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JUDGING MULTIDISTRICT LITIGATION

ELIZABETH CHAMBLEE BURCH*

High-stakes multidistrict litigations saddle the transferee judges who manage them with an odd juxtaposition of power and impotence. On one hand, judges appoint and compensate lead lawyers (who effectively replace parties' chosen counsel) and promote settlement with scant appellate scrutiny or legislative oversight. But on the other, without the arsenal that class certification once afforded, judges are relatively powerless to police the private settlements they encourage. Of course, this power shortage is of little concern since parties consent to settle.

But do they? Contrary to conventional wisdom, this Article introduces new empirical data revealing that judges appoint an overwhelming number of repeat players to leadership positions, which may complicate genuine consent through inadequate representation. Repeat players' financial, reputational, and reciprocity concerns can govern their interactions with one another and opposing counsel, often trumping fidelity to their clients. Systemic pathologies can result: dictatorial attorney hierarchies that fail to adequately represent the spectrum of claimants' diverse interests, repeat players that trade in influence to increase their fees, collusive private deals that lack a viable monitor, and malleable procedural norms that undermine predictability.

Current judicial practices feed these pathologies. First, when judges appoint lead lawyers early in the litigation based on cooperative tendencies, experience, and financial resources, they often select repeat players. But most conflicts do not arise until discovery, and repeat players have few self-interested reasons to dissent or derail the lucrative settlements they negotiate. Second, because steering committees are a relatively new phenomenon and transferee judges have no formal powers beyond those in the Federal Rules, judges have pieced together various doctrines to justify compensating lead lawyers. The erratic fee awards that result lack coherent limits. So, judges then permit lead lawyers to circumvent their rulings and the doctrinal inconsistencies by contracting with defendants to embed fee provisions in global settlements—a well-recognized form of self-dealing. Yet, when those settlements ignite concern, judges lack the formal tools to review them.

These pathologies need not persist. Appointing cognitively diverse attorneys who represent heterogeneous clients, permitting third-party financing, encouraging objections and dissent from non-lead counsel, and selecting permanent leadership after conflicts develop can expand the pool of qualified applicants and promote adequate representation. Compensating these lead lawyers on a quantum-meruit

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basis could then smooth doctrinal inconsistencies, align these fee awards with other attorneys’ fees, and impose dependable outer limits. Finally, because quantum meruit demands that judges assess the benefit lead lawyers conferred on the plaintiffs and the results they achieved, it equips judges with a private-law basis for assessing nonclass settlements and harnesses their review to a very powerful incentive: attorneys’ fees.

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INTRODUCTION

Multidistrict litigation often involves billion-dollar lawsuits steeped in media attention, such as litigation over asbestos, Apple’s iPhone, the BP oil spill, Vioxx, Facebook’s internet tracking, Google’s Street View service, Chinese-manufactured drywall, and Toyota’s

acceleration problems, to name but a few.¹ Yet, the transferee judges who use innovative procedures to usher these cases toward settlement are rarely subject to appellate scrutiny or legislative oversight.² And while multidistrict litigation is ostensibly for pretrial purposes only, in practice, as the old song goes, “when you leave that way, you can never go back.”³ In fact, transferee judges have remanded a scant 2.9% of cases to their original districts.⁴

Three practices in particular raise concerns about how judicial power affects adequate representation, doctrinal consistency, predictability, public perception, and plaintiffs’ attorneys’ incentives to shoulder expensive and time-consuming litigation. First, transferee judges create hierarchies of influence. To streamline cases and avoid having to communicate with hundreds of attorneys, judges appoint steering committees and other lead lawyers to conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases. Yet, they rarely explain why they choose particular attorneys and may even handpick counsel with few or no involved clients. Although lead attorneys control the litigation and wrest decision-making power away from plaintiffs’ individually retained counsel,⁵ judges focus on lead lawyers’ financing abilities, cooperative tendencies, and expertise—not adequate representation. These cri-

¹ E.g., Alex Berenson, *Merck Is Said to Agree to Pay \$4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1; Kirk Johnson, *Asbestos Prosecution Results in Acquittals*, N.Y. TIMES, May 9, 2009, at A10; Andrew Martin, *Turning Point for Suits over Chinese Drywall*, N.Y. TIMES, Oct. 13, 2012, at B1; John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES, Mar. 3, 2012, at A1; Bill Vlasic, *Toyota Agrees to Deal in Suit over Speedups*, N.Y. TIMES, Dec. 27, 2012, at A1; Kit Chellel & Jeremy Hodges, *Facebook Suit over Subscriber Tracking Seeks \$15 Billion*, BLOOMBERG (May 19, 2012), <http://www.bloomberg.com/news/2012-05-18/facebook-sued-for-15-billion-in-suit-over-user-tracking.html>; *Court Stays Litigation in Google Street View Case*, BLOOMBERG BNA (July 20, 2011), <http://www.bna.com/court-stays-litigation-in-google-street-view-case-certifies-for-interlocutory-appeal-its-prior-order-ruling-that-interception-of-open-wifi-data-violates-the-wiretap-act/>.

² See *infra* notes 57–61 and accompanying text (describing the lack of appellate scrutiny and legislative oversight).

³ CONFEDERATE RAILROAD, *When You Leave That Way You Can Never Go Back*, on CONFEDERATE RAILROAD (Atlantic 1992); SAM NEELY, *WHEN YOU LEAVE THAT WAY YOU CAN NEVER GO BACK* (MCA Records 1983).

⁴ Since its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,548 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. *Judicial Business 2013: Judicial Panel on Multidistrict Litigation*, ADMIN. OFF. U.S. COURTS (2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx>.

⁵ This Article focuses on litigation in which collective action problems exist principally among plaintiffs’ counsel, but in some litigation, such as intellectual-property litigation, the collective action problem may exist primarily among defense counsel. Many of the

teria further entrench repeat players, who are often settlement artists and may be more concerned about pleasing judges, fostering reciprocity among fellow attorneys, and positioning themselves for future appointments than advancing plaintiffs' heterogeneous interests.

Second, judges compensate lead lawyers. When lead attorneys assume work that goes well beyond what they would do for their own clients, they should be paid accordingly. But judges lack a unified doctrinal basis for doing so. They have borrowed piecemeal from class actions' common-fund doctrine, contract principles, ethics, and equity while ignoring the corresponding constraints of each. This mishmash has resulted in unpredictable outcomes, disgruntled attorneys, and a reduced incentive for "non-elite" lawyers to shoulder expensive, time-consuming litigation. Those costs are further exacerbated in cases where judges have cut individually retained counsel's contingent fees even after deducting lead-lawyer fees.⁶

Third, judges have presided over private settlements without a legal basis. They cite public-policy concerns or analogize multidistrict litigation to class actions, but most multidistrict cases are not certified as classes.⁷ Unlike class actions, in which Rule 23(e) demands a searching judicial inquiry into whether the settlement is fair, reasonable, and adequate, nonclass settlements are private contracts. Thus, by one view, unless the settlement itself authorizes the court to act,⁸ these judges overstepped their power and paternalistically meddled with plaintiffs' ability to contract with defendants.⁹ Others advocate extending the dubious "quasi-class action" moniker to allow judges to monitor nonclass settlements as they do class actions.¹⁰ But both views miss the mark. The first ignores attorneys' temptation to cross ethical boundaries to achieve finality and pretends that plaintiffs have conventional, one-on-one attorney-client relationships that allow them to monitor their own suits. This is plainly not the case when lawyers

arguments that I set forth will apply with equal force to the defense side in intellectual-property litigation.

⁶ See *infra* notes 193–223 and accompanying text (reviewing the controversial judicial practice of capping private contingent-fee contracts).

⁷ See *infra* notes 20–26 and accompanying text (describing the decline of class certification).

⁸ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552–53 & n.7 (E.D. La. 2009) (discussing the Vioxx Settlement Agreement and its authorizations to the court).

⁹ See, e.g., Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 126–27 (2012) (arguing that courts should not have authority to review nonclass aggregate settlements); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011) (criticizing the use of "quasi-class actions").

¹⁰ See Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 529 (1994) (arguing that consolidations should be treated for some purposes as class actions).

represent thousands of clients in the same litigation. Yet, the second view allows litigants and the judiciary to end-run Rule 23, strip away its due-process protections, and use it as a grab bag from which they can select helpful provisions while ignoring those that impede finality.¹¹

As class certification dwindles and courts rely increasingly on multidistrict litigation to resolve aggregate litigation, much work remains to be done on how we understand and theorize these practices. Although a few commentators have begun to recognize multidistrict litigation's significance, they tend to focus on single issues without evaluating the spillover effects.¹² By considering judicial practices holistically, this Article aims to present a unified theory of judicial power—and its limits.

By turning a critical lens on judicial power, this Article makes three principal contributions. First, it presents the first empirical look into the number of repeat players that transferee judges appoint to leadership positions. As such, it offers data to support persistent anecdotes about repeat play and suggests a reality in which plaintiffs' attorneys favor reciprocity, reputation, and cooperation over adequate representation and dissent in order to secure positions as lead lawyers. Given the due-process concerns and group decision-making biases that arise when dissent is absent or salutary, judges should balance leadership committees to capture the benefits of outside perspectives and dissenters. Second, judges can compensate lead lawyers on a coherent and more predictable basis by distilling current theories down to their common denominator: quantum meruit. Quantum-meruit awards would align fees with other attorney-fee decisions and compensate leaders based on the value they actually add. Third, employing a quantum-meruit theory for fees would give judges a private-law basis for scrutinizing settlements. Because courts must evaluate the case's success to determine how much compensation is merited, it would likewise help stymie a trend toward self-dealing where repeat players insert fee provisions into master settlements and

¹¹ See Mullenix, *supra* note 9, at 394 (describing a case in which the court resisted plaintiffs' attempt to circumvent class-action rules); see also Vaz v. Allstate Prop. & Cas. Ins. Co., No 1:06cv481-LTS-RHW, slip op. at 2 (S.D. Miss. Oct 25, 2006) (observing that it would be "inconsistent" to "deny class certification . . . and at the same time allow [claims] to go forward in what the Magistrate accurately described as a 'quasi-class action lawsuit . . . without regard for the rigid requirements for class certification'").

¹² See, e.g., Grabill, *supra* note 9, at 126–27 (discussing judicial roles in private mass-tort settlements); Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial "Approval" and "Rejection" Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (discussing judicial approval and rejection of nonclass mass settlements).

require plaintiffs and their attorneys to “consent” to fee increases to obtain settlement awards.

These proposals differ substantially from one set forth by Professors Silver and Miller, who recommend adapting the lead-plaintiff process in securities class actions to fit multidistrict litigation.¹³ Specifically, Silver and Miller suggest judges appoint a plaintiffs’ management committee comprised of attorneys with the largest client inventory and that those attorneys then pick, compensate, and monitor the lawyers performing the common-benefit work.¹⁴ While there is value in seeking an objective measure such as client inventory, in reality, this rewards lawyers who purchase the largest number of undifferentiated clients from referral lawyers, motivates counsel to collect clients with weaker claims, empowers repeat players,¹⁵ and further encourages attorneys to value reciprocity, reputation, and cooperation over adequate client representation. Although market-based solutions remain a viable option (particularly if implemented through a well-informed third-party financier),¹⁶ this Article focuses on improving representation and predictability in decision making and thus depends on a knowledgeable, neutral third party: the judge.

Part I sketches the host of concerns animating judicial decisions and incentives in multidistrict litigation such as the need to thwart self-dealing and manage agency problems between attorneys and their clients, prevent collusion, organize lawyers, and strike a delicate balance between too much and not enough judicial oversight. In many ways, certifying a class under Rule 23 simplified this balancing act by equipping judges with explicit authority to intervene. Yet, many of the abuses that Rule 23 was designed to address tend to flourish in its absence. These abuses, both real and potential, prompt conscientious judges to push the limits of their authority to discourage coercive, collusive, or unfair settlements. But institutional pressure, with its steady drumbeat of settlement, complicates their task by layering judicial and systemic efficiency interests atop parties’ interests.

¹³ See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 159–77 (2010) (discussing the adoption of the lead-plaintiff process and its advantages).

¹⁴ *Id.* at 159–75.

¹⁵ Having repeat players on key committees is not an inherently negative scenario. Rather, it is the tit-for-tat reciprocity and lingering reputational concerns that suggest repeat players may sell out a segment of the group when it furthers repeat players’ self-interest. Likewise, there is a separate concern that many repeat players are appointed for their expertise as settlement artists, and not because they are the best litigators.

¹⁶ I have put forth a proposal along these lines in the past. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1315–38 (2012).

Part II critiques the exercise of judicial power using extralegal insights from social psychology as well as conventional due process. Part II.A explains that when judges emphasize expertise, cooperation, and financial resources, they tend to appoint repeat players and cultivate an environment in which attorneys must put their self-interest and reputation above representing clients with divergent interests. To support this proposition, this Part introduces empirical evidence on repeat players in leadership roles. As long hypothesized, although less than half of the law firms involved in product-liability multidistrict litigations are repeat players, attorneys from those firms filled over 78% of all leadership positions.¹⁷

Moving beyond their appointment, Part II.B critiques the piecemeal doctrinal theories used to compensate lead lawyers—class-action law’s common-fund doctrine, contract principles, ethics, and equity. None of these theories fully explain judicial decisions, which leads to unpredictable fee awards. And these circumstances make it nearly impossible for dissenting attorneys to identify a doctrinal toehold for their objections. Part II.C extends these concerns over predictability and limits on judicial power to settlements and suggests that judges’ current justifications for “approving” private, nonclass settlements suffer from similar shortcomings.

Part III identifies regulatory and doctrinal solutions to Part II’s concerns. First, it proposes alternative criteria and procedures for appointing lead lawyers and expanding the pool of eligible candidates. For example, encouraging input and dissent from non-lead lawyers promotes adequate representation, and permitting qualified attorneys to rely on third-party financing to fund common-benefit work expands the number of viable candidates. Second, it suggests that employing a quantum-meruit theory to compensate lead lawyers would align those decisions with fee awards more generally, impose predictable limits, and curtail the practice of uniformly reducing non-lead attorneys’ contingent fees. Finally, because using a quantum-meruit theory requires judges to assess the benefit that leaders conferred and the results they obtained for the plaintiffs, it supplies a valid basis for assessing private settlements. Although this authority is limited and thus not a gateway to the kind of wholesale settlement review that Rule 23(e) would countenance, it does furnish judges with enhanced policing authority tied to a consequential incentive: attorneys’ fees.

¹⁷ See *infra* notes 114–26 and accompanying text for additional information and qualifiers.

I

MULTIDISTRICT LITIGATION MINUS CLASS CERTIFICATION

Transferee judges face a Herculean task. Coordinating hundreds or thousands of nominally similar cases entails managing countless intrinsic human elements—attorneys’ egos, injured plaintiffs, defendants with public-relations problems and fickle shareholders, not to mention greed, reputational concerns, and personal animosity. Section 1407 captures none of this when it authorizes the Judicial Panel on Multidistrict Litigation (“the Panel”) to oversee all federal dockets and transfer cases with a common question of fact to a single federal judge for coordinated pretrial handling.¹⁸ The first hint that coordination requires more than strict deadlines comes when the Panel forgoes parties’ geographic convenience in favor of an experienced transferee judge.¹⁹ While past experience helps ensure judicial competence, it also means that transferee judges may be repeat players who approach new litigation with their own assumptions, prejudices, and preferences.

A. *Transferee Judges’ Evolving Role*

Transferee judges’ experiences and preferences are increasingly constrained by changing procedural options, chiefly the gradual decline of class certification. Since the mid-1990s, Congress and the appellate courts have made it harder to certify a class by requiring plaintiffs to prove Rule 23’s prerequisites by a preponderance of the evidence,²⁰ instructing judges to delve into a case’s merits when the merits overlap with class-certification requirements,²¹ and complicating choice-of-law questions and manageability by providing federal courts with jurisdiction.²² As researchers at the Federal Judicial

¹⁸ 28 U.S.C. § 1407 (2012).

¹⁹ See John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2240 (2008) (describing the Panel’s ideal transferee judge).

²⁰ E.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *In re IPO Sec. Litig.*, 471 F.3d 24, 37 (2d Cir. 2006); see also *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001) (stating that a district court judge must receive evidence and resolve disputes before deciding whether to certify a class).

²¹ E.g., *In re Hydrogen Peroxide*, 552 F.3d at 307; *Oscar*, 487 F.3d at 268; *In re IPO Sec.*, 471 F.3d at 41; *Szabo*, 249 F.3d at 676; see also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.06 (2010) (stating that if the court must resolve a substantive question to determine suitability for class-action treatment, the court should do so). More recently, *Wal-Mart Stores, Inc. v. Dukes* strengthened the commonality standard under Rule 23(a) and ensured that defendants could raise individual defenses, which could prevent Rule 23(b)(3) certification. 131 S. Ct. 2541, 2558–61 (2011).

²² Class Action Fairness Act of 2005 (CAFA) § 2(a)–(b), Pub. L. No. 109-2, 119 Stat. 4, 5 (codified at 28 U.S.C. § 1711 note (2012)). Of course, one might say that because CAFA

Center found, the number of personal-injury and product-liability cases consolidated through multidistrict litigation has increased, while the number of class-certification motions has decreased, which “suggest[s] a declining rate of class certification.”²³ Yet, certification offered transferee judges a dizzying array of judicial powers to appoint class counsel,²⁴ ensure a fair settlement,²⁵ and award fees,²⁶ all of which helped prevent counsel from exploiting absent class members.

Waning class certification contributed to two developments. First, it forced multidistrict litigation to become the primary means for resolving aggregate litigation.²⁷ Yet, Congress never envisioned transferee judges concluding multidistrict cases; the plan was simply to streamline the discovery and pretrial process and then return cases to their home districts for trial.²⁸ Thus, nothing in § 1407 confers any additional authority beyond what is available through the ordinary Federal Rules. This leads to the second development: Transferee judges have had to adapt to ambiguous authority despite lingering concerns over collusion, contingent fees, and attorney overreaching. So, as experienced transferee judges struggle to police the same self-interested behavior they witnessed in class-action practice, they find themselves without the tools that Rule 23 provided.

B. Judicial Misgivings over Attorney Conduct

Collusive circumstances in class actions initially forced judges into uncharted territory: No longer were they acting as neutral arbiters, but as inquisitors.²⁹ When both parties become “friends” of the deal and ask the court to approve and enforce a settlement class,

tends to inhibit class certification due to choice-of-law questions, the choice-of-law issues are actually much easier because they simply disappear once class certification is denied.

²³ Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 KAN. L. REV. 775, 777 (2010).

²⁴ FED. R. CIV. P. 23(g).

²⁵ FED. R. CIV. P. 23(e).

²⁶ FED. R. CIV. P. 23(h) & advisory committee’s note to 2003 amendment.

²⁷ To be clear, multidistrict litigation (MDL) has always played a substantial role in products-liability litigation, where individual issues tend to predominate over common ones, but less of a role in other areas that often proceeded as class actions like securities or antitrust.

²⁸ See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998) (quoting legislative history); see also L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 196–97 (2004) (describing Congress’s emphasis on expediency).

²⁹ See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1983, 2002–03 (1999) (arguing that in mass-tort litigation judges must make searching inquiries into the fairness and adequacy of representation of a settlement).

judges can no longer depend on the adversarial system.³⁰ But just as they adapted to this new culture by assuming the mantle of a “managerial”³¹ judge or even a “deal-broker,”³² aggregate litigation changed again with the class action’s gradual decline.³³ Nevertheless, defendants’ desires have remained static: They want a global resolution that provides them with finality and closure.

So, even though class certification has decreased, experiments with ethically questionable means for achieving finality have not. Conflicts between attorneys and their clients and among the clients themselves continue to materialize. Plaintiffs’ firms might have tacit agreements or fee-sharing arrangements with one another that further their collective self-interest and tether their financial interests to each other instead of to each client’s outcome.³⁴ Competing interests, attorney funding, and contingent fees can lead to quick or collusive settlements, underfunded litigation, exorbitant attorneys’ fees, coercive settlement terms, and misallocated settlement proceeds.³⁵ For example, in *Johnson v. Nextel Communications, Inc.*,³⁶ a group of clients hired a law firm to sue Nextel for employment discrimination, but the firm made a deal with the defendant that would give plaintiffs’ lawyers kickbacks in exchange for convincing their clients to abandon their legal claims.³⁷

Although judges often act carefully to stymie attorney abuses like these, they can also facilitate overreaching by approving new forms of self-dealing where lead lawyers use their bargaining position to increase their fees. For instance, in the *Guidant* litigation, Judge Frank initially issued a fee-transfer form that required participating plaintiffs and their counsel to allocate 2% of a plaintiff’s gross monetary

³⁰ Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 953 (2014).

³¹ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982) (describing judges who see their task as case management).

³² See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 373 (2001) (discussing judges’ vested interest in transactions that create finality).

³³ See Willging & Lee, *supra* note 23, at 777 (describing a decrease in class-certification motions); see also Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement* (1984), 78 FORDHAM L. REV. 1265, 1269 (2009) (“Rather than considering corrective action to prevent overreaching by the plaintiffs’ bar, the courts used [asbestos] cases as a basis for almost destroying the class action . . .”).

³⁴ E.g., *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 221–22 (2d Cir. 1987).

³⁵ See Weinstein, *supra* note 10, at 525, 527–30 (1994) (“If counsel is without financial resources to handle litigation, he or she may feel pressured to settle some cases quickly to finance the litigation—to prime the pump, so to speak.”); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512–14 (2011) (noting the principal-agent problems that pervade class settlements).

³⁶ 660 F.3d 131 (2d Cir. 2011).

³⁷ *Id.* at 135, 139.

recovery to compensate lead lawyers and 2% for litigation costs.³⁸ Apparently unhappy with this compensation but not wanting to rob their fee award of its aura of contractual consent, the plaintiffs' steering committee negotiated its fees with the defendant. As a result, the Master Settlement Agreement permitted the steering committee to apply for fees, which plaintiffs and their attorneys "consented" to by accepting the deal.³⁹ Of course, controlling lead lawyers' compensation is a powerful bargaining chip that defendants do not give up freely, but exchange for things like lower settlement amounts, higher participation rates, and other beneficial provisions.⁴⁰ Despite the structural collusion and the lack of clear notice to plaintiffs and their attorneys, Judge Frank read the settlement as "contract[ing] around" his initial order and upped lead lawyers' fees substantially, from 2% to 14.4%—an extra \$29.7 million.⁴¹

Lead lawyers' fee success in *Guidant* kick-started a disturbing trend of permitting lead lawyers to negotiate with defendants to include their fees in settlements. The Vioxx settlement followed closely on the heels of the Guidant settlement and, like *Guidant*, contracted around Judge Fallon's 3% fee cap, raising the cap to 8% and deducting the entire amount from individual attorneys' contingent fees.⁴² Similarly, in the *Genetically Modified Rice Litigation*, Judge Perry ruled that she lacked jurisdiction to order state-court litigants to withhold and contribute 11% of plaintiffs' gross settlement recovery to a common fund that would compensate and reimburse lead lawyers.⁴³ Yet, the settlement agreement required *all* enrolling claimants (whether litigating in state or federal court) to contribute that amount to the common fund even though federal litigants surely benefitted more from lead attorneys' discovery efforts than did state-court plaintiffs.⁴⁴

³⁸ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *2 (D. Minn. Mar. 7, 2008). The *Guidant* litigation involved claims by plaintiffs stemming from alleged defects in implantable defibrillator devices and pacemakers that Guidant manufactured.

³⁹ *In re Guidant*, 2008 WL 682174, at *2–4, *13.

⁴⁰ Silver & Miller, *supra* note 13, at 134.

⁴¹ *In re Guidant*, 2008 WL 682174, at *2–4, *12, *15–16; *see also* Silver & Miller, *supra* note 13, at 109 (describing how judges have historically awarded lead attorneys high fees).

⁴² Lawyers settled the *Guidant* litigation on July 12, 2007, and the *Vioxx* litigation on November 9, 2007. The respective judges involved issued their corresponding opinions about six months apart. *In re Guidant*, 2008 WL 682174, at *3; *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008).

⁴³ *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1–3 (E.D. Mo. Feb. 24, 2010).

⁴⁴ MDL Settlement Agreement § 8.1.1–.2, *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 (CDP) (July 2011), available at http://www.gmricesettlement.com/BY_

Repeat players influence on this trend is readily apparent. Three of the four lead lawyers in *Guidant* were also appointed to leadership positions in *Vioxx*,⁴⁵ and one lead attorney in both of those litigations was also a lead lawyer in the *Genetically Modified Rice Litigation*.⁴⁶ To be clear, the trouble isn't with compensating lead lawyers who may benefit other attorneys and their clients, but in allowing those in power to negotiate their fee with the defendant—a classic form of structural collusion and breach of their fiduciary obligations.⁴⁷

The *Vioxx* litigation was plagued with other ethical questions, too. For example, the settlement “offer” was actually a contract between the plaintiffs’ attorneys and Merck, which required each participating attorney to recommend the settlement to 100% of her eligible clients and to withdraw from representing any who refused.⁴⁸ If fewer than 85% of claimants consented, Merck could withdraw its offer and no one—plaintiffs’ attorneys included—would receive any money. The settlement also named Judge Fallon, who presided over the federal multidistrict litigation, as its “chief administrator,” a posi-

OfficialSettlement.aspx. On appeal, the Eighth Circuit affirmed. *In re Genetically Modified Rice Litig.*, 764 F. 3d 864 (8th Cir. 2014).

⁴⁵ The Lead Counsel Committee in *Guidant* included Richard Arsnault, Elizabeth Cabraser, Seth Lesser, and Charles Zimmerman. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (D. Minn. Dec. 19, 2005) (Pretrial Order No. 1 (Designation of Plaintiffs’ Lead, Liaison Counsel, and Defendants’ Lead and Liaison Counsel)). Richard Arsenault and Elizabeth Cabraser were two of the eleven people appointed to the *Vioxx* Plaintiff Steering Committee. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Apr. 8, 2005) (Pretrial Order No. 6). Seth Lesser was appointed to the Government Actions Plaintiffs’ Case Management Committee. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. July 9, 2009) (Pretrial Order No. 44).

⁴⁶ Richard Arsenault was also a lead attorney in the *Genetically Modified Rice Litigation*. *In re LLRice 601 Contamination Litig.*, MDL No. 4:06 MD 1811 CDP (E.D. Mo. Apr. 18, 2007) (Order Appointing Leadership Counsel). Stephen Weiss, who was also named a lead attorney in the *Genetically Modified Rice Litigation*, is a partner of Chris Seeger, who was a lead attorney in *Vioxx*.

⁴⁷ See John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647–48 (1987) (“While no honest defendant’s attorney would offer to exchange a low settlement for a high fee award (nor would a responsible plaintiff’s attorney accept such an offer, if made), neither has to offer any such ‘bribe,’ because the legal rules applicable to class actions essentially do it for them.”); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1990 (2011) (arguing that lead attorneys are fiduciaries to all the plaintiffs). In fairness, as Part II.B.1 explains in depth, no coherent rationale currently explains lead lawyers’ fee awards, so attorneys are attempting to contract around this uncertainty.

⁴⁸ Settlement Agreement § 1.2.8.1–2, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), available at <http://www.laed.uscourts.gov/vioxx/>. For the many ways in which this agreement arguably ran afoul of the *Model Rules of Professional Conduct*, see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279–92 (2011).

tion that nonsettling plaintiffs claimed made him appear partial.⁴⁹ Disgruntled plaintiffs cited language from one of Judge Fallon's orders, which required nonsettling plaintiffs to appear in courts around the country "to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program have all necessary information available to them so they can make informed choices."⁵⁰ Yet, plaintiffs had private counsel who had presumably already explained the deal to them. So, objectors argued that the order had a pejorative quality to it. Nevertheless, the Fifth Circuit rejected both the argument that the settlement's terms coerced plaintiffs' consent⁵¹ and the contention that Judge Fallon's dual roles created conflicts demanding recusal.⁵²

All of these examples—*Vioxx*, *Guidant*, and *Genetically Modified Rice*—highlight concerns that arise during settlement. Nevertheless, transferee judges encourage settlement. First, Rule 16 expressly authorizes judges to facilitate settlement discussions before trial, and as pretrial judges, transferee judges would be remiss not to prompt these conversations.⁵³ Second, as Judge Weinstein has observed, "Federal judges tend to be biased toward settlement."⁵⁴ Finally, the Panel

⁴⁹ Appellants' Brief, *In re Vioxx Prods. Liab. Litig.*, 388 F. App'x 391 (5th Cir. 2010) (No. 09-30446), 2009 WL 7111920, at *23; see Jef Feeley & Leslie Snadowsky, *Merck Vioxx Judge Threatens to End Suit Consolidation*, BLOOMBERG (Jan. 5, 2006), <http://www.bloomberg.com/apps/news?pid=21070001&sid=aOUXOdXoKAX8> (discussing Judge Fallon's role in the Vioxx settlements); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.6 & cmt. (2008) (stating that judges must be careful that efforts to further settlement do not undermine parties' right to be heard); Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of the Courts*, 54 LAW & CONTEMP. PROBS. 227, 230 (1991) ("Faced with mass tort litigation, judges are not simply neutral arbiters; rather, they have strong personal incentives to speed the judicial process, save costs and labor, and reduce redundancy."); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 361–62 (1986) (describing how judges who make enormous investments in a settlement are unlikely to remain indifferent to its outcome); Weinstein, *supra* note 10, at 521 ("Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases.");

⁵⁰ Appellants' Brief, *supra* note 49, at *13 (citation omitted).

⁵¹ *In re Vioxx Prods. Liab. Litig.*, 412 F. App'x. 653, 653–54 (5th Cir. 2010). *But cf. In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133–34 (7th Cir. 1979) ("The subclass member is presented with an accept-or-else situation: if he does not accept, his federal claim is lost even though he cannot receive the benefits of the settlement package. . . . [T]he dismissal of the action is fundamentally unfair to nonconsenting subclass members . . .").

⁵² *In re Vioxx*, 388 F. App'x at 395–97.

⁵³ FED. R. CIV. P. 16(a)(5).

⁵⁴ Weinstein, *supra* note 33, at 1265; see also *In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992) (observing that the Panel consolidated cases in front of Judge Acosta, but "[s]hortly thereafter, the Chief Justice appointed the Honorable Louis C. Bechtle as a 'settlement judge,'" such that while Judge Acosta advanced the litigation toward trial, "Judge Bechtle endeavored to advance

views quickly settling a complex case as a hallmark of success that disposes it to reward that judge with new litigation.⁵⁵ Multidistrict litigations are plum judicial assignments; they involve interesting facts, media attention, and some of the nation's most talented attorneys. So, even though conflicting interests, misaligned incentives, and attorney overreaching crop up most prominently during settlement, judges have their own incentives to broker deals.

II

THE LIMITS OF JUDICIAL POWER AND INHERENT AUTHORITY

Despite facing a task of mythic proportions, transferee judges possess no more power than their mortal counterparts. Yet, the need for settlement, judicial misgivings about attorney misconduct and free riding, and the lack of Rule 23's explicit policing power persist—so judges innovate. They have stretched basic common-law doctrines like their “inherent judicial authority” to fill the regulatory void. And while judges' intentions in implementing these creative solutions are exemplary, these measures have downsides too.

Three practices, in particular, warrant scrutiny. First, in appointing attorneys to leadership positions, judges focus on experience, cooperative tendencies, and an ability to finance the litigation—factors that favor repeat players, as evidenced by their filling over 63% of all leadership positions.⁵⁶ Emphasizing these traits can have detrimental effects like group decision-making biases and fear of dissenting. Second, when judges invoke a variety of legal doctrines, analogies, and their inherent judicial authority to compensate lead lawyers, their decisions can be unpredictable and difficult to chal-

settlement prospects by determining individual and aggregate values for the cases”); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2288–89 (2008) (discussing settlement bias in multidistrict litigation).

⁵⁵ This observation is based principally on conversations I have had with federal judges and their clerks, as well as on the general perception that judges who receive these cases are especially capable and that such assignments are accompanied by publicity and prestige. See David F. Herr & Nicole Narotzky, *The Judicial Panel's Role in Managing Mass Litigation*, SN066 A.L.I.-A.B.A. 249, 299 (2008) (“The Panel undoubtedly considers the ability and reputation of a judge in determining whether to assign complex, multidistrict litigation . . . [The Panel] expressly identified former Panel membership, as well as leadership roles in various federal court committees as a reason for selecting Chief Judge Sam Pointer as a transferee judge.”); Susan Willett Bird, Note, *The Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475, 483 n.42 (1975) (reporting that related cases were “assigned specifically to Judge X . . . because he was ‘especially able’”).

⁵⁶ See *infra* notes 114–26 and accompanying text for additional information and qualifiers.

lenge. Finally, judges who publicly approve or disapprove private settlements have not identified explicit authority that allows private parties to predict when judicial interference will occur or the boundaries for such conduct.

Despite attorney dissatisfaction with these decisions, several factors inoculate them from thorough appellate review.⁵⁷ First, because most multidistrict litigations result in private settlements, they are not reviewable on appeal, even when subject to public judicial commentary. Second, because most interim rulings are not dispositive orders, they are reviewable only through an extraordinary writ of mandamus or subsequent dismissal.⁵⁸ Motions to disqualify a lead attorney, for example, are not immediately appealable as a matter of right even though an attorney could theoretically petition for mandamus.⁵⁹ Third, even if the appellate court grants mandamus or reviews a dismissed case, it tends to do so using the highly deferential abuse-of-discretion standard.⁶⁰ Vague initial standards, subjective decisions about which attorney would best serve the plaintiffs, and the lack of precedent make this standard a formidable hurdle. Fourth, practical incentives counsel against objecting, at least with regard to lead-

⁵⁷ See Carolyn A. Dubay, Trends and Problems in the Appointment and Compensation of Common Benefit Counsel in Complex Multi-District Litigation: An Empirical Study of Ten Mega MDLs 13 (Oct. 2010) (unpublished manuscript) (on file with the *New York University Law Review*) (“Discerning the practices of each MDL court with respect to common benefit counsel is daunting for a number of reasons. Decisions are rarely published, rarely appealed, and oftentimes records relating to fees are filed under seal.”); Silver & Miller, *supra* note 13, at 109, 119 (“[Judges] face no known risk of appellate review or reversal: no appointment decision seems ever to have been challenged, much less reversed.”).

⁵⁸ Transferee judges tend to issue *Lone Pine* orders after most plaintiffs’ cases are resolved through a comprehensive settlement. These orders require nonsettling claimants to submit specific proof regarding their injuries to avoid dismissal. *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at *3–4 (N.J. Super. Ct. Law Div. Nov. 18, 1986); see also, e.g., *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340–41 (5th Cir. 2000) (finding that the district court’s prediscovery *Lone Pine* orders were not abuses of its discretion).

⁵⁹ See *Cunningham v. Hamilton Cnty.*, Ohio, 527 U.S. 198, 207 (1999) (finding that the decision to appeal should turn on clients’ interests alone); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 370 (1981) (holding that orders denying motions to disqualify counsel are not appealable final decisions).

⁶⁰ See *In re Dresser Indus., Inc.*, 972 F.2d 540, 542–43 (5th Cir. 1992) (finding mandamus appropriate only when a trial court has indisputably abused its discretion). Dismissals under Rule 16(f) are reviewed using the abuse-of-discretion standard. *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam) (“The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.”); e.g., *In re Vioxx Prods. Liab. Litig.*, 388 F. App’x 391, 395–96 (5th Cir. 2010) (using the abuse-of-discretion standard in reviewing the allegation that Judge Fallon should have recused himself based on his dual roles as judge and chief administrator of the Master Settlement Agreement).

lawyer selections. An objecting attorney faces the risk that her peers will dub her non-cooperative and thus “ineligible” for future leadership roles. Plus, early objections could alienate dissenters from both the chosen leaders and the transferee judge, making them less effective advocates.⁶¹ Consequently, if change is to be had, transferee judges must initiate it.

A. *Appointing Lead Lawyers*

Current judicial practice in selecting attorney leadership, where courts stress expertise, cooperative abilities, and financial means, can raise several concerns. First, valuing cooperation may encourage attorneys to be more concerned with impressing judges or their peers than vigorously representing clients whose interests differ from the majority's.⁶² Second, cooperation fosters a need for attorneys to curry favor with one another, which, when combined with the prevalence of repeat players,⁶³ can infect leadership committees with well-documented group decision-making biases, like conformity.⁶⁴ Third, appointing only repeat players may create groups of homogeneous thinkers who are less innovative.⁶⁵ Thus, focusing on experience and cooperation may cut against the notion that “diversity trumps ability” in disjunctive tasks like identifying and cultivating successful legal arguments.⁶⁶

⁶¹ See Silver & Miller, *supra* note 13, at 119.

⁶² This can cause a cascade effect that prompts them to discount contrary information. See CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 55–59, 74 (2003) (“In a reputational cascade, people think that they know what is right . . . but they nonetheless go along with the crowd in order to maintain the good opinion of others. Even the most confident people sometimes fall prey to this, silencing themselves in the process.”).

⁶³ See *infra* Part II.A.2 (discussing the prevalence of and potential problems with appointing repeat players to leadership positions).

⁶⁴ See SUNSTEIN, *supra* note 62, at 62 (“Cascade effects and blunders are significantly increased if people are rewarded not for correct decisions but for decisions that conform to the decisions made by most people. . . . Such a system of rewards is likely to lead both individual and groups in bad directions.”).

⁶⁵ See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* xvii (1st paperback prtg. 2008) (arguing that cognitive diversity enables novel breakthroughs).

⁶⁶ See *id.* at xiv–xv (“[D]isjunctive tasks [are] those in which only one person needs to succeed for the group to be successful, and *conjunctive tasks* [are] those in which everyone’s contribution is critical. . . . Diversity works best on disjunctive tasks because multiple approaches can be tried simultaneously, and one good idea means success for everyone.”). As Professor Page points out, “[m]ost real world tasks are neither purely disjunctive nor purely conjunctive,” *id.* at xv, which is likewise true for the work of a plaintiffs’ steering committee. Conducting document review, for example, is likely to be a conjunctive task where everyone’s contribution is critical and one missed document can cause a host of problems. Making decisions about which arguments to pursue, however, is more of a disjunctive task—only one person needs to propose a winning theory for the group’s motion to succeed.

1. Adequate-Representation Concerns

Lead-attorney hierarchies have not always held as much influence as they do today. Early groups coalesced mainly for convenience: They pooled expertise and financing, hired experts, created trial handbooks with “hot” documents, and even developed “schools” to train lawyers with similar cases in trial techniques.⁶⁷ But, absent unique financing arrangements,⁶⁸ group decision making did not bind non-consenting attorneys, and leaders received fees solely from their own clients.⁶⁹

By contrast, today’s committees are formalized, far-reaching, and obligatory. The recent *Vioxx* multidistrict litigation alone included at least ten committees.⁷⁰ These committees do not exist simply for attorney convenience; they assume control of the litigation and their duties usurp the traditional attorney’s daily responsibilities. Committees initiate and conduct discovery, act as spokespersons for all plaintiffs, call counsel meetings, examine and depose witnesses, coordinate trial teams, select cases for bellwether trials, submit and argue

⁶⁷ See Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 5–9 (1982) (describing litigation groups’ activities); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 899–902 (discussing how plaintiffs’ groups arise for mutual advantages such as including information and strategy harmonization). Examples of early groups include the late-1970s swine flu multidistrict litigation, which had a single thirteen-person steering committee, and the 1980s Dalkon Shield litigation, which had but one lead counsel. Rheingold, *supra*, at 4.

⁶⁸ See, e.g., Burch, *supra* note 16, at 1287 (discussing the Agent Orange financing arrangement).

⁶⁹ See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 443 (1998) (noting that lead lawyers in the L-Tryptophan litigation “received no premiums for their group service”); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1006 (1995) (“Notwithstanding the benefits of coordination, plaintiffs’ lawyers usually insist on retaining ultimate control over their individual cases.”).

⁷⁰ See *Pretrial Orders and Minute Entries*, MDL-1657 VIOXX PRODUCTS LIABILITY LITIG., <http://www.laed.uscourts.gov/vioxx/Orders/Orders.htm> (last updated Dec. 18, 2014) (referencing a Plaintiffs’ Steering Committee (PSC), Defendants’ Steering Committee, State Liaison Committee, Plaintiffs’ Liaison Counsel, PSC Executive Committee, Fee Allocation Committee, Third Party Payor Fee Allocation Committee, Government Actions Plaintiffs’ Case Management Committee, and Private Third-Party Payor Bellwether Trial Committee); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 1, 2008) (Pretrial Order No. 6B) (confirming the functions, duties, and responsibilities of the PSC, Plaintiffs’ Liaison Counsel, and the PSC Executive Committee). For another example, see *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD1596 (E.D.N.Y. Feb. 15, 2011) (Order No. 38) (appointing a plaintiffs’ steering committee to advise pro se litigants); see also Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 454 (2012) (discussing the merits of a plaintiffs’ steering committee for pro se litigants in mass actions).

motions, and negotiate proposed settlements.⁷¹ The individually retained attorney has no power to appoint or discharge the leaders who assume control of her clients' cases. Instead, she is relegated to an observer who can do little more than complain that the lead lawyers have violated their fiduciary obligations to the whole group.⁷²

Evolving from organic, ad hoc groups to mandatory, formal committees has important implications for committee members' fiduciary obligations and adequate representation, particularly when group members' interests are in tension with one another. When ad hoc groups were purely voluntary,⁷³ the attorney consented to participate and, since that decision fell within her agency authority, her consent bound her client. But neither clients nor their attorneys freely consent to multidistrict litigation or the subsequent selection of lead counsel on their behalf.⁷⁴ This non-voluntariness makes the committee appointment process more akin to choosing class counsel—where putative class members have no say in who represents them—than to forming ad hoc attorney groups. Yet, unlike selecting class counsel, judges seem to pay little attention to *Amchem*-like adequate-representation concerns in multidistrict litigation.⁷⁵

⁷¹ See, e.g., *In re Bos. Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, slip op. at 10 (S.D.W. Va. Feb. 29, 2012) (Pretrial Order No. 1) (outlining the committee's responsibilities regarding hearings and meetings); *In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, MDL No. 2187, slip op. at 3 (S.D.W. Va. Feb. 1, 2011) (Pretrial Order No. 3) (outlining the duties and responsibilities of the Plaintiffs' Lead Counsel); *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* MDL No. 2179, slip op. at 2–4 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 8) (outlining the responsibilities of the Plaintiffs' Steering Committee and the Plaintiff Executive Committee); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (DWF/AJB), 2005 WL 3704679, at *1 (D. Minn. Dec. 20, 2005) (outlining the responsibilities of the Plaintiffs' Lead Counsel); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, slip op. at 2–4 (E.D. La. Apr. 8, 2005) (Pretrial Order No. 6) (outlining the Plaintiffs' Steering Committee's responsibilities).

⁷² See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 234 (1st Cir. 1997) ("Whether or not there is a direct or formal attorney-client relationship between plaintiffs and the PSC, the PSC and its [individually retained plaintiffs' attorney] members necessarily owed a fiduciary obligation to the plaintiffs."); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004) (describing the characteristics and responsibilities of the lead counsel); Silver & Miller, *supra* note 13, at 118–20 (detailing the selection and empowerment of managerial attorneys). Some judges, however, have made efforts to ensure that the Plaintiffs' Steering Committee keeps individually retained attorneys informed of the litigation's progress and have permitted individually retained attorneys to participate in fee disputes by teleconference. See Weinstein, *supra* note 70, at 462 n.45 (noting a technique that he used in resolving the Zyprexa litigation).

⁷³ For examples of voluntary litigation groups, see Rheingold, *supra* note 67, at 14 (citing Mer/29, the Pill, asbestos, and Ford transmission cases as examples).

⁷⁴ Some judges have used actual contracts to tax participating attorneys at specified rates. See *infra* notes 180–92 and accompanying text (discussing fee-transfer agreements).

⁷⁵ See *infra* note 83 and accompanying text (describing structural conflicts of interest).

Nevertheless, structural conflicts of interest among claimants or between claimants and lead lawyers persist and may arise at multiple points.⁷⁶ Some conflicts will be apparent while trying to establish liability, such as significant differences in legal status, state laws,⁷⁷ claims,⁷⁸ or insurance coverage questions,⁷⁹ while others may arise only when contemplating remedies.⁸⁰ Judges have attempted to quell these adequate-representation fears by proclaiming that lead attor-

⁷⁶ That is, a conflict of interest either between the “claimants and the lawyers who would represent claimants on an aggregate basis” or “among the claimants themselves that would 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” PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (2010). Professor Coffee identified four basic structural conflicts that may arise in mass-tort class actions:

(1) internal conflicts that exist within the class—typically, because subcategories of class members are competing over the allocation of the settlement; (2) external conflicts that arise because class members (or their attorneys) have some extraneous reason for favoring a settlement that does not truly benefit the interests of all class members; (3) risk conflicts that arise because class members or class counsel have very different attitudes about the level of risk they are willing to bear; and (4) conflicts over control of the litigation.

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000). Although Professor Coffee focused on class actions, the same conflicts can arise in multidistrict litigation.

⁷⁷ When transferee courts do remand actions, they often cite case-specific differences in state laws as a reason for remanding. *E.g.*, *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1200 (D. Minn. 2012); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 77 (D. Me. 2011); *In re Nuvaring Prods. Liab. Litig.*, No. 4:08MD1964 RWS, 2009 WL 4825170, at *2 (E.D. Mo. Dec. 11, 2009).

⁷⁸ *See, e.g.*, *In re Genetically Modified Rice Litig.*, MDL No. 1811, slip op. at 2 (E.D. Mo. Apr. 18, 2007) (appointing a separate representative for Mississippi farmers and another representative for farmers who would prefer to litigate individually in state court). For example, if lead lawyers’ clients asserted only economic claims, but the entire plaintiff group included members with economic and physical injury claims, the attorneys may be less inclined to represent those with physical injuries.

⁷⁹ *E.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941, 959 (W.D. Wis. 2008) (subclassing a class action because of different statutes of limitation); *Maloney v. Califano*, 88 F.R.D. 293, 294–95 (D.N.M. 1980) (subclassing based on the time taken by the government to make disability determinations); *see also Daley v. Provena Hosps.*, 193 F.R.D. 526, 527–30 (N.D. Ill. 2000) (subclassing debtors who received different form letters); *Francis v. Davidson*, 340 F. Supp. 351, 361 (D. Md. 1972) (subclassing unemployed fathers who had applied unsuccessfully for certain benefits but were denied benefits for different reasons).

⁸⁰ For example, if some claimants required immediate medical attention, they would receive far less benefit from a settlement that provided research funds. *See Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992) (including claimants who had to have their heart valve removed immediately and thus did not benefit from the settlement’s research-and-development fund without special representation); *see also JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASES* 43 (1998) (expressing concern over the lack of separate representation in *Bowling v. Pfizer, Inc.*).

neys have a duty to represent all plaintiffs.⁸¹ Of course, class counsel has the same obligation.⁸² But, without determining whether group members' interests are cohesive, simply recognizing that the obligation exists does not iron out conflicts or reduce incentives to sell out a segment of the group. Claiming otherwise contradicts the Supreme Court's principal ruling in *Amchem*: Attorneys cannot simultaneously represent group members with fundamentally incompatible interests.⁸³ Accordingly, papering over conflicts with a generic, fiduciary veneer is a nonviable fix.

In fact, multidistrict litigation heightens concerns about inadequate representation.⁸⁴ Although plaintiffs technically consent to settle and thus "opt in," the dynamics of all-or-nothing settlements⁸⁵ and settlements where attorneys threaten to withdraw from representing nonsettling clients⁸⁶ undermine clients' theoretical autonomy. And, unlike in class actions, plaintiffs who feel inadequately represented cannot collaterally attack a settlement by contending that counsel failed to represent them in the first suit.⁸⁷ These plaintiffs must simply rely on their individual attorneys, who may be unable to effectively voice clients' concerns because the committee negotiating

Bowling would likely proceed as multidistrict litigation rather than a class action if litigated today.

⁸¹ See *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 234 (1st Cir. 1997) (addressing the lead attorney's fiduciary duties to the class plaintiffs). Group representation under forced multidistrict litigation circumstances differs even from that in collective representation where clients can consent to their attorney representing and advancing the group's aggregate interests. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL. F. 519, 529–30 (discussing individual attorneys representing clients as a group). Committee appointments more closely resemble class-counsel appointments. In class actions, counsel have to represent the best interests of all class members, but because members have not consented to being represented in any meaningful way, their interests must be cohesive. When interests differ, as did the interests of those with present and future claims in *Amchem*, members must have separate representatives. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1997).

⁸² See FED. R. CIV. P. 23(g)(4) (detailing the duties of class counsel).

⁸³ See 521 U.S. at 626–27; see also *infra* notes 259–60 and accompanying text (describing structural conflicts of interest).

⁸⁴ I have elaborated elsewhere on the relative degrees of cohesion and difference among plaintiffs' positions in aggregate litigation. See Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 25–36 (2009).

⁸⁵ See Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 982–83 (2010) (chronicling the ethical abuses potentially arising from all-or-nothing settlements).

⁸⁶ See Erichson & Zipursky, *supra* note 48, at 279–92 (highlighting the ethical problems resulting from mandatory recommendation and mandatory withdrawal provisions).

⁸⁷ See *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991) (listing options available to plaintiffs in class actions); *Baylor v. U.S. Dep't of Hous. & Urban Dev.*, 913 F.2d 223, 225 (5th Cir. 1990) (discussing collateral attack in the class-action setting); *Gillespie v. Crawford*, 858 F.2d 1101, 1102–03 (5th Cir. 1988) (same).

the settlement offer denied them a seat at the table and the offer requires that individual attorneys recommend the deal to all or none of their clients. One solution then is to ensure that the lead lawyers around the table represent plaintiffs' different views, a solution that the *Manual for Complex Litigation* endorses.⁸⁸

The *Manual for Complex Litigation* makes two important but often overlooked points about adequate representation. First, it observes that “[c]ommittees are most commonly needed when group members’ interests and positions are sufficiently dissimilar to justify giving them representation in decision making.”⁸⁹ Second, it suggests that 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.”⁹⁰ Nevertheless, practice demonstrates that courts stress the *Manual’s* other criteria—attorneys’ experience, financial resources, and cooperative abilities⁹¹—perhaps because they are easier to assess without knowing much about the plaintiffs themselves.⁹² After all, judges typically appoint a plaintiffs’ steering committee within a few weeks of receiving the transferred cases and before most discovery ensues.⁹³

Two additional judicial practices may likewise compound adequate-representation concerns: appointing attorneys to leadership

⁸⁸ See MANUAL FOR COMPLEX LITIGATION, *supra* note 72, §§ 10.221, 10.224 (classifying organizational structures for lead lawyers and the court’s responsibilities); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 37–43 (2009) (emphasizing issues relating to litigants’ participation, voice, and control).

⁸⁹ MANUAL FOR COMPLEX LITIGATION, *supra* note 72, §§ 10.221, 10.224 (“[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.”).

⁹⁰ *Id.* § 10.224.

⁹¹ See, e.g., *In re Bos. Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, slip op. at 9 (S.D.W. Va. Feb. 29, 2012) (Pretrial Order No. 1) (“The main criteria for PSC membership will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation.”); see also Dubay, *supra* note 57, at 39 (“While the MCL4th suggests consideration of reasonableness of rates and diversity of representation, the courts with specific orders as to qualifications focused on experience in MDLs or complex litigation and the ability and resources to commit to the leadership responsibilities.”).

⁹² See MANUAL FOR COMPLEX LITIGATION, *supra* note 72, § 10.224 (listing factors the court should assess when evaluating counsel).

⁹³ Judge Fallon appointed the Plaintiffs’ Liaison Committee in the same month he received the initial transfer and appointed the Plaintiffs’ Steering Committee within two months. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (J.P.M.L. Feb. 16, 2005) (transferring cases to the Eastern District of Louisiana pursuant to § 1407); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 28, 2005) (Pretrial Order No. 2) (appointing Plaintiffs’ Liaison Counsel); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. April 8, 2005) (Pretrial Order No. 6) (appointing Plaintiffs’ Steering Committee).

positions who have no involved clients⁹⁴ and ratifying plaintiffs' attorneys' proposed leadership slate. First, when judges appoint counsel without affected clients, attorneys may feel more beholden to the judge than the plaintiffs. In theory, appointing a clientless lawyer lessens the fear that her duty to the group may conflict with her clients' specific interests and might add an alternative perspective.⁹⁵ But attorneys who are untethered to clients have little incentive to understand and identify conflicting interests, cannot be fired or replaced by plaintiffs' counsel, and serve purely at the court's behest. Plus, judges' incentives and objectives differ from clients' incentives and goals: transferee judges generally want to achieve global settlements that will land them additional interesting and challenging multidistrict litigation assignments,⁹⁶ whereas plaintiffs want everything from compensation to an apology or injunctive relief.⁹⁷ Moreover, clientless lawyers' compensation comes entirely from the court's ruling on fees, not private retainers. As Professors Silver and Miller have pointed out, this means that "a clientless lawyer will rationally want to settle on any terms a defendant will offer . . . [because she] has no stake in the MDL's upside potential, but will suffer greatly if negotiations fail."⁹⁸

Second, when judges ratify plaintiffs' attorneys' picks for key positions, they can amplify adequate-representation concerns

⁹⁴ For example, Judge Weinstein appointed Melvyn I. Weiss as chair of the *Zyprexa* Plaintiffs' Steering Committee even though he had no clients with pending claims in the litigation. And Judge Fallon appointed Russ Herman as liaison counsel despite having only a few clients. As Professors Silver and Miller point out, both Weiss and Herman are experienced deal makers. Silver & Miller, *supra* note 13, at 151. *But see* Dubay, *supra* note 57, at 39, 62 (observing that "in the Prempro MDL, the court specifically allowed the addition of PSC members without active MDL cases over the defendants' objections," yet noting that "representation of a plaintiff in a pending MDL may be necessary for some leadership positions, but not for others").

⁹⁵ See Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 *DRAKE L. REV.* 621, 625–26 (2006) (addressing concerns that arise during expert discovery).

⁹⁶ See *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) ("[I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. . . . Indeed, MDL practice actively encourages retention even of trial-ready cases in order to 'encourage' settlement.").

⁹⁷ See Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 *LAW & SOC'Y REV.* 645, 645 (2008) (showing the tradeoff between a cash payment and the pursuit of litigation); Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of the Plaintiffs' Litigation Aims*, 68 *U. PITT. L. REV.* 341, 363 (2006) ("Plaintiffs' articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance, 18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.").

⁹⁸ Silver & Miller, *supra* note 13, at 151.

depending on the committee position. Judges tend to use one of two methods to select lead lawyers: a consensus method, where informal attorney networks choose their own leaders and the judge then confirms that slate,⁹⁹ or a competitive selection process where the court invites submissions and chooses among them. In the *Vioxx* litigation, for example, plaintiffs' attorneys nominated Chris Seeger and Andy Birchfield as co-lead attorneys over dinner in New Orleans; Judge Fallon then made their appointment official.¹⁰⁰

Relying on self-selection methods can encourage undisclosed fee-sharing arrangements that may adversely affect settlement incentives,¹⁰¹ tit-for-tat reciprocity among repeat players, "good ol' boy networks,"¹⁰² and unrepresentative committees.¹⁰³ Lawyers have little incentive to consider adequate representation when brokering a consensus since representing more people leads to a higher fee and a

⁹⁹ *E.g.*, *In re Genetically Modified Rice Litig.*, MDL No. 1811, slip op. at 1–2 (E.D. Mo. Apr. 18, 2007) (appointing leadership counsel and observing that the group "most closely meets the 'private ordering' concept, because it has support of the larger number of plaintiffs and lawyers involved"); *In re Neurontin Mktg. & Sales Practices Litig.*, MDL No. 1629, slip op. at 7–10 (D. Mass. Dec. 16, 2004) (Corrected Case Management Order) (appointing plaintiffs' counsel's proposed slate). The first *Manual for Complex Litigation* recommended this approach, though it changed course by the second edition and advised judges to oversee the appointment process. *Compare* MANUAL FOR COMPLEX LITIGATION (FIRST) §§ 1.92, 4.53 (1982), *with* MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.224 (1985). *See also* Rheingold, *supra* note 67, at 3–4 ("[T]he court sets the ground rules for a steering committee, and the decision of the committee binds all of the cases made part of the litigation. However, even then the actual selection of the members of the committee . . . is usually left for the group to decide."). Informal selection methods vary and may simply be based on a vote of attorneys invited to a particular meeting.

¹⁰⁰ *See* SNIGDHA PRAKASH, ALL THE JUSTICE MONEY CAN BUY 13–14 (2011) (describing the nomination and selection process). To be clear, my point is not that Birchfield and Seeger were unqualified for the position, but that—as Judge Fallon has recognized—self-selection methods can generate suboptimal incentives. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 n.4 (E.D. La. 2010) ("Moreover, the selection of lead counsel by their fellow attorneys would involve intrigue and side agreements which would make MacBeth appear to be a juvenile manipulator. Frequently, recommendations by attorneys for positions on leadership committees are governed more on friendship, past commitments and future hopes than on current issues."). For another example, see Daniel Wise, *Lawyers Pack World Trade Center Hearing*, N.Y. L.J., May 9, 1994, at 1 (describing how lawyers involved in the first World Trade Center bombing in 1993 created their own steering committee and submitted it to the judge for approval).

¹⁰¹ *E.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452 (E.D.N.Y. 1985) (approving a plaintiffs' management committee's internal fee-splitting agreement that would give financing attorneys three times the amount they advanced to finance the litigation), *rev'd*, 818 F.2d 216 (2d Cir. 1987).

¹⁰² The majority of repeat players remain male. *See infra* Appendix tbl.1 (eleven of fifty attorneys on this list are female, or approximately 22%).

¹⁰³ *See In re Vioxx*, 760 F. Supp. 2d at 643 n.4 (discussing the membership selection process for committees). *But see* Silver & Miller, *supra* note 13, at 160–69 (arguing in favor of appointing lawyers with the largest client list to lead positions and then allowing them to appoint attorneys to perform common-benefit work).

greater ability to invest in the litigation.¹⁰⁴ And, because the multidistrict litigation statute requires only a common question of fact, plaintiffs' claims need not be cohesive.¹⁰⁵ Consequently, attorneys have little reason to call attention to divisions among their clients or consider those differences when proposing candidates.

Consensus selection is also problematic because the relevant plaintiff's bar is fairly small and the attorneys must work together frequently.¹⁰⁶ Thus, reputation and reciprocity matter among this group. Asked privately, attorneys might candidly assess their peers, but publicly they may silence themselves out of concern that they will be ostracized and thus ineligible for future leadership positions. As such, they may rely solely on others' signals even if their own preferences conflict with the majority.¹⁰⁷ They are more apt to conform since the circumstances make it politically untenable to express dissenting views.¹⁰⁸

Despite these concerns, consensus selection is actually preferable when appointing liaison counsel as opposed to lead counsel or steering committee members. Liaison counsel acts as a middleman between the court and plaintiffs' counsel by disseminating information, calling meetings, resolving scheduling conflicts, and maintaining document databanks.¹⁰⁹ Given that many attorneys have worked together before, they are likely to have superior knowledge about lawyers' responsiveness and organizational skills. Thus, appointing the consensus nominee may work to the plaintiffs' and the judge's advantage, particularly if attorneys reached consensus through a secret ballot, which helps alleviate backlash concerns.¹¹⁰

¹⁰⁴ See Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 121 (2011).

¹⁰⁵ Compare 28 U.S.C. § 1407 (2012) (requiring a common question of fact), with FED. R. CIV. P. 23(a) (requiring a common question of law or fact and adequate representation), and FED. R. CIV. P. 23(b)(3) (requiring that common questions predominate over individual ones).

¹⁰⁶ See *infra* Part II.A.2 (providing data on repeat players in leadership positions).

¹⁰⁷ See SUNSTEIN, *supra* note 62, at 57 (describing an analogous phenomenon with medical doctors).

¹⁰⁸ See Cass R. Sunstein, *Conformity and Dissent* 23 (Pub. Law & Legal Theory, Working Paper No. 34, 2002) (noting that in cascades, "[p]eople will often neglect their own private information and defer to the information provided by their predecessors").

¹⁰⁹ See MANUAL FOR COMPLEX LITIGATION, *supra* note 72, at § 10.221 (defining the role of a liaison counsel).

¹¹⁰ Using a secret ballot helps overcome the pressure toward conformity and consensus. See generally SUNSTEIN, *supra* note 62, at 14–36 (discussing conformity and dissent); DANIEL KAHNEMAN, THINKING, FAST AND SLOW 245–46 (2011) ("[T]he proper way to elicit information from a group is not by starting with a public discussion but by confidentially collecting each person's judgment.").

2. Repeat-Player Concerns

When judges emphasize experience, cooperation, and financial resources in selecting lead lawyers, they may winnow the eligible attorney pool to repeat players. Although having some experienced repeat attorneys in key positions could benefit plaintiffs by offsetting repeat play on the defense side, repeat play can also create fertile soil for collusion, reciprocity concerns, and incentives to protect one's deal making or collaborative reputation at the expense of uniquely situated clients. Both repeat players and aspiring repeat players have rational economic incentives to protect their reputations and develop reciprocal relationships to form funding coalitions,¹¹¹ receive client referrals, share information, and streamline tasks like document review.¹¹² As such, extralegal, interpersonal, or business concerns may govern their interactions. Nonconforming lawyers may be ostracized and informally sanctioned, which promotes cooperation, but deters dissent and vigorous representation.¹¹³

Accordingly, to achieve some sense of how prevalent repeat players (individual attorneys and law firms) are in multidistrict litigation, I collected data from the seventy-two product-liability and sales-practices multidistrict litigations that were pending as of May 14, 2013.¹¹⁴ If repeat players exist, these cases should provide a represen-

¹¹¹ For example, the Vioxx Litigation Consortium included lawyers from five law firms and the Polybutylene Plumbing Litigation included forty-nine law firms. *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 435 (Tex. Ct. App. 2000); Silver & Miller, *supra* note 13, at 126.

¹¹² See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 220–23 (2004) (analyzing the role of reputation in contingent-fee practice and referrals); Stier, *supra* note 67, at 896–904 (describing networks of plaintiffs' counsel and the information sharing and referrals that occur between lawyers). Several sprawling, formal groups of plaintiffs' lawyers have formed over the years. *E.g.*, *Who We Are*, AM. ASS'N FOR JUST., <http://www.justice.org/who-we-are> (last visited Feb. 2, 2015) (formerly the Association of Trial Lawyers of America).

¹¹³ See Armin Falk et al., *Driving Forces Behind Informal Sanctions*, 73 *ECONOMETRICA* 2017, 2028–29 (2005) (finding that cooperating group members impose the most severe sanctions on defectors and that retaliation is a driving factor behind fairness-driven informal sanctions); Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter—The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 *ECON. J.* C1, C2–C3 (2002) (evaluating the social preference for reciprocity). Reciprocity and reputational concerns, along with trustworthiness, are most robust when people cooperate with one another over time in repeated interactions. See Frans van Dijk et al., *Social Ties in a Public Good Experiment*, 85 *J. PUB. ECON.* 275, 291–92 (2002) (discussing the implications of public-good experiments on reciprocity).

¹¹⁴ I identified the relevant cases using the Panel's list of pending MDLs as of May 14, 2013. Because many of the same attorneys who litigate product-liability cases were also involved in the *Deepwater Horizon* oil spill litigation, the litigation in front of Judge Barbier was also included. Two cases mentioned on the May 14, 2013, list were excluded because the orders were not electronically available (*In re "Factor VIII or IX Concentrate*

tative sample for several reasons. First, product liability and sales practices comprise the largest portion of pending cases, constituting well over one-third of all multidistrict litigation.¹¹⁵ Second, examining pending cases on a certain date includes data from cases transferred over a twenty-two-year span.¹¹⁶ Third, to the extent possible, I included data from all orders appointing lead lawyers (plaintiffs' steering committees, plaintiffs' liaison committees, discovery committees, trial committees, etc.), not just lead counsel or the plaintiffs' steering committee. When taken as a whole, this information should give an accurate sense of the scale of repeat play.

The data confirmed that repeat players are prevalent. Although only 31% of individual attorneys involved in multidistrict litigation were named to one or more leadership positions, the total number of positions this small group occupied is more revealing: repeat players held 749 out of 1177 available leadership positions, or 63.6%.¹¹⁷ Fifty attorneys were named as lead lawyers in five or more multidistrict litigations and claimed 30% of all leadership roles.¹¹⁸

Repeat play among law firms was even more evident. Again, even though only 40.7% of law firms were repeat players in these suits,¹¹⁹ lawyers from those firms occupied 78% of all available leadership positions.¹²⁰ Seventy law firms had attorneys who were named to five or more leadership roles, and attorneys from those firms were

Blood Products" *Products Liability Litigation*, which began in 1993, and *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, which began in 2000). *In re Plavix Marketing, Sales Practices & Products Liability Litigation* is a new MDL, and therefore only interim counsel, appointed on July 25, 2013, is included. Finally, I could identify only interim counsel in *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices & Products Liability Litigation*. This litigation currently contains only fourteen cases and is pending in front of Judge Carney.

¹¹⁵ See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 12 (2012), available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2012.pdf (showing 34 sales-practices multidistrict litigations and 72 products-liability litigations out of 291 total multidistrict litigations).

¹¹⁶ As noted in footnote 114, two older cases were excluded because the orders were not available electronically, but *In re Asbestos Products Liability Litigation*, which began in 1991, is included in the data.

¹¹⁷ There were 624 different individuals appointed to leadership positions and 195 of them were named more than once.

¹¹⁸ See *infra* Appendix tbl.1 (listing attorneys who were named as lead lawyers in five or more product-liability multidistrict litigations).

¹¹⁹ There were 429 unique law firms involved, and 175 of those firms had attorneys who were appointed to more than one leadership position.

¹²⁰ Two judges named entire law firms as lead or liaison counsel. Where possible, only the attorneys from the named law firm who were "to be noticed by the court" on PACER were included in the data. Thus, the number of available leadership positions from the law firm perspective was 1183, and lawyers from firms named more than once occupied 927 of those leadership positions.

appointed to well over half of all lead-lawyer positions.¹²¹ Put starkly, 16% of the involved law firms held nearly 54% of all leadership positions.

These numbers include five separate multidistrict litigations over pelvic repair systems transferred to Judge Goodwin.¹²² Judge Goodwin named the same sixty-two attorneys as lead lawyers in four of those five cases.¹²³ While closely coordinating discovery, pretrial rulings, and counsel prevents inconsistent rulings and redundant requests, appointing the same lead lawyers is evidence of repeat play and poses the same associated concerns.¹²⁴ Nevertheless, coding those four litigations as one would reduce the percentage of repeat play: Repeat attorneys would hold 54.9% of all lead-lawyer positions and repeat law firms would occupy 73.2% of the available positions.¹²⁵

Some judges appeared to be more inclined to appoint repeat players than others.¹²⁶ For example, repeat players held seven out of ten positions in *In re Zurn Pex Plumbing Products Liability Litigation*; fifteen out of seventeen in *In re Yasmin & Yaz Marketing, Sales Practices & Products Liability Litigation*; eight out of nine in *In re Propulsid Products Liability Litigation*; eighteen out of twenty-two in *In re Actos Products Liability Litigation*; and seventeen out of nineteen in *In re Zimmer Nexgen Knee Implant Products Liability Litigation*. By contrast, in *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*, Judge Salas appointed only two repeat players out of eleven lead-lawyer positions, and, in *In re ConAgra*

¹²¹ Specifically, attorneys named as lead lawyers from those seventy firms occupied 638 of 1183 available positions, or 53.9% of all the lead-lawyer positions.

¹²² See *In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 844 F. Supp. 2d 1359, 1360 (J.P.M.L. 2012) (“The actions in each MDL share factual issues arising from allegations of defects in pelvic surgical mesh products manufactured by AMS, Boston Scientific, and Ethicon, respectively.”).

¹²³ The same attorneys were named as lead lawyers in *In re American Medical Systems, Inc. Pelvic Repair Systems Products Liability Litigation*, *In re Boston Scientific Corp. Pelvic Repair Systems Products Liability Litigation*, *In re C.R. Bard, Inc. Pelvic Repair Systems Products Liability Litigation*, and *In re Ethicon, Inc. Pelvic Repair Systems Products Liability Litigation*. *In re Coloplast Corp. Pelvic Support Systems Products Liability Litigation*, with the smallest number of cases, did not have identical lead lawyers appointed.

¹²⁴ For more on this, see *infra* notes 130–45 and accompanying text.

¹²⁵ Coding those four litigations as one would reduce the number of available lead-lawyer positions to 998; 548 of those positions were filled by attorneys who were also lead lawyers in other multidistrict litigations. Likewise, it reduces the number of positions for law firms to 1004; 735 of those positions were filled by lawyers from firms named more than once. Asterisks in Tables 1 and 2 in the Appendix illustrate the effect this anomaly would have on those numbers.

¹²⁶ The database did not take into account the date that lead lawyers were appointed, so it could be that one particular judge appointed an attorney first and that others then followed suit.

Peanut Butter Products Liability Litigation, Judge Thrash selected only five repeat players to serve in nineteen leadership positions.

In many ways, these findings are unsurprising; repeat players in highly specialized legal fields are common. As Professor Coffee recognized nearly twenty years ago, fewer than fifty firms specialized in asbestos litigation, and even then only “a handful dominate[d] the field,” namely because attorneys need large case inventories to make mass litigation economically feasible.¹²⁷ Those circumstances have escalated in the years since: Mass litigation is increasingly expensive (a single Vioxx case initially cost between \$1 million and \$1.5 million to develop),¹²⁸ and it may take years before attorneys receive a return on their investment.¹²⁹ Thus, when judges want experienced attorneys who can afford to finance not only their own clients’ claims but unified discovery as well, the pool of “qualified” candidates is relatively small.

Although experience, financing abilities, and cooperative tendencies seem to be compelling selling points,¹³⁰ there are several reasons why appointing solely or predominately repeat players may fail to serve plaintiffs’ best interests. First, seeking candidates with cooperative tendencies further encourages rational attorneys playing the “long game” to curry favor with one another and position themselves for future appointments. Leadership positions result in increased fees, prestige, and marketing opportunities.¹³¹ Voicing the concerns of a minority of plaintiffs (particularly when one has not been specifically delegated that task) can be politically unpopular and brand the dissenter a defector. Speaking up, for example, could derail a settlement that would generate a significant payoff for other plaintiffs’ attorneys. Over time, expressing those opinions could lead to a reputation for being contrary and uncooperative, which would, in turn, decrease lucrative leadership opportunities.

Second, groups of repeat players who shun dissent are more likely to be infected by group decision-making biases such as cascade

¹²⁷ John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1364–65 (1995); see also Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1590–96 (2004) (discussing the emergence of select repeat players).

¹²⁸ See Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES, Nov. 17, 2007, at C1 (noting the significant resources expended developing a case).

¹²⁹ See Burch, *supra* note 16, at 1285–87 (detailing the financial risks of aggregate litigation).

¹³⁰ The *Manual for Complex Litigation* recommends these traits. See MANUAL FOR COMPLEX LITIGATION, *supra* note 72, § 10.221.

¹³¹ Dubay, *supra* note 57, at 9.

and conformity effects,¹³² confirmation bias, and group polarization.¹³³ Cascades can occur when a few people signal that a particular position is correct and others fall in line in lieu of relying on their own contradictory information, whether that information concerns ethical obligations or knowledge that some clients might receive no benefit from proposed remedial relief.¹³⁴ The initial signal might be misinformed, such that mentioning this information or dissenting would alter the outcome, but when reciprocity and reputation are important, the tendency is to stay silent.¹³⁵

Confirmation bias afflicts group decision making when members' convictions cause them to discount contradictory evidence or interpret information in a way that supports their existing beliefs.¹³⁶ Similarly, group polarization—where a committee may adopt a more extreme position after discussing it with others who are likeminded¹³⁷—occurs with greater frequency and intensity when group members are connected through friendship, mutual affection, or solidarity as repeat

¹³² See SUNSTEIN, *supra* note 62, at 62 (“Cascade effects and blunders are significantly increased if people are rewarded not for correct decisions but for decisions that conform to the decisions made by most people.”); Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 563, 564 (2002) (“[F]ormal and informal conformity pressures and the desire to preserve harmony within a group can override the motivation to critically appraise the relevant facts, thus (often) leading to poor decisions.”).

¹³³ See SUNSTEIN, *supra* note 62, at 112, 118 (observing that “[a] deliberating group ends up taking a *more extreme position* than its median member took before deliberation began,” a concept known as “group polarization,” and that “those with a minority position often silence themselves or otherwise have disproportionately little weight in group deliberations”); Schulz-Hardt et al., *supra* note 132, at 564–65 (2002) (“[C]onfirmation bias’ (preference for information confirming one’s position) was most pronounced in groups in which all members had favored the same alternative individually (so-called ‘homogeneous groups’) . . .”). Repeat play and agency relationships may, however, dampen other biases. Linda Babcock, George Loewenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 921 (1997).

¹³⁴ See SUNSTEIN, *supra* note 62, at 55–56, 74–75 (defining and analyzing cascades).

¹³⁵ See *id.* at 74–75 (introducing reputational cascades).

¹³⁶ See Joshua Klayman, *Varieties of Confirmation Bias*, in DECISION MAKING FROM A COGNITIVE PERSPECTIVE 385, 385–87, 398 (Jerome Busemeyer et al. eds., 1995) (defining confirmation bias); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 178, 210 (1998) (explaining the preferential treatment of confirmatory evidence).

¹³⁷ See Michael A. Hogg, *Social Identity, Self-Categorization, and the Small Group*, in 2 UNDERSTANDING GROUP BEHAVIOR 227, 234 (Erich H. Witte & James H. Davis eds., 1996) (“[T]raditional explanations of group polarization fall into two broad categories: (a) those that emphasize compliance, for self-presentational motives . . . and (b) those that emphasize the intrinsic persuasiveness of novel arguments brought up in discussion that support one’s original position.”).

players may be.¹³⁸ Confident experts—such as successful repeat players—are even more likely to polarize groups.¹³⁹ So, if a steering committee discusses ways to encourage plaintiffs to accept its proposed settlement, but its members are unlikely to dissent, the discussion could lead them to adopt increasingly coercive terms like mandatory recommendation and withdrawal provisions.¹⁴⁰

Third, appointing solely or predominantly repeat players and emphasizing cooperation promotes consistent thinking and may not provide plaintiffs with the most innovative representation.¹⁴¹ Groups with cognitively diverse members—people with alternative perspectives, interpretations, and heuristics who are outside powerful lawyers' stable of go-to people—may be more capable problem solvers and may identify more successful solutions than homogeneous groups when performing disjunctive tasks.¹⁴² Disjunctive tasks are those in which only one person needs to propose a winning strategy or idea in order for everyone to succeed (determining the best legal theory,

¹³⁸ SUNSTEIN, *supra* note 62, at 79, 129–30; cf. Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, 28 EUR. J. SOC. PSYCHOL. 323, 323–36 (1998) (finding that group identification and social attraction contributed to group polarization effects while friendship ties did not).

¹³⁹ SUNSTEIN, *supra* note 62, at 129; Maryla Zaleska, *The Stability of Extreme and Moderate Responses in Different Situations*, in GROUP DECISION MAKING 163, 164 (Hermann Brandstätter et al. eds., 1982); see also Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 675 (2002) (stating that experts are more likely to overestimate their actual knowledge of their field of expertise and are prone to more routinized ways of thinking when it comes to approaching problems in their field). Individuals working alone do, however, tend to brainstorm more ideas than groups. Gayle W. Hill, *Group Versus Individual Performance: Are N + 1 Heads Better than One?*, 91 PSYCHOL. BULL. 517, 527 (1982).

¹⁴⁰ See CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 3 (2009) (describing how group polarization leads to outcomes more extreme than initial individual inclinations would have indicated); JAMES SUROWIECKI, THE WISDOM OF CROWDS 184–85 (2004) (describing these group polarization effects, particularly on groups' risk preferences); Michael A. Hogg & Scott A. Reid, *Social Identity, Self-Categorization, and the Communication of Group Norms*, 16 COMM. THEORY 7, 18–19 (2006) (discussing the tendency of groups to adhere to group norms in reaching decisions); see also, e.g., *supra* notes 48–49 and accompanying text (discussing the Vioxx settlement).

¹⁴¹ See *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, slip op. at 1–2 (E.D. La. June 25, 2009) (Pretrial Order No. 42) (emphasizing cooperation as a criterion for membership in a plaintiffs' steering committee). Although transferee judges rarely explain their rationale for appointing particular attorneys, this basic assumption regarding homogeneity has been true in the securities class-action context, where judges issue reasoned opinions about why they selected particular lead plaintiffs. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1139–41 (2011).

¹⁴² See PAGE, *supra* note 65, at xiv–xv (finding that diversity helps the most with disjunctive tasks); Issacharoff, *supra* note 139, at 675 (“[Experts] are subject to routinized ways of approaching problems and to an unreflective ‘group think’ style of inbred behavior.”).

identifying successful negotiating tactics, and selecting which issues to appeal, for example), as opposed to conjunctive tasks in which everyone must perform well for the group to succeed.¹⁴³ Accordingly, to the extent that repeat play and fear of dissent promote uniform thinking, repeat players may be less innovative than outsider attorneys when performing disjunctive tasks.

Finally, appointing repeat players may increase the likelihood of collusive settlements. Repeat players, aggregation, and judges who want to settle are the three traditional factors that enable collusion.¹⁴⁴ And now that most multidistrict litigation settles without class certification, even the most vigilant judge lacks the formal tools to probe behind the scenes of what has then become a nonadversarial process.

These concerns over collusive conditions, cognitive homogeneity among lead lawyers, disincentives to dissent, and decision-making biases add up to an overarching disquiet about whether repeat players can adequately represent the entire plaintiff group. While the temptation to appoint repeat players is understandable because judges know that their personalities are conducive to deal making and that they are dependable emissaries, convenience should not outweigh constitutional due process. Alleviating adequate-representation concerns demands a healthy infusion of new entrants, procedures that tolerate and promote dissent, and special appointments to represent plaintiffs with conflicting interests.¹⁴⁵

B. Awarding and Cutting Attorneys' Fees

As the push to become a lead lawyer suggests, attorneys' fees in multidistrict litigation are big business. Merck's Vioxx defense fees ran more than \$600 million annually, and the settlement yielded plaintiffs' firms nearly \$2 billion.¹⁴⁶ While defense fees are typically paid through billable hours, plaintiffs' attorneys often have their clients sign contingent-fee contracts, which entitle counsel to some percentage of her client's settlement or judgment—typically in the neighborhood of 33%.¹⁴⁷ When collected from thousands of clients, attorneys' fees can be staggering—one of the many reasons that

¹⁴³ See PAGE, *supra* note 65, at xv (explaining the difference between disjunctive and conjunctive tasks). Conducting document review is a conjunctive task; one missed, critical document can pose setbacks for the entire group, so everyone's contribution is critical.

¹⁴⁴ Chamblee, *supra* note 28, at 170–71.

¹⁴⁵ *Infra* Part III.A.

¹⁴⁶ Berenson, *supra* note 1.

¹⁴⁷ Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 285–86 (1998).

judges feel compelled to intervene.¹⁴⁸ Compared to class-action awards, which average around 20%,¹⁴⁹ these fees may seem excessive. Consequently, judges have grappled with two critical questions: (1) how to compensate lead attorneys using a coherent rationale, and (2) how lead lawyers' compensation should affect the fees of non-lead attorneys who no longer have to bear the lion's share of the work or the financing risk.

1. *Compensating Common-Benefit Work*

To justify awarding fees to lead lawyers, judges have borrowed ad hoc from class-action law's common-fund doctrine,¹⁵⁰ contract principles, ethics, and equity. As this section explores, each theory standing alone is too sparse and cannot fully explain fee awards. But lumped together, these theories appear to create a seamless facade. Yet, this doctrinal patchwork lacks predictable limits, prompts unexpected awards, and can undermine attorneys' incentives to shoulder complex, time-consuming cases.¹⁵¹

First, even though judges often deny class certification,¹⁵² they nevertheless tend to invoke the class action's common-fund doctrine to compensate lead lawyers.¹⁵³ The common-fund doctrine rests on

¹⁴⁸ See Curtis & Resnik, *supra* note 69, at 434 (“[T]he work of judges on attorneys’ fees in all kinds of cases has exposed the courts to billing practices that upset them; judges have become impatient and distressed at the size of bills and the relationships between outcomes and costs.”). Of course, defense fees can be staggering, too, but judges rarely interfere with those fees.

¹⁴⁹ See Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 258 (2010) (examining class-action awards from 1993 to 2008 and concluding that “[t]he mean fee to recovery ratio was 0.23, or 23 percent of the class award, but this percent varies by recovery size”); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 831 tbl.7 (2010) (concluding that fees and expenses in class actions averaged 20% of the total settlement awards in 2007). For a detailed explanation of why multidistrict litigation costs attorneys more money to litigate than class actions, see Burch, *supra* note 16, at 1288–91.

¹⁵⁰ This is also referred to as the “common-benefit doctrine.”

¹⁵¹ I suggest an alternative rationale in Part III.B.

¹⁵² *E.g.*, *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (denying class certification because of the variety of illnesses alleged and other dissimilarities between plaintiffs); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 463 (E.D. La. 2006) (denying plaintiffs’ motion to certify a personal-injury class); *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587, 595–96 (N.J. 2008) (affirming the decision not to certify a Vioxx medical-monitoring class).

¹⁵³ *E.g.*, *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606–07 (1st Cir. 1992); *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 770–71 (E.D. La. 2011); *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–92

restitution principles: A self-appointed, non-contractually-retained attorney litigates on behalf of absent class members and benefits them when she settles (the “common fund”).¹⁵⁴ If the settlement compensated class members without paying counsel, it would unjustly enrich them at counsel’s expense.¹⁵⁵ Yet, this doctrine assumes that claimants implicitly consent to fee awards and count as passive beneficiaries, which is not the case in multidistrict litigation where active plaintiffs retain their own attorneys and have no ability to exit the multidistrict litigation.¹⁵⁶ As the *Restatement (Third) of Restitution & Unjust Enrichment* plainly states: “By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation cannot be explained entirely by restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court.”¹⁵⁷

Still, the common-fund doctrine’s underlying rationale is attractive: When lead lawyers perform the work for individually retained attorneys, they benefit them. Failing to pay lead lawyers could thus unjustly enrich non-lead attorneys, particularly free riders who simply

(E.D.N.Y. 2006); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, MDL 1699, 2006 WL 471782, at *1 (N.D. Cal. Feb. 28, 2006); see also Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 375–76 (2014) (discussing the common-fund doctrine’s application in class actions and its migration into the multidistrict litigation context).

¹⁵⁴ See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney’s fees.” (citations omitted)); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (2011) (“Class counsel assumes for this purpose the role of restitution claimant; the restitution claim is asserted by the counsel against the class. Counsel asserts that the class will be unjustly enriched, at counsel’s expense, unless a reasonable fee is awarded from the common fund.”); Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656, 663–66 (1991) (arguing that restitution principles justify forcing absent plaintiffs to pay attorneys who represent plaintiffs’ classes).

¹⁵⁵ *Boeing*, 444 U.S. at 478 (“The [common-fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.”); see also *Case v. Cont’l Airlines Corp.*, 974 F.2d 1345, 1992 WL 201080, at *2–4 (10th Cir. 1992) (unpublished table decision) (overruling the imposition of PSC fees where plaintiffs experienced no traceable benefits from the committee’s work); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (“The contingent nature of the class action fee—the fact that a fee is payable only in the event of success, and then only by deduction from the recovery—obviates most of the potential threat of forced exchange.”); Curtis & Resnik, *supra* note 69, at 427 (noting that the common fund “began in the nineteenth century when courts recognized that individual plaintiffs and their attorneys might, by virtue of victorious litigation, confer a benefit on third parties”).

¹⁵⁶ Silver & Miller, *supra* note 13, at 124–27.

¹⁵⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c.

wait for lead lawyers to negotiate a proposed settlement.¹⁵⁸ Moreover, a non-lead attorney's retainer agreement assumes that she will complete the work and thus pays her a contingent fee.¹⁵⁹ But she's no longer doing most of the work.¹⁶⁰ Of course, this isn't due to neglect on her part; it's the result of a changed procedural environment. The question is whether that change creates compensable fees on a restitutionary basis, or noncompensable spillover effects.¹⁶¹

Thus enters the second but related doctrine: contract law. The *Restatement (Second) of Contracts* suggests that a contract such as a retainer agreement can be discharged if "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."¹⁶² Like the common fund, this doctrine's initial attractiveness is apparent, but ultimately translates poorly into multidistrict litigation. First, the client's principal purpose in hiring her attorney is for the attorney to satisfactorily resolve her case.¹⁶³ Yet, appointing lead lawyers frustrates the retainer agreement's purpose by putting the client's case into the lead lawyers' hands.¹⁶⁴ Second, the

¹⁵⁸ *In re Nineteen Appeals*, 982 F.2d at 606 ("[S]tony adherence to the American rule invites a serious free-rider problem. . . . [E]ach attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs . . .").

¹⁵⁹ See *Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) ("A problem does arise, however, if individual counsel entered a contingency agreement with his or her client on the assumption that individual counsel would perform all work associated with the case and that the agreed-upon fee would constitute the only fee for this work. Given that . . . lead and liaison counsel are being separately compensated for this work, these contingency fee arrangements may no longer be reasonable.").

¹⁶⁰ *Id.*; cf. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *19 (D. Minn. Mar. 7, 2008) ("[A]lthough the fee arrangements may have been fair when the individual litigations were commenced, the Court concludes that many of the fee arrangements are likely not fair now because of the common benefit work and economies of scale . . .").

¹⁶¹ See *infra* notes 314–17 and accompanying text (discussing noncompensable externalities versus compensable work).

¹⁶² RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

¹⁶³ See *id.* § 265 cmt. a (emphasizing that the frustrated purpose must have been a principal one for the party making the contract); 30 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 77:94 (4th ed. 2004) (noting that one of the conditions for deeming a contractual obligation dischargeable under the "doctrines of impracticability and frustration" is whether the frustrated purpose was "a principal purpose of that party in making the contract").

¹⁶⁴ See *In re Air Crash Disaster at Fla. Everglades* on December 29, 1972, 549 F.2d 1006, 1019 n.17 (5th Cir. 1977) ("In a case like the one before us the lead counsel are not free to strike their own bargains but work under the court's order."); RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (requiring that the principal purpose of a contract be frustrated before the impracticability doctrine applies); WILLISTON & LORD, *supra* note 163, § 77:94 (requiring that "the frustration must be substantial" before a judge should deem a contract impracticable).

client, having little legal knowledge, may not contemplate the possibility that someone other than her attorney would litigate her case without her consent.¹⁶⁵ So, “without the default of either party, [the] contractual obligation becomes incapable of performance because the circumstances . . . render it a thing radically different from the undertaking contemplated by the contract.”¹⁶⁶ But the remedy is to discharge the contractual duty to pay. And transferee judges do not discharge contingent fees; they essentially reform the contract and institute the bargain they think the parties would have reached. While judges can reform agreements if they fail to reflect the parties’ true agreement,¹⁶⁷ or if there has been a mutual or unilateral mistake,¹⁶⁸ multidistrict litigation fits neither category.

Finally, transferee judges have cited their “inherent managerial authority” or “inherent equitable authority” as authorizing them to compensate lead attorneys.¹⁶⁹ They rationalize that the power to consolidate and manage complex litigation as well as the authority to appoint lead lawyers “necessarily implies a corollary authority to . . . compensate them for their work.”¹⁷⁰ This power, they claim, somehow derives from Federal Rule of Civil Procedure 42, which allows courts to consolidate actions and “issue any other orders to avoid unnecessary cost or delay.”¹⁷¹ But relying on this authority as a stopgap measure when positive law cannot be identified risks violating the Rules Enabling Act.¹⁷² As such, inherent authority appears to have no

¹⁶⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (noting that the party must not have assumed that the frustrating event would have occurred); WILLISTON & LORD, *supra* note 163, § 77:94.

¹⁶⁶ WILLISTON & LORD, *supra* note 163, § 77:94.

¹⁶⁷ See, e.g., *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 423–24 (D.C. 2006) (“The governing law is that, ‘where an agreement has been reached by the parties but the writing does not accurately express [their] mutual agreement . . . reformation is appropriate.’” (alterations in original) (quoting *Isaac v. First Nat’l Bank*, 647 A.2d 1159, 1162 n.9 (D.C. 1994))).

¹⁶⁸ *Souls Farms, Inc. v. Schafer*, 797 N.W.2d 92, 108–09 (Iowa 2011) (“Where there has been a mistake . . . in the expression of the contract, reformation is the proper remedy.”).

¹⁶⁹ E.g., *In re Air Crash*, 549 F.2d at 1017; *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 770–71 (E.D. La. 2011); *In re Genetically Modified Rice Litig.*, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010).

¹⁷⁰ *In re Vioxx*, 802 F. Supp. 2d at 770; see also *In re Air Crash*, 549 F.2d at 1016 (“The court’s power is illusory if it is dependent upon lead counsel’s performing the duties desired of them for no additional compensation.”).

¹⁷¹ FED. R. CIV. P. 42(a); see, e.g., *In re Air Crash*, 549 F.2d at 1013–15 (noting that Rule 42 confers “a broad grant of authority, particularly in the last clause”). Rule 42, however, speaks to consolidations under that rule, not to coordinated pretrial handling under § 1407, unless the judge also orders consolidation.

¹⁷² See 28 U.S.C. § 2072(b) (2012) (requiring that rules of procedure not “abridge, enlarge, or modify any substantive right,” a stricture potentially violated by the use of Rule 42(a) to order plaintiffs to compensate lead lawyers).

limits: It is guided by neither consent nor contract principles and swells to fill whatever role it must, sacrificing transparency, predictability, and restraint in its wake.

Adding to this doctrinal patchwork, judges invoke these rationales at different litigation stages and depend on various means for implementing them. They have asked special masters¹⁷³ and committees of attorneys¹⁷⁴ to recommend fees, but the recent trend has been to require attorneys to sign fee-transfer agreements at the beginning of litigation.¹⁷⁵ Fee-transfer agreements (and most allocation systems) depend on the court creating a fund, which taxes plaintiffs' gross monetary recovery—usually between 2% and 6%—and places the money in an interest-bearing account to be divvied up among the lead lawyers.¹⁷⁶ Like the nebulous rationales supporting them, the percentages are arbitrary.¹⁷⁷ Most judges do not explain their chosen percentages,¹⁷⁸ and when they do, they cite the piecemeal theories just mentioned,¹⁷⁹ previous multidistrict litigation assessments, or proposals from the steering committee—none of which have a dependable theoretical mooring.

In theory, fee-transfer agreements and fee provisions in settlements buttress tenuous doctrinal rationales by lending a veneer of

¹⁷³ *E.g.*, *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006) (“[T]he four settlement special masters were directed to consult with the parties in order to arrive at a recommended fee schedule cap and allocation of expenses.”).

¹⁷⁴ *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 20, 2007) (Pretrial Order No. 32) (appointing a fee-allocation committee).

¹⁷⁵ *See, e.g.*, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, 2006 WL 471782, at *8 (N.D. Cal. Feb. 28, 2006) (assessing 4% of the gross monetary recovery, 2% for fees and 2% for costs); *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, slip op. at 2–4 (D. Minn. Feb. 15, 2006) (Pretrial Order No. 6) (same); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, slip op. at 3 (E.D. La. Aug. 4, 2005) (Pretrial Order No. 19) (assessing 3% of the gross monetary recovery, 2% for fees and 1% for costs, but noting that the 2% for fees comes from individual attorneys' fee contracts whereas the assessment for costs comes from the clients' portion of the recovery).

¹⁷⁶ *E.g.*, *In re Bextra*, 2006 WL 471782, at *8; *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, slip op. at 2–4 (D. Minn. Feb. 15, 2006) (Pretrial Order No. 6); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, slip op. at 1, 3 (E.D. La. Aug. 4, 2005) (Pretrial Order No. 19); *In re Rezulin Prods. Liab. Litig.*, No. 00 CIV. 2843(LAK), 2002 WL 441342, at *1–2 (S.D.N.Y. Mar. 20, 2002). For average amounts of fee awards, see William B. Rubenstein, *On What a “Common Benefit Fee” Is, Is Not, and Should Be*, 3 CLASS ACTION ATT'Y FEE DIG. 87, 90 (2009) (examining twenty-one reported cases using common-benefit fees and finding that almost all courts had assessed these fees between 4% and 6%).

¹⁷⁷ *See* Dubay, *supra* note 57, at 42 (noting that courts seem to select assessment rates arbitrarily based on prior litigation and suggestions from plaintiffs' steering committees).

¹⁷⁸ *E.g.*, *In re St. Jude Medical, Inc.*, No. MDL 1396, 2002 WL 1774232, at *2 (D. Minn. Aug. 1, 2002); *In re Rezulin*, 2002 WL 441342, at *1.

¹⁷⁹ *E.g.*, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *4–5 (D. Minn. Mar. 7, 2008).

coherence and consent to an unruly legal minefield.¹⁸⁰ Fee-transfer agreements often contain recitals that mimic consideration, such as “Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients,” so they intend “to be legally bound hereby” and “agree” to certain assessments.¹⁸¹ Similarly, when lead lawyers embed fee provisions within settlements,¹⁸² they impart a consensual pretense even though the “settlement” may actually be a contract between plaintiffs’ attorneys and the defendant that requires attorneys to recommend the deal to their clients or withdraw from representing them.¹⁸³ Consenting attorneys receive their contingent fee, minus lead lawyers’ fees, only after enough clients agree.¹⁸⁴ Instead of chastising attorneys for self-dealing or holding them in contempt of court for undermining previous common-fund orders, judges appear to embrace these “consensual” settlement measures by increasing lead lawyers’ fees in accordance with the settlement.¹⁸⁵

Of course, as in many contracts of adhesion, there is little genuine consent involved in accepting either fee-transfer agreements or settlements with embedded fees. Fee-transfer agreements are standardized forms, presented by those with superior bargaining power (the court and the steering committee) to attorneys with pending cases in the multidistrict litigation who effectively have no choice but to accept them.¹⁸⁶ Attorneys cannot conduct discovery on their own, so they

¹⁸⁰ See Curtis & Resnik, *supra* note 69, at 437 (“[U]nless retainer agreements are modified in advance of or upon the creation of a PSC, no client has agreed by contract to pay the costs of aggregation . . .”).

¹⁸¹ *In re Bextra & Celebrix Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, 2006 WL 471782, at *8 (N.D. Cal. Feb. 28, 2006) (Pretrial Order No. 8).

¹⁸² See, e.g., *In re Guidant*, 2008 WL 682174, at *12 (“[A] common benefit payment from the Settlement Fund is expressly contemplated by the terms of the MSA. Thus, even if there was an agreement previously to utilize a straight assessment at 2% + 2%, the terms of the MSA contracted around it.”); see also Silver & Miller, *supra* note 13, at 132–33 (critiquing the *Guidant* fee award).

¹⁸³ E.g., Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 1.2.8.1 (Nov. 9, 2007), available at <http://www.officialviioxsettles.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>.

¹⁸⁴ See *id.* § 11.1.1–4 (specifying that Merck can terminate the settlement if not enough clients agree, resulting in no client or attorney receiving a payout).

¹⁸⁵ See, e.g., *In re Guidant*, 2008 WL 682174, at *4 (increasing the common cost award to the PSC to \$10 million, which is greater than the original common fund envisioned); *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705 (D. Minn. Feb. 15, 2006) (Pretrial Order No. 6) (creating original common fund structure for *Guidant* litigation).

¹⁸⁶ See Silver & Miller, *supra* note 13, at 132–35 (describing the forced fee transfers from claimants to lead attorneys that the latter can extract because of the bargaining power differentials between them and non-lead attorneys). Although one can debate the merits of

have few options but to use the common work product unless they remain solely in state courts.

Even state-court attorneys find it difficult to evade the fee agreement since federal judges use both carrots and sticks to encourage participation. For instance, if they agree, state counsel may receive and use the common-benefit work product, but if not, they are forbidden from receiving both the work product and any common-benefit fees, even if their efforts benefitted the plaintiffs as a whole through winning trial verdicts, for example.¹⁸⁷

Similarly, there is little true consent when lead lawyers negotiate settlement offers that require plaintiffs' law firms to tender their entire client inventory or continue litigating in front of a judge who promoted and then publicly blessed the deal.¹⁸⁸ Were those circumstances not cause enough for concern, some judges have even allowed lead lawyers to increase the fees set forth in initial fee-transfer agreements by upping the percentage through a later settlement.¹⁸⁹

In *Guidant*, *Vioxx*, and the *Genetically Modified Rice Litigation*, the lead lawyers negotiating the settlement inserted provisions into the global agreement increasing their fee and requiring settling plaintiffs to waive their objections if they wanted to enroll.¹⁹⁰ In addition to the lack of genuine consent, this is troubling for the plain risk of structural collusion it presents by giving defendants some control over lead lawyers' fees. As Professors Silver and Miller point out, "The defendant is happy to offer [lead attorneys] 'red-carpet treatment on fees'—higher common benefit fees cost the defendant nothing—in return for other things, such as a smaller settlement fund, a later funding date, or

adhesive contracts, there is something particularly troubling about them when they are promulgated by and enforced by the judiciary. See *infra* notes 338–40 and accompanying text (discussing the need for courts not to facilitate or assist exploitative action).

¹⁸⁷ *In re Chantix (Varenicline) Prods. Liab. Litig.*, MDL No. 2092, slip op. at 4–5 (N.D. Ala. June 2, 2010) (Pretrial Order No. 7). Similarly, to encourage early cooperation, some federal judges penalize latecomers by taxing them at a higher rate. *Id.* at 7–8 (assessing a 6% fee for early participating counsel and an 8% fee for later participating counsel); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, MDL 1699, 2006 WL 471782, at *2–3 (N.D. Cal. Feb. 28, 2006) (Pretrial Order No. 8) (assessing 2% as fees and 2% as costs for counsel who participate within ninety days of the court's order and an amount that "shall exceed the 4% assessment under the full participation option" for those who participate after ninety days).

¹⁸⁸ See Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 513 (2011) (describing how critics described the settlement offer as coercive).

¹⁸⁹ See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *11–14 (D. Minn. Mar. 7, 2008) (increasing the common-benefit fee specified in the form agreements from 4% to 15% of the settlement); Silver & Miller, *supra* note 13, at 132–35 (criticizing this practice).

¹⁹⁰ *Supra* notes 42–47 and accompanying text.

a higher participation threshold.”¹⁹¹ Thus, allowing lead lawyers to compensate themselves via settlement suggests collusion, not consent, and should be judicially reprimanded as self-dealing because it violates lead lawyers’ fiduciary obligation to their principals.¹⁹²

2. *Capping Contingent Fees*

Capping private contingent-fee contracts is perhaps the most controversial emerging judicial practice in multidistrict litigation.¹⁹³ Although this Article’s empirical evidence on repeat players suggests that a limited market may exist that could lead to inflated fees,¹⁹⁴ some judges have taken fee awards into their own hands without sound justification. Specifically, some judges have awarded lead lawyers a percentage of the total settlement amount, capped non-lead attorneys’ contingent fees, and based those capped percentages on the already reduced settlement amount.¹⁹⁵ So, depending on the calculation method,¹⁹⁶ a non-lead attorney initially entitled to 33% of a \$1 million award, who must allocate 8% of that total award to lead law-

¹⁹¹ Silver & Miller, *supra* note 13, at 134.

¹⁹² See Silver, *supra* note 47, at 1990 (arguing that, as fiduciaries to all the plaintiffs and the “disabled lawyers,” lead attorneys should not use “their control of settlement negotiations to enrich themselves at disabled lawyers’ expense” but could “[enrich themselves] by increasing claimants’ recoveries”); cf. RESTATEMENT (SECOND) OF AGENCY § 469 (1958) (“An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty . . .”).

¹⁹³ E.g., Aimee Lewis, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 REV. LITIG. 209 (2012); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013); Silver & Miller, *supra* note 13, at 136–41; Jeremy Hays, Note, *The Quasi-Class Action Model for Limiting Attorneys’ Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589, 591 n.9 (2012). Although commentators have only recently begun to explore the issue in depth, fee capping occurred in the early 1990s in the *San Juan Dupont Plaza Hotel Fire Litigation*. See No. MDL-721, 1993 WL 564466, at *2 (D.P.R. Nov. 24, 1993) (“The Court has already modified these contingent fee agreements once, imposing a ceiling of twenty-five percent (25%) for minor and incompetent plaintiffs and thirty-three percent (33%) for all other plaintiffs.”), *rev’d on other grounds*, 56 F.3d 295 (1st Cir. 1995).

¹⁹⁴ But see Silver & Miller, *supra* note 13, at 137–38 (“[L]awyers compete for clients in competitive markets.”). One expert concluded that “market failure was not a practical possibility.” *Id.* at 138.

¹⁹⁵ E.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *19 n.30 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 496–97 (E.D.N.Y. 2006). In *Vioxx*, however, Judge Fallon capped all lawyers’ fees at 32% and initially allocated 8% of that amount to lead lawyers. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 645 (E.D. La. 2010); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 607 & n.1 (E.D. La. 2008).

¹⁹⁶ There are several methods for calculating fees:

(1) 20% of \$1,000,000 = \$200,000 as the total fee. 8% of that \$200,000 fee = \$16,000 in common-benefit fees. Therefore, lead lawyers would receive \$16,000 and individual counsel would receive \$184,000.

yers (as Judge Fallon charged in *Vioxx*) and whose fee is then capped at 20% of the remaining settlement (as Judge Frank attempted to do in *Guidant*),¹⁹⁷ might receive \$184,000 as opposed to \$330,000—a significant reduction.

Reducing fees gained momentum when Judge Weinstein capped privately retained attorneys' fees at 35% in *Zyprexa*.¹⁹⁸ Although he cited a variety of doctrines ranging from class-action analogies to ethics, the real basis for his decision appears to have been a general concern about public perception and a specific concern about *Zyprexa* plaintiffs, who were "both mentally and physically ill and . . . largely without power or knowledge to negotiate fair fees."¹⁹⁹

Other courts, however, have overlooked Judge Weinstein's concern about legal incapacity and focused on plaintiffs' physical impairments and public perception.²⁰⁰ In *Guidant*, for example, Judge Frank capped all contingent fees at 20%, with the caveat that special masters could adjust them upward "to a maximum of either 33.33%, the percentage previously agreed to in the individual cases . . . , or the limit imposed by state law, whichever of the three is less."²⁰¹ This meant that some lawyers whose clients had agreed to a 40% fee received 28% of their client's gross recovery.²⁰² Building on *Zyprexa* and *Guidant*, in the *Vioxx* litigation, Judge Fallon capped individual attor-

(2) 20% of \$1,000,000 = \$200,000 as the total fee. 8% of \$1,000,000 = \$80,000, which is the common-benefit fee. Therefore, lead lawyers would receive \$80,000 and individual counsel would receive \$120,000 (\$200,000 – \$80,000 = \$120,000).

(3) 8% of \$1,000,000 = \$80,000, which is the common-benefit fee. \$1,000,000 – \$80,000 = \$920,000 net after the common-benefit fee is extracted. 20% of that \$920,000 = \$184,000; thus individual counsel receives \$184,000.

The numbers that follow in this sentence are based on the third method. Courts have used a combination of these methods to award fees. Sources cited *supra* note 195.

¹⁹⁷ See Silver & Miller, *supra* note 13, at 136–37 (discussing those fee awards).

¹⁹⁸ *In re Zyprexa*, 424 F. Supp. 2d at 491 (allowing special masters to vary caps upwards to 37.5% and downwards to 30%). There are some instances of earlier fee caps, however, in the bankruptcy context and in the breast implant litigation. *E.g.*, *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S., Civ. A. No. CV94-P-11558-S., MDL No. 926, 1994 WL 114580, at *4 (N.D. Ala. Apr. 1, 1994) (capping fees at 25%); *In re A.H. Robins Co.*, 182 B.R. 128, 138–39 (Bankr. E.D. Va. 1995) (capping compensation at 10% of claimants' pro rata payments).

¹⁹⁹ *In re Zyprexa*, 424 F. Supp. 2d at 491.

²⁰⁰ See *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 560–61 (E.D. La. 2009) (justifying efforts to ensure that contingent-fee awards were fair and consistent by noting that many plaintiffs were physically ill and elderly); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 613 (E.D. La. 2008) (same); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *17–18 (D. Minn. Mar. 7, 2008) (discussing the need to prevent contingency fees from appearing abusive or harming the public's perception of the legal profession).

²⁰¹ *In re Guidant*, 2008 WL 682174, at *19.

²⁰² *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 3896006, at *8, 10 (D. Minn. Aug. 21, 2008).

neys' contingent fees at 32% plus reasonable costs.²⁰³ Finally, in the Ground Zero workers' litigation against New York City, Judge Hellerstein simply ruled that he would not approve a settlement with a one-third contingent fee, cut plaintiffs' attorneys' fees from the contractual amount of 33% to 25%, and prohibited them from charging clients some \$6.1 million in interest costs from third-party financing.²⁰⁴

Although Judge Fallon and Judge Frank both echoed Judge Weinstein's apprehensiveness over public perception and cited his quasi-class-action analogy,²⁰⁵ nothing about the plaintiffs in either *Vioxx* or *Guidant* suggested that they were *mentally* unfit to negotiate their own fees.²⁰⁶ Also like Judge Weinstein, Judge Fallon and Judge Frank identified a generic concern about the inherent conflicts between claimants and their attorneys in contingent-fee cases.²⁰⁷ Yet, those arguments do not support an across-the-board fee cap where plaintiffs possess the legal capacity to enter into binding contracts.

First, while it is true that courts have been more cautious when it comes to contingent fees than billable hours,²⁰⁸ judges should have

²⁰³ *In re Vioxx*, 650 F. Supp. 2d at 556 (instituting the cap but noting that "extraordinary circumstances may exist which could warrant a departure (in either direction) from the 32% cap in individual cases"); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 617 (E.D. La. 2008).

²⁰⁴ *In re World Trade Ctr. Disaster Site Litig.*, 879 F. Supp. 2d 396, 403 n.29 (S.D.N.Y. 2012); *In re World Trade Ctr. Disaster Site Litig.*, Nos. 21 MC 100(AKH), 21 MC 103, 2010 WL 4683610, at *1 (S.D.N.Y. Nov. 15, 2010) ("Plaintiffs' counsel may charge no more than a 25 percent contingent fee, with expenses limited in accordance with previous orders, rulings, and agreements."); Mark Hamblett, *Plaintiffs' Lawyers in 9/11 Cases Lose Bid to Recoup Interest Costs*, N.Y. L.J., Aug. 30, 2010, at 1; Mireya Navarro, *Terms Met, Payout Rises for Workers at 9/11 Site*, N.Y. TIMES, Sept. 13, 2011, at A28.

²⁰⁵ *In re Vioxx*, 574 F. Supp. 2d at 611–13; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *17 (D. Minn. Mar. 7, 2008). Concern about public perception stems from the high-profile nature of these cases and the significant media attention that results. *See, e.g., supra* note 1 (listing newspaper stories about multidistrict litigation).

²⁰⁶ Judge Fallon suggested that *Vioxx* plaintiffs were vulnerable because of their advanced age and alleged personal injuries, but never stated they were mentally unfit. *In re Vioxx*, 650 F. Supp. 2d at 560 ("[L]ike the elderly and physically ill claimants in *Zyprexa* and *Guidant*, *Vioxx* claimants have all suffered some form of physical injury and many are elderly.").

²⁰⁷ *In re Vioxx*, 574 F. Supp. 2d at 611; *In re Guidant*, 2008 WL 682174, at *17.

²⁰⁸ Rather than affording them the usual hands-off approach typically reserved for fee contracts under the American rule, judges closely scrutinize contingent fees because they give attorneys an interest in the litigation's outcome. *See Allen v. United States*, 606 F.2d 432, 435 (4th Cir. 1979) ("The district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established."); WILLISTON & LORD, *supra* note 163, § 62:9 (noting that courts "closely scrutinize" contingent-fee arrangements). Still, the only metric courts use in scrutinizing these contracts is whether the percentage is unreasonable—the award does not correlate with the value provided by the attorney. If the fee is unreasonable, then courts either change the calculation formula or use quantum meruit to award a fee. *See, e.g., Wunschel Law Firm, P.C. v. Clabaugh*, 291

some exceptional reason before interfering with private contracts when plaintiffs are physically ill or elderly, but mentally fit. *Farmington Dowel*, which Judge Frank and Judge Weinstein cited in support of their decisions,²⁰⁹ involved extreme circumstances: A competent adult agreed to pay counsel one-third of his trebled antitrust damages plus the judicially determined amount awarded as a “reasonable attorney’s fee” under section 4 of the Sherman Act.²¹⁰ In rendering its decision, the First Circuit distinguished between its role under section 4 and its ethical, supervisory power, noting that the latter “is reserved for exceptional circumstances” and “requires [the court] to arrive at a figure which it considers the outer limit of reasonableness.”²¹¹ *Rosquist*, the other main case that Judge Weinstein cited, involved a situation in which the court appointed a guardian ad litem to protect orphaned minors.²¹² Neither case justifies uniformly capping private contingent fees where mentally and legally competent adults assent to the arrangement.²¹³

Second, despite repeated citations to the contrary, there is no such thing as a quasi-class action: A class is either certified or not.²¹⁴ Treating Rule 23 as a grab bag of authority to be invoked when convenient undermines the Rule’s due-process protections and structural assurances of fairness.²¹⁵ When judges cite the “quasi-class action” to justify cutting attorneys’ fees, they risk lending an air of legitimacy to the case’s outcome even though they have not subjected it to Rule 23’s rigors.²¹⁶

N.W. 2d 331, 337 (Iowa 1980) (suggesting that, where a contingent-fee arrangement was void on public-policy grounds, the law firm could still recover under quantum meruit); WILLISTON & LORD, *supra* note 163, § 62:9 (“Where the contingent fee is held to be unreasonable, the court may either change the formula for calculating the fee, or award a fee based on quantum merit.”).

²⁰⁹ *In re Guidant*, 2008 WL 682174, at *18 n.29.

²¹⁰ *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90–91 (1st Cir. 1969).

²¹¹ *Id.* at 90; *see also infra* note 340 and accompanying text (noting courts’ self-regarding concerns).

²¹² *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1109 (7th Cir. 1982).

²¹³ *See* Ratner, *supra* note 193, at 81–83 (surveying cases cited by MDL courts which cap contingency fees in cases involving protection of incompetents).

²¹⁴ *See* Mullenix, *supra* note 9, at 389 (arguing that there is “no such thing as a quasi-class action”). *But see* Weinstein, *supra* note 33, at 480–81 (describing types of mass torts as “in effect quasi-class actions”).

²¹⁵ *See* Mullenix, *supra* note 9, at 390 (noting the due-process protection for absent class members in Rule 23).

²¹⁶ *See* Reynolds v. Beneficial Nat’l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) (“We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”); Mullenix, *supra* note 9, at 397–400 (criticizing Judge Weinstein’s characterization of the suit in *Zyprexa* as a quasi-class action).

Third, when judges use their “inherent authority” or “general equitable powers”²¹⁷ to police individual attorneys’ contingent fees, they must still tether that authority to a normative framework that dictates when a fee is reasonable.²¹⁸ The *Model Rules of Professional Conduct* and most states’ ethics rules contemplate a context-specific inquiry that considers factors such as customary fees in particular locations; time, labor, and skill required; results obtained; attorneys’ experience and reputation; and attorneys’ opportunity costs in accepting the matter.²¹⁹ Yet, courts that have dubbed fees excessive across-the-board and capped them accordingly²²⁰ have shied away from identifying the applicable ethics code or conducting choice-of-law inquiries that pinpoint which state’s ethics rules apply to which attorneys.²²¹

Finally, conflicting interests exist between attorneys and clients in all contingent-fee cases, not just in multidistrict litigation. While judges may have inherent authority to regulate unreasonable fees,²²² and contingency fees are treated with special care,²²³ if concern over contingent fees alone were enough to justify routine judicial review,

²¹⁷ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (recognizing the court’s “inherent authority”); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (describing the court’s authority as “general equitable powers”).

²¹⁸ See Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 22 (2005) (noting that a court’s inherent powers are meant to supplement the federal rules, but that states’ ethical rules; the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence; the Rules of Professional Conduct; and norms of conduct established within the bar should frame judicial expectations); Ratner, *supra* note 193, at 77–78 (discussing the *Vioxx*, *Guidant*, and *Zyprexa* courts’ reliance on normative frameworks in policing contingency fees).

²¹⁹ MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (1991); Ratner, *supra* note 193, at 78.

²²⁰ Judge Frank eventually rejected the special masters’ proposal that he cap fees at 25% across the board in favor of “the lesser of the contractual fee, the state-imposed fee limit, or 37.18 percent of the client’s gross recovery.” Silver & Miller, *supra* note 13, at 137.

²²¹ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 559 (citing the *Model Rules of Professional Conduct* and cases from multiple jurisdictions, but not identifying which states’ laws governed which attorneys’ fees); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (citing cases from multiple jurisdictions that capped excessive fees and relying on ethics principles without identifying a particular rule); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 492 (discussing general supervisory powers but not pinpointing specific ethical codes or provisions).

²²² This has been questioned. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 776–79 (2001) (quoting Justice Kennedy and arguing that statutes and rules limit courts’ inherent powers).

²²³ See Ratner, *supra* note 193, at 77–78 (discussing treatment of contingency fees in *Vioxx*, *Guidant*, and *Zyprexa*). The *Model Rules of Professional Conduct* explicitly except contingent fees from the general ban on a lawyer assuming an interest in the litigation and subject them to multiple safeguards. MODEL RULES OF PROF’L CONDUCT R. 1.5(c), 1.8(e)(1).

then nearly every personal-injury action in the country would demand scrutiny.

Judges' disquiet over fees may stem from two rationales. First, they are accustomed to awarding plaintiffs' attorneys class-action fees, which average around 20% of the class award.²²⁴ In comparison, a 33% (or more) contingent fee may seem excessive. Second, because attorneys benefit from the cost savings that economies of scale engender, judges reason that this discount should be passed on to plaintiffs lest their attorneys receive a windfall.²²⁵ Reduced costs result from both lead lawyers' efforts and aggregation in general. But once judges extract lead lawyers' fees from individual attorneys' fees, aggregation is the only cost-saving rationale that hasn't been taken into account.

The cost savings from aggregating clients is not an independent reason to reduce fees. Attorneys routinely aggregate cases and clients outside of multidistrict litigation. And lawyers who specialize in a particular area often recycle their work to benefit new clients—but they typically do not discount their fees. Rather, the aggregation benefits clients by creating leverage against the defendant, and the recycled work product may encapsulate years of attorney expertise. So, what judges in multidistrict litigation deem cost-saving measures might ordinarily be seen as the justifiable price for expertise, experience, and leverage.

Likewise, the cost savings generated by aggregating cases and appointing lead lawyers may not save individual attorneys as much as courts anticipate. When contrasted with class actions, multidistrict litigation contains additional risks and expenses for individual attorneys: They must advertise, recruit, screen, and interact with many clients (as opposed to just named representatives); develop the history and facts surrounding each client's claim to prove specific causation; keep clients informed of the litigation's progress; and counsel clients on when and whether to settle.²²⁶ Each activity significantly increases attor-

²²⁴ *Supra* note 149.

²²⁵ *See, e.g., In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992) ("A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and, to that end, may employ measures reasonably calculated to avoid 'unjust enrichment of persons who benefit from a lawsuit without shouldering its costs.'" (quoting *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987))).

²²⁶ In the Dupont Plaza Hotel fire litigation, individually retained attorneys who were not on the plaintiffs' steering committee argued that the district court judge greatly undervalued their contribution to individual clients. *Id.* at 607–08.

neys' administrative burden and staffing costs.²²⁷ Yet, client recruitment helps amplify settlement pressure and thereby contributes to the group's collective good—a factor that receives little attention when judges cap fees.²²⁸ So, while it may be true that particular attorneys stand to receive a windfall, that would be nearly impossible to determine without considering each attorney's opportunity costs, sunk costs, and contribution to plaintiffs' overall outcome. Capping fees uniformly places the burden on objecting attorneys to demonstrate extraordinary circumstances entitling them to their contractually agreed upon fee.²²⁹

Finally, courts may not fully appreciate contingent fees' insurance-like dimension. What appears to be a windfall for individual attorneys may actually reflect a gain in a much larger portfolio of risk that funds not only the present litigation, but other cases too.²³⁰ Attorneys working on a contingent fee must diversify their cases and their risk so that their "winnings" reflect the expense of litigating both successful and unsuccessful cases.²³¹ Put differently, without some big wins, these attorneys may not be able to accept pro bono clients or cases without clear liability.

In sum, while aggregating plaintiffs' claims and appointing lead lawyers streamlines certain aspects of the cases, litigating may not be as economical as judges presume. And, while judges' experience with collusive settlements in the class-action context may justifiably prompt concern over contingent fees, their involvement must have predictable limits and quantifiable metrics. Reducing contingent fees should be the exception, not the rule. If such a cap is warranted, then it should be justified on an individual basis.

²²⁷ "[A]ttorneys in the Vioxx Litigation Consortium considered 30,000 potential clients and accepted only 2000—a process which took a combined 1,601,150 hours by staff, paralegals, attorneys, nurse practitioners, and medical experts at a cost of \$13.5 million." Burch, *supra* note 16, at 1288.

²²⁸ See Silver & Miller, *supra* note 13, at 128–29 (describing the process of reviewing potential claimants).

²²⁹ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 556 (E.D. La. 2009) (responding to the Vioxx Litigation Consortium's objection to fees and observing that "extraordinary circumstances may exist which could warrant a departure (in either direction) from the 32% cap in individual cases").

²³⁰ See KRITZER, *supra* note 112, at 10–19 (describing contingency-fee legal practice as portfolio management); Burch, *supra* note 16, at 1290 (measuring litigation's risks and rewards like a portfolio, and noting that successful cases finance losing cases).

²³¹ See KRITZER, *supra* note 112, at 17–19 (developing a formula to quantify the profits in terms of risk in a contingent-fee practice).

C. Approving Aggregate Settlements

Given their concern over attorneys' fees and analogies to class actions, judges' interest in ostensibly private settlements is not surprising. After all, settlement and fees go hand in hand, with some lead lawyers negotiating their fee and the settlement in one fell swoop.²³² Plus, the controversy over what many commentators view as meddling in fee awards extends to settlement review,²³³ in part because judges cite similar authority for both. Unlike class actions, in which Rule 23(e) requires judges to thoroughly assess whether the settlement is fair, reasonable, and adequate, nonclass settlements like those in *Guidant*,²³⁴ *Zyprexa*,²³⁵ *Vioxx*,²³⁶ and the *World Trade Center Disaster*

²³² E.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008) ("The [Master Settlement Agreement] included a provision, section II.K, stating that the Court would determine the amount of the Common Benefit Payment."); see also Weinstein, *supra* note 10, at 529 ("In large class actions and other consolidated litigations, fees often determine the shape of settlements."); *Judge Signs Off on Deal for Ground Zero Workers*, NPR (June 10, 2010, 3:04 PM), <http://www.npr.org/templates/story/story.php?storyId=127746263> (observing that Judge Hellerstein rejected a previous settlement offer because the amount was too small and attorneys' fees were too large).

²³³ See, e.g., Grabill, *supra* note 9, at 175–78 (describing the connection between settlement review in quasi-class actions and private mass-tort settlements); Rothman, *supra* note 12, at 320–21 (discussing Judge Hellerstein's review of settlement in *In re World Trade Center Disaster Site Litigation*). But see Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 74 UMKC L. REV. 623, 623 (2006) (arguing that a separate judge should be appointed "to oversee efforts to achieve a global settlement of a mass tort").

²³⁴ *In re Guidant*, 2008 WL 682174, at *10 ("Through the extraordinary efforts of the common benefit attorneys who contributed their time and skills, and advanced money to fund this litigation, Plaintiffs' counsel achieved a global settlement of \$240,000,000.00 for 8,550 Plaintiffs. The Court notes that many of the individual cases likely are not strong stand-alone cases.").

²³⁵ Judge Weinstein set firm trial dates in the *Zyprexa* litigation to encourage settlement, as many trial judges do. *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2004 WL 2792123, at *1 (E.D.N.Y. Dec. 2, 2004). But, once the parties reached an agreement in principal, he also appointed Ken Feinberg, Michael Rozen, retired Judge John Trotter, and Catherine Yanni as Settlement Masters to develop criteria for administering and evaluating claims, gather necessary information, implement a settlement plan for valuing claims, and mediate contested claims. *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2005 WL 1939339, at *1 (E.D.N.Y. Aug. 10, 2005); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2005 WL 2237824, at *1 (E.D.N.Y. June 30, 2005).

²³⁶ During a status conference in the *Vioxx* litigation, Judge Fallon convened judges with the heaviest *Vioxx* dockets—Judge Higbee from New Jersey state court, Judge Chaney from California state court, and Judge Wilson from Texas state court—along with plaintiffs' lead lawyers and defendants' lead counsel, and jointly announced that the parties should begin "serious settlement negotiations." *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2010 WL 724084, at *2 (E.D. La. Feb. 18, 2010); see also Susan Todd, *Inside the Vioxx Litigation*, NJ.COM, (Nov. 18, 2007, 12:34 PM), http://blog.nj.com/business_impact/print.html?entry=/2007/11/inside_the_vioxx_litigation.html ("Fallon, Higbee and Chaney met in New Orleans. Over dinner they prepared for a meeting the next morning with attorneys from both sides. It was time, the judges had decided, for the lawyers to discuss a

*Site Litigation*²³⁷ are private agreements that parties presumably enter voluntarily. Thus, the existence of a legal basis for policing a “voluntary” settlement between private parties is uncertain at best.

This uncertainty has prompted courts and commentators to take two divergent views about judicial power in nonclass settlements. By one view, unless the settlement itself authorizes the court to act,²³⁸ these judges have overstepped their authority and paternalistically meddled with plaintiffs’ contractual ability.²³⁹ But this ignores the realities of mass litigation, where plaintiffs have attenuated relationships with their attorneys and their attorneys face powerful financial temptations to achieve closure by pushing ethical boundaries and coercing consent.²⁴⁰ For example, the private settlement that Judge Hellerstein rejected in the litigation over injuries received while cleaning up Ground Zero offered a close-knit community of firefighters and police officers \$575 million if 95% of them accepted, but \$657.5 million if 100% agreed.²⁴¹ Even though Judge Hellerstein acknowledged the settlement offer’s private nature, he was concerned with attorney overreaching, public perception, transparency, and the fairness of the amount itself.²⁴²

resolution.”). Once the lead lawyers reached a proposed settlement eleven months later, the judges reconvened to jointly announce and informally “approve” the settlement alongside the lead lawyers. See Transcript of Status Conference at 5, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), available at <http://www.laed.uscourts.gov/vioxx/Transcripts/11-9-07.pdf>.

²³⁷ *Infra* notes 241–42 and accompanying text.

²³⁸ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552–53 & n.7 (E.D. La. 2009) (discussing the Vioxx Settlement Agreement).

²³⁹ See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1024 (2013) (“Claims belong to claimants, not to the judge.”); Grabill, *supra* note 9, at 127 (arguing that courts should avoid reviewing private mass-tort settlements). In *Vioxx*, Judge Fallon noted, “the parties have done more than simply ask the Court to approve a settlement agreement or move for a disbursement of funds. In fact, this Court is expressly authorized to be the Chief Administrator of the Settlement Agreement.” *In re Vioxx*, 650 F. Supp. 2d at 557.

²⁴⁰ See *supra* notes 48–49 and accompanying text (discussing an example in the *Vioxx* case).

²⁴¹ Mireya Navarro, *Judge Rejects Deal on Health Claims of Workers at Ground Zero*, N.Y. TIMES, Mar. 20, 2010, at A12; see also Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127, 157–60 (2012) (reviewing the history of the settlement).

²⁴² Judge Hellerstein’s words are worth quoting:

Most settlements are private; a plaintiff and defendant come together, shake hands, and it’s done with. Although the judge may look and see if there’s some infant or some compromise or something else, basically it’s the parties that decide. It’s the parties that grant the fee. The judge has no part in it.

This is different. This is 9/11. This is a special law of commons. This is a case that’s dominated my docket, and because of that, I have the power of review. If I don’t think it is fair, I’m going to tell you that, and you will make the judgment how to deal with it.

A second view credits the concerns Judge Hellerstein identified and advocates extending the dubious “quasi-class action”²⁴³ label to allow transferee judges to monitor large, private settlements as they would class actions under Rule 23(e).²⁴⁴ On one hand, judicial involvement, particularly through published opinions, enhances the transparency and legitimacy of deals negotiated by self-interested attorneys that occur with little client involvement, monitoring, or consent. But on the other, judges have engaged with private settlements to different degrees, and without clear limits or standards, there is less predictability.²⁴⁵ Moreover, accepting the “quasi-class action” rationale permits attorneys and judges to circumvent Rule 23’s certification requirements, strip away its due-process protections, and cherry-pick its convenient aspects while ignoring those that impede closure.²⁴⁶

Consequently, what is needed, and what Part III.C offers, is a middle ground that permits some judicial oversight, but also cabins judicial power. As that Part argues, compensating lead lawyers using a quantum-meruit theory would require judges to assess the litigation’s outcome to evaluate the case’s success and the lead lawyers’ contributions. This fee assessment thus provides a legitimate private-law basis for appraising nonclass settlements.

III

RETHINKING BEST PRACTICES IN MULTIDISTRICT LITIGATION

As evidenced thus far, multidistrict litigation places transferee judges in uncharted territory, yet burdens them with enormous

Transcript of Status Conference at 54:14–24, *In re* World Trade Ctr. Disaster Site Litig., No. 21 MC 100 (S.D.N.Y. Mar. 19, 2010); *id.* at 63:9–12 (“I want accountability. I want judicial control over this process, because that’s what’s fair. If I’m the judge, I can be reversed. If the parties appoint someone, he’s the dictator. We don’t have dictators.”); *see also* *In re* World Trade Ctr. Disaster Site Litig., No. 1:21-mc-00100-AKH (S.D.N.Y. June 23, 2010), ECF No. 2091 (approving the settlement agreement).

²⁴³ See Mullenix, *supra* note 9 (criticizing the use of “quasi-class actions”).

²⁴⁴ See Weinstein, *supra* note 10, at 529 (“In my view, consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements.”).

²⁴⁵ Cf., e.g., *supra* notes 234–37 (discussing the *Guidant*, *Zyprexa*, *Vioxx*, and *World Trade Center* settlements).

²⁴⁶ The predominance aspect is often the stumbling block for actual class certification. *See* FED. R. CIV. P. 23(b)(3) (requiring common questions of law or fact to predominate over individual questions of law or fact); *see also* Mullenix, *supra* note 9, at 390–91, 394 (describing the use of quasi-class actions as an end run around Rule 23 requirements); cf. *McFarland v. State Farm Fire & Cas. Co.*, No. CIVA1:06CV466LTS-RHW, 2006 WL 3071988, at *2 (S.D. Miss. Oct. 25, 2006) (observing that it would be “inconsistent” to “deny class certification . . . and at the same time allow [claims] to go forward in what the Magistrate accurately described as a ‘quasi-class action lawsuit’ . . . without regard for the rigid requirements for class certification.”).

responsibility. While the *Manual for Complex Litigation* provides judges with some guidance, it has not been updated since 2004 and thus provides no guidance on many recent developments. Accordingly, this Part suggests some substantive and procedural improvements for the three principal areas Part II critiqued: appointing lead lawyers, awarding those lawyers fees, and reviewing nonclass settlements.

First, because dissent promotes adequate representation, thwarts detrimental group decision-making biases, and encourages innovation, judges should embrace avenues for changing the current norms that silence objectors and pressure attorneys toward cooperation and consensus. This can be achieved by designating lead lawyers to represent plaintiffs' various interests, inviting objections, and conducting evidentiary hearings before choosing leaders. Second, compensating lead counsel on a quantum-meruit basis could clarify the muddled doctrinal lineage that judges have previously cited and would reflect the true nature of appointing lead lawyers, which is more akin to a forced client referral than a common fund. Finally, if judges embrace the quantum-meruit proposal, it would give them a legitimate basis to assess how much lead lawyers benefitted the plaintiffs through the results they achieved. Although this settlement review would be limited as compared with judicial review under Rule 23(e), conducting that review in the context of awarding fees supplies a powerful incentive against collusion.

A. Selection Criteria for Lead Lawyers

As Part II.A.2 demonstrated, transferee judges' emphasis on experience and financing abilities often results in appointing repeat players to leadership positions. Although having some seasoned lawyers in these roles may benefit plaintiffs,²⁴⁷ the danger is that cooperative norms, reputational concerns, and conformity could lead to inadequately representing clients whose best interests conflict with the majority. Put plainly, when governing norms demand collaboration and shun dissent, plaintiffs' representation suffers.²⁴⁸

²⁴⁷ See Issacharoff, *supra* note 139, at 678 ("Through repeat confrontations with a problem, errors that may trigger heuristic deficiencies in lay actors may be overcome, or at least compensated for.").

²⁴⁸ See Armin Falk, Ernst Fehr & Urs Fischbacher, *Driving Forces Behind Informal Sanctions*, 73 *ECONOMETRICA* 2017 (2005) (finding that cooperating group members impose the most severe sanctions on defectors and that retaliation is a driving factor behind fairness-driven informal sanctions); Fehr & Fischbacher, *supra* note 113, at C2–C3 (arguing that reciprocal fairness shapes social preferences); Michael Schrage, *Daniel Kahneman: The Thought Leader Interview*, 33 *STRATEGY+BUS.* 1, 4 (2003), <http://www.strategy-business.com/media/file/03409.pdf> (describing the risk of polarization in

Both judges and committees can take steps to combat these negative effects. If committee members each briefly summarized their positions in writing, collected them confidentially, and only then discussed the issue, that process would crystallize positions and make information known before leaders prompt others to fall in line behind them.²⁴⁹

Judges can alleviate these concerns by adopting the following strategies to select lead lawyers:

1. *Cognitive Diversity, Dissent, and Group Decisions*

Appointing a cognitively diverse leadership committee can encourage dissent and increase innovation on certain disjunctive tasks like identifying and cultivating successful legal arguments.²⁵⁰ *Cognitive* diversity focuses on diverse knowledge and expertise as opposed to *identity* diversity, which includes visible differences such as race, ethnicity, age, gender, physical disabilities, and demographic dissimilarities.²⁵¹

Nevertheless, cognitive diversity is not as readily identifiable as identity diversity because it comes directly from training and exper-

group dynamics). Reciprocity and reputational concerns, along with trustworthiness, are most robust when people cooperate with one another over time in repeated interactions. See Van Dijk et al., *supra* note 113, at 291–92 (describing the trend towards reciprocity in public-good experiments).

²⁴⁹ See KAHNEMAN, *supra* note 110, at 245 (“This procedure makes better use of the knowledge available to members of the group than the common practice of open discussion.”).

²⁵⁰ See PAGE, *supra* note 65, at xiv–xv (discussing the advantages of diversity in groups).

²⁵¹ *Id.* at 7–8; Karen A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Workgroups*, 44 ADMIN. SCI. Q. 741, 756–60 (1999) (describing the results of a study isolating value, ethnic, and social-category diversity); Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 J. SOC. ISSUES 261, 267–68 (2009) (describing the shift away from identity diversity); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference? The Promise and Reality of Diverse Teams in Organizations*, 6 PSYCHOL. SCI. PUB. INTEREST 31, 41–42 (2005) (reviewing studies examining the effects of information-processing diversity in groups). While identity diversity might occasionally be important for plaintiffs to feel adequately represented, it may also lead to stereotyping, social rifts, difficult intragroup relations, and increased conflict. See King et al., *supra*, at 278 (describing the risk of conflict in diverse groups); Mannix & Neale, *supra*, at 33–35 (describing the negative consequences of diversity in groups); Stephanie Francis Ward, *Women Should Be Among Lead Lawyers in IUD Case, Federal Judge Says*, A.B.A. J. (May 20, 2013, 7:00 PM), http://www.abajournal.com/news/article/iud_litigation_needs_some_women_as_lead_lawyers_says_federal_judge (citing a federal judge’s comment that given the nature of the intrauterine-device litigation, the lack of female lawyers on plaintiffs’ proposed executive committee could be problematic).

iences—traits that are imprecise and hard to evaluate.²⁵² Cognitive differences and personality traits are not the same thing, and thus cognitive abilities cannot reliably be measured with personality indicators like Myers-Briggs or OCEAN tests.²⁵³ Even if judges could assemble a cognitively diverse group by focusing on ability, training, and experiences,²⁵⁴ there would still be a danger that members' cognitive differences might converge; members may assimilate and become cohesive.²⁵⁵

Accordingly, leveraging outsiders' expertise is a more viable means of achieving cognitive diversity. This is the familiar idea behind hiring outside consultants. The organization hopes that an outsider will raise issues that insiders either cannot see or are afraid to voice.²⁵⁶ Outsiders aren't smarter—they're just novel and different. They add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion.²⁵⁷

Outsiders are readily available in multidistrict litigation. Judges and lead lawyers need look no further than the host of attorneys who were not appointed to lead positions. Inviting objections and soliciting feedback from outside attorneys on critical motions and strategy help to avoid cognitive diversity's main pitfall—that it is too tough to recognize from the information that applicants provide. When outsiders object and share new information, their actions may dovetail with adequate representation's aims: Having someone represent your interests means having someone who will dissent on your behalf when your interests are jeopardized, vocalize your position to the group, and, if that fails, to the judge.

²⁵² See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* 302–09 (2007) (describing how training and experience cause cognitive diversity).

²⁵³ See *id.* at 377 n.3 (explaining that Myers-Briggs and OCEAN tests capture personality traits).

²⁵⁴ See *id.* at 362 (describing a heuristic in the college-admissions context to create a cognitively diverse group).

²⁵⁵ See *id.* at 343 (“[O]utsiders do not stay outsiders for long.”).

²⁵⁶ See *id.* at 343–44 (describing the valuable perspective of outsider consultants in business); Schulz-Hardt et al., *supra* note 132, at 564 (“Initial preference heterogeneity was a necessary condition for disagreement . . . when the group started its information search. This consistent disagreement led to lower commitment to the preliminary group decision and lower confidence about having already found the best alternative . . . , and these two processes, in turn, debiased group information seeking.”).

²⁵⁷ See PAGE, *supra* note 252, at 344 (“Visiting committees and consultants challenge the status quo. . . . [They] identify new policy dimensions, and they force us to abandon our existing predictive models.”); Ulrich Klocke, *How to Improve Decision Making in Small Groups: Effects of Dissent and Training Interventions*, 38 SMALL GROUP RES. 437, 437–38, 460–62 (2007) (describing the benefits of dissenting group members).

2. *Plaintiffs' Heterogeneous Interests*

Even though dissenting outsiders can act as a safety net for adequate representation, they cannot substitute for representative leadership.²⁵⁸ Appointing lead attorneys precludes plaintiffs' individually chosen counsel from having a seat at the decision-making table and thus raises due-process concerns if those attorneys do not adequately represent them. Adequate representation demands separate counsel when structural conflicts exist or where certain claimants' unique issues might not be fully developed.²⁵⁹ Structural conflicts arise when there is a danger that counsel "might skew [the litigation] systematically" to favor some claimants over others "on grounds aside from reasoned evaluation of their respective claims or . . . disfavor claimants generally vis-à-vis the lawyers themselves."²⁶⁰

Structural conflicts present a high bar for truly separate representation. Plaintiffs' goals, injuries, claims, and remedies are likely to run the gamut, but often do not meet this threshold.²⁶¹ So, while separate counsel may not always be required, it is worthwhile for judges to solicit information from attorneys that reveals how familiar they are with those variations.

Selecting qualified representatives based on their clients' different interests is also more likely to create a cognitively diverse committee.²⁶² If lead lawyers' clients' aims and preferences vary, the committee will likely include dissenters who challenge the status quo and inject new information into the discussion.²⁶³ Soliciting that information through leadership applications incentivizes attorneys to iden-

²⁵⁸ 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.

²⁵⁹ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. k (2010) (calling for separating counsel to address conflicts on central issues).

²⁶⁰ *Id.* § 2.07(a)(1)(B); see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677–1700 (2008) (defining "structural defects" in classes).

²⁶¹ For detailed information on differences among claimants and how they may fall into more cohesive subgroups, see Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 121–25 (2011).

²⁶² See Schulz-Hardt et al., *supra* note 132, at 566 (noting that task-oriented conflict can counteract biased information seeking and that "one way to facilitate this task-oriented conflict is to select members with heterogeneous decision preferences when forming groups").

²⁶³ See *id.* at 582–83 (explaining that genuine dissent counteracts group polarization and proposing that appointing heterogeneous group members with different functional and educational backgrounds will produce dissent).

tify potential conflicts early on and, by making them explicit, take appropriate steps to ensure informed consent.²⁶⁴

3. *Litigation Financing Abilities*

Diversifying lead lawyers may be difficult if judges continue to heavily factor attorneys' ability to finance the litigation into their decisions and refuse to permit alternative financing arrangements. Established law firms tend to have more assets available to fund common-benefit work, which means that judges will continue to choose repeat players.²⁶⁵ Yet, financing need not impede otherwise-qualified attorneys if judges permit third-party funding arrangements. When properly disclosed to the court (as all alternative financing should be) and allowed by the relevant state bar, certain third-party financing can solve funding and monitoring problems.²⁶⁶ Still, not all alternative financing arrangements are created equal: As I have explored in depth elsewhere,²⁶⁷ financing options can differ substantially, and each type has its own benefits and drawbacks.²⁶⁸

First, financiers might loan money directly to plaintiffs' law firms when those firms cannot secure loans from traditional sources like banks. These recourse loans are secured by all of the firm's assets, including future fee awards. On the upside, loans to law firms may make newer market entrants and less liquid firms eligible for leadership positions. But, because these financiers charge significantly higher interest rates than banks, they may amplify the pressure to settle quickly and avoid added interest charges.²⁶⁹

The second novel but more promising form of financing would be to permit the funder to contract directly with an attorney's clients for

²⁶⁴ If judges sense a fear among attorneys that such candor could prejudice their claims vis-à-vis defendants, then they could review applications in camera.

²⁶⁵ See Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 577 (2014) (noting "concerns that the 'usual characters' tend to dominate certain classes of aggregate litigation and that the established resources of some major players help create an entrenched bar").

²⁶⁶ Burch, *supra* note 16, at 1273, 1331–32 (discussing the need to disclose funding agreements to prevent collusion between attorneys and financiers who might aspire to influence or control litigation decisions).

²⁶⁷ See *id.* at 1300–11 (discussing different forms of alternative financing).

²⁶⁸ Cf. Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 621 (2014) ("Although [insurers and third-party funders] presumably use contracts to maximize the joint welfare of themselves and the parties they work with, the manner in which the contracts operate reflects the opposition of the parties in litigation. . . . Funding contracts are intended to maximize net expected gains from lawsuits.").

²⁶⁹ See Burch, *supra* note 16, at 1312–13, 1318–19 (discussing interest rates charged and noting the greater incentive to settle).

a percentage of the clients' proceeds.²⁷⁰ This is akin to a plaintiff paying the financier a contingent fee—if she loses, she owes nothing, but if she wins, the contingency goes to the financier. In return, the financier pays the client's attorney on a billable-hour rate plus a small percentage of the funder's gross proceeds as a successful litigation bonus.²⁷¹ Like loaning money directly to law firms, this allows attorneys in firms with less capital to serve in leadership roles, but it also incentivizes sophisticated financiers to vet attorneys, monitor them, and keep costs reasonable. The financier's and attorney's self-interests tend to check one another in advantageous ways: Working on a billable-hour rate incentivizes attorneys to spend time communicating with their clients and consulting with "outside" non-lead attorneys, which counterbalances a financier's push for quick settlement.²⁷² But the bonus rewards efficiency and productivity, which reduces attorneys' incentives to unduly prolong the litigation or duplicate effort.²⁷³ The main drawback to this approach, however, is that it covers only costs for counsel's contractual clients, not the added amount needed to fund work for *all* plaintiffs' benefit.

A third option could thus work as a stand-alone financing arrangement or function alongside the previous proposal to cover common-benefit costs for plaintiffs with whom the lead lawyers have no contract. As with loans to plaintiffs' law firms, financiers could contract directly with firms to cover the cost of performing common-benefit work. The key to this arrangement's success, however, hinges on the contract's compensation provisions and ensuring that lead attorneys—not financiers—retain decision-making control.²⁷⁴ If the funding contract simply loans the firm money at a specified interest rate, the dangers of a financier hijacking settlement discussions and lawyers pushing for an early settlement persist. If the funding contract pays the attorney on a billable-hour rate with the financier receiving lead lawyers' contingent-fee award, then the attorneys might unnecessarily protract the litigation. But, if the funding contract pays lead lawyers on a billable-hour rate and includes a sliding-scale litigation bonus tied to the judge's performance assessment under quantum-

²⁷⁰ This percentage should not exceed a state's permissible contingent fee for attorneys.

²⁷¹ See Burch, *supra* note 16, at 1319–20 (describing a system of a negotiated billable-hour rate overseen by a financier).

²⁷² The decision to settle should, of course, remain with the client. See *id.* at 1320–21 (discussing rules of professional conduct and decision-making control).

²⁷³ See *id.* at 1319–20 (describing the incentives of bonus rewards).

²⁷⁴ See *id.* at 1320–24 (discussing various possibilities for decision-making control and arguing that clients should retain ultimate control over their settlement decisions).

meruit principles, this may appropriately balance both parties' incentives.²⁷⁵

Granted, claimants do not consent to this form of financing as they would if they contracted directly with the funder, but then they do not consent to judges appointing lead lawyers either. Yet, compensating lead lawyers necessarily rests on restitution, not contract principles. So, extending those restitutionary mores to financiers through quantum-meruit principles is not as far-fetched as it might initially seem. As Part III.B elaborates below, quantum-meruit considerations include assessing lead lawyers' work, the status of the case, and the litigation's outcome. Lead attorneys thus have an incentive to work hard to improve the settlement on plaintiffs' behalf and not to unduly protract the litigation. And, as sophisticated investors, financiers would presumably fund only qualified counsel, thereby alleviating some of the judge's vetting responsibilities.²⁷⁶

4. *Procedural Aspects of Lead-Lawyer Appointments*

Information about financing, diverse interests, and attorneys' qualifications may not be readily available when cases are first transferred. As such, this section suggests modifying appointment procedures in four ways to reduce informational asymmetries and improve representation. First, as to timing, judges should consider appointing interim leadership until they can identify conflicting interests. The interim selection process could be an abbreviated version of the detailed procedures that follow, which include publishing a proposed leadership slate followed by a "notice and comment" period with confidential objections and supporting documentation.²⁷⁷ Once appointed, interim counsel would serve until enough information exists to assess plaintiffs' heterogeneous interests and potential structural conflicts.²⁷⁸

That informational tipping point might arise upon receiving a motion for class certification, or earlier, depending on how quickly the issues develop and how soon attorneys file suit. Class certification

²⁷⁵ See *infra* Part III.B (discussing the advantages of compensating lead lawyers on a quantum-meruit basis).

²⁷⁶ See Issacharoff, *supra* note 265, at 574 (describing how, in some respects, funders are in a better position than lawyers to assess cases).

²⁷⁷ See, e.g., *In re Bos. Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, slip op. at 9 (S.D.W. Va. Feb. 29, 2012) (Pretrial Order No. 1), available at http://www.wvsc.uscourts.gov/MDL/amsinc/pdfs/PTO_1.pdf ("Written objections may be made to the appointment of a proposed applicant or nominee. . . . Any objections should be concise yet thorough and have any necessary documentation attached.").

²⁷⁸ For more information on structural conflicts, see *supra* note 260 and accompanying text.

motions can prove helpful in singling out conflicts given that they leverage defendants' incentives to pinpoint dissimilarities among the plaintiffs. But reaching that tipping point also requires a critical mass of plaintiffs' attorneys to have appeared. A recent study by the Federal Judicial Center demonstrates that highly specialized repeat players appear earlier in multidistrict litigation than do other attorneys, making their first appearance an average of 73 days after transfer.²⁷⁹ Repeat players with fewer appearances arrive after 333 days, and on average, attorneys appear 419 days post-transfer.²⁸⁰ This suggests that judges will have more attorneys from which to choose if they wait longer than three months to appoint permanent leadership.

Second, conducting an evidentiary hearing can introduce nonrepeat players to the court, increase transparency, and help prevent informational cascades.²⁸¹ Cascades based on misinformation are less likely to occur with an open vetting process, where competing attorneys object, inject new information into the discussion, and provide reasons for appointing one person over another.²⁸² As such, this process provides judges with an opportunity to distinguish between meritorious challenges and strategic ones designed to extort backroom payoffs.²⁸³ Moreover, an evidentiary hearing provides counsel an opportunity to ask the judge questions about the process and state her case for selection.²⁸⁴

Third, judges can improve the information they receive about applicants by tailoring application forms for specific positions, using the evidentiary hearings to glean additional information, soliciting feedback from law clerks, and then assimilating and scoring applicants

²⁷⁹ Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 166 (2014) ("On average, attorneys appear 419 days after centralization—more than a year. Among our repeat-player group (ten or more MDL proceedings in the study period), attorneys appeared on average 333 days after centralization—just under a year. . . . But super-repeat attorneys, with 30 or more MDL proceedings, appeared on average after just 73 days.").

²⁸⁰ *Id.*

²⁸¹ See Samuel Issacharoff & R. David Proctor, Selection and Compensation of Counsel in Multi-District Litigation, Presentation to the 2012 Transferee Judges Conference 17, 23 (Oct. 23, 2012), available at http://law.duke.edu/sites/default/files/centers/judicialstudies/mdl2014/Selection_Compensation_Counsel.pdf (suggesting evidentiary hearings on attorneys' qualifications and common application forms to facilitate comparisons between attorneys).

²⁸² See SUNSTEIN, *supra* note 62, at 64, 70–72 (describing the benefits that organizations receive when they allow dissenting opinions to be expressed).

²⁸³ This practice is well known in the class-action context. *E.g.*, Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 432–33. Given anecdotal evidence and the overlap of repeat players in both contexts, there is reason to think it persists in multidistrict litigation.

²⁸⁴ Issacharoff & Proctor, *supra* note 281, at 23.

based on their relevant qualifications.²⁸⁵ As Nobel Prize-winning economist Daniel Kahneman suggests, formulas and scores (as opposed to expert intuition) tend to better predict a candidate's success by combating the halo effect, where positive initial impressions influence later judgments.²⁸⁶ To create an application form, Kahneman suggests selecting a few relevant traits that are prerequisites for success in the position, making a list of questions for each trait, and ultimately scoring those traits on a one-to-five scale.²⁸⁷ For example, based on the typical responsibilities of plaintiffs' steering committee, judges might seek members who are organized, responsible, and responsive; excel in written and oral communication; demonstrate leadership skills; have experience conducting depositions and large-scale document review; have expertise in the litigation's subject matter; and represent clients with various injuries and claims (or only a subset of interests). After creating a list of relevant traits, judges should then recruit other evaluators with less insider knowledge—such as term law clerks—to review the forms and score the applicants.²⁸⁸

Reviewers would rate attorneys' qualifying traits based on the applications and information gleaned during the evidentiary hearing. Kahneman recommends collecting the information "one trait at a time, scoring each before . . . mov[ing] on to the next one," then, without discussing scores with each other, tabulating them to create a presumptive leadership roster.²⁸⁹ At that point, the judge should consider whether the presumptive slate adequately represents plaintiffs' various interests.²⁹⁰ She could then substitute qualified attorneys who represent clients with conflicting interests and who would promote discourse and dissent.²⁹¹

²⁸⁵ *Id.*

²⁸⁶ KAHNEMAN, *supra* note 110, at 82–83, 222–33.

²⁸⁷ *Id.* at 232.

²⁸⁸ This further combats the halo effect and the impulse to empower only known attorneys, while sidelining personal biases. *See id.* at 231–32 (defining the halo effect and suggesting how it might be avoided).

²⁸⁹ *Id.* at 232. Note that while this is somewhat of an "objective" measure, it differs substantially from Professors Silver and Miller's proposal of assigning presumptive leadership to those with the largest client inventory. Silver & Miller, *supra* note 13, at 159–69. As noted, that approach can reward attorneys who collect an undifferentiated mass of cases with varying claims and complicate settlement.

²⁹⁰ It may be less important to have diverse representation for purely administrative positions, like liaison counsel.

²⁹¹ *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 21 (1979) (referring to the touchstone for a good judicial decision or approved settlement as whether the court "tolerates, or even invites, a multiplicity of spokesmen," with "each perhaps representing different views as to what is in the interest of the victim group"); *cf.* PAGE, *supra* note 252, at 362 (proposing a hypothetical college-admissions process in which

Finally, some judges have suggested imposing one-year “term” limits on leadership appointments such that they can continually reassess the lawyers’ effectiveness.²⁹² While this does provide added incentive for lead lawyers to continue working hard, it has the downside of making them principally beholden to the judge. Lead lawyers vigorously representing their clients could be in danger of replacement if they displease the judge, which may encourage them to curry judicial favor at the expense of fulfilling their fiduciary obligations to plaintiffs. The better alternative might be to allow non-lead attorneys to request substitutions or additions to the roster if lead lawyers neglect cases or if new information on conflicts comes to light.²⁹³

B. Lead Lawyers’ Fees: A Quantum-Meruit Theory of Fee Awards

Selecting lead lawyers is, of course, only half the battle. Once chosen, lead lawyers raise compensation questions.²⁹⁴ As Part II.B explained, judges have traditionally relied on an amalgam of doctrines to accomplish this task, which has resulted in less predictability and created an opportunity for repeat players to contractually increase their fees. The mismatch is apparent: A judicially appointed lead lawyer who does not operate under the goodwill afforded by contractual consent should likewise have the judge set her fees through a transparent process, not through backdoor trades with the defendant that are slipped into a settlement.

What is needed then is a standard by which judges assess the value that lead lawyers add. Such a standard exists in quantum meruit.²⁹⁵ Quantum meruit lies at the heart of each of the theories that judges have invoked in the past to piece together compensation decisions—contract, restitution, and equity—and compensates lead

admittees are chosen by a mathematical formula and then a group of outsiders looks for ways to increase relevant diversity while maintaining average ability level).

²⁹² Issacharoff & Proctor, *supra* note 281, at 25.

²⁹³ Some judges have, for example, helped ensure adequate representation by appointing a new plaintiffs’ steering committee for nonsettling plaintiffs after the original committee negotiated a proposed deal with the defendant. *E.g.*, *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 261–62 (E.D.N.Y. 2006). Judge Fallon appointed additional counsel to the plaintiffs’ steering committee to represent ineligible or unenrolled claimants post-settlement. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 8, 2010) (Pretrial Order No. 45A), available at <http://www.laed.uscourts.gov/vioxx/Orders/PTO45A.pdf>.

²⁹⁴ This is, however, controversial. Professors Silver and Miller’s proposal, for example, proposes selection methods but does not suggest that judges should compensate the steering committee. Silver & Miller, *supra* note 13, at 159–76.

²⁹⁵ Quantum meruit is generally used only where parties do not agree to compensation in advance and can thus be thought of as a theory of recovery as opposed to a substantive legal theory, such as contracts.

lawyers for contributions that benefit the plaintiffs.²⁹⁶ Given that lead lawyers benefit different plaintiffs to different degrees, this allows judges to tailor awards to match the circumstances. As such, it could likewise reduce compensation for free-riding attorneys who do little more than file cases, wait for lead lawyers to negotiate a proposed settlement, and collect their fee.

Courts have long used quantum-meruit awards to compensate attorneys where they are discharged without cause and work on contingent fees,²⁹⁷ they dispute how to divide fees among themselves,²⁹⁸ they voluntarily withdraw with good cause,²⁹⁹ no fee agreement exists,³⁰⁰ local counsel is fired before a contingency occurs,³⁰¹ and even when attorneys serve as special counsel to a debtor in bankruptcy.³⁰² Likewise, the *Restatement (Third) of the Law Governing Lawyers* gives counsel a right to recover a fair fee in quantum meruit when “a client and lawyer have not made a valid contract providing for another measure of compensation.”³⁰³ In multidistrict litigation, even though the client contracts with her chosen attorney, she typically has no contract with the lead lawyers. Rather, the situation is more akin to a forced referral or sale, where the individual’s attorney

²⁹⁶ BLACK’S LAW DICTIONARY 1361–62 (9th ed. 2009); Lauren Krohn, *Cause of Action by Attorney to Recover Fees on Quantum Meruit Basis*, in 16 CAUSES OF ACTION 85, 91 (Shepard’s Editorial Staff eds., 1988).

²⁹⁷ *E.g.*, *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (6th Cir. 1988); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 401 F. Supp. 2d 1120, 1123–24 (D. Nev. 2005); *Marks v. Struble*, 347 F. Supp. 2d 136, 144 (D.N.J. 2004); *Byrne v. Leblond*, 811 N.Y.S.2d 681, 682–83 (App. Div. 2006); Joseph M. Perillo, *The Law of Lawyers’ Contracts Is Different*, 67 FORDHAM L. REV. 443, 457–58 (1998).

²⁹⁸ *E.g.*, *Kirschner & Venker, P.C. v. Taylor & Martino, P.C.*, 627 S.E.2d 112, 113 (Ga. Ct. App. 2006) (holding that local counsel was entitled to recover the quantum-meruit value for its services even though the firm was fired before the contingency became payable); *Carr v. Pearman*, 860 N.E. 2d 863, 868–70, 874 (Ind. Ct. App. 2007) (holding that counsel was entitled to quantum-meruit recovery even after violating professional conduct rules by failing to obtain a written contingency-fee agreement); *Byrne*, 811 N.Y.S.2d at 682–83 (holding that a further hearing was necessary to determine the compensation that discharged counsel should have received on a quantum-meruit basis). *But cf.* *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) (refusing to award quantum-meruit recovery to an attorney with unclean hands).

²⁹⁹ *E.g.*, *Stall v. First Nat’l Bank of Buhl*, 375 N.W.2d 841, 845–46 (Minn. Ct. App. 1985).

³⁰⁰ *E.g.*, *Crockett & Myers*, 401 F. Supp. 2d at 1124 (D. Nev. 2005); *Jacks v. Sullinger*, 224 So. 2d 583, 583–85 (Ala. 1969) (compensating a deceased attorney’s estate in quantum meruit when no agreement was in place for the attorney’s services prior to his death).

³⁰¹ *E.g.*, *Kirschner & Venker*, 627 S.E.2d at 113.

³⁰² *E.g.*, *In re EBW Laser, Inc.*, 333 B.R. 351, 357 (Bankr. M.D.N.C. 2005); *In re Allen*, 217 B.R. 952, 955 (Bankr. M.D. Fla. 1998). *See generally* Krohn, *supra* note 296, at 92 (“A quantum meruit analysis of attorneys’ fees will therefore be appropriate in virtually any case in which the value of legal services is at issue.”).

³⁰³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 (2000).

hands clients over to the lead lawyers who bundle and pursue some aspects together.³⁰⁴ Thus, grounding lead lawyers' fee awards in quantum meruit brings them in line with actual practice and with attorneys' fees jurisprudence more generally.

Granted, given its lineage in contract, equity, common-benefit funds, and attorneys' fees, the law surrounding quantum-meruit awards is jumbled, to say the least. Although lead lawyers plainly have the burden of establishing their fees' reasonableness and hence the value they conferred,³⁰⁵ assessing that value can vary depending on the cases cited. Relying on cases where attorneys failed to contract in advance with clients, for instance, would be inappropriate since those circumstances result in conservative fees and do not capture the uniqueness of multidistrict litigation committees.³⁰⁶ Similarly, standards used to assess fees under fee-shifting statutes are designed with different public-policy goals in mind and run the risk of being too generous. Instead, leadership committees are most analogous to a situation in which the client employs her chosen attorney and that attorney, in turn, relies on (in effect, employs) lead lawyers.

Because "quantum meruit" by definition implies a recovery goal based on "how much is merited" as opposed to a specific cause of action, assessing fair value³⁰⁷ should depend on the lead lawyers' billing practices (whether hourly billing or contingent fees), work, and time spent;³⁰⁸ the status of the case; and the amount of work the individual plaintiffs' chosen attorneys contributed to the outcome.³⁰⁹

³⁰⁴ See Curtis & Resnik, *supra* note 69, at 447 (recognizing the "forced referral or sale" of individual cases to PSC members and suggesting that paying PSC members for their work reflects the concept of "quantum meruit").

³⁰⁵ Anderson v. Anchor Org. for Health Maint., 654 N.E.2d 675, 681 (Ill. Ct. App. 1995); Krohn, *supra* note 296, at 94.

³⁰⁶ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c ("A conservative evaluation is usually appropriate in assessing fees under this Section. When a lawyer fails to agree with the client in advance on the fee to be charged, the client should not have to pay as much as some clients might have agreed to pay.").

³⁰⁷ *Id.* § 39 cmt. b(ii).

³⁰⁸ See Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974) (assessing the time spent on a case), *abrogated on other grounds by* Blanchard v. Bergeron, 489 U.S. 87, 93 (1989); Ackermann v. Levine, 610 F. Supp. 633, 635-40 (S.D.N.Y. 1985) (examining specific services rendered), *aff'd in part, rev'd in part*, 788 F.2d 830, 844-45 (2d Cir. 1986); Hiscott & Robinson v. King, 626 A.2d 1235, 1238 (Pa. Super. Ct. 1993) (considering an attorney's hourly billing rate); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c (discussing hourly fees); Perillo, *supra* note 297, at 448 (discussing competing views on compensation of attorneys who violate their duties to a client after some services are performed).

³⁰⁹ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c ("The standard rate or hourly fee might be modified by other factors bearing on fairness, including success in the representation and whether the lawyer assumed part of the risk of the client's loss, as in a contingent-fee contract."); Lester Brickman, *Setting the Fee when*

Judges should also consider the case's success, lead lawyers' opportunity costs, and whether the attorneys assumed financial risk to pursue the litigation.³¹⁰ In this vein, quantum-meruit awards entail a comparative, fact-specific, contextualized evaluation of lead attorneys' work and risk over time as opposed to a flat percentage-of-the-fund tax at the beginning of litigation, which could over- or undercompensate in certain circumstances.³¹¹

While lead lawyers might theoretically insert provisions within a master settlement agreement that alert enrolling state-court plaintiffs (and their counsel) that their award will be subject to the federal judge's quantum-meruit fee assessment, those assessments should ultimately reflect the value lead lawyers added to the cases. Although lead attorneys may confer substantial value on state cases by negotiating a settlement, unless state-court attorneys relied on joint discovery efforts, lead lawyers may have benefitted them less than those within the multidistrict litigation. Thus, the fee should reflect a proportional reduction. As this suggests, adhering to a quantum-meruit theory demands certain limits, which could improve predictability and consistency in awarding fees.

First, because the general theory supporting quantum-meruit recovery is that the circumstances have changed and judges are implementing the fee that is merited based on lead lawyers' work, the total contingency charged to clients should not fluctuate. Put simply, if a client agreed to a 30% contingent fee, that percentage should remain static. She is paying attorneys to complete the work on her case. Her chosen attorney has, in effect (though not necessarily willingly), hired a second set of attorneys to do a portion of that work. So, the court

the Client Discharges a Contingent Fee Attorney, 41 EMORY L.J. 367, 392–93 (1992) (discussing the importance of the size of the recovery in determining appropriate compensation).

³¹⁰ E.g., *Richardson v. Parish of Jefferson*, 727 So. 2d 705, 708 (La. Ct. App. 1999); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c. Although Congress has not provided guidance for awarding attorneys' fees in multidistrict litigation, bankruptcy provides an important comparison. In bankruptcy, judges can award trustees "reasonable compensation for actual, necessary services" and "reimbursement for actual, necessary expenses." 11 U.S.C. § 330(a)(1)(A)–(B) (2012). Reasonable compensation is calculated based on a number of factors, including "time spent," "rates charged," "whether the services were necessary . . . or beneficial," whether the services were timely given the case's complexity, and what other comparably skilled practitioners would charge. *Id.* § 330(a)(3). But the statute specifically prohibits judges from compensating attorneys for duplicate or unnecessary services, as well as services that were not "reasonably likely to benefit the debtor's estate." *Id.* § 330(a)(4).

³¹¹ See Curtis & Resnik, *supra* note 69, at 442 ("[Fees] should be based on fact-specific, contextualized evaluations that include assessments of risk, as it changes over time and payments for investments of both capital and of work, including the provision of services of individual litigants.").

may award lead lawyers whatever portion of that fee reflects their value.

Second, courts often exclude pro se litigants from having to pay lead lawyers' fees and costs even though they, like claimants with counsel, may benefit from lead attorneys' efforts.³¹² It is true that pro se litigants have not retained any lawyer and thus have not consented whatsoever to legal representation. But allowing them to "opt out" is inconsistent with a quantum-meruit theory, which hinges on someone receiving a benefit for which they have not paid. That is true even if the court subscribes to the common fund's interpretation of quantum meruit: The purpose of a common fund is to "require . . . others—in the absence of contract—to contribute ratably to the cost of securing the common benefit."³¹³ Under that rule, all claimants are linked by their joint interest in "a common legal position."³¹⁴ Because their interests are interconnected and lead lawyers have benefitted them by advancing the ball in some material way, judges should not excuse pro se litigants from paying lead-lawyer fees.

Third, if lead attorneys have their own clients, as they should,³¹⁵ quantum meruit suggests the court should compensate them only for the benefit they confer on others beyond the work they would typically perform for their own cases.³¹⁶ Just think: If several lawyers won big verdicts on their own in separate courts, the positive externalities from those trials would spill over to other cases around the country. Yet, the beneficiaries would not pay for the externality. As the restitutionary basis for class-action awards makes plain, "class counsel may base a claim for fees only on the *enhanced* recovery obtained for a class: the difference, in other words, between what the class received in consequence of the lawyer's intervention and what the class would have received without it."³¹⁷ Of course, measuring this gain in multidistrict litigation is much harder since a judge cannot simply identify

³¹² See, e.g., *In re Air Crash Disaster at Fla. Everglades on December 29, 1972*, 549 F.2d 1006, 1010 n.5 (5th Cir. 1977) ("Claimants who had not retained counsel were excluded from payment of the fee.").

³¹³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. a (2011).

³¹⁴ *Id.*

³¹⁵ *Supra* notes 94–98 and accompanying text.

³¹⁶ Cf. *In re Air Crash*, 549 F.2d at 1017 (responding to the criticism that attorneys should not be paid for doing something they would have to do on behalf of their own clients by pointing out that "[i]t is uncertain that appellants or any other plaintiff lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage").

³¹⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c.

the reasonable value of an attorney's service.³¹⁸ Consequently, judges have prohibited lead attorneys from reporting "time spent on developing or processing individual issues in any case for an individual client" and allowed only "time spent on matters common to all claimants" when requesting a fee.³¹⁹

Fourth, quantum meruit suggests that automatically awarding a flat percentage³²⁰ of plaintiffs' awards without considering the circumstances or the work completed may be inappropriate since the fee should be "an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship."³²¹ For instance, if cases were transferred back to their original fora for trial as Congress intended, reflexively awarding lead lawyers a flat percentage of plaintiffs' settlement could be unreasonable given that individual counsel ushered in the final result.³²² To be sure, this does not suggest using the lodestar method in lieu of a percentage method; rather, it means that judges should tailor the percentage to the circumstances.

Tailored fee awards could thus vary depending on whether a case is remanded, whether it goes to trial, whether and when it is settled, the role lead lawyers played in achieving that settlement, and the overall cost savings achieved through economies of scale and mass settlement.³²³ As the Eighth Circuit recognized in assessing fees against class-action opt-outs who landed in multidistrict litigation, awarding an automatic, across-the-board percentage risks giving lead lawyers a windfall, particularly if one case goes to trial and includes a significant punitive-damage award: "[A]ssuming one plaintiff receives \$1,000,500 in damages, lead counsel would be entitled to \$300,000 and liaison counsel would be entitled to \$100,000. . . . A fee award that gives court-appointed counsel a windfall and unfairly penalizes either plain-

³¹⁸ See Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 REV. LITIG. 127, 130 (2007) (noting the potential difficulty of measuring gain instead of merely the reasonable value of services rendered).

³¹⁹ *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), slip op. at 9 (D. Minn. Feb. 15, 2006) (Pretrial Order No. 6) (emphasis omitted).

³²⁰ See, e.g., *In re Air Crash*, 549 F.2d at 1010-11 (observing that the district court awarded lead lawyers an 8% contingent fee).

³²¹ BLACK'S LAW DICTIONARY 1361-62 (9th ed. 2009).

³²² Cf. MANUAL FOR COMPLEX LITIGATION, *supra* note 72, § 21.71 ("Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. b (2010) ("[T]he percentage method may not be feasible when the value of the common fund is difficult to assess. . . . In those circumstances, the court should use the lodestar method.").

³²³ In this way, the fee award is concerned with not only whether the work was performed by lead lawyers or individual counsel, but whether aggregation diminished the total amount of work per client.

tiffs or defendants does not constitute 'fair reimbursement and compensation.'"³²⁴ Likewise, small judgments or settlements run the risk of undercompensation.³²⁵

This principle of tailoring fee awards to the work completed and result obtained risks becoming a double-edged sword by further pressuring lead lawyers to settle. Yet, substantial pressure to settle already exists³²⁶ and, as the next section explores, using a quantum-meruit theory to award fees would give the transferee judge a private-law basis to assess the settlement's terms. Thus, this inquiry should help alleviate concerns about collusive deals, deals that favor some claimants over others on unreasonable grounds, and deals that disfavor claimants generally vis-à-vis the lead lawyers.³²⁷

Finally, nothing in quantum-meruit theory allows judges to indiscriminately cap contingent-fee agreements. If judges' concern is that individual counsel will receive a windfall since they no longer perform the lion's share of the work, then that concern should be addressed by increasing lead lawyers' share, not cutting contingent fees. Of course, this does not mean that judges cannot address an exorbitant fee in individual circumstances,³²⁸ but doing so would require assessing whether that fee is unreasonable under the relevant state law and whether state law permits judicial modification of fee awards.³²⁹

In sum, determining how much lead lawyers have benefitted individual counsel and their clients in specific cases will depend heavily on adversarial litigation to yield the relevant information. Even though appraising fair value should vary depending on a number of inputs³³⁰ and entail a fact-specific, contextualized evaluation of lead attorneys' work and risk over time, judges could place cases in general categories based on factors like whether the case is in state or federal court and

³²⁴ *Walitalo v. Iacocca*, 968 F.2d 741, 748 (8th Cir. 1992) (citation omitted). Courts have likewise voiced this concern in awarding fees from a common fund in class actions. *E.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987).

³²⁵ *Walitalo*, 968 F.2d at 748.

³²⁶ See *supra* notes 53–55 and accompanying text (discussing judges' incentives to encourage settlement); *supra* notes 106–08 and accompanying text (discussing attorneys' reputations, which would extend to reputations as deal makers).

³²⁷ See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (describing the rights of individual claimants in aggregate litigation).

³²⁸ See *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980) (noting the court's power to monitor contingency fees for reasonableness).

³²⁹ See *supra* notes 218–21 and accompanying text (discussing how judges apply state ethics codes to evaluate the reasonableness of attorneys' fees).

³³⁰ Inputs include factors such as the lead lawyers' billing rates, work, and time spent; the type of work the lead lawyers performed (i.e., the committees on which they served); the status of the case and its success; the amount of work the plaintiffs' chosen attorneys contributed to the outcome; lead lawyers' opportunity costs; and whether the attorneys assumed financial risks when pursuing the litigation.

whether individual counsel relied on lead lawyers' discovery efforts. They could further dissect lead lawyers' value based on committee assignment. Certain committees like the plaintiffs' steering committee or executive management committee may play a larger role (and thus confer a larger benefit) in achieving a satisfactory outcome. Conducting hearings would provide objectors an opportunity to make their case and would equip judges with enough information to tailor the lead lawyers' fees to each case (or each category). Hearings and orders have the added benefit of making the fee award appealable—an essential error-correcting tool that lead lawyers sometimes dodge by writing fees into private settlements.

C. *Evaluating Settlements Through Quantum-Meruit Fee Assessments*

In class actions, there is no shortage of concern over self-dealing, collusion, and principal-agent problems, but as the introductory examples of *Vioxx*, *Guidant*, and the *Genetically Modified Rice Litigation* illustrated in Part I, those concerns do not dissipate when judges deny class certification. Although clients are not absent in multidistrict litigation as they are in class actions, they are not able to monitor their attorneys as they might in truly individual litigation. When attorneys represent hundreds of plaintiffs in the same suit, communicating meaningfully and informing each client fully becomes more difficult logistically unless attorneys embrace technology to widely disseminate information.³³¹ Information about one's own case says little about how the litigation is progressing overall, so even clients who receive regular updates may not have a complete picture.

In many ways, multidistrict litigation complicates the incentives, dynamics, and temptations that Rule 23 simplified through heightened judicial control and scrutiny. Rather than addressing a single dynamic between largely absent class members and class counsel, multidistrict litigation incorporates a pyramid relationship where lead lawyers act as agents for individual attorneys who act as agents for their clients. Not only must agents watch other agents over whom they lack any

³³¹ See, e.g., Robert H. Klonoff et al., *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT. L. REV. 727 (2008) (discussing the capacity of the internet to positively impact class-action participation); see also Weinstein, *supra* note 70, at 457–60 (2012) (describing lawyers' and judges' use of technology to keep individual plaintiffs apprised of the status of mass litigation). This is not to say that attorneys representing many clients in the same litigation do not comply with MODEL RULES OF PROF'L CONDUCT R. 1.4 (2014) (requiring lawyers to communicate certain types of information to their clients), but that the character of the relationship itself changes from a one-on-one relationship to a less personal group setting.

control, but the judge also lacks any formal power to police the settlement.³³²

These circumstances present a quandary for the scrupulous transferee judge when parties announce a private settlement that the judge thinks is unfair. Circumstances like those led Judge Hellerstein to publicly denounce the settlement reached in the Ground Zero workers' litigation against New York City, which made achieving the settlement's required participation rate a foregone impossibility.³³³ Plus, the prevalence of repeat players and the trend toward lead lawyers' self-dealing by writing their fee terms into settlements suggest the need for safeguards. Yet, given the misplaced adventure into "quasi-class actions," parties also need predictability and parameters on judicial review.³³⁴

Awarding lead lawyers' fees on a quantum-meruit basis provides judges a valid but limited foothold for reviewing settlements.³³⁵ While limited in scope, linking the settlement's merits to lead lawyers' fees creates a powerful disincentive toward self-dealing or collusion. As noted, quantum-meruit awards require assessing the results obtained and the objective benefit to the client, such as whether lead lawyers' work produced a desirable outcome.³³⁶ Thus, while the judge lacks the

³³² Some argue that judges have no business approving or getting involved in nonclass settlements because individual plaintiffs freely consent to the deal. Grabill, *supra* note 9, at 165, 173. While this is technically true, it overlooks the coercive nature of some settlements. In the *Vioxx* litigation, for instance, the settlement offer required attorneys to recommend the deal to all of their clients and to withdraw from representing those who refused. Plus, settling plaintiffs had to decide whether to settle without ever knowing how much compensation they would receive. For a detailed rationale as to why individual consent does not diminish the need for judicial involvement, see Burch, *supra* note 188, at 512–16.

³³³ *Supra* notes 241–42 and accompanying text.

³³⁴ See *supra* notes 243–46 and accompanying text (casting doubt on quasi-class actions as a viable rationale). But see Grabill, *supra* note 9, at 165, 173 (arguing that individual consent should suffice without judicial involvement).

³³⁵ This does not preclude other less formal means of prompting parties to reevaluate settlement terms. For example, settling parties often ask the court to issue *Lone Pine* orders that govern nonsettling plaintiffs, which a judge could refuse to do if she thought the settlement was coercive. Settlements likewise might include enforcement jurisdiction, which would allow the court to enforce a settlement if challenged. For more on these two possibilities, see Grabill, *supra* note 9, at 179–82.

³³⁶ See *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 195 (D. Mass. 1991) ("Where a higher level of skill is necessary, or where the efforts of counsel bear a more substantial relation to the ultimate favorable outcome, [a higher fee in quantum meruit is] . . . appropriate . . ."); *520 East 72nd Commercial Corp. v. 520 East 72nd Owners Corp.*, 691 F. Supp. 728, 739 (S.D.N.Y. 1988) ("In determining the value of an attorney's services in quantum meruit, the following factors must be considered: 1. The difficulty involved in the matters in which the services were rendered; 2. The nature of the services; 3. The amount involved; 4. The professional standing of counsel; 5. The results obtained." (citation omitted)), *aff'd mem.*, 872 F.2d 1021 (2d Cir. 1989); *In re Hall*, 415 B.R. 911, 923 (Bankr.

authority to “reject” a settlement, if lead lawyers negotiate a deal that is of little benefit to plaintiffs, then their attorneys’ fees would be diminished proportionally. Similarly, if the settlement grid grossly undercompensated claimants with severe injuries and strong proof of specific causation, then lead lawyers’ fees should likewise suffer.³³⁷

Some might claim that even this modest fairness review insults autonomous agents. But there is substantial cause for concern when judges informally “approve” settlements as they may when settling parties request that they issue *Lone Pine* orders³³⁸ to nonsettling plaintiffs or when they enforce settlements if a party breaches.³³⁹ As Professor Shiffrin explains, a court’s concern in contexts like these “need not represent an effort to supplant the judgment or action of the contracting parties,” but “may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action.”³⁴⁰ Put differently, just because plaintiffs have the right to enter these deals doesn’t mean that the government should assist par-

M.D. Ga. 2009) (citing *Lewis v. Smith*, 618 S.E.2d 32, 35–36 (Ga. Ct. App. 2005)) (“Under *quantum meruit*, attorney fees are valued in light of the amount of work done and by the results obtained. The court must determine whether the client received any benefit from the services and the value of the services rendered.”); *Richardson v. Parish of Jefferson*, 727 So. 2d 705, 708 (La. Ct. App. 1999) (citing *Johnson v. Ins. Co. of N. Am.*, 666 So. 2d 1286, 1289–90 (La. Ct. App. 1996)) (“A *quantum meruit* analysis properly evaluates not merely the hours expended, but the results and benefits obtained.”); *Swain v. Kamalsky*, No. 916193C, 1996 WL 33401226, at *5 (Mass. Super. Ct. July 30, 1996) (“Since the efforts of Simon and Fine bore the most substantial relation to the favorable outcome of the case, Bader’s efforts should be valued on a *quantum meruit* basis.”); Krohn, *supra* note 296, at 95 (“The third category of factors relevant to determining a reasonable attorney’s fee concerns the result or outcome of the attorney’s representation of the client . . . [including the] benefit received by the client as a result of the attorney’s services [and] the cost to the attorney of pursuing the client’s case.”).

³³⁷ To be sure, this is not a perfect solution since the number of plaintiffs with less severe claims will tend to exceed those with serious injuries. Thus, some danger of overcompensating persists even under a *quantum-meruit* approach.

³³⁸ *Lone Pine* orders typically require nonsettling plaintiffs to provide some evidentiary support for their claims. *Supra* note 58; see also, e.g., *In re Vioxx Prods. Liab. Litig.*, 509 F. App’x 383, 384–85 (5th Cir. 2013) (“[A] *Lone Pine* order imposed certain discovery requirements on such plaintiffs, including production of pharmacy and medical records, expert reports, and answers to Merck’s interrogatories.”). As Jeremy Grabill describes, “*Lone Pine* orders . . . govern plaintiffs who choose not to opt in and any copycat plaintiffs who may file claims after the settlement is announced . . . [They] provide another leverage point for a judge who may have concerns about a contemplated settlement.” Grabill, *supra* note 9, at 179.

³³⁹ After cases settle, plaintiffs typically dismiss their cases under Rule 41. In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court held that “[w]hen the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2) . . . the parties’ compliance with the terms of the settlement contract (or the court’s ‘retention of jurisdiction’ over the settlement contract) may, in the court’s discretion, be one of the terms set forth in the order.” 511 U.S. 375, 381 (1994).

³⁴⁰ Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 224 (2000).

ties in carrying them out if the terms are unduly harsh. On the contrary, tying lead lawyers' compensation to the outcome they helped produce can maintain a delicate balance: preserving the parties' decision-making autonomy on one hand and promoting both procedural fairness and institutional integrity on the other.

CONCLUSION

Multidistrict litigation remains a high-stakes gamble for everyone involved. But that gamble should hinge on the suit's substantive merits, not on whether lead attorneys will fairly represent claimants' heterogeneous interests, collude with defendants to insert their fees into settlements, or fall prey to well-documented group decision-making biases. Nor should that gamble encompass doctrinal unpredictability in awarding lead lawyers' fees, capping individual attorneys' contingent fees, or commenting on nonclass settlements without a legal basis. Centering the gamble on substantive merits requires judges to wield and constrain their authority in ways that promote procedural legitimacy and doctrinal consistency.

Accordingly, first, judges should delay appointing permanent lead lawyers until they have sufficient information on conflicts of interest and, as it becomes available, should consider selecting qualified attorneys who use appropriate third-party financing. This will help ensure that claimants' diverse interests are adequately represented and that repeat players are not the only eligible candidates. Second, because the power to appoint lead lawyers should likewise entail the power to compensate them, judges need not warp consent through forced fee-transfer agreements. They should likewise reprimand self-dealing lead lawyers who try to circumvent quantum-meruit fee assessments through settlement negotiations with the defendant. Neither plaintiffs nor their attorneys contractually consent to appointing lead lawyers, so lead lawyers' fees should be allocated by the judge through a transparent process, not through the backdoor of settlement. Third, assessing how lead attorneys benefitted plaintiffs and compensating them for that added value requires judges to consider the litigation's outcome from plaintiffs' perspective. When the litigation settles, judges must thus assess the settlement's attributes. Paying lead lawyers on a quantum-meruit basis should foster fidelity to the claimants—not to other lawyers or the judge. Finally, encouraging leadership committees to entertain input from non-lead attorneys on critical motions and strategy, as well as permitting objections during judicial hearings on those key motions will leverage dissent to promote adequate representation and combat group decision-making biases.

APPENDIX

TABLE 1: ENTRENCHED REPEAT PLAYERS WITH FIVE OR MORE APPEARANCES AS LEAD LAWYERS

Attorney³⁴¹	Lead-Lawyer Appearances	Law Firm
Richard Arsenaault	17*	Neblett Beard & Arsenaault
Daniel Becnel, Jr.	14	Becnel Law Firm LLC
Dianne Nast	14*	NastLaw LLC
Christopher Seeger	14	Seeger Weiss LLP
Jerrold Parker	11*	Parker Waichman LLP
Jayne Conroy	10*	Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP
Michelle Parfitt	10*	Ashcraft & Gerel, LLP
Mark Robinson, Jr.	10	Robinson Calcagnie Robinson Shapiro Davis, Inc.
Arnold Levin	9	Levin, Fishbein, Sedran & Berman
Michael London	9	Douglas & London, P.C.
Martin Crump	8*	Davis & Crump, P.C.
W. Mark Lanier	8	The Lanier Law Firm
Hunter Shkolnik	8*	Napoli Bern Ripka Shkolnik, LLP
Fred Thompson III	8*	Motley Rice LLC
Thomas Cartmell	7*	Wagstaff & Cartmell
A.J. De Bartolomeo	7*	Girard Gibbs LLP
James R. Dugan	7	Dugan Law Firm
Yvonne Flaherty	7*	Lockridge Grindal Nauen P.L.L.P.
Pete Flowers	7*	Foote Meyers Mielke & Flowers, P.C.
Dave Matthews	7*	Matthews & Associates
Richard Meadow	7*	The Lanier Law Firm
Joseph A. Osborne	7*	Babbitt, Johnson, Osborne & Le Clainche, P.A.
John Restaino	7*	Restaino Law Firm, P.C.
Rachel Abrams	6*	Levin Simes LLP
Thomas Anapol	6*	Anapol Schwartz
Bryan Aylstock	6*	Aylstock, Witkin, Kreis & Overhotz, PLLC
Ed Blizzard	6*	Blizzard, McCarthy & Nabers
Elizabeth Cabraser	6	Lieff Cabraser Heimann & Bernstein, LLP
John Climaco	6	Climaco, Wilcox, Peca, Tarantino & Garofoli Co., LPA
Doug Monsour	6*	The Monsour Law Firm
Alyson Oliver	6*	The Oliver Law Group
Christopher Placitella	6*	Cohen, Placitella & Roth, P.C.
Robert Salim	6*	Salim-Beasley, LLC
Joseph Zonies	6*	Reilly Pozner LLP
Andres Alonso	5	Parker Waichman LLP

³⁴¹ For a detailed explanation of these numbers, which multidistrict litigation cases were included in this assessment, and why appointing these repeat players may be problematic, see *supra* Part II.A.2, and specifically notes 114–26 and accompanying text.

Riley Burnett	5*	Law Offices of Riley Burnett, Jr.
Eric Chaffin	5*	Chaffin Luhana LLP
Clayton Clark	5*	Clark, Love & Hutson
Erin Copeland	5*	Fibich, Hampton, Leebron, Briggs & Josephson, LLP
Roger Denton	5	Schlichter Bogard & Denton, LLP
Henry Garrard, III	5*	Blasingame, Burch, Garrard & Ashley, P.C.
Michael Goetz	5*	Morgan & Morgan
Jeff Grand	5*	Bernstein Liebhard LLP
Stacy Hauer	5*	Johnson Becker PLLC
Scott Love	5*	Clark, Love & Hutson
Victoria Maniatis	5*	Sanders Viener Grossman, L.L.P.
Michael Miller	5*	Michael J. Miller, Esq.
Mark Mueller	5*	Mueller Law
Derek Potts	5*	Potts Law Firm
Bill Robins, III	5*	Heard, Robins, Cloud & Black LLP
Joseph Saunders	5*	Saunders & Walker, PA

*Number includes appointment to all four coordinated Pelvic Repair Systems Products Liability Litigations pending before Judge Goodwin. Coding these four cases as one to account for the overlap would cause those with seven or fewer appointments to be excluded from this list.

TABLE 2: ENTRENCHED REPEAT LAW FIRMS WITH FIVE OR MORE
LEAD-LAWYER APPOINTMENTS

Number of MDL Positions by Firm³⁴²	Law Firm Name
22*	Levin, Middlebrooks, Thomas, Mitchell, Rafferty & Proctor, P.A.
21**	Motley Rice LLC
21*	Parker Waichman LLP
20*	Neblett Beard & Arsenault
20	Seeger Weiss LLP
18*	Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.
18*	The Lanier Law Firm
17	Lieff Cabraser Heimann & Bernstein, LLP
16*	Robinson Calcagnie Robinson Shapiro Davis, Inc.
15*	Aylstock, Witkin, Kreis & Overholtz, PLLC
15	Levin, Fishbein, Sedran & Berman
14*	Ashcraft & Gerel, LLP
14	Becnel Law Firm LLC
13*	Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP
12*	Anapol Schwartz
12*	Lockridge Grindal Nauen P.L.L.P.
12*	Roda Nast PC
12	Shepherd, Finkelman, Miller & Shah, LLP
11	Douglas & London, P.C.
11*	Sanders Viener Grossman, L.L.P.
10**	Clark, Love & Hutson
10*	Morgan & Morgan
10	Weitz & Luxenberg, P.C.
9**	Blasingame, Burch, Garrard & Ashley, P.C.
9	Climaco, Wilcox, Peca, Tarantino & Garofoli Co., LPA
9	Cory Watson Crowder & DeGaris, P.C.
8*	Babbitt, Johnson, Osborne & Le Clainche, P.A.
8*	Davis & Crump, P.C.
8*	Johnson Becker PLLC
8*	Matthews & Associates
8*	Napoli Bern Ripka Shkolnik, LLP
8	Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C.
8*	Wagstaff & Cartmell
8	Zimmerman Reed
7*	Cohen, Placitella & Roth, P.C.
7*	Foote Meyers Mielke & Flowers, P.C.

³⁴² This includes firms with five or more affiliated attorneys named as a lead lawyer in a product-liability multidistrict litigation. Again, for a detailed explanation of these numbers, see *supra* Part II.A.2.

7*	Girard Gibbs LLP
7	Hagens Berman Sobol Shapiro LLP
7*	Levin Simes LLP
7*	The Miller Firm, LLC
7*	Restaino Law Firm, P.C.
7	Simmons Browder Gianaris Angelides & Barnerd LLC
6*	Bernstein Liebhard LLP
6*	Blizzard, McCarthy & Nabers
6	Burg Simpson Eldredge Hersh & Jardine, P.C.
6*	Fibich, Hampton, Leebron, Briggs & Josephson, LLP
6	Finkelstein Thompson LLP
6	Herman, Herman, Katz & Cotlar, LLP
6*	Lewis & Roberts, PLLC
6*	The Monsour Law Firm
6*	Reilly Pozner LLP
6	Schlichter Bogard & Denton, LLP
5*	Andrus Hood & Wagstaff
5	Audet & Partners, LLP
5	Baron & Budd
5*	Chaffin Luhana LLP
5*	Greene Ketchum Bailey Walker Farrell & Tweel
5*	Heard, Robins, Cloud & Black LLP
5	Heninger Garrison Davis, LLC
5*	Hersh & Hersh
5	Kiesel Boucher Larson LLP
5*	Kline & Specter, P.C.
5*	Law Offices of Riley Burnett, Jr.
5*	Mueller Law
5*	The Oliver Law Group
5*	Potts Law Firm
5	Richardson, Patrick, Westbrook & Brickman, LLC
5	Saunders & Walker, PA
5	Seeger Salvas LLP

*Number includes firms with one attorney appointed to all four coordinated Pelvic Repair Systems Products Liability Litigations before Judge Goodwin. Coding these four cases as one would cause those firms with seven or fewer appointments to be excluded from this list.

**Number includes firms with two attorneys appointed to all four coordinated Pelvic Repair Systems Products Liability Litigations before Judge Goodwin. Coding these four cases as one would cause those firms with eleven or fewer appointments to be excluded from this list.