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Nudges and Norms in Multidistrict Litigation: A Response to Engstrom

Elizabeth Chamblee Burch

ABSTRACT. On paper, the Federal Rules of Civil Procedure apply equally to billion-dollar opioid allegations and claims for $75,000.01. In practice, however, judges and attorneys in high-stakes multidistrict proceedings like those over opioids have invented a smattering of procedures you will never find in the Federal Rules: plaintiff fact sheets, short-form complaints, science days, bellwether trials, census orders, inactive dockets, and *Lone Pine* orders, to name but a few. In a world where settlement is the prevailing currency, new norms take root. But as these norms blossom, the stabilizing features of the federal rules—balance, predictability, and structural protections—can wither. As safeguards atrophy and transferee judges actively nudge the parties to settle, the deals that emerge may reflect the scars of creative pruning, not the suit's merits.

This Essay responds to Nora Engstrom's article, *The Lessons of* Lone Pine, by introducing empirical data on her target (*Lone Pine* orders) and her remedy (plaintiff fact sheets). Examining these two innovations in the lifecycle of products-liability multidistrict litigation illustrates that norms can undermine a key aim of the Federal Rules: achieving procedural parity, where discovery burdens and the risks of erroneous decisions fall equally on both parties. Although procedural design choices should respond to case-management demands, both shortcuts can impact plaintiffs more harshly, upending protections for those who need them most.

INTRODUCTION

The world of mass-tort multidistrict litigation that Nora Engstrom describes in her recent *Yale Law Journal* Article, *The Lessons of* Lone Pine, is foreign to most lawyers.[1] These proceedings command not only their own lingo, like *Lone Pine* orders, census orders, and fact sheets, but also their own bespoke procedures,

1. *See* Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019).

which an elite cadre of federal judges invoke to wrangle cases into settlement.[2] That means that a key assumption behind the Federal Rules of Civil Procedure—that "a litigant can walk into any federal courtroom in the country and know that the same procedures will apply to her case"—does not ring true.[3] For the uninitiated, *Lone Pine* orders require mass-tort plaintiffs to prove that the defendant's product or device caused their injuries with an expert report, such as one from a surgeon or physician.[4] As a judicial concoction, *Lone Pine* orders are the pluots of mass torts, grafting together snippets of federal rules while ignoring their procedural protections.[5]

In stark contrast to most existing literature lauding *Lone Pine* orders, Engstrom deftly exposes their deep flaws: *Lone Pine* orders circumvent jury trials, little precedent exists to guide them, and, as a case-management tool under Rule 16, they are afforded an abuse-of-discretion standard on appeal rather than the stricter de novo standard used for summary judgment.[6] Put simply, *Lone Pine* orders bypass institutional constraints and are out of step with existing procedural rules. Like summary-judgment motions, they demand substantive support for claims, but they short-circuit Rule 56's procedural protections and clear burdens of proof. And like Rule 11 sanctions, they hope to siphon off frivolous claims, but they demand that plaintiffs provide expert reports and prima facie evidence of their injury, whereas Rule 11 merely requires that lawyers certify that

2. Some transferee judges in federal multidistrict proceedings have begun to issue census orders (or registration orders) at the settling parties' request. These require all attorneys to register their clients' state and federal claims, whether filed or unfiled, so that the settling defendant can use that number as the denominator for calculating compliance with a settlement's walkaway percentage. (They are, of course dubious, because federal jurisdiction attaches to claims, not lawyers.) I explore walkaway provisions in note 31, *infra*, and the accompanying text. Fact sheets are court-ordered forms that sometimes act as a substitute for more formal discovery tools like interrogatories, requests to produce documents, and depositions. I take a closer look at plaintiff fact sheets in Part II, *infra*, but judges have used fact sheets for both plaintiffs and defendants in multidistrict proceedings.

3. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1687 (2017). As Engstrom explains, *Lone Pine* orders have been used in state courts, too, but my focus here is on federal cases.

4. To recover in tort, plaintiffs must prove that the defendant's product, device, or action proximately caused her injuries. The expert report by a doctor or specialist, for example, thus helps plaintiffs link their injury to the defendant's action or inaction and prove causation by a preponderance of the evidence.

5. For other examples, see Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389 (2011).

6. *See* Engstrom, *supra* note 1, at 36-52.

support exists or is likely to exist after discovery.[7] Finally, like discovery sanctions under Rule 37, *Lone Pine* orders dismiss noncompliant cases, but contrary to this Rule they do so as a first step rather than a last resort.

Why do judges use them then? Some judges and defense lawyers claim that *Lone Pine* orders "represent salvation from the huddled masses of meritless plaintiffs' claims lying in wait for eventual settlement checks."[8] With that in mind, Engstrom suggests a balance: judges should use *Lone Pine* orders sparingly and "only when (1) procedures explicitly sanctioned by rule or statute are unavailable or are patently insufficient, and (2) substantial evidence casts doubt upon plaintiffs' entitlement to relief and/or the plaintiffs have displayed a marked and unjustifiable lack of diligence."[9] In lieu of *Lone Pine* orders, Engstrom contends that judges should winnow claims by requiring plaintiff fact sheets and disincentivizing noncompliance, "with a first step being that . . . noncompliant plaintiffs will face entry of a *Lone Pine* order, and those who fail to comply with that order will see their claims dismissed with prejudice."[10]

Engstrom's article is a tour-de-force on *Lone Pine* orders and should be required reading for every transferee judge who handles a mass-tort multidistrict litigation (MDL). Her dataset includes a wide array of *Lone Pine* orders used in both state and federal courts, many of which were issued during discovery and before a proceeding settled.[11]

Volume-wise, state courts handle more mass-tort cases than federal courts do. But once the Judicial Panel on Multidistrict Litigation (the Panel) centralizes federal cases before a transferee judge, that judge and the attorneys she selects to spearhead the MDL proceeding tend to be in the driver's seat when it comes to negotiating a global settlement. As Part I explores, global deals aim to include all plaintiffs, regardless of whether they sued in state or federal court.

Part I thus narrows the scope of our inquiry, shifting away from how all state and federal courts use *Lone Pine* orders to how transferee judges employ them in products-liability MDLs. Products liability encompasses the largest and thorniest mass torts, like asbestos and pelvic mesh, which tend to demand heavy-

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7. Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation 129-30 (2019).

8. Engstrom, *supra* note 1, at 22 (citing Rachel B. Weil, *Knee Implant MDL Judge Enters Aggressive Lone Pine Order*, Drug & Device L. (June 23, 2016), https://www.druganddevicelawblog.com/2016/06/10720.html [https://perma.cc/JY86-GJPJ].

9. Engstrom, *supra* note 1, at 12.

10. *Id.* at 60.

11. *See* Nora Freeman Engstrom & Amos Espeland, *Lone Pine Orders: A Critical Examination and Empirical Analysis* (unpublished paper on file with author).

handed case management.[12] Corralling dispersed plaintiffs into a single settlement framework takes some doing, and ethics rules can take a backseat to closure goals.[13] Looking at the lifecycle of mass torts in that context shows that *Lone Pine* orders appear almost exclusively *post*-settlement—not as pre-settlement sieves, but as an additional means to urge non-settling plaintiffs to settle.[14]

Repositioning *Lone Pine* orders as settlement nudges means that they should fail the first prong of Engstrom's test, for tried-and-true procedures already exist to resolve cases without them. When plaintiffs refuse a settlement offer, nothing about the status quo should change. Non-settling plaintiffs should be able to continue their path toward trial. If they have not completed discovery, then discovery should continue. If they don't respond to discovery requests, then the court could consider whether to issue Rule 37 sanctions and dismiss the case. Alternatively, if pretrial matters have concluded, plaintiffs' cases should be remanded to their original court for trial as the MDL statute contemplates.[15]

Part II explores Engstrom's proposed solution—using plaintiff fact sheets in lieu of *Lone Pine* orders. Unlike *Lone Pine* orders, fact sheets do appear routinely before a global settlement. But, as yet another ad hoc invention that substitutes for formal discovery rules, they fall prey to some of the same criticisms that Engstrom levels at *Lone Pine* orders.

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12. I focus on product-liability MDLs because that category captures the personal-injury mass torts that tend to include the most plaintiffs. Historically, products-liability proceedings have constituted the largest segment of MDLs, constituting well over one-third of the Panel's docket. And looking at the number of actions contained in each proceeding shows that products-liability cases comprise around 90% of pending actions. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1460-63 (2017). Transvaginal mesh, or "pelvic mesh" as it has become known, is a product used to treat pelvic organ prolapse, but the mesh can pierce women's internal organs and wreak havoc on their bodies. Even revision surgeries may not be successful because the mesh can splinter internally. Most pelvic mesh has now been pulled from the market.

13. For more on these practices, see BURCH, *supra* note 7, at 44-54, 60-62.

14. Erin Marie Day, *Lawyers Debate Value of 'Lone Pine' Orders*, LAW360 (July 24, 2008), https://www.law360.com/articles/63725/lawyers-debate-value-of-lone-pine-orders [https://perma.cc/WLF2-C92U] (quoting Chris Seeger on *Lone Pine* orders as saying, "Many judges won't enter them at all, but of those that do, it's always near the end of the case"). Engstrom notes that 38% of the courts in her dataset entered *Lone Pine* orders early in the litigation and only 24% used them later in the proceeding. *See id.* at 14.

15. 28 U.S.C. § 1407(a) (2018) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . .").

I. *LONE PINE* ORDERS AS SETTLEMENT NUDGES

As Engstrom points out, there is widespread agreement that not all mass-tort plaintiffs have valid claims, even though no firm data exists on the topic.[16] But if plaintiffs' attorneys file dubious claims, it's with the hope of getting some small payout from a settlement grid—a volume game that they would lose if they withheld those claims from a settlement program.[17] So, if transferee judges issue *Lone Pine* orders *after* lead attorneys negotiate a settlement, those orders are unlikely to weed out suspicious claims and more likely to push reluctant plaintiffs to settle by raising litigation costs and signaling judicial approval of the deal.

Using a dataset of products-liability MDLs that settled over the course of fourteen years,[18] I found that judges in sixteen of thirty-four proceedings issued *Lone Pine* orders, or 47%. Of those, fifteen (93.7%) issued them *after* the first settlement date. This suggests that, at least in these MDL proceedings, *Lone Pine*

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16. Some lawyers have attributed this phenomenon to the role of lead generators and Internet advertising. Paul D. Rheingold, *Multidistrict Litigation Mass Terminations for Failure to Prove Causation*, ABA, (Apr. 24, 2019), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2019/summer2019-multidistrict-litigation-mass-terminations-for-failure-to-prove-causation [https://perma.cc/2A5P-GZRP].

17. Settlements typically include "grids," which group claimants by injury category and payouts.

18. My dataset includes all products-liability proceedings pending on the MDL docket as of May 2013 that concluded in a private, aggregate settlement before May 2018 (thirty-four of the seventy-three proceedings, except the asbestos litigation, for which early electronic records were unavailable). See Figure 2 for those outcomes. I have recently made all of the data and documents publicly available and searchable at *MDL Docs*, U. GA. SCH. L., https://mdl.law.uga.edu [https://perma.cc/W4Y2-CJWL]. Focusing on aggregate settlements filtered out class actions and homed in on personal-injury proceedings, which are more likely to require innovative case-management techniques such as *Lone Pine* orders and plaintiff fact sheets. Those thirty-four proceedings settled over the course of fourteen years and collectively resolved 190,875 actions.

This dataset is the subject of MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 223-26 (2019), except that I further updated and refined my research in this Essay to include recently-issued *Lone Pine* orders and to exclude most "show cause" orders, which the book included. I looked on the MDL dockets for orders that judges either labeled as "*Lone Pine* orders" (or referred to as such in subsequent transcripts) or that required plaintiffs to provide prima facie evidence of causation (typically with an expert report). I did include the first of several show cause orders from *Zimmer Durom Hip Cup*. The judge in that proceeding specified that she issued the order "[f]or the reasons set forth on the record," but that transcript is currently unavailable. Order Granting Zimmer, Inc. and Zimmer Holdings, Inc.'s Motion for Order to Show Cause, *In re* Zimmer Durom Hip Cup Prods. Liab. Litig., No. 2:09-cv-04414-SDW-MCA (D.N.J. Mar. 8, 2019). Subsequent information may suggest excluding it. For information on Engstrom's dataset, see Engstrom & Espeland, *supra* note 11, at 9-10.

orders do not winnow meritless claims pre-settlement.[19] It's the settlement's claims administrators who decide which claims warrant compensation, not judges. Of course, not all noncompensable claims are "meritless"; some may simply fall outside the strict parameters that settling parties negotiate. In the massive *Vioxx* settlement, for example, the claims administrator asked for additional information on 256 potentially fraudulent claims, and did not get a response on 194.[20] Of the sixty-two who responded, thirty-nine overcame the initial suspicion (46%), and Judge Fallon later reported that only two out of 50,000 claims were fraudulent.[21]

Looking at the bigger picture, the first settlements in those thirty-four proceedings occurred, on average, 1,234 days (or three years and 4.5 months) after the Panel centralized them. And the judges who issued *Lone Pine* orders within those proceedings did so on average 1,411 days (or three years and 10.3 months) after centralization.[22] Although not all of the proceedings have closed and the difference is not statistically significant in this sample, closed proceedings with *Lone Pine* orders ended no sooner than those without them. More specifically, the ten closed proceedings that issued *Lone Pine* orders concluded an average of 3,304 days (or a little over nine years) after centralization, whereas the eight proceedings that did not issue them closed an average of 2,904 days (or less than eight years) after centralization—over a year sooner.[23]

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19. Only *Fosamax* issued a pre-settlement *Lone Pine* order, though it issued a second one after a global settlement as well. Pre-settlement *Lone Pine* Order, *In re* Fosamax Prods. Liab. Litig., No. 06-MD-1789 (S.D.N.Y. Nov. 20, 2012); *Lone Pine* Order, *In re Fosamax*, No. 06-MD-1789 (S.D.N.Y. July 30, 2014). This finding is consistent with Engstrom's. *See* Engstrom & Espeland, *supra* note 11, at 14 ("Generally, these twilight orders were issued in the MDL context, after the lead plaintiffs' attorneys had hammered out a tentative settlement agreement and were, often in concert with the defendant, trying to corral the remaining plaintiffs to opt in.").

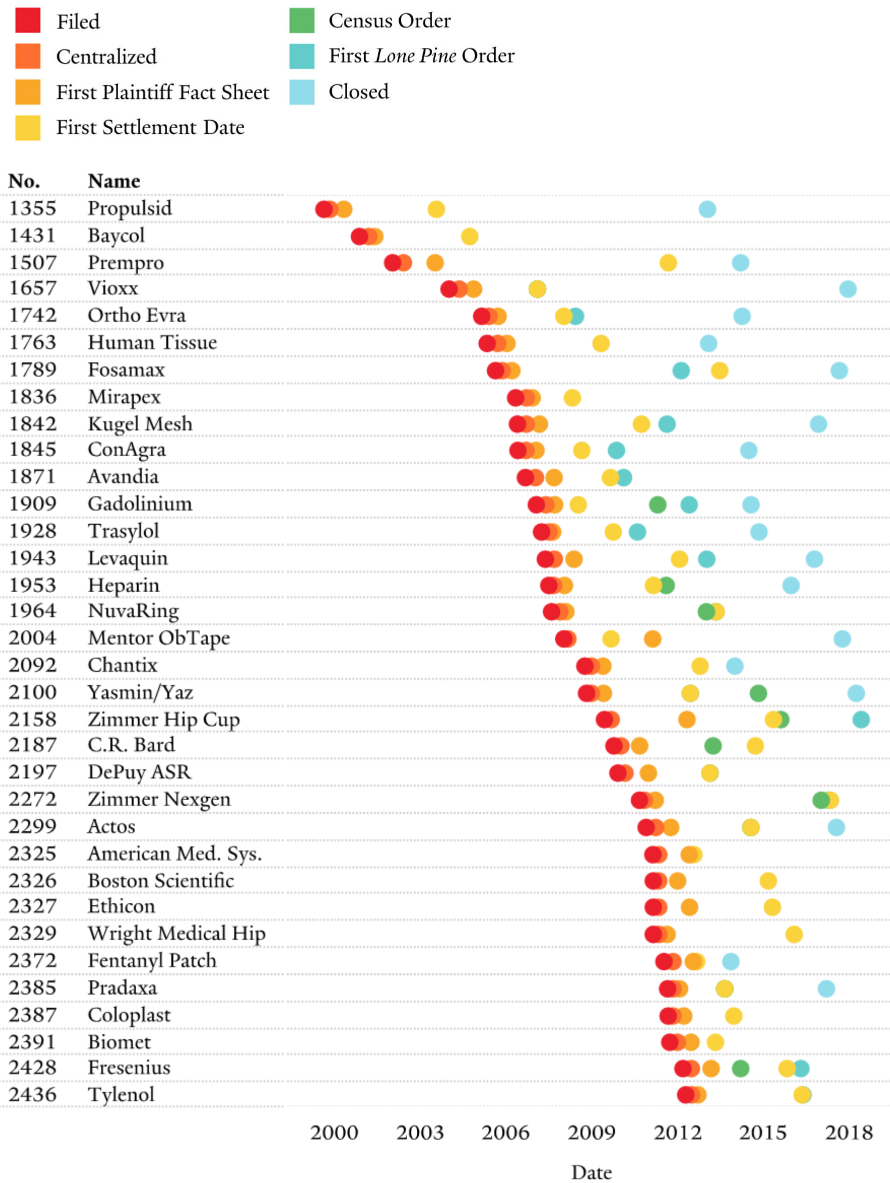
20. Report by the Claims Administrator on Potentially Fraudulent Claims Filed in the Nationwide Vioxx Consumer Settlement Program, *In re* Vioxx Prods. Liab. Litig., No. 05-md-01657 (E.D. La. Feb. 25, 2015). Proceedings, like those over pelvic mesh, that settle on an "inventory," or firm-by-firm basis, may be different. But thus far in those proceedings, Judge Joseph Goodwin has not used *Lone Pine* orders.

21. Status Conference at 59, *In re Vioxx*, No. 05-md-1657 (E.D. La. July 27, 2010).

22. See *infra* Appendix Table A1 for detailed information.

23. Closed proceedings using *Lone Pine* orders included an average of 3,304 actions, versus 2,904 average actions for closed proceedings that did not use them. This suggests that judges may be more inclined to issue *Lone Pine* orders in larger proceedings.

Figure 1.
TIMELINE OF MDL EVENTS WITHIN THE DATASET[24]



As Figure 1 illustrates, 97.3% of these *Lone Pine* orders applied *post-settlement* only to non-settling plaintiffs. If *Lone Pine* orders do not screen cases pre-settlement, then judges must issue them for a different reason entirely. As twilight

orders that follow on the heels of a private deal, Engstrom aptly observes that these *Lone Pine* orders can have a "dark side"—"to *strongarm* claimants to accede to a settlement agreement that they would rather refuse."[25] Thus, any study of *Lone Pine* orders in mass-tort MDLs must begin with an understanding of how those private settlements work, a task to which we now turn.

A. Settlement Dynamics in MDLs

Settlement designers in both mass-tort deals and class-action settlements want to include as many people as possible to give defendants all-inclusive relief. Class-action settlements can work like sticky flypaper: dealmakers aim to keep class members from opting out through most-favored nation provisions, walkaway clauses, and even liens on the defendant's assets in favor of settling class members.[26] Inertia helps. Class members are bound by the deal unless they opt out, so the default position promotes closure for defendants. Yet, Rule 23 includes some safeguards for absent class members—notice, opt-out rights, objections, judicial settlement approval, and adequate representation.[27]

But imagine a scenario without those class-action protections, where a client becomes a number, not a name, and is represented by the same attorney who represents hundreds of others. Imagine further that only one common factual question is needed to centralize those cases before the same judge and that the judge does not appoint lead plaintiffs' lawyers to ensure that they adequately represent the spectrum of competing interests. Instead, judges appoint leaders based on attorneys' expertise, tendency to cooperate with others, and ability to fund the suits.[28] That's what happens before mass torts conclude in private, aggregate settlements, as 47.9% of all products-liability proceedings in the dataset ultimately did. Unlike class settlements, where everyone is automatically "in," plaintiffs' attorneys must convince their clients to settle—to affirmatively act—

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24. Products-liability proceedings see some major events that can affect their duration. Looking over a proceeding's lifecycle shows when these events occur and how quickly they facilitate closure. My deepest thanks to Margaret S. Williams for creating this visual.

25. Engstrom, *supra* note 1, at 36.

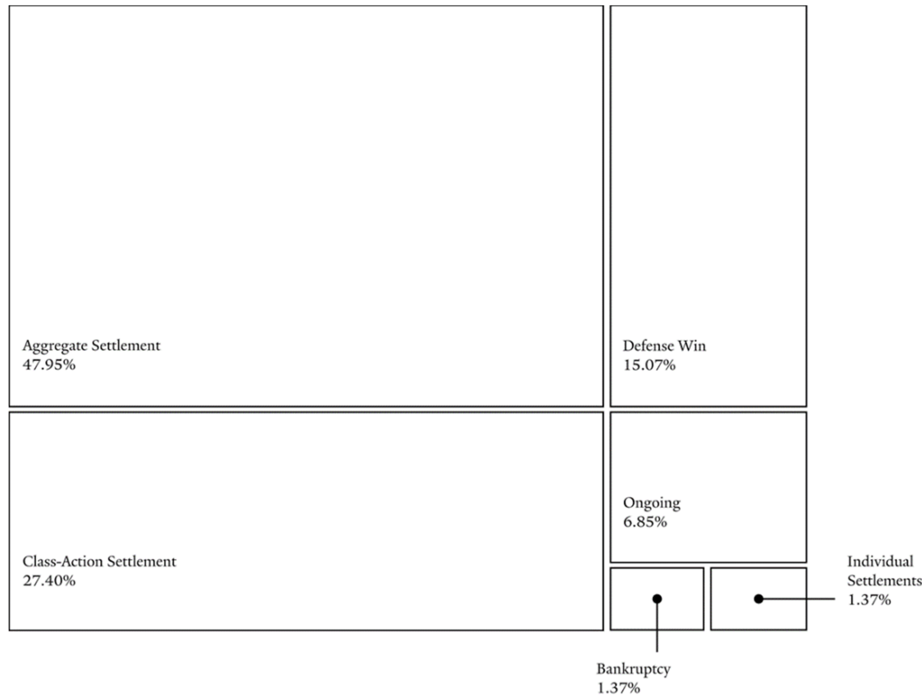
26. *See e.g.*, Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 204-19 (2003). For more detail on the effects of walkaway clauses in MDLs, see Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 92-94 (2017).

27. FED. R. CIV. P. 23. Not that class actions are perfect—far from it. *See, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277 (7th Cir. 2002) (scrutinizing the role of the plaintiffs' attorneys and ultimately rejecting a collusive class-action settlement).

28. BURCH, *supra* note 7, at 90-96; Burch & Williams, *supra* note 12, at 1460-63.

to satisfy defendants' closure goals. That is where the ethical conundrums and the "dark side" that Engstrom alludes to begin.

Figure 2.
HOW DO PRODUCT-LIABILITY MDLS END?[29]



Understanding how these deals work requires a bit of terminology and explanation. In this context, the word "settlement" is a misnomer—the private agreements do not actually settle anything. They are deals between the lead plaintiffs' lawyers and the defendant that set up settlement *programs*. This is key, because the terms require plaintiffs' lawyers to do a little arm-twisting before an actual settlement occurs.[30]

For example, every publicly available private deal in the dataset included a "walkaway" clause, meaning that the defendant could abandon the settlement

29. See *infra* Appendix Table A2 for detailed information.

30. BURCH, *supra* note 7, at 40-54.

offer if too few plaintiffs signed up.[31] To measure compliance and identify the denominator for the walkaway percentage, some leaders request a "census" order, as Figure 1 showed. Although lead lawyers could count federal cases on their own, they want a full roll call that identifies state-court plaintiffs and unfiled claims. So they enlist the court's help: judges in 35% of the thirty-four proceedings required attorneys to register all of their clients, regardless of where (or whether) they filed those claims.[32]

Meeting walkaway percentages, which require between 85% and 100% of plaintiffs to enter the program, means plaintiffs' lawyers must corral as many clients as possible or risk blowing up the offer and not getting paid.[33] Entering the program, however, requires plaintiffs to dismiss their lawsuit with prejudice.[34] Yet, in 60% of the private settlements, plaintiffs had little idea how much—if anything—they would actually receive.[35] Informed consent is therefore a stretch.[36]

That takes out carrots and leaves us with the real stick: ethically dubious clauses that require plaintiffs' attorneys to recommend that all of their clients settle and to withdraw from representing clients who refuse.[37] Non-settling clients find themselves between a rock and a hard place.[38] In corresponding with pelvic-mesh plaintiffs as part of an ongoing study,[39] for example, one plaintiff told me "I let [my law firm] know that I do NOT want them to dismiss my case

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31. Ten of the thirty-four proceedings ending in private, aggregate settlements made those settlements publicly available. Three of the ten had two settlements each, for a total of thirteen.

32. BURCH, *supra* note 7, at 118.

33. *Id.* at 44-45.

34. It thus becomes extremely difficult, if not impossible depending on the proceeding, to tell whether a dismissal on the docket results from entering into a settlement program or failing to comply with a court order.

35. BURCH, *supra* note 7, at 140; Paul D. Rheingold, *In Mass Torts, Who Speaks for the Individual Plaintiffs?*, LEGAL CURRENT (Feb. 23, 2017), http://www.legalcurrent.com/in-mass-torts-who-speaks-for-the-individual-plaintiffs [https://perma.cc/ZC59-JGAR] ("As I consider recent settlements, many were so complex and mechanistic that I could not predict what my clients would get by way of settlement—yet, they had to sign a release as a pre-condition for entering into the settlement plan.").

36. BURCH, *supra* note 7, at 137-44; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 281-92 (2011); Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3252-57 (2013).

37. Burch & Williams, *supra* note 12, at 1502-08.

38. BURCH, *supra* note 7, at 43-54; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 90-102 (2017).

39. This project will be ongoing at least until the end of November 2019. *Procedural Justice Study on Women's Health Multidistrict Litigation*, ELIZABETH CHAMBLEE BURCH, https://www.elizabethchambleeburch.com/womens-mdls [https://perma.cc/NJ8D-ASGZ].

[to enter a settlement program]. They have told me that means I will likely be dropped from them . . . . Right now they are trying to bully me, and that just isn't working!"[40]

To make matters worse, these mandatory recommendation and withdrawal provisions tend to appear alongside simultaneous agreements for attorneys not to solicit or accept new clients.[41] So, if that plaintiff declined to settle and her attorney withdrew from representing her, she may have to proceed pro se—not a simple task for injured plaintiffs laden with medical bills, especially when *Lone Pine* orders demand expensive expert proof.[42]

Withdrawing from representing a client midstream typically necessitates judicial approval.[43] In 35% of the thirty-four proceedings, judges acquiesced. Others were "systematic in not permitting withdrawal."[44] Adaptive lawyers, however, have engineered workarounds in their contingency-fee agreements. Some build escape hatches: one firm incorporated an exit clause that allowed it to get out of its client obligations at any time.[45] Others include deterrents: one firm required a client to reimburse it for her litigation expenses if she went against counsel's settlement advice and insisted on going to trial but ultimately lost.[46]

As Judge Jack B. Weinstein recognized, "[t]heoretically, each client has the option of rejecting his share of a settlement . . . . In practice, the attorney almost always can make a global settlement and convince the clients to accept it."[47] But as the terms *Lone Pine orders*, census *orders*, and withdrawal *orders* suggest,

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40. Elizabeth Chamblee Burch, *Updated: When Trial is Too "Expensive" for Law Firms*, MASS TORT LITIG. BLOG (Apr. 25, 2019), https://lawprofessors.typepad.com/mass_tort_litigation/2019/04/updated-when-trial-is-too-expensive-for-law-firms.html [https://perma.cc/EZB7-6AGD].

41. BURCH, *supra* note 7, at 50-53.

42. BURCH, *supra* note 7, at 46-52.

43. Of the thirteen private settlements that were publicly available, 53% contained withdrawal provisions. BURCH, *supra* note 7, at 45 (including *Propulsid I* & *II*, *Vioxx*, *Fosamax*, and *American Medical Systems*, which require a certain percentage of plaintiffs to participate, and *DePuy ASR I* & *II*, which allows the defendant to expel noncompliant law firms).

44. Transcript of Status Conference at 16, *In re* Fresenius GranuFlo/Naturalyte Dialysate Prods. Liab. Litig. (D. Mass. Dec. 14, 2016).

45. *See e.g.*, Complaint at 34, Contingency Fee Retainer Agreement, Plummer v. McSweeney, No. 4:18-cv-00063 (E.D. Ark. Jan. 24, 2018) ("Counsel may withdraw from Client's representation at any time, upon reasonable written notice to Client at Client's last known address.").

46. Motley Rice LLC Contract of Representation at ¶ 7 ("Should Motley Rice and/or co-counsel recommend settling my claims(s) but I elect to proceed to trial, if no monetary damages are recovered at trial, my attorneys will have the right to collect from me reasonable expenses incurred in this litigation.") (on file with author).

47. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521 n.212 (1994).

attorneys are not alone in their settlement-inducing endeavor. Judges nudge too. In 64.7% of those thirty-four proceedings, judges formally appointed the private claims administrator or settlement master.[48] And, to varying degrees, 52.9% "approved" the private settlements despite having no formal statutory authority to do so.[49]

Approving settlements and appointing claims administrators imprints the deal with a judicial imprimatur. In the *In re Fresenius GranuFlo* litigation, Judge Douglas Woodlock observed, "it is nice to be asked to provide an imprimatur," but "[it is] to some degree not my responsibility to provide imprimaturs to various kinds of things [like appointing a settlement master] . . . . I try not to exercise my jurisdiction when . . . it is the judicial equivalent of a blurb on the back of a new best seller."[50]

But 52.9% of judges felt differently. Judicially endorsing a private deal legitimizes it. Yet none of those proceedings adversarially aired the deal's pros and cons. Judges did not write an opinion reasoning through whether the settlement was fair, reasonable, or adequate, as they would in approving a class settlement. Nor did they decide whether lead lawyers adequately represented plaintiffs with conflicting interests.[51] In some instances, judges blessed the deal before ever ruling on the merits: judges in only 50% of those thirty-four proceedings had made at least three merits-related rulings (summary judgment, *Daubert* motions, class certification, or presiding over a bellwether trial) before the first settlement and any subsequent *Lone Pine* order occurred.[52] In four proceedings, judges issued post-settlement *Lone Pine* orders without making a single merits-related ruling beforehand.[53]

B. Lone Pine *Orders in MDLs*

The *Pradaxa* suits aptly illustrate how *Lone Pine* orders enter into MDL case management and settlement dynamics. In *Pradaxa*, Judge David Herndon never held a bellwether trial nor ruled on summary judgment, *Daubert*, or class

48. BURCH, *supra* note 7, at 116-17.

49. *Id.* at 104-119, 130-33 (discussing judges' lack of authority to endorse private settlements).

50. Transcript of Status Conference at 6-7, *In re* Fresenius GranuFlo/Naturalyte Dialysate Prods. Liab. Litig. (D. Mass. Apr. 29, 2016).

51. BURCH, *supra* note 7, at 90-96.

52. *Id.* at 110.

53. Those proceedings included *In re* Avandia Mktg. Sales Practices & Prods. Liab. Litig., No. 07-MD-1871 (E.D. Pa.); *In re* Gadolinium-Based Contrast Agents Prods. Liab. Litig., Nos. 1:08 GD 50000 (N.D. Ohio); *In re* Ortho Evra Prods. Liab. Litig., No. 1:06-cv-40000 (N.D. Ohio); *In re* Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig., No. 3:12-md-2385-DRH-SCW (S.D. Ill.); *see also* BURCH, *supra* note 7, at 246-65.

certification.[54] He urged the parties to settle and, once they did, issued a flurry of orders. He stayed the proceeding, which meant nonsettling plaintiffs could not continue discovery or have their cases remanded.[55] He issued a census so that all attorneys with a case before him had to include eleven categories of information for all of their clients—regardless of where (or even whether) they had filed suit, and regardless of whether the client wanted to settle.[56]

Judge Herndon then appointed the private claims administrator and imposed additional discovery burdens on non-settling plaintiffs via a *Lone Pine* order.[57] Under the order, non-settling plaintiffs had approximately fifteen days after the settlement's opt-in deadline to produce fact sheets, affidavits, and pharmacy and medical records dating back to five years before their alleged injury occurred. In total, plaintiffs had a little over two months to comply with the *Lone Pine* order by producing an expert report on both general and specific causation. If they failed, they had just twenty days to fix the deficiency—a deadline that could not be extended.[58]

That is the *Lone Pine* order's power. Perhaps now we can see those twilight orders for what they are in MDLs: a cleanup device, not a screening tool. Colorfully described by plaintiffs' leadership as "a post-settlement mop-up procedure," and by defendants as a "put up or shut up" device, settlement designers use *Lone Pine* orders to signal that plaintiffs should either settle or prepare to prove their claims immediately without the procedural protections of summary judgment.[59]

With *Lone Pine* orders positioned as MDL settlements' billy club, I would go further than Engstrom and suggest that they should fail her test per se in the MDL context. She suggests that judges must use *Lone Pine* orders only as a last resort when no other tools suffice, or when credible evidence casts doubt on

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54. BURCH, *supra* note 7, at 110-13.

55. Minute Order, *In re Pradaxa*, No. 3:12-MD-02385-DRH-SCW (S.D. Ill. May 28, 2014).

56. Case Management Order No. 77, *In re Pradaxa*, No. 3:12-MD-02385-DRH-SCW (S.D. Ill. May 29, 2014).

57. Case Management Order No. 78, *In re Pradaxa*, No. 3:12-MD-02385-DRH-SCW (S.D. Ill. May 29, 2014); BURCH, *supra* note 7, at 110-13.

58. Case Management Order No. 78, *supra* note 57. Appendix Table A1 includes the timeframe that other courts have used for issuing similar orders.

59. Order, *In re* Fosamax Prods. Liab. Litig., No. 1:06-md-01789-JFK-JCF (S.D.N.Y. July 30, 2014) (quoting Plaintiffs Steering Committee's Memorandum of Points and Authorities in Opposition to Defendant Merck's Motion for Entry of *Lone Pine* Order at 7, *In re Fosamax*, No. 1:06-md-01789-JFK-JCF (S.D.N.Y. Oct. 29, 2012)); Transcript of Proceedings at 59, *In re* Biomet M2A Mangum Hip Implant Prods. Liab. Litig., No. 3:12-md-02391–RLM-CAN (N.D. Ind. May 18, 2015) (quoting defense attorney John Winter).

some or all of plaintiffs' claims (or dilatory plaintiffs persist).[60] But ready-made rules and statutory remands exist for all non-settling MDL plaintiffs. So, there is no need for *Lone Pine* orders to function as a gap filler.[61] And, as Engstrom readily notes, "a plaintiff's refusal to acquiesce to a global settlement should inform neither prong of the analysis."[62]

Claims that remain post-settlement tend to stem from one of two kinds of plaintiffs: nonresponsive plaintiffs[63] or plaintiffs who want a trial. *Lone Pine* orders do not distinguish between the two. They hit both with a heavy procedural burden that mimics summary judgment but lacks its safeguards. Separating these categories shows that existing procedures aptly address both situations, meaning that *Lone Pine* orders would not survive Engstrom's first hurdle.

First, when nonresponsive plaintiffs refuse to settle, their cases should still be in discovery.[64] If plaintiffs refuse to respond to discovery queries, Rule 37 supplies a series of steps and sanctions: attempts to confer in good faith, an order compelling disclosure or a response, then an array of possible sanctions that range from deeming disputed facts established to dismissing the action.

Second, when non-settling plaintiffs want to try their cases, they will respond to discovery requests and should be able to return to their original district once pretrial matters conclude. After all, multidistrict litigation is supposed to be for pretrial purposes only.[65] In practice, however, only around 3% of all actions transferred have ever been remanded.[66]

As Judge Eduardo Robreno, who handled and remanded many of the asbestos cases, explained, "As a matter of judicial culture, remanding cases is viewed as an acknowledgement that the MDL judge has failed to resolve the case . . . ."[67] That stigma should change. But vanity is no excuse for a *Lone Pine* order, especially when remanding cases can perform the same function. Once

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60. Engstrom, *supra* note 1, at 54-55.

61. *Id.* at 55.

62. *Id.* at 56 n.231.

63. Plaintiffs' nonresponsiveness may result from counsel's poor job of keeping up with her clients.

64. In practice, nonsettling plaintiffs face a discovery stay—another tool that pushes settlement. BURCH, *supra* note 7, at 119, 258-65.

65. *See* 28 U.S.C. § 1407(a) (2018).

66. *See Table S-20: Cumulative Summary of Multidistrict Litigation During the 12-Month Periods Ending September 30, 2016 Through 2018*, U.S. COURTS (2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_s20_0930.2018.pdf [https://perma.cc/7ATN-2YV3].

67. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013).

remanded, a defendant can move for summary judgment on specific causation and, if the plaintiff prevails, she can insist on her day in court.[68]

II. A CRITICAL LOOK AT PLAINTIFF FACT SHEETS

Siphoning claims pre-settlement falls to another judicially concocted order: plaintiff fact sheets. Unlike party-driven discovery devices in routine cases, this judge-issued order requires plaintiffs to provide defendants with specific information about their individual claims, circumstances, and injuries. As Figure 1 illustrates, all but one of the thirty-four proceedings (97%) used a plaintiff fact sheet. Engstrom suggests that streamlined fact sheets "have effectively culled meritless claims" with less expense and fewer disadvantages than *Lone Pine* orders.[69]

As I explain in this Part, however, I have reservations: like *Lone Pine* orders, fact sheets short circuit tried-and-true discovery rules as well as their built-in protections and limits. As they have evolved over time, some have become increasingly burdensome. Once again, that burden tends to fall disproportionately on plaintiffs.

Like Engstrom, I see some upside to narrowly tailored fact sheets: they give both sides data on the proceeding's scope in terms of claims, damages, and numbers. When centralized into a repository that the judge can access, they can help select representative bellwether cases. And, once a plaintiffs' steering committee decides which claims to develop and pursue, they can identify cases falling outside those parameters that should be remanded without having to wait for the MDL to run its course.[70] Perhaps they winnow cases, too. But apart from a preliminary report by the Federal Judicial Center, there has been no systematic study documenting fact sheets' use or effect.[71]

Overall, I have two concerns. First, I worry about the cumulative impact ad hoc procedures have on plaintiffs. And second, I worry about Engstrom's

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68. BURCH, *supra* note 7, at 207-15 (promoting the use of episodic remands).

69. Engstrom, *supra* note 1, at 58.

70. BURCH, *supra* note 7, at 207-15 (promoting the use of episodic remands for plaintiffs who fall outside the scope of the claims the steering committee decides to develop).

71. The Federal Judicial Center prepared a study for the Judicial Conference Advisory Committee on Civil Rules, which showed docket evidence of dismissals in 55% of the proceedings in which judges ordered fact sheets. Margaret S. Williams et al., *Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008-2018*, FED. JUD. CTR. 4 (Mar. 2019), https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf [https://perma.cc/JZ3V-EADN]. An in-depth study of fact sheets is coming soon. Margaret S. Williams & Jason A. Cantone, *Fact Sheets in Mass Tort Multidistrict Litigation Proceedings, 2008-2018* (forthcoming) (on file with author).

recommendation that courts strengthen the consequences for plaintiffs who do not comply with fact sheet orders. As I explore in this Part, plaintiffs' attorneys may not communicate with their clients as much as we would hope and even diligent plaintiffs may face barriers to obtaining their medical records. So, raising the stakes for noncompliance by subjecting plaintiffs to a *Lone Pine* order and then dismissing their claims with prejudice may be unjust.[72]

Like other ad hoc inventions, fact sheets lack standardization and are only loosely tethered to the discovery rules. They thus suffer from two of the pathologies that Engstrom identified with *Lone Pine* orders—they are inconsistent and unpredictable, and may be out of step with the formal procedural scheme.[73]

First, plaintiff fact sheets fluctuate in timing, name, compliance, content, and consequences. As plaintiffs face ever-changing burdens and deadlines, concerns arise about treating like plaintiffs alike. Although nearly all judges in my dataset ordered fact sheets, they did so at different times, ranging from forty-five to 1,084 days after the Panel centralized the proceeding. On average, judges required plaintiff fact sheets 248.8 days post-centralization,[74] but called them different things. Some referred to fact sheets as plaintiff profile forms,[75] which generally required less information (and were sometimes a precursor to a fact sheet), while others termed follow-on fact sheets a "supplemental discovery obligation," which required an expert report (like a *Lone Pine* order).[76]

Plaintiff fact sheets likewise varied substantially on compliance deadlines, which spanned from thirty to 120 days.[77] Although rolling deadlines make sense given that cases enter a multidistrict proceeding at different times, deadlines depended on everything from the first letter of the plaintiff's last name,[78] what

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72. *See* Engstrom, *supra* note 1, at 60. Engstrom notes that plaintiffs should have reasonable time to cure deficiencies first.

73. *See id.* at 37-46. Fact sheets have, however, been upheld on appellate review. *See, e.g.*, *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1237 (9th Cir. 2006); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 496 F.3d 863 (8th Cir. 2007).

74. This is around eight months, which is consistent with the Federal Judicial Center's study finding that the average time was 8.2 months. *See* Williams et al., *supra* note 71, at 3.

75. *See, e.g.*, Pretrial Order No. 9 Plaintiff Profile Form/Execution of Authorizations, *In re* Propulsid Prods. Liab. Litig., No. 00-md-01355 (E.D. La. Jan. 31, 2001).

76. *See* Pretrial Order No. 102, *In re* Baycol Prods. Litig., No. 01-md-01431 (D. Minn. Jan. 16, 2004).

77. BURCH, *supra* note 7, at 258-65.

78. *E.g.*, Pretrial Order No. 18A, *In re* Vioxx Prods. Liab. Litig., No. 2:05-md-01657 (E.D. La. Aug. 17, 2005).

"wave" or "phase" the plaintiff's case fell into,[79] and when the plaintiff filed her complaint,[80] to the transfer date[81] and whether the plaintiff entered a tolling agreement.[82]

As one would expect, fact sheets sought different information. In general, however, they requested (1) medical and pharmacy records, (2) personal background information, and (3) a plaintiff's litigation history—from previous tort claims to employment lawsuits to bankruptcy.[83] The first two categories appear tied to a hodgepodge of discovery rules, but the third makes little sense. Prior lawsuits unrelated to the current claim are not "relevant to any party's claim or defense" under Rule 26, nor do they have a tendency to prove or disprove a fact that matters under substantive tort law, likely rendering them irrelevant under evidentiary rules.[84] The only plausible inference a jury could draw from that information would be a forbidden and often unsupportable one: that this is an overly litigious person who probably has a frivolous claim.[85]

These idiosyncrasies raise the second concern: plaintiff fact sheets, like *Lone Pine* orders, can be out of step with the formal procedural scheme. Their requested content reads like a pancaked version of initial disclosures, interrogatories, requests to produce documents, and deposition queries, but without each rule's prepackaged protections and limits. For instance, some judges deem fact sheets "interrogatories" under Rule 33, which imposes a twenty-five-question limit, including subparts. But fact sheets often exceed 100 questions and seek information that one would ordinarily expect to convey when deposed or to send as part of Rule 26's initial disclosures.[86]

In a run-of-the-mill case, parties must send initial disclosures at least fourteen days after the Rule 26(f) conference, which occurs "as soon as

79. *See, e.g.*, Pretrial Order No. 2, *In re* Mirapex Prods. Liab. Litig., No. 07-md-01836 (D. Minn. Sept. 5, 2007); Pretrial Order No. 4, *In re* Levaquin Prods. Liab. Litig., No. 08-md-01943 (D. Minn. Feb. 20, 2009).

80. *See, e.g.*, Pretrial Order No. 7, *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., No. 07-md-01871 (E.D. Pa. June 9, 2008).

81. *E.g.*, Case Management Order No. 2, *In re* Zimmer Nexgen Knee Implant Prods. Liab. Litig., No. 1:11-cv-05468 (N.D. Ill. Dec. 23, 2011).

82. *See e.g.*, Pretrial Order No. 7, *supra* note 75.

83. Williams et al., *supra* note 71, at 2.

84. FED. R. CIV. P. 26(b)(1); FED. R. EVID. 401. Questions about prior litigation history are likely a relic from fact sheets' origins in the *Silica* litigation. *See* Order No. 6 at ex. A, *In re* Silica Prods. Liab. Litig., No. 03-md-01553 (S.D. Tex. Feb. 5, 2004).

85. This inference would likely be excluded under Federal Rule of Evidence 403's balancing test because it has little-to-no relevance to substantive law and any probative value would be substantially outweighed by the danger of unfair prejudice.

86. *See e.g.*, Pretrial Order No. 40, *In re* Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-md-02327 (S.D.W.V. Mar. 6, 2013).

practicable."[87] And then, once served with interrogatories and requests to produce documents, parties have thirty days to respond, unless the court orders otherwise.[88] In the usual sequencing, then, most plaintiffs will know several months in advance what lies ahead and what documents they will likely need to gather. But in an MDL, their case might be transferred as a "tag-along" action such that an order for fact sheets greets them upon arrival. Most judges take care to give these new arrivals longer deadlines, and rightfully so, but there are no guarantees.

Timing can matter, especially when it comes to medical records and device injuries, which can entail multiple explant surgeries, specialists, and years of follow-up care. One pelvic-mesh plaintiff explained that she had seen over seventy-five different doctors in thirteen years and had eight mesh-related surgeries.[89] And a 2018 study on U.S. News & World Report's top-ranked hospitals found that even patients with less-extensive medical histories can face "long waiting periods and unclear request processes" for their records.[90] While some hospitals made electronic and paper records available almost immediately, others took four to eight weeks and charged over $280 for a 200-page record.[91] Even among these top hospitals, the report found "a lack of transparency" in the request process, noncompliance with HIPAA's recommended fees, and "processing times longer than the state-required time."[92]

When ongoing treatment and records requests pose obstacles to gathering the information that fact sheets seek, lenience—not stricter penalties for noncompliance—should be the norm. Yet the consequences for noncompliance fluctuated substantially.[93] Most judges gave plaintiffs a chance to "cure" any

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87. FED. R. CIV. P. 26(f).

88. FED. R. CIV. P. 33(b)(2), 34(b)(2)(A).

89. "I have seen 8 GI doctors, 1 oncologist, 9 [OBGYNs], 2 infectious disease doctors, 1 proctologist, 3 pelvic reconstructions specialists, 2 plastic surgeons, 9 urologists, 4 dermatologists, 4 allergists, 5 physical therapists, 11 primary care providers, 1 foot doctor, 2 endocrinologists, 1 ophthalmologist, 3 rheumatologists. Then because of not being treated and gaslighted and emotionally abused by doctors, 3 psychiatrists, 3 psychologists, 3 counselors," she wrote. Her identity is confidential. She is one of the many amazing women with whom I have interacted as part of an ongoing procedural justice study on women's health multidistrict proceedings. *See Procedural Justice Study on Women's Health Multidistrict Litigation*, ELIZABETH CHAMBLEE BURCH, https://www.elizabethchambleeburch.com/womens-mdls [https://perma.cc/5X2E-FGBE].

90. Carolyn T. Lye et al., *Assessment of US Hospital Compliance with Regulations for Patients' Requests for Medical Records*, JAMA NETWORK OPEN 4-6 (Oct. 5, 2018).

91. *Id.* at 4-6.

92. *Id.* at 9.

93. *Compare* Pretrial Order No. 28, *In re* Vioxx Prods. Liab. Litig., No. 05-md-1657 (E.D. La. Nov. 9 2007) (giving plaintiffs twenty days to cure but refusing to grant any further extensions);

errors or omissions; but others were more draconian, allowing defendants to move to dismiss plaintiffs' claims (without prejudice) thirty days after notifying them.[94]

As a discovery tool, fact sheets should be governed by Rule 37, which sets up a predictable—yet flexible—sequence: defense counsel would move to compel only after certifying that she first conferred with opposing counsel in good faith. This, one hopes, eliminates motions to compel in cases where plaintiffs encounter roadblocks beyond their control. If defendants do move to compel, noncompliant plaintiffs' counsel would have an opportunity to respond and be heard. Afterward, if a plaintiff still does not comply, the court may choose from a menu of options ranging from striking pleadings to dismissing the action in whole or in part.[95]

As fact sheets evolve through norms that operate in the shadows of formal discovery rules, it is not just their variety and unpredictability that is worrisome.[96] Over time, as lawyers simply add to what is already there, the questionnaires can look more like a museum storeroom and less like a streamlined discovery tool. An early fact sheet in the *Silica* litigation sought just a few pages of basic questions,[97] but some recent examples span forty-eight pages (with forms and all), exceed 100 questions, and seek fifteen years of medical history, ten years of employment history, and information on everything from divorces to children's names, addresses, and birthdays.[98]

With increased length, fact sheets' aim may shift from discovery to harassment—something that Engstrom cautions against and that the federal rules committee explicitly considered when limiting parties to twenty-five interrogatories.[99] Plaintiffs' education levels vary and not all receive attorney

with In re Composix Kugel Hernia Repair Patch Litig., No. 04-md-1842 (D.R.I. Dec. 6, 2007). In *Kugel Mesh*, the court subjected noncompliant plaintiffs to dismissal if "good cause for such dismissal is shown," meaning that the plaintiff failed to submit a fact sheet, failed to complete a fact sheet, or failed to fill in material aspects of the fact sheet. The defendant had to send plaintiff's counsel a letter of noncompliance, which triggered an additional forty-five days to comply.

94. Order Regarding Completion of IH/PTC Plaintiff Fact Sheets, *In re* Mirena IUS Levonorgestrel-Related Prods. Liab. Litig. (No. II), No. 17-md-02767 (S.D.N.Y. Aug. 30, 2017).

95. FED. R. CIV. P. 37.

96. *See* Burch & Williams, *supra* note 12, at 1456-59 (observing the growth of ad hoc practices).

97. Order No. 6, *supra* note 84, at ex. A.

98. *See, e.g*, Pretrial Order No. 40, *supra* note 86; Pretrial Order No. 2, *supra* note 79; *In re* Zimmer Durom Hip Cup Prods. Liab. Litig., No. 09-cv-04414 (D.N.J. Jan. 31, 2013).

99. FED. R. CIV. P. 33, 1993 advisory comm. note ("Experience in over half of the district courts has confirmed that limitations on the number of interrogatories are useful and manageable. Moreover, because the device can be costly and may be used as a means of harassment, it is

assistance. As representing mass-tort clients has turned into a wholesale business for many lawyers, some plaintiffs have never even spoken with their attorney. Third-party vendors (often owned by plaintiffs' lawyers) have popped up to fill the gap, promising that "our Physicians in India prepare Plaintiff Fact Sheets for $35 an hour as a billable expense."[100] So, by using a third-party service, the money eventually comes out of plaintiffs' pockets as a cost rather than attorneys' contingency fees, thereby impacting plaintiffs' bottom line. In short, while plaintiffs' fact sheets aim to streamline discovery, in practice, they can bypass built-in discovery protections and impact parties disproportionately.

CONCLUSION

It is true that multidistrict litigation should not abrogate defendants' ability to discover plaintiff-specific information or the basic tenet that plaintiffs must prove their claims. But, as Engstrom acknowledges, judges should be mindful about overtaxing plaintiffs too—whether through *Lone Pine* orders or plaintiff fact sheets.[101] Procedural justice dictates that procedural burdens should not fall disproportionally on one party. Rather, rules should distribute the risks of error and the costs of access as evenly as possible.[102] Rule 26 strives to accomplish this by requiring that discovery remain proportional to a case's needs. But as hand-me-down procedures like plaintiff fact sheets and *Lone Pine* orders spread through common-law norms and escape formal rules' rigorous vetting process, parity may dissolve.[103]

Where does all of this leave us? On the one hand, transferee judges are right: every mass-tort proceeding differs in some respect, which suggests the need for flexibility over rigidity. On the other hand, when judges and parties invent procedures for a particular proceeding, they risk focusing on the pragmatics of that case, overlooking normative issues, and importing the baggage of their biases and thoughts about the proceeding. Achieving neutrality, where discovery

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desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases . . . ."); Engstrom, *supra* note 1, at 60 n.247.

100. *Plaintiff Fact Sheets*, REC. REFORM, https://www.medquestltd.com/mass-torts/plaintiff-fact-sheets [https://perma.cc/WRW5-AKMK].

101. Engstrom, *supra* note 1, at 60 n.247.

102. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 257-58 (2004); Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 514 (2003).

103. In the Federal Judicial Center's study, 42% of courts required defendant fact sheets, whereas 57% required plaintiff fact sheets (87% of proceedings with 1,000 or more actions required plaintiff fact sheets). Williams et al., *supra* note 71. Still, searching company databases is unlikely to be as burdensome as requiring plaintiffs to provide fifteen years of pharmacy and medical records.

burdens and the risks of erroneous decisions fall equally on both parties, may be hard in the heat of battle. Although design choices should respond to what is happening on the ground, issuing a *Lone Pine* order or a plaintiff fact sheet does not occur in a vacuum; those decisions have ripple effects that can impact plaintiffs more harshly than defendants.[104] If judges experiment with bespoke procedures, they should take care to ensure a fair fit for both parties that works with—not against—off-the-rack rules.

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104. *See, e.g.*, Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 SEDONA CONF. J. 1, 8 n.40 (2011) ("In some cases, however, it appears to plaintiffs that the 'fact sheet' process does not save them time or money, as defendants have seized and developed fact sheets as a weapon of attrition, using shotgun 'deficiencies' (including typographical errors, failure to provide information as to questions marked 'N/A,' missing middle initials, etc.) to prolong the process and, as in PPA, to set up motions for dismissal as the ultimate sanction.").

APPENDIX

TABLE A1
EVENT OCCURRENCE DATES WITHIN THE MDL PRODUCTS-LIABILITY DATASET

Litigation Name	*MDL No.*	*Days from Centralization to PFS*	*Days from Centralization to First Settlement*	*Days from Centralization to LPO*	*Days from Centralization to Census*	*Days from Centralization to Closure*
Propulsid	1355	177	1,362			4,823
Baycol.	1431	76	1,290			
Prempro	1507	406	3,384			4,307
Vioxx	1657	181	996	996	996	4,964
Ortho Evra	1742	117	957	1,105		3,234
Human Tissue	1763	117	1,319			2,694
Fosamax	1789	122	2,775	2,286		4,305
Mirapex	1836	75	587			
Kugel Mesh Hernia Patch	1842	167	1,470	1,796		3,731
ConAgra Peanut Butter	1845	128	712	1,156		2,846
Avandia	1871	237	959	1,126		
Gadolinium Contrast Dyes	1909	110	413	1,828	1,429	2,619

Litigation Name	*MDL No.*	*Days from Centralization to PFS*	*Days from Centralization to First Settlement*	*Days from Centralization to LPO*	*Days from Centralization to Census*	*Days from Centralization to Closure*
Trasylol	1928	45	820	1,129		2,681
Levaquin	1943	252	1,600	1,946		3,323
Heparin	1953	137	1,273		1,434	3,031
NuvaRing	1964	77	1,995	1,995	1,873	
Mentor Corp. ObTape.	2004	1,084	552			3,506
Chantix	2092	146	1,387			1,831
Yasmin and Yaz	2100	153	1,261	1,261	2,132	3,382
Zimmer Durom Hip Cup	2158	968	2,073	3,194	2,165	
C.R. Bard	2187	238	1,715		1,176	
DePuy ASR	2197	297	1,082		1,085	
Zimmer Nexgen Knee Implant	2272	137	2,374	2,352	2,256	
Actos (Pioglitazone)	2299	193	1,217		1,216	2,309
American Medical Systems	2325	387	448			

Litigation Name	*MDL No.*	*Days from Centralization to PFS*	*Days from Centralization to First Settlement*	*Days from Centralization to LPO*	*Days from Centralization to Census*	*Days from Centralization to Closure*
Boston Scientific	2326	240	1,399			
Ethicon	2327	393	1,450			
Wright Medical	2329	105	1,728			
Watson Fentanyl Patch	2372		301			738
Pradaxa	2385	82	658	659	659	1,958
Coloplast Corp.	2387	137	777			
Biomet	2391	174	486			
Fresenius GranuFlo /NaturaLyte	2428	252	1,223	1,399	629	
Tylenol	2436	80	1,411	1,423		
Average		248.8	1,234.70	1,411	1,414.7	1,348

TABLE A2
JUDICIAL ASSIGNMENTS AND RESOLUTIONS IN THE MDL PRODUCTS-LIABILITY DATASET

Judge	Litigation Name	MDL Number	Outcome
Eduardo C. Robreno	In re: Asbestos Prod. Liab. Litig. (No. VI)	875	Aggregate Settlement
John Grady	In re: Factor VIII or IX Concentrate Blood Products Prod. Liab. Litig.	986	Class-action Settlement
Harvey Bartle, III	In re: Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig.	1203	Class-action Settlement
Eldon E. Fallon	In re: Propulsid Prod. Liab. Litig.	1355	Aggregate Settlement
Michael James Davis	In re: Baycol Prod. Liab. Litig.	1431	Aggregate Settlement
William R. Wilson	In re: Prempro Prod. Liab. Litig.	1507	Aggregate Settlement
James Moody, Jr.	In re: Accutane (Isotrentinoin) Prod. Liab. Litig.	1626	Defense Win
Patti B. Saris	In re: Neurontin Marketing, Sales Practices and Prod. Liab. Litig.	1629	Class-action Settlement
Eldon E. Fallon	In re: Vioxx Prod. Liab. Litig.	1657	Aggregate Settlement
Esther Salas	In re: Ford Motor Co. E-350 Van Prod. Liab. Litig. (No. II)	1687	Defense Win
Bernard Friedman	In re: Ford Motor Co. Speed Control Deactivation Switch Prod. Liab. Litig.	1718	Defense Win
Rodney W. Sippel	In re: Celexa and Lexapro Prod. Liab. Litig.	1736	Individual Settlements
David A. Katz	In re: OrthoEvra Prod. Liab. Litig.	1742	Aggregate Settlement
Todd J. Campbell	In re: Aredia and Zometa Prod. Liab. Litig.	1760	Defense Win
William J. Martini	In re: Human Tissue Prod. Liab. Litig.	1763	Aggregate Settlement
John F. Keenan	In re: Fosamax Prod. Liab. Litig. (MDL 1789)	1789	Aggregate Settlement
Michael James Davis	In re: Mirapex Prod. Liab. Litig.	1836	Aggregate Settlement
Mary M. Lisi	In re: Kugel Mesh Hernia Patch Prod. Liab. Litig.	1842	Aggregate Settlement

Judge	Litigation Name	MDL Number	Outcome
Thomas W. Thrash, Jr.	In re: ConAgra Peanut Butter Prod. Liab. Litig.	1845	Aggregate Settlement
Cynthia M. Rufe	In re: Avandia Marketing Sales Practices and Prod. Liab. Litig.	1871	Aggregate Settlement
Kurt D. Engelhardt	In re: FEMA Trailer Formaldehyde Prod. Liab. Litig.	1873	Class-action Settlement
Dan A. Polster	In re: Gadolinium Contrast Dyes Prod. Liab. Litig.	1909	Aggregate Settlement
Donald M. Middlebrooks	In re: Trasylol Prod. Liab. Litig.	1928	Aggregate Settlement
John R. Turnheim	In re: Levaquin Prod. Liab. Litig.	1943	Aggregate Settlement
James Carr	In re: Heparin Prod. Liab. Litig.	1953	Aggregate Settlement
Ann D. Montgomery	In re: Zurn Pex Plumbing Prod. Liab. Litig.	1958	Class-action Settlement
Rodney W. Sippel	In re: NuvaRing Prod. Liab. Litig.	1964	Aggregate Settlement
Ortrie D. Smith	In re: Bisphenol-A (BPA) Polycarbonate Plastics Prod. Liab. Litig.	1967	Class-action Settlement
Christopher A. Boyko	In re: Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.	2001	Class-action Settlement
Clay D. Land	In re: Mentor Corp. ObTape Transobuturator Sling Prod. Liab. Litig.	2004	Aggregate Settlement
Andrew J. Guilford	In re: Land Rover LR3 Tire Wear Products Liability Litigation	2008	Class-action Settlement
Brian M. Cogan	In re: Bayer Corp. Combination Asprin Prod. Marketing and Sales Practices Litig.	2023	Class-action Settlement
James Ware	In re: Apple iPhone 3G Products Liability Litigation	2045	Defense Win
Eldon E. Fallon	In re: Chinese-Manufactured Drywall Prod. Liab. Litig.	2047	Class-action Settlement
Cecilia M. Altonaga	In re: Denture Cream Products Liab. Litig.	2051	Defense Win
Inge P. Johnson	In re: Chantix Prod. Liab. Litig	2092	Aggregate Settlement
David R. Herndon	In re: Yasmin and Yaz (Drospirenone) Marketing , Sales Practices Prod. Liab. Litig.	2100	Aggregate Settlement

Judge	Litigation Name	MDL Number	Outcome
Michael P. McCuskey	In re: IKO Roofing Shingle Prod. Liab. Litig.	2104	Ongoing
James V. Selna	In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liab. Litig.	2151	Class-action Settlement
Susan D. Wigenton	In re: Zimmer Durom Hip Cup Prod. Liab. Litig.	2158	Aggregate Settlement
Cormac J. Carney	In re: Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices, and Products Liab. Litig.	2172	Defense Win
Carl J. Barbier	In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010	2179	Class-action Settlement
Joseph R. Goodwin	In re: C.R. Bard, Inc., Pelvic Repair System Prod. Liab. Litig.	2187	Aggregate Settlement
Ronald Whyte	In re: Apple Inc. iPhone 4 Marketing, Sales Practices & Prod. Liab. Lit.	2188	Class-action Settlement
David A. Katz	In re: DePuy Orthopaedics Inc., ASR Hip Implant Prod. Liab. Litig.	2197	Aggregate Settlement
Matthew F. Kennelley	In re: Navistar 6.0 Diesel Engine Prod. Liab. Litig.	2223	Class-action Settlement
Danny C. Reeves	In re: Darvocet, Darvon and Propoxyphene Prod. Liab. Litig.	2226	Defense Win
Gregory L. Frost	In re: Porsche Cars North America Inc. Plastic Coolant Tubes Prod. Liab. Litig.	2233	Class-action Settlement
Freda Wolfson[105]	In re: Fosamax (Alendronate Sodium) Prod. Liab. Litig. (No. II)	2243	Ongoing
James Edgar Kinkeade	In re: DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.	2244	Ongoing
Rebecca R. Pallmeyer	In re: Zimmer Nexgen Knee Implant Prod. Liab. Litig.	2272	Aggregate Settlement
J. Michelle Childs	In re: Building Materials Corporation of America Asphalt Roofing Shingle Prod. Liab. Litig.	2283	Class-action Settlement
Gene E. K. Pratter	In re: Imprelis Herbicide Marketing, Sales Practice, and Prod. Liab. Litig.	2284	Class-action Settlement

105. Formerly assigned to Joel A. Pisano.

Judge	Litigation Name	MDL Number	Outcome
Rebecca F. Doherty	In re: Actos (Pioglitazone) Prod. Liab. Litig.	2299	Aggregate Settlement
Thomas B. Russell	In re: Skechers Toning Shoe Prod. Liab.Litig.	2308	Class-action Settlement
Benita Y. Pearson	In re: Ford Motor Co. Spark Plug and 3-Valve Engine Prod. Liab. Litig.	2316	Class-action Settlement
Joseph R. Goodwin	In re: American Medical Systems Inc., Pelvic Repair System, Prod. Liab. Litig.	2325	Aggregate Settlement
Joseph R. Goodwin	In re: Boston Scientific Corp Pelvic Repair Sys. Prods. Liab. Litig.	2326	Aggregate Settlement
Joseph R. Goodwin	In re: Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.	2327	Aggregate Settlement
William S. Duffey, Jr.	In re: Wright Medical Technology, Inc., Conserve Hip Implant Prod. Liab. Litig.	2329	Aggregate Settlement
Brian M. Cogan[106]	In re: Propecia (Finasteride) Prod. Liab. Litig.	2331	Ongoing
David C. Norton	In re: MI Windows & Doors, Inc., Prod. Liab. Litig.	2333	Class-action Settlement
Cynthia M. Rufe	In re: Zoloft (Sertraline Hydrochloride) Prod. Liab. Litig.	2342	Defense Win
Matthew F. Kennelley	In re: Watson Fentanyl Patch Prod. Liab. Litig.	2372	Aggregate Settlement
David R. Herndon	In re: Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig.	2385	Aggregate Settlement
Joseph R. Goodwin	In re: Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig.	2387	Aggregate Settlement
Robert L. Miller, Jr.	In re: Biomet M2a Magnum Hip Implant Prod. Liab. Litig.	2391	Aggregate Settlement
Dale S. Fischer	In re: Nexium (Esomeprazole) Products Liability Litigation	2404	Defense Win
Freda L. Wolfson	In re: Plavix Marketing, Sales Practices & Prod. Liab. Litig. (No. II)	2418	Ongoing
F. Dennis Saylor	In re: New England Compounding Pharmacy, Inc. Prod. Liab. Litig.	2419	Bankruptcy
Douglas P. Woodlock	In re: Fresenius GranuFlo/NaturaLyte Dialysate Prod. Liab. Litig.	2428	Aggregate Settlement

106. Reassigned from John Gleeson.

Judge	Litigation Name	MDL Number	Outcome
Cathy Seibel	In re: Mirena IUD Prod. Liab. Litig.	2434	Defense Win
Lawrence F. Stengel	In re: Tylenol (Acetaminophen) Marketing, Sales Practices and Prod. Liab. Litig.	2436	Aggregate Settlement