant to Section (c) a "sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title," but does not provide a protocol for how parties should obtain the facts in support of such a statement except that Section (f) provides that "[t]he contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service." *Id.* § 1867(d), (f). Section (e) provides, however, that "[t]he procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." *Id.* § 1867(e).
[10] Defendant's Motion for Access to Jury Selection Records and Information, *supra* note 5, at 2 (citing Test v. United States, 420 U.S. 28, 30 (1975)).
[11] *Id.* at 3 (citing *Test*, 420 U.S. at 28).

for these ***records relating to*** the jury selection process from an actual ***challenge to*** the jury selection process, noting that in order to receive the requested records, a litigant need only "allege that he is preparing a motion to challenge the jury selection process," whereas in order to actually mount a challenge to the process, a litigant would be required to submit a sworn statement of facts in support of that challenge.[12]

On that basis, the *Opioids* defendants requested "immediate access" to twelve broad categories of documents and information from the court clerk's office relating to the jury selection process in that case, including but not limited to: all documents, correspondence, communications, and the like, "reflecting the process by which jurors were selected from the Master Wheel," and/or regarding "the Clerk's and/or Court's decision to exclude, except, or defer prospective jurors," as well as a "list of jurors approved for excusal, exception, or deferral, and all demographic information available, including age, gender, racial, ethnic, employment, and income information."[13]

Plaintiffs opposed the filing defendants' motion, pointing first to the "general rule" in Section (f) of the statute that the "contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed . . . until after . . . all persons selected to serve as jurors before the master wheel was emptied have completed such service," but acknowledging the exceptions to that general rule, which include disclosure "as may be necessary to the preparation or presentation of a motion under subsection (a), (b), or (c) of this section."[14] Plaintiffs asserted in their opposition motion, however, that the filing defendants' assertion pursuant to that exception, i.e., that they anticipated filing a motion under subsection (c), was "completely baseless and should be rejected."[15] Plaintiffs also argued that the rate of excusal described by defendants in their motion was perfectly appropriate relative to both the "extreme hardship" provision of 28 U.S.C. § 1866(c)(1), and to the Northern District of Ohio's Juror Selection Plan Section O, which provides that "temporary excuses on the grounds of undue hardship or extreme inconvenience may be granted by the court, and, under the court's supervision, by the clerk of court," in light of the fact that the trial was anticipated to last seven weeks and challenged the scope of the materials defendants requested.[16]

The Northern District of Ohio (Judge Polster) rejected plaintiffs' argument that the defendants' prospective challenge to the sufficiency of the jury selection

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[12] *Id.* (citing United States v. Williams, CR. No. 06-00079, 2007 WL 1223449, at *1, *5-6 (D. Haw. Apr. 23, 2007) and United States v. Royal, 100 F.3d 1019, 1025 (1st Cir. 1996)). Indeed, this makes sense, since a litigant would first need to obtain access to the records reflecting the jury selection process in order to support a challenge to that process.

[13] *Id.*

[14] Plaintiffs' Response in Opposition to Motion for Access to Jury Selection Records and Information at 1, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 25, 2019), ECF No. 2623 (citing 28 U.S.C. § 1867(f)).

[15] *Id.*

[16] *Id.* at 2 ("[I]t is to be expected that a significant majority of potential jurors would invoke this process and be excused by the Court from a seven-week trial for the undue hardship or extreme inconvenience this extended service would cause them.") (citing 28 U.S.C. § 1866(c)(1) and *Juror*

process needed to be *prima facie* viable, holding that "in requesting information under § 1867(f), a defendant does not need to show probable success or probability of merit in a proposed jury challenge."[17] That said, the court granted defendants' motion in part—holding that defendants were entitled to only a small amount of the information they requested—and denied the remainder of the motion to the extent it exceeded the scope necessary to assure the jury is selected at random from a fair cross section of the community.[18] The court also denied the motion insofar as it purported to require the court staff to "compile lists," explaining that § 1867(f) grants entitles parties to access only to "records and papers already in existence; it does not entitle defendants to require jury administrators to analyze data on their behalf."[19] Specifically, the court addressed several categories of the information sought by defendants by reference to the court's Jury Selection Plan website,[20] and then ordered that defendants were entitled to:

> (1) a list of individuals selected from the qualified wheel to be summonsed as prospective jurors; (2) the Juror Qualification Questionnaires for the individuals summonsed as prospective jurors; and (3) the Extreme Hardship Forms for the individuals summonsed as prospective jurors (which will reflect whether the request was accepted or denied).[21]

The court held that the more limited set of information would provide defendants with the demographic composition of those who received summonses, as well as those who were excused for hardship (and for what reason they were excused), as well as those who remained in the jury pool. The court further ordered that the information to be provided would be redacted to protect the prospective jurors, masking all personal information (i.e., names, addresses, phone numbers, and email addresses), identifying the prospective jurors only by their juror identification numbers.[22]

B. *In re Roundup* Judge Announces Intent to Restrict Individual Voir Dire

In October 2019, the Hon. Vince Chhabria of the United States District Court for the Northern District of California presiding over the *In re Roundup*

Selection Plan, U.S. Dist. Court N. Dist. of Ohio 6 (July 31, 2014), https://www.ohnd.uscourts.gov/sites/ohnd/files/JurySelectionPlan.pdf and United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986) (describing a similar length of anticipated trial and rate of excusal for hardship in that case)).

[17] Opinion and Order Granting in Part and Denying in Part Defendants' Motion for Access to Jury Selection Records and Information at 4, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804 (N.D. Ohio Sept. 25, 2019), ECF No. 2684 (citing U.S. v. Alden, 776 F.2d 771, 774 (8th Cir. 1985); U.S. v. Beaty, 465 F.2d 1376, 1380 (9th Cir. 1972); Gov't of Canal Zone v. Davis, 592 F.2d 887, 889 (5th Cir. 1976); U.S. v. Royal, 100 F.3d 1019, 1026 (1st Cir. 1996)).

[18] *Id.* at 4-5.

[19] *Id.* at 6.

[20] *Id.* at 2 n.1.

[21] *Id.* at 5.

[22] *Id.*

Products Liability Litigation, MDL 2741,[23] announced his intention, with respect to the upcoming bellwether trials in that action, not to permit counsel for the parties to individually voir dire potential jurors. Judge Chhabria explained to the parties that although he understood why some degree of extra screening beyond the court's normal process for civil trials might be necessary, "given who the defendant is and given the subject matter," that "all this business of individually voir diring jurors. . . I have a pretty strong reaction against that."[24] Judge Chhabria observed that the degree of individual questioning proposed by Monsanto's counsel was more appropriate in "a death penalty case."[25] Rather than questioning potential jurors individually, Judge Chhabria suggested that the parties should instead begin by screening potential jurors for possible hardship excuses relative to the projected month-long trials, and then the court would question the remaining potential jurors as a group.[26]

In response, counsel for the defendant, Monsanto Company, expressed concern that a recent $289 million state court verdict against Monsanto from a trial also held in San Francisco might bias potential jurors against his client in the upcoming cases. Were the court to engage in group questioning of potential jurors, Monsanto's counsel argued, if one or more jurors discussed "his or her hostility toward Monsanto, it can taint and pollute the entire venire."[27] Judge Chhabria countered that individuals in group voir dire screenings routinely express various types of hostility to defendants, but suggested that such expressions do not taint every such jury, and, that in presiding over the group voir dire, he was poised to cut off any potentially hostile commentary and to provide instruction to the pool of jurors to eliminate the potential for harm from such discussion.[28] The court requested briefing from the parties to address the question of whether individual voir dire was necessary under the circumstances.

Monsanto argued in its brief that widespread media coverage of the recent verdict against the company—including paid advertisements run by groups supporting plaintiffs and celebrity public discourse on the case and the verdict—resulted in a significant proportion of potential jurors in the Bay Area being aware of the recent verdict, including its amount, and that many of those aware of the verdict had specific views regarding Monsanto as a company.[29] In light of the widespread local knowledge of the recent verdict, Monsanto

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[23] *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016).
[24] Transcript of Proceedings at 49, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016), ECF No. 2219-2; *see also* Hearing Transcript at 30, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016), ECF No. 2280.
[25] Transcript of Proceedings at 51, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016), ECF No. 2219-2.
[26] *Id.* at 49.
[27] *Id.* at 51.
[28] *Id.* at 55-56.
[29] Plaintiff's Brief Addressing the Standard for Striking Jurors for Cause at 2-4, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Cal. Oct. 4, 2016), ECF No. 2219 (attaching as Exhibit to brief the report of a marketing research expert to quantify and describe the extent of knowledge extant in the potential juror pool).

urged the court that individualized voir dire was appropriate. Monsanto cited *Skilling v. United States*[30] as support for its position. In *Skilling*, the court engaged in individualized questioning of potential jurors, "thus preventing the spread of any prejudicial information to other venire members," and the parties were permitted to ask "followup questions of every prospective juror brought to the bench for colloquy."[31] Monsanto advocated for the use of juror questionnaires to identify those potential jurors with knowledge of the recent verdict, and "[i]n the event the Court is unwilling to presume bias" as to such jurors, asked that it permit individualized voir dire for counsel to explore the extent of such jurors' knowledge and/or views as to Monsanto.[32]

Plaintiffs argued that a "'presumption of prejudice' because of adverse press coverage 'attends only in the extreme case,'" and that news coverage in a large metropolitan area and of a "primarily factual" nature should be attributed less weight toward such a presumption.[33] In addition, plaintiffs argued that because much of the media coverage of the recent verdict came from Monsanto and its parent company, Bayer, and was actually prejudicial to plaintiffs, rather than to Monsanto,[34] such a presumption should not apply and that any potential bias should instead be explored in group voir dire.

Judge Chhabria thereafter ruled that although he would not go so far as urged by Monsanto's counsel—i.e., he would not "presume bias" as to any jurors with any knowledge of the recent verdict—he would treat those with knowledge of the verdict differently in voir dire.[35] Depending on the jurors' responses, Judge Chhabria would excuse certain jurors at the outset, and then potentially engage in a group discussion with only the jurors who indicated knowledge of the verdict during voir dire.[36]

II. PRACTICAL TAKEAWAYS FOR JURY SELECTION IN MDL TRIALS

As illustrated in the two recent examples discussed above, the overall aims and basic principles applicable to jury selection in the context of an MDL are the same as in a more discrete case, but the scale is likely broader, the subject matter and procedural history more complex, and the stakes greater, and thus the import of each selection—or exclusion—from among the venire carries heightened

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[30] 561 U.S. 358, 381 (2010).
[31] Plaintiff's Brief Addressing the Standard for Striking Jurors for Cause at 6 (quoting *Skilling*, 561 U.S. at 389) (internal quotation marks omitted).
[32] *Id.* at 7 (citing Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968) (The "court should make a careful individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles.")).
[33] Plaintiffs' Brief About Whether Exposure to News About the Litigation Should Disqualify a Prospective Juror, *In re Roundup*, MDL 2741 at 2 (quoting Hayes v. Ayers, 632 F.3d 500, 511 (9th Cir. 2011) and Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir.), *op. amended on denial of reh'g*, 152 F.3d 1223 (9th Cir. 1998) (citing Harris v. Pulley, 885 F.2d 1354, 1362 (9th Cir. 1988)).
[34] *Id.* at 5.
[35] Hearing Transcript, *supra* note 24, at 30.
[36] *Id.*

importance. Moreover, due to the aforementioned attributes of MDL cases, it is far more likely that prospective jurors will come into the case with at least some knowledge of the issues at play, if not particularized knowledge of the specific case or bias against one of the parties. Increased scrutiny of and attention to the jury selection process in an MDL action is therefore warranted. As Florida Supreme Court Justice Adkins wrote in his famous dissent in *Ter Keurst v. Miami Elevator Co.*: "The change of a single juror in the composition of the jury could change the result."[37]

The following principles are drawn from my own personal experience in MDL jury trials, as well as my informal survey of esteemed colleagues and my review of the literature on these topics.[38]

A. Ensure a Representative Jury

At the very least, parties will want to ensure that the venire for any particular bellwether trial is drawn from a large enough pool that it is possible to draw a demographically (i.e., race, gender, socio-economic) diverse and representative venire. And as the motion practice in the Opioids MDL illustrated, parties will also want to ensure that the court's process for selecting from among the broader juror pool is both fair and randomized.

B. Address Hardships

Though perhaps the most straightforward of the bases for excusing potential jurors, it is important to ensure that jurors' potential hardships in serving on the type of trial, and for the anticipated length of trial, are addressed. Vast trial prep resources and valuable time are lost if a mistrial results from the attrition of individual jurors over the course of trial, or worse, a last-minute revolt of empaneled jurors who come to appreciate too late what the impending trial may entail for them personally.

C. Identify Possible Juror Bias

The use of jury questionnaires is now commonplace, but not universal. In most instances, and particularly in the MDL context, parties benefit from the use of at least some form of questionnaire. Disputes emerge as to the specific form of questionnaire and the degree to which the questionnaire should probe beyond jurors' demographic statistics and experiential responses to explore their attitudinal views and opinions prior to voir dire. At base, however, some form of joint, agreed form of questionnaire is typically invaluable for both plaintiffs' and defense counsel in the MDL context. Questionnaires permit the court and the

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[37] 486 So. 2d 547 (Fla. 1986).

[38] Thank you to my partners Mike Brock and Mike Jones for sharing their insight and experiences relative to jury selection in MDL cases both in preparation for this article, and in the course of preparing for trials together.

parties an opportunity to identify uncontroversial strikes for cause in advance without using valuable live courtroom time to discern such categorical strikes, and also to manage the vast details about the jury venire prior to the start of live fire voir dire.[39]

Fundamentally, however, for a questionnaire to be useful, the parties must have enough time to process the results and incorporate the information into their plans for voir dire. In fact, a questionnaire without sufficient time before voir dire can be worse than no questionnaire at all. That is because once a prospective juror has taken the time to complete such a questionnaire about themselves, they will expect counsel to respect that effort and not to ask the same questions again. In situations where counsel is not permitted sufficient time to review the questionnaires, jurors have been known to show swift animosity to lawyers perceived to lack respect for those jurors or their time by (apparently) disregarding their questionnaire responses.

Jury questionnaires are most helpful in cases in which the parties are limited either in time or in form as to the scope of live voir dire. Whether and how the parties seek to delve into attitudinal questions will depend in part on the extent of live voir dire permitted, and also on the nature of the questions proposed by either party. In many cases, counsel deem a shorter questionnaire to which the parties have agreed to be superior to a longer questionnaire that includes questions from either side unilaterally and risks including attitudinal questions that could begin to suggest outcomes on particular issues.

D. Confirm and Attend to the Mechanics of Voir Dire

Who will do the questioning, lawyers or judge, or some combination of both? Will the questioning be conducted to potential jurors as a group or individually? What will be the process for attorney follow-up on juror responses? Are there local rules that provide a default plan for voir dire? What is the legal standard for striking a juror "cause" in this jurisdiction? How will that standard apply in the context of this specific MDL action, given the facts and law applicable to the case? Lawyers for the parties should consider and seek answers to each of

[39] Separate from the jury questionnaire, attorney research into potential jurors has also become increasingly commonplace as the amount of publicly available social media and other online information about individuals has increased. Along with that, questions have emerged about the scope of permissible investigation into potential jurors. One widely accepted line as to that limit is the principle that counsel for the parties should not, in the course of their research efforts, seek to engage the potential or actual jurors in any way (e.g., in an effort to goad a juror into revealing his or her true feelings on a topic). *See e.g.*, ABA Standing Comm'n Ethics & Prof'l Responsibility, Formal Op. 466 (2014).

these questions in planning for what may be an accelerated voir dire experience at the start of an MDL bellwether trial.

JURY SELECTION IN THE FIRST OPIOID TRIAL

Judge Dan Aaron Polster*

Jury selection in a high-profile case always presents challenges for the parties and the trial judge. Typically, the concern is that extensive media coverage about the subject matter of the trial or the trial itself will taint the jury pool, resulting in many of the prospective jurors coming in with preconceived notions about liability.

This was certainly the case as we prepared for the first bellwether trial in the Opioid MDL, slated to start October 21, 2019.[1] The plaintiffs in the case were Cuyahoga County and Summit County, Ohio (the Counties covering Cleveland and Akron). The defendants were several manufacturers of prescription opioids and several distributors of these drugs. Plaintiffs' main allegation against the manufacturers was that they aggressively marketed and promoted prescription opioids as being safe and effective, when in fact they were highly addictive. The principal allegation against the distributors was that they did not do what the law required to ensure that the prescription opioids went only to the people who were supposed to receive them. Not a day passed without a story on TV or radio, or an article in the national or local press regarding the opioid epidemic or the upcoming trial. In addition, there were stories and articles about settlement discussions.

While this extensive pretrial publicity was a concern, I did not foresee it being an insurmountable problem. As a result of my experience picking civil and criminal juries over the course of nearly twenty-two years on the federal bench, I have come to understand that each of us is inundated with so much information that it literally goes in one ear and out the other; very little sticks. Countless times when I have asked a prospective juror: "Do you recall seeing, hearing or reading anything about this case or the subject matter of this case?" I have received an affirmative answer, but when I have posed the follow-up question: "Tell me what you remember hearing, seeing or reading?" the answer has been "I don't recall anything specific." The far greater concern is that, in Ohio, there are very few people who *don't* have a family member, a friend, a parent of a friend, or a child of a friend who has been impacted by drug addiction, drug overdose, and even death. That personal connection to the opioid epidemic is something no one can forget, and that personal connection can easily lead to ascribing blame or liability. If that happens, one can no longer be a fair and impartial juror; one comes in with the scale tipped one way or the other, meaning that one of the parties has a hidden burden to overcome just to get to neutral.

I was very worried about finding a group of people who could be fair and impartial to both sides in this case, and I had no idea what I would do if we could not find them in the jury pool. While judges have occasionally changed the venue of a trial in order to minimize the impact of extensive pretrial publicity, Ohio and the surrounding states are considered the epicenter of the opioid crisis. Further,

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* Judge Polster served as a federal prosecutor for twenty-two years before being appointed to the federal bench in 1998. He has been appointed to preside over the Opioid MDL and continues to serve in that capacity.

[1] Judge Polster is presiding over the Opioid MDL, 1:17-MD-2804.

every part of our country, urban and rural, has been impacted, so I did not know where I could move the trial to find a less biased jury pool.

Accordingly, I set about devising with counsel a procedure that maximized the likelihood that we could seat a fair and impartial jury. The first issue of course was finding jurors who could sit for an eight-week trial. Many people have professional or personal obligations that would create a real hardship were they to be compelled to sit for that long. I asked the jury department to contact a pool of approximately 500 prospective jurors, and we asked them only one question: Would sitting on a jury for approximately eight weeks beginning October 21, 2019 cause you or your family a significant hardship? About half of the pool had legitimate excuses, leaving us with about 250 prospective jurors.

I then asked the lawyers to develop a case-specific questionnaire, which we would send to this group of 250 people. They gave me their proposal, which I reviewed and edited. The Jury Department sent this nineteen-page questionnaire to the 250 prospective jurors, asking them to respond either electronically or by hard copy. Once we had the completed questionnaires, we sent them to all counsel. I asked counsel to meet and confer, and to place the prospective jurors into four groups: those who both sides agreed should be excused for cause, those that only the plaintiffs wanted to excuse, those that only the defendants wanted to excuse, and those that both sides agreed could go forward, noting any questionnaire responses that needed follow-up questioning. On Friday, October 11, 2019, I summoned all counsel to court, and we spent about two hours reviewing the pool. Those prospective jurors that both sides agreed should be removed were excused at that point. After we started discussing jurors that only one side wanted to excuse, I made it clear that I would employ the same strike zone for each side. Once this became clear to everyone, most of the objections vanished, and I only needed to make a decision in a handful of cases. We ended up with approximately 150 jurors to summon.

While I typically pick a civil or criminal jury in a single morning or afternoon, I had previously blocked out three days with counsel, Wednesday-Friday, October 16-18, 2019. I foresaw the difficulty of seating an impartial jury in this case, and my courtroom cannot accommodate more than fifty prospective jurors at a time. Consequently, our jury department summoned fifty prospective jurors for Wednesday, fifty for Thursday, and fifty for Friday.

In a typical case, I have a list of approximately forty questions I pose to the panel at voir dire. When I need to ask a follow-up question that is best asked privately, I bring the juror up to sidebar for a few minutes, and my courtroom deputy puts on the white noise in the courtroom. I determined that this procedure would not work in this case. First, we had a very large number of attorneys, and I felt it would be intimidating for a juror to be surrounded by that many people during sidebar. Further, the questioning might be extensive. I didn't want to make everyone stand for that long. Plus, the white noise begins to get unpleasant and I thought the rest of the prospective jurors would become impatient. So, after I finished asking the panel my general questions, I told them that I had some follow-up questions for each juror that I needed to ask privately, and that it would be more comfortable for everyone if I did that in my chambers.

My staff suggested that I limit the number of lawyers for the private questioning, both because of space and to make it less intimidating for each juror. Accordingly, I said that only one attorney per party could participate. Again, at the suggestion of my staff, the only people sitting at the rectangular table in my chambers were myself, the court reporter, and the juror, along with two members of my staff. I sat at the head of the table with the court reporter to my left, and the juror to my right. The lawyers were all seated in chairs toward the back of the room, well away from the juror. I did most of the questioning, focusing on the one or two responses to the juror questionnaire that posed concerns about the juror's ability to be fair and impartial. Most of the questioning concerned a family member's experience with drug addiction, overdose, or treatment, or the employment of the juror or family member with one of the plaintiff counties or with one of the defendants named in the MDL. While I had been concerned that this questioning in chambers would feel very intimidating to the jurors, in fact, they generally seemed to be at ease. I felt that prospective jurors perceived my questioning as more of a conversation than an interrogation, and that the jurors were being very candid. The key question I usually posed at the end was: "If the situation were reversed, and you were one of the lawyers or parties in this case, would you have any concern about your fairness or impartiality as a juror?" Most answered no, a few answered yes, and some said they weren't sure.

After I concluded my questioning, I asked all the lawyers whether they had any additional questions. This process did not take long because they did not have many questions. After that, I asked the juror to step outside my chambers, and then the lawyers and I had a brief discussion about the juror. There was very little disagreement. Either both sides readily agreed the juror should be excused, or neither side had any challenge for cause. In the few cases where there was disagreement, I heard brief argument and then made a decision.

The Rules of Civil Procedure mandate a jury of between six and twelve jurors,[2] and I had previously told the parties I planned to seat twelve jurors, making sure we would have ample jurors to deliberate should some need to be excused during the lengthy trial. I told the lawyers that any juror remaining at the end would be part of the deliberations. The Federal Rules of Civil Procedure give the judge latitude in setting the number of peremptory challenges in a multi-party case.[3] We had six defendants, so I gave the defense six peremptory challenges, and I told them they could exercise them individually or collectively. I correspondingly gave the two plaintiff counties a total of six peremptory challenges. This meant we needed to qualify twenty-four jurors for cause. The process proceeded very expeditiously. By the end of the first day, we had twenty-one jurors, and nine of the initial group of fifty jurors remained to be questioned. I asked those jurors to return the next morning and I told the Jury Department that the next group of fifty jurors summoned for Thursday did not need to report to court.

In a short period of time on Thursday morning, we had selected the remaining three jurors needed to give us twenty-four jurors in total. I then allowed

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[2] FED. R. CIV. P. 48(a).
[3] FED. R. CIV. P. 47(b) (citing 11 U.S.C. §1870 (2020)).

the attorneys to exercise their peremptory challenges. When that process was concluded, I swore in our twelve jurors, admonished them to avoid watching, reading, or listening to anything about the trial, and excused them until Monday morning.[4]

From my conversations with counsel, it was clear that they were pleasantly surprised at how smoothly and expeditiously the jury selection process was completed. Everyone believed that we had selected jurors who could decide this difficult case fairly and impartially. We received no complaints from the jurors themselves. I believe that the prospective jurors were far more comfortable sitting in the courtroom without the white noise while we brought them individually into chambers.

The individual questioning proved to be particularly effective. We ended up excusing slightly over half of the jurors, largely by agreement. Almost nobody seemed to be purposely trying to get off the case; to the contrary, most people seemed very interested in serving. At the same time, they appreciated the importance of the process we were undertaking to make sure everyone could be fair and impartial. When the lawyers asked questions, they followed my lead and did so in a conversational tone. As a result, the jurors did not become defensive. While there is, of course, no way to know for sure if a prospective juror was being fully candid with the court and the parties, the collective impression was that these jurors were doing their best.

I will definitely employ this jury selection process for future bellwether trials in this MDL, and I will consider using it should I have another high-profile trial in the future. I was very pleased that, notwithstanding the tremendous amount of pretrial publicity on top of the devastating and pervasive impact the opioid epidemic has had on my part of the country, we showed that we could seat a fair and impartial jury.

[4] Over the weekend, the parties settled the case, so I excused the jury Monday morning.

BELLWETHER TRIALS

Robert Adams*, Brent Dwerlkotte**, Patrick Stueve*** and Abby McClellan****

INTRODUCTION

A bellwether trial is a pivotal time in Multidistrict Litigation (MDL). It allows the parties to put their theories to the test and dictate the future resolution of the MDL. For this article, we have come together to provide our shared experience with bellwether trials from the plaintiff and defense perspective. We reviewed dozens of articles written about the bellwether trial process and selected important aspects of a bellwether trial that have received little attention in literature. One or both side's view of these important bellwether topics is discussed, and we end with some notes and guidance. We hope this can be used as a practical guide for both parties and the MDL Court when faced with developing a bellwether trial plan.

I. CONSIDERATIONS FOR BELLWETHER SELECTION

We will not detail the numerous methods for bellwether pool selection as many before us have written on this issue.[1] We instead highlight some unique

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** Brent Dwerlkotte pronounced "Dwell-Kotte," (like the motorcycle Ducati) is a partner at Shook Hardy Bacon, where he often finds himself leading the defense in large MDLs and other complex litigations. Some have dubbed him the next Rob Adams for his trial work. Brent has worked in all areas of civil law, first for the plaintiff side, then as a federal law clerk, and finally as a dreaded defense lawyer. One of Brent's main hobbies is reading the Federal Rules of Civil Procedure and he puts this hobby to good use by serving as the Federal Rules Chair of the Western District of Missouri's Federal Practice Committee, and as a member of the Jury Instruction Committee of the United States Court of Appeals for the Eighth Circuit.

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considerations for selection of bellwethers for initial discovery and trial selection. This is by no means exhaustive but is meant to provide practical insights into various issues attendant to the bellwether trial selection process that we have experienced in our practice. Our insights and recommendations below come from our collective experiences trying and litigating MDL cases.

II. STAGGERED PROCESS

A. Plaintiff Recommendation

The Manual for Complex Litigation advises if bellwether trials "are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases."[2] To ensure the trial pool is representative and stays representative, we recommend staggered selections: choose one discovery pool early on in the case, and once the case develops and more cases are filed, allow for one or more discovery pools to be added. The staggered process is recommended because what makes a case representative is often a moving target. New information from medical records, expert testimony, scientific studies, depositions, written discovery, and other sources may change what is considered representative. New information could add a representative factor that should go through discovery or could remove an important issue that is no longer representative or necessary for further discovery. In the *Taxotere* litigation, a staggered process was ordered, which allowed the parties to add cases to the pool of trial plaintiffs as the case progressed.[3] This proved helpful for several reasons. A large portion of cases were filed after the initial round of bellwethers were selected. The ability to add additional cases to the bellwether pool allowed the parties to review important factors discussed on the Plaintiff Fact Sheet and determine which percentage of the cases had these factors present and whether those percentages changed with the addition of cases. After a few rounds of bellwether pools, the court determined that trying a case with multiple cancers present was not representative and would not be helpful to try as

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Encouraging Academic Performance (LEAP) where she runs the lawyer volunteer tutoring program at Operation Breakthrough, a facility which provides a safe educational environment for children in poverty.

[1] For a detailed discussion about plaintiff sections for bellwether pool discovery, see generally Eldon Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); *see also* Melissa J. Whitney, FED. JUDICIAL CTR. AND JUDICIAL PANEL ON MULTIDISTRICT LITIG., BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES (2019).

[2] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.315 (2004) (hereinafter "MCL").

[3] *In re* Taxotere (Docetaxel) Prod. Liab. Lit., (MDL No. 2740) (E.D. La.) Case Management Orders 3, 6, 8A (detailing the process for selection of the first two bellwether discovery pools).

a bellwether, so plaintiffs with multiple cancers were no longer added to the selection pool, even though they were present in the first bellwether round.

III. *LEXECON* ISSUES

A. Defense Recommendation

In *Lexecon Inc. v. Milberg Weiss*, the Supreme Court held that a transferee judge presiding over an MDL cannot hold a trial in a case transferred to the MDL without the parties' voluntary consent.[4] It is imperative that courts and parties anticipate and resolve as early as possible any *Lexecon*-related concerns. Parties should understand that the bellwether selection process and *Lexecon* waiver decisions can be used as both a shield and sword, allowing parties to prevent fewer desirable cases for each side to move forward in discovery. Courts have drawn on their collective case experiences to facilitate *Lexecon* waivers or workarounds, which prevent parties from making a deliberate *Lexecon* decision. For example, if a party declines to provide a *Lexecon* waiver, courts have issued pretrial orders indicating that the MDL judge would hold trials where the cases were initially filed utilizing intra-circuit or inter-circuit assignments.

In instances where *Lexecon* waivers are provided at the outset of litigation in order to establish a discovery pool of cases, courts should narrowly construe *Lexecon* waivers to only those cases initially selected. This allows both parties the opportunity to provide *Lexecon* waivers for subsequent discovery pool or trial cases. In addition, in cases where the transferee court determines that inter-or intra-circuit assignments under 28 U.S.C. § 292 are available, the parties should immediately raise the impropriety of this *Lexecon* workaround or other similar workarounds. The Ninth Circuit ruled out this option in *In re Motor Fuel Temperature Sales Practices Litigation*.[5] In that case, the presiding MDL judge requested that then-Chief Judge Alex Kozinski of the Ninth Circuit permit her to preside over three cases, which were subject to remand because they had originally been filed in California. Judge Kozinski denied her request, finding:

> [o]nly if the presiding judge is recused or unable to serve, and the local district is unable to reassign the case according to its local procedures, will the chief judge of the circuit be called upon to bring in a judge from outside the district. For me to sign a Certificate of Necessity in the absence of such circumstances would constitute a serious encroachment on the autonomy of the district courts and also interfere with the random assignment of cases.

Intra-circuit or inter-circuit assignments are not necessary because the bellwether process produces a large volume of materials that the parties and courts can then

[4] 523 U.S. 26 (1998).
[5] *In re* Motor Fuel Temperature Sales Practices Litigation (MDL No. 1840) (D.Kan.)

provide to originating courts after remand. The whole point of the bellwether process is to allow the parties and the court to develop pretrial materials from which future trials can be conducted in a streamlined manner. For example, establishing a common set of exhibits and deposition designations that could be used in any future trials would streamline pretrial proceedings.

B. Plaintiff Recommendation

If *Lexecon* is not waived by a bellwether plaintiff, it can be more efficient to have the MDL judge sit for an intra-circuit or inter-circuit assignment rather than have a case tried by a court unfamiliar with the litigation.

Remand to a new judge can lead to delays because the court has to get up to speed not only on the factual issues, but also the legal issues. Additionally, there is a vast difference in the time to trial across the federal districts. For example, in 2018, the average time to trial in the District of Massachusetts was 31.9 months compared to 12.4 months in the Eastern District of Virginia.[6] Cases that are sent for remand would likely get a shorter time since the majority of discovery is complete, but this data highlights that once a case is sent for remand, they do not automatically get a court date, which delays the ability to obtain a representative verdict.

Inter- and intra-circuit assignment enables the parties to take advantage of the knowledge the transferee judge acquired during the course of the MDL and prevents a "remaining case from languishing in the transferor court."[7]

IV. SELECTION PROCESS FOR MDLs WITH INDIVIDUAL CLAIMS AND PUTATIVE CLASSES

A. Plaintiff Recommendation

Much has been written about the creation of a bellwether pool for individual trials, but little has been written on how to proceed when the MDL has a large number of both individual and putative class claims. We recommend selecting a discovery pool similar to what was contemplated in the *Syngenta* MDL, which had a mix of both individual and class plaintiffs.[8] In *Syngenta,* Plaintiffs originally filed two master consolidated class action complaints; one complaint covered producer plaintiffs, with fifty-two named class representatives in twenty-two states asserting claims under the laws of each of those states. The other complaint covered non-producer plaintiffs, with four named class representatives, each asserting a number of state-law claims. Both complaints asserted class-action claims under federal law. There were also several hundred individual cases filed

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[6] UNITED STATES DISTRICT COURTS, *National Judicial Caseload Profile*, 4, 68, https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2018/09/30-1 ("Data Table").

[7] *See* Duke Principles Best Practice 14C, at 112.

[8] *See generally, In re Syngenta AG MIR 162 Corn Litig.,* (MDL No. 2591) (D. Kan.), Scheduling Order #2: (Oct. 21, 2015) (ECF #1098).

in the MDL under various states' laws, and finally, there was a master complaint filed on behalf of two milo farmers. Judge John Lungstrum ordered a diverse initial bellwether discovery pool of at least sixty-three plaintiffs from the following groups:

- the five non-producer plaintiffs who filed suit;
- the two milo plaintiffs named in the milo master complaint;
- a sampling of six producer plaintiffs from eight of the twenty-two states at issue, with each side selecting four states on an alternating basis, with plaintiffs selecting first, and further with each side selecting three plaintiffs per state on a similar alternating basis; and
- the named class representative(s) in each of the eight selected states.

If a producer plaintiff was selected as a bellwether plaintiff (whether for discovery or later for trial) and voluntarily dismissed its case, the selecting party was able to identify a replacement. For the producer plaintiffs, Judge Lungstrum requested each party provide a report with "concise but reasonably detailed information about why the parties believe their selections are representative of the range of cases involved."[9] From this pool, a narrower pool was selected for the trials. This approach allowed for a variety of cases to be worked up for trial in a focused and efficient manner, and afforded counsel for the parties significant input into the trial selection process while the court had the final say. Importantly, even if the MDL court ultimately denied class certification (which it did not), there were several individual bellwethers from various states ready for trial. Because the court certified several state-wide classes of farmer claims, those cases were set for trial first in the MDL.

V. SETTLEMENT AND DISMISSAL BEFORE TRIAL

A. Plaintiff Recommendation

A large amount of time and expense goes into working up a bellwether case for trial. The massive effort is worth it if a verdict comes back in your side's favor, and even an unfavorable verdict can help move the litigation along and be good preparation for the next trial. The Manual for Complex Litigation states the goal of the MDL trial is to "produce a sufficient number of representative verdicts" and to "enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group

[9] *Id.* at 7.

basis."[10] This goal cannot be met if a case is worked up for trial but is settled before a verdict is obtained.

Because a settlement does not allow the parties to learn from the trial experience or gain valuable information from a jury verdict, the bellwether trial selection process should account for what happens if a settlement is reached on the eve of trial. In the *Actos* MDL, it was required that any case nominated for trial provide a certification by counsel that they intended to try the case and not settle or dismiss the case and certify they had no reason to believe the case would settle individually before trial.[11] We agree that once a case is picked for trial, the goal should be trial, but if the case is resolved prior to a verdict, the parties must agree to the disclosure of the settlement amount to all court designated settlement counsel and the settlement master or mediator to inform the relevant parties of the potential value of the cases.

B. Defense Recommendation

Defendants usually object to providing details of settlements before trial. That is because cases settle for any number of reasons, and settlements often do not show the actual value of a case. A defendant may settle simply to avoid the burden and expense of a trial. Requiring disclosure of settlements would dissuade parties from settling in many instances because neither side wants to be perceived as having capitulated in a large MDL.

While there are many good-faith reasons for settling or voluntarily dismissing a selected bellwether case before trial, there can be manipulation of the bellwether process if proper safeguards are not established early in the selection process. We have found that the bellwether selection process works more efficiently and fairly where the parties work together to select bellwether trial cases.

One criticism of MDL litigation is the filing of too many non-meritorious cases, which leads to a high percentage of bellwether cases being dismissed.[12] One way to curb such filings is to penalize plaintiffs who dismiss bellwether cases without good cause, by allowing the defendant to select the replacement bellwether case from among the entire case pool.[13]

VI. TYPES OF TRIALS

The most common bellwether trial discussed in the literature is a single plaintiff or single class trial. The single bellwether trial may not always be the most

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[10] MCL at 19.

[11] *In re* Actos (Pioglitazone) Prod's. Liab. Litig. (MDL No. 2299) (W.D. La.)

[12] *See In re* Mentor Corp. Obtape Trans. Sling Prods. Liab. Litig., 2016 WL 4705807 (MDL No. 2004) (M.D. Ga. 2016) (noting that MDL products liability actions "have the unintended consequence of producing more new case filings of marginal merit, many of which would not have been filed otherwise.").

[13] *See generally*, DUKE L. CENTER FOR JUDICIAL STUDIES, *Guidelines and Best Practices for Large and Mass-Tort MDLs* (2014).

effective or efficient trial type for the MDL, particularly when there is a large number of case types or classes. Other options are potentially available, so we briefly discuss the other bellwether trial options.

A. Consolidated Class Trials

1. Plaintiff Recommendation

In a case with putative classes from multiple states, we recommend trying more than one class at a time to efficiently obtain multiple representative verdicts. A common opposition by defendants is that class claims should not be combined for trial because of differences in the law of each state and the likelihood of confusing the jury. Plaintiffs do not believe any prejudice exists because jury confusion can be mitigated by jury instructions.

The issue of consolidating class trials occurred in the *Syngenta* litigation. That MDL was comprised of class cases from twenty-two states with seven class cases remaining in the bellwether pool after the trial of the Kansas class. Plaintiffs urged the court to consolidate the class trials and Defendants objected that they would be prejudiced because combining the classes would confuse the jury due to the differences in state law claims. Judge Lungstrum relied on Federal Rule 42(a) and 42(b) to weigh interests of convenience, expedition, and economy against the potential for prejudice or confusion in deciding whether and how to combine the classes' claims for trial.[14] The Court concluded that the potential for prejudice or confusion did not require seven separate class trials, and the efficiency achieved in combining multiple state-wide classes in a single trial outweighed the potential problems. The court elected to try no more than two statewide classes at a time, grouping the states based on the similarity in state law and the type of claims asserted.[15] Multistate-wide class trials provide an efficient method to try several types of claims that can inform both the settlement value of similar claims, including the likelihood and settlement value of punitive damages.[16]

Individual plaintiff claims can also be consolidated, and, similar to class trial consolidation, can be an effective means to test claims and allow for several representative verdicts at a time rather than waiting months or years to receive such verdicts. Consolidation can be appropriate when common evidence dominates (MCL § 11.631) and has been done in a number of product cases.[17]

2. Defense Recommendation

Cases should not be consolidated for trial as part of the bellwether process. The goal of the bellwether process is to achieve valid results for the parties to

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[14] *See In re Syngenta*, Memorandum and Order (July 6, 2017) (ECF #3319) (court may order separate trials "[f]or convenience, to avoid prejudice, or to expedite and economize").
[15] *Id.* at 4.
[16] *Id.* at 7.
[17] *See*, e.g., Order Consolidating Bellwether Cases For Trial, *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., MDL 2244, (N.D. Tex., January 18, 2016) (consolidating five cases

assess strengths and weaknesses, not to resolve a large number of cases. Courts have recognized that consolidated trials are generally inappropriate until (if at all) enough individual trials have been conducted and various case-specific issues determined.[18]

B. Bench Trial/Mini Trials

1. Defense Recommendations

Alternative approaches to bellwether trials that are less expensive exist that can help develop critical information for litigants. The bench trial is one alternative approach. In class actions, the parties can consent to a bench trial on certified issues, resolving liability and damages issues separately. If a certified issue is resolved in the defendant's favor, it would be necessary for the court (or other courts from which the cases were transferred) to try any of the other issues raised by individual class members' claims. The potential savings in terms of time and resources could entice the parties to negotiate a settlement. Bench trials serve several other advantages. First, they allow the parties and the judicial system to benefit fully from the court's knowledge of, and familiarity with, the certified issues. Second, they conserve the considerable resources necessary to empanel and educate a jury on the issues to be tried. Third, they afford the court maximum flexibility to resolve the certified issues on the facts, on the law, or a combination of the two. Given the United States Supreme Court's recent decision in *Merck Sharp & Dohme Corp. v. Albrecht*,[19] which required that judges, not juries, decide for preemption purposes whether clear evidence shows that the FDA would not have approved of a drug label change, preemption is a potential issue an MDL court could try.[20]

Parties could similarly agree to conduct mini-trials or summary trials, conducted either by the MDL judge or by consenting to a federal magistrate

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for bellwether trial where the common issues of law and fact prenominated); see also *In re* Boston Scientific Corp. Pelvic Repair System Prods. Liab. Litig., (MDL No. 2326) (S.D. W. VA) (consolidating four plaintiffs' claims in *Campbell* and consolidating four plaintiffs' claims in *Eghnayem*).

[18] *See In re* Levaquin Prods. Liab. Litig., No. 08-1943, 2009 U.S. Dist. LEXIS 116344, at *9–11 (D. Minn. Dec. 14, 2009) (internal quotation marks and citations omitted); see also Pretrial Order # 71 at 2, *In re* C.R. Bard Inc., Pelvic Repair Sys. Prods. Liab. Litig., (MDL No. 2187) (S.D. W. Va.) (Mar. 7, 2013) (denying plaintiffs' motion to consolidate three plaintiffs' cases or, in the alternative, "seat three juries in a single trial but deliberate separately and render separate verdicts" as the first bellwether trial in product-liability litigation involving pelvic implant surgery).We note that issues have developed involving multi-plaintiff trials *after* the bellwether trials have occurred. Issues attendant to courts conducting multi-plaintiff trials are beyond the scope of this article. From the defense perspective, we believe that consolidated multi-plaintiff trials are unfair and prejudicial to defendants. *See, e.g.*, Guenther v. Novartis Pharm. Corp., No. 6:08-cv-456-Orl-31DAB, 2012 WL 5398219, at *2 (M.D. Fla. Oct. 12, 2012) ("[The MDL] Panel has repeatedly rejected attempts to consolidate cases for trial and has ordered multi-plaintiff case complaints to be severed because the claims of individuals plaintiffs were not suited for consolidation").

[19] 139 S. Ct. 1668 (May 20, 2019).

[20] *See In re* Zofran (Ondansetron) Prods. Liab. Litig., 368 F.Supp.3d 94, 116-17 (D. Mass. 2019)

judge.[21] Mini-trials are nonbinding trials on single issues. Summary trials involve impaneling a jury from the federal jury pool to hear an abbreviated presentation of evidence. Summary trials often last no more than a day and are non-binding. Summary trials may be conducted by the lawyers where they provide a presentation of the key evidence that would be heard at trial, or they may involve live testimony from the most critical witnesses. Because "real juries" are involved, parties may walk away with an accurate sense for how their claims will be received.

C. Trial Logistics: Timed Trials

1. Plaintiff Recommendation

Plaintiffs' counsel cautions against timed trials and recommends instead a detailed trial plan with estimates of time based on likely live and videotaped depositions and committing to a number of days in which plaintiffs will complete their case. The time allotted to plaintiffs should be more than for defendants because: (1) plaintiff bears the burden of proof and essentially has the responsibility to present any background or foundational evidence for the jury's comprehension of the subject matter; and (2) defendants attempt to introduce their own favorable evidence into the plaintiffs' case, which inevitably makes their case shorter. Further, the use of a time clock presents plaintiffs with difficult choices regarding how much time to leave themselves for defendants' case-in-chief, and would give defendants the ability to game the system. For example, defendants can literally wait to call a key witness until they *know* plaintiffs have little or no time left for cross-examination.

A time clock was contemplated in *Syngenta*, and the court sided with Plaintiffs' recommendation that a time clock was not needed. Judge Lungstrum explained that "[b]ased on its 25 years of experience trying cases, the Court agrees with plaintiffs that in the normal course, the plaintiff's case-in-chief exceeds that of the defendant." The court then provided a detailed plan that contemplated the number of days for trial testimony (giving the plaintiffs an extra day) rather than using a time clock.[22] The class trial finished right on time.

2. Defense Recommendation

Timed trials can provide, in appropriate cases, speedy and fair justice for the parties, witnesses, juries, and the courts. Lawyers who have participated in timed trials no doubt appreciated the discipline it requires to plan who will actually

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(pre-*Albrecht* decision; noting that it was unclear if the court should conduct an evidentiary hearing or "what amounts to a lengthy bench trial" to resolve factual issues relevant to preemption), *vacated in part* (July 15, 2019). As a general matter, affirmative defenses like statute of limitations, laches, and estoppel would be prime candidates for bench trials or mini-trials and could provide valuable insight that would apply to a large set of similar cases.

[21] Mini-trials and summary trials also present the opportunity for younger lawyers to get on their feet and obtain trial experience in front of federal judges.

[22] *See Syngenta* "Order Concerning Time Limits" (May 24, 2017) (ECF #3182).

testify and for how long. Without time limits, the most complex cases last the longest and are tried to the least qualified jurors. Timed trials would therefore provide corporate clients with greater comfort in a jury pool. The most important benefit of timed trials is that they focus the parties, witnesses, and the court on the real issues in the case. Even where the judge does not explicitly agree to time the trial, if the judge allocates a fixed number of days for trial, we are often able to agree with our adversary to keep time and divide it between the two sides. This is just as practical to facilitate timely completion of the trial in an efficient and focused manner. A good example of this is Judge Matthew Kennelly's order allocating a total of seventy hours for the parties to try the first Auxilium-only bellwether trial in *In re Testosterone Replacement Therapy Products Liability Litigation.*[23] After developing a "good deal of familiarity with the cases from presiding over extended pretrial proceedings," the court rejected the parties' request for three weeks, finding that the estimate "assumes unnecessary repetition of points and presentation of unnecessarily cumulative evidence."[24]

D. Expert/*Daubert*

1. Defense Recommendation

It is critical for litigants and courts to design the bellwether selection pool of trial cases toward producing beneficial results for the entire set of cases. Essential to the MDL process is the goal of consistency, particularly as it relates to expert and *Daubert* issues.[25] *Daubert* rulings have a critical impact on MDLs, because these rulings can help defendants avoid large numbers of non-meritorious cases.[26] If one of the ultimate goals of bellwether trials is to help inform the parties of the estimated value of the litigation, *Daubert* rulings at an early stage in the MDL and before the first bellwether trials begin will give litigants a strong sense for which types of claims will reach a jury and, accordingly, ballpark valuations if settlement is contemplated.[27]

One method of ensuring that bellwether trials operate efficiently is to limit expert testimony to actual opinions, rather than allowing the parties to build up an expert's credibility with long, unnecessary background questions. We have tried cases where the court has required the parties to submit a one-page narrative with the expert's background that will be read to the jury, leaving only the substantive opinions for the expert to testify about during trial. This is very effective, particularly in product liability cases where complex scientific expert testimony is necessary to prove causation. Jurors are much more receptive to expert testimony

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[23] (MDL No. 2545) ECF #2183, CMO No. 72 (N.D. Ill. 2017).
[24] *Id.*
[25] *See generally*, Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993).
[26] *See generally*, Christopher Gramling, et al., Early Assessment of Claims Can Help Reduce the MDL Tax, Critical Legal Issues: Working Paper, No. 216 (March 2020).
[27] *See In re* Genetically Modified Rice Litig., (MDL No. 1811) (E.D. Mo.) (As part of the first bellwether trial, the court issued a detailed opinion on summary judgment and *Daubert* motions, which were applicable to a large part of subsequent cases).

when they do not have to endure hours of listening to an expert's educational and research background.

E. Witness Testimony

1. Plaintiff Recommendation

There is no doubt that jurors and courts prefer live testimony over video depositions (or worse, reading deposition testimony). If bellwether trials are supposed to be the forum in which litigants present their best evidence before a jury, it is imperative that critical witnesses appear live absent extraordinary circumstances. For this reason, we favor allowing live testimony via contemporaneous transmission under Federal Rule of Civil Procedure 43 in instances where critical witnesses refuse to appear in person for no good reason. For example, in *In re Actos (Pioglitazone) Products Liability Litigation*, the court instructed the parties in its scheduling order that it "expect[ed] the parties to make significant efforts to produce witnesses for trial rather than relying on deposition testimony."[28] Although the parties recognized that Rule 45 placed the witnesses outside the court's subpoena power, the court nonetheless ordered those witnesses to testify via contemporaneous transmission by appearing at a federal courthouse within 100 miles of their location for videotaping.[29]

2. Defense Recommendation

Defendants generally oppose permitting remote transmission of video depositions where appropriate and the need for and unavailability of witnesses may be anticipated. The advisory committee notes of Federal Rule of Civil Procedure 43 make clear that remote transmissions are a rare exception when prior deposition testimony is not available, not a go-to procedure to be used whenever the plaintiff already has deposition testimony but simply desires a more polished presentation.[30]

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[28] *In re* Actos (Pioglitazone) Prods. Liab. Litig., 2014 WL 107153, at *4 (W.D. La. Jan. 8, 2014).
[29] *Id.* at *10-11; *see also*, *In re* DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig., 206 WL 9776572 (N.D. Tex. Sept. 20, 2016).
[30] *See, e.g.,* Roundtree v. Chase Bank USA, 2014 WL 2480259, at *2 (W.D. Wash. 2014) (finding "no reason . . . to consider whether this situation merits the *exceptional* use of video transmission of testimony") (emphasis added); *In re* Prograf Antitrust Litig., 2014 WL 7641156, at *5 (D. Mass. 2014).

Rule 43 makes it clear that remote transmissions should be only be ordered in exceptional circumstances.

F. Jury Feedback

1. Plaintiff Recommendation

Feedback from the jury can be immensely helpful for assessing the strengths and weaknesses of a case for purposes of resolution and to prepare for future trials. We encourage both sides to request and recommend the court allow the parties to speak to the jury after the verdict. In *Syngenta,* the court allowed both parties to question the jury after the Plaintiff verdict of $217.7 million. One of the questions Plaintiffs posed was why the jury gave the full compensatory damages requested but neglected to assess punitive damages. Jurors also were allowed to independently speak to lawyers if they wished, which allowed for more detailed questions about specific key issues. After the chance to discuss the result with the jury, both sides used the information to alter their strategy for the next trial.

The discussion with the jury can also be helpful in a scenario where the jury verdict form asks a specific causation question prior to general causation. If a jury finds for the defendant on the first question of specific causation, then plaintiffs do not know if the jury had issue with the general causation evidence. The ability to question the jury after the verdict can be helpful to determine the strength of the causation evidence.

2. Defense Recommendation

Jury feedback can provide some of the greatest insight into a case's strengths and weaknesses. As Bill Gates has said, "We all need people who will give us feedback. That's how we improve."[31] We agree with our colleagues that the parties should request and recommend that the court allow the parties to speak to the jury after a verdict. The best research we can do relating to experts is jury feedback. You can watch an expert testify at trial or read trial transcripts, but you still do not know how they are perceived by the jury. Over the years, we have been amazed that we went through an entire trial certain of an issue or piece of evidence only to have the jury surprise us with something completely different.

CONCLUSION

When faced with developing a bellwether trial plan we hope the recommendations provided in this article will be of good use. The bellwether selection plan will determine the number of cases and causes of actions to be tried, which will in turn dictate which type of trial should be chosen. The logistics of the trial cannot wait until the months leading up to trial and should instead be

[31] Bill Gates, *Teachers Need Real Feedback*, TED (May 2013).

determined early so the parties can appropriately plan. Adjustments to the bellwether pool should occur based on developments during discovery. After the first bellwether trial is complete, the parties and the court should assess how well the trial plan worked and should make changes and tweaks to the plan as needed.

The number of MDLs has increased immensely over the past decade and we foresee this trend will continue. The proliferation of MDLs increases the likelihood of bellwether trials. These future bellwether trials will provide plenty of opportunities to further test and assess the recommendations set forth in this article. Our hope is that more literature can be written on these topics in the coming years as these theories and recommendations are put to the test.

BELLWETHER TRIALS

Judge Eldon E. Fallon*

I. INTRODUCTION

The MDL process embodied in 28 U.S.C §1407 is emerging as a significant legal vehicle for dealing with complex litigation involving numerous cases. This process was originally intended to establish a centralized forum, selected by the MDL Panel, where related cases would be consolidated so that coordinated pretrial discovery could proceed in an efficient and effective manner. The centralized forum or "transferee court," as it is known, was to be a sort of waystation at which the preliminary aspects of the litigation could be more or less completed before individual cases would be sent back for trial by the transferor court, the court(s) where the cases were originally filed. In practice, however, the transferee court has done more than function as the discovery crucible. Statistically, only about two percent of MDLs are remanded back to the transferor court for resolution.[1] Most MDLs are resolved in the transferee court. One method used by transferee judges to accelerate a global resolution of an MDL is the "bellwether" or "representative trial."

II. DEVELOPMENT OF BELLWETHER CONCEPT

Initially, courts attempted to use the results of a bellwether trial to bind the parties in the similar consolidated cases. This attempted early use of bellwether trials was essentially an endeavor to adopt the method used in adjudicating a class action, but an MDL is not a class action. True, like a class action, an MDL is a consolidation of common or similar cases, but, unlike a class action, the commonality aspect of the cases in an MDL lacks the necessary predominance requirement of Federal Rule 23(b). That is to say, while there is some commonality of facts, this commonality aspect does not predominate over or exceed the individual aspect of each of the cases. In an MDL, each case remains distinct and separate from the others, and appellate courts have generally held that a decision on the merits in one does not bind other coordinated cases. Consolidation of individual cases in a transferee court by the MDL Panel pursuant to §1407 does not merge the suits into a single cause, change the rights of the parties, or make those who are parties in one suit parties in another.[2] Thus, while consolidation improves the efficiency of the pre-trial process, courts still face the possibility of trying hundreds or thousands of similar cases. It is in this setting that bellwether trials have developed and proved useful.

Although bellwether trials are not binding on other related cases, they are, of course, binding on the parties in the specific case that is tried and can also still be beneficial to the MDL process. However, the primary purpose of conducting bellwether trials is not to resolve the thousands of related cases pending in an MDL

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* United States District Judge for the Eastern District of Louisiana.

[1] *See Statistical Analysis of Multidistrict Litigation*, JPML, http://www.jpml.uscourts.gov/statistics-info (last accessed Jan. 7, 2020).

[2] 28 U.S.C. § 1407 (2020).

by one representative proceeding, but instead to provide meaningful information, experience, and data to allow the parties to make an intelligent and informed decision as to the future course of the litigation. The type of information and data spawned by the bellwether process includes such things as informing the parties as to the economic costs of a trial, the effective use of jury questionnaires in selecting a jury, the time it takes for a trial, the performance of the witnesses during a trial, the appropriate exhibits for a trial and the most effective method of using and displaying them, the testing of various theories of liability or defenses in a trial setting, and, finally, the result or verdict rendered by the jury. This information and data can play an important role in informing the parties as to whether the litigation can be completely resolved either by a global settlement or some other global dispute resolution process. Even if a global resolution is not immediately available, the bellwether process makes future trials more efficient and less expensive. The bellwether process allows the parties to compile what is known as a "trial package," which usually includes video depositions, pleadings, expert reports, a copy of the jury questionnaire used in the bellwether trial, copies of the significant exhibits, *in limine* rulings in the bellwether trial, jury charges, and other material that can be of assistance in future trials in similar cases.

Moreover, even where a successful global resolution is achieved, whether it be a settlement or an alternate dispute process, the resolution most often consists of an "opt in" requirement and generally not all of the cases choose to do so. For those cases that do not opt into the final resolution, the parties (in those cases) have access to the trial package, which can be used in the trial of those later cases. This is another benefit resulting from the bellwether process.

III. SELECTING CASES FOR BELLWETHER TRIALS

With this in mind, it is timely to discuss the method for selecting the bellwether cases. After the initial determination to utilize the bellwether process, the transferee court and lead counsel for the parties should focus on the mechanics of the trial selection process. Ideally, the trial selection process should accurately reflect the individual categories of cases that comprise the MDL so the resolution of the bellwether cases can illustrate the potential for success or failure of a particular category of cases, give the measure of damages, and illuminate the costs of a trial as well as the forensic and practical challenges of presenting certain types of cases to a jury. Any trial selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact.

There are three separate but equally important sequential steps that will streamline any trial selection process and allow that process to achieve its full potential, regardless of the type of MDL. The first step requires the transferee judge to catalogue the entire universe of cases that comprise the MDL and divide the cases into several distinct, easily ascertainable categories. The easiest way to carry out this step is to instruct the parties to use fact sheets in place of interrogatories and construct the fact sheets so that this type of information is readily available. In MDLs, the use of interrogatories as a discovery device is problematic. They generate a plethora of motions, which can derail an MDL at the beginning or slow

its progress down to glacial speed so that it becomes a proverbial "black hole". Fact sheets allow the parties to acquire some basic information so they can proceed expeditiously with depositions and documentary requests. In practice, the fact sheets are prepared by the parties by agreement. If the parties cannot reach an agreement on the structure and content of the fact sheets, the transferee court can prepare them. If the fact sheets are answered electronically, they can be searched for pertinent information so each case can be placed in the appropriate category.

The second step requires the attorneys for the parties and the transferee court to select a manageable number of cases that reflect the various categories and contain cases that are both amenable to trial by the transferee court and close to being trial-ready. This becomes the discovery pool from which the bellwether cases are selected. The number of cases that make up the discoverable pool bears some relationship to the number of bellwether trials anticipated. For example, assuming the goal is to try five or six bellwether trials, a workable discovery pool would be about thirty cases. Ten can be selected by the plaintiffs, ten by defendant, and ten by the transferee court. The court can either select specific cases or randomly pick them. If fact sheets are completed electronically, there are computer programs that will allow the court to randomly pick the ten cases reflecting the census of the litigation.

The third step requires the attorneys and the transferee court, after case specific discovery nears completion, to select the cases for the bellwether trials. There is no one prescribed way for selecting bellwether cases. The trial selection process is limited only by the ingenuity of each transferee court and the attorneys for the parties. Each transferee court that utilizes the bellwether process must consider all the unique factual and legal aspects specific to the MDL in question, and then fashion an appropriate, customized trial selection formula. One method empowers the court to do so either by picking specific cases or by random selection. Another method is for the attorneys to do it, with each side picking a fixed number of cases, as well as vetoing one case selected by the opposing side. A third way involves both the attorneys and the court picking the bellwether cases; each side has a certain number of picks and the court makes its picks by random selection.

IV. TRIAL LOGISTICS

Once the cases are selected for bellwether trials, the focus shifts to the logistics of the trials. An initial decision needs to be made about the length of time to set aside for each bellwether trial. Experience indicates that time limits should be favorably considered. Otherwise, the trials become interminable and less focused. This can be done in several ways. One way is for the court to meet with counsel, discuss the number of witnesses to be called, and allot a certain number of hours to each side. Another way is for the court to assign a number of days to each side. In any event, it should be possible to conduct a bellwether trial in two to three weeks. To accomplish this objective, however, it is necessary that the trial be devoted to the testimony of the witnesses and not be consumed by argument of counsel over objections regarding the admissibility of exhibits. This can be

avoided by the court making rulings–on the record–as to the admissibility of the exhibits in advance of trial after affording opposing counsel the opportunity to object. This does not eliminate the need for counsel to introduce the exhibit at trial, but it avoids the need for opposing counsel to object since her objection has already been made and put on the record. It is also helpful for the court to conduct pretrial meetings each day of trial to discuss the impending testimony and any anticipated issues that may occur. The court can give counsel its anticipated ruling if necessary, so that the trial can proceed more efficiently.

Another effective method for making the bellwether trial proceed more efficiently is the use of jury questionnaires. This can considerably shorten the time to select and seat the jury. Generally, the parties can meet, confer, and produce an agreed-upon questionnaire, which the court can alter if necessary. If counsel cannot agree, then each side can present their proposed questionnaire and the court can fashion the appropriate one to use. The most effective method of utilizing the questionnaire is to invite the prospective jurors to court about one or two weeks before the trial and fill in the questionnaire. This ensures that their answers are their own and not the answers of friends or family. The questionnaires can then be sent to the attorneys for review and a date set with the court two days hence for cause challenges which, of course, are put on the record. The use of jury questionnaires generally allows the jury to be selected in several hours so that the trial can commence more quickly.

When selecting the dates for the bellwether trials, it is helpful to select the dates for all of the designated trials with perhaps a month or three weeks between cases so that the parties can prepare for the next trial. It is also helpful for the court to inform counsel, at the outset, that if one of the trials settles, the next one must move into the settled case's slot. This insures a more efficient process.

V. STREAMING TESTIMONY

One practice gaining favor in bellwether trials in MDLs is the streaming of testimony. This is particularly useful in product liability cases, especially prescription drug cases. In those cases, the plaintiffs must prove what the defendant manufacturer knew or should have known at various periods during the development of the drug. They generally attempt to do this by taking the depositions of the defendant employees. It is not unusual for these depositions to be taken early in the discovery process when the plaintiffs have several potential theories of recovery that they are seeking to prove. The depositions, which are usually conducted by video, cover the entire litany of theories and generally consume the full time limit of seven hours.

When one of the cases in the MDL comes up for a bellwether trial several years later, many of the theories covered in the deposition are no longer viable or do not form the main theory of liability in the particular case. Usually, the trial is in a different state than the residence or location of the defendant employee who was deposed long ago, so the witness cannot be subpoenaed and will not voluntarily come to court to testify. The deposition can, of course, be used, but it will take seven hours to present to the jury and contains a lot of information that

may not be relevant or useful in the present theory of liability. In such an instance, the plaintiff attorney generally attempts to excerpt the testimony she feels is germane. This attempt is usually met with an objection based on Rule 106 of the Federal Rules of Evidence, arguing that additional testimony is necessary to put the testimony in proper perspective.[3] This usually increases the length of the testimony and dilutes its focus.

To give each side a fair opportunity to present their case as they see fit, a transferee court may elect to stream the witness's testimony. Under 28 USC §1407(b), the transferee court in an MDL has the same power as any district court in any district in the country. As an example, acting under 28 USC §1407(b), the transferee judge in a recent Xarelto case issued a subpoena to a witness in Philadelphia directing the witness to appear at the federal court in Philadelphia, and his testimony was streamed to the trial which took place in Jackson, Mississippi.[4] The testimony took two hours and was focused on the significant theories and defenses.

VI. CONCLUSION

The injection of jury trials into the MDL process through the use of bellwether trials can greatly assist in the resolution of disputes. At a minimum, the bellwether process provides counsel the opportunity to develop their cases and gain practical litigation experience. This can lead to the development of trial packages, which can be used by contract or retained counsel in the event that a global resolution cannot be reached, and a particular case needs to be tried. But the objective results obtained in the bellwether trials often precipitate settlement negotiations, and also ensure that all of the parties to such negotiations are grounded by real-world evaluations of the litigation by multiple juries. Indeed, these experiences, coupled with the alternative of dispersed litigation in courts across the country, supply a strong impetus for global resolution.

Despite the benefits of bellwether trials in the MDL process, there are some potential disadvantages associated with the practice. Bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. This is to be expected to a degree, as coordinating counsel often pull out all the stops for bellwether trials given the raised stakes. For example, in bellwether trials, it is not unusual for both sides to utilize teams of lawyers and jury selecting consultants, shadow juries, and mock juries. Live testimony is usually streamed from the courtroom into separate "war rooms" in the courthouse, as well as to remote locations around the country so that attorneys can follow along and, in some instances, draft various motions in real time. All of these bells and whistles add up; indeed, holding multiple trials on this stage can quickly swell the cost of multidistrict litigation. Furthermore, because bellwether trials are typically held in the transferee court's judicial district, the informational output is generally limited to the local jury pool. And in a country as diverse as ours, local communities are

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[3] FED. R. EVID. 106.

[4] The author has personal knowledge of this subpoena as a judge involved in the case.

bound to exhibit divergent tendencies and beliefs. Of course, to the extent that this reality raises concerns, the transferee judge can travel to different locations to hold bellwether trials before different jury pools. This was done in the Vioxx and Xarelto MDLs when the transferee court, located in New Orleans, tried some cases in Texas and Mississippi to give the attorneys experience with different jury pools.[5] But, even recognizing these disadvantages, the use of bellwether trials proves a balanced and effective tool in resolving complex multidistrict litigation.

[5] Nicholas Malfitano, *Xarelto Litigation Resolved with $775M Global Settlement; Louisiana Federal Court, Philadelphia's CLC Handled Most Cases*, PENN. RECORD (Mar. 26, 2016), https://pennrecord.com/stories/512325249-xarelto-litigation-resolved-with-775m-global-settlement-louisiana-federal-court-philadelphia-s-clc-handled-most-cases.

SETTLEMENTS OF MASS TORTS CLAIMS

Vance R. Andrus

Resolution of a mass tort action often involves a mysterious and *sui generis* process in which the efforts of the parties switch, either imperceptibly or seemingly instantaneously, from grinding litigation to the prospect of resolution. The Manual for Complex Litigation, Fourth Edition (hereinafter "MCL") is a treasure trove of information, insights, and explanation of this complex topic (pun intended).

Evaluating the strengths and weaknesses of cases in a mass tort ultimately occurs in connection with the litigation of an "actual case in controversy," and this leads directly to the use by MDL judges of the bellwether process.

Mass torts can only be resolved if they are effectively aggregated. If the litigation is spread out through hundreds of courts hosting thousands of cases, there can be no effective aggregation. How that can be accomplished is both complex and beyond the scope of this article.[1] For our purposes we will assume the litigation has been effectively aggregated by the JPML[2] before one MDL judge as we focus on resolution. However, the reader should recognize that in instances in which mass tort suits are located in multiple active state and federal jurisdictions, the resolution process is exponentially more complicated.

The MCL recognizes the difficulty of resolution:

> Some cases involve important questions of law or public policy that are best resolved by public, official adjudication. Other times, however, resistance to settlement arises from unreasonable or unrealistic attributes of parties and counsel, in which case the Judge can help them reexamine their premises and assess their cases realistically.[3]

Only those who have stood before the power and majesty of a puissant federal judge intent on helping them "reexamine their premises and assess their cases realistically" know just how intimidating that moment can be. More often, the role of the MDL court in facilitating settlement is dictated by the personal predilections of the trial judge.[4] The purpose of litigation is the peaceful resolution of conflict through simulated combat between adversaries who are represented by champions known as lawyers. As the referee, umpire, and judge of the contest, the court has a heightened duty to appear impartial. Actively involving itself in settlement can easily be seen by the combatants as creating at least the appearance of partiality toward one side or the other.

Instinctively, most trial judges know that trials, or even trial dates, settle cases. In the context of mass torts, that necessarily involves bellwethers. Once the court picks one or more plaintiffs to be bellwethers, it will issue rulings that may apply not just to this case but to all cases, or they might be specific to this case

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[1] For detailed analysis on aggregation best practices, see *e.g.*, Robert Adams, et al., *Bellwether Trials*, 89 UMKC L. REV. 937 (2021).

[2] The Judicial Panel on Multidistrict Litigation (JPML) is codified under 28 U.S.C. §1407.

[3] MANUAL FOR COMPLEX LITIGATION (FOURTH) §13.11 (hereinafter "MCL 4th").

[4] See MCL 4th §13 for a detailed description of the various tools available to the trial court to promote settlement.

alone. The theory is that if the court tries one or more of these bellwether cases, the court will become acclimated to the issues involved in these cases and the parties will discover the weaknesses and the strengths of their cases. After all the discovery is complete, the case will proceed to trial.

Bellwether trials have been around as long as MDLs. In the usual MDL, there will be a handful of bellwethers selected. In some instances, the courts put up a slate of a hundred or more. In these instances, the court is merely trying to grind the parties into the ground. In other cases, the court will pick four or five, tell the parties to prepare the first two, then hold a trial. That trial is a real trial, one in which the legal dispute of that plaintiff is going to be resolved. However, the rulings emanating from that trial, such as *Daubert* or other pre-trial rulings, might apply to everyone. In *Vioxx*,[5] the court tried eight separate bellwether trials. Plaintiffs won some, Defendant won some, and down the road they would go. In *Avandia*,[6] the MDL Court did not even hold a bellwether trial.

It takes a special judge to have the skill and the daring to effect resolution without even trying one case. Some judges believe a bellwether trial will serve only to cement the parties' positions. For example, if the plaintiffs win, plaintiff lawyers may have unreasonable expectations that they can win every similar case, and if they win a lot of money, they may believe every similar case is lucrative. If the defendant wins, the defendant's lawyers typically know not to read too much into it, but their client may not know any better, and the Board of Directors of that company might say, "See, I told you we could win this thing." This reinforcement of positions during bellwether trials can be very unsettling to the resolution process. Nonetheless, thoroughly preparing for trial is important because at some point the defendant will realize they may soon be facing remand.[7]

Separate and apart from inserting herself directly into the settlement process, and in addition to setting trial dates, the trial judge has at her disposal several options to encourage settlement. Chief among these are: the threat of remand of some or all of the cases;[8] the appointment of a Special Master to

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[5] *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La.).

[6] *In re* Avandia Mktg. Sales Practices & Prods. Liab. Litig., No. 07-MD-1871 (E.D. Pa.).

[7] *See* 28 U.S.C. §1407(a). Defendants often have unlimited legal resources. They can hire a thousand-lawyer firm. I was in a case where my opponent had a thousand lawyers in its firm. I had four in my firm. When it got down to crunch time, that firm hired another firm, which had another 700 lawyers. What they don't have is the ability to fill multiple trial teams simultaneously across the United States, including experts who can be *Daubert*-tested and testify. Long ago I was Lead Counsel in a class action in Louisiana in the breast implant litigation. (*See* Spitzfaden v. Dow Corning Corp., 619 So. 2d 795 (La. Ct. App.), writs denied, 624 So. 2d 1236, 1237 (La. 1993)). Dow Corning, which was our primary defendant, went bankrupt two weeks before trial, but it was not insolvent. Later, after all the dust settled, I was having dinner with opposing counsel and I asked what happened. And he replied: "I had 13 trials scheduled in the next four weeks all over the United States and I only had two trial teams and three sets of experts." The prospect of sending the cases back is very daunting to the defendant, and it should be to the plaintiff lawyers too. However, they generally are not known for having a lot of self-introspection, and they definitely don't want to admit that they will be in a sling too, if 500 of their cases get sent back all over the United States.

[8] 28 U.S.C. §1407 (a); *see also,* U.S. *ex rel.* Hockett v. Columbia/HCA Healthcare Corp., 498 F. Supp. 2d 25, 36–37 (D.D.C. 2007). (Only the Judicial Panel on Multidistrict Litigation may remand

supervise the settlement process;[9] encouraging the parties to use a private mediator; and the threat of issuing a *Lone Pine* Order.[10] Of the three, threat of remand weighs most heavily on the defendant, while the prospect of a *Lone Pine* Order looms large over the plaintiffs.

Often, MDL remand orders are accompanied by a dreaded *Lone Pine* Order.[11] This is a common law doctrine that arises from an obscure trial decision, which in one form or another has gained traction with most trial judges charged with managing large numbers of aggregated cases. It stands for the proposition that every plaintiff in the litigation must, at some point, be prepared to demonstrate both general and specific causation, in addition to proving his exposure to the suspected agent, as well as the extent of his injuries. Failure to adequately comply with the Order can be, and often is, cause for dismissal of the suit. It sounds simple enough, but in the context of litigation involving a staggering number of cases, it presents obstacles of scale, time, and expense.

First, there are usually only a limited number of experts qualified to issue *Daubert* proof evidence of general causation (Can it cause this harm?), and deep into the litigation they often reach the breaking point. Next, while there may be an adequate number of experts who, in reliance on the General Causation opinions of others, are competent to issue a Specific Causation opinion that the drug or chemical in question did in fact cause this harm to this plaintiff, there remains the logistical nightmare of having hundreds or thousands of plaintiffs examined and opinions collected in a timely manner. Lastly, obtaining those written opinions can be a very expensive proposition. The specter of dismissal of individual cases hangs over the plaintiff bar like a cold, dark fog.

Generally speaking, there are two types of resolutions[12] that come in various guises: Global Resolutions and Inventory Resolutions. Now, what is a Global Resolution? It might be disguised as a class action resolution of this case. It might be disguised as a mandatory resolution of this case under certain Federal Rules. It might be disguised as an individualized voluntary resolution of the case. All global resolutions have two things in common. First, there is only one pot of money, and second, there is only one set of criteria that applies to every client involved. Does that mean that if, for example, there are one hundred people and the pot is worth one hundred dollars, every person receives one dollar? No, everyone gets separate allocations. However, there is only one set of qualifying criteria, usually set by the defendant, which leads to specified amounts for certain

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a case or cases transferred for coordinated pretrial proceeding; a district court sitting as transferee court lacks that power).

[9] MCL 4th, §13.13.

[10] *See* Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: From Fact Sheets to Lone Pine Orders* (July 23, 2019) YALE L. J. FORUM (Forthcoming), https://ssrn.com/abstract=3425289.

[11] Lore v. Lone Pine Corp., No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); *see* Burch, *supra* note 10, at 1-15.

[12] For a rather negative view of MDL product liability settlements, see Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531 (2017).

circumstances or injuries. So, whether you're a solo practitioner with two cases or you're a litigation powerhouse with a thousand cases, your identically situated clients are going to be paid an identical amount of money if they accept the deal.

A class action resolution using a global resolution amends that process by providing that class members will be bound unless they affirmatively opt out. In almost every case, except very limited pot cases that are subject to certain bankruptcy rules, everyone gets a chance to accept or reject the opportunity to participate in the settlement. In other limited circumstances, the clients must accept the settlement "blind," that is, without knowing the ultimate value of their settlement.[13] More often, however, the client will know at least his gross settlement amount prior to accepting or rejecting the settlement.

In an inventory settlement, there are many, many pots. Indeed, there is one for each law firm. The defendant will come to your law firm to offer you a certain amount of money for that many cases. Then it will go to another law firm and offer it a different amount of money for the same number of cases. Thereafter, it may offer a third firm yet another amount of money for a different number of cases. Further, the criteria by which the plaintiff can allocate the money often changes from settlement to settlement. Historically, all of the resolutions were global, because all mass torts were generally driven by class actions to begin with, and that was the easiest way to get as many people signed up as possible. The reluctance of the federal courts to certify class actions in mass tort litigation has reduced the use of class actions for purposes of case aggregation and, thus, for resolution.

Now virtually all of the national settlements are inventory settlements negotiated firm by firm. MDLs are led by teams of lawyers selected by the presiding court and formed into a Plaintiffs' Steering Committee, usually led by one or more Lead Counsel. Do the clients of the PSC attorneys get more than those of a solo practitioner? Yes, because they have proven that they pose a greater threat to the defendant. They know the science, they know the case, they are willing to go to court, they are funded and capable, and their clients will benefit accordingly. While this may seem unfair, ideally the leaders of these various ways of joining cases have worked hard and in the best interests of everyone.

One of the most compelling reasons that inventory settlements have gained traction is the thought by defendants that their extrajudicial nature makes them more effective, less complicated and less costly than global resolutions. With rare exceptions, they avoid costly and time-consuming court approval which itself is rife with potential for objections and appeals.[14] Further, the defendants have shown a willingness to pay a premium to the clients of those firms that pose an actual litigation threat. This strategy, however, does not extend to those firms not actually engaged in the litigation and most definitely does not apply to firms which have simply collected cases through advertising with no intent whatsoever of ever actually trying one.

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[13] This most often happens in global class action settlements such as that contained in the NFL concussion litigation. *See In re* National Football League Players' Concussion Injury Litig. No. 2:12-md-02323 (E.D. Pa.).

[14] *See* Mueller, *supra* note 12, at 556-61.

It is fair to say that mass tort litigation usually gets contentious. The fate of hundreds or thousands of clients and the corresponding exposure to the defendant of millions (if not billions) of dollars of liability tends to attract a certain type of lawyer. They are referred to as trial counsel, and only the most articulate, most daring attorneys apply. Driven by a compelling need to compete, they tend to take matters to the extreme. This attribute, while laudable, may lead trial counsel to become bitter toward each other and myopic about their clients' exposure during litigation. While there may be some grudging admiration for an opponent, there is precious little social interaction between opposing trial counsel. This, in turn, has led to the advent of settlement counsel. These attorneys tend to be more socially adept, less engaged in the emotional aspects of the fray, and more willing to entertain the notion of an extra-judicial resolution of the dispute. While some trial counsel eschew their use, the more recent trend is for each side to use settlement counsel while the battle rages on in Court.

At some point the defendant offers your firm a certain sum of money in return for its clients' releases. The defendant generally does not want to become involved in the allocation process. Usually, who receives money and how much are of little concern, but it does want some safeguards to ensure it receives the relief it seeks.

Most often a defendant will request a participation percentage – perhaps 95% of your clients to accept their offers: sometimes by number, sometimes by value (i.e., either clients receiving 95% of the allocated value or 95% of all of the clients must provide releases of their claim.) Making the decision of allocation involves a series of interlocking algorithms using columns of data culled from spreadsheets to assign points. Visualize this as a checkerboard with A and B coordinates arranged in numerous rows and columns, resulting in multiple squares. Each row and each column represent a constellation of compensation factors such as: age of onset, amount of exposure, latency, injuries, and other significant items, all of which are allocated points. The more points a client is allocated, the more valuable his or her case.

Every single client will be assigned to a grid coordinate, and a given client can only have one. This is called the allocation process, and each one of these squares has a value. The final step involves tallying all the points and dividing it into the money, thus creating a per-point value. Clients should be offered their per-point value multiplied by the number of points that they were allocated.

However, mistakes happen. Clients are not always timely or forthcoming with case updates; information gets overlooked, forgotten, or misunderstood. Yet continuously accepting changes leads to a slippery slope. The most prudent course of action is to withhold a percentage of funds from the pot and save it for appeals.

Unique and extraordinary circumstances are bound to occur, which do not tend to fit neatly within a square on the allocation grid. For this reason, it is wise to set aside another percentage of the pot for an extraordinary injury fund (EIF). If the Appeals Fund or EIF have leftover cash after the process, that money is returned to the original pot.

There are ethical rules about how to conduct a settlement of that sort, particularly about giving to your client's full disclosure of pertinent settlement

facts. A keen eye for detail is key. Each client must be advised of the best recommendation and whether they should accept it. Further, the participation percentage must remain at the forefront of these recommendations. If it is not met, Defendants may retract the offer (although if the numbers are very close, the lucky plaintiffs' team may receive a wink and be allowed to proceed). If an offer is retracted, the per-case average will surely plummet – that is, if Defendants can be persuaded to return to the negotiating table.

The next stage involves addressing liens. A lien is an inchoate right which exists without a writing in favor of one against another for services that have been rendered. Liens must be paid in priority to anything else, and they act as a claim against the individual's recovery. There are two types of liens. Mandatory liens, such as Medicare and Medicaid, require the client, through counsel, to affirmatively reach out and make sure they are settled. There are other liens which ordinarily only must be addressed if the company with the lien has put the client (or counsel) on notice.

It may seem counterintuitive that a health insurance subscriber who successfully sues a drug manufacturer has to give some of her settlement money to her insurance carrier, since she likely bought insurance to cover an event like the hospitalization that resulted from her taking the drug. Yet most of those insurance companies, either by contract or law, have a right to be paid back some or all of what they are owed.[15] A scrupulous defendant will take care to ensure all liens are satisfied, lest a disgruntled lienholder turn its sights on them instead.

At long last, the defendant releases the settlement funds and the curtain falls once the clients receive their distributions. Only those who are comfortable in a highly chaotic environment will be successful in the MDL arena. The enormous stakes, the abrupt changes of fortune, and the unpredictable unfolding of events require a nimble mind, a still heart, critical thinking skills, and the courage to act upon one's convictions. Should this describe you, then welcome!

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[15] *See* Erik V. Larson & Diana L. Panian, *Successfully Discharging Medical Liens on Personal Injury Cases*, 32 CUMB. L. REV. 349 (2002).

FROM THE PROSAIC TO THE SUBLIME: ONE DEFENSE LAWYER'S VIEW ON FIVE FACTORS THAT MAY IMPROVE THE EFFECTIVE AND EFFICIENT SETTLEMENT OF MULTIDISTRICT LITIGATIONS AND MASS TORT CLAIMS

Barbara Binis

In my second year of law school (a long, long time ago in a galaxy far away), I signed up for a course called Complex Litigation. I knew nothing about the subject matter, except that it was supposed to involve "up and coming issues" for civil litigators. There were only about thirty of us in the class, and we studied "multi-district litigations"—not a term I heard mentioned in any of my other classes before or after. Little did I know then how often I would think back to that class in the next thirty-two years as my career centered on MDLs and the mass tort litigation landscape changed dramatically.

According to a 2018 study done by the ABA and Lawyers for Civil Justice, MDLs now make up more than half of the federal civil docket, an astonishing figure.[1] And by far the largest MDLs are medical device or pharmaceutical product liability cases (about 70%), the area in which I have practiced for the better part of my career, and in which I have acted as defense lead or trial counsel for at least ten major MDLs.[2] The explosion of cases is due in no small part to the increase in lawyer advertising and the evolution of "lead generators."[3] After a certain point, quantitative differences become qualitative, and the increase in the "mass" of the torts presents new problems for defendants.

Today, MDLs are at a crisis point. The traditional wisdom that MDLs promote efficiencies and are effective tools for settling mass inventories has come under attack by both sides in the last few years. Both Lawyers for Civil Justice and the American Association for Justice have suggested major changes to the MDL practice.[4] In October 2019, forty-five general counsel from large companies signed a letter to the Advisory Committee on the Civil Rules supporting review and revision of the MDL rules.[5]

I have personally seen how the lack of symmetry between parties (requiring much more discovery and expense from defendants than plaintiffs), the

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[1] *MDLs Surge to Majority of Entire Federal Civil Caseload*, RULES4MDLS, https://www.rules4mdls.com/copy-of-new-data-on-products-liabil (last visited Nov. 9, 2020).

[2] *The Trend Toward MDLs in Products Cases*, JD SUPRA (Aug. 6, 2019), https://www.jdsupra.com/legalnews/the-trend-toward-mdls-in-products-cases-34353/.

[3] Paul D. Rheingold, *Multidistrict Litigation Mass Terminations for Failure to Prove Causation*, ABA (Apr. 24, 2019), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2019/summer2019-multidistrict-litigation-mass-terminations-for-failure-to-prove-causation/.

[4] ADVISORY COMMITTEE ON CIVIL RULES, MEETING REPORT 205 (Apr. 10, 2018), https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf; *LCJ Urges MDL Reform*, LAWYERS FOR CIVIL JUSTICE, https://www.lfcj.com/rules-for-mdls.html (last visited Nov. 9, 2020).

[5] Dan Clark, *45 General Counsel Sign Letter Supporting Review of MDL Procedures*, LAW.COM (Oct. 8, 2019, 4:58 PM), https://www.law.com/corpcounsel/2019/10/08/45-general-counsel-sign-letter-supporting-review-of-mdl-procedures/.

selection of "bellwether" trial cases that are nowhere near representative of the caseload and result in bizarrely huge verdicts, and the overvaluation of inventories at settlement puts defendants in an untenable position. This leads to decisions by the defendant to fight against the creation of MDLs at any cost, and an unwillingness to waive *Lexecon* despite an acknowledgement of the efficiencies of the system. It is difficult to get serious about settling hundreds of thousands of cases when you suspect that 70% of the inventory is junk. Here are a few things I think make at least some difference in leveling the playing field between uneven expectations of defendants and plaintiffs.

I. THE PROOF IS IN THE PUDDING

Often, plaintiffs amass large numbers of claimants without collecting any real information about them other than the very basics. They approach an MDL with the goal of first putting the pressure on the defendants with unrelenting discovery requests–a no holds barred approach–followed by motions to compel and even sanction motions wherever possible. Only then, once the discovery of defendants is complete, is there any expectation that some limited in-depth discovery of individual plaintiffs will occur, to be followed by settlement discussions.

But what if the priority was to statistically analyze the plaintiffs' inventory of claims first, so the court and the parties could have transparency into exactly what claims were being brought? For example, so the court could see if there are some claimants who have not been physically injured? Or how the injuries break down in terms of mild, moderate, or severe injury? In other words, discovery could be used to figure out if this is like the Thalidomide case, where none of the claimants ended up being compensated and the plaintiffs' counsel were sanctioned for misleading their clients, or if it is like the Seroquel case, where the inventory was settled without a single trial. What if discovery was used to understand whether all (or at least most) of the claims have been filed timely, or if the injuries are confirmed by medical records?

Most MDL courts adopt some version of a Plaintiff's Fact Sheet ("the PFS") at the beginning of an MDL to inform defendants about the cases, and then, frankly, forget about it and look no further. This is a wasted opportunity in my opinion, since it ignores a great chance to develop an understanding of the statistical breakdown of the inventory at the beginning of the MDL, which in turn can inform the court as to disputes regarding defendants' discovery.

The intricacies of PFS production is a boring and frustrating process. Courts often set deadlines for the production of the PFS that are difficult for plaintiffs to meet (i.e., sixty days to produce a PFS for every plaintiff in the MDL). This expectation leads to failure to produce, as well as incomplete PFS productions, which does not help either side. Sanctions for failure to timely produce a PFS are often ineffective, leading to a waste of time and resources for both parties. We must find better ways to ensure the reliable and timely production of vital information, but we also need to find better ways of using the information from the beginning to inform the court and the parties of exactly what types of

cases are involved. If it turns out that 1% of the cases claim one type of injury, 60% claim a different injury, and 39% of cases claim fear of future injury and the need for medical monitoring, wouldn't that be helpful to know at the beginning of the case? Couldn't that information be used to structure discovery of defendants?

A few courts around the country are experimenting with ways to better utilize the PFS,[6] and hopefully some of the ideas that they are trying out will prove to be effective. There is no question that the early analysis of the types of claims inventoried is not just helpful, but essential, at the beginning of a mass tort.

II. ENSURING REPRESENTATIVENESS

Like the idea of an unlucky (castrated) namesake thirteenth-century bellwether sheep chosen by the shepherd to lead his flock wearing a bell, the idea that the initial trials in the MDL must be "representative" of an inventory can be a valuable tool in settlement. After all, the best understanding of the strengths and weaknesses of each side comes into focus only when discovery is complete, witnesses have been tested, and pretrial motions and *Daubert* challenges have been decided. So even when cases settle prior to trial, the process of working up bellwether cases can be helpful to settlement. But how can one ensure that the cases are representative? And representative of what: The type of injury? The particular product? The manner of relief requested? A statistical analysis conducted on the inventory of claims in the beginning of an MDL can be essential here because the key concern in selecting bellwether trials should be keeping "strategic gamesmanship to a minimum, while promoting the best process for choosing a representative case."[7]

In most of the MDLs in which I have participated, courts use some variation of the system where each side "picks" a certain number of cases for the pool, and then, after discovery on those limited cases is complete, each side presents argument to the court as to why their selections from the pool are the most representative. Inescapably (because we are, after all, trial lawyers), that means that plaintiffs pick their worst injury cases and defendants pick the least injured, and the judge picks as carefully as he or she can from the parties' choices. Trials are then set in a "Plaintiffs' pick, Defendants' pick" order. The problem with the "picks" system is that both sides tend to disregard, or at least minimize, the results of such trials when discussing settlement, and attribute a win or loss to the fact that the particular case was not a fair example.

I think the most effective system is one that emphasizes *de-selection*—in other words, a system that allows the parties to alternate "strikes." A "strike" system prevents this sort of gamesmanship by systematically removing from the pool the cases that lay on the outer edges of favorability for either party. The strike process also mirrors the jury selection process, which almost all courts employ as the fairest and least partisan way to pick a jury. Such a system guarantees that

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[6] *See, e.g. In re* Zantac (Ranitidine) Prod. Liab. Litig., MDL No. 2924 (S.D. Fla. 2020).
[7] *See* Konrad v. AbbVie, Inc., 2017 WL 2574057, at *1 (N.D. Ill. May 22, 2017).

neither side will get the cases that they feel are most strategically beneficial to be tried first. In fact, it ensures that the first-tried cases are ***equally neutral to both sides***, since neither felt strongly enough to strike them until the end of the process. Accordingly, while each side may be somewhat unhappy with the choices, this method should result in a just selection.

The "strike" method was used for bellwether case selection in *In re Vioxx Products Liability Litigation*.[8] Following the settlement of that case, Judge Fallon noted that a system that allows both parties to be involved in the selection of bellwether trial cases is "the most useful approach" because it "institutes fairness and attorney participation, while maintaining efficiency and placing the burden of ensuring representative cases on those with the most stake in the trial selection process."[9]

I recently used this strategy in one of my mass torts in Delaware state court to good effect. First, we asked that cases be assigned to the bellwether pool by the "first-in, first-out" approach according to date of filing (note that even this approach may not be the most equitable, as the most serious injury cases tend to the be the ones that are filed early, long before an MDL is established, and before the mass advertising has begun; a better approach might be to have the court run a computer-generated random list of all active cases).

Once the list of cases was finalized, we proposed (and Judge Mary Johnston agreed) that instead of the parties' "picks," we use a system of "strikes" on the bellwether pool after completion of discovery. The cases were then listed for trial in reverse order of the strikes–i.e., the first case struck was calendared for trial last, and the last case struck was the first to be tried, ensuring that the first trial was the least objectionable case to both sides. In that instance, we were able to settle the inventory even before trials began.

III. THE IMPORTANCE OF EDUCATING THE COURT EARLY AND OFTEN ON THE SCIENCE OF THE CASE

Since pharmaceutical and medical device product liability cases are by their nature science-based, it is important for both sides to ensure the court has the best understanding of the scientific evidence by presenting the general scientific themes thoughtfully and thoroughly. There are myriad ways of doing this, including: a "Science Day" presentation to the court at the beginning of an MDL; the traditional *Daubert* challenge to an opponent's expert witnesses; and other, less utilized but sometimes effective, tools. These less utilized tools include: (1) appointing a neutral scientific expert panel under Federal Rule of Civil Procedure 706, re-opening *Daubert* challenges that were previously denied after the first few trials after the court has heard the evidence in greater detail; and (2) "hot tubbing,"

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[8] 501 F. Supp. 2d, 789, 791 (E.D. La. 2007).

[9] *See In re* Benicar (Olemartisan) Prods. Liab. Litig., 2016 WL 1370998, at *1 (D.N.J. Apr. 6, 2016); MDL 2606, Case Management Order No. 15 (D.N.J. Nov. 23, 2015); *In re* Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig., 2017 WL 846642, at *4 (D. Minn. Mar. 6, 2007); *In re* General Motors LLC Ignition Switch Litig., 2016 WL 1441804, at *3 (S.D.N.Y. Apr. 12, 2016); *In re* Gadolidium-Based Contrast Agents Prods. Dist. Litig., (N.D. Ohio May 12, 2009).

assembling a panel of experts that will be cross-examined together while they respond to each other regarding the relevant causation issues.

The use of Rule 706 Expert Panels has been few and far between since the *In re Silicone Breast Implant Litigation*, where the expert panel reached a general consensus that no scientific basis existed to support the claim that silicone gel breast implants caused connective tissue or immune system dysfunctions.[10] That finding had heavy influence on the outcome of the litigation. Even though several remand courts refused to allow the use or consideration of the Panel results, the MDL Judge said that the report had considerable impact on the dynamics of settlement negotiations.[11]

However, it has become popular to do a "Science Day" for judges early in an MDL, on the theory that "[a] court that understands the science will be better equipped to deal with discovery issues, to address threshold causation issues sooner, or to weed out unmeritorious cases."[12] Generally, a Science Day is convened at the defendants' request, and it requires some negotiation with the plaintiffs as to format, length of presentation, and content. Both sides present a basic explanation of the device or pharmaceutical, as well as the theories of how the product works, and the alleged defect in the product. Most of the time, a lawyer from each side presents the scientific information, but judges have asked that scientists or medical experts be the presenters.[13] None of the Science Day material may be admitted at trial or used for any purpose other than educational context.[14] It may be recorded for the benefit of clerks and others who could not be present at the initial hearing, but nothing more.[15]

I am a fan of the Science Day, but I think we could greatly improve on it by offering one or two follow-up presentations targeted to questions the judge may have about the material after the initial session. We cannot expect any judge to understand the entire technical picture of an MDL after a short presentation—the lawyers have the advantage of learning this over time from true experts in the field, something judges do not normally get to do until trial. Also, lawyers do as much as they can at these presentations, but we are only lawyers, not scientists. If a judge who has questions or sees issues that need better explanations can get more information as the case progresses, isn't that to everyone's benefit? In addition, the science of a case develops as the case evolves. It may be helpful for all parties to do additional presentations every six months as the MDL progresses.

Finally, the idea that *Daubert* hearings should be reconvened at a party's request after the first few trials is, in my opinion, a good idea. Courts understand so much more about an expert's basis for their testimony after going through a trial, and the parties have a much better picture to present on which to base their

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[10] 318 F. Supp. 2d 879 (C.D. Cal. 2004).
[11] *See* Hall v. Baxter Healthcare Corp., 947 F. Supp. 1387 (D. Or. 1996); Hooper et al., *Neutral Science Panels: Two Examples of Panels of Court-Appointed Experts in* Breast Implants Prod. Liab. Litig., FED. JUDICIAL CTR. (2001).
[12] *See* Rachel B. Passaretti-Wu, Erik W. Snapp & Sharon Turret, *Science First: Science Days in Mass Torts*, 14 IN-HOUSE DEF. Q. 6, 7 (2019).
[13] *Id.* at 8.
[14] *Id.*
[15] *Id.* at 9.

objections to a witness's methodology after a trial. Such an opportunity should be expected and embedded.

IV. ESTABLISHING AN END DATE FOR CLAIMANTS TO SUE

One of the most pressing and repeated questions defense counsel is asked by clients when discussing settling an MDL is: how do we know we're settling things once and for all? The last thing a defendant wants is to be presented with a number of new filings from the counsel with whom they just settled an inventory the week after settling. There is no easy answer to this question; if new claimants continue to seek representation and file cases after a settlement, they certainly have that right. Consequently, we must often tell our clients there is no magic answer. That does not make defendants eager to jump into settlement negotiations.

The most effective tool to help solve this conundrum is for the court to decide some over-arching issues regarding the statute of limitations early in the litigation. Sometimes clarity requires an across-the-board ruling, like the holding from Judge Bechtle entered in the Fen-Phen litigation, where he established that a fen-phen consumer had inquiry notice of her potential claims as of a date certain due to extensive publicity of the drug's recall (both print and TV news, defendant's efforts to notify consumers about the recall, letters to physicians regarding the recall, and the comprehensive publicity campaign surrounding the class action settlement).[16] Sometimes a case-specific event is more appropriate, such as Judge Goodwin's rulings in the pelvic mesh litigation that absent being told something to the contrary by a physician or a particular state law requirement, the date a medical device was explanted from a plaintiff starts the running of the statute, since once the product in question was removed, the plaintiff was on notice to investigate a claim.[17]

There will always be case-specific nuances to argue about, but a general rule of some sort will help both sides fairly evaluate their current inventory for settlement, as well as any anticipated future filings. The earlier a court deals with the date the statute of limitations begins to run, the easier it becomes to outline a settlement strategy that Defendants will accept.

V. MANAGING THE MILIEU SURROUNDING AN MDL

In addition to dealing with the nuts and bolts of an MDL, there are outside influences that may require court involvement in order to achieve a smooth and efficient MDL, as well as its resolution.

A. Plaintiff Advertising

[16] *In re* Diet Drugs Prod. Liab. Litig., 352 F. Supp. 2d 533 (E. D. Pa. 2004).
[17] *See, e.g.,* Robinson v. Bos. Sci. Corp., 647 Fed. Appx. 184 (4th Cir. 2016).

As mentioned above, the "mass" in mass torts starts with the advertising: on TV, in magazines, and often in "surveys" on the internet, where the fine print explains that you have agreed to be represented if you complete the survey. Plaintiff advertising (which is, of course, lawful) has been around for as long as mass torts; it is how plaintiffs put together an inventory. If you have ever stayed home for a day and turned on the TV, you must have seen the ads in action. However, in the last ten years, advertising and "lead generation" have ramped up to become a sizeable cottage industry made up of non-lawyers who sell "leads" to certain plaintiffs' law firms, which amass such claims but do not litigate the case. These law firms, in turn, sell the cases to trial lawyers who appear in court and litigate. Because the "mass" means millions and often billions of dollars in settlements, lead generators have become influential and ubiquitous. Claimants themselves are often unaware of their commoditization and do not know why a different law firm is representing them, not the one they signed up with in the beginning.

Advertisements that misrepresent the facts are a frustrating occurrence. For example, if an advertisement states that a product has been recalled by the FDA, when it has not, that advertisement is factually misrepresentative. Ads should be carefully monitored by defendants, and I routinely send cease-and-desist letters to firms who propagate ads that misrepresent the facts of the litigation. Most times, this does the trick, and the firm takes the ad or the misleading information immediately off the website: a simple solution. If that does not happen, however, the defendants should be able to approach the judge for a resolution. Despite the fact that most courts are not interested in policing such advertisements, I would argue that since advertisements pervade mass tort litigation, it is appropriate for the court to monitor and resolve these issues. Clear instructions and parameters from the court on these issues can be helpful to parties seeking a resolution because allowing such tactics makes the parties less willing to negotiate and firms increase their resolve to fight.

B. Litigation Financing Trends

A pernicious practice has emerged in some MDLs, as I learned first-hand in the diet drug and mesh litigations. As the business of advertising to sell "leads" has blossomed, claimants have been offered other enticements, as well. In the mesh litigation,[18] we were able to uncover through discovery that third-party lead generation companies were encouraging claimants to have explant surgeries without even one medical examination before the day of surgery. The plaintiffs were told that their cases would be worth much more money if they had an explant (possibly true), but they were also told by these telemarketers (most of whom were young women with high school educations), that all the symptoms experienced by the claimant could only be addressed by an explant, and that the marketing

[18] C. Gavin Shepherd, *Transvaginal Mesh Litigation: A New Opportunity to Resolve Mass Medical Device Failure Claims*, 80 TENN. L. REV. 477 (2013).

company had retained the "best doctors available" to address such explants. The companies then paid women to travel to another state (frequently Florida) to have a removal surgery the same day they got there, having met the surgeon for the first time for twenty minutes that morning. As hard as it may be to believe, a good number of claimants signed up to have these explants done, despite the fact that it was in contradiction to their own doctor's advice. Needless to say, the defendant and the court were horrified by this cavalier recruitment. For these cases where we could show the use of such tactics, the settlement was nuisance-level to nothing.

Some MDL judges feel that addressing concerns like advertising and lead generation constitute a sideshow and takes away from the legal work of an MDL. Luckily, Judge Goodwin and Magistrate Judge Eifert were willing to listen to our concerns and allowed some limited discovery. When the discovery confirmed the facts above to be correct, it was helpful in the settlement process. It also resulted in a grand jury indictment of one of the surgeons involved, as well as one of the lead marketers.

Similarly, in the diet drug litigation,[19] a doctor financed by the plaintiffs took echocardiograms measuring heart valve regurgitation from potential plaintiffs all over the country, which were then submitted to the court as proof of injury. The echocardiograms turned out to be improperly done and they exaggerated or created regurgitation to meet certain guidelines. The fraudulent results were thrown out of the settlement, and Judge Bechtel sent the doctor to jail for six years. While such outright fraud is not a factor in the majority of claims in an MDL, it increasingly exists in these cases because the temptation is too great when such large amounts of money are at issue. Courts should be aware of tactics like these and, in the advancement of fairness, address them if the defendants can show credible evidence of such fraud. Far from creating a "sideshow," discovery regarding issues like these helped defendants analyze their settlement stance in new ways, and helped settle the other cases in the inventory that had none of the fraudulent involvement.

[19] *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 2004 WL 1535828, at *1 (E.D. Pa. July 6, 2004).

A JUDICIAL PERSPECTIVE ON APPROACHES TO MDL SETTLEMENT

Judge Stephen R. Bough* and Anne E. Case-Halferty**

For as many different types[1] of Multidistrict Litigation ("MDL") that exist, there are at least as many different approaches to settlement of an MDL. Considering that "[f]or the first time in its 50-year history, multidistrict litigation makes up more than 50 percent of the federal civil caseload"[2] and close to fifteen percent of all lawsuits in the nation,[3] it is not surprising that most MDLs end in settlement because most civil cases settle.[4] But as with many of the issues raised by MDLs, settlement can present a double-edged sword: "MDLs make global peace easier to obtain for defendants, but they also put a lot of power in the hands of the judges selected to oversee them."[5]

Given that "MDLs were created in the 1960s to relieve crowded backlogs in federal courts,"[6] federal judges handling these large and complex cases have become adept at resolving them. Criticism regarding forced settlements comes from both the defense side[7] and the plaintiff perspective.[8] This article, interspersed

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[1] In 2019, the most common types of MDLs were product liability (34.2%), antitrust (24.7%), sales practices (10.5%), intellectual property (15.8%), securities (2.6%), contract (2.1%), common disaster (1.6%), employment practices (0.5%), and miscellaneous claims (17.9%). *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2019, at 11 (2019).

[2] Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, AM. BAR ASS'N (Feb. 19, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket/.

[3] Terry Turner, *Multidistrict Litigation*, DRUGWATCH.COM (June 29, 2020), https://www.drugwatch.com/lawsuits/multidistrict-litigation/.

[4] *See* ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 243 (2020) ("[Ninety-seven] percent of all MDLs are resolved by the transferee court, either by settlement or other disposition. (Of course, the vast majority of non-MDL cases settle as well.)").

[5] *Multi-district Litigation Proceedings (MDLs)*, FEDERALIST SOC'Y PRAC. GRP. PODCAST (Sept. 20, 2019) (transcript available at https://fedsoc.org/events/multi-district-litigation-proceedings-mdls).

[6] Turner, *supra* note 3.

[7] Stephen McConnell, *MDL Judges: Information-Forcing or Settlement Forcing?*, DRUG & DEVICE L. BLOG (Sept. 7, 2016), https://www.druganddevicelawblog.com/2016/09/mdl-judges-information-forcing-or-settlement-forcing.html ("[F]ar too many MDL judges act as if any defendant who does not gallop over to the plaintiff steering committee with a settlement offer, a grid, and an open checkbook needs a spanking.").

[8] William Cash, *Is it Time to Rethink the MDL for Mass Tort Cases?*, NAT'L TRIAL LAWS. (Sept. 1, 2015), https://thenationaltriallawyers.org/2015/09/rethink-the-mdl-for-mass-tort-cases/ ("In many cases, the company makes just one offer—take it or leave it—to the entire universe of plaintiffs.").

with the wisdom of experienced federal MDL judges, examines several approaches to MDL settlement and the practical application of these varying methods.

I. APPROACHES TO MDL SETTLEMENT: AN OVERVIEW

"Multidistrict litigation presents a federal judge with difficult management, intellectual, and personal challenges."[9] As United States District Judge Gary Fenner of the Western District of Missouri observed:

> I have found my MDL cases to be very much like other complex civil litigation. They are without a doubt more challenging from a legal and management standpoint, but establishing and enforcing a realistic scheduling order, timely ruling motions, and being available to resolve disputes moves cases.[10]

These sentiments are echoed by United States District Judge John Lungstrum from the District of Kansas, who stated:

> I believe the most effective way to resolve an MDL is early on to set deadlines, including for trial(s), and stick to them. And as a corollary, rule on motions, such as for dismissal or for class certification, promptly. Each MDL is different, but they share the common trait of needing hands-on management by the judge that sends the clear message that this will not become a black hole.[11]

While some federal judges take a very hands-off approach to managing normal civil litigation, every MDL judge appears to take a very active role in moving an MDL. The Manual for Complex Litigation, "the 'bible' for complex cases in the federal courts,"[12] speaks to the role an MDL judge plays in settlement:

> One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee

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[9] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT; A GUIDE FOR MULTIDISTRICT LITIGATION FOR TRANSFEREE JUDGES, at v (2d ed. 2014) [hereinafter TEN STEPS TO BETTER CASE MANAGEMENT].

[10] Interview with the Honorable Gary Fenner, United States District Judge for the Western District of Missouri (July 8, 2020).

[11] Interview with the Honorable John Lungstrum, United States District Judge for the District of Kansas (July 7, 2020).

[12] Christine Durham, *Taming the Monster Case: Management of Complex Litigation*, 4 J.L. & INEQ. 123, 124 (1986).

> judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.[13]

While the Manual for Complex Litigation does not specifically address techniques to settle an MDL, it offers several guideposts: setting a firm bellwether trial date, referring mediation to another judge and/or an outside mediator, engaging in confidential discussions with the judge, appointing settlement counsel and special masters, issuing orders barring contribution, making offers of judgment, and severing important issue(s) for a separate trial.[14] These broad approaches are tools that already exist in every judge's toolbox.

A. First Things First: Remove the Obstacle

Professor Robert H. Klonoff, in his recent book, *Federal Multidistrict Litigation in a Nutshell*, observes that:

> Most MDL judges view their job as attempting, whenever possible, to dispose of the cases so that they are not remanded to the transferor courts. Some judges have been clear about this objective, noting early on their goal of achieving a global settlement. For instance, in the widely publicized *National Prescription Opiate* MDL, the transferee judge strongly suggested at his initial hearing as MDL judge that his goal was to oversee a comprehensive settlement. He noted that "[p]eople aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories. . . . [M]y objective is to do something meaningful to abate this crisis and to do it [quickly]."[15]

This approach is called "remove the obstacle." United States District Judge Dan Polster for the Northern District of Ohio, the Opioid MDL judge cited to by Professor Klonoff, expanded on the removal of obstacle approach:

> [Judge Charles] Breyer has cogently stated that the main task of the MDL Transferee Judge is to identify early on the principal impediment to resolution, and then to structure the MDL to tackle that impediment. You generally have excellent counsel on both sides, and by engaging in focused discussion with them the judge should be able to identify the issue and then to develop an action plan. It may be a purely legal issue that needs to be briefed and decided. It may be an issue that requires fact and/or expert discovery. It may be the need to coordinate the MDL litigation with investigations and enforcement actions by the federal government, or by state Attorneys General. Or in the case of a truly

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[13] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).
[14] *See id.* § 13.13.
[15] KLONOFF, *supra* note 4, at 223.

> unique challenge such as the one posed by the Opioid MDL, it could be the need to create a new structure that would permit global resolution.[16]

Identifying the obstacle is the first hurdle. Obstacles to settlement can take many forms. For example, defense counsel may not disclose that there is a dispute about insurance coverage between insurance carriers. In-fighting among plaintiffs' counsel might not be readily apparent. Genuine legal issues may need to be resolved before settlement can be realistically discussed. Experienced MDL judges often hold regular and frequent status and telephone conferences to address and proactively resolve these types of obstacles.[17] In-person hearings—where lawyers, judges, and maybe even the parties, can all see each other—are a great way to keep the case moving and, to borrow Judge Polster's phrase, promote a more honest "focused discussion" about the real obstacle preventing settlement.[18] Once that obstacle is identified, the additional methods that follow may further assist in removing common barriers to settlement.

B. There Is No Substitute for Hard Work

As any Midwestern farm kid will tell you, the value of hard work can never be overlooked. In an MDL context, prioritizing the resolution of any dominant legal issue early in the MDL process can pave the way for settlement. One less-aggressive approach to encouraging MDL settlement is emphasizing mediation early on in the litigation process. As suggested in *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation*, "it may be a good idea to suggest that counsel establish a mediation structure, select a mediator, and begin settlement negotiations."[19] The following are aggressive approaches that promote settlement yet require additional hard work by judges and the parties alike.

1. Front-Load Dispositive Issues, Including Preemption and Scientific Causation

MDLs come in many shapes and sizes, with each raising a different set of legal issues and problems. Preemption may be the vital legal issue in a pharmaceutical product liability claim, but may be inapplicable in a sales practices suit. Structuring and scheduling an MDL in a manner that allows the MDL's significant and dispositive issues to be addressed and resolved in an expedient manner can help lay the groundwork for productive settlement discussions down the road. Preemption was an enormous issue in the National Football League's concussion MDL, so much so that United States District Judge Anita Brody of the Eastern District of Pennsylvania stayed discovery to allow the parties to file only

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[16] Interview with the Honorable Dan Polster, United States District Judge for the Northern District of Ohio (July 9, 2020).
[17] *See* TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 6.
[18] *See* Interview with the Honorable Dan Polster, *supra* note 16.
[19] TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 7.

preemption-based motions to dismiss.[20] United States District Judge Richard Gergle of the District of South Carolina emphasizes the importance of tackling science issues early:

> I am often surprised how often complex science issues that are critical to the outcome of litigation have not been thoroughly addressed and thought through by the parties. The early focus by the Court on these issues can help the parties to do additional work and narrow the differences that may exist between them. In my [aqueous film-form foams] AFFF MDL, I asked the parties to each give me a set of 10 articles that they considered the most important to support their positions on the science. There was not a single article in common from the 10 provided each by the plaintiffs and defendants! I have also found very useful a Science Day early in the MDL to sort out what the parties know and claim to know about the science underlying their claims. I conducted a Science Day in my AFFF MDL in which I had each party present to me three experts. No direct or cross, just presentations to me by the experts and responses to my questions. I found the Science Day very helpful in getting me up to speed on the science.[21]

While the legal hurdles are different in every case, preemption and scientific causation are two frequent impediments that have been effectively addressed by experienced MDL judges by prioritizing them early in the litigation. Investing the effort and time to resolve or clarify those issues at the beginning of an MDL can yield positive results and help streamline other aspects of the litigation, including settlement.

2. Appoint a Settlement Committee

Just as Stephen R. Covey advises us to "begin with the end in mind,"[22] United States District Judge Charles Breyer of the Northern District of California appointed the settlement committee at the very beginning of the Volkswagen Clean Diesel MDL.[23] Appointing a settlement committee at the onset of an MDL emphasizes that settlement is a priority to the court and, in turn, should similarly be a priority to all parties involved.

Once appointed, ideally a settlement committee will not lie dormant, but each judge must decide the extent of his or her engagement in settlement talks. Some judges actively engage the settlement committee by scheduling frequent

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[20] *See In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 390 (E.D. Pa. 2015).

[21] Interview with the Honorable Richard Gergel, United States District Judge for the District of South Carolina (July 17, 2020).

[22] *See generally* STEPHEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 109 (25th ed. 2020).

[23] *See generally In re* Volkswagen "Clean Diesel" Mktg., Sales Practices and Prods. Liab. Litig., 148 F. Supp. 3d 1367, 1368 (J.P.M.L. 2015).

hearings and ordering counsel, parties, and insurance carriers to appear. Judge Brody in the NFL Concussion MDL rejected the first proposed settlement of $765 million because she "was primarily concerned that the capped fund would exhaust before the 65-year life of the Settlement."[24] Judge Brody later approved an uncapped resolution after she ordered actuarial data to be shared with the special master.[25] Some judges may opt for a different approach depending on the nature of the MDL. In a class action context, it is important to note that "[i]n reviewing the settlement, the court is acting as a fiduciary for the class"[26] and the "judge cannot rewrite the agreement."[27] While the role as a fiduciary for the class is not without controversy, that role becomes even more complicated the deeper a judge ventures into the settlement conversation, especially in a non-class MDL where there is no true statutory basis for approval of the settlement. Nevertheless, no matter how involved or hands-on a judge plans to be in the settlement process, appointing and utilizing a settlement committee from the onset remains an important step in ensuring the steady progression and resolution of an MDL.

3. Appoint a Respected Settlement Master

Many federal judges have opted to appoint settlement masters to keep the parties focused on resolving the case. Settlement masters have been utilized to reach global settlements in large-scale tort litigation dating back to at least the late 1980s, and "[c]ourts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a buffer between the court and the parties can provide a useful approach to reaching a settlement."[28] Once the settlement master is appointed (either unilaterally or with the input of the parties), most MDL judges enter an extensive order outlining the settlement master's powers and regularly follow up with the parties and the master.[29] David Cohen, one of the most nationally well-known special masters, observed:

> Similar to a "regular" case, nothing encourages global MDL settlement like setting bellwether trials (and more than one trial can be scheduled right from the start). It may take more than one, but choosing MDL bellwethers and trying them to verdict provides information the parties need to value their litigation. Also, Discovery Masters and Settlement

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[24] *In re* Nat'l Football League Players Concussion Injury Litig., 307 F.R.D. at 364.
[25] *Id.*
[26] KLONOFF, *supra* note 4, at 255.
[27] MANUAL FOR COMPLEX LITIGATION, *supra* note 13, at § 21.61.
[28] ACADEMY OF COURT-APPOINTED MASTERS, APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS: A HANDBOOK FOR JUDGES AND LAWYERS 4, § 1.1 (2d ed. 2009).
[29] *See, e.g.*, *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. 2672 CRB (JSC), 2016 WL 4010049, at *1 (N.D. Cal. July 26, 2016) (discussing appointment of former FBI Director Robert Mueller as settlement master and his role in settlement negotiations); *see also* Reuters, *This Former FBI Director will be Volkswagen's "Settlement Master"*, FORTUNE (Jan. 19, 2016), https://fortune.com/2016/01/19/volkswagen-robert-mueller/.

> Masters undoubtedly grease the skids to get trials and settlements to occur more efficiently and quickly.[30]

Judges have increasingly opted to appoint special masters with expertise in fields of particular relevance to the litigation (e.g., accounting, finance, science, and technology).[31] The Manual for Complex Litigation offers an excellent discussion and comparison of the pros and cons associated with utilizing a special master versus a magistrate judge in the settlement-negotiation process.[32]

4. Order Fact Sheets to Establish an Inventory List

Mass tort settlements are "importantly different" from other types of MDLs and require the valuation of large groups of claims.[33] To help establish the value of the underlying claims in an MDL, judges in over half of all MDL proceedings have ordered plaintiffs to complete plaintiff fact sheets—"party-negotiated and court-approved standardized questionnaires that seek information about parties' claims and defenses."[34] Fact sheets typically include the claimant's personal identification information and other relevant data, e.g., health records or litigation history.[35] Sometimes the fact sheets go even deeper into discovery[36] and are used by defendants to value the inventory list of claims in the MDL.

Some judges have found that mandating the use of fact sheets is a quick way to get the MDL lawyers to know their inventories.[37] Professor Elizabeth Burch of the University of Georgia School of Law analyzed "all publicly available non-class [MDL] settlements," which each involved the negotiated resolution of inventories.[38] Fact sheets, however, are not universally viewed with favor by either the plaintiff or defense perspective. Plaintiff lawyers have occasionally opposed fact sheets,[39] and some defense attorneys believe fact sheets are not a good

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[30] Interview with Attorney David Cohen, Charter Member of Academy of Court-Appointed Masters (July 20, 2020).
[31] MANUAL FOR COMPLEX LITIGATION, *supra* note 13, at § 11.52.
[32] *See id.* §§ 11.52-.53.
[33] *See* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1166 (2020).
[34] MARGARET S. WILLIAMS, JASON A. CANTONE, & EMERY G. LEE III, FED. JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 2-3 (2019).
[35] *See id.* at 1-3.
[36] *See, e.g.*, Plaintiff Fact Sheet, *In re* C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 2187, *available at* https://www.wvsd.uscourts.gov/MDL/2187/pdfs/PFS.pdf (United States District Judge Joseph R. Goodwin ordered plaintiffs to use a twenty-four page fact sheet inquiring into, among other things, the pelvic mesh product lot number, date of implant, and doctor's name and address).
[37] *See* WILLIAMS ET AL., *supra* note 34, at 1-3.
[38] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 87 (2017).
[39] *See* Cash, *supra* note 8 ("Somewhere along the way from the creation of the modern mass tort, to today, [the plaintiffs' bar] accepted the notion that all cases were the same, all cases could fit into the same tidy plaintiff's fact sheet, and the same judge could and should decide all the issues. Why?").

substitution for getting rid of frivolous cases. Objections to fact sheets and the shortcomings[40] of their use aside, plaintiff steering committees and defendants need to have some idea of scale when they are evaluating resolution of an MDL by settlement. "Settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims."[41] Fact sheet usage in mass tort MDLs is at least one helpful judicial tool used to create an inventory of the claims that can smooth the path to future settlement talks.

5. Implement a Focused, Targeted Discovery Plan

Once the lawyers and the judge have a firm grasp on the scope and scale of the MDL, tailoring a discovery plan that focuses on the main legal issues or disputes is an effective strategy for moving the MDL toward resolution. United States District Judge Fernando Gaitan from the Western District of Missouri states that in his experience, "the most effective approach on resolving an MDL case is limited and targeted discovery."[42] The value of this approach cannot be overstated. When formulating a discovery schedule, judges should consider the obstacles or dispositive legal issues raised by the MDL and how targeted discovery may be able to narrow the scope of litigation and pave the way to a more expedient resolution.

Crafting a focused discovery plan responsive to the issues and needs of a given MDL takes more work and planning from all parties involved. In addition to simply entering a case management order, "[s]equencing the discovery and briefing necessary to resolve class certification and summary judgment is one of [an MDL judge's] most vital tasks. . . . On the other hand, limited discovery or 'reverse sequencing' may be appropriate if settlement is likely."[43] Whatever the circumstance, constructing a focused and targeted discovery plan requires judges to have candid, honest discussions with counsel about the sticking points in their cases and what information is needed from either side. In my own experience on the bench, I have found that lawyers generally know the real issues in the case and the information needed to move forward. During a regular scheduling hearing, I ask each attorney the following question: "What do you need from the other side to evaluate the case?" The lawyers are usually very candid, whether it be medical records, deposition of the plaintiff, or business valuation. From my perspective, these conversations help me issue orders that facilitate production and impose or alter deadlines based on the parties' needs. While the scale of discovery is

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[40] *See* Burch, *supra* note 38, at 70 ("Clients are people, not inventories.").

[41] DUKE UNIV., BOLCH-DUKE CONFERENCE, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 1 (2018), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_4-plaintiff_fact_sheets.pdf.

[42] Interview with the Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri (July 7, 2020).

[43] TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 3-4.

obviously different in an MDL context, the same principles apply and, as exemplified by Judge Gaitan's experience,[44] are similarly effective.

C. Group Apples with Apples: The Multi-Track Approach

As the MDL process unfolds, it often becomes readily apparent that the one-size-fits-all approach does not work for all claims, even when there are common issues of law or fact. In my conversations with experienced federal judges who have overseen some of the largest and most complex MDLs in recent memory, several commented on the benefits of establishing different tracks for cases within an MDL. Categorizing cases into different tracks based on their complexity, progression, factual commonalities, relief sought, or other relevant dimensions can help prioritize and maximize the time and effort of the parties and the court. In many cases, it can also facilitate more expedient resolution. Organizing cases in this manner may allow for similarly positioned cases to be settled, thereby resolving a portion of the litigation and redirecting the parties' attention to the remaining cases.[45]

For example, United States District Judge Pattie B. Saris from the District of Massachusetts established two tracks in the *Pharmaceutical Industry Average Wholesale Price Litigation* MDL.[46] Track 1 was a "fast track" that involved five defendants, a bench trial, and extensive findings of fact and conclusions of law.[47] Track 2, in contrast, involved ten defendants, two hundred drugs, and the parties negotiated settlements largely based on the outcome of Track 1.[48] In the Bard IVC Filter Products Liability Litigation MDL, United States District Judge David Campbell of the District of Arizona developed a two-track approach based on how close the parties were to resolution.[49] After a bellwether trial, Judge Campbell established the following options:

> **Track 1: Tentatively Resolved Cases.** These include cases or groups of cases that have been resolved in principle pursuant to an executed release or term sheet.
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> **Track 2: Cases Near Settlement.** These include cases or groups of cases that are the subject of substantive settlement negotiations in which

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[44] *See* Interview with the Honorable Fernando J. Gaitan, Jr., *supra* note 42.
[45] *See* CATHERINE R. BORDEN, FED. JUDICIAL CTR., MANAGING RELATED PROPOSED CLASS ACTIONS IN MULTIDISTRICT LITIGATION 12 (2018).
[46] *See id.*
[47] *See id.*
[48] *See id.*
[49] Interview with the Honorable David Campbell, United States District Judge for the District of Arizona (July 8, 2020).

> both sides agree that discussions have progressed to the point where execution of a release or term sheet is likely in the near future.[50]

All other cases were to be remanded back to the transferor districts (or if directly filed, then back to the proper district under 28 U.S.C. § 1404(a)).[51] Judge Campbell also set specific reporting deadlines to ensure cases did not linger, stating that "[t]he Court . . . advises the parties that it does not intend to delay remand or transfer of MDL cases after a reasonable opportunity to settle."[52] The message was clear: if the parties jointly believed settlement was moving along for an individual case—great news, stay the course.[53] But if the case was not moving toward settlement, pack your bags—the case was getting remanded to the transferor court.[54]

II. "NOT MY JOB": STRIKING A BALANCE

Federal judges are not a monolith that can be stereotyped. Though many MDL judges actively strive to settle a case and view remand to the transferor court as a failure, other judges think reaching a settlement is "not my job." Judges from both camps must learn to strike a balance between establishing a framework to allow the parties to resolve cases without forcing settlements on either party.
United States District Judge David Campbell from the District of Arizona articulated his own approach in the massive *In re Bard IVC Filter* MDL:

> In my MDL, which was fairly large (about 8,500 cases), I held the same view that I do in my cases generally – that it is not my role to get directly involved in settlement discussions. So, I told the parties before the bellwether trials began that I would not hold the MDL for a sustained period after the trials to facilitate settlement. I explained my view that my work as an MDL judge would be done once we were through with discovery and resolution of MDL-wide motions.[55]

Judge Campbell's hard-work approach is straight out of the MDL enabling statute that states: "[e]ach action so transferred shall be remanded by the panel at or before

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[50] Case Management Order No. 42, at 5-6, *In re* Bard IVC Filters Prods. Liab. Litig., MDL 15-02641-PHX-DGC, (D. Ariz. Mar. 21, 2019).
[51] *Id.* at 6.
[52] *Id.* at 5.
[53] *See id.* at 5-6.
[54] *See id.* at 5-6. While beyond the scope of this article, a word of caution is warranted here. Large, complex litigation such as MDLs involves the overlap of state, federal, and even international jurisdiction, and a host of transjurisdictional issues can arise in the implementation of a global settlement agreement. Judges and attorneys facing these issues would be well-served by reading *Morphing Case Boundaries in Multidistrict Litigation Settlements*, an article by Professor Margaret S. Thomas exploring three paths taken by different federal judges in various MDL cases to address these transjurisdictional settlement issues. *See* Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).
[55] Interview with the Honorable David Campbell, *supra* note 49.

the district conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[56] United States District Judge Kathryn Vratil of the District of Kansas, who served on the Judicial Panel on Multidistrict Litigation (JPML) from 2004-2013, echoes Judge Campbell's approach with her observation that "[n]othing encourages MDL settlement like an announcement that at the close of common discovery, the cases will be remanded to the transferee judges."[57]

Judicial involvement in MDL settlement has its place, and in many instances it can serve as a moderating force that protects the interests of the claimants. Professor Burch notes, in stating valid criticism of the extremely repetitive nature of steering committee appointments by lawyers who have never tried a case to verdict, that many MDL settlements are negotiated without "the threat of trial in the face of an unsatisfactory settlement offer."[58] Without the threat of trial, "[o]ften touted as the plaintiff's most valuable bargaining chip, multidistrict litigation eliminates that threat for all but a few bellwether cases."[59] Professor Burch suggests that an amendment to J.P.M.L. Rule 10.1(b) to require immediate remand of non-settling plaintiffs would help correct this imbalance.[60] The idea of immediate remand has to be music to Judge Campbell's and Judge Vratil's ears. Immediately remanding would not only help ensure the preservation of the constitutional right to trial by jury for all parties, but would also restore the balance between a plaintiff's lawyer's traditional threat to go to trial and a defense lawyer's ability to take her opponent up the courthouse stairs and into the courtroom.[61]

III. CONCLUSION

Before I came on the federal bench, I had my own small plaintiffs' practice. I handled mostly personal injury claims and insurance coverage disputes, along with some class actions. I hated MDLs; it meant that my client's case would

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[56] 28 U.S.C. § 1407(a).

[57] Interview with the Honorable Kathryn Vratil, United States District Judge for the District of Kansas (July 7, 2020).

[58] Burch, *supra* note 38, at 152.

[59] *Id.* at 152-53.

[60] *See id.* at 153.

[61] Their benefits aside, MDLs, the process of consolidation, how judges are appointed to the JPML, the lack of diversity on steering committees, and the power to review and approve non-class settlements are frequent areas of criticism. While beyond the scope of this article, numerous proposals for reform have been offered over the years to address these concerns. In particular, the Advisory Committee to the Civil Rules is currently taking comments on changes to the Federal Rules of Civil Procedure and an MDL subcommittee issued a related report in the Civil Rules Agenda Book on April 1, 2020. *See generally* ADVISORY COMMITTEE ON CIVIL RULES, MINUTES TO THE APRIL 1, 2020 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES (Apr. 1, 2020), https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf. Whether these proposals remain ideas or are eventually translated into rules or amendments, recognizing the underlying concerns articulated by the MDL Subcommittee is important for judges and attorneys grappling with challenges and implications raised by the MDL settlement process.

be filed, get removed to federal court, and immediately be transferred to the court presiding over the MDL. The motion to remand would never be ruled on, the case would be settled without any communication with me or my client, and I would be stuck with trying to explain the "justice system" to my client and why I had not been "in the room where it happened."[62] It just felt wrong. Eventually I added a paragraph to my client contract stating that I would no longer represent them if the case got swept up into an MDL.

Now, as a federal trial judge, I am required to follow the rules for Multidistrict Litigation set forth in 28 U.S.C. § 1407. From my vantage point, I can now see the wisdom of consolidating one-half of the civil docket, and I am gaining an appreciation for the MDL system. But I still have genuine concerns about the treatment of the individual plaintiffs, the lack of communication by plaintiff steering committees, and viewing an individual claimant as merely part of an inventory. I also share many of Professor Burch's concerns about a homogenous monopoly of MDL lawyers exercising unchecked power over the MDL process.[63] Similarly, the idea that forcing a defendant to settle just because he or she has been sued several times (or several thousand times) offends my notions of fair play and due process. By talking to my judicial peers, I perceive that sometimes there is a feeling of failure if the cases are not all settled or resolved at the conclusion of the MDL proceeding. But if the right to jury trial is to be preserved,[64] defendants cannot be forced to settle whenever an MDL is formed. Forcing settlement on defendants only feeds the flames of plaintiff lawyers' advertising, monopolistic behavior in pre-formed committees, and third-party litigation finance.[65]

Judges, by adopting creative and just solutions to address common impediments to MDL settlement, face the challenges of balancing the rights of the claimants and defendants with the expediency and efficiency offered by the MDL process. As every lawyer and judge knows, this is not a science. Every human and every case are a little different. Nevertheless, my goal as a federal judge—one I am confident is shared by my judicial peers—is to do everything in my power to keep a case progressing steadily toward resolution, whether that comes in the form of a jury trial or a global settlement agreement. Ultimately, we are seeking the "just, speedy, and inexpensive determination of every action."[66] Achieving that goal with half the federal civil docket[67] just makes it a little more challenging.

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[62] *See generally* Lin-Manuel Miranda, *Act II: The Room Where It Happens*, HAMILTON: AN AMERICAN MUSICAL (2015).

[63] *See generally* Burch, *supra* note 38, at 75.

[64] *See* U.S. CONST., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[65] *See* JAYME HERSCHKOPF, FED. JUDICIAL CTR., THIRD-PARTY LITIGATION FINANCE 1 (2017) (listing criticisms of third-party financing as increasing the number of weak cases, prolonging litigation, undercutting plaintiff and lawyer control, and constituting champerty).

[66] FED. R. CIV. P. 1.

[67] *See* Wittenberg, *supra* note 2 (noting multidistrict litigation makes up more than fifty percent of the federal civil caseload and fifteen percent of all lawsuits in the nation).

MDL REMAND: PLAINTIFFS' PERSPECTIVE

Thomas P. Cartmell*

I. INTRODUCTION

Though an essential endpoint of MDL procedure under 28 U.S.C. § 1407, the final frontier of the MDL journey–remand[1] to the transferor court[2]–is certainly the road less traveled. Few cases make that journey.[3] But that should be neither surprising nor concerning. Few cases ever reach a jury trial in the federal courts, whether or not they join an MDL.[4] While trials are essential to civil litigation, the system works efficiently when cases resolve without them. Just as a jury trial is a procedural endpoint for an individual case in district court, MDL remand is the procedural endpoint of the coordinated proceedings in the MDL court. Few cases reach that stage because of the waypoints along the way that end the journey for many cases. But MDL remands are essential and must happen to enable unresolved cases to advance to trial in the appropriate venue.

By the time remand occurs, MDL parties will ideally have completed a voluminous amount of discovery on issues common to all of the centralized cases, as well as key discovery and depositions in individual cases. The MDL court has hopefully resolved all key legal motions on common dispositive and *Daubert* issues. There may have been one (or many) bellwether trials of cases presenting similar issues. By remand, parties have lots of information to inform settlement negotiations, so parties often settle large numbers of individual cases before the MDL court begins remanding cases. Strong MDL cases tend to produce larger settlements, on average, and weaker cases produce smaller ones, just like in cases outside of an MDL. If any cases lack legal sufficiency to survive on a common issue, those cases are dismissed. The MDL system functions well for resolving large numbers of individual cases, but it is less effective in resolving "outlier" cases, or those on the ends of the spectrum, good and bad.

MDL judges may also feel some weight of expectation to try to facilitate resolution of as many cases as possible before they scatter by remand to transferor courts. This serves the interest of efficiency, which takes on heightened importance for the court and litigants alike when a widely distributed product or device is

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[1] In this article, "remand" broadly means any transfer of an individual case from the MDL court to another district court at the end of coordinated MDL proceedings. This includes transfers of cases filed directly into the MDL but for which proper venue for trial is elsewhere.

[2] Likewise, "transferor court" broadly refers to district courts receiving all "remands" at the end of coordinated MDL proceedings. This includes courts that receive transfers of cases that were filed directly into MDLs because they are determined to be the appropriate venue for trial.

[3] *See* Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400-01, 400-01 nn.8-10 (2014) (stating approximately three percent of MDL cases were remanded from 2010 through 2013).

[4] U.S. Courts, *Federal Judicial Caseload Statistics 2019*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019 (reporting that seven percent of all federal cases terminated in prior twelve-month period went to trial).

claimed to have caused tortious injury to tens of thousands of people. For example, the Manual for Complex Litigation, Fourth Edition, written mostly by and for federal judges, states:

> One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.[5]

The pressure on judges to make the most of their opportunities to facilitate settlements is not unique to MDL practice, nor does it inherently favor plaintiffs more than defendants. Judges encounter similar pressures when managing their crowded dockets outside the context of MDLs. Ultimately, judges facilitate resolution of cases by moving cases forward in a fair, judicious manner. While thousands of related, yet individual, cases present unique management challenges to the parties and judges and may require creative streamlining procedures tailored to the specifics of the dispute, the fundamental litigation tools available to counsel and judges are similar inside and outside the MDL world. In either world, not all cases can be resolved short of trial.

This article discusses the MDL remand process from the perspective of plaintiffs' counsel. It is informed by this author's experiences litigating mass tort, product liability MDLs, and most recently, dozens of cases remanded from the pelvic mesh MDLs centralized before Judge Goodwin in the Southern District of West Virginia. Section II discusses why remand is an essential part of MDL procedure, even when rarely used. Section III briefly discusses a trend that may cause MDL remands to become more common in the future. Section IV offers a quick guidebook to plaintiffs' counsel on the post-remand journey, emphasizing important first steps counsel should take after remand to chart a proper course to trial.

II. MDL REMAND IS ESSENTIAL, AND FUNCTIONS BEST AS A TRUE ENDPOINT

Remand is as essential to MDL procedure as the jury trial is to civil procedure. There must be a logical endpoint to the centralization of cases in the MDL transferee court for pretrial proceedings. Under *Lexecon*, an MDL transferee judge cannot self-transfer an individual case (for which proper venue lies elsewhere) to his or her district for trial,[6] absent *Lexecon* waivers by the parties.[7] Thus, for individual cases that lack venue in the MDL transferee district, there must be a remand or transfer to a court with proper venue prior to trial.

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[5] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).
[6] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).
[7] *See id.* at 41.

Nevertheless, there should be no rush to remand cases, as the MDL court can order individual discovery on case-specific issues just as easily as any transferor court. The advantages of the MDL judge's familiarity and expertise acquired about the issues, and the "unique opportunity" of the MDL to facilitate resolutions, weigh in favor of preserving centralization for as long as possible. The MDL judge may also conduct bellwether trials within and outside the transferee district, with appropriate bellwether selection, use of *Lexecon* waivers, and intracircuit assignments.[8] While this approach requires more work for the MDL judge and staff, it best serves the interests of justice and economy for the parties and the federal judicial system to maximize the expertise, economies, and opportunities of centralization.

Judge Goodwin charted a labor-intensive, impressively thorough course in the pelvic mesh MDLs. To the credit of the Judge and his staff, the overwhelming majority of cases transferred into the pelvic mesh MDLs were resolved by mutual agreement of the parties before remand. But, just as importantly, the cases that have been remanded–and there are many because of the large numbers of cases in those MDLs–are well-packaged with a record of discovery and legal rulings that renders them nearly trial-ready by transferor courts across the country: dispositive motions on common issues are ruled on; *Daubert* challenges to expert opinions on all common issues are ruled on, and are briefed as to case-specific issues; common discovery is complete; and, most of the individual discovery necessary for trial (including depositions of plaintiffs, treating physicians, and case-specific experts) is complete, as well. Judge Goodwin managed and required the completion of all of that work through the MDL for thousands of individual cases, using "waves" of individual cases placed on staggered schedules. This procedure allowed the parties to conduct all of that discovery under common protocols and with a single source for resolving any disputes, which was far more efficient for the system and fair to all parties than leaving the work to individual district courts around the country. While more work for the MDL judge, it saved work for others, including the parties and transferor courts. The remanded cases progressed about as far as they could under centralization with the MDL judge familiar with the range of complex issues presented in the litigation. By making remand a true "endpoint," the pelvic mesh MDLs maximized efficiencies, fairness, consistency, and opportunities for resolution.

Handled that way, the MDL remand is a powerful tool for efficiency and to encourage settlements where appropriate. Parties must know that a trial, when the stakes are all or nothing, looms at the end of their district court journey.

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[8] *See, e.g., In re* Xarelto Prods. Liab. Litig., MDL No. 2592 (E.D. La. Sept. 17, 2015) (Case Mgmt. Order No. 2, Doc. 1305) (describing the court's intent to seek temporary assignment to other districts for two bellwether trials).

Remand is the vehicle that ensures that endpoint, so its very existence and the MDL judge's willingness to use it are essential to resolving cases within MDLs.

III. MDL REMANDS MAY BECOME INCREASINGLY PREVALENT

Remands happen at the conclusion of MDLs when parties are unable to settle cases that have, to that point, survived the legal challenges as well. Typically, parties are unable or unwilling to settle when the gap between their respective case valuations is greatest. This happens most often for those cases that plaintiffs and their counsel believe are the strongest, or most valuable. It is easier for both sides to find compromise on weaker cases, because any gap in their respective valuations is necessarily smaller.

The dynamics of negotiating settlements for large groupings of cases within an MDL is evolving in a way that may produce more remands in the future. In this author's experience, defense settlement counsel tends to increasingly focus on driving for the lowest possible "per case" settlement amount in an aggregate settlement, but that is not the singular measure by which to compare one settlement to another. For example, in the language often used in negotiating settlements of large groups of cases, a $40 million settlement of a bundle of 800 cases is a settlement that could be described as "$50,000 per case." That does not mean each of the 800 plaintiffs receives $50,000 from the deal. Instead, individual plaintiff allocations vary based on their case specifics and are determined by an independent third party looking at the entire bundle of cases. The best or strongest cases might be allocated $500,000, for example, and the weakest cases in the group might be allocated only $5,000. It depends on what cases comprise that bundle, and every plaintiff in that group must accept the amount allocated to them, or else they will "opt out" of the global settlement. If there are enough "opt outs" of a proposed global settlement, the deal fails. But during negotiations, from the defense perspective, a $40 million payment for 800 plaintiffs is a $50,000-per-case deal, whereas a $50 million payment for the same 800 plaintiffs is $62,500 per case. It is easy to see why defense counsel would push, during settlement negotiations, for the lowest "per case" value of an aggregate settlement to which they can convince plaintiffs to agree.

However, using the "per case" metric as the singular measure of a successful settlement, which seems to be an increasing trend, is a recipe for more remands in the future. An alternative metric of success defense counsel could use with their clients would be to look at how many cases they successfully resolved. The lower an aggregate settlement's "per case" value is, the lower the proposed allocations are, necessarily, for the highest-value cases in that bundle. And when the gap is highest between each parties' respective valuations of a case, the chance of settlement is smallest. When the lowest "per case" amount in a deal is the singular focus, there simply may not be enough money in the deal to keep the plaintiffs with the best cases in the settlement; they just will not accept it.

This has certainly happened in the pelvic mesh litigation, and that dynamic likely accounts for a significant percentage of the remands resulting from those MDLs. While the risks of going to trial are very real, plaintiffs have also seen in

that litigation that twenty-eight of the thirty-six jury trials thus far have resulted in plaintiff's verdicts.[9] The plaintiffs' verdicts have been substantial, ranging from a low of $500,000, to a high of $120 million, with a median verdict of $6.7 million.[10] Those numbers do not tell the whole story by any means, as some plaintiff's verdicts (and defense verdicts) have been overturned on appeal. The risks for both sides of continuing the journey past MDL remand are substantial, and the path to finality through a jury trial, and possible appeal, can add many months or even years to the journey. Yet, some MDL plaintiffs with strong cases who have already waited several years just to reach remand have become patient over time and do not seem concerned about the possibility of waiting another several years for a final resolution. Having come that far, some see no reason not to press on to their day in court. For those plaintiffs, MDL remand is the essential gateway to move their cases forward to trial.

IV. QUICK GUIDE FOR PLAINTIFFS AFTER MDL REMAND

Once the MDL transferee court issues its order or suggestions of remand to the JPML, the process typically moves quickly. The order of remand may set deadlines on counsel to designate and file those portions of the record from the MDL docket that they wish to include in the record in the transferor court. It is imperative that plaintiff's counsel gear up to move as quickly as needed to comply with all deadlines set by the MDL court, and, very soon after, by the transferor court.

The MDL court's order and suggestions of remand may well include recommendations and guidance from the MDL judge to the transferor judges about the status of the case, and what issues may be unresolved. Counsel should review such order carefully and prepare to advocate for the schedule and procedures that they believe are necessary, or not necessary, to position the case for trial.

Several administrative steps may be essential immediately. For cases that were filed directly in the MDL, and thus have not yet been opened in the transferor court, it may be necessary for plaintiff's counsel to apply for admission *pro hac vice* in the transferor court with associated local counsel, which may need to be retained. As soon as the transferor court assigns the case to a particular judge, it will be important to assess that judge's familiarity with the issues presented in the case to begin preparing how best to bring the judge up to speed on the case-specific issues, as well as to consider any particular rules, standing orders, or preferences of the newly assigned judge.

It is critical for plaintiff's counsel both to appreciate and to counsel their client on the fact that there may be case-specific issues, or potential areas of weakness in that plaintiff's individual case that were not fully explored in the centralized MDL proceedings, but which will now be tested by opposing counsel and potentially heard and decided by the new court. This creates risk and uncertainty for both sides as the case moves forward in its new venue. There may

[9] *See* Table 1, Appendix.
[10] *Id.*

be potential case-specific issues, such as a state-specific statute of limitations, or specific facts or testimony in an individual case, that could give rise to a dispositive motion, as with any case in federal court. Plaintiff's counsel must be prepared to shift from the emphasis that was previously placed on common case issues to the individual issues of their clients' case that are now the focus on remand.

Soon after the case is remanded and docketed in the transferor court, plaintiffs' counsel should request or prepare for an initial status and scheduling conference, and also prepare to seek a trial date as well as any other necessary intermediate deadlines. If there is a trial package for plaintiffs' counsel available from the MDL, it may be wise to acquire it as soon as possible. Likewise, plaintiffs' counsel who have not tried a case of the same kind that has been remanded may want to consider associating with special trial counsel with more experience in trying this type of case.

Once the record has been filed, a case management conference has occurred, and a schedule is in place, the case remanded from the MDL should look and feel like any other case in federal court, except that it may already be very close to trial-ready. The case's settlement negotiations could occur at any time, and the transferor court may require the parties to engage in further alternative dispute resolution. At every step forward, counsel should stay in close contact with their client to make sure all remaining steps in the case are completed appropriately to give the client's case its best chance of success.

V. CONCLUSION

The fact that MDL remand is a road less traveled does not diminish its importance. The availability, possibility, and effective use of MDL remands is a crucial tool for judges in managing MDLs with fairness and efficiency. From the plaintiff's perspective, cases that reach the point of MDL remand are often ones that plaintiffs and their counsel perceive to be stronger than average, and thus not satisfactorily resolved through the values produced by a global settlement. That dynamic, when it applies, only underscores the high stakes for all parties that come clearly into focus once the MDL judge issues an order of remand. The MDL remand procedure is essential, and sometimes the best evidence of its importance may be the rarity with which it is actually used.

Table 1: Pelvic Mesh Repair Product Liability Jury Verdicts

The following table shows all known jury verdicts in Pelvic Mesh personal injury cases. Please note that this chart reports only the jury verdicts. In many cases, results changed through post-trial proceedings and appeals.

Date	Verdict	Case
Jul-12	$5.5M	*Scott v. Kannappan*, No. S-1500-CV-266034-WDE (Calif. Super., Kern Co.)
Feb-13	$11.1M	*Gross v. Gynecare*, No. A-0011-14T2 (N.J. Super. Ct. App. Div.)
Aug-13	$2.0M	*Cisson v. C.R. Bard*, No. 2:11-cv-00195 (S.D.W.Va)
Apr-14	$1.2M	*Batiste v. Johnson & Johnson*, No. DC-12-14350-D (Tex.Dist.)
July-14	Defense	*Albright v. Boston Scientific Corp.*, No. MICV201200909 (Mass. Super.)
Aug-14	Defense	*Cardenas v. Boston Scientific Corp.,* No. 12-2912 (Mass. Super.)
Sept-14	$3.27M	*Huskey v. Ethicon, Inc.*, No. 2:12-cv-05201 (S.D.W. Va.)
Sept-14	$73.46M	*Salazar v. Lopez, M.D.,* No. DC1214349 (Tex.Dist.)
Nov-14	$6.7M	*Eghnayem v. Boston Scientific Corp.*, No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	$6.7M	*Dortes v. Boston Scientific Corp.*, No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	$6.7M	*Nunez v. Boston Scientific Corp.*, No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	$6.5M	*Betancourt v. Boston Scientific Corp.*, No. 1:14-cv-24061 (S.D. Fla.)
Nov-14	$5.25M	*Blakenship v. Boston Scientific Corp.*, No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	$4.75M	*Wilson v. Boston Scientific Corp.*, No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	$4.25M	*Campbell v. Boston Scientific Corp.*, No. 2:12-cv-0863 (S.D.W. Va.)
Nov-14	$4.25M	*Tyree v. Boston Scientific Corp.*, No. 2:12-cv-0863 (S.D.W. Va.)
Mar-15	$5.7M	*Perry v. Ethicon, Inc.*, No. S-1500-CV-279123 (Calif. Super., Kern Co.)
May-15	$100M	*Barba v. Boston Scientific Corp.*, No. N11C-08-050 MMJ (Del. Super. Ct.)
Oct-15	Defense	*Cavness v. Kowalczyk, M.D.*, No. DC1404220 (Tex. Dist.)
Oct-15	Defense	*Winebarger v. Boston Scientific Corp.,* No. 3:15CV211-RLV (W.D.N.C.)

Oct-15	Defense	*Carlson v. Boston Scientific Corp.,* No. 5:15CV57-RLV (W.D.N.C.)
Dec-15	$12.5M	*Hammons v. Ethicon, Inc.*, No. 1305003913 (Pa.Com.Pl.)
Feb-16	Defense	*Sherrer v. Boston Scientific Corp.*, No. 1216-CV27879 (Mo.Cir.)
Feb-16	$13.5M	*Carlino v. Ethicon, Inc.,* No. 130603470 (Pa.Com.Pl.)
Apr-17	$20M	*Engleman v. Ethicon, Inc.,* No. 140305384 (Pa.Com.Pl.)
May-17	$2.16M	*Beltz v. Ethicon Women's Health and Urology,* No. 1306003835 (Pa.Com.Pl.)
June-17	Defense	*Adkins v. Ethicon, Inc.*, No. 130700919 (Pa.Com.Pl.)
Sept-17	$57M	*Ebaugh v. Ethicon, Inc.,* No. 130700866 (Pa.Com.Pl.)
Dec-17	$15M	*Hrymoc v Ethicon, Inc.,* No. L-13696-14 (N.J. Super. Ct.)
Mar-18	$35M	*Kaiser v. Johnson & Johnson, No.* 2:17-cv-114-PPS (N.D. Ind.)
Apr-18	$68M	*McGinnis v. C.R. Bard, Inc.,* No. BER-L-017543-14 (N.J.Super.L)
Jan-19	$41M	*Emmett v. Ethicon, Inc.,* No. 130701495 (Pa.Com.Pl.)
Apr-19	$120M	*McFarland v. Ethicon, Inc.*, No. 130701577 (Pa.Com.Pl.)
May-19	$80M	*Mesigian v. Ethicon, Inc.,* No. 140200399 (Pa.Com.Pl.)
June-19	$500K	*Dunfee v. Ethicon, Inc.,* No. 151002736 (Pa.Com.Pl.)
Jan-20	Defense	*Salinero v. Johnson & Johnson,* No. 1:18-cv-23643-UU (S.D. Fla.)

REMAND: THE FINAL STEP IN THE MDL PROCESS—SOONER RATHER THAN LATER

Judge Joseph R. Goodwin*

I. INTRODUCTION

In theory, the final stage of multidistrict litigation ("MDL") is remand.[1] "The authority to remand an action to the transferor court rests with the [Judicial Panel on Multidistrict Litigation (the "Panel")]… and not with the transferee court."[2] "The Panel is empowered to separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the rest of the action."[3] A transferee court's suggestion of remand to the Panel, however, is tantamount to an order of remand because the Panel gives great deference to a transferee judge's suggestion.[4] Ordinarily, the transferee court lacks authority to try actions transferred from other jurisdictions. Accordingly, cases transferred to an MDL must be remanded to their home district at or before the conclusion of MDL pretrial proceedings.[5]

After handling nine product liability MDLs, I have concluded that one of the greatest failures in multidistrict litigation is the extraordinarily long time that cases linger in transferee courts. I have come to believe that in any adversarial proceeding, including multidistrict litigation, definite timeframes should be required. Establishing a fixed timeframe for an MDL proceeding in a transferee court will strongly encourage the parties to settle or have their cases scattered by remand or transfer.

II. THE HISTORY, LAW, AND THE PROCESS OF MDL LITIGATION

The multidistrict venue statute, 28 U.S.C. § 1407, originated in the late 1960s as a tool to permit the management of federal court cases on a nationwide basis. The need for multidistrict litigation became "evident during the pendency of numerous civil antitrust cases relating to the electrical equipment industry."[6] Fifty years later, in 2018, the MDL cases in the country totaled "over 134,000 pending

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[1] This section also addresses the court's role in transfer pursuant to 28 U.S.C. § 1407.

[2] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2234 n.48 (2008) (citing *In re* Roberts, 178 F.3d 181, 183 (3d Cir. 1999)).

[3] *See* Lori J. Parker, *Causes of Action Involving Claim Transferred to Multidistrict Litigation*, in 23 CAUSES OF ACTION § 13 (2d ed. 2013); *see also* 28 U.S.C. § 1407(a) (2020); § 1407 r. 7.6(c); PAUL D. RHEINGOLD, MASS TORT LITIGATION § 4:3 (1996).

[4] Heyburn, *supra* note 2, at 2235.

[5] *See* Lexecon, Inc. v. Bershad, 520 U.S. 1227 (1997).

[6] David F. Herr & Nicole Narotzky, *The Judicial Panel's Role in Managing Mass Litigation*, *in* A.L.I.-A.B.A. COURSE OF STUDY: MASS LITIGATION 249, 254 (2008).

actions spread across 196 active MDL dockets," and comprised fifty-two percent of federal civil cases.[7]

Pursuant to 28 U.S.C. § 1407(a), "[e]ach action so transferred shall be remanded by the [P]anel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated …."[8] The MDL court issues a suggestion of remand to the Panel, and the Panel issues a conditional order of remand. The case is held for seven days and then, assuming there is no objection, the conditional order of remand becomes effective and the case is then transferred.

Conversely, the court need not formally notify the Panel with respect to direct filed cases when sending such cases to the appropriate jurisdiction. Cases cannot be direct filed as a matter of right. The MDL statute, as interpreted by the Supreme Court in *Lexecon, Inc. v. Bershad*, 520 U.S. 1227 (1997), "does not allow the MDL court to override personal-jurisdiction and venue requirements to achieve complete jurisdiction over a case."[9] Defendants, however, can waive these defenses in order to allow direct filing. Case-wide direct filing stipulations are common in MDL litigation to avoid inefficiencies and inconsistencies that accompany defendants individually granting permission on a case-by-case basis.[10] Nevertheless, some MDL courts are unwilling to allow plaintiffs to direct file, even when defendants waive these defenses, when it is clear that other courts would be more convenient and appropriate forums.[11] Cases directly filed with an MDL court may be transferred by the MDL court, pursuant to 28 U.S.C. § 1404, "to any other district or division where it might have been brought or to any district or division to which all parties have consented."[12]

Generally, remand "is required when centralized proceedings have concluded, but one or more transferred cases remains unresolved. When discovery has been completed, pretrial motions have been ruled upon, and reasonable attempts to try to settle the actions have not borne fruit . . . ."[13] The same is true for cases filed directly in an MDL. Most cases originally filed in or transferred to an MDL settle long before the transferee court suggests remands or transfers the cases back to the home jurisdictions.

The decision to direct file in the MDL court or be subject to remand by the Panel to the court in which the case was originally filed impacts the final stages of multidistrict litigation. Cases transferred by the Panel pursuant to 28 U.S.C. § 1407

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[7] Alan Fuchsberg & Alex Dang, *MDLs Are Redefining the US Legal Landscape*, LAW360 (Oct. 30, 2019, 5:48 PM), https://www.law360.com/articles/1214276/mdls-are-redefining-the-us-legal-landscape.

[8] § 1407(a).

[9] Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 797 (2012).

[10] *See id.*

[11] *Id.*

[12] § 1404(a).

[13] Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUDICIAL CTR. 48 (2011), https://www.jpml.uscourts.gov/sites/jpml/files/FJC-2011-Managing%20MDL%20PL%20Pocket%20Guide.pdf.

must be returned to the jurisdiction from which they originated. Whereas, pursuant to the requirements of 28 U.S.C. § 1404, the MDL judge has discretion regarding where to send direct filed cases.

III. STATISTICS IN PELVIC MESH MDLs

The pelvic mesh MDLs assigned to me followed the routine pattern, and very few of the MDL cases actually ended in the jurisdiction where they originated or otherwise belonged. This is not surprising because:

> [s]ince its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, a total of 13,432 actions had been remanded for trial, 398 actions had been reassigned within the transferee districts, 359,432 actions had been terminated in the transferee courts, and 89,123 actions were pending in 271 multidistrict litigation dockets throughout 56 transferee district courts.[14]

"Indeed, the incentive structure for controlling stakeholders (lead plaintiffs' attorneys, defendants, and transferee judges) and the procedural requirements for remand are stacked so heavily in favor of settlement that remanding even 2.9% of cases is remarkable."[15]

In 2010, the Panel began assigning cases to me involving product liability actions against manufacturers of pelvic mesh products used to treat stress urinary incontinence and pelvic organ prolapse in women. What began as a handful of cases against one manufacturer in one MDL quickly grew to seven MDLs assigned by the Panel, which involved seven different manufacturers of multiple pelvic mesh products and just over 100,000 total cases.[16] The Panel assigned the second, third, fourth and fifth MDLs (AMS, Boston Scientific, Ethicon, and Coloplast, respectively) in 2012, the sixth (Cook) in 2013, and the seventh (Neomedic) in 2014.[17] Most of the cases in the MDLs assigned to me were direct filed rather than transferred. This group of MDLs is unique in its number of cases and the number of defendants, but the statistics in these MDLs reveal that, like any other MDL, most MDL cases settle before they are ever remanded or transferred.

Of the 101,968 cases originally filed, to date, I have placed 1,301, or 1.276 percent of the total cases, on remand or transfer orders. In many cases, after entering the remand or transfer order, but before actual remand or transfer, the parties dismissed the case. Of the original 1,301 cases placed on remand or transfer orders, I remanded or transferred only 973 cases, or .954 percent of the total cases.

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[14] *Judicial Panel on Multidistrict Litigation – Judicial Business 2013*, U.S. COURTS (2013), http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx.

[15] Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 416 (2014).

[16] At its height, I had 101,357 cases which comprised a large percentage of civil cases filed in federal courts throughout the country.

[17] The MDL case names and numbers are: C.R. Bard, Inc. 2:10-md-2187; American Medical Systems, Inc. 2:12-md-2325; Boston Scientific Corp. 2:12-md-2326; Ethicon, Inc. 2:12-md-2327; Coloplast Corp. 2:12-md-2387, Cook Medical, Inc. 2:13-md-2440 and Neomedic 2:14-md-2511.

The two charts below indicate the number of cases initially placed on a remand or transfer order, and then ultimately remanded or transferred in each of the seven MDLs.

REMANDS					
MDL	**MDL No.**	**Total No. of Cases with Remand Orders**	**Total No. of Cases Actually Remanded**	**Total No. of Cases Not Remanded**	**Total No. of Cases with Remands Pending**
C. R. Bard, Inc.	2187	6	6	0	0
American Medical Systems, Inc.	2325	5	5	0	0
Boston Scientific Corp.	2326	10	10	0	0
Ethicon, Inc.	2327	184	140	41	3
Coloplast Corp.	2387	1	1	0	0
Cook Medical, Inc.	2440	0	0	0	0
Neomedic	2511	0	0	0	0
Totals		**206**	**162**	**41**	**3**

DIRECT FILED CASES					
MDL	**MDL No.**	**Total No. of Cases with Transfer Orders**	**Total No. of Cases Actually Transferred**	**Total No. of Cases Closed Not Transferred**	**Total No. of Cases with Transfers Pending**
C. R. Bard, Inc.	2187	83	49	34	0
American Medical Systems, Inc.	2325	44	44	0	0
Boston Scientific Corp.	2326	144	93	51	0
Ethicon, Inc.	2327	790	601	152	37
Coloplast Corp.	2387	34	24	10	0
Cook Medical, Inc.	2440	0	0	0	0
Neomedic	2511	0	0	0	0
Totals		**1095**	**811**	**247**	**37**

The above statistics provide important context. Very few cases that begin in an MDL actually end up back in their home jurisdiction. In the pelvic mesh MDLs, less than one percent actually made it all the way home to the appropriate jurisdiction.

IV. OBSERVATIONS AND RECOMMENDATIONS

My experience with a very large number of cases assigned to me by the Panel involving pelvic mesh products has followed the rather typical process of emphasizing settlement in the transferee court. By the usual metric, these cases have been MDL successes because nearly all have settled before remand or transfer. We employed the usual practices of general and specific causation work up, motion practice, and preparing and trying bellwether cases. However, my now long experience with these MDLs leads me to conclude that the singular emphasis on settlement almost always results in enormous delay. That delay may deny the parties timely justice and is rightly considered by many as a major failure of the MDL paradigm. Over time I have come to believe that a different approach to product liability MDLs is justified.

It is certainly desirable to achieve resolution in the transferee court by settlement. I now believe that a more rigidly structured approach to scheduling by the transferee judge will result in nearly as many settlements, but with resolution of the cases in a timelier fashion. A firm deadline for concluding proceedings in the transferee court and remanding or transferring unresolved cases should be established very early on in the litigation. The schedule must be generous and recognize the standard practices, as well as the invariable vagaries of multidistrict litigation. The court should provide ample time for organization by the leadership appointed by the court. I believe this to be the most critical step in multidistrict litigation.

The organizational phase is followed by planned and agreed-upon expediencies, such as the filing of master complaints and answers, and then by uniform disclosures of claimed facts by each plaintiff, discovery related to defendants' product, and development of the theories of general causation. Most of the claim-specific discovery can be delayed so long as the fact sheets the court requires plaintiffs to submit are comprehensive and completed in a timely manner. The whole purpose of requiring fact sheets and general causation discovery early in the process before the transferee court is to facilitate knowledgeable settlement discussions. Other specific and more detailed discovery is ultimately for trial preparation. Though it is beyond the scope of this article to discuss further details of an MDL schedule, it is sufficient to say I believe that an inviolate remand or transfer date set after careful planning, which allows generous time for each step of discovery and permits generally applicable motion practice, will result in fairer and faster resolution of the cases.

Judges and members of the bar experienced in multidistrict litigation have come to expect the selection and trial of bellwether cases, but this does not necessarily interfere with my recommendation. I think it critically important that the transferee judge not permit preparation of bellwether cases to delay or interrupt

the progress of common discovery and adherence to the schedule. It is perfectly possible to treat those cases somewhat separately from the discovery process, and thus not interfere in developing the mass of cases in the MDL.

A firm deadline for the completion of discovery, general motion practice, and remand or transfer forces settlement negotiations to proceed apace. Much of the delay in settlement occurs when the parties are permitted to procrastinate. Knowing that your cases will be dispersed across the country if you do not settle before the remand or transfer deadline will be strong incentive to prepare earlier, evaluate sooner, and negotiate seriously. All processes for the resolution of disputes must be delimited. To the extent that there is an amorphous structure, the MDL process is flawed.

I further recommend an approach that bifurcates the efforts in the transferee court along two distinct paths. One path focuses upon the discovery and motion practice. This path deals with the bellwether cases and preparation for remand or transfer and trial. The other path is devoted to settlement discussions. Ultimately, in this two-path system, there are two separate leadership teams. One set of plaintiffs' leadership and defendants' leadership deals with case development and the other set deals with settlement. The transferee court needs to be consistently and actively involved in facilitating settlements and superintending discovery and motion practice. Multidistrict litigation is a practical necessity and it can and should be an expeditious and just means for the resolution of these product liability cases.

MDL REMANDS: A DEFENSE PERSPECTIVE

Richard B. North, Jr.*

In their cartographic efforts, attorneys Ryan Hudson, Rex Sharp, and Dean Nancy Levit understandably identify "remand" as one of the five stages of a multidistrict litigation (MDL). However, including remand in their visual depiction of the MDL process is tantamount to including Antarctica on a world map; it is acknowledging a place generally known to most lawyers, but an area where most attorneys–even experienced MDL practitioners–have seldom traveled.

But that may be changing. In recent years, a number of scholars, and even some federal judges, have begun advocating for the more frequent remand of individual MDL cases. And some judges are heeding that call. Over the last several years, Judge Joseph R. Goodwin has remanded[1] dozens of cases from the sprawling pelvic mesh MDLs he has been handling in the Southern District of West Virginia. More recently, Judge David G. Campbell from the District of Arizona has remanded more than 2,000 cases from the *In re: Bard IVC Filters* MDL.

The advocates for remand advance a number of benefits that, in their view, would result from the more frequent remand of MDL cases to other district courts for trial. As a defense lawyer toiling in the trenches of an MDL and handling numerous remanded (or transferred) cases, I am particularly interested in the belief proposed by some that routinely remanding MDL actions may provide a disincentive to the proliferation of meritless claims. This article briefly details the trend toward remand, the theory that remands may discourage the filing of marginal claims, and then provides some anecdotal evidence of how that disincentive may actually exist.

I. THE TREND TOWARD REMAND

The genesis of any MDL is 28 U.S.C. § 1407. The provision contemplates the transfer of related cases to a single judge, but not for ultimate resolution.[2] Instead, the statutory language suggests limitations on a transferee judge's role, explicitly permitting transfer only for "coordinated or consolidated pre-trial proceedings."[3] The provision further commands that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[4] And the Supreme Court has made clear that the plain

* The author wishes to thank Christopher Shaun Polston, his colleague at Nelson Mullins Riley & Scarborough, LLP, for his invaluable assistance.

[1] The term "remand" is technically a misnomer when used to describe many of the cases sent by MDL judges to other courts. After the formation of an MDL and the transfer of cases to that court by the Judicial Panel on Multidistrict Litigation (JPML), many MDL courts permit the direct filing of additional cases in the transferee jurisdiction. When the time comes for remand, the directly filed cases are typically transferred to other jurisdictions under 28 U.S.C. § 1404.

[2] *See* 28 U.S.C. § 1407.

[3] *See id.* § 1407(a).

[4] *Id.* (emphasis added).

language of the statute means what it says.[5] The JPML may not decline to remand a transferred case, over a party's objection, once pretrial proceedings have been completed.[6]

Despite the clarity of the statute's wording and the Supreme Court's pronouncement, the historical reality is that remand of an MDL case is a rare occurrence. According to the Administrative Office of the United States Courts, since the JPML's creation in 1968, only 2.3% of transferred cases have been remanded (based on data collected as of September 30, 2019).[7] However, that number is misleading. It does not include the hundreds of thousands of additional cases directly filed in MDLs that are never transferred out of the proceeding. If the direct-filed cases were added to the calculation, the true percentage of MDL cases ultimately transferred or remanded out of an MDL for trial is probably far less than 1%. The rarity of MDL remands over the years can be explained by many factors. Judge Eduardo Robreno, who ultimately supervised the epic asbestos MDL, once observed: "[a]s a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case . . . ."[8]

More recently, however, the imperative for global resolution of MDL litigation under the stewardship of a transferee judge appears to be receding. A number of noted scholars have championed the perceived benefits of remanding MDL cases for trial.[9] Judge Clay D. Land, the former Chief Judge of the Middle District of Georgia and a veteran transferee judge of two MDLs, has advocated for the remand of MDL cases for case-specific discovery and adjudication following the completion of pretrial proceedings regarding common issues, while noting that his view is a "minority approach."[10]

The proponents of remand identify many reasons for their viewpoint. Among other things, they argue that the pursuit of global settlements and the avoidance of remands benefit lead plaintiffs' attorneys, sometimes at the expense of plaintiffs with stronger claims.[11] Some supporters of remands perceive

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[5] *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35-36 (1998).

[6] *See id.* at 34.

[7] *See* Admin. Office of the U.S. Courts, *Judicial Panel on Multidistrict Litigation—Judicial Business 2019* (2019), https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019 ("Since its creation in 1968, the Panel has centralized 722,146 civil actions for pretrial proceedings. By the end of fiscal year 2019, a total of 16,918 actions had been remanded for trial. 570,766 actions had been terminated in the transferee courts, and 134,462 actions were pending throughout 51 transferee district courts.").

[8] *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013).

[9] *See, e.g.*, Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014); Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1070 (2014).

[10] *See* Clay D. Land, *Multidistrict Litigation After 50 Years: A Minority Perspective from the Trenches*, 53 GA. L. REV. 1237, 1242 (2019).

[11] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAN. L. REV. 67, 152-54 (2017).

advantages in having disputes resolved closer to a plaintiff's home, by a judge more familiar with the applicable state law.[12]

II. THE PROBLEM OF MARGINAL CLAIMS

Of particular interest to me, as a defense practitioner, is the widespread belief that making MDL remand the norm will become a disincentive to the filing of frivolous claims. The proliferation of marginal claims in the MDL setting is a very real problem. An MDL subcommittee of the Advisory Committee for the Rules of Civil Procedure has noted that there is "fairly widespread agreement" among MDL stakeholders (experienced practitioners and judges alike) that the problem exists.[13] That committee estimates that 20-30% of claims in some centralized proceedings, and perhaps as high as 40-50% of cases, are "unsupportable."[14] Those marginal claims include cases where the plaintiff did not use the product at issue or did not actually suffer an injury from the product, and cases clearly barred by the statute of limitations.[15] Judge Land has characterized the phenomenon as one of the "unintended consequences" of MDL consolidation.[16] As he has observed, "[s]ome lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action."[17] A number of commentators have referred to the proliferation of dubious claims in an MDL proceeding as the "'Field of Dreams' problem – 'if you build it, they will come.'"[18]

One factor explaining the large number of questionable claims that often populate MDLs is the staggering expansion of attorney advertising. The United States Chamber Institute for Legal Reform, an affiliate of the United States Chamber of Commerce, estimates that plaintiffs' attorneys (in coordination with lead generators and third-party financing groups) spend approximately $1 billion annually on television advertising to solicit clients for mass tort litigation.[19]

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[12] *See* Land, *supra* note 10, at 1244.

[13] ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, MDL SUBCOMMITTEE REPORT 142-43 (Nov. 1, 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[14] *Id.* at 142.

[15] *Id.*

[16] *See In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

[17] *Id.*

[18] Burch, *supra* note 9, at 413-14; ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 13, at 142-43.

[19] *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, GAMING THE SYSTEM: HOW LAWSUIT ADVERTISING DRIVES THE LITIGATION LIFECYCLE 1 (2020), https://www.instituteforlegalreform.com/uploads/sites/1/Gaming_the_System_How_Lawsuit_Advertising_Drives_Litigation_Lifecycle_2020April.pdf. In its case study, the Institute found that plaintiffs' interests spent $94 million for advertising in the Pradaxa litigation; $122 million in the Xarelto litigation; $63 million in talcum powder litigation; and $103 million in the Roundup litigation. *See id.* at 2-3. Similarly, more than $89 million has been spent in advertising for cases

Pervasive advertising of that magnitude attracts many plaintiffs whose claims are then filed in an MDL in the hope that these potentially weaker claims will be wrapped up in a global settlement, with the merits of the claims never examined.[20]

III. A REPORT FROM THE TRENCHES

Will the more frequent remand of MDL cases reduce the number of doubtful claims filed? In the past, remand has occurred too rarely to provide any robust data for assessing that proposition. My anecdotal experiences, however, suggest that remand can indeed be a disincentive as theorized.

At present, my law firm (in coordination with other firms) is engaged in the defense of hundreds of MDL cases that have been remanded from an MDL concerning a medical device. Thus far, roughly twenty-five percent of the original inventory of MDL cases have been sent to courts throughout the country. The remanded cases undeniably include some claims which, although vigorously contested, are by no means frivolous. A number of those plaintiffs are represented by knowledgeable and diligent counsel. On the other side of the spectrum, the remand process has exposed a significant number of cases that are marginal, at best. Some of those plaintiffs are represented by counsel who are either ill-equipped or disinterested in actually litigating the case.

Some proponents have theorized that more frequent remands would result in the dismissal of weak claims if plaintiffs' attorneys could not hide their lack of merit in an undifferentiated mass settlement.[21] That prediction has come to fruition in the litigation we are handling. Approximately ten percent of the remanded cases have been dismissed within weeks or just a few months of remand, without any settlement. In other words, the plaintiffs' attorneys appear to have abandoned ten percent of the remanded cases rather than choosing to prosecute them.

Proponents of remand have similarly speculated that the absence of a global settlement may prompt some attorneys to withdraw from representation

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against the various manufacturers of inferior vena cava filters (a figure determined by surveys conducted by X Ante using Kantar CMAG data). Some plaintiffs' attorneys have even continued to spend millions of dollars on advertising during the COVID-19 pandemic after being approved for as much as $49.7 million in loans from the Paycheck Protection Program according to data from the United States Small Business Administration and surveys conducted by X Ante. *See* Nate Raymond, *Mass Tort Law Firms Spending Big on TV Ads Got U.S. Government Coronavirus Aid*, REUTERS LEGAL (July 24, 2020 12:07 AM), https://www.reuters.com/article/lawyers-advertising/mass-tort-law-firms-spending-big-on-tv-ads-got-us-government-coronavirus-aid-idUSL2N2EV0LP.

[20] *See In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., 2016 WL 4705827, at *1 n.2 (noting that "onslaught of lawyer television solicitations" contributed to an explosion of cases in that MDL); ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, *supra* note 13, at 142-43; *accord* Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 KY. L.J. 467, 471-72 (2019) (noting MDL "[a]ggregation tends to encourage the filing of meritless claims for a variety of reasons, including the reduction of individual scrutiny received by claims that are pending in aggregated proceedings. As a result, there are many instances in which multidistrict litigations have been inundated with claims that have later been eliminated because they lacked merit.").

[21] *See, e.g.*, Burch, *supra* note 9, at 413-14; Land, *supra* note 10, at 1241 n.19.

rather than litigate the case.[22] Again, our experience has shown that concern to be justified. We have seen dozens of instances where a plaintiff's attorney has withdrawn after remand, abandoning his or her client to navigate the litigation *pro se*.

For those cases that have proceeded after remand, initial case-specific discovery has exposed the problematic impact of television advertising. Many plaintiffs admit, when deposed, that they never had any symptom or known complication until they saw a television advertisement providing dire warnings about the severe "risks" allegedly associated with the device. These plaintiffs often complain about their fears that a complication will occur in the future, fears associated more with the television solicitations (disguised as medical alerts) than with any actual medical diagnosis.[23] In those instances, the remands have led to the case-specific discovery that has exposed the dubious nature of the claim.

Perhaps most disturbing, the remand process has exposed a few plaintiffs' attorneys who are either ill-equipped or unwilling to handle the cases once remanded.[24] In some instances, attorneys have simply ignored orders scheduling conferences or hearings, and failed to attend without any explanation. In other cases, they have flouted local rules governing pro hac appearances and the association of local counsel, sometimes to the irritation of the remand court. Moreover, a number of plaintiffs' attorneys–while striving to represent their clients appropriately–simply have no familiarity with the history of the MDL or the discovery that has previously occurred.

Despite the anecdotal evidence suggesting that remands can expose and even sometimes eliminate marginal claims, remands are not a panacea for defendants. Not surprisingly, remands can be costly. Significant funds and resources are required to defend hundreds of cases simultaneously in courts throughout the country. And remands can prolong and even increase the risks to defendants, risks that global settlements are designed to control. In short, a remand process is not advantageous to a defendant in every situation, as the costs may sometimes outweigh the benefits. Stated differently, although remands may help to cull meritless or marginal claims, the cost in many instances will simply be too high.

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[22] *See, e.g.*, Land, *supra* note 10, at 1241 n.19.

[23] *See generally* Elizabeth Tippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J.L. & MED. 7, 7 (2015) (studying sample television solicitations in drug and device litigation, some of which "mimicked public service announcements, claiming to be a 'medical alert' 'consumer alert' or 'FDA warning'"); Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 327-41 (2013-2014) (discussing proliferation of television solicitations and their marketing tactics).

[24] The phenomenon is not unique to the litigation we are handling. Courts presiding over remanded cases in other litigation have recently sanctioned plaintiffs' attorneys for the mishandling of a case. *See* Thompson v. C.R. Bard, Inc., No. 6:19-CV-17, 2020 WL 3052227, at *1 (S.D. Ga. June 8, 2020); Rolandson v. Ethicon, Inc., No. 15-CV-537 (ECT/DTS), 2020 WL 2086279, at *10 (D. Minn. Apr. 30, 2020).

IV. CONCLUSION

As long as television advertising for mass tort claimants continues unabated, the proliferation of frivolous claims will undoubtedly remain a problem. Courts, advisory committees, and commentators will continue to evaluate and debate mechanisms to screen MDL case inventories for marginal claims. As that debate proceeds, more frequent remands may emerge as a viable screening tool and a disincentive for the filing of questionable claims. From our anecdotal experiences in the trenches, remands do indeed appear to have that desired effect.

THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: THE VIRTUES OF UNFETTERED DISCRETION

Robert Klonoff*

INTRODUCTION

The federal multidistrict litigation (MDL) statute,[1] enacted in 1968, provides in relevant part that "[w]hen civil actions involving one or more common questions of fact are pending in different [federal] districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[2] Such transfers are ordered by a special panel, known as the Judicial Panel on Multidistrict Litigation (the "JPML").[3] The JPML determines whether to create an MDL, and if so, it selects the judicial district and the individual judge to handle the cases.[4] The JPML consists of seven federal circuit and district court judges designated by the Chief Justice of the United States (no two of whom can be from the same circuit).[5] The statute specifies no term of service for JPML members, but in recent years, members of the JPML have served, on average, for ten years.[6] Although the stated purpose of § 1407 is to achieve judicial efficiency in "*pretrial* proceedings,"[7] the reality is that only about three percent of the cases end up being transferred back to the transferor courts for trial.[8] The other ninety-seven percent are resolved by the MDL judge, either through settlement or dismissal.[9]

The JPML's decisions have profound consequences for our civil justice system. A majority of the federal civil docket consists of MDL cases.[10] Many of

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[1] 28 U.S.C. § 1407.

[2] § 1407(a).

[3] *Id.*

[4] § 1407(b).

[5] § 1407(d).

[6] Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424, 434 (2013).

[7] § 1407(a) (emphasis added).

[8] Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Civil Procedure,* 165 U. PA. L. REV. 1669, 1673 (2017).

[9] *Id.*

[10] As of September 30, 2018, MDL cases constituted 51.9 percent of the civil caseload in the federal district courts. *Fact Sheet: Why Federal Rules of Civil Procedure Need to be Designed to Apply to Multidistrict Litigation Cases*, RULES 4 MDLS, https://www.rules4mdls.com/fact-sheet (last visited July 16, 2020). (These numbers exclude Social Security cases and cases brought by prisoners, other than death penalty cases). Because the average MDL case "lasts about twice as long" as non-MDL cases, some commentators focus on the percentage of civil cases filed each year that are included in MDL proceedings. Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary Over the Past 50 Years*, 53 GA. L. REV. 1245, 1271 (2019). That number has been as high as 21 percent in recent years, still a very high percentage. *Id.* at 1272.

the cases (especially the mass tort cases) could not have been certified as class actions because individualized issues predominated over common issues.[11] Thus, MDL has served a critical role of achieving aggregation in cases that could not proceed as class actions. Because MDLs play such an important role in federal civil litigation, it is not surprising that judges, lawyers, and scholars have debated whether various aspects of the MDL process should be reformed.

The possibility of civil rule changes focusing on MDL practice has been taken up by a Subcommittee of the Federal Advisory Committee on Civil Rules ("MDL Subcommittee"). Since November 2017, the MDL Subcommittee has been examining numerous possible reform proposals, urged primarily by the defense bar and various academics. Interestingly, however, there has been virtually no focus on reforming the JPML's decision-making process. Instead, the focus has been entirely on reforms addressed to the MDL judges assigned to handle the cases. Thus, in its most recent public statements (from April and May 2020), the MDL Subcommittee has focused on early judicial review of the strength of claims; interlocutory appellate review of orders of MDL judges; review of settlements by MDL judges; MDL judges' appointment of leadership attorneys; and the awarding of attorneys' fees in MDLs.[12] Additional topics that the MDL Subcommittee has examined include filing fees for MDL cases; criteria for master complaints; third-party litigation funding; and possible rules addressing the trial of test cases (known as bellwether trials).[13]

At no time has the MDL Subcommittee indicated any interest in considering rules or statutory recommendations relating to the JPML's role in the MDL process. Nor have any concrete proposals regarding the JPML's decision-making process been put forward. Thus, I have seen no proposals urging more stringent (or more relaxed) criteria governing the JPML's decision whether to centralize. Nor have I seen proposals urging specific criteria that the JPML should use in selecting the district court and district judge to handle specific MDL cases. The only criticism I have seen regarding the JPML process is that the JPML could do a better job in selecting a diverse array of MDL judges.[14] And those arguments

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[11] ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL § 1.4 at 13 (2020) (hereafter MDL NUTSHELL).

[12] *See*, *e.g.*, U.S. COURTS, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 490-508 (June 23, 2020), available at https://www.uscourts.gov/sites/default/files/2020-06_standing_agenda_book.pdf (containing May 27, 2020 summary of the MDL Subcommittee's work); U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 145-64 (Apr. 1, 2020), available at https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf.

[13] *See* U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 207-20 (Apr. 2–3, 2019), available at https://www.uscourts.gov/sites/default/files/2019-04_civil_rules_agenda_book.pdf; U.S. COURTS, ADVISORY COMMITTEE ON CIVIL RULES 154-57 (Nov. 1, 2018), available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

[14] *See*, *e.g.*, Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713, 1718, 1734 (2019) (reviewing MDL assignments from 2012–2016 and observing that "…while the Panel's choices have mostly matched the racial and gender diversity of the federal bench, that is a low bar that we do not mean to endorse"). "In the largest MDLs, transferee judges are more likely to be male and white than federal district judges overall. Meanwhile, new MDL judges are slightly more likely to be female and liberal than the pool overall, but not dramatically so. New MDL judges are not more racially diverse than the pool overall." *Id.* at 1734.

have been only general criticisms that the JPML should be more attentive to diversity; no one (to my knowledge) has proposed quotas or other specific statutory or rule changes governing the selection of MDL judges.

This lack of focus on the JPML process as a subject for reform is remarkable; the decision to create an MDL, and the decision to designate a particular district court and judge, are profoundly important. Indeed, the success or failure of an entire category of litigation may turn on whether the cases are centralized in an MDL, and if so, which judge is designated to oversee the cases. One would think that the plaintiffs' bar, the defense bar, or both would have strong views on those issues. This has not been the case. Nonetheless, although there is no groundswell of support for reform of the JPML's role, it is worth considering whether reform would be useful. The MDL Subcommittee is now focused on MDL reform, and once this opportunity passes, it could be a decade or more before the rules process again focuses on MDL reform.

Section I of this article examines the virtually unlimited discretion of the JPML in making its decisions. It explains that, under the current scheme, it is virtually impossible to challenge the JPML's crucial decisions. Section II considers possible areas of reform, but ultimately concludes that any attempt to constrain the JPML's virtually unlimited discretion would be difficult to codify and, ultimately, self-defeating. As Section II explains, the JPML is doing an excellent job, and there is no indication that it needs to be reined in through the adoption of more rigorous and explicit criteria for determining whether to centralize cases and selecting the district courts and judges for MDL assignments.

I. DISCRETIONARY DECISIONS OF THE JPML

The JPML makes two critical decisions: (1) whether to grant centralization, and (2) if so, which district court and district judge should be assigned to oversee the cases.

The Federal Rules of Civil Procedure have little or no relevance to the JPML's work because the JPML does not manage cases, oversee discovery, rule on dispositive motions, or conduct trials.[15] Moreover, while the MDL statute provides broad criteria for determining whether transfer should be ordered, it offers no details.[16] And the statute offers *no* guidance whatsoever on the criteria for selecting either the MDL district court or the MDL district judge.[17] Although the JPML has promulgated its own rules of procedure,[18] those rules relate mainly to administrative and mechanical matters, such as filing deadlines and other matters relating to briefing and oral argument. The rules say nothing about the decision to centralize or the criteria for selecting the district court and judge.

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[15] *See* DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 1:1 (2020). Of course, the Federal Rules are directly relevant to the judges who are assigned to oversee MDL cases. *See*, *e.g.*, *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 841 (6th Cir. 2020) (noting that MDL judges cannot "disregard[]" the Federal Rules of Civil Procedure).

[16] *See infra* Section IA.

[17] *See infra* Section IB.

[18] *See* Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.D.R. 561 (1978).

As discussed in Sections IA and IB, the standards applied by the JPML in making its crucial decisions vary from case to case, with decisions in one putative MDL having little or no precedential value in other cases. And as discussed in Section IC, under the MDL statute, the JPML's decisions are almost entirely unreviewable. There is *no* review, even by extraordinary writ, for a decision *denying* transfer.[19] And decisions in favor of transfer (as well as the selection of the district courts and judges) are reviewable only by extraordinary writ, not by appeal. Moreover, under the strict mandamus standard, the JPML has almost never been second-guessed by any federal appellate court.[20] As a practical matter, therefore, the JPML's decisions are unreviewable.

A. The Decision Whether to Transfer

A potential MDL action may be initiated by any party in any constituent action, or by the JPML on its own motion.[21] The JPML decides whether centralization is warranted after considering the statutory criteria, i.e., looking at whether there are "one or more common questions of fact,"[22] and whether an MDL "will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions."[23] Although the JPML typically issues written opinions explaining its rulings, those decisions are conclusory (often only a couple of pages), and as a practical matter those rulings do not constrain the JPML's decisions in other cases. Indeed, as discussed below, the decisions are heavily fact-specific and often appear to be contradictory.

First, with respect to whether there is a common question of fact, the JPML sometimes finds that a single issue of fact is sufficient, even if there are many individualized issues. This can be seen, for example, in a number of mass tort cases.[24] Yet, the JPML sometimes denies transfer, even when indisputable common questions of fact exist, reasoning that individualized factual questions *predominated* over the common questions.[25] In these latter cases, the JPML has

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[19] 28 U.S.C. § 1407(e).

[20] *See infra* Section IC (discussing research revealing only a single case granting mandamus against the JPML).

[21] § 1407(c).

[22] § 1407(a).

[23] *Id.*

[24] *See, e.g.*, *In re* Zostavax (Zoster Vaccine Live) Prods. Liab. Litig., 330 F. Supp. 3d 1378, 1379 (J.P.M.L. 2018) (holding that numerous civil actions based on alleged injuries from a shingles vaccine involved common questions of fact and warranted transfer to MDL proceedings; although each plaintiff had individualized injuries, those variations were "not an obstacle" because the claims "share[d] a common factual core"); *In re* Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig., 316 F. Supp. 3d 1380, 1380–81 (J.P.M.L. 2018) (holding that numerous civil actions alleging defects in the defendants' hernia mesh product involved common questions of fact despite the plaintiffs' claims of individualized injuries).

[25] *See, e.g.*, *In re* Table Saw Prods. Liab. Litig., 641 F. Supp. 2d 1384, 1384 (J.P.M.L. 2009) (denying centralization of dozens of actions involving injuries from allegedly defective table saws, noting that the "common issues [were] overshadowed by the non-common ones" because "[e]ach action arises from an individual accident that occurred under necessarily unique circumstances"); *In re* Ambulatory Pain Pump-Chondrolysis Prods. Liab. Litig., 709 F. Supp. 2d 1375, 1377 (J.P.M.L.

applied a more exacting test (similar to a class action under Federal Rule of Civil Procedure 23(b)(3)) than simply the presence of a single common question of fact. The JPML can decide how rigorous it wants to be in applying the common question of fact test.

Second, the JPML rarely discusses the statutory convenience and justice/efficiency criteria as freestanding tests.[26] And when it does, it usually does so in a conclusory fashion, which makes it difficult for counsel who are arguing for or against centralization in a particular set of cases to identify overarching principles. For instance, the JPML has noted, with little elaboration, that "[c]entralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . . and conserve the resources of the parties, their counsel, and the judiciary."[27] The JPML has taken into account party preferences and agreements in determining convenience.[28] But as a practical matter, the convenience and justice/efficiency tests do not constrain the JPML's discretion in deciding whether to centralize. Indeed, when cases are spread out in multiple states, as is common in putative MDLs, what is convenient for some parties and attorneys will necessarily be inconvenient for others.

Third, the JPML has cited other criteria in deciding whether to transfer but has done so inconsistently. For instance, the presence of multiple defendants or products has sometimes defeated a request for an overarching MDL,[29] but in other cases it has not.[30] The JPML has sometimes found that consolidation was unnecessary because coordination among judges and attorneys in various cases

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2010) (rejecting centralization of mass tort personal injury cases in part because "individual issues of causation and liability . . . predominate, and are likely to overwhelm any efficiencies that might be gained by centralization"); *In re* Mortg. Lender Force-Placed Ins. Litig., 895 F. Supp. 2d 1352, 1353 (J.P.M.L. 2012) (denying centralization of multiple actions involving alleged abusive practices in the banking and insurance industry, finding that "[c]ommon questions of fact . . . do not predominate").

[26] *See* MDL NUTSHELL § 3.4 (discussing cases).

[27] *In re* Uber Techs., Inc., Data Sec. Breach Litig., 304 F. Supp. 3d 1351, 1353 (J.P.M.L. 2018); *see also In re* Local TV Adver. Antitrust Litig., 338 F. Supp. 3d 1341, 1343 (J.P.M.L. 2018) (using same language).

[28] *See, e.g.*, *In re* Facebook, Inc., Consumer Privacy User Profile Litig., 325 F. Supp. 3d 1362, 1363–64 (J.P.M.L. 2018) (noting that "[a]ll responding parties agree that the actions share factual issues," and that centralization was supported by numerous responding plaintiffs and defendants); *In re* Opana ER Antitrust Litig., 65 F. Supp. 3d 1408, 1409 (J.P.M.L. 2014) (centralizing actions when "[a]ll plaintiffs and defendants in the actions support centralization"); *In re* Gen. Motors LLC Ignition Switch Litig., 26 F. Supp. 3d 1390, 1390 (J.P.M.L. 2014) (same).

[29] *See, e.g.*, *In re* Power Morcellator Prods. Liab. Litig., 140 F. Supp. 3d 1351 (J.P.M.L. 2015) (declining to create an industry-wide MDL against multiple defendants that manufactured allegedly defective power morcellators used for surgical procedures); *In re* Yellow Brass Plumbing Component Prods. Liab. Litig., 844 F. Supp. 2d 1377 (J.P.M.L. 2012) (declining centralization in multi-defendant litigation challenging the chemical composition of certain plumbing components).

[30] *See, e.g., In re* AndroGel Prods. Liab. Litig., 24 F. Supp. 3d 1378 (J.P.M.L. 2014) (finding that centralization was appropriate in cases against numerous defendants alleging injuries from the use of testosterone replacement therapies); *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1377–78 (J.P.M.L. 2017) (centralizing numerous claims against multiple defendants in an MDL involving "the alleged improper marketing of and inappropriate distribution of various prescription opiate medications into cities, states and towns across the country").

could occur informally,[31] but in other cases it has found that informal coordination would not suffice and that formal MDL treatment was necessary.[32] In some instances, the possibility of transfer of venue under 28 U.S.C. § 1404(a)[33] has been a reason to deny centralization,[34] but in other cases the JPML will centralize cases notwithstanding the availability of a Section 1404 transfer.[35] In some instances, the JPML has transferred cases despite different kinds of plaintiffs (e.g., private plaintiffs and government entities),[36] but in other cases, the existence of different kinds of plaintiffs has prevented transfer or has prompted the JPML to create multiple MDLs.[37] Similarly, the fact that various lawsuits raise different types of claims or allegations is sometimes a basis for denying centralization.[38] At other times that factor is not a basis for denying transfer.[39] At times, the extent of plaintiff or defense opposition to MDL transfer has been an important factor in denying transfer,[40] but at other times transfer has been ordered despite significant

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[31] *See, e.g.*, *In re* Uponor, Inc., F1960 Plumbing Fittings Prods. Liab. Litig., 895 F. Supp. 2d 1346, 1349 (J.P.M.L. 2012); *In re* Dry Bean Revenue Prot. Crop Ins. Litig., 350 F. Supp. 3d 1381, 1382 (J.P.M.L. 2018).

[32] *See, e.g.*, *In re* Generic Pharms. Pricing Antitrust Litig., MDL No. 2724, 2017 U.S. Dist. LEXIS 67521, at *2 (J.P.M.L. May 3, 2017); *In re* Viagra (Sildenafil Citrate) Prods. Liab. Litig., 224 F. Supp. 3d 1330, 1331 (J.P.M.L. 2016).

[33] 28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

[34] *See, e.g.*, *In re* Best Buy Co., 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011); *In re* Gerber Probiotic Prods., Mktg. & Sales Practices Litig., 899 F. Supp. 2d 1378, 1380–81 (J.P.M.L. 2012).

[35] *See, e.g.*, *In re* Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Practices Litig., 26 F. Supp. 3d 1392, 1393 (J.P.M.L. 2014); *In re* Oxycontin Antitrust Litig., 314 F. Supp. 2d 1388, 1390 (J.P.M.L. 2004).

[36] *See, e.g.*, *In re* Generic Pharms. Pricing Antitrust Litig., MDL No. 2724, 2017 U.S. Dist. LEXIS 67521, at *2 (J.P.M.L. May 3, 2017) (finding that the actions brought by the states could be handled as part of the existing MDL involving private plaintiffs); *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., MDL 2672, 2016 U.S. Dist. LEXIS 103485, at *2 (J.P.M.L. Aug. 5, 2016) (same).

[37] *See*, *e.g.*, *In re* Pfizer Inc. Mktg. & Sales Practices Litig., 657 F. Supp. 2d 1367, 1367–68 (J.P.M.L. 2009) (denying centralization of claims alleging that defendants "engaged in a fraudulent scheme and conspiracy to promote eleven different prescription drugs" because "the named plaintiffs allege that they themselves each took only one of those eleven drugs, and that neither took the same drug as the other"); *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (centralizing claims for personal and economic injuries arising from Deepwater Horizon oil spill); *In re* BP p.l.c. Secs. Litig., 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010) (creating a separate MDL for securities and ERISA claims arising from Deepwater Horizon oil spill).

[38] *See*, *e.g.*, *In re* Urban Outfitters Fair Labor Standards Act, 987 F. Supp. 2d 1381, 1382 (J.P.M.L. 2013) (denying centralization of actions for unpaid overtime because there appeared to be "substantial variation between the duties of the subject employees," and "their allegations differ[ed] markedly from action to action").

[39] *See*, *e.g.*, Dabon v. GlaxoSmithKline, Inc. (*In re* Avandia Mktg.), 528 F. Supp. 2d 1339 (J.P.M.L. 2007) (centralizing marketing, sales practices, and product liability claims in a single MDL); *In re* Vytorin/Zetia Mktg., Sales Practices, & Prods. Liab. Litig., 543 F. Supp. 2d 1378 (J.P.M.L. 2008) (same).

[40] *See, e.g.*, *In re* CVS Caremark Corp. Wage & Hour Emp. Practices Litig., 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010); *In re* "Lite Beer" Trademark Litig., 437 F. Supp. 754, 755–56 (J.P.M.L. 1977).

opposition.[41] Similarly, although certain types of cases tend to be especially suitable for transfer, there are no hard-and-fast rules.[42] The JPML has emphasized that it does not "rubber stamp in any docket."[43] In short, the JPML is all over the map in assessing the appropriateness of centralization, with the tests seemingly changing depending on whether the JPML wishes to grant or deny centralization.

B. Decision Regarding the JPML's Selection of the Transferee District and Transferee Judge

1. Selection of District Court

The JPML invokes a variety of factors in selecting the transferee district. But here again, the JPML has articulated no formula or standard for selecting the district court. Depending on the case, the JPML may be persuaded by a single factor or a confluence of factors, and factors that might be pivotal in one MDL may be given little or no weight in another.[44]

Party Preferences. While the JPML may select any federal district court in the country, it is more likely to select a court for which the parties have

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[41] *See, e.g.*, *In re* Nat'l Century Fin. Enters., Inc., 293 F. Supp. 2d 1375, 1376 (J.P.M.L. 2003); *In re* Asbestos Prods. Liab. Litig., 771 F. Supp. 415, 416–17 (J.P.M.L. 1991).

[42] For instance, the JPML has noted that air crash cases are often suitable for MDL treatment. *See, e.g.*, *In re* Air Crash Disaster at Falls City, Neb., 298 F. Supp. 1323, 1324 (J.P.M.L. 1969); *In re* Air Crash Near Rio Grande, 787 F. Supp. 2d 1361 (J.P.M.L. 2011). Yet, the JPML has not hesitated to deny transfer in air crash cases. *See, e.g.*, *In re* Air Crash Near Lake Wales, Fla. on June 7, 2012, 118 F. Supp. 3d 1374, 1375 (J.P.M.L. 2015); Harp v. Airblue, Ltd. (*In re* Air Crash Near Islamabad, Pak.), 777 F. Supp. 2d 1352 (J.P.M.L. 2011). Likewise, the JPML has frequently granted centralization in antitrust cases. *See*, *e.g.*, *In re* Ranbaxy Generic Drug Application Antitrust Litig., 355 F. Supp. 3d 1382 (J.P.M.L. 2019); *In re* Capacitors Antitrust Litig. No. III, 285 F. Supp. 3d 1353 (J.P.M.L. 2017). But it has also denied centralization in such cases. *See, e.g., In re* Dental Supplies & Equip. Antitrust Litig., 289 F. Supp. 3d 1330, 1330–31 (J.P.M.L. 2018); *In re* H&R Block Employee Antitrust Litig., 355 F. Supp. 3d 1380 (J.P.M.L. 2019).

[43] *In re* CVS Caremark Corp. Wage & Hour Emp. Practices Litig., 684 F. Supp. 2d 1377, 1379 (J.P.M.L. 2010) (internal quotation marks omitted).

[44] *See*, *e.g.*, Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1215 (2017) ("When assigning cases to a transferee judge, the JPML gives a variety of reasons. What matters in one case may not matter in another. What one can say about JPML transfer orders is that they seem to give decent, practical reasons for choosing the transferee court and judge. But it is also fair to say that those reasons vary considerably").

expressed a preference.[45] Yet, in many cases the JPML has given little weight to party preferences.[46]

Location of Parties, Witnesses, and Evidence. The JPML often tries to select a convenient transferee court for the litigants. But when parties are geographically dispersed, it is impossible to choose a convenient venue for everyone, and often the JPML will either favor some parties over others[47] or find a compromise venue somewhere in the geographical center.[48] Sometimes (but not always) the JPML will pick the district where the defendant is located.[49] The JPML has often cited the location of relevant documents and witnesses as an important consideration in selecting the transferee district,[50] but in other cases that factor has not been given substantial (or any) weight.[51] Of course, if the witnesses and

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[45] *See, e.g., In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1326 (J.P.M.L. 2017) (selecting the Northern District of Georgia as the transferee court in part because that district was "supported by defendants and the vast majority of responding plaintiffs"); *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., 65 F. Supp. 3d 1402, 1405 (J.P.M.L. 2017) (choosing the Eastern District of Louisiana as the transferee court, the JPML noted that the district had "the support of a number of plaintiffs and also [was] supported by the opposing defendants as an appropriate alternative").

[46] *See*, *e.g.*, *In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 949 F. Supp. 2d 1369, 1370 (J.P.M.L. 2013) (centralizing cases in Eastern District of Wisconsin, despite the fact that all parties supported the Northern District of Illinois); *In re* Biomet M2A Magnum Hip Implant Prods. Liab. Litig., 896 F. Supp. 2d 1339, 1340 (J.P.M.L. 2012) (centralizing cases in Northern District of Indiana, "even though no party suggested it and no plaintiff ha[d] yet filed a case there").

[47] *See*, *e.g.*, *In re* Hard Disk Drive Suspension Assemblies Antitrust Litig., 396 F. Supp. 3d 1374, 1375 (J.P.M.L. 2019) (centralizing cases in Northern District of California, over the opposition of responding defendants); *In re* Uber Techs., Inc., 304 F. Supp. 3d 1351, 1355 (J.P.M.L. 2018) (transferring cases to the Central District of California, despite the fact that a number of responding plaintiffs supported other districts).

[48] *See, e.g.*, *In re* Library Editions of Children's Books, 297 F. Supp. 385, 387 (J.P.M.L. 1968) (case in which constituent actions spanned the country, with many actions in California and on the East Coast; JPML transferred all actions to the Northern District of Illinois, noting that "there is . . . something to be said for the convenience of a geographically central forum in coast-to-coast litigation"); *In re* Sonic Corp. Customer Data Sec. Breach Litig., 276 F. Supp. 3d 1382, 1383 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio, "a centrally-located and easily accessible location"); *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio, "a geographically central and accessible forum").

[49] *See, e.g., In re* Toyota Motor Corp. Unintended Acceleration Mktg. Sales Practices & Prods. Liab. Litig., 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (picking district where defendant is located); *In re* Equifax, Inc., Customer Data Sec. Breach Litig., 289 F. Supp. 3d 1322, 1326 (J.P.M.L. 2017) (same); *but see, e.g.*, *In re* Ethicon Physiomesh Flexible Composite Hernia Mesh Prods. Liab. Litig., 254 F. Supp. 3d 1381, 1383 (J.P.M.L. 2017) (choosing district other than the defendant's location); *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg., Sales Practices & Prods. Liab. Litig., 273 F. Supp. 3d 1377, 1379 (J.P.M.L. 2017).

[50] *See, e.g.*, *In re* Uber Techs., Inc., Data Sec. Breach Litig., 304 F. Supp. 3d 1351, 1355 (J.P.M.L. Apr. 4, 2018); *In re* BP p.l.c. Secs. Litig., 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010); Dabon v. GlaxoSmithKline, Inc. (*In re* Avandia Mktg.), 528 F. Supp. 2d 1339, 1341 (J.P.M.L. 2007).

[51] *See*, *e.g.*, *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375, 1379 (J.P.M.L. 2017) (centralizing cases in the Northern District of Ohio with no mention of the location of relevant documents or witnesses); *In re* Samsung Top-Load Washing Mach. Mktg., 278 F. Supp. 3d 1376, 1378 (J.P.M.L. 2017) (centralizing cases in the Western District of Oklahoma without mention of the location of relevant documents or witnesses).

evidence are dispersed across the country, this factor necessarily takes on much less significance.[52]

Location of Pending Actions. The JPML has often found the location of the various actions to be relevant to the choice of transferee court.[53] In other cases, however, the location of various actions has not been dispositive or even important.[54]

Docket Conditions of Potential Transferee Courts. The JPML sometimes cites the light workload of a transferee district in selecting a district.[55] At other times, the JPML may find a district attractive if it has few or no pending MDL cases.[56] Nonetheless, the JPML frequently selects districts in major urban areas that already have many MDLs or are otherwise very busy with existing cases.[57]

Location of First-Filed Action. In a number of decisions, the JPML has referred to the location of the first-filed action as supporting a particular transferee court.[58] But in many other cases, the venue of the first-filed action is not selected.[59]

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[52] *See, e.g.*, *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., 148 F. Supp. 3d 1367, 1369 (J.P.M.L. 2015) (noting that "any number of transferee districts could ably handle this litigation," given that the controversy "touches multiple districts across the United States and that the various VW entities hold ties to many districts").

[53] *See, e.g., In re* Nat'l Arbitration Forum Antitrust Litig., 682 F. Supp. 2d 1343, 1345–46 (J.P.M.L. 2010) (selecting the District of Minnesota, in part because seven of the ten actions were already pending in that district); *In re* Total Body Formula Prods. Liab. Litig., 582 F. Supp. 2d 1381, 1382 (J.P.M.L. 2008) (finding that the Northern District of Alabama was an appropriate transfer district, given that fourteen of the twenty actions were pending there).

[54] *See, e.g., In re* Silicone Gel Breast Implant Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992) (transferring cases to district and judge with no pending cases); *In re* BP p.l.c. Secs. Litig., 734 F. Supp. 2d 1376, 1379 (J.P.M.L. 2010) (transferring cases to Southern District of Texas and noting that the fact "that no constituent action is currently pending in the Southern District of Texas is not an impediment to its selection as the transferee district") (citation omitted).

[55] *See, e.g., In re* Maxim Integrated Prods., Inc., Patent Litig., 867 F. Supp. 2d 1333, 1336 (J.P.M.L. 2012) (selecting the Western District of Pennsylvania in part because that district "enjoy[ed] favorable caseload conditions"); *see also In re* Halftone Color Separations ('809) Patent Litig., 547 F. Supp. 2d 1383, 1385 (J.P.M.L. 2008) ("Current docket conditions in the Eastern District of Texas counsel against assignment of this MDL to that district where other appropriate districts are available to handle the litigation.") (citation omitted).

[56] *See, e.g.*, *In re* Chantix (Varenicline) Prods. Liab. Litig., 655 F. Supp. 2d 1346, 1346–47 (J.P.M.L. 2009) (noting that the transferee district "currently is home to only one multidistrict litigation proceeding"); *In re* Total Body Formula Prods. Liab. Litig., 582 F. Supp. 2d 1381, 1382 (J.P.M.L. 2008) (selection of transferee district was supported by the fact that "no multidistrict litigation dockets [were] currently pending" there).

[57] *See*, *e.g.*, *In re* Nine West LBO Secs. Litig., 2020 WL 2847269 (J.P.M.L. 2020) (transferring cases to Southern District of New York); *In re* ZF-TRW Airbag Control Units Prods. Liab. Litig., 410 F. Supp. 3d 1357, 1361 (J.P.M.L. 2019) (transferring cases to Central District of California).

[58] *See, e.g.*, *In re* Smith & Nephew BHR & R3 Hip Implant Prods. Liab. Litig., 249 F. Supp. 3d 1348, 1352 (J.P.M.L. 2017) (selecting transferee district in part because the first-filed action was pending there); *In re* GMAC Ins. Mgmt. Corp. Overtime Pay Litig., 342 F. Supp. 2d 1357, 1358 (J.P.M.L. 2004) (same).

[59] *See*, *e.g.*, *In re* Dealer Mgmt. Sys. Antitrust Litig., 291 F. Supp. 3d 1367, 1369 (J.P.M.L. 2018) (transferring cases to the Northern District of Illinois, even though the first-filed action was filed in another district); *In re* Unified Messaging Sols. LLC Patent Litig., 883 F. Supp. 2d 1340, 1342 (J.P.M.L. 2012) (same).

Coordination with Other Proceedings. At times, the JPML will consider the possibility of coordinating MDL proceedings with other judicial proceedings. If a potential district is located where criminal, civil, or bankruptcy proceedings relating to the MDL are taking place, the JPML may be inclined to transfer the MDL to that district.[60] But the JPML has also frequently rejected the possibility of coordination with related proceedings as a reason for selecting a particular venue.[61]

2. Selection of District Judge

Transferee Judge Is Presiding over Some Pending Cases. A transferee judge is frequently selected because that judge is already presiding over one or more of the pending cases.[62] But in a number of cases, that factor has not been decisive or even mentioned.[63]

Experience of the Judge. The experience of potential transferee judges in complex litigation generally or in MDLs specifically is sometimes a factor in the JPML's selection determination.[64] But the JPML frequently selects judges as being "experienced" without referencing specific experience, if any, in complex

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[60] *See, e.g.*, *In re* Orthopaedic Implant Device Antitrust Litig., 483 F. Supp. 2d 1355, 1355 (J.P.M.L. 2007) (transferee district was "where related grand jury proceedings [were] located"); *In re* Neurontin Mktg. & Sales Practices Litig., 342 F. Supp. 2d 1350, 1351–52 (J.P.M.L. 2004) (transferee district was "where a False Claims Act *qui tam* action predicated on the same facts as those at issue in the [MDL] actions had been pending for eight years" prior to settlement).

[61] *See*, *e.g.*, *In re* Am. Med. Collection Agency, Inc. Customer Data Sec. Breach Litig., 410 F. Supp. 3d 1350, 1354 n.9 (J.P.M.L. 2019) (declining to transfer cases to the district where a defendant's bankruptcy was pending, JPML noted that "the transferee judge and the bankruptcy judge need not sit in the same district to be able to coordinate informally on matters arising in the MDL that implicate the bankruptcy proceeding") (citation and internal quotation marks omitted); *In re* Takata Airbag Prods. Liab. Litig., 84 F. Supp. 3d 1371, 1373 n.4 (J.P.M.L. 2015) (same).

[62] *See, e.g., In re* Natrol, Inc. Glucosamine/Chondroitin Mktg. & Sales Practices Litig., 26 F. Supp. 3d 1392, 1394 (J.P.M.L. 2014) (noting that the transferee judge selected was "presid[ing] over two MDLs that raise[d] similar factual and legal claims concerning the effectiveness of dietary supplements containing glucosamine and chondroitin in promoting joint health"); *In re* Ford Motor Co. DPS6 PowerShift Transmission Prods. Liab. Litig., 289 F. Supp. 3d 1350, 1353 (J.P.M.L. 2018) (noting that the transferee judge was already presiding over several actions); *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. No. II, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014) (same).

[63] *See, e.g., In re* Silicone Gel Breast Implant Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992) (transferring cases to district and judge with no pending cases); *In re* Oil Spill by the Oil Rig "Deepwater Horizon," 731 F. Supp. 2d 1352, 1356 (J.P.M.L. 2010) (assigning cases to a judge without explicitly relying on the fact that multiple cases were already pending before the transferee judge).

[64] *See*, *e.g.*, *In re* Qualcomm Antitrust Litig., 273 F. Supp. 3d 1373, 1376 (J.P.M.L. 2017) ("[W]e select a jurist with multidistrict litigation experience and the ability to steer this complicated litigation on an efficient and prudent course."); *In re* Chrysler-Dodge-Jeep EcoDiesel Mktg. Sales Practices & Prods. Liab. Litig., 273 F. Supp. 3d 1377, 1379 (J.P.M.L. 2017) (judge selected was "well-versed in the nuances of complex and multidistrict litigation").

litigation or MDLs.[65] And the JPML is also willing (as it must be) to select judges with no prior MDL experience.[66]

The Judge's Workload. The JPML sometimes relies on a district's light or manageable workload in selecting the particular district and judge.[67] In other cases, however, the JPML will select a judge from a district with heavy docket conditions[68] or will make a selection without any reference to workload considerations.[69]

C. Appellate Review

Consistent with the statutory framework, there is virtually no opportunity for a litigant to challenge either the JPML's decision whether to create an MDL or its selection of the district court or district judge. Under 28 U.S.C. § 1407, judicial review of JPML decisions is severely constrained. Mandamus is available for a decision granting centralization (and for decisions regarding the selection of the district court and district judge),[70] but the mandamus standard is exceedingly difficult to satisfy. To obtain mandamus, a petitioner must demonstrate that it has a "clear and indisputable" right to the issuance of the writ.[71] Moreover, under §1407(e), even the narrow remedy of mandamus is unavailable to challenge JPML

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[65] *See*, *e.g.*, *In re* ZF-TRW Airbag Control Units Prods. Liab. Litig., 410 F. Supp. 3d 1357, 1361 (J.P.M.L. 2019) ("[the judge] to whom we assign the litigation, is an experienced jurist, and already is presiding over nine of the ten Central District of California actions"); *In re* Hill's Pet Nutrition, Inc., Dog Food Prods. Liab. Litig., 382 F. Supp. 3d 1350, 1351 (J.P.M.L. 2019) (noting only that "[the judge] to whom we assign the litigation, is an experienced jurist").

[66] *See*, *e.g.*, *In re* TransUnion Rental Screening Sol., Inc., FCRA Litig., 437 F. Supp. 3d 1377, 1378 (J.P.M.L. 2020) ("assign[ing] this litigation to an able jurist who has not yet had the opportunity to preside over an MDL."); *In re* Sorin 3T Heater–Cooler Sys. Prods. Liab. Litig. No. II, 289 F. Supp. 3d 1335, 1337 (J.P.M.L. 2018) (transferring cases to "an experienced jurist who has not had the opportunity to preside over an MDL").

[67] *See*, *e.g.*, *In re* Maxim Integrated Prods., Inc., Patent Litig., 867 F. Supp. 2d 1333, 1336 (J.P.M.L. 2012) (selecting the Western District of Pennsylvania in part because that district "enjoy[ed] favorable caseload conditions"); *In re* Chantix (Varenicline) Prods. Liab. Litig., 655 F. Supp. 2d 1346, 1346 (J.P.M.L. 2009) (noting that the transferee district "currently is home to only one multidistrict litigation proceeding").

[68] *See*, *e.g.*, *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 704 F. Supp. 2d 1379, 1382 (J.P.M.L. 2010) (rejecting the argument that "docket conditions" in the Central District of California made that district a poor candidate for an MDL, the JPML concluded that the transferee judge was "positioned to devote all the time necessary to manage and decide the important issues that these cases raise"); *In re* Rosuvastatin Calcium Patent Litig., 560 F. Supp. 2d 1381, 1382–83 (J.P.M.L. 2008) (assigning MDL to the District of Delaware over a defendant's argument that the JPML should select another district with "more favorable docket conditions").

[69] *See*, *e.g.*, *In re* Samsung Top-Load Washing Mach. Mktg., Sales Practices, & Prods. Liab. Litig., 278 F. Supp. 3d 1376, 1378 (J.P.M.L. 2017) (centralizing cases before a judge in the Western District of Oklahoma without mention of workload); *In re* Epipen Mktg., 268 F. Supp. 3d 1356, 1360 (J.P.M.L. 2017) (centralizing cases before a judge in the District of Kansas without mention of workload).

[70] 28 U.S.C. § 1407(e).

[71] Cheney v. U.S. Dist. Court for the Dist. of Columbia, 542 U.S. 367, 381 (2004).

decisions *denying* centralization,[72] meaning that review is unavailable even in theory. Not surprisingly, mandamus is only rarely sought to challenge a JPML decision, and virtually all such requests are denied.[73] Indeed, the author has found only one case since the adoption of the MDL statute in 1968 granting mandamus to overturn a JPML decision transferring cases.[74]

II. WHETHER PRECISE STATUTORY OR RULE CHANGES ARE NECESSARY TO CABIN THE DECISIONS OF THE JPML

As discussed in Section I, the JPML is essentially unconstrained in whether to create an MDL and the criteria it uses to select the district court and judge. While there are at least nominal criteria for deciding whether to centralize—i.e., the existence of common questions of fact and the advancement of convenience and efficiency—there are *no* criteria whatsoever in the statute or the JPML's rules regarding the selection of the district court and judge. One would think, therefore, that at least some scholars or practitioners would favor reform of the JPML's decision-making process, and that they would have offered proposed statutory or rule changes to constrain the JPML's decisions or make them more consistent. But there have been no such calls for reform, other than some general calls for the JPML to be more receptive to diversifying the pool of MDL judges.[75]

A basic concept of medicine is "first do no harm." That principle should also apply in the consideration of any proposed statutory or rule change. In my view, the JPML is doing an excellent job, and there is no need for statutory or rule changes.

I have read countless JPML transfer decisions. On the issue of whether to create an MDL, I cannot recall a single opinion in which I concluded that the JPML was either egregiously wrong in declining centralization or egregiously wrong in ordering it. Perhaps there are cases at the margin that were not centralized that arguably should have been. But in those situations, the statute provides no review, not even mandamus review, and there are strong arguments for not allowing review of a decision denying MDL treatment—including the burdens placed on appellate courts and the delays in the underlying litigation that such appellate challenges would necessarily cause. Moreover, it is hard for parties to argue that they have

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[72] *See* 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the JPML denying a motion to transfer for consolidated or coordinated proceedings.").

[73] MDL NUTSHELL § 5.6 (discussing several cases in which mandamus was denied).

[74] Royster v. Food Lion (*In re* Food Lion), 73 F.3d 528 (4th Cir. 1996) (ordering that the JPML return the remanded cases to the transferee court so that the appeals from the summary judgment rulings could all be heard by the Fourth Circuit).

[75] *See, e.g.,* Brooke D. Coleman, *A Legal Fempire?: Women in Complex Litigation*, 93 IND. L.J. 617, 635 (2018); Amanda Bronstad, *Women Attorneys Secure Record Number of Lead Counsel Appointments in MDLs in 2018*, LAW.COM (Mar. 6, 2019, 11:40 AM), https://www.law.com/2019/03/06/women-attorneys-secure-record-number-of-lead-counsel-appointments-in-mdls-in-2018/?slreturn=20200921233607. *Accord, e.g.*, Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1283-84 (2019) (citing empirical evidence that "the percentage of non-white and female transferee judges chosen by the JPML has increased over time").

been unfairly prejudiced by having to continue to litigate their cases without an MDL procedure. After all, MDL is an exception to the default rule that cases are litigated individually, unless another aggregation device, such as class action treatment, joinder, or consolidation applies.

Importantly, the statute does not give any party the *right* to MDL treatment; it merely states that the JPML "may" centralize cases when there are "one or more common questions of fact" and the JPML "determin[es] that transfers . . . will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[76] Given that the centralization decision is itself so highly discretionary, it is hard to imagine a circumstance in which a JPML decision denying transfer would be so profoundly wrong as to warrant mandamus. Thus, the statute correctly forecloses mandamus regarding JPML decisions denying centralization.

For similar reasons, given the flexibility inherent in the "common question" and "convenience" criteria, it is hard to imagine that a JPML decision *in favor* of centralization would be so profoundly wrong as to warrant mandamus. Even the most conclusory findings of common questions and convenience would appear to demonstrate that mandamus is not warranted. Indeed, the JPML does not centralize cases unless it believes that there are strong arguments for that approach.[77] And if centralization proves to be unwise, the MDL judge can always advise the JPML—which decides whether and when to remand cases[78]—that the cases should be remanded to the transferor judges.

Likewise, I cannot recall a single JPML decision in which, in my view, the selection of the district court or district judge was so illogical or wrongheaded as to demonstrate the need for strict criteria to govern the selection process. It is inevitable that some parties will be unhappy with the selection of the district court and district judge, but that does not mean that the JPML has committed error, let alone that those decisions are sufficiently egregious as to warrant mandamus.

Moreover, it would be especially troublesome to open up appellate review (beyond mandamus) of the JPML's selection of particular district judges. Obviously, plaintiffs' counsel would prefer a judge who is believed to be pro-plaintiff, and defense counsel would prefer a judge who is believed to be pro-defense. But surely that should not be a ground for challenge. The goal should be to find an open-minded judge. Indeed, the JPML has in some instances rejected parties' recommendations for particular judges precisely because each side appeared to be seeking a favorably disposed judge rather than a neutral one.[79]

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[76] 28 U.S.C. § 1407(a).

[77] In fact, recent statistics show that a majority of requests for MDL treatment are denied. *See Calendar Year Statistics January through December 2019*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. 3 (2019), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2019_1.pdf (out of forty-eight motions for centralization filed, only twenty-one were granted). And, presumably, parties do not ask for MDL treatment unless there are at least plausible arguments that the commonality and convenience factors are satisfied.

[78] § 1407(a).

[79] *See, e.g., In re* Silicone Gel Breast Implant Prods. Liab. Litig., 793 F. Supp. 1098, 1100–01 (J.P.M.L. 1992) (transferring cases to district judge whom neither side had urged because of "an acrimonious dispute among counsel" which "has caused the parties and counsel on each side to

As noted, there *has* been criticism that the JPML is not sufficiently sensitive to diversifying the group of judges selected to handle MDLs.[80] But as one commentator has noted, in recent years, the JPML "appears to be making a concerted effort to expand the gender and racial composition of the pool of MDL transferee judges."[81] Although there is certainly room for more diversity among MDL judges, I believe that the codification of criteria, such as race or sex-specific criteria, would be unwise. Such criteria would be extremely difficult to craft and would ultimately hamper the JPML's effort to find the best judge for a particular set of cases. Nonetheless, judges, attorneys, and scholars should continue to speak out about the importance of diversity in the JPML's selection of MDL judges.

It is, of course, possible to imagine hypothetical scenarios in which the selection of a particular district judge would be sufficiently egregious as to warrant mandamus. For instance, it would be intolerable if the JPML were to assign a set of cases to a judge whose daughter or son is lead counsel for the defendant in all of the cases. But I know of no situation in which such a flagrantly improper assignment has occurred. The members of the JPML are carefully selected by the Chief Justice, and there is simply no evidence that they are prone to make mistakes of this sort. In all events, for an egregious error, such as one involving a clear conflict of interest, the statute's existing mandamus remedy is sufficient to ensure that the parties are not prejudiced.

Even if there were strong grounds for arguing in favor of more precise criteria to govern the JPML's decisions, it is hard to imagine what a proposed statutory or rule change would look like. Any attempt to codify specific criteria would only hamper the JPML's ability to look at all the facts and circumstances of a particular set of cases.

Turning first to the decision whether to centralize, it would be extremely difficult to codify criteria beyond the general formulations in the statute. "Commonality" is itself a term fraught with ambiguity. For instance, even among the members of the Supreme Court, there is a serious dispute about what commonality means (in the class action context). In *Wal-Mart Stores, Inc. v. Dukes,*[82] the majority held that a common question must be one that has "the capacity . . . to generate common *answers* apt to drive the resolution of the litigation."[83] The dissent, by contrast, accused the majority of articulating a test for predominance, not for commonality.[84] In short, it is difficult to envision a "one size fits all" definition of commonality.

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harbor a perception that they would be unfairly affected by selection of any of the suggested forums"); *see also In re* Oil Spill by the Oil Rig "Deepwater Horizon," 731 F. Supp. 2d 1352, 1355–56 (J.P.M.L. 2010) (rejecting the argument that a judge in the Eastern District of Louisiana would be biased as an MDL judge overseeing the *Deepwater Horizon* litigation).

[80] *See* Coleman, *supra* note 75, at 635.

[81] Coleman, *supra* note 75, at 651.

[82] 564 U.S. 338 (2011).

[83] *Id.* at 350 (citation omitted; emphasis in original).

[84] *Id.* at 378 (Ginsburg, J., concurring in part and dissenting in part) (criticizing the *Dukes* majority for "importing a 'dissimilarities' notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry").

The convenience criteria would be even more difficult to codify. Almost any MDL will be convenient for some parties and witnesses but inconvenient for others. That is the necessary implication of a system that allows centralization of cases from multiple parts of the country. The weight that should be given to the location of witnesses and evidence, the convenience to major airports, the convenience to the parties, or the host of other considerations that the JPML considers will depend on the circumstances of the particular cases. A determination of convenience in the MDL context is an inherently discretionary and fact-specific one that is not suitable for rigid rules. The same is true for the justice and efficiency criteria.

With respect to the selection of the district court, it would be next to impossible to codify the criteria that should govern, given that so many factors can come into play. As discussed above, factors that may determine the selection of the district court could include, in a particular case, workload considerations; prior assignment of some of the cases; convenience to related state cases (or related federal criminal or bankruptcy cases); the location of parties, witnesses, and counsel; the location of pertinent evidence; and many others. Considerations relevant to the selection of the judge could potentially include all of the aforementioned factors, as well as the judge's prior experience in the subject area; the judge's prior experience in MDLs or other complex litigation; and the judge's own caseload. A statute or rule that attempted to prioritize these and other criteria would almost certainly be counterproductive. As with the decision whether to create an MDL in the first place, the decisions regarding the selection of the district court and district judge are inherently discretionary and not suitable for codification.

Another downside of codifying strict criteria is that, to satisfy those requirements (and avoid mandamus challenges), the JPML would need to write far more elaborate opinions. That would increase substantially the time and effort required by the JPML to decide each request for MDL treatment. The need for in-depth opinions would be even greater if the statute were amended to authorize appeals of JPML decisions (and not just mandamus petitions). Yet, the members of the JPML are all sitting federal judges with their own caseloads, and it makes little sense to put them to the burden of having to issue elaborate opinions to justify what, in the end, are gut-level decisions about whether to transfer (and if so, to whom).

Finally, appellate review is especially unwarranted given the composition of the JPML. The typical appellate scenario (other than in rare cases involving three-judge district court panels) is a decision by one district judge, reviewed by a three-judge appellate panel. Here, the JPML consists of seven district court and appellate judges, hand-picked by the Chief Justice because of their impeccable credentials and experience. At least four of the seven judges must agree to any decision for it to be binding,[85] and the vast majority of the JPML's decisions are unanimous.[86] An appeal from seven federal judges to a panel of three would be

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[85] 28 U.S.C. § 1407(d).

[86] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2235

strange enough in any circumstance, but in the MDL context, such a scenario would be especially questionable. The JPML has vast experience deciding whether to create an MDL and to whom the cases should be assigned. It is highly unlikely that a randomly selected three-judge appellate panel, entrusted with the task of second-guessing the JPML's decisions, would bring comparable experience to bear on the issues.

CONCLUSION

The status quo is a bit disquieting: it gives the JPML essentially unreviewable discretion over decisions of profound importance that it must make dozens of times each year. [87] And, at least superficially, the JPML's written opinions at times appear to be inconsistent or even contradictory. But the alternative to the status quo—rigid criteria and expanded appellate review—would be far worse.

The MDL process is not perfect, but the JPML is performing its tasks well. In my view, it would be unwise to adopt statutory or rule changes to constrain the JPML's discretion in rendering the important decisions that it must make.

(2008) ("[O]ver the past two decades, nearly every one of [the JPML's] decisions has been unanimous.").

[87] For example, in 2019, the JPML decided forty-eight motions for centralization. In 2018, it decided fifty-six such motions. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., *supra* note 77, at 3.

FROM THE STREET TO THE COURTROOM: THE LEGALIZATION OF GRAFFITI ART

Meredith Burtin*

INTRODUCTION

In 2002, real estate developer Gerald Wolkoff enlisted renowned graffiti artist Jonathan Cohen to turn a group of run-down warehouse buildings Wolkoff owned in Long Island City, New York into an exhibition area for artists.[1] Acting as curator, Cohen recruited other street artists to rent studio spaces in Wolkoff's buildings, and they quickly filled the walls with numerous pieces of artwork, which were often the subject of pertinent social and cultural issues.[2] Depending on the visual outcome and popularity of the piece, some works became permanent fixtures, while others existed just temporarily and were painted over by other artists in a process known as "creative destruction."[3]

The site, which became known as 5Pointz, housed over 10,600 works of art throughout its existence.[4] It lay in clear view to travelers using the 7-subway line, and it drew the attention of daily visitors, celebrities, and various media outlets.[5] The artwork eventually gained world-wide recognition among artists, art enthusiasts, and casual viewers alike; 5Pointz became a "cultural landmark" in New York, cultivating a strong community focused on celebrating and developing hip-hop, youth, and art culture.[6]

The large-scale graffiti showcase essentially gentrified the city, leading Wolkoff to pursue municipal approval in May 2013 to demolish the buildings and replace them with multimillion-dollar luxury apartments.[7] Upon learning of Wolkoff's intentions, Cohen and several other 5Pointz artists filed a lawsuit against the property owner in the United States District Court for the Eastern District of New York to save their work from devastation.[8] They sued under the Visual Artists Rights Act (VARA)[9], a federal statute that awards visual artists

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[1] Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir. 2020).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Bruce Wallace, *Remembering 5Pointz: A Five-Story Building That Told Plenty More*, NPR (Nov. 21, 2013, 5:01 PM), https://www.npr.org/2013/11/21/246549375/remembering-5pointz-a-five-story-building-that-told-plenty-more.

[6] *Id.; see generally* Eli Anapur, *The Legendary 5 Pointz - History and Legacy*, WIDEWALLS (Nov. 15, 2016), https://www.widewalls.ch/magazine/5-pointz.

[7] *Castillo*, 950 F.3d at 162.

[8] *Id.* at 163.

[9] 17 U.S.C. § 106A (1990).

certain "moral rights" in their art in order to maintain the integrity and reputation of their work and names.[10]

In November of the same year, the district court issued a minute order denying the plaintiffs' application for a preliminary injunction but also giving notice that a full written opinion would soon follow.[11] In the eight days between the minute order and the issue of the opinion, Wolkoff whitewashed the art from the site in frustration.[12] Judge Frederic Block expressed regret in his opinion for failing to find a plausible legal avenue to grant the preliminary injunction.[13] Yet, because Judge Block also emphasized the potential for monetary damages under VARA, Cohen amended and later consolidated his complaint with nine additional artists who sued Wolkoff for intentional destruction of their work.[14]

Ultimately, the United States Court of Appeals for the Second Circuit's decision in *Castillo* is the first case to legally recognize the artistic and cultural value of graffiti or street art. Graffiti can be traced as far back as ancient Grecian times, but its emergence in the United States as the type of contemporary art recognized among ordinary citizens today began in the late 1950s.[15] Through the following decades, graffiti artists individualized and refined their artistic styles, often creating their art to address relevant cultural and societal issues.[16] Graffiti can be found today in neighborhoods of all classes, as well as in revered art galleries and exhibits.[17] Several cities even host events honoring graffiti as an important form of creative expression.[18] For example, the city of St. Louis hosts an annual event called "Paint Louis" that draws artists from around the world to celebrate graffiti and hip-hop culture.[19] Kansas City, Missouri also holds the "SpraySeeMO Mural Festival" each year as a similar type of artistic celebration.[20]

Regardless, many people still perceive graffiti artists solely as criminals and their art as a sheer nuisance, due in part to the art's disfavored history within the United States legal system.[21] The type of graffiti protected by *Castillo*, however, is notably distinct from the type criminalized by several states. *Castillo* protects graffiti created with permission of the property owner—not in an act of vandalism. The decision distinguishes the two categories and announces to the general public what a large community of contemporary artists and art enthusiasts

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[10] *Castillo*, 950 F.3d at 163.
[11] *Id.* at 163; Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212, 214 (E.D.N.Y. 2013).
[12] *Castillo*, 950 F.3d at 163.
[13] *Cohen*, 988 F. Supp. 2d at 226.
[14] *Castillo*, 950 F.3d at 163.
[15] Marisa A. Gómez, Note, *The Writing on Our Walls: Finding Solutions Through Distinguishing Graffiti Art from Graffiti Vandalism*, 26 U. MICH. J.L. REFORM 633, 636-37 (1993).
[16] *Id.* at 637-39.
[17] *Id.* at 641.
[18] *See generally* Carol Guttery, *Your Guide to Great Global Street Art & Mural Festivals: 2020 Edition*, WAYFARING VIEWS (Nov. 22, 2019), https://wayfaringviews.com/street-art-mural-festivals/.
[19] Jimmy Bernhard, *Our Beautiful City: Paint Louis Graffiti Wall*, KSDK (June 3, 2016, 1:02 PM), https://www.ksdk.com/article/features/our-beautiful-city-paint-louis-graffiti-wall/23025649.
[20] *See SpraySeeMO Mural Festival,* SPRAYSEEMO, https://www.sprayseemo.com/about (last visited July 24, 2020).
[21] *See* Al Roundtree, Note, *Graffiti Artists "Get Up" in Intellectual Property's Negative Space*, 31 CARDOZO ARTS & ENT. L.J. 959, 964 (2013).

realized about graffiti and other forms of street art decades ago: these works are, in fact, art, and they offer value to our society.

Though ultimately positive, the outcome of the *Castillo* decision is rare. The artists' only avenue for asserting a claim was by way of a federal statute (VARA) that affords purposefully limited protection. Compared to other international moral rights legislation, VARA's impact is strained in several ways. Namely, VARA significantly limits the types of works eligible for protection,[22] along with the specific moral rights afforded to those works.[23]

This Comment focuses on the impact of the *Castillo* decision and how it should drive legislative change for increased protection of art in the United States. It also illustrates the differences between the Visual Artists Rights Act and similar international legislation, which provides guidance for how to adequately amend the current provisions in VARA. Part I discusses the progression of moral rights through history as they originated in Europe and achieved recognition in the United States decades later. Part II then analyzes the Visual Artists Rights Act through explanations of specific provisions, legislative history, and statutory interpretation in its limited case law. It also evaluates the statute against current moral rights legislation in other countries. Next, Part III explores the procedural history and holding of the United States Court of Appeals for the Second Circuit's decision in *Castillo*. Finally, Part IV explains why *Castillo* should mark a deserved victory for the 5Pointz artists but should also motivate the expansion of moral rights protection in the United States. Instead of simply adding to an already conflicting area of case law, *Castillo*, along with foreign moral rights legislation, demonstrates why change to the Visual Artists Rights Act is necessary to provide for more sufficient moral rights protection in the United States.

I. MORAL RIGHTS HISTORY LEADING TO VARA

At the center of *Castillo* lies a debate surrounding the moral rights of the 5Pointz artists. Moral rights, originating as *le droit moral* in early nineteenth-century France, arise from the idea that artists infuse a part of themselves or their personalities into their work; the cultural and fundamental significance of the work and its creator—as reflections of diversity and human interests of the time—justifies its legal protection.[24] These rights derive not from the economic value of the work, but from the "spirit" the artist injects into the art during the creation process.[25]

In contrast, American copyright law has historically limited artists' protection to only economic rights, favoring the production of art and other works for utilitarian purposes of maximizing societal value and benefit.[26] The United States Constitution affords to Congress the "power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the

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[22] 17 U.S.C.A. § 101 (1990).
[23] § 106A(a)(1)(A)-(B).
[24] Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995).
[25] *Id.*
[26] Kelley v. Chicago Park Dist., 635 F.3d 290, 296 (7th Cir. 2011).

exclusive right to their respective writings and discoveries."[27] Congress's right to authorize this monopoly incentivizes artists and other authors to produce creative works in order to achieve such recognition and protection, so long as their creations serve the public good.[28]

While the United States' interest in affording copyrights has continued throughout history to rest mainly in their societal benefit, increased difficulty in balancing this interest with that of the specific author or artist has stimulated the enactment of several federal copyright statute amendments.[29] Advancements in technology and the ability to produce works unforeseen to Congress when it wrote the Constitution have also driven the creation of these amendments, which now primarily govern this area of intellectual property law.[30]

The Copyright Act of 1976 currently operates as the principal source of copyright law, essentially taking the place of the Copyright Act of 1909.[31] This 1976 Act allows copyright protection for "original works of authorship fixed in any tangible medium of expression."[32] Copyright owners mainly hold a right to exclude others from using their work in certain ways, such as reproducing the work, preparing derivative works, and distributing copies of the work to the public.[33] These "exclusive rights" do not award the holder of the copyright full control over the use of their work, but owners are entitled to remedies if someone else infringes upon their rights.[34] However, another's "fair use of a copyrighted work," for purposes like "criticism, comment, news reporting…scholarship, or research" does not qualify as a copyright infringement.[35]

The Copyright Act of 1976 continued to highly value the economic interests of creators, but it also marked at least a small step for the United States in the direction of stronger collaboration with the intellectual property laws of France

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[27] U.S. CONST. art. I, § 8, cl. 8.

[28] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); *see also* Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

[29] *Sony Corp. of America*, 464 U.S. at 429.

[30] *Id.* at 431.

[31] H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660, 1976 WL 14045.

[32] Section 102 of the Copyright Act lists the following categories of works of authorship: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. 17 U.S.C. § 102(a)(1)-(8) (1990).

[33] § 106.

[34] Section 504 of the Copyright Act defines the remedies for infringement:(a) In General—Except as otherwise provided by this title, an infringer of copyright is liable for either— (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c). § 504.

[35] § 107.

and other Berne Convention-adhering countries.[36] The Berne Convention for the Protection of Literary and Artistic Works, also known as the Berne Convention, was adopted in 1886 primarily in an effort to establish a basis for international intellectual property law standards.[37] It also aimed to recognize and protect the copyrights of artists and authors in all countries that are members of the Berne Union.[38] Though other countries gradually joined the Berne Union, the United States refused to do so for many years in large part due to conflicting principles of copyright "duration and formalities."[39] A particular area of contention about the Berne Convention for the United States was Article 6*bis*,[40] which guarantees artists and authors certain moral rights in their work in accordance with several European and other international countries' ideals.[41]

However, Congress introduced four bills in 1987 to amend national copyright law and allow the United States to join the Berne Union.[42] The Senate and House of Representatives officially enacted legislation to implement the Berne Convention in 1988,[43] particularly because of interests in global trade and several revisions made to the Berne Convention targeting American accession.[44]

II. VARA VERSUS INTERNATIONAL MORAL RIGHTS LAWS

A. Works Eligible for Protection

As a result of the United States' accession to the Berne Convention, Congress enacted the Visual Artists Rights Act (VARA)[45] in 1990 to further

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[36] Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, J. L. & TECH. 71, 75 (1988) ("With the revision of Berne at Rome (1928) and Brussels (1948), and the failure of several United States revision efforts aimed at permitting United States adherence to Berne, the two paths would not even begin to converge in material ways until the enactment of the 1976 Copyright Act.").
[37] *Id.* at 72.
[38] *Id.*
[39] *Id.* at 75.
[40] Article 6*bis* reads: "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.…(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed." Berne Convention for the Protection of Literary and Artistic Works, art. 6bis, Sept. 9, 1886, as revised at Paris on July 24, 1971, S. Treaty Doc. No. 99–27 (1986).
[41] Oman, *supra* note 36, at 80. ("Apart from the economic rights of authors in their works and the permissible limitations upon such rights, the Berne Convention also provides for "moral rights,"' which encompass a variety of specific interests authors have with respect to public utilization of their works. These interests are more in the nature of artistic and professional integrity than pure commercialism. The recognition and progressive elaboration of the moral rights of the author is and has long been one of the most distinctive features of the Berne Convention.")
[42] *Id.* at 71.
[43] Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong., 102 Stat. 2853 (1988) (enacted).
[44] Oman, *supra* note 36, at 105.
[45] § 106A.

comply with obligations under the Berne Convention.[46] Similar to Article 6*bis*, VARA recognizes and defends some moral rights of visual artists in their work.[47] While VARA may seemingly indicate a significant development in American copyright law, its adoption of moral rights is purposely limited and infrequently applied. The statute prescribes that its stipulated moral rights do not apply to or protect "any reproduction, depiction, portrayal, or other use of a work" that does not qualify as a "work of visual art."[48] This classification of a "work of visual art"—effectively, the scope of the Visual Artists Rights Act—is perhaps the most limiting part of the statute. Only "visual art" as specifically outlined by Congress is eligible for protection. The definition also only applies to work that falls into an even narrower group of "pictorial, graphic, and sculptural works" protected by the Copyright Act.[49]

Congress explicitly defined a work of visual art both by what it is and what it is not. Paintings, drawings, prints, sculptures, and still photographic images, when produced solely for exhibition purposes, qualify as "works of visual art."[50] Conversely, posters, maps, charts, applied art, advertising materials, works made for hire, audiovisual works, literary works, and motion pictures, among other types of works, do not qualify for moral rights protection as "visual art."[51]

Whether these excluded works are openly named in or discreetly omitted from the statute, VARA's exclusions seemingly outnumber its inclusions, especially in relation to comparable international laws. For example, French copyright law stipulates that an author of "a work of the mind" shall enjoy in that work "an exclusive incorporeal property right which shall be enforceable against all persons."[52] This exclusive right "include[s] attributes of an intellectual and moral nature as well as attributes of an economic nature."[53] Some "works of the mind" enumerated in the statutory language include the following: literary, artistic, and scientific writings; dramatic musical works; lectures and sermons; cinematographic works; architectural, geographic, and topographic works; and even applied art.[54]

German and Italian copyright laws largely mimic their French counterpart, protecting moral rights of authors of many similar literary, scientific, and artistic

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[46] H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6920, 1990 WL 258818.
[47] *Id.*
[48] § 106A(c)(3).
[49] H.R. REP. NO. 101-514 at 6921.
[50] § 101.
[51] "A work of visual art does not include– (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication; (ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container; (iii) any portion or part of any item described in clause (i) or (ii); (B) any work made for hire; or (C) any work not subject to copyright protection under this title." *Id.*
[52] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L111-1 (Fr.), *translated in* INTELLECTUAL PROPERTY CODE (WIPO 2003).
[53] *Id.*
[54] *Id.* at art. L112-2.

works.[55] The German Copyright Act indicates that its protected artistic works include architectural works, applied art, and drafts of such work.[56] It also extends safeguards not only to photographic and cinematographic works, but also to other works "produced by processes similar to" photography and cinematography.[57] Moreover, the Italian Copyright Act awards moral rights security to "literary, dramatic, scientific, didactic and religious works, whether in written or oral form."[58] Thus, the scope of international moral rights protection is much broader than VARA and applies to all copyrightable work instead of merely a narrow group.

VARA also lists other exceptions for the extension of moral rights.[59] One exception explains that modified or mutilated works will not be protected by VARA when such modification resulted from "the passage of time or the inherent nature of the materials."[60] Modifications caused by conservation or public presentation, "including lighting and placement . . . of the work" also fall outside of the scope of VARA's protection, "unless the modification is caused by gross negligence."[61]

Further, many of VARA's terms were left undefined and, therefore, open to wide and sometimes conflicting interpretation from courts—courts that also have little experience or comfort extending moral rights to claimants in the United States. In *Carter v. Helmsley-Spear*, the court addressed whether sculpture installations within a commercial building's lobby constituted applied art, so as to be excluded from VARA's protection.[62] The court held that even though parts of the sculptures were attached to areas of the lobby that served solely utilitarian purposes, the work nevertheless was not applied art.[63] Holding to the contrary "would render meaningless VARA's protection for works of visual art installed in buildings."[64] Thus, even if a work incorporates features serving utilitarian purposes, it may still be protected by the statute if the piece as a whole constitutes visual art.[65] However, after *Carter*, the court in *Cheffins v. Stewart* denied a claim for an artistically converted school bus through analysis of applied art.[66] It characterized the work as applied art because the bus still functioned as a vehicle, even though it had been modified by extensive artistic work.[67] The analysis in *Cheffins* strained the applicability of VARA by adopting the following standard: "where a functional object, despite claims of artistic merit, continues to serve a

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[55] URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND RELATED RIGHTS] Sept. 9, 1965, BGBL I at 1273, § 2 (Ger.).
[56] *Id.*
[57] *Id.*
[58] LEGGE 22 aprile 1941, n.633, art. 2 (It.).
[59] *See* § 106A(c)(1)-(3).
[60] § 106A(c)(1).
[61] § 106A(c)(2).
[62] Carter v. Helmsley-Spear, 71 F.3d 77, 79 (2d Cir. 1995).
[63] *Id.* at 85.
[64] *Id.*
[65] *Id.*
[66] *See* Cheffins v. Stewart, 825 F.3d 588, 595 (9th Cir. 2016).
[67] *Id.*

utilitarian purpose, it is applied art."[68]

In *Pollara v. Seymour*, a hand-painted banner was excluded from protection because it was made for hire and effectively served as an advertising material.[69] The court explained that "protection of a work under VARA will often depend . . . upon the work's objective and evident purpose."[70] Even works that would otherwise be considered visual art under the statute can be excluded based on their intended meaning.[71] In *Phillips v. Pembroke Real Estate*, a VARA claim to prevent the removal and relocation of multiple commissioned sculptural and landscape works from a park was denied.[72] The court concluded that the works qualified as site-specific art—art created for a specific location that is itself an element of the work.[73] The court explicitly recognized that this type of art "unmistakably enriches our culture and the beauty of our public spaces," but nonetheless denied protection because the plain language of the statute does not reference site-specific art.[74]

Allowing for even more ambiguity in VARA's application, Congress indicated in its analysis of the statute that "common sense and generally accepted standards of the artistic community" should guide courts when determining whether a work is protected under VARA.[75] Yet, the common sense of an artist likely differs greatly from the common sense of a United States court of law. Even if artistic standards are to be applied, only a court—not the artistic community—has the power to actually enter a judgment. Congress also noted that the "medium or materials used" to create a work shall not be determinative of its status under the statute, further complicating a court's analysis of specific works.[76]

Though limited, claims arising under the Visual Artists Rights Acts can differ greatly depending on the part of the statute at issue. Regardless of the type of claim, courts have shown reluctance to extend protection to works that do not obviously fit within Congress's restricted definition of "visual art." In summarizing the purpose of the statute, Congress noted that VARA is "a pragmatic response to a real problem . . . . We should always remember that the visual arts covered by this bill meet a special societal need, and their protection and preservation serve an important public interest."[77] This "important public interest" may be more difficult to discern when considering that some works expressly or otherwise precluded from moral rights protection under VARA often are afforded such protection in other countries. While the statute does provide needed protection for some art, the burden for proving worthiness of VARA's safeguards is steep.

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[68] *Id.* at 594.
[69] Pollara v. Seymour, 344 F.3d 265, 270 (2d Cir. 2003).
[70] *Id.* at 269.
[71] *See* Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 135 (1st Cir. 2006).
[72] *Id.* at 137.
[73] *Id.* at 140.
[74] *Id.* at 143.
[75] H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921, 1990 WL 258818.
[76] *Id.*
[77] *Id.* at 6915-16.

B. Infringements

If a work of art does fall within the narrow scope of eligibility for VARA, the artist can receive some moral rights protection for the work. This protection, though, is restricted in its reach. The federal statute amended the Copyright Act, but copyright registration is not a requirement for filing a VARA claim.[78] Rights under VARA exist independently of any copyright in a work of art.[79] However, both copyright and statutory requirements must be met in order to collect damages under VARA. For reference, a claim for VARA relief was unsuccessful in *Kelley v. Chicago Park District* because an artist's wildflower garden located in a city park did not meet requirements under copyright law. It was not adequately fixated or attributable to an author, since natural forces were largely responsible for its appearance.[80]

Generally, moral rights are classified by four unique rights: attribution, integrity, withdrawal, and disclosure.[81] The right of attribution affords artists the ability to claim their work as their own and to prevent others from doing so.[82] The right of integrity allows artists to prevent the mutilation, modification, distortion (and sometimes even destruction) of their work.[83] The right of withdrawal dictates artists' ability to modify or retract a work after publication.[84] Finally, the right of disclosure enables artists to decide whether, when, and how a work will be published.[85] Countries vary as to which moral rights they affirm in their legislation. France, Germany, and Italy, for example, provide all four of these rights to authors of works that qualify for protection.[86] In the Visual Artists Rights Act, the United States specifies moral rights protection only for the rights of attribution and integrity.[87]

For the specific purposes of VARA, the right of attribution allows artists to claim rightful authorship of and recognition for their artwork.[88] Artists can also prevent their names from being attributed to another's work or to their own work that has been mutilated or modified in such a way that would cause harm to their

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[78] *Id.* at 6931-32; *see also* Carter v. Helmsley-Spear, 71 F.3d 77, 83 (2d Cir. 1995).
[79] § 106A(a).
[80] Kelley v. Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011).
[81] Cynthia Esworthy, *A Guide to the Visual Artists Rights Act*, NEA OFFICE OF GEN. COUNSEL, WASHINGTON AND LEE LAW SCHOOL, http://www.law.harvard.edu/faculty/martin/art_law/esworthy.htm.
[82] *Id.*
[83] § 106A(a)(2).
[84] Esworthy, *supra* note 81.
[85] *Id.*
[86] JEAN-MATHIEU BERTHO & AURÉLIE ROBERT, COPYRIGHT LITIGATION IN FRANCE: OVERVIEW, Thomas Reuters Practical Law (database updated Oct. 2018); 2 VALERIA FALCE ET AL., INT'L COPYRIGHT LAW AND PRACTICE ITA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 2 MICHAEL GRUENBERGER & ADOLF DIETZ, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).
[87] § 106A(a).
[88] § 106A(a)(1)(A).

character or reputation.[89] Once an author exercises the right of attribution, another's failure to mention the author's name in relation to his or her work may give rise to an infringement of the right.[90] Copyright laws in France, Germany, and Italy include similar terms but additionally specify that an author can publish a work anonymously or by using a pseudonym of the author's choice.[91]

The right of integrity under VARA permits visual artists to prohibit intentional defacement, distortion, or modification of their work when doing so would damage their artistic identity, even after transferring title to the art.[92] However, artists can only prevent destruction of works of "recognized stature."[93] Whether a piece of art achieves this stature depends generally on its artistic quality and recognition by a relevant artistic community.[94] Any "intentional or grossly negligent destruction" of this type of work violates the author's right.[95]

French law recognizes the right of integrity as "the right to respect for [the author's] name, his authorship, and his work."[96] French authors or artists can assert this right without proving that their honor or reputation would be prejudiced, nor must they justify their reasons for preventing an act they believe would prejudice them.[97] Accordingly, "French law specifically seeks to preclude the public, third parties, or the courts from substituting their choices or value judgments for the author's concerning whether modifications of his work might be fitting."[98] German law, on the other hand, requires the author to show some harm or threat to his or her interests,[99] but the German Copyright Act recognizes these interests not just in terms of the author's honor and reputation, but also in terms of the author's other intellectual or personal interests in a work.[100]

VARA also provides limiting guidelines addressing situations in which an artist's work is incorporated into a building. Even if artwork incorporated in a part of a building cannot be removed from the building without "destruction, distortion, mutilation, or other modification of the work," no rights under VARA apply if the artist consented to the work's installation either before VARA's effective date or in a writing signed by the building owner specifying that the installation may

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[89] § 106A(a)(1)(B).
[90] *Id.*
[91] 1 PASCAL KAMINA ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 2 INT'L COPYRIGHT LAW AND PRACTICE GER, *supra* note 85; 2 INT'L COPYRIGHT LAW AND PRACTICE ITA, *supra* note 86.
[92] § 106A(a)(3)(A).
[93] § 106A(a)(3)(B).
[94] Castillo v. G&M Realty L.P., 950 F.3d 155, 166 (2d Cir. 2020).
[95] § 106A(a)(3)(B).
[96] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L121-1 (Fr.), *translated in* INTELLECTUAL PROPERTY CODE (WIPO 2003).
[97] 1 PASCAL KAMINA ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).
[98] *Id.*
[99] 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).
[100] *Id.*

subject the work to harm upon removal.[101] If a property owner seeks removal of art from a building when doing so can occur without damage or modification, an artist's moral rights prevail; however, the statute also lists two possible exceptions to this VARA protection.[102] The first exception prevents VARA protection if "the owner has made a diligent, good faith attempt without success to notify the author of the owner's intended action affecting the work of visual art."[103] The second exception also denies VARA security if "the owner did provide such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal."[104]

In terms of the duration of rights under the Visual Artists Rights Act, protection for most works lasts only as long as the life of the artist.[105] If more than one artist created a work, the rights withstand as long as the life of the last surviving author.[106] VARA rights cannot be transferred to another person, but they can be waived in general in a written instrument signed by the author.[107] In contrast, French and Italian moral rights are perpetual.[108] Upon an author's death, the rights of attribution and integrity are transferred to the author's heirs or descendants, who can then exercise the rights without time limitation, even after the work falls into the public domain.[109] Moral rights are not perpetual in Germany, but they do not expire until seventy years after the death of the author or the last surviving coauthor.[110]

Compared to foreign legislation, protection of moral rights in the United States is limited in scope, length, and application. While relevant provisions in French law, which are often referenced as affording incredibly liberal security to moral rights, may not fit well in the United States legal system, a happy medium between the systems would provide more satisfactory protection for deserving artists and authors.

C. Resolutions for Infringement

Upon sufficiently establishing a violation of the Visual Artists Rights Act, an injured party can recover either actual or statutory damages.[111] Ordinarily, statutory damages range from $750 to $30,000 per work, unless the injured party

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[101] 17 U.S.C. § 113(d)(1)(A)-(B) (2020).
[102] § 113(d)(2).
[103] § 113(d)(2)(A).
[104] § 113(d)(2)(B).
[105] H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 1990 WL 258818.
[106] § 106A(d)(3).
[107] § 106A(e)(1).
[108] 2 VALERIA FALCE ET AL., *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE ITA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019); 1 PASCAL KAMINA ET AL., INT'L COPYRIGHT LAW AND PRACTICE FRA § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).
[109] *Id.*
[110] 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).
[111] § 504(a)(1)-(2).

proves a violation was "willful."[112] In the case of a willful violation, the statute authorizes statutory damages up to $150,000 per work.[113]

Foreign laws also specify possible damages for moral rights infringements. German law even provides that anyone who negligently or intentionally invades another's moral rights must compensate the injured party "for the prejudice suffered as a result of the infringement."[114] The calculation of damages may be influenced by profits gained by the infringer as a result of the violation or "the amount the infringer would have had to pay in equitable remuneration if the infringer had requested authorisation to use the right infringed."[115] Certain rightsholders may also receive compensation for non-pecuniary damages to the extent that is equitable.[116] German law additionally specifies potential criminal penalties of up to three years' imprisonment or a fine for infringing upon, or attempting to infringe upon, an artist's right of attribution.[117] The same punishment is available for any distribution, communication, adaptation, or reproduction of a work without permission of the author.[118]

In France, an infringer may be charged with a criminal offense of up to three years' imprisonment or a fine up to €300,000 ($353,700).[119] An organized group guilty of a violation is subject to five years' imprisonment or a maximum €500,000 ($592,120) fine.[120] Additional sanctions are also possible in the presence of aggravating circumstances.[121] Further, in Italy, an intentional infringement of the right of authorship or integrity is punishable by up to a year in prison or a fine of not less than 1,000,000 lire ($1,363,077).[122] If such a violation was negligent, only a fine of up to 2,000,000 lire ($2,726,154) may be imposed.[123]

Regardless of the amount of monetary compensation available internationally, the potential for criminal sanctions in these countries indicates the significant value they attribute to moral rights. Imposing criminal punishment for these infringements may not be realistically possible in the United States due to our historic propensity to limit legal protection of creative works, but the importance of moral rights and the variety of benefits of the creation of artwork in

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[112] § 504(c)(1), (2).
[113] § 504(c)(2).
[114] URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND RELATED RIGHTS] Sept. 9, 1965, BGBL I at 1273, § 97(1) (Ger.).
[115] *Id.* § 97(2).
[116] *Id.*
[117] *Id.* § 107(1).
[118] *Id.* § 106(1).
[119] CODE DE LA PROPRIETE INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROP. CODE] art. L335-2 (Fr.), *translated in* INTELLECTUAL PROPERTY CODE (WIPO 2003).
[120] *Id.*
[121] JEAN-MATHIEU BERTHO & AURÉLIE ROBERT, *supra* note 86, COPYRIGHT LITIGATION IN FRANCE: OVERVIEW, Thomas Reuters Practical Law (database updated Oct. 2018).
[122] LEGGE 22 aprile 1941, n.633, art. 171 (It.).
[123] *Id.* at art. 172.

general nevertheless calls for greater protection.

III. *CASTILLO v. G&M REALTY L.P.*

Castillo v. G&M Realty L.P. marks the first time an artist or group of artists has attempted to state a claim under the Visual Artists Rights Act for works of aerosol art or, more specifically, graffiti art.[124] The 5Pointz artists specifically asserted violations of their moral rights to the integrity of their work. The case eventually made its way to the United States Court of Appeals for the Second Circuit but not before encountering several obstacles.

A. Procedural History

The legal history of 5Pointz began in 2013.[125] After being denied a petition for the site to be designated as a landmark, seventeen graffiti artists filed suit under VARA to prevent its destruction.[126] The artists sought a preliminary injunction to prevent property owner Gerald Wolkoff from tearing down the buildings to erect two luxury apartment buildings in their place.[127]

Less than a month later, the court issued a minute order that denied the preliminary injunction and indicated that a full written opinion from Judge Frederic Block would soon be released.[128] The opinion followed just eight days later, but, within this short time, Wolkoff denied the artists access to the site and ordered the whitewashing of the art—without formally notifying the artists.[129] The evidence suggests that Wolkoff knew at the time that VARA would have otherwise required him to give 90 days' notice to the artists to salvage some of the work that the court previously deemed removable.[130]

However, because Judge Block's opinion indicated the potential for significant monetary damages if a trial court were to determine that the artwork achieved recognized stature under VARA,[131] the artists amended their complaint in 2014.[132] Accordingly, they alleged that their work achieved such recognized stature and that Wolkoff's whitewashing qualified as a willful violation of their statutory rights.[133] In 2015, ten other artists filed a separate lawsuit against Wolkoff and consolidated both claims into *Castillo*.[134]

Ultimately, the district court held that the art possessed recognized

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[124] *See* Castillo v. G&M Realty L.P., 950 F.3d 155 (2d Cir. 2020).
[125] *See generally* Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212 (E.D.N.Y. 2013).
[126] Plaintiffs' Memorandum of Law in Support of Their Motion for a Temp. Restraining Order & Preliminary Injunction, Cohen v. G&M Realty L.P., No. 13-5612 (E.D.N.Y. Oct. 10, 2013).
[127] *Id.*
[128] *Cohen*, 988 F. Supp. 2d at 214.
[129] *Castillo,* 950 F.3d at 163.
[130] *Id.* at 164; *see also* § 113(d)(2)(B).
[131] *Cohen*, 988 F. Supp. 2d at 226.
[132] Second Amended Complaint, Cohen v. G&M Realty L.P., No. 13-5612 (E.D.N.Y. June 17, 2014).
[133] *Id.*
[134] *See* Complaint, Castillo v. G&M Realty L.P., No. 15-3230 (E.D.N.Y. June 3, 2015).

stature.[135] The court relied heavily upon expert testimony in favor of the quality and recognition of the 5Pointz art, along with testimony explaining the prominence of graffiti in the art world.[136] It even noted that VARA defends temporary art from destruction.[137] Additionally, the court found that Wolkoff intentionally demolished the 5Pointz art.[138] Though the district court found actual damages to be inadequate under the circumstances, it did analyze statutory damages for the infringement.[139] It awarded $6.75 million—the maximum amount of statutory damages allowed by VARA—for the demolished work.[140]

Wolkoff and his company, G&M Realty, then appealed the judgment,[141] and in February 2020, the United States Court of Appeals for the Second Circuit upheld, for the first time, that the work of an exterior aerosol artist is deserving of legal protection.[142]

B. Analysis and Holding of the United States Court of Appeals for the Second Circuit

After reviewing the lower court's decision, the Court of Appeals affirmed the judgment.[143] Wolkoff contested the district court's conclusion that the graffiti art at 5Pointz, some of which was inherently temporary, achieved "recognized stature."[144] Yet, no provision in VARA explicitly prohibits temporary artwork from reaching this stature, and Wolkoff's own expert witness testified that a work's temporary nature does not preclude it from achieving "recognized stature."[145]

The United States Court of Appeals for the Second Circuit also acknowledged the emergence of street art as a valuable and culturally significant form of contemporary art, specifically referencing the work of famous street artist Banksy[146] as such that would be considered of "recognized stature."[147] For these reasons, along with expert testimony attesting to the high artistic quality of the 5Pointz art, the court upheld the district court's decision to acknowledge the

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[135] *Castillo*, 950 F.3d at 170.
[136] *Cohen*, 988 F. Supp. 2d at 221-22.
[137] *Id.* at 226.
[138] Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 428 (E.D.N.Y. 2018).
[139] *Id.* at 445. "When determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer's state of mind, (2) the expenses saved, and profits earned, by the infringer, (3) the revenue lost by the copyright holder, (4) the deterrent effect on the infringer and third parties, (5) the infringer's cooperation in providing evidence concerning the value of the infringing material, and (6) the conduct and attitude of the parties." § 504(c).
[140] *Cohen*, 320 F. Supp. 3d at 447.
[141] Castillo v. G&M Realty L.P., 950 F.3d 155, 162 (2d Cir. 2020).
[142] *Id.* at 164.
[143] *Id.*
[144] *Id.* at 167.
[145] *Id.*
[146] *See* Will Ellsworth-Jones, *The Story Behind Banksy*, SMITHSONIAN MAGAZINE (Feb. 2013), https://www.smithsonianmag.com/arts-culture/the-story-behind-banksy-4310304/ (detailing the anonymous British graffiti artist's famed career leading to his *Time* magazine selection for one of the world's 100 most influential people in 2010).
[147] *Castillo*, 950 F.3d at 167-68.

5Pointz graffiti art as attaining "recognized stature."[148]

Wolkoff's deliberate behavior was also crucial in determining the outcome of this conflict. Solely because his actions constituted a willful violation of VARA, both the district and appellate courts imposed additional statutory damages against Wolkoff.[149] He gave conflicting, untrue statements in his affidavit and testimony regarding the necessary start date for demolition of the building.[150] Then, having no sincere business reason to do so, he whitewashed the art from the site in an "act of pure pique and revenge."[151] The district court further elaborated on Wolkoff's state of mind, noting that as an experienced real estate developer, he showed a willingness "to run the risk of being held liable for substantial statutory damages rather than to jeopardize his multimillion-dollar luxury condo project."[152] The damages accumulated to a maximum amount of $6.75 million and served simultaneously as compensation for the loss of distinguished artwork and deterrence against an intentional infringement upon artists' rights.[153]

IV. CONCLUSION

Castillo highlights much of the controversy that has developed throughout the existence of the Visual Artists Rights Act. The original purpose of the statute was to expand moral rights protection in the United States,[154] but VARA's excessive limitations have impeded its ability to truly achieve that goal.

Most notably, *Castillo* demands an expansion of the definition of a "work of visual art" under VARA. Judge Barrington Parker recognized graffiti not just as a rising form of contemporary art, but also as a type of "high art."[155] Though not specifically enumerated in the statute as a "work of visual art," graffiti art surpassed VARA's limitations and loopholes in *Castillo* and earned the protection it deserves. Yet, the rarity of this case invites inquiry into other impressive and impactful works of art that could have been destroyed or damaged without reparation because of VARA's exclusivity. In order to avoid future denial of protection to such artwork, VARA's definition of a "work of visual art" should be amended to more closely mirror the statutory language of international legislation. The Italian Copyright Act, for example, affords moral rights to artists of "works of sculpture, painting, drawing, engraving and similar figurative arts, including scenic art."[156] This language leaves more adequate space for protection of works that do not fit within the narrowest characterization of art.

To accompany a broader definition of visual art, extension of the duration of rights under VARA would also allow for more sufficient moral rights protection.

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[148] *Id.* at 167-69.
[149] *Id.* at 162.
[150] *Id.* at 164.
[151] *Id.* at 172.
[152] *Id.*
[153] *Id.*
[154] *See* H.R. REP. NO. 101-514 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 1990 WL 258818.
[155] *Castillo*, 950 F.3d at 167.
[156] LEGGE 22 aprile 1941, n.633, art. 2 (It.).

In the United States, Congress touted the "special societal need"[157] for the works of art protected by the statute, but it failed to allow protection for longer than the life of the artist. Without changing the law so far as to afford perpetual moral rights, like in Italy or France, VARA should be amended to allow protection to last for a defined number of years after the artist's death—perhaps seventy years, as is the law in Germany.[158]

Both the Visual Artists Rights Act and *Castillo* have evoked intense reactions—such as triumph, pride, disdain, and even outright disgust—from a variety of people and communities.[159] The art community has celebrated the *Castillo* decision and its enforcement of VARA. Conversely, a large part of the legal community in the United States has scrutinized the United States Court of Appeals for the Second Circuit for its holding. Much of their contention stems from traditional United States legal principles honoring contracts and property law.[160] Outside of the legal community, the Daily News Editorial Board, labeling the art as "vandalism that would otherwise be illegal," even called the decision "a frontal assault on property rights."[161] However, VARA explicitly provides provisions balancing—not exclusively honoring—the artists' rights with those of a property owner.[162] Only because of Wolkoff's impudence in prematurely whitewashing 5Pointz were the artists able to receive $6.75 million in damages.[163]

Awareness and understanding of adequate moral rights protection under VARA are even more imperative in light of recent events. On July 20, 2020, Wolkoff's counsel filed a writ of certiorari to the Supreme Court of the United States.[164] In their attempt to invalidate *Castillo*, they suggested that Congress never had the power to enact the Visual Artists Rights Act, claiming that moral rights fail to serve the following copyright objectives: (1) rewarding copyright owners any rightful financial compensation for their work, and (2) encouraging the creation or dissemination of useful art.[165] Perhaps less obvious to those engulfed in highly technical legal research and analysis, though, many types of art actually have a profound impact on our society.[166] Even after its destruction, 5Pointz has

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[157] H.R. REP. NO. 101-514 at 6915.

[158] 2 MICHAEL GRUENBERGER & ADOLF DIETZ, *supra* note 86, INT'L COPYRIGHT LAW AND PRACTICE GER § 7 (Paul Edward Geller Int'l Copyright Law and Practice ed., Matthew Bender & Company, Inc. 31st ed. 2019).

[159] *See* Louise Carron, *Case Review of the 5Pointz Appeal: Castillo et al. v. G&M Realty L.P. (2020)*, CENTER FOR ART LAW, https://itsartlaw.org/2020/03/02/case-review-castillo-et-al-v-gm-realty-l-p/ (Mar. 2, 2020); Daily News Editorial Board, *Paint That a Shame: The Crazy Precedent Set by a 5Pointz Appeals Ruling,* DAILY NEWS (Feb. 26, 2020), https://www.nydailynews.com/opinion/ny-edit-graffiti-is-illegal-20200226-n6chh5ijgvahzavxkns3ymr6ny-story.html; Cathay Y.N. Smith, *Community Rights to Public Art*, 90 ST. JOHN'S L. REV. 369 (2016).

[160] *See generally* Drew Thornley, *The Visual Artists Rights Act's "Recognized Stature" Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351 (2019).

[161] *Paint That a Shame*, *supra* note 159.

[162] *See* § 113(d)(1)-(2).

[163] Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 447 (E.D.N.Y. 2018).

[164] Petition for Writ of Certiorari, Castillo v. G&M Realty, 950 F.3d 155 (2020) (No. 20-66).

[165] *Id.* at 5-6.

[166] GEOFFREY CROSSICK & PTRYCJA KASZYNSKA, UNDERSTANDING THE VALUE OF ARTS & CULTURE 1, 60, 86, 74, 103 (Arts & Humanities Research Council, 2016) (indicating a connection between civic engagement and the arts; reporting that creative industries account for 1.71 million jobs; linking art

continued to significantly affect local and outside communities.[167] Congress has explicit Constitutional power to promote the creation of such "useful" and impactful art.[168] Accordingly, artists should be able to claim and protect their art, just like any other tangible or intellectual property owner.

The writ also indicated that the difficulty of determining whether a work of art achieves "recognized stature" violates the Fifth Amendment's due process clause.[169] It claimed that the statute's absence of an explicit definition of "recognized stature" "fails to provide a person of ordinary intelligence fair notice of what is prohibited."[170] While courts have employed more than one approach to proving "recognized stature," the district court noted that the variety of exhibits and credible testimony presented by the artists proved the 5Pointz art achieved the necessary status "even under the most restrictive of evidentiary standards."[171] The petitioners' "void for vagueness" argument carries even less weight when considering the otherwise incredibly narrow nature of the statute. Currently, art must meet very specific criteria in order to even qualify as a "work of visual art," so the issue of whether a work would achieve "recognized stature" would likely not be a difficult one to solve with the help of research and expert witnesses. Perhaps Congress purposefully left the term undefined for this reason, or maybe it wanted to allow broad interpretation from courts given the restricted applicability of VARA. The petitioners failed to recognize that judicial interpretation is not, in its essence, an infringement upon the separation of powers. Thankfully, on October 5, 2020, the Supreme Court denied the petitioners' writ of certiorari.[172] Still, without any legislative action, the fight for increased moral rights protection in the United States continues.

Art of any kind, including visual art, is meant to be a fluid concept subject to different interpretations from different people with different perspectives. Though art may be difficult to quantify in any legal system, its value and impact on society, which are gifted to us by the artists themselves, justify its protection. To see the 5Pointz art and hear the words of its creators and admirers is to understand the effort, inspiration, and power behind each piece. *Castillo* and the graffiti artists involved in the case deserve to be protected by the Visual Artists Rights Act. 5Pointz is gone, but with necessary changes to VARA, the future of

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and cultural activity to economic and urban regeneration; and identifying one report of multiple clinical benefits in a hospital that integrated visual arts in its new design).

[167] Laura Hard, *5 Years Ago, Their 5Pointz Art Was Erased. Now There's a Museum for It*, N.Y. TIMES, (Sept. 16, 2018), https://www.nytimes.com/2018/09/16/nyregion/5pointz-street-art-graffiti-museum-nyc.html (referencing the Museum of Street Art now located in Lower Manhattan honoring the history and meaning of 5Pointz and showcasing work from 20 original 5Pointz artists); *see generally* Geoff Cobb, *The Tragic Death and Lasting Legacy of Five Pointz*, GREENPOINTERS (Apr. 30, 2019), https://greenpointers.com/2019/04/30/the-tragic-death-and-lasting-legacy-of-five-pointz/.

[168] U.S. CONST. art. I, § 8, cl. 8.

[169] Petition for Writ of Certiorari, *supra* note 164, at 6.

[170] *Id.*

[171] Cohen v. G&M Realty L.P., 320 F. Supp. 3d 421, 438 (E.D.N.Y. 2018).

[172] G&M Realty L.P. v. Castillo, No. 20-66, 2020 U.S. LEXIS 4495 (2d. Cir., Feb. 20, 2020), *cert. denied.*

art in the eyes of the law can be as bright as the white walls that helped secure the artists' rightful victory.

IS THE *WAYFAIR* RULING WAY-UN-FAIR FOR SMALL BUSINESSES?

Kimberly Lechowicz*

INTRODUCTION

Imagine: you own an online start-up boutique in Kansas City, Missouri. You are a local entrepreneur trying to spark business in the city for your company which sells personalized tote bags, coffee mugs, and more. Right now, the business is solely online because it is just a hobby you like to dabble in on the weekends to feed your creative side. It is not your main source of income, so you do not invest a lot of time in the accounting side of the business. When tax season comes around, you consult TurboTax to help you prepare your return. Unfortunately for you, a customer on the Kansas side of the city purchases fifteen tote bags totaling a $200 income, which translates to approximately $100 in profit. That $200 of income you made now requires you to collect and remit sales tax for the state of Kansas, regardless of your modest profit. Even if you sold just one tote bag to just one customer in Kansas, the state now has the Supreme Court decision from *South Dakota v. Wayfair* as justification to collect sales taxes from every single out-of-state and online business.[1] This additional tax burden was something you never had to worry about pre-*Wayfair*, but it now requires you to stay up to date with each state you sell products to and each of their respective tax laws. Your fun hobby has now turned into a tax nightmare in the blink of an eye.

Small businesses need to be given guidance from Congress and state governments to navigate the complex and monumental *Wayfair* decision. Without immediate action, the future of small businesses in the economy could be considerably affected by the impact of individual state taxation. This Comment explores the inadvertent and severe consequences the *Wayfair* decision currently poses to small businesses. Part I analyzes the history prior to the United States Supreme Court decision in *Wayfair* to discover what led to the drastic change. Part II introduces the effects on small businesses and the issues that have followed. Part III scrutinizes the Kansas remote tax, its detrimental effects on small businesses, and questions the constitutionality of the tax. Finally, Part IV proposes potential steps Congress and state governments can take in order to lend a helping hand to small businesses.

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[1] Michael Bowen, *After Wayfair, Is Nexus Needed for Remote Tax Obligations?*, LAW360 (Aug. 29, 2019), https://www.law360.com/articles/1193641.

I. THE HISTORY BEHIND THE *WAYFAIR* DECISION

Over the past few decades, the world has transformed its evaluation of company riches from prime brick and mortar, to clicks-per-minute. Online shopping has allowed companies like Amazon to explode the internet and become the one-stop-shop for any customer. While the amount of money consumers are spending online has been constantly increasing for decades, the ability for states to tax those companies has not.[2] In 2001, e-commerce sales accounted for only one percent of total sales.[3] By the end of 2018, it accounted for 14.4 percent of total sales.[4] Even with the sizeable increase, various Supreme Court decisions prohibited states from taxing companies unless they had a substantial nexus through physical presence in the state.[5] This disconnect between online retail purchases and state taxing powers has left states struggling to find other ways to raise funds, and ultimately there was still a significant amount of revenue lost each year.[6]

Implementing legislation that requires companies to collect sales and use tax is just one route a state can take to earn revenue on sales generated within the state.[7] Although commonly lumped together as one tax, sales tax and use tax do have significant differences.[8] A sales tax is imposed on a transaction taking place within the state from which the tax will be collected,[9] whereas a use tax applies to goods purchased outside of a state but that are subsequently transferred into the state.[10] The two taxes are designed to complement each other and work together to equally tax all purchases, whether the goods are acquired in or out of the state.[11] The use tax is intended to minimize tax evasion of the sales tax by consumers traveling out of state to make purchases to escape paying sales tax.[12] Thus, property on which sales tax has already been paid is not generally subject to a use tax, therefore avoiding double taxation.[13] An out-of-state seller's liability to collect and remit sales tax was minimal due to the physical presence needed to invoke

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[2] Nick Surma, Note, *Overturning Quill: Why Wayfair Was Correctly Decided and What Lies Ahead*, 93.N.D. L. REV. 521, 522-23 (2018).
[3] *United States Department of Commerce News*, U.S. CENSUS BUREAU (Feb. 20, 2002, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/01q4.pdf.
[4] Jessica Young, *US ecommerce sales grow 14.9% in 2019,* DIGITAL COMMERCE 360 (Feb. 19, 2020), https://www.digitalcommerce360.com/article/us-ecommerce-sales/.
[5] *See* Nat'l Bellas Hess v. Dep't of Revenue, 87 S. Ct. 1389, 1392 (1967).; Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1907 (1992).
[6] Young, *supra* note 4.
[7] *See State and Local Revenues,* URBAN INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-revenues.
[8] 67B Am. Jur. 2d, *Sales and Use Taxes* § 1 (2020).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 67B Am. Jur. 2d *Sales and Use Taxes* § 135 (2020).
[13] *Id.*

"substantial nexus."[14] Companies must have more than just communications with customers in that state to claim substantial nexus.[15] There must be a physical presence, such as an employee, goods, or an office, in order to collect sales tax.[16] Due to the states' lack of ability to regulate the collection of sales tax, the states placed the burden on the customers.[17] States like Connecticut would make taxpayers sift through boxes of old receipts to find all their out-of-state purchases that did not already collect sales tax.[18] Despite the effort, only 1.6 percent of people would report and actually pay that tax, preventing the states from collecting millions of dollars of revenue.[19] Even though such a significant percentage of people did not pay their sales tax, the cost for the state to take legal action would outweigh the potential tax collection.[20] This left the states immobilized and in desperate need of a sales tax reform.[21]

Reform came when *Wayfair* completely tore down the "physical" wall that was stopping states from obtaining more taxing power and opened the door to millions of dollars in sales on which to collect sale taxes.[22] Companies will now have a difficult time claiming no substantial nexus in a state where they sold millions of dollars to residents solely online.[23] *Wayfair* eliminated the outdated belief that in order for a company to have substantial nexus, there must be a physical connection in the state.[24] With the ability to connect customers from New York to a retailer in California just by the click of a button, the Supreme Court realized that a company can easily obtain substantial nexus even without a physical presence.[25]

The *Wayfair* decision radically overturned the sales and use tax system that was set in stone for decades before.[26] The buildup to this monumental change came from years of development in the technology and retail industries allowing consumers to purchase items completely online from out-of-state stores and the extensive interconnected economy.[27] The ease of purchasing items online has

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[14] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087-88 (2018).
[15] Nat'l Bellas Hess v. Dep't of Revenue*,* 87 S. Ct. 1389, 1392 (1967).
[16] *See id.* at 1390.
[17] Chana Joffe-Walt, *Most People Are Supposed to Pay this Tax. Almost Nobody Actually Pays It.*, PLANET MONEY: NPR (Apr. 16, 2013, 3:55AM), https://www.npr.org/sections/money/2013/04/16/177384487/most-people-are-supposed-to-pay-this-tax.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *See* Surma, *supra* note 2, at 523.
[22] *Id.*
[23] *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).
[24] *Id.* at 2093.
[25] *See generally id.*
[26] *See generally id*.; Charles L. Merriweather & John T.M. Whiteman, *Missouri's Taxation of Remote Sellers in a Post-Wayfair World,* 58 WASH. U. J.L. & POL'Y 95, 95 (2019).
[27] Claire Shook, Comment, *Physical Presence Is In No Wayfair!: Addressing the Supreme Court's Removal of the Physical Presence Rule and the Need for Congressional Action*, 124 DICK. L. REV.

moved far past a "fad" and into the new social norm with online sales reaching over $513 billion in 2018.[28] With online sales reaching this considerable amount, the question became: How do states fairly tax those purchases?

When the United States Constitution was adopted, it granted the federal government the authority to "lay and collect taxes."[29] Even though the federal government received the express authority to collect taxes, the states have always been perceived to have an implicit ability to do so as well.[30] The former thirteen colonies had that power before the ratification of the United States Constitution; thus, the taxing power of the states has rarely come into question.[31] The Due Process Clause of the Fourteenth Amendment and the Commerce Clause guide and restrict the power of taxation of the states.[32] Both limit the power of states to impose and collect tax.[33]

Within the context of taxation, the Due Process Clause of the Fourteenth Amendment requires minimum contact between the state and the business, person, property, or transaction from which it is attempting to collect tax payments.[34] The Commerce Clause, on the other hand, allows Congress to regulate commerce among the states.[35] However, the Commerce Clause forbids state governments from interfering with interstate commerce by discriminating against or creating excessive burdens from out-of-state retailers.[36]

National Bellas Hess, Inc. ("National"), a mail-order business incorporated in Delaware, questioned the authority of states to collect taxes utilizing both the Commerce Clause and the Due Process Clause as a defense.[37] The state of Illinois was requiring National to collect sales tax from its in-state sales despite having no place of business, no representatives, and owning no property within the state.[38] The only interaction within the state was with the United States mail or common carrier when orders were delivered, or when bi-yearly catalogues were mailed to the company's customers.[39] Illinois determined that any retailer that "engaged in soliciting orders within the State from users by means of catalogues or other advertising" was sufficiently connected to the state

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227, 242-43.

[28] *U.S. Census Bureau News,* U.S. DEP'T OF COM. (Mar. 13, 2019, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/18q4.pdf.

[29] U.S. CONST. art. I, § 8, cl. 1.

[30] *State and Local Taxes,* U.S. DEP'T OF TREASURY (Dec. 5, 2010, 10:24 AM), https://www.treasury.gov/resource-center/faqs/Taxes/Pages/state-local.aspx.

[31] *Id.*

[32] J. Scott Rosenbach, Comment, *Ding Dong Quill is Dead: How South Dakota v Wayfair Alters the Substantial Nexus Test Under* Complete Auto, 97 DENV. L. REV. 261, 265 (2019).

[33] *See id.*

[34] Legality of Notice 19-04, Op. Att'y Gen. Derek Schmidt 2019-8 (2019).

[35] Aidan V. Nuttall, Note, *South Dakota v. Wayfair: Erasing a Dull Bright-Line*, 51 LOY. U. CHI. L.J. 623, 629 (2019).

[36] Legality of Notice 19-04, *supra* note 34.

[37] Nat'l Bellas Hess v. Dep't of Revenue*,* 87 S. Ct. 1389, 1391 (1967).

[38] *Id.* at 1390.

[39] *See id.*

to be classified as a retailer maintaining a place of business in this state.[40] Therefore, by Illinois's determination, National undoubtedly met the standard to collect sales taxes by soliciting orders from residents.[41] National argued that the liability that Illinois is thrusting upon these companies violates the Due Process Clause of the Fourteenth Amendment and creates an unconstitutional burden upon interstate commerce.[42]

National's lack of physical presence in the state was fundamental to the Court's decision.[43] If this tax were upheld, it would have allowed every state, municipality, political subdivision, and school district throughout the nation to impose sales and use taxes on out-of-state sellers with no physical connection to the state.[44] The variations in tax rates, exemptions, and administration and record-keeping requirements would burden the nation's interstate commerce by making it difficult for companies to comply.[45] The fear of that excess burden was a main reason why the Court determined that this state tax was not justified and was a violation of the Due Process Clause.[46] The Court indicated that the question that needs to be asked is whether the state has given anything to a company for which it can legally ask for tax payment in return.[47] In this case, there was no legitimate claim to impose a fair share of the cost of the local government through taxes on this company.[48] The Commerce Clause ensures that the national economy remains free from such unjustifiable local entanglements that would burden interstate commerce.[49] As such, the enacted Illinois sales tax requirement was struck down because it violated both clauses by the lack of connection the company had with the state.[50]

This tax issue has been debated since the 1960s, beginning with *National Bellas Hess, Inc.*[51] Even back in 1967, when the case was being decided, there were dissenters that disagreed with the physical presence requirement to obtain substantial nexus.[52] Justice Fortas argued in his dissent that this "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus'" to require the collecting and remittance of the use tax.[53] Businesses are soliciting consumers who live and work in Illinois, who otherwise could have purchased locally and paid the sales tax to support their

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[40] *Id*
[41] *Id.*
[42] *Id.* at 1391.
[43] *See id.* at 1390-92.
[44] *See generally id.* at 1392-93.
[45] *Id.* at 1393.
[46] *Id.*
[47] *See id.* at 1391.
[48] *Id.*
[49] *Id.* at 1393.
[50] *Id.*
[51] *Id.* at 1393-96 (Fortas, J., dissenting).
[52] *Id.*
[53] *Id.* at 1394.

state.[54] Instead, these restrictions are encouraging consumers to evade paying sales taxes simply by mailing an order form and purchasing from out-of-state sellers.[55] The "burden" of entangling the economy with this additional requirement for out-of-state sellers is no more than the burden on local businesses.[56] Surprisingly, until the 2018 *Wayfair* decision, the dissenting opinion continued to be the minority opinion.[57]

Decades later, the United States Supreme Court was given the opportunity to reevaluate almost the exact same issue as *National Bellas Hess* in *Quill Corp. v. North Dakota*.[58] "Quill Corp. ("Quill") was a Delaware corporation with offices and warehouses in Illinois, California, and Georgia."[59] The company had no employees that worked or resided in North Dakota, nor did the company have any tangible property in the state.[60] Similar to National, Quill used the mail and common carriers to solicit business through catalogs and delivery orders.[61] North Dakota defined a "retailer" to include "every person who engages in regular or systematic solicitation of a consumer market in the state."[62] In North Dakota's view, Quill was a retailer that was subject to its sales tax even though they had no property or personnel located in the state.[63] Nevertheless, even after a thought-provoking dissenting opinion by Justice Fortas in *National Bellas Hess*, the Court ultimately decided to uphold the prior ruling and strike down North Dakota's regulation.[64]

Even though the Court was still adhering to the decision from *National Bellas Hess, Quill* continued building off of Justice Fortas's dissenting opinion in *National Bellas Hess* and started paving a way for the *Wayfair* decision.[65] The opinion highlighted the difference in a state's taxation ability under the Due Process Clause and the Commerce Clause,[66] a significant change from *National Bellas Hess*, which used the strict analysis of physical presence and substantial nexus.[67]

In *Quill*, the Court determined that under the Due Process Clause, an out-of-state seller could have "minimum contacts" with a state, and yet lack the "substantial nexus" required by the Commerce Clause.[68] The Due Process Clause

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[54] *Id.*
[55] *Id.* at 1394-96.
[56] *Id.* at 1396.
[57] *Id.* at 1394-96 (Fortas, J., dissenting)*;* Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).
[58] *Quill Corp.*, 112 S. Ct. at 1907.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 1907-08.
[62] *Id.* at 1908 (citing N.D. Cent. Code § 57-40.2-01(6)).
[63] *Id.*
[64] *Id.* at 1916.
[65] *See generally id.* at 1908-15.
[66] Surma, *supra* note 2, at 527.
[67] *Id.* at 525.
[68] *Id.* at 528.

does not bar enforcement of the state's sales tax if a company purposefully directed its activities to a state's residents, the magnitude of those contacts is more than sufficient for due process purposes, and the sales tax is related to the benefits the business received from the state.[69] This distinction eased the requirement of the Due Process Clause for states from the prior rule acquired from *National Bellas Hess*.[70] The Court recognized that due process jurisprudence has evolved substantially since *National Bellas Hess* and now focuses on whether a party has minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.[71] The Court is now less concerned with requiring physical presence and more on the reasonable requirement that the company could defend a suit in that state.[72]

Still, the court in *Quill* maintained the four-part test for the Commerce Clause, which upholds a tax "so long, as the tax is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[73] This bright-line rule of substantial nexus and physical presence was still very much alive and the majority's view even after *Quill,* but it was still generating controversy like it has been for decades.[74]

Justice Kennedy became the first to call out the flaws in the physical presence rule in his concurring opinion in *Direct Marketing Association v. Brohl*.[75] This case did not call into question the constitutionality of a state requiring companies to collect use tax, like *National Bellas Hess* and *Quill*.[76] Rather, the crux of the matter was whether Colorado's statute could require companies that did not collect sales tax to notify in-state customers of their tax liability.[77] Nonetheless, Justice Kennedy recognized the bigger picture of the "injustice faced by Colorado and many other states."[78] His concurrence emphasized that *Quill* was concluded on stare decisis alone, but that the majority understood that their conclusion was wrong and was now inflicting extreme harm and unfairness on states.[79] This concurrence highlighted the expansion and connection of the web to bring consumers and retailers together.[80] Justice Kennedy pointed out that "a business may be present in a state in a meaningful way without that presence being

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[69] *See Quill Corp.*, 112 S. Ct. at 1908-11.
[70] *See generally id.* at 1909-11.
[71] *Id.* at 1910 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339 (1949))).
[72] *Id.*
[73] Complete Auto Transit, Inc. v. Brady, 97 S. Ct. 1076, 1079 (1977).
[74] *See generally Quill Corp.,* 112 S. Ct. at 1916-22.
[75] *See* Direct Mktg. Ass'n v. Brohl*,* 135 S. Ct. 1124, 1134-36 (2015) (Kennedy, J., concurring).
[76] *See id.*
[77] *See id.* at 1125-26.
[78] *Id.* at 1134 (Kennedy, J., concurring).
[79] *Id.*
[80] *Id.* at 1135.

physical in the traditional sense of the term."[81] This concurrence became the final building block the states needed to get to the *Wayfair* decision. After the opinion was published, numerous states enacted statutes that attempted to collect sales taxes from sellers that had no physical presence in hopes that these statutes would be held constitutional by the Court if challenged.[82]

South Dakota was one of the states that enacted new legislation based off of the *Quill* concurrence.[83] South Dakota enacted an act "to provide for the collection of sales taxes from certain remote sellers" who deliver more than $100,000 of goods or services into the state or engage in 200 or more separate transactions for the delivery of goods or services within a single tax year.[84] The act banned retroactively applying the new regulation until its constitutionality was determined by the Court.[85] Following this enactment, South Dakota commenced a civil action against three large corporations, including Wayfair, Inc., for unpaid sales taxes.[86]

Wayfair was a merchant with no employees or property in South Dakota, similar to the situation of *National* and *Quill*.[87] Once again, the issue presented to the Court was: "[A]re out-of-state retailers required to abide by state taxing laws that force them to collect sales tax?"[88] South Dakota accepted Justice Kennedy's invitation to try to overturn the holding from *Quill*.[89]

The state argued that the "*Quill* rule [was] at war with its own ends; it undermines rather than advances the economic union the dormant commerce clause is meant to promote" by encouraging companies to centralize in one state rather than investing in jobs and infrastructure in other states.[90] It burdens interstate commerce from its own restrictions by unfairly harming local brick-and-mortar businesses.[91] Wayfair rebutted this claim, stating it "would be detrimental to small businesses and startup companies" to force them to "comply with the thousands of state and local tax jurisdictions throughout the United States."[92]

Even with the additional compliance costs, the reality is that the physical presence rule becomes further removed from economic reality as the online economy becomes increasingly vast and interconnected year after year.[93] Placing the burden only on companies that have a physical presence in a state creates a

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[81] *Id.* at 1134-36.
[82] Surma, *supra* note 2, at 537.
[83] *See* S. 106, 2016 Legis. Assemb., 91st Sess. (S.D. 2016).
[84] *Id.*
[85] *Id.*
[86] Surma, *supra* note 2, at 538.
[87] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087-89 (2018).
[88] *See id.*
[89] *See* Kole M. Brinegar, *Finding the Way: Substantial Nexus After Wayfair*, 53 IND. L. REV. 163, 171 (2020); *see also Wayfair,* 138 S. Ct. at 2084-90.
[90] Surma, *supra* note 2, at 539-40.
[91] *Id.* at 539.
[92] *Id.* at 540.
[93] *See Wayfair*, 138 S. Ct. at 2092.

disproportional advantage to remote retailers.[94] It generates a competitive benefit to these remote retailers by creating a tax shelter for their business solely because they decided to sell their products remotely, something that has become easier as technology has advanced.[95] The Commerce Clause was simply not intended to relieve those engaged in interstate commerce from their share of state tax burden, a consideration that was convincing enough for the Court to overturn *Quill* and decades of previous rulings.[96]

Since *Wayfair* was decided in April 2018, the number of states that require remote sellers to collect and remit sales taxes based on economic nexus has more than doubled, now totaling forty-three states plus the District of Columbia.[97] States are allocated the funding they have long waited for, and companies are now forced to pay their fair share of taxes.[98] Unfortunately for small businesses, Wayfair's argument that overturning *Quill* would be detrimental to their growth had some merit.

II. THE DAMAGING CONSEQUENCES ON SMALL BUSINESSES

It did not take long for small businesses to feel the detrimental effect of the *Wayfair* decision. Just two years after the decision, Halstead Bead Company, owned by Brad and Hillary Scott, is already facing a business's scariest question: should we close our doors permanently due to the repercussions from the *Wayfair* decision?[99] Over forty-five state governments are pursuing claims against the company that has only thirty-two employees.[100] Halstead is physically located in Arizona, but sells its beads all over the country to vendors who buy raw materials to turn their beads into fashion jewelry to sell to customers.[101] Roughly fifteen percent of Halstead's sales are actually taxable, "but [the company] must produce a copy of the vendors' resale exemption certificate should an auditor come to call."[102]

Now, because of the *Wayfair* decision, Halstead is forced to increase spending on tax compliance costs on the fifteen percent of sales that are taxable.[103]

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[94] *Id.*
[95] *Id.* at 2094.
[96] *Id.*
[97] Michael Cohn, *Cities, Counties and Districts Add Sales Tax Laws after* Wayfair, ACCOUNTINGTODAY (Mar. 09, 2020, 1:16 PM), https://www.accountingtoday.com/news/more-states-enacting-online-sales-tax-nexus-laws-after-wayfair-decision.
[98] *See Wayfair* 138 S. Ct. at 2100 (Gorsuch, J. concurring).
[99] Tripp Baltz, *A Retailer's Struggle to Survive a Post-Wayfair Sales Tax World*, BLOOMBERG (Oct. 24, 2019, 1:43 P.M.), https://www.bloomberglaw.com/product/tax/document/X1IBVMG8000000?bna_news_filter=daily-tax-report-state&jcsearch.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*

Otherwise it could incur thousands of dollars in penalties if the company does not comply.[104] Currently, it is estimated that Halstead has spent nearly $162,000 on compliance costs to collect less than $68,000 in taxes for the states.[105] This company is spending $2.39 in compliance costs for every $1.00 of revenue.[106] The disproportionality of these costs are making it difficult for companies like Halstead to remain in business by forcing their small staff to now handle monthly state notices, jurisdictional data reporting, state filings, and troubleshooting state correspondences.[107] States are threatening to put a lien on the business's property or even go as far as seizing the property.[108] It is now inevitable that Halstead's clients are absorbing these compliance costs in order for the company to remain profitable and in business.[109]

Chief Justice Roberts voiced his fear about the implications this decision would have on small businesses trying to survive the newly renovated and complex tax regulations post-*Wayfair*, stating in his dissent that "the burden will fall disproportionately on small business."[110] The Court's primary concern in *Wayfair* was to remove the physical presence rule from *Quill* to allow states to tax remote sellers as they would physical businesses.[111] The states were suffering significant budget shortfalls, estimating a loss of approximately $23.2 billion in sales tax revenue.[112] However, the Court's dismissal of small businesses was alarming, casually discharging the costs this new tax structure would inflict.[113] Unfortunately, those incurred costs will be felt predominantly by the small businesses that do not have the necessary resources, revenue, time, or funds to establish an accounting and legal team to assist with the compliance process.[114] These "small businesses must act quickly to replicate the resources more readily available to a more established multistate business or face significant penalties."[115]

Conversely, large corporations, like Wayfair, typically have the financial means to utilize their already established accounting and legal teams to navigate compliance issues. Wayfair is a leading online retailer of home goods and

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[104] *See id.*
[105] *Small-Business Owners Discuss Struggle with Wayfair Decision*, NFIB (Dec. 20, 2019), https://www.nfib.com/content/news/arizona/small-business-owners-discuss-their-real-life-horror-with-the-wayfair-decision/.
[106] *Id.*
[107] Baltz, *supra* note 99.
[108] *Id.*
[109] *Id.*
[110] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103 (2018) (Roberts, J., dissenting).
[111] *See generally* Surma, *supra* note 2, at 545-46.
[112] *Id.* at 545-46.
[113] *Wayfair*, 138 S. Ct. at 2103 (Roberts, J., dissenting).
[114] *Id.* at 2104.
[115] *South Dakota v. Wayfair, Inc.: How Main Street is Fairing and Whether Federal Intervention is Necessary: Hearing Before the United States House of Representatives Committee on Small Business Subcommittee on Economic Growth, Tax, and Capital Access*, (2020) [hereinafter *Hearings]* (statement of Jamie C. Yesnowitz, American Institute of Certified Public Accountants).

furniture.[116] In 2017, it had net revenues of over $4.7 billion.[117] Wayfair is by no means a small business. Wayfair, and similar companies, were the focus of the Court's decision, but this decision reaches far beyond these big companies.[118] The effect of this decision does not discriminate based on size; it trickles down to even the smallest companies just trying to survive.

As illustrated by Halstead's position, small businesses now have the stress of calculating additional expenses that come with economic nexus in new jurisdictions, like tax software or accountant salaries.[119] In *Wayfair*, the Court failed to set a rigorous standard in their opinion, but merely removed the previous requirement of physical presence.[120] By not implementing strict safe harbor requirements necessary to avoid creating an undue burden, the Court left it to the states to determine what is constitutional based on the acceptance and interpretation of the South Dakota rule.[121] Each state, jurisdiction, and taxing authority has to interpret the rule and make adjustments based off of their respective needs.[122]

Currently, the states are using nine different thresholds.[123] For example, California's safe harbor nexus is $500,000 in sales based on the previous calendar year's sales.[124] This safe harbor nexus provides protection for companies who do not sell $500,000 within the state of California.[125] Those companies do not need to collect and remit sales taxes until they hit that threshold.[126] Pennsylvania, on the other hand, uses a threshold of $100,000 in sales from the last twelve months.[127] Although the difference between the two states may initially seem slight, trying to recognize the discrepancies among jurisdictions and keep accurate records makes the process burdensome, especially to small businesses that never kept track of this information before *Wayfair*.

Presently, there are over 12,000 jurisdictions in the United States.[128] A company can be subject to audits from forty-five states and the District of Columbia.[129] Once again, imagine the owner of a start-up boutique in Kansas City.

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[116] *Wayfair*, 138 S. Ct. at 2089.
[117] *Id.*
[118] *See generally id.*
[119] Baltz, *supra* note 99.
[120] *See generally Wayfair*, 138 S. Ct. at 2095-100.
[121] Hasmik Hmayakyan, *Taxation in the Cyber Age: The Future of Wayfair*, 39 LOY. L.A. ENT. L. REV. 285, 304 (2018-2019).
[122] Maria Tanski-Phillips, *A Seller's Guide to Economic Nexus Laws by State*, PATRIOT (Feb. 2, 2020) https://www.patriotsoftware.com/blog/accounting/economic-nexus-laws-by-state/.
[123] *Summary of States' Wayfair and Marketplace Implementation*, BLOOMBERG TAX (July 17, 2020), https://www.bloomberglaw.com/product/tax/document/X6VGD9RS000000.
[124] Tanski-Phillips, *supra* note 122.
[125] *Id.*
[126] *See generally id.*
[127] *Id.*
[128] Elaine S. Povich, *As High Court Weighs Online Sales Taxes, States Get Ready to Pounce*, STATELINE (Mar. 13, 2018).
[129] *Id.*

How would the small businessowner keep track of each state's sales, tax regulations, reporting requirements, software needs, and implementation dates? Like Halstead Bead Company, small businesses are spending a tremendous amount of money trying to keep up with changing state tax requirements.[130] Nonetheless, states continue to enact different thresholds, or even no thresholds at all, causing more discrepancies in compliance standards from state to state.[131] In determining economic thresholds on sales, some states count only the amount of taxable sales and omit exempt sales, while others use the aggregate gross sales amount.[132] Sadly, these complex tax regulations mean it may be more beneficial for a company to stay in one state than to grow and sell to customers in other states that subject them to new and different rules.[133]

The *Wayfair* Court attempted to defend its decision despite the additional costs to small businesses by considering that "[e]ventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems."[134] The indifference and lack of concern for small businesses, giving just a mere hope that affordable software will eventually become available, is disheartening. Small businesses make up a pivotal part of the economy and additional expenses, however trivial or minor some may view them to be, are detrimental to the businesses' ability to grow and compete.[135]

Further increasing the burden, some states are requiring companies to pay back taxes in order to boost the states' bank accounts.[136] The *Wayfair* majority never explicitly stated that not requiring back taxes was a requirement for the constitutionality of the South Dakota statute.[137] This ambiguity in the majority opinion has left it to the states to construe what is and what is not constitutional to enact.[138] California required three years of back taxes, believing it was being gracious by not requiring more.[139] The unrealistic requirement for companies to sift through three years of prior sales to determine whether or not sales taxes were collected is unduly time consuming.[140] For small businesses that may have just a few employees, requiring an employee to spend a significant amount of time doing so can be detrimental to the entire business.[141]

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[130] Baltz, *supra* note 99.
[131] Roger Russell, *The* Wayfair *Burden on Small Businesses,* ACCOUNTING TODAY (Mar. 10, 2020, 4:07 PM), https://www.accountingtoday.com/news/the-wayfair-burden-on-small-businesses.
[132] *Id.*
[133] *See generally Hearings, supra* note 115 (statement of Jamie C. Yesnowitz).
[134] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).
[135] *See generally 2018 Small Business Profile,* U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY (2018), https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf.
[136] Editorial Board, *State Tax Collectors Want You,* WALL ST. J., Aug. 12, 2019.
[137] *See Wayfair*, 138 S. Ct. at 2099.
[138] *See generally id.*
[139] Editorial Board, *supra* note 136.
[140] *See generally id.*
[141] *Id.*

In addition, other states are now attempting to tax digital services, which includes any digital downloads or subscriptions.[142] Once again, a large company in this industry, similar to *Wayfair*, generally already has the legal and accounting team to prepare and plan for a change in tax. Startup businesses will be forced to shut down due to the costs of compliance before they even really get an opportunity to open their doors for business. States are interpreting the *Wayfair* decision far beyond what the Court may have envisioned because the decision lacks definitiveness.[143]

Chief Justice Roberts revealed in his dissent that the alleged mistake in *National Bellas Hess* over fifty years ago may have been an unintended factor contributing to the growth of e-commerce, and any important question of economic policy should be undertaken by Congress.[144] Congress has the ability to view current trends and determine if an abrupt policy change would have adverse consequences to the growth of the economy.[145] Congress would be able to better accommodate and investigate competing interests from the states and businesses to avoid any detrimental effects.[146] The benefit of allowing Congress to undertake this issue is that it has the power to create a minimum safe harbor threshold that states would have to follow through legislation.[147] For decades, the United States has been a hub for cultivating start-up companies that eventually become a household name.[148] "E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule."[149] However, the *Wayfair* decision may be the end of the era of hope for small start-up businesses.

III. KANSAS TAKES A BOLD STANCE, BUT IS IT CONSTITUTIONAL?

Navigating the individual state tax regulations was difficult prior to *Wayfair* and has become even more challenging since.[150] Justice Kennedy attempted to quiet the lingering concern about small businesses in his opinion in *Wayfair*, harping on the point that "South Dakota affords small merchants a reasonable degree of protection . . . requir[ing] a merchant to collect the tax only if it does a considerable amount of business in the State."[151] The safe harbor exemption allows for many small businesses to avoid paying taxes in states in

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[142] *Id.*
[143] *See* Paul Williams, *Kansas Remote Tax Policy Dares to Test Wayfair's Limits,* LAW360 (Aug. 5, 2019).
[144] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2104 (2018) (Roberts, J., dissenting).
[145] *Id.*
[146] *Id.*
[147] *See id.*
[148] *2018 Small Business Profile, supra* note 135.
[149] *Wayfair*, 138 S. Ct. at 2103 (Roberts, J., dissenting).
[150] *Hearings, supra* note 115, at 8 (statement of Jamie C. Yesnowitz).
[151] *Wayfair*, 138 S. Ct. at 2099.

which they do not have a substantial amount of business.[152] It was one of the key aspects that Justice Kennedy alluded to that the Court focused on when making its decision in the case.[153] Although Justice Kennedy did not explicitly state that a safe harbor exemption is required in order to be constitutional, without it, an undue burden may be imposed on interstate commerce, which would be unconstitutional.[154]

The Court relied on and stressed three key features of the South Dakota law: (1) a safe harbor provision making the law only applicable to remote sellers who annually have over $100,000 of sales or 200 or more transactions; (2) no retroactive application; and (3) being a member of the Streamlined Sales and Used Tax Agency (SSUTA) to provide a system to reduce administrative and compliance costs.[155] Nonetheless, states have decided to push the boundaries and ignore the significant features of the decision.[156] Kansas implemented a new remote tax policy in light of this decision and the policy's constitutionality has come into question.[157]

Kansas has become the first and only state with a remote tax policy that has not instituted a small business exemption, completely minimizing Justice Kennedy's emphasis on the exemption's importance.[158] A "race to the bottom" instinctively started between states with each continually lowering their standards for nexus thresholds, forcing more businesses to fall within the new sales tax limits.[159] South Dakota provided a dual threshold approach by requiring either $100,000 in sales or 200 transactions as a minimum threshold.[160] States, including California, Colorado, North Dakota, and South Carolina, changed South Dakota's dual threshold approach to a singular dollar threshold, normally $100,000.[161] Even this substantial change from South Dakota's rule did not win the race to the bottom.

Kansas took home the prize when its legislature released Notice 19-04 on August 1, 2019.[162] The notice stated that the state planned to impose its sales and use tax collection requirements to the fullest extent permitted by law.[163] To Kansas, this means that the state can now require all online and out of state remote sellers to register with the state and collect sales taxes.[164] There is no longer a safe harbor

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[152] *Id.*
[153] *See id.*
[154] *See generally id.*
[155] *Id.* at 2099-2100; Michael T. Fatale, Symposium, *Wayfair, What's Fair, and Undue Burden,* 22 CHAP. L. REV. 19, 45 (2019).
[156] *See* Legality of Notice 19-04, *supra* note 34, at 2-3.
[157] *See generally id.*
[158] Paul Williams, *Kan. Remote Seller Policy Constitutional, Tax Chief Asserts*, LAW360 (Sept. 25, 2019).
[159] Bowen, *supra* note 1.
[160] *Wayfair*, 138 S. Ct. at 2089.
[161] Bowen, *supra* note 1.
[162] *Kansas Notice* 19-04 (Aug. 1, 2019).
[163] Legality of Notice 19-04, *supra* note 34, at 9.
[164] *Id.*

threshold to protect small businesses.[165] Every single business that sells their goods or services in the state of Kansas must register.[166]

This has been extremely controversial for professionals within the state as Governor Laura Kelly seems to be ignoring warning signs from the Attorney General on the constitutionality of this notice.[167] (There are significant issues with the formal process, or lack thereof, that the governor used to change the tax law, but that lies beyond the scope of this Comment.[168] This Comment addresses whether the lack of protection for small businesses is constitutional, or if it violates the Commerce Clause by creating an undue burden on interstate commerce).

In *Wayfair*, the Court questioned the constitutional definition of "presence" in relation to the rationality to require taxes.[169] It determined that "presence" was no longer defined as simply physical, but that there could also be an economical presence that would warrant the collection of taxes.[170] What the Court did not decide, much less change, was what "substantial nexus" means.[171] On the contrary, it acknowledged that "other aspects of the court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines."[172] An understanding of what the Court overruled is vital because without it, if the Court did remove the substantial nexus requirement, states would gain the power to tax anyone who was connected to the state no matter how nominal.

However, case law still requires that states demonstrate that a retailer has a "substantial nexus" and that no undue burden would be inflicted on an out-of-state retailer.[173] *Quill* articulated the need for a substantial presence in a state and *Wayfair* did not alter that rule.[174] The Court defended *Quill*'s holding regarding "substantial nexus" by prominently noting that there were sufficient safeguards in place to protect from undue burdens if there was no substantial nexus for small businesses.[175] Tax practitioners and policy analysts have taken the position that even though the Court did not definitively state that the small business exemption was necessary in their decision, it will likely pose an undue burden on interstate commerce if one is not offered.[176]

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[165] *Id.*
[166] Williams, *supra* note 143.
[167] Paul Williams, *Kansas Tax Chief Not Worried About Remote Seller Litigation,* LAW360 (Oct. 16. 2019).
[168] Paul Williams, *Kan. Overhaul Should Modernize State Code, Panel Told*, LAW360 (Sept. 24. 2019).
[169] Bowen, *supra* note 1.
[170] *Id.*
[171] *Id.*
[172] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2086 (2018).
[173] Legality of Notice 19-04, *supra* note 34, at 3.
[174] Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1913 (1992).
[175] *Wayfair*, 138 S. Ct. at 2099.
[176] *See* Williams, *supra* note 143.

Despite backlash and caution from lawmakers, professionals, and businesses, Governor Kelly continued to support her stance that a safe harbor provision is not necessary to prevent undue burden.[177] Earlier in the year, she vetoed a bill passed by the Kansas Legislature intended to establish a safe harbor threshold of $100,000 in sales with respect to the new remote sales tax.[178] Governor Kelly and the state of Kansas have taken the position that establishing an economic nexus threshold for remote sellers would discriminate against in-state companies that lack a similar tax exemption.[179]

As noted previously, the issue with the Court's opinion in *Wayfair* is that it did not reestablish a bright-line rule after it diminished the old one.[180] It relied heavily on the key features mentioned above, but did not explicitly require them.[181] The Court held that South Dakota's policy was sufficient to avoid any undue burden on the seller, not that it was the only avenue states had to take to avoid undue burden.[182] If what the Court relied on was a checklist, then all states would have to adopt South Dakota's statute verbatim, including the safe harbor threshold and membership with the SSUTA.[183] Noticeably, states have not done this, and numerous interpretations have unfolded.[184] Unfortunately, Kansas's interpretation is causing an undue burden on interstate commerce and crossing the line into unconstitutionality.

The *Wayfair* Court relied on the fact that South Dakota was one of the twenty states that are full members of SSUTA.[185] SSUTA requires state-level tax administration to adopt uniform definitions of products and services, simplified tax rate structures, and other uniform rules.[186] It provides sellers access to sales tax software at no cost and generally deems users immune from audit liability.[187]

Kansas Revenue Secretary Mark Burghart released a statement to Deputy Attorney General Andaya stating his case for why this tax law is constitutional and does not promote undue burden on small businesses.[188] His key argument, similar

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[177] *Id.*

[178] Tripp Baltz, *Kansas Only State Making Small Businesses Pay Remote Sales Tax*, BLOOMBERG TAX (Aug. 1, 2019, 4:23 PM; Updated Aug. 1, 2019, 5:16 PM).

[179] Williams, *supra* note 158.

[180] Rosenbach, *supra* note 32, at 276; Steven M. Hogan & Alan J. LaCerra, South Dakota v. Wayfair*: The Case That Changes Everything*, 93-APR FLA. B.J. 22, 26 (2019).

[181] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099-100 (2018).

[182] Letter from Mark Burghart, Secretary of Revenue, Kansas Department of Revenue, to Athena E. Andaya, Deputy Attorney General (Sept. 4, 2019) (on file with Kansas Attorney General Office).

[183] *Id.*

[184] *Summary of States' Wayfair and Marketplace Implementation, supra* note 123.

[185] *Wayfair*, 138 S. Ct. at 2099-100.

[186] Craig Johnson, *Streamlined Sales Tax Governing Board, Inc.*, (2018), https://www.streamlinedsalestax.org/about-us/about-sstgb.

[187] Craig Johnson, *Streamlined Sales Tax Governing Board, Inc. – FAQs – General Information About Streamlined* (2018), https://www.streamlinedsalestax.org/Shared-Pages/faqs/faqs---about-streamlined.

[188] Burghart, *supra* note 182.

to South Dakota's argument, is that Kansas is a member of SSUTA.[189] Since Kansas is a member, small businesses have the ability to register with SSUTA and get a list of services for free, thus alleviating any undue burden.[190] To Burghart, undue burden is measured in the amount of money that is spent.[191] Burghart believes there is an undue burden if a seller's expenses in complying with a state's tax scheme are proportionately too high for the taxes it collected and remits.[192]

Burghart's belief that money is what causes an undue burden is not erroneous, but it is not a full analysis of the issue. For small businesses, time can be just as valuable as money, and the amount of time that would be spent understanding the guidelines and completing the required registrations can be a hefty burden when dealing with numerous states. SSUTA does provide a vast amount of great resources for small businesses, but it still requires these businesses to spend the time to understand their products and become acclimated to their systems.[193] A small online company trying to sell personalized products is not going to have this kind of time to spend on registrations.

Furthermore, at the time of publication, only twenty states are members of SSUTA.[194] States that are not members of SSUTA have no obligation to provide any aid in compliance with their tax laws.[195] The burden of obtaining potential software falls on the businesses.[196] Unwittingly, the Court created false hope that software would become available at a reasonable cost to make it easier for small businesses to cope with this issue.[197] More than two years later, small businesses are still waiting for this reasonably affordable software to be created.[198] Companies bear the burden to learn how to utilize any software that is released for each state.[199] Even if the software itself is inexpensive, the time it takes to understand the software is expensive for businesses with limited resources and employees.[200] The Attorney General of Kansas, Derek Schmidt, was asked by a state senator and state representative to take a stance on the constitutionality of the newly adopted tax standard.[201] Schmidt observed that the *Wayfair* Court realized that South Dakota designed its statute to prevent undue burden upon interstate commerce by

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[189] *See id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] Johnson, *supra* note 186.
[194] STREAMLINED SALES TAX GOVERNING BD., INC., *State Information*, https://www.streamlinedsalestax.org/Shared-Pages/State-Detail.
[195] *See generally id.*
[196] Keegan Shepardson, *The Void: How the Wayfair Decision is Affecting Small Business in New Hampshire*, SBA'S OFFICE OF ADVOCACY (Oct. 4, 2019).
[197] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018).
[198] Shepardson, *supra* note 196.
[199] *Id.*
[200] *Id.*
[201] Legality of Notice 19-04, *supra* note 34.

including that safe harbor protection.[202] Although not stated as a requirement, it was sufficient evidence that undue burden was not likely. The Court simply limited the requirements needed to show substantial nexus; it did not eliminate *all* limitations imposed by the Commerce Clause.[203]

In Governor Kelly's response to Kansas Attorney General opinion, she stated that "[t]his is about protecting our friends . . . doing business on Main Street . . . [t]hey are working hard, playing by the rules and deserve to be on a level playing field with out-of-state retailers."[204] This argument is reminiscent of South Dakota's position in *Wayfair*; consumers have the ability to purchase items across state borders. The tax law should not foster tax evasion; on the contrary, it should make all businesses pay their fair share of taxes regardless of physical or virtual location. One Governor Council co-chairwoman mentioned that she was a small-businesswoman in Kansas and argued that an out of state business with the same amount of income would be exempt from the tax when she would not, ostensibly making the playing field uneven.[205] Since the decision to aggressively tax remote sellers, over 3,200 out-of-state businesses have registered to collect Kansas sales taxes.[206]

George Isaacson, the attorney who argued the case for Wayfair, believes the fact that a small remote seller must register and potentially file taxes in Kansas is indicative of the precise burden the Court was hoping to avoid.[207] The idea that a single sale in the state creates a "substantial nexus" seems unreasonable.[208] The *Wayfair* Court did not remove all substantial nexus regulations and declare that every single business that operates in every state has a nexus.[209] They simply redefined the term "presence."[210]

The Kansas remote sales tax taken at face value on its own, just as one state not having a small business safe harbor, may not unduly burden interstate commerce. However, if all fifty states decide to remove the safe harbor provision from their tax regulation, small businesses will have a plethora of compliance regulations to abide by and that *will* create an undue burden.

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[202] *Id.*
[203] *Id.*
[204] Laura Kelly, *Governor Responds to the Attorney General's Opinion on Notice 19-04,* KAN. OFF. OF THE GOVERNOR (Oct. 1, 2019), https://governor.kansas.gov/governor-responds-to-the-attorney-generals-opinion-on-notice-19-04/.
[205] Paul Williams, *Kan. Tax Panel Questions Need for Remote Seller Thresholds*, LAW360, Nov. 14, 2019.
[206] Kansas City Star Editorial Board, *Online Shopping Just Got a Bit More Expensive in Kansas. Here's Why That's Good News*, KANSAS CITY STAR (Oct. 7, 2019).
[207] Williams, *supra* note 143.
[208] *See id.*
[209] *See generally* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2087-100 (2018); Annette Nellen, *New State and Local Tax Obligations in Cyberspace*, 74 BUS. LAW. 279, 282 (2019).
[210] *Id.*

IV. WHAT CHANGES CAN BE MADE TO RELIEVE SMALL BUSINESSES

Each state has the right to impose taxes as it sees fit within the constraints of the Constitution.[211] It is one of the most lucrative ways states can raise funds to provide services to their citizens.[212] However, there must be a reasonable balance between a state's rights to tax and the needs of businesses to operate efficiently.[213] The *Wayfair* decision may be the most important state and local tax decision in recent decades, as it removed the obstacles states had faced for decades when trying to tax remote sellers.[214] *Quill's* narrow holding of physical presence is no longer a logical constraint and the doors have been opened for states to tax e-commerce.[215] With all this new power comes new challenges.[216] The *Wayfair* Court acknowledged the concern for potential burdens for businesses, but pointed out that Congress had the ability to intervene if necessary.[217] Now that states have adopted a variety of new standards burdening countless small businesses, it is imperative that Congress intervenes.[218]

Congress and state governments need to investigate and analyze current tax trends to make an informed decision on how to help small businesses.[219] They should consider the following acts that could minimize the undue burden of compliance on small businesses: (1) join the Streamlined Sales and Use Tax Agreement (SSUTA); (2) incorporate a *de minimis* threshold for small businesses and standardize when there is a nexus; (3) offer free compliance software and immunity for vendors who properly rely on such software; (4) prohibit retroactive application of the new standard; and (5) narrowly tailor this decision to apply to sales and use tax.[220]

SSUTA's goal is "to find solutions for the complexity in state sales tax systems."[221] The purpose is to "simplify and modernize sales and use tax administration to substantially reduce the burden of tax compliance."[222] One benefit of SSUTA membership is that the state has contracts with Certified Service Providers that can handle nearly all of a seller's sales and use tax responsibilities

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[211] *State and Local Taxes*, *supra* note 30.
[212] *Id.*
[213] *Hearings, supra* note 115 (statement of Jamie C. Yesnowitz).
[214] D. Gamage, D. Shanske, & A. Thimmesch, *Taxing E-Commerce in the Post-Wayfair World*, 58 WASH. U. J.L.& POL'Y 71, 71 (2019).
[215] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099-100 (2018).
[216] *See generally*, Gamage et al., *supra* note 214, at 71-73.
[217] *Id.* at 73.
[218] *See* Hmayakyan, *supra* note 121, at 286.
[219] Richard D. Pomp, *Wayfair: Its Implications and Missed Opportunities*, 58 Wash. U. J.L. & Pol'y 1, 11 (2019) (quoting South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting)).
[220] Gamage et al., *supra* note 214, at 71-72.
[221] Johnson, *supra* note 186.
[222] *Id.*

for no charge if they are a remote seller.[223] If states join SSUTA, this can provide significant relief for small businesses. States that are members of SSUTA are required to have simplified and uniform state and local tax rates, administration of exemptions, and a central electronic registration system.[224] Membership forces states to simplify their complex state and local tax system.[225] Sellers that are able to qualify as volunteer sellers benefit from no SSUTA registration fees in participating states, no calculation fees, no monthly filing fees, and audit protection from member states.[226] These benefits and services reduce compliance costs and give small businesses the protection the Court believed they could obtain when considering the effect of undue burden in *Wayfair*.[227]

The lack of uniform minimum nexus requirements is one of the most prevalent issues that has risen from the *Wayfair* decision.[228] Many believe that Congress should consider establishing a minimum nexus requirement because it creates fairness and consistency.[229] The playing field would be leveled between out-of-state sellers and in-state sellers by requiring the collection and remittance of sales tax on every single transaction, regardless of any minimum nexus.[230] The lack of protection for small businesses would discourage any small seller from selling their products to other states and diminish the ability of the economy to grow.[231] Congress should adopt a standard similar to the South Dakota nexus requirement providing a compromise between states and businesses. A safe harbor would prevent states from suffering a loss in tax revenue while still protecting businesses that are not established or large enough to handle compliance costs.[232] A uniform standard for nexus would ease the compliance burden for small businesses.[233]

If a standard safe harbor threshold is utilized, Congress then needs to determine when a seller should collect sales taxes[234] and provide for a 90-day grace period.[235] For businesses that are hovering right around the thresholds, the question becomes: Should they avoid charging sales tax in hopes that they will not reach

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[223] *Certified Service Providers*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/certified-service-providers/certified-service-providers-about.
[224] Johnson, *supra* note 186.
[225] *Action Items to Become a Member State*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/for-states/becoming-a-sst-member-state. (last visited Nov. 5, 2020).
[226] *Do You Qualify for Free Sales Tax Calculation & Reporting Services?*, STREAMLINED SALES TAX GOVERNING BOARD, INC, https://www.streamlinedsalestax.org/certified-service-providers/freeservices. (last visited Nov. 5, 2020).
[227] Johnson, *supra* note 186.
[228] *See* Hmayakyan, *supra* note 121, at 311.
[229] *See id.* at 311-12.
[230] *Id.*
[231] *Id.*
[232] *Id.*at 313.
[233] *Id.* at 311-13.
[234] *Id.* at 313.
[235] *Hearings, supra* note 115 (statement of Jamie C. Yesnowitz).

the threshold?[236] It would become arduous for companies to review all their sales for the year and figure out what sales tax they owe, as well as if the consumer paid the use tax on the item. Many smaller companies choose to not calculate sales taxes throughout the year because they have not hit the threshold in the past.[237] Making the determination that a company starts collecting sales tax once they hit the threshold and providing a 90-day grace period would provide a clear standard for businesses to follow and would relieve the stress of frantically looking back on sales when taxes become due.[238] It would provide a reasonable amount of time after the close of the fiscal or calendar year before a remote seller is required to register to collect and remit the sales tax, minimizing the onerous time burden.[239]

Finally, Congress should narrowly tailor the decision in *Wayfair* to only sales and use tax application.[240] Companies are nervous to see how far states are going to take the new nexus standards and whether the standards will bleed into the income tax world.[241] Predominately, the standard from *Quill* is not considered to apply to income taxes, but some disagree.[242] For example, Wells Fargo is one company that announced it will be making a $481 million adjustment to its earnings based on the *Wayfair* decision.[243] This decision was not prompted by potential sales tax exposure, but because some of its affiliated entities were relying on *Quill* to not pay income taxes in states.[244] Especially with extreme stances like in Kansas, Congress should consider legislation to rein in the interpretations of this decision. Congress has the power to establish parameters of the *Wayfair* decision so states know how to properly navigate their tax requirements.[245] While it is not feasible to completely streamline all sales and income tax regimes, it is possible for Congress to set minimum standards for both to make it easier for small businesses to confidently comply.[246]

The *Wayfair* decision was long anticipated in the tax industry. It provides states with taxing power they should have against companies that have substantial presence within the state.[247] Nevertheless, the lack of uniformity among states has caused harm for small businesses that must be addressed.[248] Justice Roberts was not wrong when he foreshadowed that "the burden will fall disproportionately on

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[236] Hmayakyan, *supra* note 121, at 313-14.
[237] *Id.*
[238] *See generally Hearings*, *supra* note 115 (statement of Jamie C. Yesnowitz).
[239] *Id.*
[240] Gamage et al., *supra* note 214, at 83-86.
[241] *Id.*; *One by One, States Respond to* South Dakota v. Wayfair*,* RIA ST. & LOC. TAX UPDATE (Aug. 1, 2018).
[242] *Id.* at 83-84.
[243] *Id.* at 83.
[244] *Id.*
[245] *Hearings, supra* note 115 (statement of Jamie C. Yesnowitz).
[246] *Id.*
[247] Nuttall, *supra* note 35, at 627-28.
[248] *See Hearings, supra* note 115 (statement of Jamie C. Yesnowitz).

small business[es]."[249] Small businesses employ almost 59 million people in the United States.[250] Around 240,000 businesses were established in one quarter alone.[251] Action needs to be taken to protect those chasing their dream so they are not stopped by Uncle Sam before they even get started.

Your small online boutique shop could become the next big thing, but that business must be given the opportunity to grow. Large corporations did not become what they are overnight, but instead, with years of growth and protection from proportionally unfair taxes. Dismantling that protection and replacing it with numerous state tax regulations and registration requirements can steer people away from chasing their dreams and diminish the presence of small businesses in the national economy.

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[249] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2103 (2018) (Roberts, J., dissenting).
[250] *2018 Small Business Profile, supra* note 135.
[251] *Id.*