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FACILITATIVE JUDGING: ORGANIZATIONAL DESIGN IN MASS-MULTIDISTRICT LITIGATION

*Jaime Dodge**

ABSTRACT

Faced with the emerging phenomenon of complex litigation—from school desegregation to mass torts—the judiciary of the last century departed from the traditional, purely adjudicative role in favor of managerial judging, in which they actively supervised cases and even became involved in settlement talks. I argue that a similar transition in judicial role is now occurring. I contend that transferee judges are now stepping back from active participation in settlement discussions but playing a far greater role in structuring and administering the litigation. This new judicial role focuses on facilitating the parties’ resolution of the case, whether through settlement or remand for trial. But as transferee judges increasingly focus upon efficiently directing and sequencing litigation, their procedural and structural decisions can often have unanticipated consequences for the parties’ strategic aims. This Article therefore focuses not only upon identifying the emerging best practices for what I term “facilitative judges” in the first days of multidistrict litigation but upon the strategic consequences these practices have for the litigation.

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I am indebted to many of our nation’s leading litigators from both the plaintiffs’ and defense bars, who spoke to me on the condition of anonymity, for their excellent counsel in the development of this Article. But my greatest debt is to the half-dozen transferee judges who graciously took time out of their incredibly busy schedules to provide counsel and feedback from the perspective of the bench as to the greatest challenges facing our MDL system; without their wisdom, this piece would not have been possible. Given the wise counsel received from both bench and bar, any less than wise assertions in this piece are the failure of the author alone.

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INTRODUCTION

With increasing restrictions upon class action remedies, multidistrict litigation (MDL) has taken on a profoundly important role in not just the aggregate litigation system but also the judiciary as a whole. It has become the avenue for addressing many of our nation's largest mass actions, from deadly cars,¹ to neurological injuries and murder-suicides by NFL players,² and even litigation about the almighty iPhone,³ Google,⁴ and Facebook.⁵ These massive cases are not only reflecting areas of acute public concern but also of individual concern. Today, fully one-third of all federal cases are MDL matters.⁶ And, of these, 90% are coordinated into eighteen "mass-MDLs," which are comprised of more than 100,000 individual actions.⁷

But how does one even begin to litigate a case involving tens of thousands of separate lawsuits? This is the position of the MDL transferee judge, who is charged with efficiently moving these massive cases to trial. Yet, the transferee judge is not given special powers or tools akin to those in Rule 23.⁸

¹ See *In re* Gen. Motors LLC Ignition Switch Litig., —F. Supp. 3d—, 2014 WL 2616819 (J.P.M.L. 2014); *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 704 F. Supp. 2d 1379 (J.P.M.L. 2010).

² See *In re* NFL Players' Concussion Injury Litig., 301 F.R.D. 191 (E.D. Pa. 2014); cf. *NFL Player Who Killed Girlfriend in Murder Suicide Had Brain Damage*, ASSOCIATED PRESS, Sept. 30, 2014, available at <http://www.cbsnews.com/news/nfl-player-who-killed-wife-in-murder-suicide-had-brain-damage/>.

³ See *In re* iPhone Application Litig., 844 F. Supp. 2d 1040 (N.D. Cal. 2012).

⁴ See *In re* Google Inc. St. View Elec. Commc'ns Litig., 733 F. Supp. 2d 1381 (J.P.M.L. 2010); see also *In re* Google Inc. Android Consumer Privacy Litig., 802 F. Supp. 2d 1372 (J.P.M.L. 2011).

⁵ See *In re* Facebook, Inc., IPO Sec. & Deriv. Litig., 899 F. Supp. 2d 1374 (J.P.M.L. 2012).

⁶ DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (2d rev. ed. forthcoming 2014) (manuscript at x–xi) (on file with author and Emory Law Journal) [hereinafter DUKE BEST PRACTICES] ("In 2014, these MDL cases make up 36% of the civil case load. In 2002, that number was 16%. Removing 70,328 prisoner and social security cases from the total . . . the 120,449 pending actions in MDLs represented 45.6% of the pending civil cases as of June 2014." (footnote omitted)).

⁷ *Id.* at iii–iv; see also U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT AS OF OCTOBER 15, 2014 (2014), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2014.pdf [hereinafter OCTOBER 15, 2014 MDL STATISTICS REPORT].

⁸ If the MDL has an embedded class action, the judge must apply Rule 23 to the class action but does not have the authority to impose those requirements upon other individual cases consolidated with the class action. For example, Rule 23 mandates that a settlement must receive preliminary and final approval from the court. FED. R. CIV. P. 23(e). If a global settlement is reached, the court's approval is necessary to bind the class members. *Id.* However, individual plaintiffs may still accept the settlement, even if the court rejected the settlement. Of course, in practice, defendants may contractually require a minimum participation rate or even mandate that the settlement is only binding if approved by the court in order to ensure that they receive the anticipated closure. See Jaime Dodge, *The Tyranny of Settlement: Recapturing the Promise of Multi-District Litigation* (Oct. 15, 2014) (unpublished manuscript) (on file with author and Emory Law Journal). Thus, as a

Transferee judges must instead rely upon special skills and innovative techniques, as well as strategic knowledge, far beyond those of the typical district court judge to successfully and efficiently resolve these high-stakes cases. In many ways, this distinction is known—the Federal Judicial Center and Judicial Panel on Multidistrict Litigation (JPML) offer annual trainings and special materials to teach transferee judges about the latest skills, techniques, and legal developments.⁹ Yet, our scholarship continues to focus narrowly upon isolated parts of the MDL cycle and attorney motivations rather than upon the shift in the judicial role.¹⁰

This Article reconceptualizes the role of the MDL judge in these cases, arguing that transferee judges have necessarily evolved a new generation of techniques, taking a “facilitative” approach in contrast to the traditional adjudicative and managerial judge models. I utilize the term facilitative because the judges structure not only their role but the entire MDL process with the goal of facilitating the parties’ resolution of the case—whether through settlement, final disposition, or remand.¹¹ Under this model, the judge facilitates resolution through the structures they create¹² rather than through actively and directly mediating the resolution, as managerial judges do.¹³

functional matter, if a class action is included in the MDL, the parties may treat its requirements as applying across the class for certain purposes.

⁹ These materials can be accessed through the organizations respective websites. See FED. JUD. CENTER, <http://www.fjc.gov/> (last visited Dec. 14, 2014); U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/> (last visited Dec. 14, 2014). The Federal Judicial Center (FJC) also has a number of training materials that are only accessible to judges and their staffs, and thus are not available through the public website, which provide specialized information on various aspects of the MDL process.

¹⁰ For an interesting discussion of the checks upon MDL judges, see Edward F. Sherman, *The BP Oil Spill Litigation and Evolving Supervision of Multidistrict Litigation Judges*, 30 MISS. C. L. REV. 237 (2011).

¹¹ See John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIG., Summer–Fall 2012, at 26, 26 (reporting that MDL counsel expect judges to take a strong role in difficult cases).

¹² For early articulations describing the transferee judge as a “player” in the MDL and contrasting this with the usual role of district court judges, see Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995); Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627 (1995).

¹³ The *Vioxx* settlement began in just this way: the transferee judge, Judge Eldon Fallon, joined his state court counterparts in New Orleans for dinner. Susan Todd, *Inside the Vioxx Litigation*, STAR-LEDGER (Newark) (Nov. 18, 2007, 12:31 PM), http://www.nj.com/business/index.ssf/2007/11/inside_the_vioxx_litigation.html. “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 resolution.” *Id.* The parties were instructed at the status conference the next day that they were to begin “serious settlement negotiations.” Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. (forthcoming 2015) (manuscript at 41 n.235), available at <http://ssrn.com/abstract=2437853>. Less than a year later, Merck announced a settlement nearing \$5 billion. Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages

Our early conception of the judicial role focused upon an external, objective judge simply balancing the parties' arguments and rendering an adjudicative decision on the merits.¹⁴ Thirty years ago, the managerial model took hold.¹⁵ MDL judges of the era were leaders in shaping this model; indeed, years before Professor Judith Resnik's description of managerial judges, Judge Weinstein was hammering out the Agent Orange settlement.¹⁶ From MDL and public litigation, these new innovations crept into all aspects of litigation.¹⁷ No longer were judges "disinterested" parties; instead, they became managers, supervising case preparation and actively meeting with litigants in chambers to encourage resolution of the case.¹⁸

Today, transferee judges have embraced a new role, ushering in a new generation of judges. Modern MDL judges no longer press settlement at all costs but instead embrace a wider variety of outcomes as successful resolutions.¹⁹ If settlement is to occur, the judge often utilizes private neutrals or special masters to negotiate settlements,²⁰ preserving his or her neutrality as the litigation moves forward and motion practice continues.²¹ Sophisticated

Hereto, § 11.1, at 41–42 (Nov. 9, 2007), available at <http://www.officialvioxsettlem.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>.

¹⁴ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380–86 (1982) (describing classical adjudicative model).

¹⁵ See, e.g., McGovern, *supra* note 12, at 1838–41 (providing examples of judges behaving in accordance with the managerial model); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

¹⁶ See KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 23–40 (2012) (providing an overview of the Agent Orange litigation).

¹⁷ See Notes of Comments of Anonymous Transferee Judges and Attorneys, Duke Law Conference on MDL (Sept. 11–12, 2014) (on file with author) [hereinafter Conference Notes] (judge encouraging careful attention to new practices of MDL judges and arguing that these innovations often begin as unique responses to the challenge of MDL but then spread into other types of cases).

¹⁸ For the quintessential discussion, see Resnik, *supra* note 14; and also Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

¹⁹ Conference Notes, *supra* note 17 (judge noting shift from original model of success as obtaining a global settlement of the MDL and broadening to recognize remand as a successful resolution as well); see also DUKE BEST PRACTICES, *supra* note 6, at 3 (“The development of goals and plans should therefore be driven by a desire to move the cases to resolution as soon as possible, whether by motion practice, settlement, or trial/remand.”).

²⁰ For an introduction to the various roles, rules, and compensation mechanisms commonly employed with the appointment of a special master, see THOMAS WILLGING, LAURAL L. HOOPER, MARIE LEARY, DEAN MILETICH, ROBERT TIMOTHY REAGAN & JOHN SHAPARD, FED. JUDICIAL CTR., SPECIAL MASTERS' INCIDENCE AND ACTIVITY (2000), [http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/\\$file/specmast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/$file/specmast.pdf).

²¹ See ACAD. OF COURT APPOINTED SPECIAL MASTERS, APPOINTING SPECIAL MASTERS AND OTHER ADJUNCTS: A HANDBOOK FOR JUDGES AND LAWYERS (2d ed. 2009), [http://www.fjc.gov/public/pdf.nsf/lookup/ACAM2009.pdf/\\$file/ACAM2009.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ACAM2009.pdf/$file/ACAM2009.pdf). For an excellent discussion of the complex determinations and expertise necessary to create a successful claims administration program, see CPR INST. COMM'N ON

transferee judges also increasingly recognize the benefit of retaining distance from the settlement process, particularly in highly complex cases in which motions may be heard while settlement talks are ongoing or challenges may be made to the settlement's terms or its implementation.²² Indeed, this new breed of settlement is highly technical, often requiring the assistance of a mass tort neutral (whether a private mediator or appointed special master), a claims administrator, and supporting professional teams²³—even after the parties have reached an agreement in principle²⁴—to ensure the creation of a functioning and effective claims facility.²⁵ But, today's judges are recognizing that resolving cases through motion practice and remand are equally valid resolution mechanisms;²⁶ the parties must settle when the litigation has matured, not simply because of overbearing judicial pressure.²⁷

While facilitative judges increasingly delegate the negotiator and mediator role, they are taking a far more active role in structuring the process for efficiently litigating the interrelated cases,²⁸ which may involve hundreds or

FACILITIES FOR THE RESOLUTION OF MASS CLAIMS, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION, MASS CLAIMS RESOLUTION FACILITIES (2011).

²² See, e.g., *In re Deepwater Horizon*, 744 F.3d 370, 378 (5th Cir. 2014) (upholding, after multiple rounds of litigation and appeal, the claims administrator's interpretation of the settlement agreement and affirming dismissal of breach of contract action against the claims administrator).

²³ See, e.g., Jaime Dodge, *Disaggregative Mechanisms: Mass-Claims Resolution without Class Actions*, 63 EMORY L.J. 1253, 1313–15 (2014) (describing structure of special masters, claims administrators, and accountants utilized in the *Deepwater Horizon* MDL settlement).

²⁴ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 233 F.R.D. 122 (E.D.N.Y. 2006) (appointing three settlement special masters after the parties reached an agreement in principle); Joint Report No. 66 of Plaintiffs' and Defendants' Liaison Counsel at 1–2, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. Sept. 20, 2011), ECF No. 63413 (noting agreement in principle reached on November 9, 2007, followed by appointment of special master on January 14, 2008); see also Mark G. Boyko, *The Role of Judges and Special Masters in Post-Settlement Claims Administration*, MEALEY'S EMERGING TOXIC TORTS, June 16, 2006, at 26, available at <http://www.cpradr.org/About/NewsandArticles/tabid/265/ID/95/The-Role-of-Judges-and-Special-Masters-in-Post-Settlement-Claim-Administration-Mealeys.aspx>.

²⁵ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-01596 (JBW), 2005 WL 1939339, at *1 (E.D.N.Y. Aug. 10, 2005) (appointing three post-settlement special masters); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. Apr. 11, 2012), ECF No. 532 (appointing presettlement special master for settlement, in addition to two other special masters).

²⁶ See DUKE BEST PRACTICES, *supra* note 6, at 109–32 (suggesting best practices for resolution and remand of MDL cases).

²⁷ See *infra* Part IV.

²⁸ See John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2230, 2233 (2008) (noting the common misperception that MDLs are all “mega-cases” and instead reporting that “[o]nly thirty-seven out of about 300 active MDLs comprise more than 100 constituent actions and only ten have more than 1000” but also recognizing that with changes in background law the Judicial Panel on Multidistrict Litigation's (JPML's) role in “manag[ing] not only putative class actions but also other complex cases seems to have grown steadily”).

thousands of victims.²⁹ MDLs can include multiple—and at times potentially overlapping—class actions, hundreds of transferred or direct-filed individual lawsuits,³⁰ and even defendants from across an entire industry.³¹ Adding even further complexity, the transferee judge must be aware of the strategic gaming and complication that occurs with parallel state court cases³²—which the federal court is impotent to directly manage and thus must rely upon the cooperation of the variety of state courts.³³

Because of the structural nature of these decisions, many transferee judges acknowledge that at times they have issued rulings not understanding the shadow those rulings cast, and the implications for the parties' strategies and, in turn, the outcomes of the case.³⁴ Further complicating this disconnect, the

²⁹ Medical mass tort claims are often particularly large: *Prempro* MDL (9,761 total actions), *Yasmin & Yaz* MDL (11,753 total actions), *Vioxx* MDL (10,319 total actions), *DePuy Orthopaedics ASR Hip Implant* MDL (9,129 total actions). See OCTOBER 15, 2014 MDL STATISTICS REPORT, *supra* note 7.

³⁰ See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014) (“Many MDLs include thousands of individual cases and multiple class actions. Hundreds of lawyers from various parts of the country might be involved in a single MDL case.”).

³¹ For example, the seven transvaginal mesh MDLs—each with a different defendant and product—have been consolidated before Judge Goodwin, in the Southern District of West Virginia, who now has responsibility for the more than 60,000 pending cases. See Austin Kirk, *Judge Plans to Speed Up Vaginal Mesh Lawsuits, Trials*, ABOUTLAWSUITS.COM (Aug. 18, 2014), <http://www.aboutlawsuits.com/mesh-lawsuits-expedited-68775/>; see also *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378, 1380–83 (J.P.M.L. 2002) (in which claims against over two dozen corporations, charged with separate pricing violations across different agencies and state statutory schemes, were consolidated in the District of Massachusetts, leading to an MDL proceeding that spanned ten years).

³² See Leonard A. Davis & Philip A. Garrett, *Case Time and Cost Management for Plaintiffs in Multidistrict Litigation*, 74 LA. L. REV. 483, 488–89 (2014) (noting that “[a]ctive case management by the presiding transferee judge is undertaken early in the MDL process” because “the transferee court has the greatest understanding of the litigation, is actively involved in the discovery phase of the litigation, has the ability to facilitate a global settlement, and oversees or conducts bellwether trials”).

³³ The *Actos* MDL provides such an example, with competing bellwethers moving ahead in the state and federal forums. See Tom Moylan, *Nevada State Court Jury Returns Defense Verdict in 2-Plaintiff Actos Cancer Trial*, LEXISNEXIS LEGAL NEWSROOM LITIG. BLOG (May 23, 2014, 10:23 AM), <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2014/05/23/nevada-state-court-jury-returns-defense-verdict-in-2-plaintiff-actos-cancer-trial.aspx> (noting that the defendant had prevailed in all five of the state cases, whether before the jury or through motion practice, but had lost in the first federal bellwether in a \$9 billion verdict now on appeal). Yet, Judge Doherty’s website has sought to foster an atmosphere of “reciprocity and cooperation,” “creat[ing] trust and respect” between the proceedings, while enhancing the transparency for all counsel and judges. It is commended as an excellent resource. See Letter from Hon. Rebecca F. Dougherty to Counsel, *In re Actos (Pioglitazone) Prods. Liab. Litig.* (Oct. 3, 2014), <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.Welcome%20Letter%20to%20Counsel%2010.3.2014.pdf>; *Welcome to MDL No. 2299*, U.S. DISTRICT CT. FOR W. DISTRICT LA., <http://www.lawd.uscourts.gov/welcome-mdl-no2299> (last visited Dec. 14, 2014).

³⁴ See, e.g., Conference Notes, *supra* note 17 (judge describing the disconnect between recommended practices and the realities heard by counsel, giving the example of transferee judges encouraging coordination with parallel state court cases without understanding the impact on fees and assessments, conflicting discovery

parties' positions are themselves incredibly dynamic, shifting and even completely reversing during the course of litigation. But, at least by then the transferee judge has had time to come to understand the nature of the case, the key legal and factual disputes dividing the parties, the subgroups of plaintiff cases, and (perhaps most importantly) the personalities involved in the particular matter. It is instead the early decisions that are the most likely to be made without an understanding of the strategic or long-term consequences. This problem is further complicated by the relative dearth of scholarship focusing on the transferee judge's first days.

This piece seeks to fill that gap, focusing upon the decisions a transferee must make at the outset in crafting the architecture of a mass-MDL. Specifically, the goal is to provide a compendium of wisdom drawn from judges and attorneys alike, focusing on the steps that new transferee judges must take in their initial days. But, equally important, the piece contextualizes these early decisions—exploring the tactical reasons that parties may be opposing a bench proposal that seems uncontroversial to the judge. In drawing out the broader structural consequences of these early decisions, the piece seeks to help the judge understand the implications of decisions that might otherwise be hidden from view. As one judge put it, “I wish the parties could just tell me what they want and why it matters—but I know they can’t tell me their strategy, they have to couch it in law, but then I don’t know what they really want and why.”³⁵ This piece attempts to fill that gap, exploring the influences upon counsel that are often not expressed to the court.

The importance of this project is underscored by the explosive growth of MDL in recent years. Once, a handful of judges—Jack Weinstein, Carl Rubin, and Tom Lambros, among others—played an influential role as innovators and repeat players in the mass tort system; they knew the game and how to play it.³⁶ But now, an ever-increasing number of judges must share the load.³⁷ Normatively, this development is a positive one—it has broken the repeat-player dynamic among judges, preventing the risk of capture (real or perceived). Yet, by definition, this creates a far larger pool of judges managing

rules across jurisdictions as to length of deposition, that are driving the parties' behavior); *id.* (transferee judge noting that “it never dawned on me” that there were those consequences for the parties when the judge was pressing the parties through various structural mechanisms).

³⁵ *See id.*

³⁶ *See* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1869 (2000).

³⁷ *See* Heyburn & McGovern, *supra* note 11, at 30; *see also* Heyburn, *supra* note 28, at 2231 (explaining that the volume and diversity of MDL cases is increasing).

their first MDL assignment.³⁸ Today, almost one-third of active judges have a pending MDL assignment,³⁹ with MDL dockets comprising approximately fifteen percent of the federal docket.⁴⁰

Consistent with the theme of this Symposium, Part I provides an overview of the origins of the increase in MDL after the Court's decisions in *Dukes* and *Concepcion*. Parts II and III then turn to providing concrete guidance for transferee judges engaging in institutional design at the outset of the MDL in crafting case management orders and in appointing lead counsel, respectively. Finally, Part IV concludes with observations about the risks of facilitative judging, reviewing the endgame strategies of counsel and the consequences this has for the perception of certain early structural decisions—and, in turn, the working relationship between the judge and counsel.

It is important to note that every MDL is different, and, as with the design of any dispute resolution process, the solution must be customized to the particular case. This piece provides a roadmap for addressing the largest and most complex cases with the goal of providing the most comprehensive compendium of tools to transferee judges. Judges who are assigned smaller or less-complex cases may decide to employ only a subset of these practices, or scale down the mechanisms commensurate with the needs of their MDL. However, for these transferee judges, the guidance provided herein may be even more important, as the strategic dynamics and complications may evade the judge's detection until far later in the case. Moreover, while judges in smaller cases may have the capacity to functionally remain closer to the managerial than the facilitative role, understanding this complexity allows the transferee judge to make a more informed election about where along this spectrum to situate himself or herself—and to more fully appreciate the dynamics at play should the judge decide to accept a more managerial role as the neutral in the negotiation process.

I. MDLS POST-*DUKES* AND *CONCEPCION*

As this Symposium has highlighted, the trends in Supreme Court

³⁸ A recent extensive survey of MDL lawyers and judges undertaken by the JPML, in conjunction with Duke Law School, indicated that both groups “favored more formal mentoring or education programs for new transferee judges.” Heyburn & McGovern, *supra* note 11, at 32.

³⁹ *Id.* at 30.

⁴⁰ *Id.* at 26.

jurisprudence epitomized by *Dukes*⁴¹ and *Concepcion*⁴² have fundamentally altered the state of complex litigation and mass-claims vindication. In this new world, class certification is far harder to obtain.⁴³ And this may well be a good thing.

While the class action device allowed for the vindication of small-value claims, it also gave rise to a new form of nuisance⁴⁴ and blackmail suits.⁴⁵ Because the named plaintiffs cannot bind the class precertification, if a company wants to not merely discourage future suits but to formally preclude future litigation through a victory on summary judgment, it must wait to file its motion until after class certification.⁴⁶ Thus, it must be willing to bear the costs of litigating both class certification and summary judgment.⁴⁷ In recent years, the electronic age has greatly expanded the number of documents that must be preserved and reviewed, raising the costs of fighting a nuisance suit.⁴⁸

For many companies, the claims raised in these lawsuits were ones with which they expected few of their consumers would even agree.⁴⁹ Yet, a single plaintiff could file a class action, inflicting hundreds of thousands or even millions of dollars in litigation costs upon a defendant in opposing the claim, in turn driving up costs for other consumers.⁵⁰ Perhaps most problematically,

⁴¹ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

⁴² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁴³ *See, e.g., Dukes*, 131 S. Ct. 2541; *Concepcion*, 131 S. Ct. 1740.

⁴⁴ *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

⁴⁵ *See* Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: *Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

⁴⁶ *See* *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (explaining that, unless a class is certified, the absent class members are bound by neither a formal class certification nor by any principle of virtual representation).

⁴⁷ As the Supreme Court clarified in *Smith v. Bayer Corp.*, a denial of class certification is not binding on absent class members, and thus the judge cannot enjoin the pursuit of class certification in another court. 131 S. Ct. 2368. However, while a federal judge is without power to enjoin state court litigation, the Court did remind federal courts to apply the comity principle in order to avoid incentivizing repeat litigation of the class certification question. *Id.* at 2381–82; *see also In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (objecting to an "an asymmetric system in which class counsel can win but never lose" because of their ability to relitigate the issue of certification).

⁴⁸ *See* Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 644–46 (2012) (explaining that spoliation can take place easily in the form of scrubbing or deleting electronic documents).

⁴⁹ For a similar argument regarding securities lawsuits, *see* Paul Atkins, *The Supreme Court's Opportunity to End Abusive Class Action Securities Lawsuits*, FORBES (Mar. 4, 2014, 3:57 PM), <http://www.forbes.com/sites/realspin/2014/03/04/the-supreme-courts-opportunity-to-end-abusive-securities-class-action-lawsuits/> (previewing argument in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014)).

⁵⁰ *See* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (establishing a heightened pleading standard). This is before one even considers the *in terrorem* effect on settlement. *See also In re Rhone-Poulenc*

these lawsuits shrink the gap between the cost of complying and not complying with the law—since either way, the company will bear substantial litigation costs.⁵¹ Yet, because the difference in cost between compliance and noncompliance is the foundation of deterrence, these lawsuits may have a negative rather than positive impact on enforcement of law and in turn on consumers at large.⁵²

But, perhaps most troubling is the impact on the (alleged) victims. In a class action, any individual that does not affirmatively opt out of the class is bound by the resolution—which, almost invariably, is a class settlement.⁵³ As a result, these class members are precluded from filing a future suit on these claims. But, particularly in consumer cases, only a fraction of the victims will ever file a claim—and thus receive any compensation for the harm suffered.⁵⁴

Seeing class actions as the worst of both worlds—simultaneously harming the corporate bottom line and failing to compensate victims—corporations have increasingly sought mechanisms to resolve these small-value claims without class actions.⁵⁵ Predispute provisions like the one in *Concepcion*⁵⁶ were thus designed to allow aggrieved individuals a streamlined mechanism for compensation, while removing the capacity of an aggrieved individual to claim all other consumers would share his view.⁵⁷ As I have argued previously,

Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) (describing certification as “forcing these defendants to stake their companies on the outcome of a single jury trial” or “to settle even if they have no legal liability” out of “fear of the risk of bankruptcy”).

⁵¹ See Dodge, *supra* note 23, at 1302.

⁵² See *id.* (suggesting that disaggregation “closes the [cost] differential between . . . compliance and noncompliance with the law” thus weakening the deterrent effect).

⁵³ The Federal Judicial Center reports that the rate of opt-out in class actions is typically one in one thousand, or 0.1%. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION 20 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/\\$file/classgde.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/classgde.pdf/$file/classgde.pdf).

⁵⁴ See Tiffany Allen, *Anticipating Claims Filing Rates in Class Actions*, RUST CONSULTING (Nov. 2008), http://www.rustconsulting.com/Knowledge_Sharing/Articles_and_Publications/ID/124/Anticipating_Claims_Filing_Rates_in_Class_Action_Settlements (noting that where an absent class member simply needs to return a form to obtain compensation, the filing rates range from two to twenty percent, with the higher rates reserved for cases involving greater compensation).

⁵⁵ See, e.g., Remarks of Teresa Roseborough, General Counsel, Home Depot, Panel Discussion at the Emory Law Journal 2014 Randolph W. Throver Symposium—Stand Alone or Stand Down: Consumer Arbitration Agreements and the Demise of Collective Dispute Resolution (Feb. 6, 2014), *available at* <http://www.youtube.com/watch?v=ZE-vGQb2mGM>.

⁵⁶ See *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

⁵⁷ These waivers do not necessarily result in individual litigation of each case. Instead, innovative corporations and their counsel are incorporating quasi-aggregative mechanisms to parallel the efficiency of the public processes. Perhaps most notable has been the use of bellwethers in the arbitration process. See Remarks of Andrew J. Pincus, Partner, Mayer Brown LLP, Panel Discussion at the Emory Law Journal 2014 Randolph

corporations have also begun to utilize post-dispute offers of individual settlement as a mechanism for offering super-compensation to aggrieved individuals, while avoiding the litigation costs, transaction costs, and consequences for deterrence that small-value class actions entail.⁵⁸

While a new generation of mechanisms has arisen to address small-value claims, the dynamics are radically different for high-value claims.⁵⁹ Many of these claims are for substantial monetary harm, catastrophic injuries, or even death.⁶⁰ The Supreme Court has noted that it has far less concern with these individuals not pursuing their claims.⁶¹ Rather, the concern is that a class action cannot allow the level of due process necessary to protect the rights of defendants and putative class members alike with respect to individualized issues (typically causation), without becoming unmanageable.⁶² Yet, without an aggregation mechanism, the costs of litigation in these cases will create investment asymmetries at best and swamp potential recoveries at worst.⁶³

Multidistrict litigation naturally filled this gap.⁶⁴ Through MDL, victims are able to file their own claims and work with the lawyer of their choice but

W. Throver Symposium—Stand Alone or Stand Down: Consumer Arbitration Agreements and the Demise of Collective Dispute Resolution (Feb. 6, 2014), available at <http://www.youtube.com/watch?v=ZE-vGQb2mGM>.

⁵⁸ See Dodge, *supra* note 23, at 1275–76 (pointing out that disaggregation post-dispute can be value enhancing for plaintiffs and corporate defendants); see also Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. (forthcoming 2014).

⁵⁹ For a more in-depth discussion of private resolution of high-value claims, see Dodge, *supra* note 58.

⁶⁰ Dodge, *supra* note 23, at 1263 n.47.

⁶¹ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

⁶² *Dukes*, 131 S. Ct. at 2560–61.

⁶³ See *Amchem*, 521 U.S. at 598 (“The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’ recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.” (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991)) (internal quotation marks omitted)); see also David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1727 (2005) (“[O]n average, it costs approximately one dollar in legal expenses for the legal system to transfer one dollar from a defendant to a plaintiff, and since such transfers are achieved predominantly via settlement, settlement must be expensive.” (footnote omitted)).

⁶⁴ For a discussion of this transition and its optimal scope, see Mark Herrmann & Pearson Bownas, *An Uncommon Focus on “Common Questions”*: Two Problems with the Judicial Panel on Multidistrict Litigation’s Treatment of the “One or More Common Questions of Fact” Requirement for Centralization, 82 TUL. L. REV. 2297 (2008); 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 (2008); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008).

still share the costs of litigation.⁶⁵ Unlike the class action, in which absent class members are presumptively included in the action unless they opt out,⁶⁶ in MDL each plaintiff files her own lawsuit, and these lawsuits are then transferred to a single court for pretrial proceedings.⁶⁷ Plaintiffs are then able to share costs under the direction of some of the best plaintiffs' lawyers in the nation, while still retaining autonomy in deciding whether to settle or proceed to trial.⁶⁸ In recent years, the use of MDL has exploded as counsel have become comfortable with the MDL process and as the extrinsic changes to the procedural landscape have increased the swath of claims that cannot be aggregated in other ways.⁶⁹ This perfect storm has not only radically expanded the number of claims in MDL but also has consequences for the MDL process itself.⁷⁰

II. INITIAL CASE MANAGEMENT ORDERS

Multidistrict litigation solves the problem of parallel discovery and motion practice in federal cases, but in so doing it gives rise to a case far beyond the ordinary realm of litigation. These complex, high-stakes cases have their own litigation strategies and behind-the-scenes dynamics, demanding the utmost skill and attention from the very best of our judiciary, who are selected by their peers to serve as transferee judges.⁷¹ But these mass-MDLs do not only tax the skillsets and abilities of these incredibly capable judges—in many cases they also tax the limits of the judicial infrastructure,⁷² which was not designed to accommodate these super-cases.⁷³

⁶⁵ For an excellent introduction to the ethical issues raised by nonclass aggregation, see Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

⁶⁶ See FED. R. CIV. P. 23(c)(2)(B)(v).

⁶⁷ See 28 U.S.C. § 1407 (2012).

⁶⁸ This is not to suggest that there are no settlement pressures in the MDL context. See Dodge, *supra* note 8.

⁶⁹ See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 759 (2012) (“The amount of multidistrict litigation . . . in the federal courts is skyrocketing, particularly in the areas of mass torts and products liability.”). For annual data, see the JPML’s website. *Statistical Information*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <http://www.jpml.uscourts.gov/statistics-info> (last visited Dec. 14, 2014).

⁷⁰ See Bradt, *supra* note 69, at 784–85.

⁷¹ John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2239–41 (2008) (describing the process for selecting transferee judges).

⁷² Transferee judges may consider whether the use of a magistrate judge or special master would be helpful in “avoiding delays in addressing time-consuming matters, such as disputes over privileged document designations or technical electronic discovery issues.” DUKE BEST PRACTICES, *supra* note 6, at 7 (discussing Best Practice 1(B)(ii)). However, in so considering, the judge will want to recognize the additional

Conventional wisdom encourages transferee judges to immediately schedule an initial conference and begin accepting motions for leadership appointments.⁷⁴ This focus on expediency is laudable, as the procedural delay inherent in the consideration of the JPML and the reconstituting of the individual cases as an MDL under newly appointed leadership can delay those cases for many months—time that any victims dealing with catastrophic illness or injury, or financial upheaval, may be unable to afford.⁷⁵

Given the pressure to “catch up” from the delay in proceedings imposed by the MDL’s formation and the inherent lack of information a transferee judge has in the early days of the litigation about the structure that the case will need, experienced transferee judges often admit that they did not focus enough on capacity building.⁷⁶ Laying a strong foundation at the outset inevitably generates substantial gains later in the course of litigation by effectively targeting resources, avoiding conflicts between counsel, and encouraging the streamlined resolution of the MDL, whether through remand or settlement.

This Part turns to the question of internal capacity building and the establishment of litigation infrastructure at the outset of the assignment of the MDL.

A. Establishing Technical Infrastructure

At the outset of assignment, a transferee judge will often need to develop the court’s internal capacity to handle the vast number of filings by a large

administrative and cost burdens this will generate. *See id.* Excellent judges have both delegated and not delegated. The right answer for any case therefore depends upon the particular capacities of the transferee judge and the judge’s existing staff, the type of case, the resources and personalities of the parties, and the expected needs of the litigation.

⁷³ Heyburn, *supra* note 71, at 2242 (“Centralizing a large number of actions before a single judge also can create a somewhat unwieldy new MDL (at least initially). More delays can occur after the Panel enters its transfer order while the transferee court organizes the new files and convenes the parties. Centralization of cases may also create conflict among lawyers and between parties that did not previously exist. In this regard, the Panel notes that it can only do so much to further the ‘just and efficient conduct’ of the involved actions; the parties and their counsel have their parts to play as well.” (footnote omitted)).

⁷⁴ *See id.* at 2241–42.

⁷⁵ *See id.* (explaining that the Panel is “absolutely committed to reducing or eliminating” delays).

⁷⁶ Beyond these pressures, transferee judges are also encouraged to promptly resolve any pending motions that had been stayed or otherwise not yet ruled upon by the transferor court. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 4 (2d ed. 2014), [http://www.fjc.gov/public/pdf.nsf/lookup/ten-steps-mdl-judges-2d.pdf/\\$file/ten-steps-mdl-judges-2d.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ten-steps-mdl-judges-2d.pdf/$file/ten-steps-mdl-judges-2d.pdf) [hereinafter TEN STEPS TO BETTER CASE MANAGEMENT]; accord DUKE BEST PRACTICES, *supra* note 6, at 7–8 (discussing Best Practice 1B(iii)).

number of counsel and to communicate effectively with state courts that have parallel cases.⁷⁷ This process need not delay the MDL; rather, it can be undertaken concurrently with the counsels' work on preliminary filings.⁷⁸

First, what is the court's capacity to handle electronic filings? Often, even courts with sophisticated e-filing systems report some problems in the issuance of e-filing credentials to out-of-state counsel or problems with the system's capacity to handle the high number of filings that can be submitted within a short period of time around key filing deadlines—notably, the deadline for Plaintiffs' Steering Committee (PSC)/Plaintiffs' Executive Committee (PEC) applications can generate a particularly large influx in filings early in the case.⁷⁹

Second, the transferee court may consider designating a particular clerk of the court to be responsible for developing the infrastructure and policies for filing in the MDL. Typically, this is an experienced clerk, very familiar with both the court's filing procedures and practices, and those of the specific transferee judge. Indeed, setting aside any self-effacing comments about the technical abilities of most judges, the reality is that in the early days of the MDL the judge should be very busy focusing on macro-level concerns with the structure of the case. It is therefore invaluable to have a trusted clerk that can focus on the technical implementation of the judge's vision—and to anticipate micro-level obstacles in advance.⁸⁰

The transferee judge may consider trying to negotiate not only for a lighter docket for herself if she takes on the MDL but also for the MDL clerk if the

⁷⁷ See TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 76, at 3–4, 6–7; *see also infra* Part III.B.

⁷⁸ *See id.*

⁷⁹ As an example of the types of unique filing challenges raised by MDLs, see the July 2, 2014, case management order in *In re Actos (Pioglitazone) Products Liability Litigation*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. July 2, 2014), ECF No. 4535, *available at* <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299-cmo1-2014Jul01.pdf> (case management order governing the filing of pleadings); *see also In re Tribune Co. Fraudulent Conveyance Claims Litig.*, No. 1:12-mc-02296, slip. op. at 2 (S.D.N.Y. Feb. 23, 2012), ECF No. 9, *available at* http://www.tribune-defendants.com/court-filings/tribune-master-case-order-no-1/_res/id=File1/02-23-2012-tribune-master-case-order-no-1.pdf (noting “[i]n a matter of days” after initial entry of JPML transfer order “the [transferee] docket swelled to an unnavigable 700 page morass of useless information”).

⁸⁰ *See, e.g.,* DUKE BEST PRACTICES, *supra* note 6, at 38–39 (suggesting in Best Practice 2C(iv) that the use of liaison counsel to support the clerk of court, given the complexity of managing all orders, filings, and discovery in the litigation and parallel cases); *see also* TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 76; *cf.* THE JUDICIAL PANEL ON MULTIDISTRICT LITIG. & THE FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEEEE COURT CLERKS, [http://www.fjc.gov/public/pdf.nsf/lookup/mdlguide.pdf/\\$file/mdlguide.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/mdlguide.pdf/$file/mdlguide.pdf).

clerk serves multiple judges—although, depending upon the district’s resources, such an accommodation may or may not be possible. The initial months of capacity building can be time intensive, particularly if the court seeks to develop a comprehensive understanding of the case at the outset in order to use this understanding to tailor the infrastructure the judge is creating.⁸¹

But, even once the initial phase of litigation is complete, there will continue to be a need for ongoing technical support. For example, the court may want to structure a more user-friendly document-management system that allows access to key documents more readily, not by filing date or docket description, but instead by document type (plaintiff forms, subordination claims, etc.).⁸² These websites have been lauded by counsel for allowing easy access to the key documents and court calendar,⁸³ while clerks have reported that it also simplifies the management of the case by substantially decreasing the number of calls the court receives requesting status updates or other case information.⁸⁴ This information sharing is particularly important where parallel proceedings in state court are either likely to reach trial first or are voluminous, as these cases will inevitably impact and shape the MDL process.⁸⁵

B. *Enhancing Efficiency*

The MDL device often adds the greatest value for mass-MDLs comprised of hundreds or thousands of individual cases with complex factual and legal

⁸¹ See, e.g., DUKE BEST PRACTICES, *supra* note 6, at 43 (noting in Best Practice 3A(ii) that the court should aggressively prepare for the influx of filings that follows the transfer of cases and encouraging the issuance of initial orders before the leadership team is appointed); see also TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 76.

⁸² For an excellent, current example of how to organize orders, consult the *Actos* MDL website. See *MDL No. 2299: Court Orders (Sorted by Category)*, U.S. DISTRICT CT. FOR W. DISTRICT LA., <http://www.lawd.uscourts.gov/court-orders-sorted-category> (last visited Dec. 14, 2014). The *Vioxx* website has also been commended by many practitioners as particularly accessible. See *Current Developments*, MDL-1657 VIOXX PRODUCTS LIABILITY LITIG., <http://www.laed.uscourts.gov/vioxx/> (last updated Oct. 6, 2014). Another particularly helpful example is the *Deepwater Horizon* MDL, which began as a more complex website and was streamlined over time. The current version can be accessed at *Current Developments*, MDL-2179 OIL SPILL BY THE OIL RIG “DEEPWATER HORIZON,” <http://www.laed.uscourts.gov/OilSpill/OilSpill.htm> (last updated Dec. 8, 2014).

⁸³ See DUKE BEST PRACTICES, *supra* note 6, at 101 (discussing Best Practice 6F).

⁸⁴ A sample order for creating a website can be found at MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.3 (2004).

⁸⁵ Cf. DUKE BEST PRACTICES, *supra* note 6, at 103 (discussing Best Practice 6H).

issues that may vary across claims.⁸⁶ But these cases also create the greatest strain on the court's resources and rules, which were typically designed for more mainstream cases.⁸⁷ The formation of a new MDL frequently precipitates the filing of additional cases, often directly filed in the MDL. Direct filing allows the parties to stipulate to the direct filing of cases in the transferee district, reserving questions about venue and choice of law.⁸⁸ It is important to note that direct filing avoids the expenditure of resources on questions that may not ultimately need to be answered, depending upon the outcome of the MDL.⁸⁹ (However, if the MDL is ultimately resolved through remand, these venue questions will need to be resolved, unless the parties execute a *Lexecon* waiver.⁹⁰)

Allowing newly filed cases to be incorporated into the MDL is to some degree essential to the global settlement desired by both the defendant and plaintiffs' lead counsel.⁹¹ Indeed, with the publicity that arises from the MDL's creation, new victims may become aware of the origins of their harm and seek to file suit.⁹² In addition, the cost-spreading MDL enables counsel to pursue

⁸⁶ See 28 U.S.C. § 1407 (2012); see also DUKE BEST PRACTICES, *supra* note 6. The JPML has recognized that “the time tolled by the stay between the filing of the § 1407 transfer motion and its resolution may amount to dead time that can delay the existing litigation” and “that such a delay or dead time is disruptive and perhaps detrimental to one party or another” and is sensitive to these concerns. Heyburn, *supra* note 28, at 2241–42.

⁸⁷ For a selection of considerations and recommended practices, see DUKE BEST PRACTICES, *supra* note 6, at 1–32.

⁸⁸ For those new to the choice-of-law issues presented by MDL, or the concept of direct filing, Bradt, *supra* note 69, is commended as an excellent introduction.

⁸⁹ By way of perspective, only three percent of cases have been remanded back to their originating courts. See Burch, *supra* note 13, at 3. For an excellent insight from the perspective of the JPML, see Heyburn & McGovern, *supra* note 11, at 31–32.

⁹⁰ In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court held that 28 U.S.C. § 1407 requires the transfer of any remaining pending cases at the conclusion of the pretrial proceedings. 523 U.S. 26, 34, 40 (1998). Parties commonly execute *Lexecon* waivers, permitting the transferee court to conduct bellwether trials. See Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2356–58 (2008). Parties could theoretically consent to the continued jurisdiction of directly filed cases in the same manner; however, there is less incentive for the parties to agree to this waiver, as both sides will likely have strategic, forum-shopping preferences for alternative venues. See *id.*; see also *id.* 2356 n.115.

For an interesting discussion of bellwether trials, see Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439 (2013).

⁹¹ See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining that MDL transfers create the “perfect condition” for an aggregate settlement and foster sufficient “judicial encouragement” to reach global settlements).

⁹² See McGovern, *supra* note 36, at 1884 (“[T]heir propensity to sue is quite low unless there is some major media event . . .”).

many meritorious cases that would have been negative-value claims outside of an aggregative context.⁹³

The combination of transferred and newly filed cases often creates a complex litigation landscape, with general questions applicable to the entire set of plaintiffs and narrower issues related only to a subset of, or even individual, plaintiffs. The traditional wisdom is to focus first upon the development of generic assets and rulings upon those general claims, which will apply to all plaintiffs—for example, general issues of causation or *Daubert* motions. Only then does the MDL process turn to the more specialized issues.⁹⁴

Judges have reported that this general-to-specific approach yields cost savings and enhances efficiency while avoiding the “black hole” of permitting individual discovery at the outset of litigation.⁹⁵ In sequencing, facilitative judges will often incorporate the parties’ input on those items that are the most crucial to reaching resolution, whether that is remand for trial or settlement.⁹⁶ This party-centric approach may be paired with setting an end date for the MDL, at which time any cases that have not settled will be remanded to the originating courts.⁹⁷

Yet, experienced transferee judges are also acutely aware that, in creating this structure, the judge’s case management structure can have a profound effect on the dynamics of settlement and the substance of the litigation. As one described it:

[The newly appointed] transferee judge needs to “do everything at once—the endgame, the start game, putting together a great PSC, and a discovery plan. And it needs to be realistic—it cannot focus just on your MDL but also needs to take into account the cases in the state system. You need to avoid duplication of effort to the extent possible, and if there is going to be conflicting activity you need to reach out to the state judges right away, so that either they can adjust or you can.”⁹⁸

But, at the same time, in those first days, it is exceedingly difficult for a transferee judge to know why parties are taking the strategic positions they do.

⁹³ See *id.*

⁹⁴ See, e.g., DUKE BEST PRACTICES, *supra* note 6, at 7–10 (discussing Best Practices 1B(iii), 1C).

⁹⁵ See *id.* at 8.

⁹⁶ See *id.* at 8–10.

⁹⁷ See, e.g., DUKE BEST PRACTICES, *supra* note 6, at 111 (discussing MDL Standard 7).

⁹⁸ *Id.* at 9–10 (quoting an anonymous federal jurist).

Most commonly, judges have asked why parties are opposing measures that are intended to streamline litigation. For example, why do defendants in some cases oppose delaying inquiries into subgroups or individual claims until after the general questions are resolved? Why do plaintiffs at times oppose partial settlements? Understanding these endgame strategies helps to explain the resulting preferences counsel express for the sequencing of the case and the reasons that purely procedural, efficiency-enhancing decisions may be opposed as shifting the balance of the litigation. It is to these concerns that the next section turns.

C. Behind the Curtain: Why is Efficiency Controversial?

Congress created the MDL process to promote pretrial efficiency in proceedings where similar cases were simultaneously proceeding in different cases around the country. How can one argue with that aim, or with the many mechanisms that judges use to promote that streamlining and efficiency? Judges have therefore openly questioned why it is that counsel, at times, oppose mechanisms intended to quickly reach resolution.⁹⁹ As one transferee judge noted, as a first-time transferee judge, he thought it was simply the same old game of defendant delay; it was only later, in retrospect, that he saw the complexities driving the defendant to take positions that he mistook as unjustified attempts to delay.¹⁰⁰

This section explores the merits-based reasons that parties oppose mechanisms that transferee judges often view as substantively neutral mechanisms for moving forward with the MDL.

1. The Cost of Efficiency

Mass torts display a certain hydraulic nature,¹⁰¹ such that if a court begins efficiently resolving cases, more plaintiffs will file suit.¹⁰² Moreover, additional cases can become viable through the enhanced cost spreading of an MDL. These newly viable cases are ones with comparatively low projected

⁹⁹ Conference Notes, *supra* note 17.

¹⁰⁰ *See id.*

¹⁰¹ *See* McGovern, *supra* note 12, at 1822, 1827–34.

¹⁰² This occurs in part as plaintiffs' attorneys seek the fastest forum for resolution and shift to jurisdictions that are clearing cases. This dynamic then allows for greater cost spreading, as new plaintiffs need not bear the full costs of litigation but merely a pro rata share. This then allows a new set of previously negative-value cases to be litigated, allowing for further cost spreading and, in turn, facilitating an additional broadening of the case.

value: those with a low probability of success, whose claims were traditionally unsuccessful on the theory of law or on the merits, or those with such low value that their litigation would otherwise lead them to become negative-value claims.¹⁰³ In some instances, bringing these cases into the system may further the ideals of justice. In other instances, it may force the defendant to expend substantial sums defending litigation that will not be successful on the merits or that will dilute the recovery of individuals who sorely need compensation, not to merely become whole but to continue on in the face of unspeakable harms.¹⁰⁴

Without making a normative judgment, one can thus observe the consequence for litigation. Defendants in many (but not all) cases will be concerned that resolving cases will encourage additional lawsuits. But, once this concern has passed—for example, through the expiration of the statute of limitations—the defendant may be far more amenable to discussing resolution. For example, in *Vioxx*, the settlement occurred soon after the court ruled that the statute of limitations had expired, assuring the defendant that settling would not open the door to a new flood of claims.¹⁰⁵ In other cases, the transferee judge has set a deadline by which claims must be filed in the MDL, after which new cases filed will be remanded to incentivize filings and create a fixed set of cases to allow the MDL to move toward resolution (without formally precluding later-filed claims).¹⁰⁶

2. *The Elasticity of Mass Torts*

The elasticity of mass torts can often generate filings in an MDL by claimants that do not have a cause of action typically regarded as cognizable at law in many states—for example, exposure-only or fear-of-cancer claims.¹⁰⁷ The ability of future plaintiffs to litigate their claims is substantially restricted

¹⁰³ See McGovern, *supra* note 12, at 1822, 1827–34.

¹⁰⁴ See DUKE BEST PRACTICES, *supra* note 6, at xii–xiii (describing Chief Justice Rehnquist’s creation of a working group that addressed, *inter alia*, “(1) whether some mass tort cases would have been filed at all but for a ‘highway’ provided by a procedural vehicle; (2) whether the procedures adopted by courts in mass tort cases allow actions that would typically be terminated by pretrial dispositive motions in other contexts avoid such scrutiny and disposition; [and] (3) whether questionable cases are swept up with meritorious cases and awarded part of the settlement proceeds at the expense of cases with merit”).

¹⁰⁵ See sources and discussion *supra* note 13.

¹⁰⁶ DUKE BEST PRACTICES, *supra* note 6, at 4–5 (discussing Best Practice 1B).

¹⁰⁷ For a discussion of these dynamics in aggregate litigation, see, e.g., Kozel & Rosenberg, *supra* note 44, at 1879–90; James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 161 (2012) (discussing the incentive of entrepreneurial enforcers to bring low-probability claims).

through the class action device.¹⁰⁸ But, these claims can be readily settled through an MDL because the notice and representation issues that ordinarily prevent class certification are not present.

Why would a defendant agree to settle these claims that are not legally cognizable? In many cases, the settlement agreement provides closure. In some settlements, the participating potential-latent-injury plaintiffs receive medical monitoring plus a guarantee of a payout commensurate with that of present-injury plaintiffs—as occurred in the recent NFL concussion settlement.¹⁰⁹ In other settlements, these plaintiffs are given a choice between the option of delayed payment on equal terms, if a covered condition arises, or taking a present payment that reflects the actuarial expected value of that payment (plus a small closure bonus in some cases).

Likewise, there may be claimants whose fact patterns are different enough to raise due process objections to class certification but whose claims can be resolved through an MDL. Where these claims are of relatively low value, this can increase the number of claims the defendant must defend, as these claims now become viable through cost spreading. As described above, the defendant may decide for strategic reasons to settle these claims.¹¹⁰ However, defendants are increasingly deciding not to settle these claims or to settle them only after stronger claims have been settled. Defendants may instead insist on exercising their constitutional due process right to present individualized evidence as to the claims at trial. Some defendants may aggressively oppose these claims, seeking to have the claims dismissed for failure to state a claim, challenging causation, or moving for summary judgment. While most MDL cases do ultimately settle, transferee judges can help facilitate resolution by timely calendaring and ruling upon these motions and defenses to give the parties clarity as they negotiate for settlement or prepare for trial.¹¹¹

3. *False or Miscategorized Claims*

Transferee judges should also be aware of a category of false claims, which is highlighted in the *Duke Best Practices*.¹¹² The label of false claims does not refer to the exposure-only or otherwise difficult-to-prove claims described in

¹⁰⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

¹⁰⁹ See *In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014).

¹¹⁰ Conference Notes, *supra* note 17.

¹¹¹ *Id.*

¹¹² See *DUKE BEST PRACTICES*, *supra* note 6, at 8–9 & n.31.

the prior section.¹¹³ Instead, it refers to claims that, when investigated, reveal that the individual has no cause of action—for example, the plaintiff never took the drug that is the subject of the MDL, which she is alleging caused her injury. Relatedly, there are those claims as to which the plaintiffs' fact sheets are erroneous, resulting in a miscategorization of the claim within the MDL and, by extension, if the error is not corrected, the settlement grid itself.¹¹⁴

While mass torts have notoriously generated false claims by individuals far removed from the tort, the structure of the modern MDL does not provide as strong a check upon these claims as exists in single-plaintiff litigation.¹¹⁵ Most plaintiffs' counsel weed out these claims. But as the *Duke Best Practices* notes, there are a small group of counsel that do not exercise diligence on the front end to catch those individuals that are seeking to file false claims.¹¹⁶ This means that on the back end, either more rigorous protections must be put in place to catch these few false claims, or the wrongful claimants must be permitted to collect, effectively drawing funds from those who were actually harmed.

But what can explain the failure of this subset of plaintiffs' counsel to diligently investigate these cases up front, just as they would work up a single-plaintiff case? Because highly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory, plaintiffs' counsel seeking these positions have an incentive to build as large an inventory as possible, which may lead a handful of bad actors to willfully fail to investigate.¹¹⁷ More commonly, it seems the problem is not an intentional act but simply a lack of resources: as the size of a firm's inventory increases, it simply has fewer resources to immediately work up each individual claim. The MDL structure itself incentivizes and encourages the rapid development of large inventories of claimants, to obtain a leadership position. Then transferee

¹¹³ See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *10 (D. Minn. Mar. 7, 2008) (noting that "Plaintiffs' counsel achieved a global settlement of \$240,000,000.00 for 8,550 Plaintiffs" and "that many of the individual cases likely are not strong stand-alone cases" and using this to justify the amount of the common benefit award).

¹¹⁴ See *DUKE BEST PRACTICES*, *supra* note 6, at 8–10 (discussing Best Practice 1C).

¹¹⁵ See McGovern, *supra* note 12, at 1823, 1827–28 (noting that ordinarily 10%–20% of tort victims enter the tort litigation process, while in mass torts the claims filed are estimated to range from 100%–200% of the actual potential plaintiffs).

¹¹⁶ See *supra* note 114.

¹¹⁷ See Burch, *supra* note 13, at 5 (citing Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 159–75 (2010)).

judges are encouraged to focus upon the development of generic assets,¹¹⁸ deferring the processing of highly individualized claims until the end of the MDL—whether that occurs through bellwethers, settlement, or remand.¹¹⁹ Thus, it should be unsurprising that while some plaintiffs’ counsel are incredibly diligent in their representation as consummate professionals, others only do the work they are incentivized to do (and put off the work of investigating individual claims, as they are also structurally encouraged to do).

Those firms that will not have leadership positions and will not receive common benefit compensation will pay a fixed common-benefit assessment at the end of the case regardless of the time each invested in working up their individual cases. Thus, for these counsel, the financial incentive is to invest as little as possible in the individual case, as any time invested will not impact their ultimate payout—as only time spent on developing generic assets, and not individual cases, is compensable as common-benefit work.¹²⁰ The primary exception is the litigation of a bellwether case, but the PSC will frequently want to assume a substantial role in litigating these cases given their strategic importance to the MDL.¹²¹ Because settlements are typically structured as grids or formulas, the only investment in an individual case that will generate increased compensation is that which shifts the plaintiff from one compensation category to another.¹²² But because these determinations cannot be made until after the settlement is reached, the incentive to delay active investigation remains.¹²³

Taken together, this creates a vacuum at the outset of the case with respect to the merits of the cases included in the MDL.¹²⁴ Judges increasingly require plaintiff fact sheets to be filed early in the litigation, but there is consensus that there is substantial variety in the quality of these forms and little accountability

¹¹⁸ See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 13–14 (2007).

¹¹⁹ See *id.* at 231.

¹²⁰ See *id.*

¹²¹ For an excellent discussion of bellwether trials, see Fallon, Grabill & Wynne, *supra* note 90.

¹²² See NAGAREDA, *supra* note 118, at 67–68.

¹²³ See *id.*

¹²⁴ Cf. JOHN H. BEISNER & JESSICA D. MILLER, WASHINGTON LEGAL FOUND., *LITIGATE THE TORT, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED* (2009), <http://www.wlf.org/upload/beisner09.pdf> (expressing concern about the quality of mass tort claims filed in MDL proceedings, noting that “[t]his problem is compounded by the fact that many of the claims are not developed by the filing counsel—they effectively were ‘purchased’ from other attorneys who advertised to attract claimants in their home markets with no intention of ever litigating the claims themselves”).

for completely inaccurate forms.¹²⁵ Often, these inaccuracies and misrepresentations only emerge after a case is selected as a bellwether. As a result, it is not unusual for a case to settle as the parties discover that it bears little resemblance to its sheet.¹²⁶ The late discovery of these inaccuracies can substantially disrupt not only that bellwether trial but the sequencing of other bellwethers, and perhaps even the coordination of timing between the MDL and parallel state court proceedings.¹²⁷

But, a facilitative judge need not view the concerns raised in this section as a hurdle or barrier, even though that is how they have traditionally been presented. Instead, the next section suggests that in addressing these complaints, the transferee judge can adopt approaches that will also resolve complaints quietly raised by leaders within the plaintiffs' bar. How can this be so? The problems identified in this section are ones limited to a fraction of plaintiffs' attorneys. As such, the measures proposed are ones that many diligent counsel indicate are already standard operating practice within their firms, while noting that they are aware of many other plaintiffs' firms that do not use these best practices. Those counsel that are already diligently representing their clients thus receive a double benefit from these proposed measures because they would affirmatively advantage these counsel in the appointment process and would require competing firms to begin deploying equal resources to their representation, leveling the playing field between these firms. This approach of converting hurdles into possibilities for joint gain lies at the heart of facilitative judging.

D. Considerations for the Facilitative Judge

The traditional wisdom is that the MDL will focus first upon general issues, then move toward the specific. Traditionally, judges have left claim-specific discovery until later in the case. However, raising the issue early can have a

¹²⁵ Consistent with the goal of attaining exemplar work product for new transferee judges, a sample fact sheet for plaintiffs, and a separate sheet for defendants can be found in the *Actos* MDL. See *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. July 9, 2012), ECF No. 1355, available at http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.070912.CMO-Plaintiff_Fact_Sheets.pdf; *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. Nov. 13, 2012), ECF No. 2045, available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.111312.cmodeffactsheet.cg.pdf>.

¹²⁶ See DUKE BEST PRACTICES, *supra* note 6, at 14–16.

¹²⁷ For an interesting discussion of the value of parallel litigation, the criteria for JPML coordination, and the selection of transferee judges, see Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008).

deterrent impact that counterbalances the structural incentives toward the inclusion of weaker claims by some counsel. Moreover, obtaining early information on the specific claims may not only be helpful in shaping the direction and priorities of general discovery but also in building a leadership team that reflects the diversity of claimants. Transferee judges may consider addressing this concern with claims earlier in the process; for example, modifying their initial orders regarding plaintiff fact sheets or even incorporating it into the selection of leadership members. The discussion that follows provides a few examples of the many ways in which this approach could be operationalized.

First, the transferee judge might require counsel to reasonably investigate their initial submissions and provide an updated form to the court within a set time when the information changes.¹²⁸ This is not at all to suggest that counsel must independently develop generic assets. Rather, it is to demand a level of diligence from the attorney in ensuring that the information reported by the client is minimally correct. Sadly, some counsel report observing practices in which the plaintiffs themselves have been asked to complete the forms, which are then submitted in the plaintiffs' handwriting, without the aid of counsel (or any check by counsel into the truth of the statements contained therein).¹²⁹ Thus, in appropriate cases, the judge may order that counsel obtain medical records from their client demonstrating, for example, that the drug in question was prescribed and that the client was subsequently diagnosed with the illness alleged.¹³⁰ This is not to say that counsel would be required to depose the doctor to determine that the documents were authentic or undertake substantial independent investigation. Rather, it is about identifying minimal indicia of the validity of the claim that should be available to the plaintiff's attorney at the outset. These requirements and timeline for submission should be set proportionately to the scope and nature of the claims being made to avoid

¹²⁸ See DUKE BEST PRACTICES, *supra* note 6, at 8–10, 13–16.

¹²⁹ See Interview with Anonymous Plaintiffs' Counsel (Oct. 15, 2014); Interview with Anonymous Plaintiffs' Counsel (June 5, 2014); Interview with Anonymous Plaintiffs' Counsel (June 4, 2014). Notes of interviews with each of these attorneys are on file with the author.

¹³⁰ Later in the discovery process, the court may consider issuing a single, or multiple, round of *Lone Pine* orders; however, these are typically only used after plaintiffs have provided an initial fact sheet. For a discussion of *Lone Pine* orders, see Michael Goldman, *A Survey of Typical Claims and Key Defenses Asserted in Recent Hydraulic Fracturing Litigation*, 1 TEX. A&M L. REV. 305, 323–30 (2013). See also Edward F. Sherman, *The Evolution of Asbestos Litigation*, 88 TUL. L. REV. 1021, 1034 & n.66 (2014).

servicing as a barrier to the prosecution of valid, potentially small-value claims.¹³¹

Second, the transferee judge may clearly specify the sanctions that will be imposed should counsel submit erroneous or incomplete sheets.¹³² Absent the imposition of specific and substantial sanctions from the court, the structure of the MDL does not itself impose a significant check upon the veracity of fact sheets.¹³³ After settlement, plaintiffs will file a proof of claim that serves as the foundation for their payment. But, without accurate fact sheets, the structure of the settlement can be substantially flawed—dramatically altering the compensation received by individual plaintiffs or jeopardizing the solvency of the settlement fund.¹³⁴

Third, where practicable, the transferee judge may consider requiring the submission of initial fact sheets for any plaintiff that counsel seeks to have considered as part of her firm's inventory for purposes of leadership appointments. These sheets can be structured to contain only the information that a diligent attorney would require in the intake process for any case.¹³⁵ This can be crafted as part of a database that can be supplemented as additional questions are added to the fact sheet as the case progresses. Thus, far from

¹³¹ For an excellent discussion of the variety of case management techniques that can be used to this end, see Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 572–75 (2012). See also *id.* (noting that *Lone Pine* orders and their brethren are “essentially ‘cheap’ discovery” that can be used to ensure that “completely unsupported claims will not consume the judge’s or litigants’ resources”).

¹³² See DUKE BEST PRACTICES, *supra* note 6, at 13–16 (discussing Best Practice 1C(iv)).

¹³³ See *id.* at 14–15 (“Fact sheets spare defendants the expense of tailoring countless interrogatories to individual claimants, while allowing plaintiffs’ attorneys to fulfill early discovery obligations with relative ease. However, fact sheets will be meaningful only if plaintiffs and their counsel devote appropriate time and attention to this project. The fact sheets should be deemed a form of discovery governed by the relevant Federal Rules of Civil Procedure, requiring the same level of completeness and verification.” (footnote omitted)).

¹³⁴ Typically, these factors emerge outside of public view and thus do not form the basis for legal commentary, even though they are well-known to the players. However, a handful of instances have become public knowledge; for example, the unexpected inundation of breast implant claims against Dow. See Tamara Jeanne Dodge, Comment, *Raging Hormones?: The Legal Obstacles and Policy Ramifications to Allowing Medical Monitoring Remedies in Hormone Replacement Therapy Suits*, 21 WIS. WOMEN’S L.J. 263, 286–87 (2006).

¹³⁵ See, e.g., DUKE BEST PRACTICES, *supra* note 6, at 15 n.54. The *Best Practices* notes, *inter alia*, that in certain proceedings fact sheets were used as a “first wave of discovery” and required information such as the plaintiffs’ prescribing physician(s), medical history, employment history, and educational history, as well as the identity of potential fact witnesses. *Id.* (citing and quoting *In re Prempro Prods. Liab. Litig.*, MDL Dkt. No. 4:03-CV-1507-WRW, 2010 U.S. Dist. LEXIS 135152, at *20 (E.D. Ark. Dec. 6, 2010); 1-4 ACTL MASS TORT LITIGATION MANUAL § 4.05 (2006)).

wasteful paperwork, the claim-forms process can become an iterative part of the discovery process. It can allow counsel to know the full panoply of claims, to know the likely subclasses or issues raised, and, most importantly, to be able to rely upon the data in crafting case strategies, in contrast to the high error rate endemic to today's forms. Requiring this information can serve as a deterrent for the handful of bad actors who simply seek to amass a large inventory without engaging in any of the traditional, individualized representation necessary to zealously advocate for those individuals.

But, more importantly for the court, fact sheets can act as a powerful tool for selecting MDL leadership. Fact sheets serve as an exemplar of the counsel's work product: Are the forms incomplete and handwritten or thorough and well presented? Fact sheets also serve as a useful point of reference in developing a leadership group that will mirror the diversity of claims in the MDL, across various domains; for example, causation, type of injury, and applicable law, are a few common dimensions transferee judges may consider.

III. APPOINTING LEADERSHIP

Unlike in class actions, there is no statutory authority for a transferee judge to appoint counsel for the plaintiffs—and thus no binding authority upon which transferee judges may rely. The JPML suggests that transferee judges: (1) seek resumes with descriptions of prior experience in complex litigation; (2) request a proposed fee arrangement; (3) hold a hearing to observe and assess counsel; and (4) consider contacting other MDL judges for their evaluations of applying lawyers.¹³⁶

The existing selection processes have, quite reasonably, shaped the behavior of plaintiffs' counsel. But, over time, this has generated second-generation problems: Small cadres of repeat players dominate most of the key leadership positions in MDL.¹³⁷ This has given rise to concerns with self-dealing and side deals made across MDLs, which may reinforce these networks to the detriment of individual plaintiffs.¹³⁸ While the MDL explosion could be utilized as a tool to curb these problems, most insiders agree that thus

¹³⁶ See TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 76, at 2–3.

¹³⁷ See Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1288 (2012) (discussing repeat-player and informal-networking effects of PSC selection).

¹³⁸ See *id.*

far it has primarily exacerbated these concerns.¹³⁹ This Part reconceptualizes this process, exploring the innovations of some judges in the areas of financing and appointments, the twin pillars of the common benefit process.

A. Behind the Curtain: Funding Structures

The funding structures for MDL are often particularly difficult for new transferee judges to fully appreciate at the outset of litigation. Indeed, no statute or rule exists to provide for the plaintiffs' side funding structures, as the MDL proceeds.¹⁴⁰ Even the common benefit fund lacks an explicit foundation in law, which has prompted scholars to attempt to explain its legality with reference to equitable principles.¹⁴¹ Moreover, because the interim funding is internal to the plaintiffs' attorneys, even experienced lawyers and transferee judges often harbor misunderstandings about the funding options and the consequences for the MDL process.

Many experienced transferee judges acknowledge that their understanding of the finances of MDL has changed their approach to not only appointments but also general management of the MDL process. Before turning to appointments, it is therefore helpful to consider the funding of an MDL. This financing can be considered as having three components, each of which is explored below.

(1) *The Plaintiffs' Interim Fund.* This fund is comprised of assessments paid by the MDL leadership. These contributions typically are assessed on a flat-rate basis within each leadership class; thus, each PEC member will be assessed the same contribution, which will often be two to four times greater than that assessed to each PSC member.¹⁴² These funds are then used to pay the plaintiffs' collective obligations; for example, paying special masters or other professionals employed for the benefit of the group. For this reason, the fund is also referred to as a housekeeping fund.

This interim fund is not typically used to reimburse counsel. Instead, lawyers are expected to front their own travel costs and other incidental

¹³⁹ See *id.* at 1293.

¹⁴⁰ See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 326–27 (1996) (explaining historical origins of the failure to address the differing roles of counsel and their compensation within the MDL statutory framework).

¹⁴¹ See, e.g., Burch, *supra* note 13, at 28–30.

¹⁴² See, e.g., Davis & Garret, *supra* note 32, at 498 n.45.

expenses of litigation.¹⁴³ However, the lawyers will contemporaneously document these expenses as well as their timesheets for later recoupment during the common benefit assessment, described below.¹⁴⁴

Transferee judges typically do not participate in the interim fund; it should be a matter for internal resolution by the leadership team.¹⁴⁵ The court's only involvement with this fund typically arises where an appointee is unable to fulfill his financial obligations, such that the court must determine whether to rescind the appointment if the individual does not resign.¹⁴⁶

(2) *The Joint Expense Fund.* Some judges have suggested the creation of an expense fund to finance joint expenses related to the litigation.¹⁴⁷ Typically, these are court-related expenses, such as retaining special masters, which are split evenly between the plaintiffs and defendant(s). However, in many cases, the structure can be simplified by having the service providers direct bill each side.¹⁴⁸ The PSC then pays the expenses from its interim fund, while the defendant makes direct payments from its corporate accounts.¹⁴⁹ While a joint expense fund is an option transferee judges may consider, in most cases the administrative oversight of such a fund can be avoided.

(3) *The Final Common Benefit Fund.* As alluded to above, plaintiffs' attorneys will contribute time as well as bear costs throughout the litigation process in the furtherance of the MDL.¹⁵⁰ Upon settlement, the transferee judge orders each participating lawyer to pay a set percentage of his contingency fee to the common benefit fund; these funds are then used to reimburse the interim

¹⁴³ See, e.g., *id.* at 499–500 & n.50.

¹⁴⁴ 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, 451 (1998) (describing the “labor-intensive evaluative analyses of bills and expense reports” that occurs during the reimbursement process).

¹⁴⁵ See Davis & Garret, *supra* note 32, at 492–95.

¹⁴⁶ See *id.* at 498–99 (listing examples of shared costs).

¹⁴⁷ Some scholars and courts have proposed public funding of these costs; however, most judges are reluctant to depend on these alternative funding resources. See, e.g., Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000).

¹⁴⁸ See, e.g., *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 6:11-md-2299, slip op. (W.D. La. Nov. 16, 2012), ECF No. 2072, available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.111612.cmodeputyspmfees.cg.pdf> (establishing rules for reimbursing fees and costs of court-appointed Deputy Special Master).

¹⁴⁹ See Davis & Garret, *supra* note 32, at 498 n.45 (“Shared Costs . . . will be paid out of the PSC Fund . . .”).

¹⁵⁰ See Fallon, *supra* note 30, at 380.

costs and hourly expenditures counsel incurred¹⁵¹ in the MDL.¹⁵² Thus, while the framework of the fund is typically created early in the MDL before the parties have performed substantial work,¹⁵³ it remains unfunded until the cases are resolved—a distinction which has contributed to some confusion about the nature of these funds.¹⁵⁴

This simple description belies the complexity of common benefit disbursements.¹⁵⁵

First, the transferee judge has no authority to compel payments in parallel proceedings, most notably in state court litigation.¹⁵⁶ Yet, parties and courts often prefer global settlements, which offer to resolve all claims in both the MDL and state court.¹⁵⁷ This sets the scene for a free-rider problem, in which the state court counsel are able to retain their full contingency, while those in federal court must pay a portion of their fee to the common benefit fund.¹⁵⁸ If allowed to persist, this would provide another incentive for counsel to seek to litigate in state court. But, particularly where the state has no coordination structure, this may hinder the cooperative development of generic assets that MDL sought to create—in essence, creating a prisoners' dilemma. To solve this problem, parties are increasingly incorporating a common benefit provision into the global settlement agreement itself.¹⁵⁹ The common benefit fund thus becomes a creature of contract rather than court order.

¹⁵¹ For a particularly thorough case management order, see *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 6:11-md-2299, slip op. (W.D. La. July 10, 2012), ECF No. 1357, available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.071012.CMO-PSCsManagementofTimekeepingCostREimbursementandRelatedCommonBenefitIssues.pdf>.

¹⁵² For an excellent discussion of the evolution of common benefit funds in MDL, see Fallon, *supra* note 30.

¹⁵³ The *Manual for Complex Litigation* recommends such an approach: “Early in the litigation the court should . . . establish the arrangements for the [designated counsel’s] compensation, including setting up a fund to which designated parties should contribute in specified proportions.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.215 (2004).

¹⁵⁴ See, e.g., *In re Zyprexa Products Liab. Litig.*, 467 F. Supp. 2d 256, 267 (E.D.N.Y. 2006) (“It has been a common practice in the federal courts to impose set-asides in the early stages of complex litigation in order to preserve common-benefit funds for later distribution.” (quoting *Turner v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d 676, 680 (E.D. La. 2006)) (internal quotation marks omitted)).

¹⁵⁵ For a general introduction, see MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (2004).

¹⁵⁶ For a discussion of global settlements and the federalism problems this creates, see Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).

¹⁵⁷ See Cory Tischbein, Comment, *Animating the Seventh Amendment in Contemporary Plaintiffs’ Litigation: The Rule, or the Exception?*, 16 U. PA. J. CONST. L. 233, 262 & n.194 (2013).

¹⁵⁸ Thomas, *supra* note 156, at 1355 & n.92.

¹⁵⁹ See *id.* at 1361.

However, this pragmatic solution does raise potential second-generation concerns that transferee judges should consider. Although perhaps mitigated by the small, repeat-player world of MDL, it does allow defendants to defect, offering one set of settlement terms to the MDL litigants that incorporates the common benefit provision, while offering another set of terms to state court litigants that excludes the “common benefit tax.”¹⁶⁰ In so doing, the defendant can greatly increase the costs that the MDL participants must each bear, particularly where a significant portion of litigation is in the state courts, by limiting the expanse of cost spreading.

Some transferee judges have attempted to set the range of common benefit assessments early in the litigation.¹⁶¹ There is an obvious attraction to this approach insofar as it would seem to align the interests of plaintiffs and counsel. To the extent that counsel settle the case immediately, they will not have accrued costs or hourly charges sufficient to reach the cap; thus, the usual concern that a plaintiffs’ attorney may have an incentive to settle too early, expecting diminishing returns, is mitigated by the lodestar approach.¹⁶² At the same time, these caps deter counsel from protracted, expensive litigation unless counsel has a strong basis to believe the additional investment will greatly increase the overall settlement. However, in practice, courts have struggled to enforce these caps and have instead modified their orders as litigation continues, which may undermine the utility of the order and also have a negative impact on the parties’ sense of finality.¹⁶³

In some cases, transferee judges have also sought to cap the contingency fees that may be charged by counsel.¹⁶⁴ These are not caps on the common benefit work managed by the PSC but instead the rate that the plaintiff

¹⁶⁰ See Fallon, *supra* note 30, at 375.

¹⁶¹ Cf. Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 255 (1985) (“[I]n the traditional common-fund situation and in those statutory fee cases that are likely to result in a settlement fund from which adequate counsel fees can be paid, the district court, on motion or its own initiative and at the earliest practicable moment, should attempt to establish a percentage fee arrangement agreeable to the Bench and to plaintiff’s counsel.” (footnote omitted)).

¹⁶² For a general introduction to attorneys’ fees calculation methods, see Resnik, Curtis & Hensler, *supra* note 140, at 339–55.

¹⁶³ Conference Notes, *supra* note 17.

¹⁶⁴ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 617 (E.D. La. 2008) (presumptively capping originating attorneys’ fees at 32% of the settlement value), *partially overruled by* 650 F. Supp. 2d 549, 565 (E.D. La. 2009) (upholding the cap of originating attorneys’ fees at 32% but allowing “in the rare case where an individual attorney believes a departure from this cap is warranted, he shall be entitled to submit evidence to the Court for consideration”).

contracted for with her own attorney at the outset of the litigation.¹⁶⁵ These caps stem from the laudable premise of maximizing victims' net compensation, given that aggregation has likely substantially decreased the amount of time the originating attorney spent working up the case, essentially allowing a very large recovery for a minimal expenditure of time.¹⁶⁶ However, the legal authority for modifying these contracts remains tenuous. Incorporating the provision into the settlement agreement may enhance enforcement—particularly against the backdrop of ethical rules prohibiting counsel from rejecting an offer simply because of the impact on his own fees¹⁶⁷—but transferee judges should remain aware of the still-evolving jurisprudence in this regard.

To this point, the discussion has been premised on the assumption that the plaintiffs obtain a settlement, which will finance the common benefit fund. But what if they do not? The prospects of remand or pre-trial victory by the defense implicate a variety of very difficult questions.

Among these issues is the viability of interim common benefit payments. To the extent that the leadership team members have very different monetary resources—whether their own funds, credit lines, or access to funding—this can become a source of internal conflict within the leadership, permeating all aspects of the litigation, from assessments to settlement positions. Ideally, the court will consider the expected duration and capital contributions of the candidates to ensure that all members of leadership will have the capacity to meet their obligations throughout the life of the MDL in order to avoid the necessity of interim payments or reconfiguring the leadership mid-litigation. However, judges are wary of allowing financing to take on too prominent a role in appointment, as this may limit potential appointees to established repeat-players and exclude counsel that might provide valuable skills—particularly at the PSC level.¹⁶⁸

Another difficult question is raised where the cases are ultimately remanded back to their originating courts. Courts may employ a combination of equitable principles and comity to obtain contribution. However, as a practical matter, it is difficult to foresee how this would result in the optimal

¹⁶⁵ *See id.*

¹⁶⁶ For an example of the court's reasoning on capping fees, see *id.*

¹⁶⁷ *See* Erichson & Zipursky, *supra* note 91, at 281–92 (describing the ethical problems surrounding the Vioxx settlement).

¹⁶⁸ Conference Notes, *supra* note 17.

funding of the common benefit fund given the predictable variance in outcomes from individual trials. With a traditional common benefit assessment, projections about the size of the settlement and size of the common benefit expenditures can be made, yielding a pro rata contribution percentage.¹⁶⁹ But, where the common benefit expenditures have been made and the total trial awards remain unknown—and indeed, may issue over a period of many years—one cannot determine a common pro rata contribution percentage. Should the attorneys’ fees be held in escrow for years to ensure that the fund is neither underfunded nor that the first successful verdicts are over taxed?¹⁷⁰ And, if some trials succeed and others fail, does this not raise questions about the extent to which the verdicts reflect the individual trial attorneys’ efforts rather than those of the MDL? The treatment of these questions will radically reshape settlement incentives of the MDL counsel, as well as the relative compensation trial counsel receive, which in turn further affects settlement incentives.¹⁷¹

But what if the defendant prevails in motion practice and obtains dismissal of all of the cases?¹⁷² Many leaders within the plaintiffs’ side community quietly admit that they expect that they would not be reimbursed and thus incorporate this risk in their decision to pursue a leadership position.¹⁷³ But recognizing this then has substantial consequences not only for assessing the ability of individuals to assume the financial obligations of leadership but also for understanding the incentives of those in leadership to work toward an ultimate global settlement of claims.

With these motivations in mind, we can turn to the appointment process.

¹⁶⁹ See Fallon, *supra* note 30, at 386–89.

¹⁷⁰ Initially, the *Deepwater Horizon* MDL was interpreted to include such an order, generating substantial controversy relating to the validity of assessing a “common benefit” against the recovery of individuals that participated in the GCCF rather than the MDL settlement. For discussion, see Colin McDonnell, Comment, *The Gulf Coast Claims Facility and the Deepwater Horizon Litigation: Judicial Regulation of Private Compensation Schemes*, 64 STAN. L. REV. 765, 770, 778–80 (2012).

¹⁷¹ Cf. Burch, *supra* note 137, at 1316 (arguing for third-party financing as a solution to collective-action problems and monitoring issues inherent to MDL).

¹⁷² See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

¹⁷³ Conference Notes, *supra* note 17.

B. A Strategic Approach to Leadership Appointments

1. The Traditional Approach

In recent years, judges have begun using an increasing array of appointments. Traditionally, the PSC—and in appropriate cases, a Defendants’ Steering Committee (DSC)¹⁷⁴—was comprised of a handful of highly qualified counsel, who were responsible for leading and often performing the day-to-day work of the MDL, as well as funding the litigation.¹⁷⁵ But, more recently, judges have begun creating a PEC comprised of these top-tier attorneys and allowing other attorneys to fill the PSC.¹⁷⁶

The results of this transition have been mixed. On the one hand, the use of a dual PEC/PSC structure creates additional positions, allowing new entrants an opportunity to enter the field. On the other hand, judges have reported high turnover rates among these PSCs due to a lack of participation or an inability to satisfy their capital obligations.¹⁷⁷

While contributions vary considerably by case and by the phase of litigation, for high-end MDLs, plaintiffs’ counsel report that the annual assessment for a PSC member can be \$50,000 to \$100,000 per year and run as high as \$100,000 to \$200,000 annually during peak litigation periods.¹⁷⁸

¹⁷⁴ In cases in which there is a single defendant, the defendant will typically select its own counsel without the need for a formal DSC and will typically make a recommendation to the judge as to which of its attorneys should serve as lead or liaison counsel, if the judge determines that these positions are necessary. See, e.g., *In re Genetically Modified Rice Litig.*, No. 4:06-md-01811-CDP, slip op. at 1 (E.D. Mo. Apr. 18, 2007), ECF No. 182, available at <http://www.moed.uscourts.gov/node/115> (appointing leadership counsel and selecting the amount of various proposed slates the judge deemed properly qualified on the basis of a “private ordering” concept” in which the group with the “support of the larger number of plaintiffs and lawyers” was selected). See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 22.61–22.62 (2004) (providing overview of case management orders judges found helpful in MDL proceedings).

¹⁷⁵ See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2005 WL 850963, at *1 (E.D. La. Apr. 8, 2005) (pretrial order appointing PSC); *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2005 WL 850962, at *1 (E.D. La. Apr. 8, 2005) (pretrial order appointing DSC).

¹⁷⁶ For an example of such an order creating co-lead counsel, a PEC, and a PSC, see *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14 C 1748, MDL No. 2545, slip op. (N.D. Ill. Aug. 1, 2014), ECF No. 244.

¹⁷⁷ One judge indicated that in the MDL he presided over, over half of the original PSC members initially appointed were not members of the PSC at the conclusion of the case, underscoring the remarkable nature of turnover experienced. Most judges identified the dual concerns of inadequate involvement and financial shortfall as the most common reasons for changes in the leadership team. See Conference Notes, *supra* note 17.

¹⁷⁸ See Ed Konieczny, *Multidistrict Litigation*, TRUST THE LEADERS (Smith, Gambrell & Russell, LLP, Atlanta, Ga.), Summer 2008, at 4, available at http://www.sgrlaw.com/resources/trust_the_leaders/leaders_issues/ttl21/1128/.

Together with the cost of performing common benefit work—in both outlays of costs and the delayed salary of lawyers and staff assigned to the MDL—a PSC member may need to have the ability to fund close to \$1 million a year of litigation-related expenses in active years.¹⁷⁹ Indeed, the Vioxx attorneys had collectively invested over \$100 million in the litigation before a settlement was reached.¹⁸⁰ Understanding the extent to which plaintiffs' attorneys are not merely seeking a contingency but have their personal fortunes sunk into litigation helps color the concerns about plaintiffs' finances as well as the power behind repeat players.¹⁸¹

While most PSCs have far lower capital requirements, these numbers provide some transparency into potential costs as judges report not only that they have underestimated the resources in assessing counsel's capacity to satisfy their PSC obligations but that the attorneys themselves have made the same error. This transparency is particularly important given that some judges report that they conduct only a minimal inquiry into financial resources, deferring to counsels' representations, on the theory that those who cannot make the contributions will be identified through the litigation process. But, this deference comes at the cost of consistency in leadership and potential internal conflict and divisiveness within the leadership.

2. *Structural Inequality, Homogeneity*

The focus on prior expertise and financial capacity at the heart of the traditional appointment criteria has yielded substantial heterogeneity amongst a small cadre of repeat players, notwithstanding the mention of diversity as a co-consideration.

One set of concerns relates to the lack of demographic diversity as a proxy for variation in life experiences, skills, and capacities. Anecdotally, attorneys have long expressed a sense that there are few women and even fewer

¹⁷⁹ See, e.g., Steve Korris, *Plaintiff Steering Committee Seeks 6% Now to Fund Ongoing BP Spill Litigation*, SE. TEX. REC. (Nov. 14, 2011, 10:00 PM), <http://setexasrecord.com/news/239689-plaintiff-steering-committee-seeks-6-now-to-fund-ongoing-bp-spill-litigation>.

¹⁸⁰ Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES, Nov. 17, 2007, <http://www.nytimes.com/2007/11/17/business/17nocera.html>; see also Burch, *supra* note 137, at 1287–88.

¹⁸¹ See, e.g., John G. Heyburn, II, Remarks at the ACI Complex Litigation Conference: "Reflections on the Panel's Work" (Dec. 2010) at 6, available at <http://www.jpml.uscourts.gov/sites/jpml/files/2010-ACI%20Complex%20Litigation%20Conference-Judge%20Heyburn%20Remarks.pdf> ("The economics of complex litigation are quite different from that of an individual case and are growing more so. Some have expressed concerns about the consequences of this increase in multidistrict litigation: fewer cases tried to verdict; more global rather than individual settlements"); accord Burch, *supra* note 137.

non-Caucasians appointed to MDL leadership, particularly on the plaintiff's side.¹⁸² To explore whether this sense was correct, I reviewed the filings from the multidistrict litigations pending as of April 15, 2014.¹⁸³ Those MDLs that did not have leadership appointments were excluded from the sample set.¹⁸⁴

In certain subject matter areas—particularly antitrust, securities, and employment litigation—the appointment of firms, rather than individual counsel, was relatively common within this sample. To focus upon individual appointments, the data set was further limited to MDLs categorized by the JPML as product liability claims because this category has more pending MDLs than any other claims type and rarely appoints firms instead of individuals.¹⁸⁵

Because electronic records are only available for select cases filed in the 2000–2004 period, the observation here is more tentative. Nevertheless, it is a helpful baseline, as the available data show that men were appointed 11.8 times more often than women during this period. In the 2005–2009 period, men were appointed 6.73 times more often than women. This trend toward increasing gender diversity continued, with a rate of 3.02 from 2010–2014. Similar gaps in race, national origin, sexual orientation, and other demographic diversity variables have also been anecdotally reported.¹⁸⁶

As referenced earlier, in recent years, transferee judges have begun appointing a PEC in some cases. The PEC positions are generally seen as more lucrative and prestigious than PSC positions, and thus made for an interesting point of comparison as to the role of women in leadership. In the 2005–2009 period, men were appointed 7.00 times as often as women to PEC positions. In the 2010–2014 period, this number decreased to 5.47—but was still much higher than the PSC appointment rate of 3.02 during the same years.

As a point of comparison, I then looked at the appointment of defense counsel. While on the plaintiffs' side there are traditionally individual applications and slates, on the defense side, the defendant itself often directly recommends an appointee. Do these differences in incentives and selection process yield different outcomes in the resulting appointments?

¹⁸² Conference Notes, *supra* note 17.

¹⁸³ This dataset is on file with both the author and the *Emory Law Journal*.

¹⁸⁴ Pleadings were reviewed utilizing Bloomberg and PACER. Cases whose filings were not accessible through either platform also were excluded from the sample set.

¹⁸⁵ See OCTOBER 15, 2014 MDL STATISTICS REPORT, *supra* note 7.

¹⁸⁶ Conference Notes, *supra* note 17.

In the 2005–2009 period, men were appointed 3.75 times as often as women, in contrast to 6.73 times on the plaintiffs’ side. In the 2010–2014 period, men were appointed 2.88 times as often as women, in contrast to 3.02 on the plaintiffs’ side. This suggests that while the same transferee judge appoints both sides, the preappointment dynamics did yield greater diversity on the defense side, although the gap is closing. But, the data cannot pinpoint the cause, as many factors influence these appointment rates.

To explore the reasons for this shift, I conducted interviews with two-dozen plaintiffs’ attorneys. Each of these attorneys had at least a decade of MDL experience, but beyond this minimum qualification, they ranged from aspiring appointees to frequently appointed repeat players. I also interviewed a number of transferee judges and defense counsel about the value of diversity in the appointment process.¹⁸⁷

The most common reason for the gender gap reported by respondents was the prevalence of slates. At their best, respondents noted that slates can allow plaintiffs’ counsel to exclude those who are known within the practice for not contributing to a PSC, as well as affirmatively forming a team in which the key players are all comfortable working with one another and believe that together they have all the components necessary to succeed. After all, the PSC and PEC will invest substantial sums of their own into the litigation, and they want to maximize their return on that investment.

Many noted that the MDL bench is “very deep” and, thus, that diversity could be obtained without compromising any standards, and would yield a more successful MDL.¹⁸⁸ The interviewees were unanimous in their view that only individuals that had the capacity, skill, reputation, and resources to successfully lead an MDL should be considered and that these standards cannot and should not be diminished for the sake of diversity. But, once the standards for excellence in each of these categories are met, many expressed concerns that friendship and collegiality become the decisive factor. Moreover,

¹⁸⁷ In addition to these interviews, in my role as editor in chief for the Duke Judicial Center’s conference, I received numerous emails from attorneys confidentially sharing their views on this issue for incorporation into the *Best Practices*. Notes reflecting the content of all of these interviews and emails are on file with the author.

¹⁸⁸ Conference Notes, *supra* note 17. After the federal jurist who made this comment expressed this idea at the Duke Conference, it received sustained applause from the attendees. *Id.* Another federal jurist said that “it’s inexcusable that the panel structure is so non-diverse. I’d count from 300 attorneys, get ten women, 1-to-2 people of color. This meeting today reflects that same reality Some judges are seeking it [diversity] out, and if they are rejecting your private ordering [slates] that may be why.” *Id.*

interviewees expressed a concern that attorneys reasonably preferred to select those with whom they have worked successfully before—meaning that they have the same past experiences to draw upon, rather than a more diverse set of prior cases that might yield greater innovation.¹⁸⁹

Those concerned with the traditional slate approach argue that an individualized-appointment process allows the decisive factors in selecting between the many qualified attorneys to become skill, diversity of clients, diversity of experience, and other factors that would more directly improve the results in the MDL. Derivative of this, many proponents of individual appointments argue that this transition breaks apart the repeat-player dynamic, allowing judges to bring in new, qualified entrants. In so doing, even if diversity is not expressly a factor, the number of diverse attorneys appointed seems to increase. Others go further, moving from the impact of structural features like slates to a discussion of the explicit value of diversity.

A number of interviewees identified the *Toyota* MDL appointment as a watershed moment in this transition.¹⁹⁰ In that case, Jayne Conroy argued to the court that when one looked at the demographics of Toyota buyers, more than half were women, and that the committee should reflect those demographics. At that point in her career, Conroy had an established reputation, the resources, and the skill to be an asset to the PSC. The argument was thus not that women should be appointed without regard to these prerequisites, but instead that of equally qualified candidates there was value to diversity, particularly where there would otherwise be a disconnect between the plaintiffs and their representatives. The court did appoint Conroy to the PSC, in a very competitive selection process.¹⁹¹

Many attorneys seeking greater diversity in appointments lauded Conroy for calling out the gender gap that had been present for so long, but simultaneously recognized that it was a mere stepping stone. While Conroy had brought diversity to the forefront, these attorneys also argued that women should be seen as valuable leaders in all types of cases, not merely those

¹⁸⁹ Cf. DUKE BEST PRACTICES, *supra* note 6, at 45–46 (discussing Best Practice 3B, and the selection of class counsel).

¹⁹⁰ See *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10-ml-02151, slip op. (C.D. Cal. May 14, 2010), ECF No. 169, available at http://www.hbsslaw.com/Templates/media/files/case_pdfs/Toyota/Order%20No%20%202%20-%20Organization%20Plan%20and%20Appointment%20of%20Counsel.s.pdf.

¹⁹¹ See *Jayne Conroy*, SIMMONS HANLY CONROY, <http://www.simmonsfirm.com/about-us/our-attorneys/profiles/jayne-conroy/> (last visited Dec. 14, 2014).

deemed “women’s issues,” and, indeed, that diversity should look at all types of diversity, not just gender.¹⁹² At the same time, other attorneys quietly raised questions about the constitutionality of an explicitly gendered approach and what the consequences would be for the profession.¹⁹³ Unsurprisingly, this phase of diversity was short-lived.

A new phase of diversity is now taking hold, in which diversity is recognized as a value for all cases. Judges and attorneys alike are recognizing that diversity of all kinds—demographic diversity, skill diversity, diversity of prior case experiences—improve outcomes. This new approach to diversity has been captured in the *Duke Best Practices*, which were prepared by an invitation-only group of eighty of the leading MDL attorneys and thirty MDL judges. The *Best Practices* affirmatively encourage judges to avoid structural selection mechanisms, like slates, which may have an unintended disparate impact in restricting diversity of all types.¹⁹⁴

As this discussion foreshadows, a second set of concerns relates to the resulting lack of diversity in skillsets and case experience. The existing selection method—including the oral argument component—may inherently favor certain skillsets, such as strong oral argument skills.¹⁹⁵ Yet, these skills are not necessarily coextensive with the management, collaboration, and relationship-building skills that are at the heart of a PSC’s success. Moreover, without careful attention and counterbalancing by the judge, this may result in a PSC that is overstocked with respect to certain high-profile skills but that lacks expertise in other relevant but less “glamorous” areas.¹⁹⁶

Another set of concerns relates to the ability of PEC or PSC members to fully engage in their role as leaders if they are serving on a number of leadership teams simultaneously. Multiple appointments are not inherently problematic, particularly where a preexisting MDL appointment is in a case that is not active; for example, where a global settlement has been reached and the majority of litigants have been enrolled.¹⁹⁷ But, increasingly counsel are expressing concerns that some repeat players are overcommitted, not allowing

¹⁹² Conference Notes, *supra* note 17.

¹⁹³ *Id.*

¹⁹⁴ See DUKE BEST PRACTICES, *supra* note 6, at 45–46.

¹⁹⁵ Conference Notes, *supra* note 17.

¹⁹⁶ *Id.*

¹⁹⁷ See Burch, *supra* note 13, at 23–27.

them to fully engage with each case, and in turn yielding settlements that are not consistent with the needs of clients.¹⁹⁸

Finally, for some, this raises the concern that counsel are selected in part for their cooperative tendencies and thus that attorneys may feel unable to dissent for fear of jeopardizing future appointments.¹⁹⁹ Some scholars have suggested that this also gives rise to heightened potential for either explicit dealmaking or mere reciprocity across cases that may advantage counsel but not their clients.²⁰⁰

Taken together, there is an increasing and broad-based concern that the repeat player system that naturally developed should be modified to ensure the best outcomes for the plaintiffs the leadership is appointed to represent. To be clear, there is broad consensus that repeat players have valuable skills, knowledge, and experience that are not merely necessary, but vital, to the successful resolution of an MDL.²⁰¹ But, there is also a sense that building more diverse leadership teams will inure to the benefit of not just plaintiffs, but the process as a whole.²⁰² Moreover, given the increasing number of mass-MDLs this shift need not be zero-sum.

Accepting that the transferee judge should act to encourage diversity of all types whenever possible and appropriate raises the question of how this can be undertaken within the confines of law and the particular realities of the individual MDL. It is to this, more difficult, question that we now turn.

3. *The Capacity-Building Approach*

Considering the aforementioned concerns, an alternative, emerging approach focuses on using each of the leadership positions to bring a broader range of capacities to bear on the litigation. In this approach, the lead counsel slots are filled with attorneys with a reputation for not only being superior litigators but also managers who will serve as strong administrators and cooperative negotiators who will work well with opposing counsel—three very different skillsets that are not entirely coexistent.

¹⁹⁸ See DUKE BEST PRACTICES, *supra* note 6, at 49–51 (discussing Best Practice 3C(iv)).

¹⁹⁹ See *id.* at 34, 51.

²⁰⁰ See *id.*

²⁰¹ See generally Burch, *supra* note 13 (discussing the pros and cons of using repeat players in an MDL).

²⁰² See *id.*

The number of lead counsel selected will vary, as with all appointments, based upon the type, complexity, and size of the litigation. In determining the number of lead counsel, the transferee judge should also consider whether other leadership appointments will be made and, as a result, what responsibilities the lead counsel will have within the litigation. Three co-lead counsel may serve as a presumptive starting point for the transferee judge, as the number is robust enough to provide continuity of leadership in case of a sudden resignation or incapacity of counsel, a multiplicity of viewpoints and experience, and a tie-breaking vote or mediator in case of disagreement. However, in simple cases, the judge may be able to appoint only two lawyers; likewise, in more complex cases—particularly those with multiple client constituencies—there may be a role for additional lead counsel or for the addition of a PEC or PSC.²⁰³

The PEC is then comprised of those attorneys who have a substantial percentage of the cases and resources to fund the litigation. While the participation of these attorneys is essential to the success of the MDL, these individuals are frequently repeat players.²⁰⁴ They may have similar skillsets and backgrounds with respect to their prior MDL experience.²⁰⁵ Moreover, some have attained their position through characteristics that are helpful to success in litigation but that are inconsistent with cooperative and inclusive leadership. Yet, these individuals are key stakeholders, whose participation in leadership is necessary to advancing the MDL to closure.

Those that have both the qualifications necessary to serve on the PEC and the capacity to serve as great leaders are frequently sought for leadership positions, and thus may be serving in the leadership of a half-dozen to a dozen MDLs or more.²⁰⁶ But, at that point, these individuals simply cannot have the depth of knowledge of each case that comes with a narrow concentration in only a handful of cases. Thus, even those who are highly capable have their constraints, with respect to their capacity and that of their firms, to dedicate the resources and attention that may be needed.²⁰⁷

²⁰³ See DUKE BEST PRACTICES, *supra* note 6, at 33–65.

²⁰⁴ For related issues with PSCs, see Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2289–90 (2008).

²⁰⁵ See Burch, *supra* note 13, at 23–25.

²⁰⁶ See *id.*

²⁰⁷ See DUKE BEST PRACTICES, *supra* note 6, at 49–51 (discussing Best Practice 3C(iv)).

Using the PSC to supplement the PEC thus becomes a powerful mechanism to create the full set of skills the MDL demands. In selecting PSC membership, the transferee judge may focus on creating a core team that can manage the day-to-day litigation process on the ground.²⁰⁸ The transferee may ask applicants to detail not only which MDLs they have participated in but also the particular committees on which they have served, to ensure that the key components of litigation are represented. For example, while many leaders are skilled oral advocates, it can often be indispensable to have skilled written advocates, counsel with substantive skills to manage science and expert committee work, and even a state–federal court liaison, depending upon the particular case.

Taken together, this approach calls upon the transferee judge to consider the nature of the particular mass-MDL and, in turn, the financial, legal, and technical abilities that its leaders must collectively possess. Having identified these basic capacities, the judge should consider creative mechanisms for satisfying these roles. In so doing, the judge should consider ways in which these needs can be satisfied through a team that will maximize the diversity of ideas, experience, and skills. This approach maximizes the capacity of the team to draw upon a broad set of ideas to solve problems and, in turn, to generate more effective brainstorming where the MDL requires creativity in generating unique solutions.

One example of this creativity is the idea of not simply appointing repeat players but looking to their seconds as potential appointees. Given that many repeat players have been MDL lawyers for three decades, it is common that the second chair has two decades of experience before obtaining a first leadership appointment. These second chairs often have specific expertise that can be brought to bear on the MDL, including a strong medical background in a pharmaceutical or medical device case, an advanced finance background in a business loss case, exceptional people skills in a product liability case in which substantial pro se filings are anticipated, or computer and data management skills in cases with disproportionately complex data mining or other unique document discovery needs.

²⁰⁸ Typically, the PSC will be responsible for “conducting documentary discovery, establishing document depositories, taking depositions, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set forth in the court’s pretrial orders, including appearing before the court at periodic conferences or hearings.” Fallon, *supra* note 30, at 373.

Historically, some judges have hesitated to appoint these individuals, concerned about the ability of the attorney to meet the financial requirements inherent to leadership. However, judges who have made these appointments have reported that the firms have met the financial and staffing obligations for these mid-level partners. A number of repeat players conceded a preference for this approach: The repeat player can now continue to apply for other leadership positions without appearing to be spread too thin, while still reaping the financial benefit of having his (or, less often, her) firm in the MDL leadership. Moreover, this approach allows for a greater degree of succession planning, as the mid-level partners can begin to build the coveted leadership experience needed for the firm to continue its leadership after the initial generation of MDL lawyers—many from the early asbestos days—retires.

As this foreshadows, some would-be repeat players have tired of the decades-long wait in line behind a marquee partner and have started their own firms. In light of repeat-player and third-party funding concerns, some have suggested increased transparency with respect to financial arrangements of counsel.²⁰⁹ This transparency is essential in ensuring that counsel maintains their fidelity writ large to the plaintiffs and that they have the financial capacity to meet their obligations. Moreover, this disclosure may facilitate the entry of new players who are mistakenly believed to lack the necessary resources by permitting an explicit consideration of their available credit lines and staffing.

But in reviewing these arrangements, judges should not confuse the assessment of financial capacity with financial entanglement. Many new entrants will have credit lines at banks, which do not intend to have any involvement in the case, that are sufficient to meet all capital calls with a comfortable margin. This situation is distinguishable from one in which a third-party financier expects to have a voice in the settlement or is explicitly involved in claims trading such that it becomes the settling party. Those situations are ones that may require careful attention by the MDL judge. But, if a new entrant simply has a credit line, this should not be a barrier to appointment in most cases.²¹⁰

²⁰⁹ See *supra* Part III.B.1.

²¹⁰ Conference Notes, *supra* note 17.

4. *Other Considerations*

Transferee judges are increasingly utilizing limited-term appointments, commonly appointing counsel for an initial year-long term.²¹¹ Many judges have indicated a preference for these shorter terms because the appointment process happens so early in the case that the judge has a very limited exposure to the counsel—much like deciding to get married on a first date. Others prefer the shorter term because it provides the judge with an explicit reminder of the judge's ongoing ability to amend the PSC to respond to the expertise, experience, and attributes that make the counsel valuable (or detrimental) to the leadership team.²¹² In addition, as discussed previously, a delay may be necessary to ensure that the leadership reflects anticipated but as yet unknown divides within the plaintiffs' claims. On the other hand, some have suggested that after the initial appointment term, the mere background ability to remove an appointee should be sufficient and that anything more will cause the counsel to be too subservient to the judge.²¹³ The judge should consider what appointment schedule will best suit the needs of the particular MDL, balancing these competing concerns.

Relatedly, some transferee judges are taking a proactive role in ensuring the fulfillment of appointed counsels' duties. These judges are increasingly requiring counsel to personally fulfill their appointed duties and to obtain leave of court before delegating these responsibilities to other lawyers or staff. However, in wording these orders, transferee judges should ensure that the language is not so broad as to functionally prohibit or impede succession planning or the development of younger attorneys. For example, the order may require all PSC members to attend monthly conferences, while permitting them to bring additional attorneys with them.²¹⁴

²¹¹ See, e.g., *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14 C 1748, MDL No. 2545, slip op. (N.D. Ill. Aug. 1, 2014), ECF No. 244 (appointing counsel for a one-year term).

²¹² See, e.g., *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299-RFD-PJH, slip op. (W.D. La. June 13, 2013), available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299-061313.2A.CO.PSC.pdf> (adding four additional counsel to the PSC in recognition of their service to the MDL and unique capacities they would bring to the committee); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299-RFD-PJH, (W.D. La. Feb. 4, 2013), ECF No. 2320, available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.020413.AOrderPSC.pdf> (adding additional attorney to the PEC).

²¹³ Cf. DUKE BEST PRACTICES, *supra* note 6, at 53–65 (highlighting factors transferee judges should assess in making appointments to ensure effective leadership).

²¹⁴ For sample language, see *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299-RFD-PJH, slip op. (W.D. La. Apr. 13, 2012), available at http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299-Order-PSC_1.pdf.

Finally, in some cases, particularly securities and antitrust MDLs, judges have experimented with appointing law firms rather than individual attorneys to fulfill the leadership roles. While this approach may be useful in some cases, these seem to be a very small and field-specific minority. Instead, most judges view the appointments as personal and also prefer to spread appointments across firms.²¹⁵

IV. UNINTENDED STRATEGIC CONSEQUENCES: A CAUTIONARY NOTE ON FACILITATIVE JUDGING

It is fairly obvious to most stakeholders in the MDL system that the transferee judge's substantive rulings will impact the case. But, what is frequently less obvious is the extent to which facilitative judging can more subtly impact the parties. This often has an asymmetric impact to the detriment of defendants. But in other cases, it is the plaintiffs' counsel that object to early settlements, arguing that the values offered are not fair value and are designed to undermine the MDL process. The purpose of this article has not been to make a normative judgment about these dynamics; indeed, to do so is impossible, recognizing the complexity of these interactions and the variety of claims brought within MDL. Rather, it is to encourage transferee judges to consider these complexities and secondary consequences of their rulings.

This final Part is thus focused upon the endgame, which frequently causes counsel from both sides to appear to be opposing logical or efficient processes. Understanding these structures may enable facilitative judges to better identify ways in which seemingly innocuous procedural and structural rulings can elicit opposition from counsel.

A. Claims Maturation

Although the MDL statute expressly states that MDL is simply a device for pretrial coordination²¹⁶ and expressly directs transferee judges to transfer cases back to their originating courts for trial, most cases are ultimately resolved in the MDL.²¹⁷ Anticipating this endgame, sophisticated judges are

²¹⁵ See, e.g., *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-2299-RFD-PJH, slip op., (W.D. La. Dec. 12, 2013), ECF No. 3737, available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.121613.cmo.3A.PSC.pdf> (removing a PSC member, with her consent, where she changed firms and moved to a firm already represented on the PSC).

²¹⁶ 28 U.S.C. § 1407 (2012).

²¹⁷ See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1365 (2005) (noting that the litigation model of resolution "is generally a fiction" in mass torts cases).

experimenting with mechanisms for keeping the parties focused upon settlement. This may be done in a variety of ways; for example, appointing a settlement special master early in the MDL process,²¹⁸ aggressively suggesting the parties enter into private settlement talks,²¹⁹ or setting an end date for the MDL to encourage the parties to remain focused on resolution of the case.²²⁰

This focus on settlement can be extremely beneficial in obtaining a resolution of the case. For example, the transferee judge can sequence discovery and motion practice to prioritize the most informative questions, which will most greatly advance the case, working toward less dispositive matters. This approach can help accelerate the maturation process by not simply focusing on the development of generic matters first but prioritizing within the class of generic questions.²²¹ In one sense then, the early appointment of a settlement neutral seems the natural and logical result of the inexorable path of an MDL.

But, an early focus upon settlement may preempt the natural maturation process for the claims. The initial stage of litigation is one in which the defendant often maintains a perceived, if not actual, advantage.²²² The initial phase is one in which the plaintiffs are expending substantial resources to attempt to prove that a cause of action exists, developing both the facts and potentially new law.²²³ At the same time, the defendant has a “virtual monopoly on information and expertise.”²²⁴ Increasingly, the defendant may use this as a decision point, deciding to engage in its own private settlement regime (as BP and GM have) or to continue litigation, fighting the validity of the science and law underlying plaintiffs’ claims.

²¹⁸ In *Actos*, the transferee judge appointed a special master for settlement as part of the initial case management structure, along with two other special masters tasked with other aspects of the litigation process. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. Apr. 11, 2012), ECF No. 532 (appointing presettlement special master for settlement, in addition to two other special masters).

²¹⁹ See, e.g., discussion *supra* note 13.

²²⁰ Judge Weinstein used this approach, setting a firm trial date for the Zyprexa cases. See *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2004 WL 2792123, at *1 (E.D.N.Y. Dec. 2, 2004). Continuing a long series of judges using this approach, Judge Dougherty has employed the same strategy in *Actos*. *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, slip op. (W.D. La. July 26, 2013), ECF No. 3081.

²²¹ This approach aligns itself with the broader shift toward managerial judging. See, e.g., Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981).

²²² McGovern, *supra* note 12, at 1834 & n.67.

²²³ *Id.* at 1842.

²²⁴ *Id.*

For defendants then, the imposition of a settlement neutral or settlement talks at the outset of the case may suggest that the rigorous testing of the claims it desires will be abbreviated. Defendants may envision a multi-tranche litigation structure in which general defenses applicable to the entire alleged wrong are litigated first—for example, whether it is the responsible party for the alleged tort, whether privity of contract exists in a contract claim, or whether any antitrust or securities law was breached.²²⁵ Then, if claims remain, the defendant may target particular swaths of claims—for example, the link between the product and particular diseases or the existence of reliance for those claimants whose states require proof of reliance rather than presuming its existence.²²⁶

For the defendant, this may give rise to an evolving strategy. One dimension of uncertainty is derived from the litigation process itself; as new facts come to light through discovery and as rulings are issued by the courts clarifying the legal issues, the parties' understanding of the case changes. But a second dimension is exogenous to the initial parties. As cases proceed toward resolution—and particularly if there are successful plaintiffs' verdicts in either state court or MDL bellwethers—this can generate additional filings. Indeed, the faster the cases are resolved, the greater the risk of elasticity.²²⁷

This creates two dynamics for the defendant. First, the quick resolution of claims may expand the pool of claimants, thereby expanding its expected liability.²²⁸ Second, if the judge has created a case management plan intending to expedite settlement based on the initial cases, it may not include all of the variables necessary to resolve the later-filed cases.²²⁹ And, the defendant may be concerned that its attempts to modify the plan to incorporate these later-arising legal strategies will be viewed as mere delay for the sake of delay—an attempt to delay the settlement payout (and the share price drop that often accompanies it), to increase costs for the plaintiffs, or to extract a low-value settlement.

Of course, in other cases, the opposite dynamic is present. For example, in the NFL concussion settlement, the objecting parties argued that the discounted

²²⁵ See DUKE BEST PRACTICES, *supra* note 6, at 7–8 (discussing Best Practice 1B(iii), concerning the priority judges should give motions in order to allow attorneys to “advise their clients about risks and expectations and may bring about an expedient global resolution of the MDL”).

²²⁶ See McGovern, *supra* note 12, at 1834–35.

²²⁷ See *id.* at 1831, 1834–35 (discussing the role of elasticity in mass tort litigation).

²²⁸ See *id.*

²²⁹ See *id.* at 1835.

values paid in the settlement assumed too low a probability of success and that with additional maturation, the science supporting the players' claims would be strengthened.²³⁰ Thus, the observation of this section is not limited to either side. Instead, counsel who believe in the merits of their cases may well oppose early settlement efforts that short-circuit the natural maturation process because it incorporates an inflated risk premium relative to the attorney's expectation about the ultimate value of the claim.

B. The Bellwether Trial

The bellwether trial has become a ubiquitous fixture in the transferee judge's arsenal. For this reason, some transferee judges have expressed confusion about the hostile response from defense counsel to bellwether trials. It may well seem that this response is simply part and parcel of the old defense technique of taking a "stonewall, scorched-earth, war-of-attrition strategy."²³¹ But, there are legitimate concerns underlying this opposition that have very real consequences for the defendant's due process rights and in turn the legitimacy of the MDL process.

Defendants are often hopeful that preliminary motions, *Daubert* rulings, and other potentially dispositive motions may narrow the range of viable cases if not effectively terminate the litigation altogether. In addition, defendants will at times prefer to retain the option of litigation after remand as to at least the subset of cases which they regard as dubious, rather than settling meritless inventory cases as a condition of global settlement. As a result, a transferee judge's suggestion of bellwether trials may be perceived as excluding the value of motion practice in narrowing the scope of issues in the MDL process.

Underlying the defendant's interest in preliminary motion practice are tactical discovery considerations. While cases were once permitted to go at their own pace—leading to a perception that cases lingered for years in MDL without substantial progress—the JPML now focuses upon selecting judges that will get the cases resolved, whether by motion practice, settlement, or remand. Today, parties expect that judges will take a leadership role in the litigation, ensuring that the parties do not expend time and money toward low-value ends. But, in mass torts, the litigation and discovery strategies of the parties will often be more clearly cyclical or phased than in single-plaintiff

²³⁰ See *In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa. 2014).

²³¹ McGovern, *supra* note 12, at 1834.

litigation and with a different focus than is familiar from class action litigation, which is divided into certification, merits, and, at times, damages phases.

Early discovery will ordinarily be restricted to general questions, applicable to the broad swath of claims in the MDL and the resultant development of generic assets.²³² As early as the Rule 26(f) conference, the transferee judge will begin to create a discovery plan customized to the issues identified by the parties. Typically, the first phase will focus upon generic discovery.²³³ Indeed, during this early phase of litigation, judges describe allowing specific discovery as “a black hole” as there is infinite information potentially available.²³⁴

If the defendant cannot establish that the generic evidence supports the dismissal of all claims, then the litigation will naturally proceed toward understanding the types of questions that may resolve the case as to particular groups of claims. In this process, careful communication with the parties is essential to determining for what purpose discovery (and eventually motion practice and early trials) is being held. Sequencing may focus first upon dispositive issues that would eliminate certain groups of claims altogether; for example, where the defendant argues that a particular set of claims is not cognizable as a matter of law. Then, the court may proceed to preliminary motion practice, resolving key issues of science and law, which can either provide certainty that is used to engender settlement or set the stage for early trials.

If early trials are to occur, the facilitative judge will again consider the parties' endgame and structure the trials to promote the generation of the requisite information.²³⁵ For example, in some cases the judge may decide to allow both sides to select their best cases for trial, reasoning that this will set

²³² See TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 76, at 2 (encouraging judges to determine which issues can be decided on an expedited basis in order to speed resolution of the MDL as a whole); accord MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.33 (2004).

²³³ *E.g.*, *In re Viagra Prods. Liab. Litig.*, No. 06-md-1724, slip op. (D. Minn. Jan. 24, 2007), ECF No. 180 (discussing different phases of discovery); Sean Wajert, *Toyota MDL Judge Issues Discovery Order*, MASS TORT DEF. (July 26, 2010), <http://www.masstortdefense.com/2010/07/articles/toyota-mdl-judge-issues-discovery-order/>.

²³⁴ See Eduardo C. Robreno, *The Federal Asbestos Product Liability [sic] Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013); DUKE BEST PRACTICES, *supra* note 6, at 8. MDL proceedings are also sometimes called a “black hole” since cases transferred to the MDL court often never return to the transferor court. See Fallon, Grabill & Wynne, *supra* note 90, at 2330.

²³⁵ See Tischbein, *supra* note 157, at 258 (describing the practical factors that “conspire” to preclude mass tort MDL plaintiffs from securing a post-MDL trial by jury, in the context of bellwether trials).

the outer boundaries for resolution.²³⁶ In other cases, the judge may randomly select cases and then offer the parties the opportunity to argue whether those cases are representative.²³⁷ In even other cases, it may be more helpful to create a sample case grid, selecting cases that represent each of those imagined subgroups.²³⁸

While the value of this process is in providing the information the parties need to resolve their claims, even attorneys will admit that the judge must take a strong role: “The parties can’t be trusted, so having the judge involved is essential. We can even use strikes for gaming.”²³⁹ As a result, there has been a focus on developing a pool of cases as to which the parties can conduct discovery, learning about not just the small handful of cases selected for early trial but about a slightly broader set that may be more instructive as to the issues that will be presented across the universe of cases.

Indeed, in some areas (like pharmaceutical cases), no case is ever truly representative. Each case is so unique that their resolution is simply informative as to other cases; indeed, were a case not to have unique issues of specific causation, that fact alone would make it different than the vast majority of claims in the MDL. For this reason, judges may instead instruct counsel to present representative nominees—not average cases or outliers but a range of cases that reflect the range of cases in the MDL. Understanding this range of cases and the reasons that those in the early discovery phase, summary judgment phase, or trial pool are resolved, will be helpful to the parties in conceptualizing the range of cases that will be presented not only at trial but also in crafting a settlement that is reflective of the actual (rather than hypothetical) cases in the MDL.

Inherent in this discussion is the recognition that counsel often cannot identify these categories or factors at the initial Rule 26(f) conference but instead that these distinctions and categories emerge over time through the discovery process. It is precisely this need for discovery and early litigation that causes consternation by defendants where transferee judges begin to talk

²³⁶ See Fallon, Grabill & Wynne, *supra* note 90.

²³⁷ Cf. Loren H. Brown, Matthew A. Holian & Andrew Ghosh, *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663 (2014).

²³⁸ For an interesting discussion, see Savage, *supra* note 90 (discussing technique of conducting individual trials, then applying the results to similarly situated claimants). Cf. 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 11:15 (5th ed. 2014) (discussing selection of a bellwether case using samples from “the pool” of cases in the MDL).

²³⁹ Conference Notes, *supra* note 17.

about settlement too early in the case, before these categories have emerged and preliminary motions that might result in dismissal have been tried.

C. *When Global Isn't Global: The Risk of Settlement*

Despite the ubiquitous focus upon the inevitability of global settlement,²⁴⁰ the reality is often far different.

Some of these risks are well-known within the MDL world. The announcement of a settlement can often trigger a new rash of filings,²⁴¹ which may deter defendants from settlement until the statute of limitations has expired.²⁴² Moreover, notwithstanding minimum-participation-rate provisions,²⁴³ the company will likely still face a number of individual suits from individuals who reject the global settlement.²⁴⁴ Finally, notwithstanding judicial attempts to coordinate state and federal settlements,²⁴⁵ state counsel may seek to avoid the MDL settlement to evade the MDL tariff with respect to fees,²⁴⁶ which may press the company to settle state and federal claims separately.²⁴⁷

²⁴⁰ See Bradt, *supra* note 69, at 762–63 (“Although MDL structurally accommodates individualized choice-of-law analyses better than does the class action, most MDLs eventually conclude with a global settlement.”).

²⁴¹ See Francis E. McGovern, *The Alabama DDT Settlement Fund*, LAW & CONTEMP. PROBS., Autumn 1990, at 61, 61–62 (citing 10,000 new cases filed against a DDT manufacturer after its first settlement).

²⁴² See, e.g., *In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 801–02, 814 (E.D. La. 2007) (holding that unfiled claims in most jurisdictions were beyond the applicable statute of limitations); cf. Erichson & Zipursky, *supra* note 91, at 278 (noting that Judge Fallon’s ruling on the statute of limitations issue was a substantial factor in Merck becoming “willing to relax its antisettlement stance”).

²⁴³ In the shadow of the ethical concerns many voiced about the Vioxx settlement’s 100% participation requirement for contracting law firms. See Erichson & Zipursky, *supra* note 91, at 281–92 (describing the ethical problems surrounding the Vioxx settlement).

²⁴⁴ See, e.g., Savage, *supra* note 90, at 468 (“[W]hile the parties may eventually try to craft a global settlement, over 7000 individual smoker suits remained pending in state and federal court as of March 2012. According to one source, these courts will not be finished clearing their dockets of *Engle* progeny trials until the year 2269.” (footnote omitted)).

²⁴⁵ See, e.g., Thomas, *supra* note 156, at 1339 (“MDL judges have begun experimenting with the exercise of power over state litigants (and even individuals who made private claims but never filed suit in any court), in order to facilitate global settlements.”).

²⁴⁶ Cf. *id.* at 1364–66 (discussing objections by state plaintiffs’ attorneys to legality of federal judge ordering set aside for common benefit from the global settlement, which therefore applied to all parties not just those that were part of the MDL).

²⁴⁷ See, e.g., Amanda Ernst, *EnCana Pays \$20.5M to Settle State Class Action*, LAW360 (July 26, 2007, 12:00 AM ET), <http://www.law360.com/articles/30737/encana-pays-20-5m-to-settle-state-class-action> (“The state court settlement [for conspiring to raise energy prices] coincides with EnCana’s \$2.4 million settlement payment ordered last month . . . in a federal multidistrict litigation involving several energy companies accused of price manipulation.”).

But, less clear to judges is the extent to which collateral lawsuits may be filed immediately after a settlement. For general counsels, there is a very real risk that settling with plaintiffs may trigger suits and other sanctions by government agencies and attorneys general, which had previously held back. Indeed, shortly after BP announced its DOJ settlement, it was hit with sanctions by the EPA that prevented it from entering into contracts with the U.S. government.²⁴⁸ In addition to these public suits, the company may also fear securities suits for the decreased stock value and derivative suits challenging the board's decision to approve the settlement.²⁴⁹ Given these dynamics, defendants may be very skeptical that a "global" settlement will buy it peace,²⁵⁰ rather than buying it a new set of lawsuits.

These examples might seem to reinforce the traditional conception of defendants seeking closure. In the shadow of these concerns, one could envision a world in which defendants affirmatively condition their consent to the global settlement on receiving a release from state and federal officials—redistributing settlement leverage by using the victims to pressure the officials to release the claims for a minimal amount.

But, contrary to the long-standing assumption, defendants do not universally press for closure. Sometimes defendants also do not delay and oppose settlement; sometimes it is the plaintiffs' counsel that argue a quick settlement is an extortive tactic. In *In re Baycol*, the defendant abandoned the global settlement matrix in favor of firm-by-firm settlements.²⁵¹ From the

²⁴⁸ See Suzanne Goldenberg, *BP Suspended from New US Federal Contracts Over Deepwater Disaster*, GUARDIAN (Nov. 28, 2012 17:34 EST), <http://www.theguardian.com/environment/2012/nov/28/epa-suspends-bp-oil-spill>. Some plaintiffs' counsel even quietly speculate that this perceived government sandbagging substantially contributed to the souring of the relationship with BP, which has publicly shifted from cooperatively operating to pay all damages to an unprecedented set of challenges to the special master's determinations and, most recently, a motion to remove him. See, e.g., Tom Fowler, *BP's New Tactic in Oil Spill Claims: Go After the 'Special Master'*, WALL ST. J. CORP. INTELLIGENCE BLOG (Jan. 27, 2014, 11:02 AM ET), <http://blogs.wsj.com/corporate-intelligence/2014/01/27/bps-new-tactic-in-oil-spill-claims-go-after-the-special-master/>.

²⁴⁹ See, e.g., Liz McKenzie, *Bayer to Pay \$18.5M to Settle Baycol Securities MDL*, LAW360 (Dec. 16, 2008, 12:00 AM ET), <http://www.law360.com/articles/80543/bayer-to-pay-18-5m-to-settle-baycol-securities-mdl> (reporting on settlement of securities MDL filed by shareholders based on alleged misrepresentation in the safety and commercial viability of Baycol).

²⁵⁰ See, e.g., Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750, 758 (2002) (describing the fundamental conflict of aggregate litigation as "the conflict between autonomy for individual plaintiffs and peace for defendants" and noting that defendants are willing to pay a premium for this closure).

²⁵¹ *In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378 (J.P.M.L. 2001); see *Bayer Has Paid \$1.143 Billion to Settle 3,058 Baycol Cases*, DRUG INJURY WATCH (Oct. 2005), http://www.drug-injury.com/druginjurycom/2005/11/bayer_has_paid_.html. Bayer also settled cases individually. See *In re Baycol*

perspective of plaintiffs' counsel, these settlements are first made with firms that have minimally invested in their clients for discounted values. These values then set the benchmark for future claims, while the non-settling plaintiffs are approaching their counsel asking why they are not getting the same deal, particularly where the terms sound facially generous, thus ratcheting up the settlement pressure.

From the perspective of defense counsel, this partial-settlement approach allows the defendant to settle with the counsel who has reasonable valuations and is not pressing for the settlement of nonmeritorious-inventory claims. In contrast, plaintiffs' counsel view these as attempts to evade paying full value for the harms caused, which should be restricted rather than encouraged.

Another approach focuses upon chunking not by firm but by claims type. The benefit of this approach lies in deterring redistribution from high-value to low-value claims. For example, in the Yaz litigation, the defendant settled the gallbladder claims through a global settlement.²⁵² These claims had a low value due to poor causation arguments, which enabled the defendant to clear a big component of the inventory at relatively low value.²⁵³ The defendant then began negotiating settlements on an aggregate firm-by-firm basis, but only for certain claims.²⁵⁴ Thus, only women alleging deep vein thrombosis or pulmonary embolism were invited to settle.²⁵⁵ In each case, because the settlements were done in the aggregate, no value was given to any particular type of harm.²⁵⁶ Instead, the plaintiffs' counsel was to allocate the funds between their clients or retain a special master to do so.²⁵⁷ Other claims, such as those for strokes, hyperkalemia, and wrongful death, remain pending.²⁵⁸ Again, these tactics can be highly contentious for a judge asked to stay

Prods. Litig., No. 0:01-md-01431-MJD-SER, slip. op. (D. Minn. Feb. 14, 2003), Dkt No. 3396, *available at* http://www.mnd.uscourts.gov/MDL-Baycol/pretrial_minutes/baycol64.ord.pdf.

²⁵² See *Bayer Pays \$402 Million to Settle Yaz and Yasmin Lawsuits*, DRUG WATCH (Aug. 2, 2012), <http://www.drugwatch.com/2012/08/02/bayer-settles-yaz-lawsuits/>.

²⁵³ See *Gallbladder Resolution Program: MDL 2100 - Yasmin and YAZ (Drospirenone) Marketing, Sales Practices and Products Liability Litigation*, U.S. DISTRICT CT. FOR S. DISTRICT OF ILL., <http://www.ilsd.uscourts.gov/mdl/mdl2100.aspx> (last visited Dec. 14, 2014).

²⁵⁴ See *supra* note 252.

²⁵⁵ See Whitney Taylor, *Yaz and Yasmin Lawsuits Still Pending, Despite Bayer's Large Settlement Payment*, YAZ LAWSUIT CENTER (May 9, 2014), <http://yazlawsuit-info.com/2014/05/yaz-yasmin-lawsuits-pending-despite-bayers-large-settlement-payment/>.

²⁵⁶ See *id.*

²⁵⁷ See *supra* note 252.

²⁵⁸ See, e.g., Ava Lawson, *63 Women File Yaz Stroke Lawsuit Against Bayer*, YAZ LAWSUIT CENTER (Aug. 21, 2014), <http://yazlawsuit-info.com/2014/08/63-women-file-yaz-stroke-lawsuit-against-bayer/>.

proceedings to enable such an approach: defendants argue this is an efficient means to facilitate settlement for fair value, while plaintiffs argue that these are attempts to delay and deprive victims of the cost spreading aggregation was meant to facilitate.

These vignettes are provided not as an exhaustive list but instead to underscore the complexity of parties' endgame strategies and the extent to which they can derivatively trigger unexpectedly strong reactions by counsel to a facilitative judge's structural decisions. No singular solution can be crafted that fits every situation. Instead, the judges—selected for their wisdom and skill—must be mindful of these complexities in crafting a solution that leads to the successful resolution for the parties.

CONCLUSION

Aggregate litigation has long required special judges to craft innovative structures to facilitate the resolution of the complex claims before them. But with the rise of MDL—both on its own merits and as a consequence of the alterations to the aggregation landscape that are the subject of this Symposium—an increasing number of judges are now being utilized as transferee judges. At the same time, the strategic dynamics and behind-the-scenes maneuvering has evolved as the MDL bar has grown in both sophistication and experience. These internal dynamics are often concealed from the court's view, and even when known, many judges report not fully appreciating their magnitude or consequences until they were far into their MDL careers.

This Article has sought to shine a light on these dynamics, articulating their origins but also the practices other transferee judges have adopted to respond to these unique challenges. In so doing, the goal is not to suggest that these practices are optimal or even appropriate to every MDL. To the contrary, in recognizing that every case is unique, this Article is intended to provide transferee judges with the solutions of others as a starting point, rather than an ending point, in developing their own frameworks and best practices.