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Articles

PLAINTIFFS' PROCESS: CIVIL PROCEDURE, MDL, AND A DAY IN COURT

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INTRODUCTION

If the 1970 decision in *Goldberg v. Kelly* marked the heyday of a focus on plaintiffs' constitutional rights in civil procedure, the years since then have been largely defendant-centric, with decades of due process jurisprudence now developed to protect where and how defendants can be sued. But that defendant-centricity is beginning to change. We focus in this essay on a theory of what we call "plaintiffs' process," and argue for its more salient consideration in civil procedure doctrine.

As an important new scholarly literature has developed on access to courts, plaintiffs are becoming more visible in civil procedure scholarship, if not yet in civil procedure's modern due process considerations. Some of this work has been spurred by doctrinal developments that have closed courthouse doors to many—from the Supreme Court's line of cases favoring arbitration, to its almost simultaneous tightening of pleading standards in the *Twombly* and *Iqbal* cases, to its stingy, modern approach to class action certification.

At the same time, there is a parallel, more mature revolution underway in the on-the-ground practice of complex civil procedure—a movement that has sought to open new pathways for plaintiffs to access court in the aggregate. This revolution grows out of other developments that have blocked courthouse doors: in the idealized, old-fashioned, paradigm, plaintiffs lacking leverage or the means to sue on their own would turn to class actions. But the Court has made class certification increasingly unattainable, with ever higher bars for commonality, including a federalism-oriented approach that often dooms

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class certification for nationwide damages suits involving many different states' laws.

In response, enterprising plaintiffs, or more aptly their enterprising lawyers, have not given up. Instead, they've innovated, finding unorthodox ways to invigorate aggregation anew.¹ As one example that made waves, the law firm Keller Lenkner took companies up on their insistence on individual (rather than class) arbitration by representing tens of thousands of individuals simultaneously.² Flooding the arbitration system with individual claims forced companies to pay \$3,000 to arbitrate each \$100 claim.³

But the most salient modern workaround in the face of limited class actions is the rise of multidistrict litigation (MDL), an old procedural vehicle that has become galvanized into a highly muscular tool to aggregate where class actions fail. Initially envisioned to coordinate individual electrical equipment antitrust cases before a single judge, MDL has dramatically transformed in response to the challenges of the day.⁴ Now, it is a force for nationalized, aggregated, preclusive case resolution via settlement, rather than the initially intended federalism-friendly hub that would coordinate only pretrial action before

1. Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 848 (2017) (“Amchem invited the use of subclasses as a ‘structural protection’ against rivalrous claims to limited recoveries.” (referencing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997))).

2. J. Marcia Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1323–24 (2018).

3. When the defendant, Intuit, then tried to transform the case into a class action settlement, Judge Charles Breyer, a former MDL Panel member, said, “Intuit was, in Hamlet’s words, hoisted by their own petard.” Justin Elliot, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud*, PROPUBLICA (Feb. 23, 2022, 3:15 PM), <https://www.propublica.org/article/turbotax-maker-intuit-faces-tens-of-millions-in-fees-in-a-groundbreaking-legal-battle-over-consumer-fraud>. He later rejected the class settlement. See Transcript of Proceedings at 6–7, *In re Intuit Free File Litig.*, No. 19-C-02546 (N.D. Cal. Dec. 17, 2020) (rejecting class action motion). See also, e.g., Alison Frankel, *Judge Breyer Rejects \$40 Million Intuit Class Settlement Amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM), <https://www.reuters.com/article/idUSKBN28W2M5> (rejecting class action motion); Alison Frankel, *Uber Loses Appeal to Block \$92 Million in Mass Arbitration Fees*, REUTERS (Apr. 18, 2022 4:54PM), <https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18/> (rejecting appeal based on class action); Alison Frankel, “*This Hypocrisy will Not be Blessed*”: Judge Orders Door-Dash to Arbitrate 5,000 Couriers’ Claims, REUTERS (Feb. 11, 2020 5:49PM) (requiring defendant to arbitrate thousands of claims individually).

4. Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1723–24 (2017).

sending cases back out to various decentralized spokes for individual trials under the nostalgic procedure paradigm.⁵

We have previously detailed this “MDL Revolution.”⁶ But its stakes continue to explode. In 2020, *one out of every two* filed federal civil cases was in an MDL proceeding, and 97% of those were products-liability cases, the focus of this essay.⁷ In 2021, when civil case filings declined by 27% overall, 30% of all new filings were still MDLs; even as the docket declined further in 2022, new MDL filings still comprised 22%.⁸ In other words, the civil docket is now significantly occupied by an unorthodox aggregation vehicle that was not supposed to be about centralized case resolution at all.⁹

How does this shift link to plaintiffs’ due process rights? MDLs do allow plaintiffs to aggregate to obtain redress in ways that arbitration and the traditional class action often forbid.¹⁰ We celebrate this process-opening aspect of MDL; our goal here is not to eliminate it. But we do wish to ground MDLs in reality. And the reality is that, once swept into an MDL, plaintiffs lose many of the choices and rights that are the hallmark of individual, and even class action, litigation. Indeed, class actions are the one area in which rule-makers and the

5. *Id.* at 1724–25; Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 16–19 (2021).

6. Gluck & Burch, *MDL Revolution*, *supra* note 5, at 16–19.

7. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DOCKET TYPE SUMMARY (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Type-December-15-2020.pdf. (listing 59 of 178 pending MDLs as products liability proceedings); U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING (Dec. 15, 2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2020.pdf (adding the total actions in the 59 pending MDLs equals 322,443 cases out of a total of 330,816 cases pending on the MDL docket).

8. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (Sept. 30, 2021), <https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf> (noting that 103,065 civil actions were subjected to MDL); U.S. CTS., U.S. DISTRICT COURTS – JUDICIAL BUSINESS 2021 (2021), <https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021> (listing 344,567 civil filings in 2021).

9. See Bradt, *Something Less and Something More*, *supra* note 4, at 1723–35 (detailing the origins of MDL).

10. Judith Resnik, “Vital” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1782 (2017).

Court have paid at least some attention to plaintiffs' due process, on the ground that aggregate litigation poses special risks to the constitutional right to one's "day in court."¹¹

MDLs, in contrast, chafe at almost every aspect of procedure's traditional rules and values. They are typified by a "Wild West" mindset—an insistence that each proceeding is too unique or complex to be confined by the transsubstantive Federal Rules.¹² MDL judges invent new mechanisms of procedure and seek creative means to achieve broad preclusion and enable global settlement. They do most of their creative and dispositive work in pretrial proceedings, so plaintiffs rarely can obtain appellate review. Because cases almost always settle, MDL judges also do not have to pay especially close attention to the nuances of and differences across state law; some MDLs are known for blurring individual state legal claims into a "mush" of a national tort law that does not actually exist but facilitates settlement, nonetheless.¹³ These tendencies also mean that the state substantive tort law underlying many of these MDL cases never gets fully developed.

Over the past few decades, MDLs have exerted a gravitational pull such that judges have resolved 99% of cases themselves rather than sending them home as the statute envisions.¹⁴ This has prompted some to call MDLs "black holes."¹⁵ In the process, as we shall elaborate, judges assert questionable personal jurisdiction over plaintiffs.

11. As we discuss in Part IV, other litigation barriers, such as stricter pleading requirements, may pose similar risks, but the Court's constitutional focus on plaintiffs to date has largely been limited to aggregation.

12. Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015) (describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies").

13. See Gluck & Burch, *MDL Revolution*, *supra* note 5, at 18 ("The drive to settle from the beginning in many cases mutes motion practice around the specifics of state law. . . . One federal judge described MDLs as 'mush[ing]' fifty state laws together.").

14. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FOR FISCAL YEAR 2020, at 12 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf (listing 414,479 total terminate cases, 4,188 of which were remanded).

15. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013).

Yet, MDLs also lack opt outs—a major difference from often-analogous damages class actions.¹⁶

MDL, in short, is Judith Resnik's managerial judging "on steroids."¹⁷ It is a procedural vehicle that has become central to modern litigation but that develops outside of and in tension with the usual confines of many of procedure's norms, rules, and constitutional focuses.¹⁸

For example, although MDLs are grounded in the model of individual lawsuits, many MDL cases are generated by lawyers who work on volume.¹⁹ And some of those lawyers contractually refuse to litigate anything but the product-liability claims against a product's manufacturer—as opposed to, say, claims against individual medical providers—an insistence that moves the model even further away from individualized litigation.²⁰ Even in situations where claims are individually filed, MDLs act as a trump card: plaintiffs may sue in one state only to get swept into MDL by an external centralizer who is a stranger to them, whether that centralizer is a group of other plaintiffs' attorneys or defendants asking the Judicial Panel on Multidistrict Litigation (JPML) to coordinate suits with similar factual issues.²¹

And then there is preclusion, the white whale of modern complex litigation—the goal of global settlement of all claims, filed in multiple courts across the country, which may involve litigants who have not yet sued—a challenge for MDL that remains unresolved and deeply implicates plaintiffs' rights.²² The main question is whether an MDL settlement, which technically settles *individual* claims, could

16. Cf. Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 931 (1995); Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROBS. 5, 47 (1991) (flagging the concern over lack of opt outs early on).

17. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1688 (2017) (describing an interview study, with one judge calling MDL "like Rule 16 on steroids.").

18. See, e.g., Gluck & Burch, *MDL Revolution*, *supra* note 5, at 12–15 (discussing due process implicated by MDL practice).

19. See Elizabeth Chamblee Burch, *MDL for the People*, 108 IOWA L. REV. 1015, 1049–55 (2023) (discussing volume lawyering in the context of MDL).

20. See *id.* at 1026 ("[T]he routinized nature of stock complaints prompts some plaintiffs' attorneys to refuse to sue individual defendants like doctors and hospitals, leaving plaintiffs frustrated that those most culpable are escaping justice.").

21. Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 473–74 (2020).

22. See, e.g., Gluck & Burch, *MDL Revolution*, *supra* note 5, 29–32 (discussing preclusion in the prescription opioid MDL).

bind potential litigants who have not filed cases, the way that class actions, which are formally aggregated and dependent on the class being adequately represented, may. A subsidiary question is whether, even for plaintiffs already in an MDL, forcing them to waive claims (forever, thanks to preclusion) so that lead attorneys can focus on higher value or aspects of the case that may be less salient to that particular plaintiff is consistent with due process.

The problem is that MDLs lack established doctrines of adequate representation and participation that, in the class-action context, at least attempt to require attorneys to be loyal proxies for plaintiffs' individual interests. Also absent is the requirement that MDLs be cohesive or attain a level of commonality—a requirement that in class actions forces attorneys to speak for everyone because everyone's claims are similar enough. Third is the ability to opt out.²³ MDLs have none of these protections.

But the bigger problem is that *without* MDL, individuals without means or leverage might not be able to access courts at all. Resnik herself has acknowledged greater appreciation of that aspect of MDL as “ordinary-course” suits are harder to bring.²⁴ Our goal in this essay is thus to fuse two major strands of Resnik's pathbreaking work: MDL's epidemic of ultra-creative, settlement-and-case-management-focused judging, combined with the difficulties and inequities attendant to accessing court today. Even as MDL has re-opened courthouse doors that the Court's aggregation doctrines have closed, its case-management-driven unorthodoxies pose significant risks to their due process rights.

What would it look like to bring more plaintiffs' process considerations into civil procedure? In this essay, we focus on the familiar concept of a “day in court.” We believe this means more than merely being able to file a claim. The concept is utilized most often by the Supreme Court in the context of preclusion—one can't be blocked from filing her claim if she hasn't already had a chance to sue or hasn't

23. There are some so-called “mandatory” class actions from which plaintiffs are not permitted to opt out, but plaintiffs must form a cohesive class and not seek damages, at least unless defendants' assets are running out.

24. Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 80 (2011) (“If eighteenth-century constitutional entitlements to open courts are to remain relevant to ordinary litigants, the question is not whether to aggregate, subsidize, and reconfigure process but how to do so ‘fairly,’ in terms of what groups, which claims, by means of which procedures, and offering what remedies.”).

been adequately represented in an aggregate suit.²⁵ Others extend the concept further, to the idea of control over and participation in the litigation. We would go further still and include a right to develop substantive legal claims and seek appellate review. As Owen Fiss wrote years ago, litigation is about more than outcomes for private parties.²⁶ The public-regarding aspects of litigation—including democratic participation and development of legal doctrine—are as lost by managerial judging on steroids as they are by Fiss's paradigmatic "settlement."²⁷

We also encourage a normative and doctrinal reassessment of the prevailing procedure doctrines, which largely take plaintiffs' power for granted. For example, civil procedure doctrines pay little attention to where plaintiffs sue, generally assuming plaintiffs have autonomy over where they file, even when they are the subject of a venue transfer or where they have little choice but to consent to filing in a far-flung jurisdiction.²⁸ These doctrines also tend not to worry about adequate representation for plaintiffs in non-aggregated cases, and they pay little attention to plaintiffs' ability to fully develop novel claims. Recentering plaintiffs in civil litigation means that we should care more about whether plaintiffs' have meaningful choice of (a) forum, (b) representation, and (c) claim development than much modern mass adjudication, and even some individual litigation, currently allows.

We confine our discussion here to MDL because it is an ever-more salient example of the plaintiffs'-process problem and one that intersects so deeply with Resnik's work. But we note at the outset that plaintiffs' process must become more relevant across the entire span

25. See *Taylor v. Sturgell*, 533 U.S. 880, 892 (2008) ("The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996))). See also *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties.").

26. Owen Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1085 (1984) ("To be against settlement is only to suggest that when parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone.").

27. *Id.*

28. See, e.g., *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. for the Western Dist. of Tex.*, 571 U.S. 49, 63–64 ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff's venue privilege.'" (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964))).

of civil procedure. For example, in the context of class actions, where courts *have* ostensibly focused on plaintiffs, courts have continued to punt on whether the lack of an opt-out in mandatory class actions (as opposed to damages class actions), violates due process.²⁹ Or consider personal jurisdiction doctrine: Justice Brennan argued more than 40 years ago that the doctrine “with its almost exclusive focus on the rights of defendants, may be outdated.”³⁰ He argued that in modern times, due process requires plaintiffs be accorded protections when it comes to choice of forum and that a defendant should not “be in complete control of the geographical stretch of his amenability to suit.”³¹ Nothing has changed since. Other developments, from federal pleading standards with disparate impacts on the development of certain kinds of claims³² to selective publication of federal judicial opinions, threaten plaintiffs’ equality of access to that idealized “day in [federal] court,”³³ but arguments on such grounds have not yet been developed by courts under a theory of due process.³⁴

29. See Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 606–11 (2015) (discussing the Court’s mandatory class action opt-out jurisprudence).

30. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 307–08 (1980) (Brennan, J., dissenting).

31. *Id.* at 311.

32. See generally, e.g., Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) (discussing the impact of a heightened pleading standard across various claim types and between pro se parties as compared to counseled parties).

33. See generally Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 1–2 (2022) (investigating an increasing trend of non-precedential unpublished opinions in the federal civil litigation system with disparities across claim type and status of the litigating party).

34. Over the past decade or so, academics, practitioners, and judges have raised the alarm on plaintiffs’ diminishing access to a day in court. In 2012, Brooke Coleman surfaced the phenomenon of disappearing complainants: in light of today’s heightened pleading standards, Coleman argued plaintiffs in seminal cases may “never [have] had their paradigmatic day in court” and thus left the legal landscape of issues such as “affirmative action, municipal liability, and gender discrimination” undeveloped. Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 501–02 (2012). In the same year, now former Judge Nancy Gertner of the District Court of Massachusetts lamented the hostility of federal courts to employment discrimination claims, in particular at the summary judgment stage, which led to the cemented “one-sided legal doctrine” in favor of defendants. Nancy Gertner, *Loser’s Rules*, 122 YALE L.J. 109, 110–11 (2012). More recently, Coleman has expanded the aperture of Gertner’s focus on the insurmountable obstacles facing employment discrimination claims to showcase how procedural rules can lead to “claims

Nor is eliminating MDL the answer. Complex civil procedure is an adaptive organism and history proves its ability to evolve. Unorthodoxies also breed more unorthodoxies. Modern MDL itself grew out of the ashes of Justice Ginsburg's "small c" conservative class-action opinion in *Amchem*, which shut the door to global class-action resolution of most nationwide torts.³⁵ Plaintiffs' lawyers refused to accept *Amchem*'s confines and repurposed MDL to meet their needs.³⁶ And recently, in cases in which MDL itself has become a frustrating vehicle to achieve global resolution, lawyers have turned their procedural creativity elsewhere, including looking to bankruptcy court to use that court's own unique muscles to force settlements.³⁷

Each new avenue, without a theory of due process or federal rules as guardrails to ensure fairness, brings its own set of arguably unconstitutional developments. For example, post-MDL-bankruptcy courts have controversially prevented state attorneys general from pursuing their own separate cases in their own state courts in the name of global—and notably *federal*—complete settlement.³⁸ In other words, in an effort to settle where MDL cannot, the bankruptcy move subverts the jurisdictional redundancy that our federalism-based, dual-system court structure is supposed to guarantee. Some MDL defendants also have tried to use the bankruptcy process to cabin liability to a subsidiary created solely for that purpose—a maneuver now sufficiently notorious to have a nickname: the "Texas two-step."³⁹ If MDL is a

extinction"—claims that would likely have been brought by "parties who lack financial backing and social power." Brooke D. Coleman, *Endangered Claims*, 63 WM. & MARY L. REV. 345, 348 (2021). Among parties most marginalized, recent literature has spotlighted pro se, or self-represented, litigants. Self-represented litigants face an array of specific local rules at the district court level, potentially resulting in a "subsystem of civil procedure for litigants who cannot secure representation." Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2694 (2022). With respect to published opinions, only about two percent of cases brought by self-represented appellants receive precedential opinions with legal reasoning—those represented by counsel were twelve times as likely to receive a published opinion. Brown et al., *supra* note 33, at 2.

35. Gluck, *supra* note 17, at 1686–87.

36. Cabraser & Issacharoff, *supra* note 1, at 875 ("The aggregation of mass harm cases in federal courts did not end with *Amchem* Outside asbestos, the most recent data on MDL cases reveal that MDLs have become the situs for the consolidation and resolution of mass harm cases, even as the class action device has been relegated to a background hole.")

37. Gluck & Burch, *MDL Revolution*, *supra* note 5, at 47.

38. *Id.* at 48–49.

39. See Michael A. Francus, *Texas Two-Stepping Out of Bankruptcy*, 120 MICH. L. REV. 38, 40 (2022) ("For a Texas Two-Step's first step, the legacy business

creative nationalist solution to procedure's federalist focus, post-MDL bankruptcy is innovative procedural nationalism to the max.

Resnik warned in 1989 that “care must be taken to ensure that innovations intended to reduce cost and delay do not do so at the expense of those qualities of the judicial process that are more important to litigants.”⁴⁰ Nearly thirty years later, in an essay recognizing some benefits of MDL for access to court, she wrote:

Federal rules and statutes need to enable aggregation because neither judges, litigants, nor the public fare well in a lawyer-less world, where economic disparities among disputants vitiate the potential for access to a fair process—or access to any process at all. What the current federal docket illustrates is that federal courts themselves benefit from class and aggregate proceedings. But the individuals affected and the public at large have too attenuated a relationship with the resulting remedies.⁴¹

After outlining the opportunities and challenges that MDLs pose to plaintiff, we advance some preliminary ideas about uniform rules about representation, jurisdiction, claim development, and

divides itself into a new business with assets (AssetCo) and a new business with liabilities (LiabilityCo). The second step is to place LiabilityCo into bankruptcy and have the bankruptcy court discharge the liabilities while the AssetCo goes on its merry way.”). *See also In re LTL Management, LLC*, 58 F.4th 738, 764 (3d Cir. 2023) (dismissing the Chapter 11 bankruptcy petition from LTL Management, LLC—a LiabilityCo created by Johnson & Johnson to indemnify assets from talc litigation costs—because the court declined “[t]o ignore a parent (and grandparent safety net shielding all liability then foreseen . . . to create a legal blind spot”). *See also In re Purdue Pharma, L.P.*, 635 B.R. 26, 35–36 (S.D.N.Y. 2021), *certificate of appealability granted*, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022) (discussing the objections of eight states, alongside other parties, to a bankruptcy reorganization plan that involved a Texas two-step that provided for “broad releases, not just of derivative, but of particularized or direct claims – including claims predicated on fraud, misrepresentation, and willful misconduct under various state consumer protection statutes – to the members of the Sackler family”).

40. E. ALLAN LIND, ROBERT J. MACCOUN, PATRICIA A. EBENER, WILLIAM L. F. FELSTINER, DEOBRAH R. HENSLER, JUDITH RESNIK & TOM R. TYLER, *THE RAND CORPORATION, THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES*, x (1989).

41. Judith Resnik, “*Vital*” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1806 (2017).

appellate review. None of these would prevent MDL judges from settling cases or from innovating procedures to expedite fact finding or organize claims, but could provide plaintiffs with more autonomy, control, and at least some individualized treatment. Our goal is to start a conversation, not to definitively resolve it.

I. MDL AND THE WILD WEST

MDL's authorizing statute, 28 U.S.C. 1407, plainly limits MDL to *pretrial process only*—“[e]ach action so transferred *shall be remanded* by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred.”⁴² In other words, dispositive actions were not supposed to happen in MDL court. Emphasizing that language and its limits, the U.S. Supreme Court, in 1998, struck down judicial attempts to circumvent it by using the ordinary venue statute, 28 U.S.C. 1404, to transfer the cases in the MDL to themselves for trial.⁴³ But the Court did not plug the biggest loophole to extracting the case from the MDL court: settlement.

This means that, in any given MDL, a case's entire lifecycle typically plays out before the single MDL judge.⁴⁴ “Settlement culture,” as Judge William Young has put it, “is nowhere more prevalent than in MDL practice.”⁴⁵ That, in turn, means that cases do not return home as the MDL statute contemplates, and that the dispositive work of MDL occurs outside of judicial motions and trials—and outside of appeals, too.

Instead, the action occurs inside Resnik's world of managerial judging, in a pretrial environment with an eye toward aggressive and global case resolution. In an interview study conducted by one of us, one MDL judge put it simply, “[i]t's the culture of transferee courts. You have failed if you transfer it back.”⁴⁶ Said another, “I view my

42. 28 U.S.C. § 1407.

43. *Lexecon, Inc. v. Milberg Wiss Bershad Hynes & Lerach*, 523 U.S. 26, 34–35 (1998).

44. In 2019, across all federal courts in the United States, there were only 2,228 bench and jury trials out of 311,520 civil cases. U.S. CTS., U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY ACTION TAKEN, DURING THE 12 MONTH PERIOD ENDING SEPTEMBER 30, 2019 (2019), <https://www.uscourts.gov/statistics/table/c-4/judicial-business/2019/09/30>.

45. *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006).

46. Gluck, *supra* note 17 (compiling interviews of 20 seasoned MDL judges).

job in this MDL [a]s to bring every single one of the cases that was transferred here to a resolution.”⁴⁷

A. Formation

MDLs formally begin when the Judicial Panel on Multidistrict Litigation (JPML) decides that centralizing factually related cases before a single judge (the “transferee” or “MDL” judge) will serve “the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”⁴⁸ Unlike the more demanding prerequisites for certifying a class action under Rule 23, the MDL statute requires only that there be “one or more common questions of fact . . . pending in different districts.”⁴⁹ Its drafters considered and rejected a predominance requirement like that of Rule 23(b)(3), relying instead on the idea that these were individual cases that would eventually return home, thereby clearing the way for MDLs to host a variety of loosely related cases whose parties’ aims and desires might align on some matters and differ on others.⁵⁰

Consider *In re* National Prescription Opiate Litigation,⁵¹ the massive national opioid MDL, as an example. Within the single MDL are claims on behalf of cities, hospitals, third-party payors (health insurers), Native American tribes, and neonates alleging harms during pregnancy.⁵² Defendants range from drug manufacturers to the distributors who truck them across America to pharmacies like CVS.⁵³ Although plaintiffs might be unified on some issues, their claims, theories of liability, and insurance coverage would almost surely require at least subclassing in the class-action context, if not separate actions altogether.

47. ELIZABETH C. BURCH, *MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION* 27 (2019).

48. 28 U.S.C. § 1407(a).

49. *Id.*

50. See Bradt, *supra* note 4, at 1731–37 (discussing the MDL statute’s legislative history, culminating in its rejection of a predominance requirement).

51. Transfer Order, *In re* Nat’l Prescription Opiate Litig., No. 1:17-md-02804-DAP (J.P.M.L. Dec. 12, 2017).

52. Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 190, 192 (2019).

53. Order Certifying Negotiating Class and Approving Notice, *In re* Nat’l Prescription Opiate Litig., No. 1:17-md-2804 (N.D. Ohio Sept. 11, 2019).

B. Management—and “Cowboys on the Frontier”

Arguably even more than Resnik's managerial judges of forty years ago, the MDL judge in many ways acts more like a modern administrator than the judge envisioned by the Federal Rules. In fact, MDL judges are often chosen specifically for their expertise in practical administration and highly creative case management.⁵⁴ To the extent transsubstantivity of federal rules reflects the view that fairness requires like cases to be treated alike, MDLs buck that trend. MDL judges insist that each proceeding is too unique to be managed by a cramped interpretation of the Federal Rules or by a uniform set of procedures. Instead, they develop their own special procedures, often in collaboration with specialist lawyers, which build on previous MDLs or analogous actions.⁵⁵

As a result, what has emerged is essentially a federal common law of MDL procedure that runs parallel to the Federal Rules, with many judges adopting a discernible “cowboy-on-the-frontier” mentality that is not as apparent in other contexts but has become an accepted, and often vaunted, norm in MDLs. Looking again to the opioid litigation as an ongoing, salient example, not only did the JPML consolidate the disparate cast of characters described above before a single federal MDL court, but that MDL judge in turn made the unusual move of inviting the state Attorneys General into the federal MDL case negotiations to achieve a global settlement.⁵⁶ State AGs would normally proceed in their own states' courts and most had not even filed federal cases at the time.⁵⁷ Going even further, once everyone was at the same

54. Gluck, *Unorthodox Civil Procedure*, *supra* note 17, at 1673–74.

55. *See id.* at 1674 (“MDLs exemplify procedural exceptionalism. This is a type of litigation that judges insist is unique, too different from case to case to be managed by the transsubstantive values that form the very soul of the FRCP.”); Draft Minutes: Civil Rules Advisory Committee April 2–3, 2019 Meeting, in ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 29, 87, 103 (Oct. 2019), <https://www.uscourts.gov/file/28653/download> (“[I]t seems clear that any rules must take care to preserve the creative flexibility that has generated sound procedures for the often unique circumstances of particular MDL proceedings.”).

56. *See* Letter to Court from State Attorneys General, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 24, 2019), ECF No. 1726, <https://static.reuters.com/resources/media/editorial/20190626/opioidsmdl—flaA-Gletter.pdf> (responding to the MDL judge's invitation).

57. Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner State of Ohio at 10–11, *In re State of Ohio*, No. 19-3827 (6th Cir. Sept. 6, 2019), <https://www.sixthcircuitappellateblog.com/wp-content/uploads/sites/11/2019/09/19.09.06-Chamber-of->

table, the MDL judge, together with plaintiffs' attorneys and special masters, devised a brand new tool of civil procedure—what they called “the negotiation class”—to try to achieve a settlement that would preclude current and later-coming filers.⁵⁸ The Sixth Circuit ultimately invalidated the negotiation-class concept on an interlocutory appeal under the class provision, Rule 23(f), stating that “[w]hat Plaintiffs fail to appreciate is that a new form of class action, wholly untethered from Rule 23, may not be employed by a court.”⁵⁹

As another example of innovation, consider the so-called “Lone Pine” orders, highlighted by Nora Engstrom. Lone Pine orders are a form of claim-testing procedure unique to MDL.⁶⁰ As Engstrom notes, they often require plaintiffs to “supply prima facie evidence of injury, exposure, and causation” and so “pu[t] plaintiffs’ claims to an early test and purg[e] those who don’t make the grade” before discovery—and without the procedural safeguards of Rule 56’s summary judgment process.⁶¹ Then there are plaintiff fact sheets with requests that read like a mishmash of initial disclosures, interrogatories, requests to produce documents, and deposition queries, but without each rule of civil procedure’s prepackaged protections and limits.⁶²

There are few checks on all this procedure-creation and MDL authority. First, as pretrial orders, none of these innovations face appellate tests, which further exacerbates MDL judges’ wild-west mentality.⁶³ Second, the MDL judge’s managerial freedom is expanded even further by the fact that remands almost never happen.⁶⁴ The

Commerce-Amicus-in-Support-of-State-of-Ohio-19-3827.pdf (“[A]ll of the states’ lawsuits . . . have been brought in their own state courts.”).

58. See Gluck & Burch, *MDL Revolution*, *supra* note 5, at 30–32 (discussing the MDL judge’s creative attempt to form a “negotiation class” in the Opiates MDL).

59. *In re National Opiate Litigation*, 976 F.3d 664, 672 (6th Cir. 2020).

60. Nora Engstrom, *The Lessons of Lone Pine*, 129 *YALE L.J.* 2, 5 (2019) (“Though they vary on the specifics, these case-management orders generally require each plaintiff swept into a mass-tort proceeding to supply prima facie evidence of injury, exposure, and causation—all by a set date, under penalty of dismissal.”).

61. *Id.*

62. Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, *YALE L.J. F.* 78 (Nov. 4, 2019); Margaret S. Williams & Jason A. Cantone, *An Empirical Evaluation of Proposed Civil Rules for Multidistrict Litigation*, 55 *GA. L. REV.* 221, 229, 231, 249 (2020).

63. See Gluck & Burch, *MDL Revolution*, *supra* note 5, at 59–60 (discussing the ways in which MDL litigants’ access to appellate review is limited).

64. See U.S. CTS., JUDICIAL PANEL ON MULTIDISTRICT LITIGATION—JUDICIAL BUSINESS 2019 (2019), <https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019> (“Since its creation in 1968, the Panel has centralized

paucity of remands—sending cases back to their original jurisdiction—centralizes almost all MDL decision-making in the hands of the single federal judge. Third, MDL judges often seek to neutralize the checks and balances on their authority that a parallel state court proceeding might offer.⁶⁵ Although MDL is only a federal-court animal, MDL courts have a track record of using their leverage to exert significant control even over parallel *state* court proceedings, which are commonly filed alongside federal ones.⁶⁶ Recognizing how much work happens in the federal MDL, MDL lawyers and MDL courts not infrequently compel the lawyers in parallel state court proceedings to contribute to the federal MDL legal fees—a practice whose constitutionality General Motors MDL judge, Jesse Furman, and Roundup MDL judge, Vince Chhabria, have both questioned.⁶⁷ Indeed, even without appeals or remands, simply allowing for more two-court-system federalism would bring more courts into the mix and dilute the MDL judges' power. But the prevailing philosophy in MDL is to tamp down those possibilities in favor of centralization before a single, creative, often unreviewable, federal judge.

722,146 civil actions for pretrial proceedings. By the end of fiscal year 2019, a total of 16,918 actions had been remanded for trial . . .”).

65. See Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. L. REV. 1649, 1673–75 (2021) (discussing the differences between federal and state MDL remand practices and procedures).

66. See, e.g., Settlement Agreement, § 1.03, *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 09-md-02100 (S.D. Ill. Mar. 15, 2013), ECF No. 2739 (Exhibit A) (requiring that claimants opting into the settlement agreement who have pending state court claims agree to the MDL court's federal jurisdiction); Settlement Agreement, § 4.1.8, *In re DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig.*, No. 10-md-02197 (N.D. Ohio Nov. 19, 2013), available at <https://www.usasrhpsettlement.com/Un-Secure/Docs/FINALASRSETTLEMENT.pdf> (requiring that all settlement claimants and their attorneys, even those with cases pending in state court, consent to be bound by the federal MDL court's order).

67. Order Granting in Part and Denying in Part Motion to Establish a Holdback Percentage at 32, *In re Roundup Prods. Liab. Litig.*, No. 16-md-02741-VC (N.D. Cal. June 21, 2021); *In re General Motors Ignition Switch Litig.*, 477 F. Supp. 3d 170, 180–81 (S.D.N.Y. 2020).

II. PLAINTIFFS' PROCESS

Modern due process doctrine in civil procedure has been all about defendants.⁶⁸ Dragged into court against their will, defendants have an ostensible layer of protection under personal jurisdiction doctrine. Defendants must be either essentially “at home” where they are sued or must have purposefully availed themselves of the forum state in a way that relates to or arises out of the plaintiff’s claims.⁶⁹ Unsurprisingly then, the early case law on personal jurisdiction in MDL focused exclusively on defendants.⁷⁰

Plaintiffs, by contrast, are often perceived in civil procedure doctrine as litigation’s prima donnas: alongside their attorneys, plaintiffs choose who and where to sue, which claims to bring, and when it is advantageous to team up with others or go alone.⁷¹ Due process mostly tells them what they can’t do—where they can’t sue defendants or how they can’t use statistical sampling, for instance.⁷²

68. Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs’ Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 873 (1995).

69. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024–25 (2021); *see Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (holding that “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”).

70. *In re FMC Corp. Pat. Litig.*, 422 F. Supp. 1163, 1164 (J.P.M.L. 1976); *In re Libr. Editions of Child.’s Books*, 299 F. Supp. 1139, 1140 (J.P.M.L. 1969); *In re Kauffman Mut. Fund Actions*, 337 F. Supp. 1337, 1339 (J.P.M.L. 1972); *In re Sugar Indus. Antitrust Industry Litig.*, 399 F. Supp. 1397 (J.P.M.L. 1975); Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1208–12 (2018).

71. Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Rule in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 825 (1989).

72. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292–93 (1980) (holding the minimum-contacts requirement of personal jurisdiction “acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system” and that “[t]he sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment”); Stephen Bittinger, Melissa Yates, & Michael Phillips, AMERICAN BAR ASS’N, *Statistical Sampling and Extrapolation* (Dec. 28, 2022), https://www.americanbar.org/groups/health_law/publications/health_lawyer_home/december-2022/statistical-sampling-and-extrapolation/ (explaining some of the limitations due process imposes on the use of statistical sampling).

To be sure, plaintiffs receive due process protections, too. These protections center around the “deep-rooted historic tradition that everyone should have his own day in court” under *Martin v. Wilks*,⁷³ *Richards v. Jefferson County*,⁷⁴ and *Hansberry v. Lee*.⁷⁵ The day-in-court concept sounds capacious, but to date it has largely been confined to preclusion as opposed to a context that mines the core virtues of individualized litigation.⁷⁶

The balancing-test articulated in *Mathews v. Eldridge*⁷⁷ offers another famous strand of plaintiff protections.⁷⁸ Under *Mathews*, procedures available to the plaintiffs cannot be unduly curtailed after weighing the interests involved against the possibility of error against the cost.⁷⁹ But as Martin Redish has pointed out, the Court has interpreted this test and the related concept of the day-in-court as a right to have one’s interest adequately represented and not a right for the individual litigant to direct and control that litigation for herself.⁸⁰

To be sure, MDLs bring plaintiffs power. They have enabled otherwise unavailable aggregation in cases ranging from military veterans’ suits over hearing loss, to women’s claims that asbestos-laced talcum powder causes ovarian cancer, to drivers’ claims that faulty ignition switches cause power failures while driving. Without MDL, those plaintiffs might not have been able to find a lawyer, afford a suit, create a credible threat, or have another avenue to aggregate given the barriers of the Rule 23 class action.

But in the Wild West of MDL, plaintiffs often involuntarily relinquish the control that characterizes a *prima donna*—whether it’s control over the court in which to sue, which claims to bring, whether to settle, or more—and have seemingly no constitutional right to

73. 517 U.S. 793, 798 (1996).

74. 490 U.S. 755, 761–62 (1989).

75. 311 U.S. 32, 40 (1940).

76. See Redish & Karaba, *supra* note 12, at 138 (“In shaping the individual’s due process right in the context of procedural collectivism, the Supreme Court has, all but exclusively, emphasized the paternalism model of the day-in-court ideal: there is no requirement that the individual litigant be given the opportunity to choose how best to represent his own rights and interests, as long as those chosen to represent those interests can be assumed to do so adequately.”).

77. 424 U.S. 319 (1976).

78. *Id.* at 334–35.

79. See *id.* at 348–49 (“The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.”).

80. Martin H. Redish & Nathan D. Larsen, *Class Actions, Political Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1584–85 (2007).

adequate representation in exchange.⁸¹ For the MDL's cowboy on the frontier, plaintiffs can often be like proverbial cattle, herded into a forum they did not choose, wrangled by attorneys they did not hire who may assert claims telling only a part of their story, and corralled into a settlement and remedy they may not want.

A. Which Court? Jurisdiction and Opt-Outs

i. Jurisdiction

MDLs uproot plaintiffs from their chosen federal courts and aggregate them before a single judge, who then typically oversees the case to the end.⁸² Plaintiffs may file a claim in a court of their choosing, but once the JPML decides to centralize cases before the single federal judge that individual case is forced to move to the new court, whether or not the plaintiff consents.⁸³

To facilitate transfer, some MDL judges enter direct filing orders, which relieve plaintiffs from having to wait for the JPML to transfer their cases to the MDL from a forum with personal jurisdiction and venue over both the plaintiff and defendant.⁸⁴ Because direct filing is typically a choice the lawyers make for convenience, rather than after consulting clients about their preferences, direct filing orders raise litigant autonomy as well as personal-jurisdiction questions and yet are exceedingly common.⁸⁵ Even if direct filing orders can be justified based on consent—the plaintiff wants to file in the forum—what if that forum has no relationship to plaintiff's case? The Court recently, in *Bristol-Myers Squibb*,⁸⁶ raised concerns over just such a scenario in a different context—there, it was worried about how plaintiffs' choosing of a forum without personal jurisdiction over them

81. 28 U.S.C. § 1407(b).

82. *Id.*

83. 28 U.S.C. § 1407(c).

84. See generally Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012) (examining the rise of multidistrict litigation and analyzing choice-of-law options).

85. Bradt, *The Long Arm of Multidistrict Litigation*, *supra* note 70, at 1171–72 (2018); Bradt, *The Shortest Distance*, *supra* note 84, at 780, 824. The convenience also has a catch: on the slim chance that the MDL judge remands a plaintiff's case, that remand must now occur under § 1404, not § 1407, which gives the judge and the defendant a say in where the case will go rather than returning the plaintiff to her chosen forum. Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather than Later*, 89 UMKC L. REV. 991, 992–93 (2021).

86. 582 U.S. 255 (2017).

might implicate defendants' due process rights.⁸⁷ Ironically, the concern in that case over plaintiffs' jurisdiction came from the position of protecting *defendants* from being sued where they do not wish to be, but it nevertheless cracked the door open to questions about personal jurisdiction over plaintiffs.⁸⁸

One critical question here, which courts have yet to resolve, is whether the due process analysis when it comes to jurisdiction over plaintiffs occurs under the Fourteenth or Fifth Amendment. Federal Rule of Civil Procedure 4(k)(1)(A) voluntarily incorporates the personal jurisdiction limits that would apply in state court under the Fourteenth Amendment.⁸⁹ To the extent that Rule applies to MDL, its importance centers on the parties' contacts with the forum state, in addition to other due process considerations. But to the extent one reads Rule 4(k)(1)(A) to be irrelevant after service of process (since that rule sets out where process can be served), then arguably plaintiffs whose cases are transferred into an MDL after service would be protected by the Fifth Amendment, not the Fourteenth. There, ties to the nation, not the state, are arguably most important, and so plaintiffs' process concerns would have to be more focused on consent, representation, and the "day in court," rather than any geographic limitation.⁹⁰ Nevertheless, it seems plausible to us that at some extreme point, far flung litigation could jeopardize a plaintiff's right to participate in her own case under the Fifth Amendment, too.

Technically, the transfer to another court is temporary—for pretrial only.⁹¹ MDL jurisdiction is premised on the idea that the

87. *Id.* at 263.

88. *Id.* at 264–65.

89. *Walden v. Fiore*, 571 U.S. 277, 283 (2014).

90. Courts are starting to grapple with this question in other contexts. For example, the First Circuit recently took the view that the Fifth Amendment, rather than the Fourteenth, applies to claims brought by plaintiffs who opted into a Fair Labor Standards Case after service of process. *Waters v. Day & Zimmermann NPS, Inc.*, 23 F.4th 84, 93–97 (1st Cir. 2022) (finding Rule 4(k) does not "limi[t] a federal court's jurisdiction after the summons in properly served.>").

91. One member on the committee that drafted the MDL statute noted in 1964 that pretrial transfer was "the maximum practical objective that is attainable," for completely transferring a case would prompt "great opposition . . . from local lawyers fearful that all their business is about to be seized by the city attorneys." Bradt, *Something Less and Something More*, *supra* note 4, at 1736–37 (citing Proposal for Legislation and Rules for Multiple Litigation (June 3, 1964) (transcript available in Papers of Judge William H. Becker, Records of the Administrative Office of the United States Courts, Record Group 116, Coordinating Committee on Multiple Litigation, 19621968, National Archives, Kansas City, MO [hereinafter Becker

original judge has jurisdiction over the plaintiff and the case will be remanded to that judge for resolution.⁹² As remand becomes a near-complete fiction, however, arguably so do the constitutional underpinnings of personal jurisdiction.⁹³ Some judges actually require plaintiffs to physically appear in their courts, effectively forcing them to waive any constitutional objections to jurisdiction by their compelled physical presence.⁹⁴ This myth of remand allows courts that would ordinarily lack personal jurisdiction over the plaintiffs to preside over them. The constitutional justification for the MDL statute is that the transferor court (the court from which the action came) has jurisdiction; provided the case returns for trial, no constitutional violations occur from pretrial management occurring elsewhere.⁹⁵ Not only does such an assumption underestimate the importance and length of that management period, but it also ignores the reality: the move is permanent, a point that Resnik made in 1991.⁹⁶ Historically, MDL judges have resolved 99% of the cases before them—there is no return home.⁹⁷

On the rare occasions that courts have considered personal jurisdiction in MDLs, they've provided scant reasoning. In the opiates MDL, the St. Croix Tribe tried to escape from the centralized action in Ohio. “The [p]anel has long denied objections to transfer based on

Papers], Box 1, Folder 1, and Notes of Co-Ordinating Committee Meeting 6, July 28, 1964 (on file in Becker Papers, Box 8, Folder 19)).

92. 28 U.S.C. § 1407(a).

93. See Redish & Karaba, *supra* note 12, at 132 (“Although it is true that transferee courts have jurisdiction only over pretrial matters, individual claims are fundamentally transformed by virtue of their consolidation into MDL. And transfer back to the original jurisdiction—in the rare instances in which it actually takes place—cannot ‘save’ the constitutionality of what happens in the transferee district.”).

94. See *infra* Part I.A.2.

95. See *In re Delta Dental Antitrust Litig.*, 509 F. Supp. 3d 1377, 1380 (J.P.M.L. 2020) (“Jurisdiction in any federal civil action *must* exist in the district where it is filed.”); *In re Takata Airbag Prods. Liab. Litig.*, 396 F. Supp.3d 1101, 1137–41 (S.D. Fla. 2019); *In re FMC Corp. Pat. Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (“Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes.” (citations omitted)).

96. Judith Resnik, *Aggregation, Settlement, and Dismay*, *supra* note 16, at 930–31; Judith Resnik, *From “Cases” to “Litigation,”* 54 L. & CONTEMP. PROBS. 5, 47 (1991).

97. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FOR FISCAL YEAR 2020, at 12 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Fiscal_Year_Statistics-2020_1.pdf (listing 414,479 total terminate cases, 4,188 of which were remanded).

the transferee court's purported lack of personal jurisdiction," wrote Chairwoman Judge Sarah Vance, citing a case that declared: "[t]ransfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue."⁹⁸

The JPML's orders are appealable only through the extraordinary writ of mandamus, and the two circuits that have later considered the personal jurisdiction question on appeal from MDL courts have given little guidance.⁹⁹ The Second Circuit in the Agent Orange litigation rejected the plaintiffs' arguments that due process prevented the MDL court from exercising personal jurisdiction over class members with no minimum contacts with New York by noting that Congress can provide for service of process anywhere in the United States. The MDL statute, opined the Second Circuit, was one such example.¹⁰⁰

But section 1407 says nothing about service of process and authorizes transfer only from a court with personal jurisdiction.¹⁰¹ The Sixth Circuit considered the same issue in a summary judgment appeal in the Sulzer Orthopedics hip implant proceeding. When the plaintiff argued that the Ohio MDL court's refusal to transfer his case back to Oklahoma violated his due process, the Sixth Circuit dubbed it "meritless" and cited Agent Orange for the proposition that the MDL statute conferred nationwide personal jurisdiction.¹⁰² In contrast, several Supreme Court justices, at the oral argument in *Bristol-Myers Squibb*,

98. *In re Nat'l Prescription Opiate Litig.*, 2018 Lexis 131985, at *3 (J.P.M.L. Apr. 5, 2018) (citing *In re FMC Corp. Pat. Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976)); see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) ("Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. Once such piece of legislation is . . . the multidistrict litigation statute."); *Howard v. Sulzer Orthopedics, Inc.*, 2010 WL 2545586, at *5 (6th Cir. June 16, 2010) (calling the notion that the MDL statute had jurisdictional limits "meritless"); *In re Nat'l Prescription Opiate Litig.*, 2018 BL 366078 (J.P.M.L. Oct. 3, 2018) ("The Panel has long denied objections to transfer based on the transferee court's purported lack of personal jurisdiction."); *In re Plavix Mktg., Sales Practices & Prods. Liab. Litig.*, 2013 BL 435273, at *5 (J.P.M.L. Aug. 6, 2013).

99. 28 U.S.C. § 1407(e). To be sure, the lack of appealability is a much larger issue across procedure. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631 (1994) ("trial courts enjoy effective insulation from appellate review for a greater proportion of their decisions than was the case fifty years ago").

100. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987).

101. 28 U.S.C. § 1407; Bradt, *The Long Arm of Multidistrict Litigation*, *supra* note 70, at 1214.

102. *Howard v. Sulzer Orthopedics, Inc.*, 382 F. App'x 436, 442 (6th Cir. June 16, 2010).

suggested that a new federal law would be required for MDL to exercise that kind of authority and pondered whether it would be constitutional; in other words, they suggested that the current MDL statute alone was not enough.¹⁰³ Andrew Bradt has likewise argued that the MDL statute does not confer nationwide jurisdiction.¹⁰⁴

One may wonder why MDL jurisdiction over the plaintiffs isn't justified on the same basis as an ordinary venue transfer is under 28 U.S.C. § 1404. Unlike the MDL statute, the ordinary venue statute provides that: "a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."¹⁰⁵ In other words, the transferee court would have to have been a permissible locale for the plaintiffs to have sued in the first place, under the Fourteenth Amendment.

The MDL statute, Section 1407, has no such language, almost certainly because it assumed cases would be remanded. As a result, a plaintiff who sues in federal court in Connecticut might understand that various procedural aspects of her case may be handled elsewhere pursuant to Section 1407, but assumes her case will be *decided* in Connecticut or, at worst, in another federal court in a different state where she could have sued. What she likely does not assume is that a court—which would not have allowed her to sue there or been able to force her to consent to suit there—would be able to compel her to resolve her case there.

Consider also that with a Section 1404 venue transfer, the Court's decision in *Van Dusen v. Barrack*¹⁰⁶ requires the transferee court to apply the substantive law of the state in which the plaintiff initially filed her federal suit.¹⁰⁷ *Van Dusen* stems from both forum shopping considerations underlying the *Erie* doctrine and from respect for plaintiffs' choice of where to sue.¹⁰⁸ Although the MDL court is

103. Oral Argument at 25:12, *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 528 U.S. 255 (2017) (No. 16-466), <https://www.oyez.org/cases/2016/16-466>.

104. Bradt, *The Long Arm of Multidistrict Litigation*, *supra* note 70, at 1214.

105. Compare 28 U.S.C. § 1404, with 28 U.S.C. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.").

106. 376 U.S. 612, 618–19 (1964).

107. *Id.* at 639.

108. *Id.* at 635–37.

also supposed to look at the various state substantive laws that attach to their aggregated litigants, the reality is the very acts of aggregating and pushing settlement tend to blur state law differences.¹⁰⁹ Even as some judges award more damages to some class members than others based on state laws, aggregate MDL settlements rarely do.¹¹⁰ Andrew Bradt also notes that when it comes to direct filing—where litigants are permitted to file directly into the MDL without first filing in a forum with which the plaintiff has contacts and then transferring venue to the MDL under Section 1407—litigants may not realize that they technically lose *Van Dusen*'s protections: because they never filed at home, their home state choice of law (and thus perhaps home state substantive law itself) will not control.¹¹¹

Although Judge Weinstein's famous assertion that he was effectively applying a single "law of national consensus" to aggregated cases from multiple states was years ago, the blending of state laws to the point differences among them are blended away continues in settlement.¹¹² In the GM ignition switch MDL, Judge Furman granted a

109. See Gluck & Burch, *MDL Revolution*, *supra* note 5, at 17–18 (describing how MDLs "smooth over" differences in state law).

110. Compare *Kostka v. Dickey's Barbecue Restaurants, Inc.*, 2022 WL 16821685, at *13 (N.D. Tex. Oct. 14, 2022) (awarding California class members more money based on favorable laws and noting that "equitable treatment is not synonymous with equal treatment"), with *Actos Settlement Points Matrix* (Appendix J), <https://mdl.law.uga.edu/sites/default/files/Actos%2520Settlement%2520-%2520Appendix%2520J.%2520Points%2520Matrix.pdf> (providing no distinction between plaintiffs from different states), and *Benicar Master Settlement Agreement*, Article VI, <https://images.law.com/contrib/content/uploads/sites/292/2017/08/benicar-settlement.pdf> (providing no distinction between plaintiffs from different states). Some early caselaw from the Seventh Circuit supported a limited blending of laws. See, e.g., *In re Air Crash Disaster at Boston*, 399 F. Supp. 1106, 1108 (D. Mass. 1975) (holding that cases from New York, New Hampshire, Vermont, Massachusetts, and Florida should be governed respectively by law of states where those laws are mostly similar in substance); *In re Air Crash Disaster Near Chicago*, 644 F.2d 594, 616 (7th Cir. 1981).

111. Bradt, *The Shortest Distance*, *supra* note 84, at 764.

112. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 701 (E.D.N.Y. 1984); Judith Resnik, *Reorienting the Process Due: Using Jurisdiction to Forge Post-Settlement Relationships among Litigants, Courts, and the Public in Class and Other Aggregate Litigation*, 92 N.Y.U. L. REV. 1017, 1052 (2017); see Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552 (1996) ("[w]here claims have been transferred from other districts—at least where the transfer is based on 28 U.S.C. § 1404 or § 1407, as is usually the case—*Van Dusen v. Barrack* further constrains the court by requiring it to apply the whole law of the transferor court, including its choice-of-law rules. This being so, it is remarkable how often courts adjudicating mass actions nevertheless find that one law applies to

motion to consider an “across the board” ruling against plaintiffs, after briefing called attention to the fact that there were critical differences among various states’ laws.¹¹³ He later emphasized the need to give detailed attention to each state’s law, noting that: “differences in state law can dictate different results for plaintiffs in different jurisdictions.”¹¹⁴

ii. Settlements and Opt-Outs

One can dispute whether, under MDL’s steroid-driven case-management reality, the statute’s envisioned temporary transfer for pretrial work is constitutional. This is a complex subject ripe for additional analysis. But the scenario that predominates is the more clearly problematic scenario of final case resolution.

The U.S. Supreme Court has made just one definitive statement on this question of plaintiff-side due process and the type of divisible relief MDL plaintiffs typically seek. In *Phillips Petroleum v. Shutts*,¹¹⁵ the Court held that a Kansas state court could assert jurisdiction over out-of-state class members who had no connection to the forum, provided they had notice of the action, adequate representation, and an opportunity to opt out.¹¹⁶ The Court distinguished between the plaintiffs’ and defendants’ rights—assuming the *defendant* would need to travel, participate in extended pretrial activities, and comply with a remedy.¹¹⁷ Absent class members, however, would not have to face those burdens by virtue of being the case instigator as well as having adequate representation:

all the claims or to each issue. The most revealing examples are in multidistrict litigation (MDL) under 28 U.S.C. § 1407.”)

113. *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2017 WL 3443623, at *2 (S.D.N.Y. Aug. 9, 2017) (“That said, Plaintiffs’ motion prompted the Court to take a closer look at the different states’ laws governing the legal claims at issue (something it obviously should have done in the first instance, even if the parties’ briefing failed to point the way) and, upon reflection, the Court concludes that it was too hasty in holding that the Pre-Recall Plaintiffs’ claims failed across the board. That is because, for purposes of at least *some* claims in *some* states, the law does not appear to require a plaintiff to allege damages in order to survive a motion to dismiss.”).

114. *In re* Gen. Motors LLC Ignition Switch Litig., 339 F. Supp. 3d 262, 275 (S.D.N.Y. 2018).

115. 472 U.S. 797, 797 (1985).

116. *Id.* at 812.

117. *Id.* at 807–08.

The burdens placed by a State upon an absent class action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. . . .

A class action plaintiff, however, is in quite a different posture. . . . The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.¹¹⁸

But what if an MDL plaintiff is compelled to travel across the country against her will? She cannot opt out of the action, at least not without dismissing her case. An interview study done by one of us highlights the due process problem here.¹¹⁹ In one exemplary case, a plaintiff and his wife sued Zimmer, the manufacturer of his malfunctioning hip cup, as well as his implanting surgeon and a hospital in Little Rock. Despite the lack of diverse citizenship for federal subject matter jurisdiction, Zimmer removed the case from Bradley County, Arkansas, to federal court by alleging fraudulent joinder.¹²⁰ Before the Western District of Arkansas had a chance to rule on the plaintiffs' motion to remand, their case was swept into an MDL nineteen hours northeast of them in Trenton, New Jersey.¹²¹ Despite the ostensible promise of only temporary transfer and despite the plaintiffs' begging

118. *Id.* at 808.

119. See generally Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835 (2022).

120. Defendant Zimmer, Inc., Zimmer Holdings, Inc., and Zimmer US, Inc.'s Notice of Removal, *David Foscue v. Zimmer, Inc. et al.*, No. 12-cv-07491 (W.D. Ark. July 18, 2012).

121. Letter to The Hon. Susan D. Wigenton Requesting a Ruling on a Suggestion of Remand from Paul W. Keith, Counsel for David and Teresa Foscue, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414 (D.N.J. Feb. 1, 2016).

unsuccessfully for a remand multiple times,¹²² they spent the next *seven years in the MDL* and were required to make a 2600-mile-round trip to New Jersey for an unsuccessful in-person mediation.¹²³

At some point, the inability to exit an MDL seems to violate due process. And yet, the entire time the MDL plaintiff is stuck in a far-flung pretrial phase, the MDL court has the ability to grant summary judgment in the case.¹²⁴ Why can a far-flung court adjudicate a plaintiff's rights through summary judgment when she has no minimum contacts with the forum, no right to adequate representation, and no ability to opt out? Plaintiffs in these scenarios start to look quite similar to the *Shutts* defendant, but without the same right.¹²⁵

The only plausible difference here seems to be a view of the Fifth Amendment that is far less protective than the Fourteenth—a view of federal due process that cares little about geography or the duration in which one is trapped without opt out in an aggregate proceeding they did not choose to enter. While we are not ready to concede that the Fourteenth Amendment's focus on ties to the state drops out entirely in the MDL context, we would suggest that even under a Fifth Amendment framework, these kinds of plaintiffs' rights should be taken into account. Instead, as things now stand, the plaintiffs may need to submit detailed evidence of her claims with a lawyer she did not choose, accept legal arguments she cannot always control, and agree to a settlement she might be strong armed to accept.

122. Letter to The Hon. Susan D. Wigenton Requesting a Ruling on a Suggestion of Remand from Paul W. Keith, Counsel for David and Teresa Foscue, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414 (D.N.J. Feb. 1, 2016); Plaintiffs' Motion for Remand, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414 (D.N.J. Feb. 20, 2018); Motion for Suggestion of Remand, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414 (D.N.J. June 24, 2017); Order, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414, (D.N.J. Sept. 5, 2017); Order, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414, (D.N.J. May 1, 2018).

123. Letter to The Hon. Susan D. Wigenton Requesting a Ruling on a Suggestion of Remand from Paul W. Keith, Counsel for David and Teresa Foscue, *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, No. 09-cv-04414 (D.N.J. Feb. 1, 2016).

124. See, e.g., Omnibus Order on All Pending *Daubert* Motions and Defendants' Summary Judgment Motion, *In re Zantac Prods. Liab. Litig.*, No. 9:20-md-02924-RLR, (S.D. Fla. Dec. 6, 2022) (granting defendants' summary judgment motions while the MDL plaintiffs were in the pre-trial phase).

125. See Bradt, *The Long Arm of Multidistrict Litigation*, *supra* note 70, at 1223 (stating that “[n]one of the three protections that effectively stand in for the minimum contacts requirement exist in MDL, despite the fact that the MDL court can grant judgment against the plaintiffs”).

Functionally, even though MDLs are usually damages actions, they thus operate more like mandatory Rule 23(b)(1) or (b)(2) class actions—which themselves have been criticized as violating due process thanks to their binding nature and, like MDL, their lack of an opt-out.¹²⁶ These features make mandatory class actions attractive to lawyers for one of the same reasons as MDLs—they facilitate global settlement. But because mandatory classes eliminate would-be plaintiffs' individual rights, Rule 23 puts due process safeguards in place. If monetary relief is not just incidental to requests for declaratory or injunctive relief, then the defendants' assets must be so limited that equity overrides individual rights.¹²⁷ And in any case, the class must be cohesive enough to allow for aggregate representation of all interests.¹²⁸

In contrast, product liability MDLs request compensatory and punitive damages, involve diverse plaintiffs and so lack the class cohesion that helps to ensure adequate representation, and typically do not involve defendants with dangerously depleted assets. The logic of *Shutts* dictates that MDL plaintiffs also should have the right to opt out or that MDL courts must remand cases as the statute demands.¹²⁹

Plaintiffs should likewise be adequately represented by counsel. Notably, it is the adequate-representation requirement that gives class-action courts personal jurisdiction over absent class members.¹³⁰ Think about it this way: a court with no personal jurisdiction over someone cannot require her to do anything, including opt out. Thus, as Patrick Woolley has argued, it is adequate representation—a bedrock principle extending back *Hansberry v. Lee*—that binds class members to class-action judgements and settlements.¹³¹

As another example, consider again *Bristol-Myers Squibb*, the Court's most recent personal jurisdiction case. There, defendants challenged an action brought in California state court by a group of

126. See Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177, 180 (2003) (arguing that “[m]andatory classes will be problematic until the Advisory Committee on Civil Rules, the Supreme Court, or Congress steps in and brings order to this universe”).

127. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859–62 (1999) (addressing Rule 23(b)(1)(B) classes); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (addressing Rule 23(b)(2) classes).

128. Mullenix, *No Exit*, *supra* note 126, at 229.

129. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

130. Patrick Woolley, *Collateral Attack and the Role of Adequate Representation in Class Suits for Money Damages*, 58 U. KAN. L. REV. 917, 970 (2010).

131. Woolley, *supra* note 130, at 970.

plaintiffs divided between residents and nonresidents of the state.¹³² The Court agreed with defendants that these plaintiffs could not simply band together to sue the defendant in California because the out-of-state residents' claims had no connection to California.¹³³ Of course, *BMS* was about protecting defendants; but what if, on the same facts, the plaintiffs were being *forced* to litigate their out-of-state cases in California. Should the outcome of the case be different merely because the suit is now focused on plaintiffs' rights?

B. Representation and Stories: The Individual v. The Collective

Once in the MDL, the judge selects a handful of plaintiffs' lawyers to represent the group.¹³⁴ These attorneys are not typically selected along adequate-representation criteria as *Shutts* requires for class actions, but rather for their experience, access to funding, and ability to play well with others.¹³⁵ The lawyers who are not chosen may be relegated to lesser roles or may play no part whatsoever. Some appointment orders even go so far as to forbid attorneys whose clients' positions diverge from leaders' positions from advocating on their client's behalf without court permission.¹³⁶

Remember the motley crew thrown together in *In re National Prescription Opiate Litigation*.¹³⁷ As noted, defendants range from drug manufacturers to the distributors who truck them across America to pharmacies like CVS.¹³⁸ Although plaintiffs might be unified on

132. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 582 U.S. 255, 258 (2017).

133. *Id.* at 265.

134. *E.g.*, Pretrial Order 1 at 8–9, *In re Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 12-md-2326 (S.D. W.Va. Feb. 29, 2012).

135. Elizabeth Chamblee Burch & Stephen R. Bough, *Collected Wisdom on Selecting Leaders and Managing MDLs*, 106 JUDICATURE 69, 70 (2022). *See generally* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

136. Case Mgmt. Order at 9, *In re Monat Hair Care Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, No. 1:18-md-02841 (S.D. Fla. June 6, 2018) (stating that “[a]ll communications from Plaintiffs with the Court should be made through Plaintiffs’ Lead and Liason [sic] Counsel. . . . Counsel for Plaintiffs who disagree with Lead and Liason [sic] Counsel, or who have individual or divergent positions, may not act separately on behalf of their clients without prior authorization of this Court.”).

137. *See supra* Part I.A.

138. Order Certifying Negotiating Class and Approving Notice at 1, 7–8, *In re Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Sept. 11, 2019), https://www.ohnd.uscourts.gov/sites/ohnd/files/2591_0.pdf.

some issues, their claims, theories of liability, and insurance coverage would almost surely require at least subclassing in the class-action context, if not separate actions altogether.

Yet, unlike the more demanding prerequisites for certifying a class action under Rule 23, the MDL statute requires only that there be “one or more common questions of fact . . . pending in different districts.”¹³⁹ Its drafters considered and rejected a predominance requirement like that of Rule 23(b)(3), relying instead on the idea that these were individual cases that would eventually return home, thereby clearing the way for MDLs to host a variety of loosely related cases whose parties’ aims and desires might align on some matters and differ on others.¹⁴⁰

In short, the kind of protections that due process requires in class actions for class members’ benefit—namely, that counsel protect all plaintiffs’ interests equally and, where conflicting interests make that impossible, appoint separate counsel—are lacking in MDL.¹⁴¹ Rule 23 provides those protections for class actions; MDL has grown up outside the Rules of Civil Procedure.¹⁴² Plaintiffs’ attorneys have complained that MDLs are “based more on judicial and administrative convenience than on a fair consideration of liability or compensation to victims,” and that MDLs vest control in a steering committee “that may lack incentive to always pursue any individual plaintiff’s best interests.”¹⁴³

Without judges policing conflicts and grooming subclasses, conflicts can proliferate. And specialized MDL procedures can stifle factual variations from surfacing in myriad ways. First, lead attorneys cannot be attuned to the nuances of every case and MDL centralization requires only one common factual question—not that common questions *predominate* as under Rule 23(b)(3).¹⁴⁴ Second, tolling

139. 28 U.S.C. 1407(a).

140. In the Opiates MDL, Judge Polster did remand a few select cases for a hub-and-spoke model. D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 L. & CONTEMP. PROBS. 21 (2021).

141. *Hansberry v. Lee*, 311 U.S. 32, 43–45 (1940) (analyzing adequacy of representation in class actions as a matter of constitutional due process for absent class members); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (emphasizing that there must be an alignment of interests between named plaintiffs and the class members they purport to represent).

142. See generally FED. R. CIV. P. 23 (detailing class action protections).

143. Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 104 (2000).

144. Compare 28 U.S.C. § 1407 (covering “civil actions involving one or more common questions of fact”); with FED. R. CIV. P. 23(b) (requiring that “the questions

agreements between plaintiff and defense counsel pause statutes of limitations and allow cases to be “on file” but never actually filed, meaning that plaintiffs’ claims may exist solely on lists, making it nearly impossible to determine whether conflicts exist.¹⁴⁵ Third, master complaints and short-form complaints like those in the pelvic mesh MDL substitute generic allegations and bare-bones facts for unique narratives that might otherwise illuminate conflicts.¹⁴⁶ And finally, the routinized nature of stock complaints prompts volume-based plaintiffs’ attorneys to leave individualized claims on the table: in their retainer agreement, some refuse to sue anyone other than the device manufacturer.¹⁴⁷ This means that solvent and potentially negligent doctors and hospitals will not face suit, thereby undermining tort law’s deterrence goal.

Many personal-injury cases in mass torts tend to come through “lead generators.”¹⁴⁸ These prospectors, incentivized by the promise of collectivization, advertise to find potential clients (with various degrees of screening) long before the JPML comes in and then sell

of law or fact common to class members predominate”); see also Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding Over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 477 (2012) (“[T]he court is the only participant to the proceedings that is truly neutral, and only the court can ensure that conflicts arising in the representation do not unfairly harm plaintiffs, give rise to invidious distinctions among plaintiffs, or unduly advantage defendants.”); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1049 (1993) (describing conflicts).

145. E.g., Aff. of Herbert M. Kritzer at 18, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Mar. 31, 2009) (citing Joint Report No. 30 of Plaintiffs’ and Defendants’ Liaison Counsel 8 (Dec. 12, 2007)) (noting that 14,100 claimants entered into tolling agreements with Merck); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 156 (2012); PAUL D. RHEINGOLD, LITIGATION MASS TORT CASES § 6.35 (2021).

146. E.g., Pretrial Order #15, *In re Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 12-md-2327 (S.D. W. Va. Aug. 22, 2012).

147. E.g., Vaginal Mesh or Sling Implant/Attorney Employment Contract, Lee Murphy Law Firm and Clark, Love & Hutson, ¶ 2 (on file with authors); Contingent Fee Legal Services Agreement, Blasingame, Burch, Garrard & Ashley, P.C. and Dan Chapman & Associates, LLC, ¶ 1 (on file with authors); Transvaginal Mesh Litigation, Attorneys Contingent Fee & Cost Employment Agreement, Aylstock, Witkin, Kreis & Overholtz PLLC and Ennis & Ennis, PA, ¶ 1 (on file with authors).

148. Amanda Bronstad, *Ad Spending Up, Defense Bar Irked; Lawyers Argue in Court That ‘Lead Generator’ Marketing Fuels Bogus Mass Claims*, LEXISNEXIS (Apr. 27, 2015), <https://plus.lexis.com/api/permalink/d464254a-f4bb-4f8f-9ed7-8192611ab3ec/?context=1530671>.

these cases to lawyers.¹⁴⁹ For those injured, advertising brings awareness and often connects the injury they are suffering to a product they use. In this sense, lead generators empower would-be plaintiffs by turning them into actual clients, and volume lawyering opens court access for those who may not clear the increasingly high bars set by elite trial lawyers.¹⁵⁰ But when plaintiffs' claims are later bundled into MDL, their individual rights as litigants may be compromised. Sometimes plaintiffs who have already filed cases in the MDL with present injuries are effectively forced to give up claims without providing genuine, informed consent because the attorneys in control require them to waive certain claims or are otherwise incentivized to bring only those with high value.¹⁵¹

In other words, the business side of lawyering and specialized MDL procedures can drown out individual stories, substituting collective discovery into the most prevalent (or lucrative) injuries for the nuances of individual cases. This deindividulization presents problems on several levels.

First, it undermines long-standing procedural justice tenets that Resnik and others have identified for tort plaintiffs. Today, study after study on legitimacy and procedural justice shows the importance of giving parties opportunities to participate and present evidence, to be treated with dignity by the courts and their attorneys, and to appeal to another person or court when error occurs.¹⁵² In fighting to avoid the federal MDL, Houston, Texas's county attorney put it simply: "We believe that our judge, our county, our juries in Harris County not only

149. *Id.*

150. See generally Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635 (2006) (discussing how damage caps may lead to decreased access to justice); Aff. of Herbert M. Kritzer at ¶¶ 9–10, 20, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-MD-01657 (E.D. La. Mar. 31, 2009) (citing the DePaul study and noting "my own work shows that the criteria for acceptance of a medical malpractice case is much more stringent").

151. See Burch, *MDL for the People*, *supra* note 19, at 1038–41 (discussing the ways in which MDL plaintiffs are sometimes effectively forced to give up claims).

152. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 31, 211–12 (1988); see generally Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011) (analyzing the federal court system through the perspective of the psychology of procedural justice); see Donna Shestowsky, *Great Expectations? Comparing Litigants' Attitudes Before and After Using Legal Procedures*, 44 L. & HUM. BEHAV. 179, 189 (2020) (providing an overview of the literature).

have the right, but that they should be the ones to decide the fate of this lawsuit. This is where it happened.”¹⁵³

As MDL Judge Jack Weinstein warned, “We would be reckless were we to ignore litigant satisfaction. Public confidence in our system of justice depends on the system’s responsiveness to people’s needs.”¹⁵⁴ In the September 11 litigation, some families would not settle because they had not had the chance to tell their individual stories.¹⁵⁵ Indeed, MDL plaintiffs who participated in a procedural justice study that one of us conducted expressed dissatisfaction and frustration at the erosion of these day-in-court ideals: 65% strongly or somewhat disagreed that they had a chance to tell their story during settlement, and 42% strongly or somewhat disagreed that the administrator had the information necessary to make informed allocation decisions.¹⁵⁶

Second, as this suggests, the chance to participate in one’s own dispute and to present evidence is about more than just satisfying litigants—participation and evidence help produce substantively accurate outcomes, one of the core considerations of the *Mathews v. Eldridge* procedural due process framework.¹⁵⁷ Because sheer numbers and procedural shortcuts afford MDL plaintiffs fewer participation

153. Andrew Joseph, *Why Houston and Other Cities Want Nothing to Do with the Massive National Opioid Lawsuit*, STAT NEWS (Mar. 27, 2018), <https://www.statnews.com/2018/03/27/houston-national-opioid-lawsuit/>.

154. Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 497 (1994).

155. See Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127, 178 (2012) (“In any event, the 9/11-tort-litigation saga is not yet complete. A small number of plaintiffs opted out of settlement.”); *In re Sept. 11 Litig.*, 600 F. Supp. 2d 549, 557 (S.D.N.Y. 2009) (“However, it became clear following these early mediation sessions that one obstacle to reaching settlements was the sense on the part of many of the families that either (i) they had not had an opportunity to tell the story of their loss and express their feelings to a representative of the Court, and/or (ii) they had not had an opportunity to tell the story of their loss to a representative of the airlines and to personally receive expressions of condolences for their loss from the airlines.”).

156. Burch & Williams, *Perceptions of Justice in Multidistrict Litigation*, *supra* note 119, at 1872, 1906.

157. *Mathews v. Eldridge*, 424 U.S. 319 (1976); Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1015–16 (2010) (arguing that procedure’s “primary value lies in the decisions, judgments, and settlements it generates”); Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, 2002 J. DISP. RESOL. 155, 160 (2002); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCH. 72, 80 (1985); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT’L J. PSYCH. 117, 119 (2000).

opportunities and some attorneys rarely communicate with their clients, accuracy can suffer. Abandoned MDL claims also feed into a larger problem that Brooke Coleman has documented in the context of heightened pleading standards.¹⁵⁸ Claims outside the mainstream take time to become mainstream, and even when those claims fail, they perform a public educational, expressive, and dignitary function. Alexander Reinert argued that failed claims can prompt legal change or help map a path for future success.¹⁵⁹ Such concerns are at the forefront of “access to justice” scholarship writ large, which argues that a day in court “not only helps victims themselves[] but also yields . . . systemic benefits, including development of legal doctrine, deterrence of violations of substantive law, deterrence of violations of substantive law, private enforcement of public regulatory regimes, and transparency about the activities of governmental institutions and private businesses.”¹⁶⁰

Third, as we documented in *MDL Revolution*, in rare cases when competing litigations can counterbalance the MDL—as have the state AG actions in the opioid litigation—more voices and more process outside of the MDL have had the salutary benefit of developing

158. See Coleman, *The Vanishing Plaintiff*, supra note 34, at 508; see also Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PA. ST. L. REV. 1443, 1445–46 (2010) (arguing that the heightened pleading standard “raises concerns that Muslim Americans’ and other minority plaintiffs’ claims of discrimination—claims that the members of these groups find plausible, indeed evident—are far less likely to find agreement with a federal judiciary that does not shine by its diversity,” ultimately working to “undermine[] a major façade of constitutional design and, by extension, the rights of minority groups in this country.”).

159. See Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1228 (2014) (“[I]n addition to helping develop the law, some meritless litigation will prompt more direct change in the law. The very fact that the litigation is unsuccessful may be perceived as a problem to be fixed.”). Specifically, Reinert calls attention to prisoners’ rights, securities, antitrust litigation, and civil rights litigation, all areas where conventional wisdom too often conflates “frivolous” and “meritless” litigation—yet meritless litigation may “result in development or clarification of the law, even if the plaintiff herself will not benefit.” *Id.* at 1125. Unsuccessful cases can demarcate winning conditions for future plaintiffs by outlining the “contours” of doctrine. *Id.* at 1226–27 (discussing the evolution of Eighth Amendment challenges to conditions of confinement challenges and Equal Protection Clause challenges to sex discrimination). See also Coleman, *Endangered Claims*, supra note 34, at 386 (“Many commentators have noted that the restrictive approach to procedure in federal courts has led to the extinction of claims like civil rights violations, for example.”)

160. Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 504–05 (2020).

state law, increasing transparency, and producing more appellate opportunities.

III. A PATHWAY TOWARD PROCESS

What would it look like to bring plaintiffs' process considerations into MDL?

Our goal is to not throw MDL into either constitutional or practical crisis. We have detailed our constitutional concerns already.¹⁶¹ On the practical level, MDL judges worry that due process reforms will hamper their creativity or force a “one size fits all” framework on MDL.¹⁶² Instead, MDL judges consistently argue they need room for procedural innovation to deal with the massive numbers and complexity of their aggregated cases.¹⁶³ (One MDL has as many as 320,638 cases.¹⁶⁴) Moreover, as we have detailed, shutting down MDL won't end creative aggregation.¹⁶⁵

We propose several first steps: More appellate review, more remands, more federalism, more motion practice, and more attention to adequate representation and jurisdiction. We are not alone. As MDL's potency increases, change seems imminent. The Advisory Committee on Civil Rules has begun to consider whether and how to constrain it. Yet, the Committee's efforts, which began in 2017, have gone from bold (increased interlocutory appeals and settlement review) to incremental (a revised Rule 16.1 that requires a pretrial meet and confer for case management, something parties and MDL judges already do).¹⁶⁶

161. *See supra* Part II.

162. DOUGLAS G. SMITH, *THE RISING BEHEMOTH: MULTIDISTRICT AND MASS TORT LITIGATION* 141–42 (ABA Publishing 2020).

163. *Id.*

164. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., *MDL STATISTICS REPORT – DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT 2 (2022)*, https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-14-2022.pdf (showing *In re* 3M Combat Arms Earplug Products Liability Litigation is comprised of 320,638 total actions).

165. *See supra* Introduction.

166. Draft Minutes of the June 23, 2020 Meeting of the Committee on Rules of Practice and Procedure, *in* ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 40–42 (Oct. 2020), https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf; Multidistrict Litigation Subcommittee Report, *in* ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 174–76 (Oct. 2022), <https://www.uscourts.gov/file/57425/download>.

MDLs come in all stripes and colors, from antitrust disputes to intellectual property to products liability, making the development of a uniform new Rule of Civil Procedure challenging.¹⁶⁷ But we also worry that none of the current stakeholders has incentives to focus on *plaintiffs'* process. Resnik and others have long-documented rifts between mass-tort lawyers and their clients.¹⁶⁸ And the defense bar has no reason to advocate for plaintiffs. To be sure, some client communication problems between volume lawyers and their clients should be solved by state bar associations enforcing existing ethics rules. But that does not mean that guardrails aren't necessary.

A. More Attention to Jurisdiction and More Appellate Review

One day, the Supreme Court itself might turn its attention to broader questions about plaintiffs and personal jurisdiction. Recall Justice Brennan's observation back in *World-Wide Volkswagen Corp. v. Woodson*¹⁶⁹ that *International Shoe's*¹⁷⁰ "almost exclusive focus on the rights of defendants[] may be outdated."¹⁷¹ Yet, an MDL case must first make it to the Supreme Court, which is unlikely—and not just for the usual scarce cert-grant reasons.

As we have noted, MDL disrupts traditional practices of appellate review not only because so much of MDL work is done in the pretrial context but also because judges try to do "everything by consensus."¹⁷² That pretrial orders are not routinely appealable under 28 U.S.C. § 1291 is a key factor limiting MDL litigants' access to an appellate court (and, with it, different judges).¹⁷³

That means that these issues of jurisdiction need to be aired more at the trial court level or before the JPML. It also seems clear that we need to bring more appellate review into the system—and not only to elevate questions about jurisdiction.

167. DOUGLAS G. SMITH, *THE RISING BEHEMOTH: MULTIDISTRICT AND MASS TORT LITIGATION* 142 (ABA Publishing 2020).

168. *E.g.*, *In re Combustion Eng'g*, 391 F.3d 190, 245 (3d Cir. 2004); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 370 (2000); Judith Resnik, *Aggregation, Settlement, and Dismay*, *supra* note 16, at 931, 938 (1995).

169. 444 U.S. 286 (1980).

170. *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

171. *World-Wide Volkswagen*, 444 U.S. at 308 (Brennan, J., dissenting).

172. Gluck, *Unorthodox Civil Procedure*, *supra* note 17, at 1706.

173. *See generally* Andrew S. Polis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643 (2011) (explaining and critiquing appellate review in MDLs).

The final-order rule largely prevents error correction relating to pretrial rulings that can have enormous significance for many litigants.¹⁷⁴ And the lack of appellate review means that little decisional law on MDL procedure has developed to guide judges and litigants, clarify due process rights, or standardize practices across jurisdictions.¹⁷⁵

In the Opiate MDL, for instance, the unprecedented *fourteen mandamus actions* against the MDL judge created transparency and afforded parties the opportunity to make legal arguments before different judges.¹⁷⁶ The use of mandamus, long thought a most extraordinary tool as a substitute for the inability to appeal, was new to opioids. Yet, without appellate opportunities for important decisions that have a substantial likelihood of affecting the outcome of the case, mandamus is now likely to spread to future cases. As in most MDL practice, imitation follows success.¹⁷⁷

One potential intervention might be to expand the opportunities for interlocutory appeal for MDL pretrial procedural decisions that have a substantial likelihood of affecting the outcome of the case. A similar rationale justified allowing litigants to appeal class-certification decisions under 28 U.S.C. § 1292(e), resulting in the addition of Rule 23(f) to the Federal Rules in 1998.¹⁷⁸ However, if the standard for appeal is not applied judiciously, it could overly favor defendants and drag out MDLs significantly because presumably there would be appeals every step of the way.

174. Gluck & Burch, *MDL Revolution*, *supra* note 5, at 59–60.

175. *Id.* at 20, 59–60.

176. See Letter from 48 Corporate General Counsel to Rebecca A. Womeldorf, Sec’y, Comm. on Rules of Prac. and Proc., Admin. Off. of the U.S. Cts. 2 (Oct. 3, 2019), <https://images.law.com/contrib/content/uploads/documents/292/56032/Initial-Census-letter-from-48-GCs.pdf> (“Out of 14 attempts over a 10-year period to request § 1292(b) certification of a potentially dispositive motion in mass tort MDL cases, zero have been granted.”).

177. See, e.g., Brian M. Goldberg & Robert D. Rhoad, *Finding MDL Ground in Venue for Wax-Hatchman Cases*, DECHERT LLP (Aug. 23, 2022), <https://www.dechert.com/knowledge/onpoint/2022/8/finding-mdl-ground-in-venue-for-hatch-waxman-cases0.html> (“In *Valeant v. Mylan Pharmaceuticals*, the [sic] Federal Circuit planted the seeds of using the MDL process to address difficulties arising from the restrictive patent venue statute, noting in a footnote that ‘[w]hile cumbersome for these types of cases, 28 U.S.C. § 1407 is at least a viable path for consolidation of these cases for pretrial purposes.’ Novo Nordisk successfully utilized that strategy to gain venue over Mylan, at least for pretrial purposes, in a jurisdiction in which it could not have sued Mylan in the first instance.”).

178. FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment.

B. More Attention to Adequate Representation

In addition to more appellate opportunities, we urge rulemakers and MDL judges to consider adequate representation when appointing lead plaintiffs' attorneys. Family law, trusts, receiverships, bankruptcies, guardians ad litem, and criminal attorney appointments have each, at times, questioned whether representation is "adequate," but all recognized the requirement is present; the only question is whether the parties before the court adhered to it.¹⁷⁹ Not MDL. MDL clings to the bygone myth of individual representation.¹⁸⁰

It is time for MDL to pay more attention to the representation that due process requires. As *Amchem* has explained in the class action context, to adequately represent another, the interests of the representative and the represented must "align" in the sense that both share the same litigation goals.¹⁸¹ And "the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups."¹⁸²

When significant divisions exist between plaintiffs within a proceeding, MDL judges should appoint separate representatives. Such conflicts arise when there's a danger that counsel "might skew [the litigation] systematically" to favor some plaintiffs over others "on grounds aside from reasoned evaluation of their respective claims or . . . disfavor claimants generally vis-à-vis the lawyers themselves."¹⁸³

179. *E.g.*, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 33 (1981) (family law); *Luis v. U.S.*, 578 U.S. 5, 12 (2016) (criminal law); *In re Combustion Engineering*, 391 F.3d (3d Cir. 2004) (bankruptcy law); *United States v. Doe*, 230 F. Supp. 2d 662, 664 (D. Md. 2002) (guardian ad litem); *Kagan v. Waldheim Cemetery Co.*, 53 N.E. 3d 259, 266 (Ill. Ct. App. 2016) (trustee's duties to beneficiaries include acting "with the highest degree of fidelity and good faith"); *Reid v. United States*, 148 Fed. Cl. 503, 523 (discussing duties of receiver toward creditors).

180. *See* John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 263 (2007) (noting that one-on-one lawyer-client representation has been replaced with mass claims processing).

181. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) ("[T]he interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs . . .").

182. *Id.* at 627 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-43 (1992)).

183. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B) (2010); *Amchem Prods.*, 521 U.S. at 627; *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677-1701

Conversely, if interests diverge so significantly that they cannot be addressed through separate leadership appointments, then that is a sign that certain cases should be remanded to their original courts.

C. More Remands

Episodic remands—sending cases home at key points during an MDL—can provide more process for plaintiffs by giving them opportunities to effectively “opt out” of the coordinated proceeding.¹⁸⁴ Building in exit opportunities allows those who want to develop individual claims against doctors and hospitals or simply have their day in court to do so. As we’ve explored elsewhere, remand benchmarks would vary by proceeding but could come at three key intervals: (1) at the beginning, for plaintiffs with claims that fall outside of those that the lead lawyers plan to develop; (2) once coordinated discovery ends and before case-specific summary judgment motions occur; and (3) after the negotiation of a global settlement, for those plaintiffs who do not wish to settle.¹⁸⁵

More remands could have other benefits including developing substantive law and allowing for more individual participation. The paucity of remands (data from the JPML reveals that of the 205,085 cases in MDLs that ended in 1968 through 2021, there were only 15,885 remands) centralizes almost all MDL decision-making in the

(2008). Separate representation matters less in certain leadership positions, like liaison counsel. Liaison counsel disseminates information and acts more as a conduit than a decision maker. But adequate representation is critically important in conducting discovery, choosing bellwether cases, and negotiating settlement.

184. Although our focus here is on remand to the federal court of origin, we note that when the opioid MDL judge refused to rule on motions to remand cases to state court, the Sixth Circuit ruled that he clearly abused his discretion and that a party’s rights in one case “cannot be impinged upon” to create efficiencies in the MDL at large. *In re Harris Cnty. et al.*, No. 21-3637, 2022 U.S. App. LEXIS 6411, at *5 (6th Cir. Mar. 11, 2022).

185. BURCH, *supra* note 47, at 210–13; Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014). Several professors and attorneys raised and elaborated on the idea of episodic remands during an American Association of Justice meeting in May of 2018, including Samuel Issacharoff, Howard Erichson, and Tobi Milrood. The kernel of the idea is also included in Memorandum from AAJ’s MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee (Feb. 22, 2018). See also J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 28 (2014) (arguing that nonremovable cases, if properly sampled, could be used to generate real-world data that would better inform settlement values).

hands of the single federal MDL judge.¹⁸⁶ Remanding more cases not only would introduce more judges in the mix but would also likely lead to more motion practice and typical pretrial proceedings, which in turn would provide more opportunities for individualized participation.

It is worth noting that there has been more attention to the lack of remands recently. Two MDL judges have suggested that the remand statistics reveal “something is really wrong with the MDL process” and that there needs to be a “philosophical change” from the notion that remand instead of settlement is a sign of judicial failure.¹⁸⁷ As Judge Vincent Chhabria said, “I strongly believe it’s not the job of the MDL judge to make sure these cases settle, and to do anything possible to force everybody to settle. And I do not believe a lack of settlement means a failure. I think there are some problems with the MDL system on that issue, but it is the job of the MDL judge to get these cases ready for trial.”¹⁸⁸ And Judge Joseph Goodwin, who handled the mammoth pelvic-mesh MDLs and remanded only 0.954% of them, found that while settlement percentages would indicate success, “the singular emphasis on settlement almost always results in enormous delay[] . . . and is rightly considered by many as a major failure of the MDL paradigm.”¹⁸⁹ Consequently, he suggests placing a firm deadline for remanding cases.

D. More Motion Practice to Develop More Substantive Law

More motion practice at home also would helpfully develop actual differences in state law that tend to get papered over by most MDLs in favor of settlement. In the Opioid cases, for instance, the MDL judge’s hub-and-spoke remand model has already helped develop public nuisance law in West Virginia, Ohio, and California.¹⁹⁰

186. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2021 (2021), <https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report%20Cumulative%20Terminated%20MDLs.pdf>.

187. Amanda Bronstad, *Judges Feel a Lot of Pressure’: Jurists Debate Path for Unsettled MDL Cases*, LAW.COM (Sept. 14, 2022, 5:08 PM), <https://www.law.com/2022/09/14/judges-feel-a-lot-of-pressure-jurists-debate-path-for-unsettled-mdl-cases/?slreturn=20230421175545>.

188. *Id.*

189. Joseph R. Goodwin, *Remand: The Final Step in the MDL Process — Sooner Rather than Later*, 89 UMKC L. REV. 991, 995 (2021).

190. *City of Huntington v. AmeriSource Bergen Drug Co. et al.*, F. Supp. 3d 408, 472–73 (S.D. W. Va. 2022); Findings of Fact and Conclusions of Law

And the competing state actions that have gone forward in opioids have likewise produced benefits that the MDL alone did not, including state-court rulings on important and underdeveloped tort doctrines, like public nuisance.¹⁹¹

As parties litigate key motions like summary judgment and *Daubert* motions on expert testimony, both they and the judge receive valuable information about the strengths and weakness of their claims. With settlement such a prominent feature of MDL, litigants should have ample opportunities to test their theories before coming to rest on appropriate terms.

CONCLUSION

We have proposed a renewed focus on plaintiffs' due process rights in the context of the MDL specifically and civil procedure generally. While civil-litigation aggregation is often intended to balance power between plaintiffs and defendants, the reality is that, sometimes, even as plaintiffs are empowered in numbers on the one hand, they are disempowered by losing control over their case on the other. We believe a constitutional crisis is percolating in MDL when it comes to personal jurisdiction over plaintiffs, adequate representation, and the lack of appellate review. Hypercentralization and too-little attention to substantive legal claims further threaten the legitimacy of these massive actions.

In *Managerial Judges*, Resnik wrote that “[u]nreviewable power, casual contact, and interest in outcome (or in aggregate outcomes) have not traditionally been associated with the ‘due process’ decision making model,” a model she described as typified by “the accuracy of decision making, the adequacy of reasoning, and the quality of adjudication.”¹⁹² Thirty-five years later, with similar problems manifesting in the sphere of complex litigation, Resnik emphasized the importance of the individual's connection to the lawsuit and its

Regarding *Walgreens, City and Cnty. of S.F. et al. v. Purdue Pharma L.P. et al.*, 620 F. Supp. 3d 936 (N.D. Ca. 2022).

191. See, e.g., *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 731 (Okla. 2021) (“The State presented us with a novel theory-public nuisance liability for the marketing and selling of a legal product, based upon the acts not of one manufacturer, but an industry. However, we are unconvinced that such actions amount to a public nuisance under Oklahoma law.”). See also Leslie Kendrick, *The Perils and Promise of Public Nuisance*, 132 *YALE L.J.* 702 (2023) (discussing the origins and evolution of public nuisance litigation as the template for opioid lawsuits initiated by state, local, and tribal governments).

192. Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 430 (1982).

outcome: “Constitutional reinvention,” she wrote, “is again in order to enable, constrain, and legitimate the distributional decisions made.”¹⁹³

193. Resnik, “*Vital State Interests*, *supra* note 10, at 1806.

