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Bellwether Trials in Multidistrict Litigation

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This Article first provides an overview of the multidistrict litigation process and the history of bellwether trials within it. The Article then recounts in detail specific uses and multiple techniques for implementing bellwether trials under the modern informational approach. After weighing the benefits and drawbacks of using bellwether trials, the Article concludes that procedures that involve considerable attention to the selection of bellwether cases, especially those that include significant attorney participation, are best suited to assist the parties in accurately valuating the thousands of other cases for which trial is often not practical or authorized in the transferee district. The Article sounds a hopeful note for judges and practitioners in multidistrict litigation today by highlighting and deconstructing one of the most innovative and useful techniques for the resolution of complex cases.

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> The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.[1]

I. INTRODUCTION

In an age of increasing skepticism regarding the use of class actions in our legal regime, the modern multidistrict litigation (MDL) process embodied in 28 U.S.C. § 1407 is emerging as the primary vehicle for the resolution of complex civil cases.[2] The MDL process has traditionally been limited to establishing a centralized forum where related cases are consolidated so that coordinated pretrial discovery can proceed in an efficient and effective manner.[3] In theory, this centralized forum, or "transferee court," as it is known, is a sort of way-station at which the preliminary aspects of the litigation can be

1. *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

2. *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 238 F.R.D. 539, 542 (E.D.N.Y. 2006) ("As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes."); *see also In re* Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 396 & nn.7-8 (S.D.N.Y. 2008) (collecting recent authorities rejecting the use of class actions in the mass tort context).

3. *See* 28 U.S.C. § 1407 (2000).

more or less completed before individual cases are sent to their final destinations in courts across the country for ultimate resolution. In practice, however, the centralized forum can do more than function as a discovery crucible. Indeed, by establishing a mechanism for conducting "bellwether" or "representative" trials, the transferee court can enhance and accelerate both the MDL process itself and the global resolutions that often emerge from that process.

This Article begins with a brief overview of the traditional MDL process. It then traces the rise and development of bellwether trials, from early attempts to bind related claimants to the results of such trials, to the modern informational, or nonbinding, approach. A typical bellwether case often begins as no more than an individual lawsuit that proceeds through pretrial discovery and on to trial in the usual binary fashion: one plaintiff versus one defendant. Such a case may take on "bellwether" qualities, however, when it is selected for trial because it involves facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases. The primary argument presented here in support of the informational approach is that the results of bellwether trials need not be binding upon consolidated parties with related claims or defenses in order to be beneficial to the MDL process. Instead, by injecting juries and fact-finding into multidistrict litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to *organize* the products of pretrial common discovery, *evaluate* the strengths and weaknesses of their arguments and evidence, and *understand* the risks and costs associated with the litigation. At a minimum, the bellwether process should lead to the creation of "trial packages" that can be utilized by local counsel upon the dissolution of MDLs, a valuable by-product in its own right that supplies at least a partial justification for the traditional delay associated with MDL practice. But perhaps more importantly, the knowledge and experience gained during the bellwether process can precipitate global settlement negotiations and ensure that such negotiations do not occur in a vacuum, but rather in light of real-world evaluations of the litigation by multiple juries.

The Article moves on to discuss the primary practical consideration for courts and counsel in employing bellwether trials, namely the method of selecting bellwether cases from a wider group of related lawsuits. Although there is no one trial selection paradigm, the process generally should proceed in three steps. First, the transferee court should catalogue the entire universe of cases that comprise the

MDL and attempt to divide the cases into several discrete categories based on prominent variables. Second, the transferee court should create a pool of representative cases, which includes cases from each category, and then place these cases on a fast-track for case-specific discovery. Third, the transferee court must devise the appropriate methodology for selecting a predetermined number of individual cases from the pool for trial. Throughout the entire process, the transferee court can greatly benefit from the assistance of the attorneys involved in the litigation. Indeed, the bellwether process works best when counsel are engaged and devoted to the endeavor from the start.

II. OVERVIEW OF THE MULTIDISTRICT LITIGATION PROCESS

Congress amended the Judicial Code in 1968 "[t]o provide for the temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in different districts which involve one or more common questions of fact."[4] In its current form, the MDL statute provides:

> 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. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, [t]hat the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.[5]

Thus, the consolidation of related cases pending in federal courts across the country is achieved by the Judicial Panel on Multidistrict Litigation, known informally as the "MDL Panel."[6]

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4. Pub. L. No. 90-296, 82 Stat. 109, 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2000)).

5. 28 U.S.C. § 1407(a).

6. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.13 (2004); *see also* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 148 (D. Mass. 2006) ("Since all 94 district courts follow identical rules concerning discovery and trial preparation, one excellent innovation in civil practice is the idea that a single judge might manage a number of 'related' cases, getting them all ready for trial in a uniform manner and returning the 'trial-ready' cases from whence they came (i.e., to the district courts with proper jurisdiction and venue) for trials before local juries."). Increasingly, the states are adopting similar legislation,

The MDL Panel "consist[s] of seven [sitting federal] circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."[7] According to the MDL Panel itself, "[t]he job of the Panel is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings."[8] The MDL Panel may carry out these functions either "upon its own initiative" or in response to a "motion filed with the panel by a party in any action in which transfer . . . may be appropriate."[9]

When the MDL Panel finds that centralization of related actions is appropriate, an MDL is formally created by the issuance of a "transfer order."[10] The Panel's transfer order will assign a title and number to the MDL and will identify the related actions currently pending in districts outside the selected transferee forum that are being

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which allows for intra-state consolidation of related cases pending in the courts of any given state. *See, e.g.*, MARK HERRMANN ET AL., STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS (2d ed. 2004) (describing the consolidation procedures of each state); Jeremy T. Grabill, Comment, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 321-23 (2005) (discussing the frameworks utilized by several states). The emerging multidistrict litigation model will often benefit, therefore, from coordination between the federal MDL and multiple state consolidations involving similar claims. *See generally* Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867, 1867-96 (2000) (suggesting complimentary roles for state and federal courts in the national mass tort context); William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1691 (1992) (arguing that "informal coordination can advance judicial economy, efficiency, and fairness").

7. 28 U.S.C. § 1407(d).

8. U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., AN INTRODUCTION TO THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION (2006), *available at* http://www.jpml.uscourts.gov/General_Info/Overview/PanelBrochure-04-08.pdf.

9. 28 U.S.C. § 1407(c). Pursuant to its statutory authority under § 1407(f), the Panel has promulgated rules for the conduct of its business. *See* Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425 (2001) [hereinafter J.P.M.L. R.P.]. Current amendments to the these rules are posted on the Panel's Web site. *See* Rules & Procedures, http://www.jpml.uscourts.gov/General_Info/general_info.html (last visited June 13, 2008). For further information concerning the functioning of the Panel, see generally DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL (2006); Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16 (2004); Earle F. Kyle, IV, *The Mechanics of Motion Practice Before the Judicial Panel on Multidistrict Litigation*, 175 F.R.D. 589 (1998); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001 (1974); and Peter Geier, *MDL Panel: 'Traffic Cop' Seeing Its Power Grow*, NAT'L L.J., Mar. 26, 2007, at 1.

10. *See* 28 U.S.C. § 1407(c).

transferred pursuant to 28 U.S.C. § 1407. These cases, together with any related actions originally filed in the transferee forum, will constitute the MDL. As the MDL Panel subsequently learns of additional related cases, it will issue "conditional transfer orders" identifying tag-along actions that are to join the MDL.[11] A conditional transfer order does not become final, however, until it is filed by the MDL Panel in the transferee court and such filing is delayed fifteen days to allow any objections to the transfer of tag-along actions to be made.[12] Thus, transferor courts retain jurisdiction over cases subject to conditional transfer orders until such orders are filed in the transferee court. From time to time, the MDL Panel will vacate a conditional transfer order before it becomes final, typically based either on a well-founded objection to transfer or in light of the dismissal or remand of an action by the transferor court.

The MDL Panel transfers cases to the transferee court for "coordinated or consolidated pretrial proceedings."[13] And as the MDL Panel has explained, the word "pretrial, as an adjective, means before trial," thus "all judicial proceedings before trial are pretrial proceedings."[14] Indeed, the transferee court's authority has been described as "broad," and it necessarily encompasses issuing pretrial orders, resolving pretrial motions (including discovery motions, motions to amend, motions to dismiss, motions for summary judgment, and motions for class certification), and attempting to facilitate settlement.[15] In reality, there is only one true limit on a transferee court's authority over cases transferred to it by the MDL Panel, namely that a transferee court cannot "unilaterally transfer[] cases to [itself] for trial."[16] The United States Supreme Court defined this limitation in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, noting that the MDL statute "not only authorizes the Panel to transfer for coordinated or consolidated pretrial proceedings, but *obligates* the Panel to remand any pending case to its originating court

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11. J.P.M.L. R.P. 7.4, 199 F.R.D. at 435-36.

12. *Id.*

13. 28 U.S.C. § 1407(a).

14. *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 494 (J.P.M.L. 1968).

15. *See generally In re* Patenaude, 210 F.3d 135, 142-46 (3d Cir. 2000) (discussing the transferee court's authority and the views expressed in the legislative history regarding that authority); Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 578-83 (1978) (discussing the authority of transferee courts).

16. Benjamin W. Larson, Comment, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*: Respecting the Plaintiff's Choice of Forum*, 74 NOTRE DAME L. REV. 1337, 1337 (1999).

when, at the latest, those pretrial proceedings have run their course."[17] Thus, *Lexecon* held that the language of § 1407 precludes a transferee court from utilizing 28 U.S.C. § 1404(a) to make "self-assignments" and thereby retain transferred cases beyond pretrial proceedings.[18] Accordingly, at the conclusion of pretrial proceedings, cases that have not been terminated in the transferee court as a result of summary judgment, judgment of dismissal, or judgment upon stipulation must be remanded by the MDL Panel to the transferor courts for trial.[19] However, in practice, "[f]ew cases are remanded for trial; most multidistrict litigation is settled in the transferee court."[20] But this process can take time.

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17. 523 U.S. 26, 34 (1998) (emphasis added). It should be noted, however, that the transferee court does have the authority to "enter pretrial orders that will govern the conduct of the trial." *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 636 (N.D. Ill. 1996). Although transferor courts may depart from a transferee court's pretrial orders after cases have been remanded, "it is obvious that the objectives of § 1407 can best be achieved when a departure from the transferee judge's pretrial orders is the exception rather than the rule, and it is this court's impression that such departures are in fact exceptional." *Id.* at 637.

18. *Lexecon*, 523 U.S. at 40-41. Section 1404 is the change-of-venue statute and allows a district court to "transfer any civil action to any other district or division where it might have been brought" if such a transfer will be "[f]or the convenience of parties and witnesses" or if it is "in the interest of justice." 28 U.S.C. § 1404(a). There have been numerous unsuccessful attempts in Congress to overturn the holding of *Lexecon*. *See, e.g.*, Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. § 3 (as introduced in the Senate on July 26, 2006); Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. § 2 (as passed by the House on April 19, 2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (as passed by the House on March 24, 2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. § 2 (as passed by the House on March 14, 2001); Multidistrict Litigation Act of 2000, H.R. 5562, 106th Cong. § 2 (as passed by the House on December 15, 2000); Multidistrict Jurisdiction Act of 1999, S. 1748, 106th Cong. § 2 (as introduced in the Senate on October 19, 1999); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H.R. 2112, 106th Cong. § 2 (as passed by the House on September 13, 1999); Multidistrict Trial Jurisdiction Act of 1999, H.R. 1852, 106th Cong. § 2 (as introduced in the House on May 18, 1999).

19. *See* J.P.M.L. R.P. 7.5, 199 F.R.D. 425, 436-38 (2001). The MDL Panel may remand actions upon the motion of a party, the suggestion of the transferee court, or its own initiative. However, "[t]he Panel is reluctant to order remand absent a suggestion of remand from the transferee district court." *Id.*

20. Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 151 (D. Mass. 2006). The MDL Panel maintains detailed statistical summaries of its activities. *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2007), *available at* http://www.jpml.uscourts.gov/General_Info/Statistics/Statistical_Analysis_2007.pdf. According to the most recent numbers, which are current through September 30, 2007, there have been 265,269 actions subjected to MDL proceedings since the MDL Panel's inception in 1968. *Id.* This consists of 202,601 actions transferred by the MDL Panel and 62,668 actions filed directly in the transferee courts. *Id.* Of this total, 176,424 actions were terminated in the transferee courts, 393 actions were reassigned to transferor judges within

Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a "black hole," into which cases are transferred never to be heard from again.[21] The fact that MDL practice is relatively slow is to be expected, however, when one court is burdened with thousands of claims that would otherwise be spread throughout courts across the country. Despite criticisms of inefficiency, judicial economy is undoubtedly well-served by MDL consolidation when scores of similar cases are pending in the courts. The relevant comparison is not between a massive MDL and an "average case," but rather between a massive MDL and the alternative of thousands of similar cases clogging the courts with duplicative discovery and the potential for unnecessary conflict. Nevertheless, the excessive delay and "marginalization of juror fact finding" (i.e., dearth of jury trials) sometimes associated with traditional MDL practice are developments that cannot be defended.[22] The use of bellwether trials can temper both of these negative tendencies.

III. THE RISE OF BELLWETHER TRIALS

While "consolidation improves the efficiency of the pre-trial process, courts still face the daunting possibility of adjudicating numerous similar claims."[23] Indeed, just like consolidation under Rule 42 of the Federal Rules of Civil Procedure, consolidation of individual cases in a transferee court by the MDL Panel pursuant to § 1407 "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."[24] It is in this setting that the use of bellwether, or representative, trials has developed and in which the practice can flourish.

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the transferee courts, and 76,842 actions remain pending in the transferee courts. *Id.* Thus, only 11,610 cases have been remanded by the MDL Panel since 1968. *Id.*

21. *See, e.g.*, *Delaventura*, 417 F. Supp. 2d at 147-57 (collecting criticisms and noting that "as compared to the processing time of an average case, MDL practice is slow, very slow"); *In re* "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring) ("There are a number of inherent inconveniences in transfers for coordinated or consolidated pretrial. Some plaintiffs are temporarily deprived of their choices of forum and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding.").

22. *Delaventura*, 417 F. Supp. 2d at 153.

23. R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 210 (1999).

24. Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-97 (1933) (discussing consolidation under 28 U.S.C. § 734, a precursor to Rule 42).

A. Early Experimentation: The Binding Approach

Initially, courts attempted to use the results of bellwether trials to bind related claimants formally.[25] The early use of bellwether trials in this binding fashion was essentially an alternative to the adjudication of a class action. That is, notwithstanding the absence of class certification, it was nevertheless thought that the trial of representative claims could somehow have a binding effect on the consolidated cases of related claimants.[26] Appellate courts have been skeptical of this practice, and for good reason.[27]

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25. *See, e.g.*, Cimino v. Raymark Indus., Inc., 151 F.3d 297, 318 (5th Cir. 1998).

26. *See id.*

27. The United States Court of Appeals for the Fifth Circuit has been particularly critical of using bellwether trials to bind related claimants. *See, e.g.*, *id.* ("While the [*In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997)] majority opinion . . . contains language generally looking with favor on the [binding] use of bellwether verdicts when shown to be statistically representative, this language is plainly *dicta*, certainly insofar as it might suggest that representative bellwether verdicts could properly be used to determine *individual* causation and damages for other plaintiffs."). In his recent book, Professor Richard Nagareda discusses in significant detail *Cimino* and the trial plan that Judge Parker sought to implement in this asbestos litigation. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 67-70 (2007). For an in-depth discussion of the *In re Chevron* case to which *Cimino* cites, see generally Richard O. Faulk, Robert E. Meadows & Kevin L. Colbert, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 779-810 (1998).

Other circuits have also recognized that the results of bellwether trials are not properly binding on related claimants unless those claimants expressly agree to be bound by the bellwether proceedings. *See In re* Hanford Nuclear Reservation Litig., 497 F.3d 1005, 1025 (9th Cir. 2007) ("We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs."); Dodge v. Cotter Corp., 203 F.3d 1190, 1199 (10th Cir. 2000) ("[T]here is no indication in the record before us that the parties understood the first trial would decide specific issues to bind subsequent trials."); *In re* TMI Litig., 193 F.3d 613, 725 (3d Cir. 1999) ("[A]bsent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff."); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 6, § 20.132 ("[T]he transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) may otherwise promote settlement in the remaining actions." (footnote omitted)). For an example of a situation where consolidated parties agreed to be bound by at least some of the results of a bellwether trial, see Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 358-60 (2d Cir. 2003).

In a recent article, Professor Alexandra Lahav attempts to utilize the theory of deliberative democracy to defend the use of binding bellwether trials. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008). Although we believe bellwether trials to be more appropriately employed for nonbinding informational purposes, the bulk of Professor Lahav's policy arguments would appear to be no less forceful when marshaled in support of nonbinding bellwether trials.

B. The Modern Informational Approach

Two recent pharmaceutical MDLs that were centralized in the United States District Court for the Eastern District of Louisiana utilized bellwether jury trials for informational purposes: *In re Propulsid Products Liability Litigation* (MDL 1355) and *In re Vioxx Products Liability Litigation* (MDL 1657).[28] The ultimate purpose of holding bellwether trials in those settings was not to resolve the thousands of related cases pending in either MDL in one "representative" proceeding, but instead to provide meaningful information and experience to everyone involved in the litigations.[29] Because the remainder of this Article draws examples from both MDLs, a brief factual summary of the *Propulsid* and *Vioxx* MDLs and the bellwether trials that were conducted is appropriate.

1. *In re Propulsid Products Liability Litigation* (MDL 1355)

The federal *Propulsid* MDL was created by the MDL Panel on August 7, 2000.[30] Propulsid is the trade name for a family of prescription drugs that contain the active pharmaceutical ingredient cisapride.[31] Propulsid was manufactured by Janssen Pharmaceutica, Inc., which is a wholly owned subsidiary of Johnson & Johnson, and approved by the United States Food and Drug Administration (FDA) in 1993 for the treatment of nocturnal heartburn symptoms caused by gastroesophageal reflux disease.[32] Propulsid is a prokinetic agent that was designed to work by increasing the rate at which the esophagus, stomach, and intestines move food during digestion.[33] The plaintiffs in the *Propulsid* MDL asserted state law products liability claims, primarily alleging that Propulsid was defectively designed and that the

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28. *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2000 WL 35621417 (J.P.M.L. Aug. 7, 2000).

29. *See, e.g.*, Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006) ("[E]ven without preclusive effect, [bellwether trials] offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated.").

30. *Propulsid*, 2000 WL 35621417, at *1-2. For a more detailed factual background of the *Propulsid* MDL, see *In re* Propulsid Prods. Liab. Litig., 208 F.R.D. 133, 144-47 (E.D. La. 2002) (denying the plaintiffs' motion for certification of a nationwide personal injury class action). The transferee court has also catalogued various orders, transcripts, and other materials on a Web site dedicated to the *Propulsid* MDL. *See* MDL-1355 Propulsid Product Liability Litigation, http://propulsid.laed.uscourts.gov (last visited June 13, 2008).

31. *Propulsid*, 208 F.R.D. at 135.

32. *Id.*

33. *Id.* at 137.

defendants failed to warn that dangerous heartbeat irregularities could develop when the drug was consumed by some individuals in certain circumstances.[34]

The transferee court conducted one bellwether trial in the *Propulsid* MDL before a jury in New Orleans. The bellwether trial, *Diez v. Johnson & Johnson*, involved the surviving spouse and children of a male plaintiff who suffered a fatal cardiac arrhythmia, allegedly as a result of his use of Propulsid.[35] The case was governed by Louisiana law and resulted in a verdict for the defendants.

In addition to the *Diez* case, the transferee court had intended to hold two additional bellwether trials in the *Propulsid* MDL. The second bellwether case, *Reed v. Johnson & Johnson*, involved a female plaintiff who allegedly suffered damage to her intestinal track as a result of using Propulsid.[36] But prior to trial, the transferee court granted summary judgment in favor of the defendants under Louisiana law, finding that the plaintiff could not state a claim because her alleged gastric problems predated her use of Propulsid.[37] The third bellwether case, *Brock v. Johnson & Johnson*, involved a female plaintiff who alleged that her use of Propulsid caused her to have a sustained prolonged QT interval, placing her at risk for sudden death.[38] Prior to trial, however, the transferee court excluded the causation opinions proffered by two of the plaintiff's expert physicians and granted summary judgment in favor of the defendants under Louisiana law.[39]

A settlement of all Propulsid-related federal lawsuits was announced on February 4, 2004.[40] Pursuant to the terms of the settlement, the defendants agreed to pay eligible claimants at least $69.5 million, but no more than $90 million, with individual awards being determined by a medical review panel comprised of individuals

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34. *Id.* at 135.

35. Diez v. Janssen Pharmaceutica, Inc., No. 00-2577 (E.D. La. filed Aug. 30, 2000).

36. Zeno v. Johnson & Johnson Co., No. 00-282 (E.D. La. filed Jan. 28, 2000) (regarding Samantha Reed).

37. *See In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 367739, at *1 (E.D. La. Feb. 18, 2003).

38. Black v. Johnson & Johnson Co., No. 00-2497 (E.D. La. filed Aug. 22, 2000) (regarding Ernestine J. Brock).

39. *See In re* Propulsid Prods. Liab. Litig., 261 F. Supp. 2d 603, 604-05 (E.D. La. 2003).

40. *See In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2004 WL 305816, at *1-3 (E.D. La. Feb. 5, 2004) (consent order expressing transferee court's agreement to exercise various powers under the settlement program).

jointly selected by counsel.[41] A second settlement of all state lawsuits, and federal suits filed after the deadline for enrollment in the first settlement program, was announced on December 15, 2005.[42] Pursuant to the terms of the second settlement, the defendants agreed to pay eligible claimants at least $14.5 million, but no more than $15 million, with individual awards again being determined by a medical review panel.[43] Finally, on August 30, 2007, a supplemental agreement was announced, which provided that certain claimants originally determined to be ineligible under either of the previous settlement programs would be entitled to a re-review of their claims.[44]

2. *In re Vioxx Products Liability Litigation* (MDL 1657)

The federal *Vioxx* MDL was created by the MDL Panel on February 16, 2005.[45] Vioxx is a prescription drug that belongs to a general class of pain relievers known as nonsteroidal anti-inflammatory drugs (NSAIDs).[46] Vioxx was manufactured by Merck & Company, Inc. and approved by the FDA in 1999 for the treatment of pain and inflammation resulting from osteoarthritis, rheumatoid arthritis, menstrual pain, and migraine headaches.[47] Vioxx was designed to work by selectively inhibiting one form of the cyclooxygenase enzyme, namely COX-2, and to thereby provide pain relief with a reduced risk of gastrointestinal perforations, ulcers, and bleeds traditionally associated with NSAID use.[48] The plaintiffs in the *Vioxx* MDL assert state law products liability claims primarily

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41. *See* MDL-1355 Propulsid Product Liability Litigation, *supra* note 30 (providing a settlement update on February 4, 2004).

42. Press Release, Janssen, L.P., The Plaintiffs Steering Committee and the State Liaison Committee of the Propulsid Multi-District Litigation Announce Agreement To Resolve Remaining Federal and State Court Cases (Dec. 15, 2005), *available at* http://propulsid.laed.uscourts.gov/settlement.htm.

43. *Id.*

44. MDL-1355 Propulsid Product Liability Litigation, *supra* note 30 (providing a settlement agreement on August 30, 2007).

45. *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1354-55 (J.P.M.L. 2005). For a more detailed factual background of the *Vioxx* MDL, see *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 776, 778-79 (E.D. La. 2007) (denying Merck's motion for summary judgment on federal preemption grounds); and *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452-54 (E.D. La. 2006) (denying the plaintiffs' motion for certification of a nationwide personal injury class action). The transferee court has also catalogued various orders, transcripts, and other materials on a Web site dedicated to the *Vioxx* MDL. *See* MDL-1657 Vioxx Products Liability Litigation, http://vioxx.laed.uscourts.gov (last visited June 13, 2008).

46. *Vioxx*, 501 F. Supp. 2d at 778.

47. *Id.* at 778-79.

48. *Id.* at 778.

alleging that Merck failed to warn of an increased risk of heart attacks and strokes associated with the use of Vioxx.[49] The bulk of these claims are individual personal injury claims; however, the *Vioxx* MDL also includes claims for medical monitoring and third-party payor claims seeking reimbursement of amounts spent on the drug.[50]

The transferee court conducted six bellwether trials in the *Vioxx* MDL, only one of which resulted in a verdict for the plaintiffs.[51] The first federal trial was held before a jury in Houston, Texas, while the transferee court was temporarily displaced during Hurricane Katrina.[52] The remaining federal trials were held before juries in New Orleans, Louisiana.[53] During this time, approximately thirteen additional cases were tried before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida.[54]

The first federal bellwether trial, *Plunkett v. Merck*, involved the surviving spouse of a male plaintiff who suffered a fatal heart attack in 2001 at the age of fifty-three, allegedly as a result of his use of Vioxx for several weeks.[55] The case was governed by Florida law and resulted in a hung jury.[56] The case was subsequently retried as the second bellwether trial and resulted in a verdict for the defendant.[57] Because of a misrepresentation by one of the defendant's expert witnesses during the retrial, the court vacated this verdict and reopened the case.[58]

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49. *Id.* at 779.

50. *Vioxx*, 239 F.R.D. at 453.

51. *See id.* at 452 n.4. As discussed below, the first bellwether trial resulted in a mistrial and was subsequently retried. Thus, although the transferee court held six bellwether trials, it did so in only five individual cases.

52. *Id.*

53. *See id.*

54. *See, e.g.*, Heather Won Tesoriero, Sarah Rubenstein & Jamie Heller, *Merck's Tactics Largely Vindicated as It Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10, 2007, at A1. Under current law and practice, any given mass tort will often manifest itself in both the federal and state courts. Parallel bellwether trials in the state courts serve essentially the same beneficial purposes as do bellwether trials in the federal MDL, and can also provide a wider geographic sampling of jury verdicts.

55. Plunkett v. Merck & Co., No. 05-4046 (E.D. La. filed Aug. 23, 2005). Prior to the first bellwether trial, the transferee court issued an omnibus order addressing various *Daubert* challenges to proffered expert witnesses. *See In re* Vioxx Prods. Liab. Litig., 401 F. Supp. 2d 565, 599-600 (E.D. La. 2005).

56. *See, e.g.*, Alex Berenson, *A Mistrial is Declared in 3rd Suit Over Vioxx*, N.Y. TIMES, Dec. 13, 2005, at C1.

57. *See, e.g.*, Heather Won Tesoriero, *Merck Wins Vioxx Decision in Vital Second Court Victory*, WALL ST. J., Feb. 18, 2006, at A7.

58. *See In re* Vioxx Prods. Liab. Litig., 489 F. Supp. 2d 587, 591-95 (E.D. La. 2007).

The third bellwether trial, *Barnett v. Merck*, involved a male plaintiff who suffered a heart attack in 2002 at the age of fifty-eight, allegedly as a result of his use of Vioxx for several years.[59] The case was governed by South Carolina law and resulted in a $51 million verdict for the plaintiff, which consisted of $50 million in compensatory damages and $1 million in punitive damages.[60] The court initially ordered a new trial on the issue of damages,[61] but upon further consideration remitted the jury's award to $1.6 million.[62] After the plaintiff accepted the remitted award, the defendant appealed to the United States Court of Appeals for the Fifth Circuit, but the parties have since settled the case and the appeal has been dismissed.[63]

The fourth bellwether trial, *Smith v. Merck*, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-two, allegedly as a result of his use of Vioxx for approximately four months.[64] The case was governed by Kentucky law and resulted in a verdict for the defendant.[65] The fifth bellwether trial, *Mason v. Merck*, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-nine, allegedly as a result of his use of Vioxx for approximately ten months.[66] The case was governed by Utah law and resulted in a verdict for the defendant.[67] The sixth bellwether trial, *Dedrick v. Merck*, involved a male plaintiff who suffered a heart attack in 2003 at the age of fifty-four, allegedly as a result of his use of Vioxx for approximately six months.[68] The case was governed by Tennessee law and resulted in a verdict for the defendant.[69]

After these six bellwether trials in the MDL, as well as several trials in the state courts, the parties, with the encouragement of the various courts, began serious settlement discussions. Those discussions ultimately proved successful and a partial settlement of all

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59. *See* Barnett v. Merck & Co., No. 06-485 (E.D. La. filed Jan. 31, 2006).

60. *See, e.g.*, Alex Berenson, *Merck Suffers a Pair of Setbacks over Vioxx*, N.Y. TIMES, Aug. 18, 2006, at C1.

61. *In re* Vioxx Prods. Liab. Litig., 448 F. Supp. 2d 737, 738 (E.D. La. 2006).

62. *See In re* Vioxx Prods. Liab. Litig., 523 F. Supp. 2d 471, 472 (E.D. La. 2007).

63. *See* Barnett v. Merck & Co., No. 07-30897 (5th Cir. Apr. 18, 2008) (entry of dismissal).

64. Smith v. Merck & Co., No. 05-4379 (E.D. La. filed Sept. 29, 2005).

65. *See, e.g.*, Heather Won Tesoriero, *Merck is Victorious in New Orleans Vioxx Trial*, WALL ST. J., Sept. 27, 2006, at A13.

66. Mason v. Merck & Co., No. 06-0810 (E.D. La. filed Feb. 16, 2006).

67. *See, e.g.*, Janet McConnaughey, *Jury Clears Merck in 11th Vioxx Trial*, WASH. POST, Nov. 16, 2006, at D3.

68. Dedrick v. Merck & Co., No. 05-2524 (E.D. La. filed June 21, 2005).

69. *See, e.g.*, Heather Won Tesoriero, *Merck Prevails in 12th Trial Since Vioxx Was Pulled*, WALL ST. J., Dec. 14, 2006, at B10.

Vioxx-related personal injury lawsuits pending in both federal and state courts was announced on November 9, 2007.[70] Pursuant to the terms of the settlement, which was contingent upon a certain percentage of current claimants agreeing to participate, Merck agreed to pay $4.85 billion to eligible claimants, with individual settlement awards varying based on an objective analysis of individual circumstances by a claims administrator.[71]

C. Benefits of the Modern Approach

In the MDL setting, bellwether trials can be effectively employed for nonbinding informational purposes and for testing various theories and defenses in a trial setting. Although the results of such "nonbinding" bellwether trials are obviously binding upon the parties to the specific cases that are tried, the results need not be binding on consolidated claimants in order to be beneficial to the MDL process. The Fifth Circuit has recognized the potential value of employing bellwether trials in this manner:

> The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar .... The reasons for acceptance by bench and bar are apparent. If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts.[72]

Another significant benefit of bellwether trials is that they provide a vehicle for putting litigation theories into practice. As most experienced litigators know, trials rarely proceed exactly as planned.

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70. *See, e.g.*, Tesoriero, Rubenstein & Heller, *supra* note 54.

71. *See id.*

72. *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997); *see also In re* Hanford Nuclear Reservation Litig., 497 F.3d 1005, 1014 (9th Cir. 2007) ("After almost two decades of litigation, . . . the parties in 2005 agreed to a bellwether trial. The trial was designed to produce a verdict that would highlight the strengths and weaknesses of the parties' respective cases and thus focused on six plaintiffs . . . who were representative of the larger group. The purpose of the trial was to promote settlement and bring long-overdue resolution to this litigation."); *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., MDL No. 1358, 2007 WL 1791258, at *2-3 (S.D.N.Y. June 15, 2007) ("A bellwether trial also allows a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action .... And every experienced litigator understands that there are often a handful of crucial issues on which the litigation primarily turns. A bellwether trial allows each party to present its best arguments on these issues for resolution by a trier of fact. Moreover, resolution of these issues often facilitates settlement of the remaining claims.").

In addition to the unexpected logistical problems that may arise, one can never be sure how certain arguments and evidence will "play" before a trier of fact. In multidistrict litigation, these uncertainties are often exacerbated by variations that exist among the circumstances of consolidated claimants and by the sheer volume of relevant material produced during discovery.

Bellwether trials thus assist in the maturation of any given dispute by providing an opportunity for coordinating counsel to organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation.[73] Indeed, the utilization of bellwether jury trials can enhance and accelerate the MDL process in two key respects. First, bellwether trials allow coordinating counsel to hone their presentation for subsequent trials and can lead to the development of "trial packages" for use by local counsel upon the dissolution of MDLs. Second, and perhaps more importantly, bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.

1. Trial Packages

The bellwether process can benefit all consolidated litigants in an MDL by providing the impetus for coordinating attorneys to assemble "trial packages."[74] As noted above, bellwether trials force litigants to

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73. The bellwether trial process is often only one phase in the effective management of multidistrict litigation. For an excellent discussion of techniques that may be employed in prior phases with respect to expert discovery and scientific evidence, see generally Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The* PPA *Experience*, 54 DRAKE L. REV. 621, 621-38 (2006). Indeed, almost every judicial action taken by an MDL transferee court could be described as having "bellwether" qualities:

> Due process requires that persons not parties to a particular litigation be afforded their own day in court unless the circumstances warrant a conclusion that they were in privity with the litigants against whom a ruling was made. Presenting similar claims or defenses, or raising the same legal issues as someone else, has never sufficed for such privity. Recognition of the due process rights of litigants need not cripple the courts in multidistrict litigation, however. Once a section 1407 or other participating judge has ruled on a matter, it will not take her long to dispose of subsequent motions based on the same legal arguments. New parties will figure out quickly which efforts to litigate issues already decided by the judge at the urging of others will be futile.

Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 669 (1987) (footnote omitted).

74. In most MDLs, the transferee court will appoint two lawyers as "lead" or "liaison" counsel, one for plaintiffs and one for defendants. These lawyers essentially serve

organize and streamline the massive wealth of material that is often produced during pretrial discovery in multidistrict litigation. Trial packages are a valuable by-product of this forced organization, and can be distributed to litigants and local counsel when an MDL is dissolved and individual cases are remanded to transferor courts for trial.

Trial packages come in different shapes and sizes, but typically will include various databases of material such as the relevant documents acquired in discovery, other valuable background information, expert reports, deposition and trial testimony (both transcripts and video, if available), biographies of potential witnesses, transferee court rulings and transcripts, and the coordinating attorneys' work product and strategies with respect to all of this material. Ideally, these materials will be well-organized, indexed, and electronically searchable.

To the extent that trial lawyers can be analogized to actors in a play, it is helpful to think of coordinating counsel as playwrights in this aspect of the bellwether process. A bellwether trial forces these playwrights to draft their manuscripts in a relatively short period of time—that is, to develop fully the presentation of their clients' cases within the MDL. Multiple bellwether trials allow counsel to hone their presentations, making minor adjustments based on previous performances and the realities of litigation—not unlike the practice of Shakespeare himself.[75] The trial package is the final product of this

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as the communication conduit between the transferee court and the thousands of lawyers that can often be involved in any given MDL. Lead or liaison counsel are usually "[c]harged with essentially administrative matters," but may also be expected to formulate and present "positions on substantive and procedural issues." MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 6, § 10.221. In addition, the transferee court may also appoint various committees of lawyers for each side, often referred to as "steering committees." For example, in the *Vioxx* and *Propulsid* MDLs, the transferee court appointed a Plaintiffs' Steering Committee and Defendants' Steering Committee. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 850962, at *1-2 (E.D. La. Apr. 8, 2005) (pretrial order no. 7) (delineating the duties and responsibilities of the Defendants' Steering Committee); *In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 850963, at *1-6 (E.D. La. Apr. 8, 2005) (pretrial order no. 6) (delineating the duties and responsibilities of the Plaintiffs' Steering Committee); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. Oct. 2, 2000) (pretrial order no. 2 at 5-10) (delineating the duties and responsibilities of the Plaintiffs' Steering Committee and designating lead counsel for the defendant), *available at* http://propulsid.laed.uscourts.gov/Orders/order2.pdf. Throughout this Article, we refer to all lawyers appointed by the transferee court as "coordinating counsel."

75. *See, e.g.*, GERALD EADES BENTLEY, THE PROFESSION OF DRAMATIST IN SHAKESPEARE'S TIME, 1590-1642, at 260-63 (1971). Indeed, the practical realities of modern mass tort litigation, revealed through the bellwether process, are not so different from those faced by the dramatist:

interactive creative process, and its dissemination to local counsel upon the dissolution of an MDL is akin to "taking the show on the road."

Ultimately, the availability of a trial package ensures that the knowledge acquired by coordinating counsel is not lost if a global resolution cannot be achieved in the transferee court. Trial packages also ensure that the products of pretrial common discovery do not overwhelm local counsel in the event that cases are remanded for trial. In this way, the bellwether process guarantees that, at a minimum, the transferee court is effective at its intended goal of streamlining pretrial discovery and preparing cases for trial in their local districts. Indeed, the creation of a complete trial package is tangible evidence that the transferee court's statutory role in overseeing pretrial discovery is nearing an end and that the dissolution of the MDL is a real possibility. By ushering in these realities, the bellwether process can also precipitate global settlement negotiations.

2. Enhancing Global Settlements

"As in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement . . . . [and] the most ambitious settlements seek to make and enforce a grand, all-encompassing peace in the subject area of the litigation as a whole."[76] By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations. Indeed, the centralized forum created by the MDL Panel truly provides a "once-in-a-lifetime" opportunity for the resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time.[77] Transferee courts can contribute to the fulfillment

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> In the world of the theatre, . . . the impact of the author's creation is in good part determined by the playwright's cooperation with his colleagues in presentation. The tailoring of the literary product to the qualities of the actors, the design of the theatre, and the current conventions of production is of vital importance in achieving the effects which the author planned.

Id. at 8.

76. NAGAREDA, *supra* note 27, at ix.

77. To be precise, we mean once in any given *mass tort*'s lifetime. Indeed, when the structure provided by the transferee court breaks down upon the dissolution of an MDL, that is, when cases are remanded to the districts from which they originated, it becomes exceedingly difficult to organize and achieve a global settlement of related claims. The institutional value of the transferee forum in this respect is beyond dispute. *See, e.g.*, *id.* at 260 ("As a practical matter, consolidated pretrial proceedings at the behest of the MDL Panel

of this important role through the initiation and management of the bellwether trial process.

In his recent treatment of mass tort settlements, Professor Richard Nagareda succinctly describes the way in which a typical mass dispute evolves: "[M]ass tort litigation frequently proceeds from an immature stage to a mature stage and, thereafter, to what one might call a peacemaking stage, where efforts focus on the crafting of a comprehensive settlement."[78] When the MDL Panel first centralizes related cases in a transferee court, chances are that the litigation is still in its "immature" stage, exhibiting the following characteristics:

> The immature stage marks the period for exploration of the legal and factual questions surrounding the merits of the litigation. The ultimate success of the litigation remains fraught with uncertainty . . . . Some individual lawsuits typically will proceed through full-scale trials to test the quality of proof gathered on the plaintiffs' side and to gauge the reactions of jurors to the allegations presented. Defendants, in particular, will be on the lookout for arguments with the potential to knock out the entire subject area of litigation—a lack of general causation as a factual matter or the absence of some other necessary element as a matter of law.[79]

Over time, as the litigation matures, both litigants and counsel begin to shift their focus to the potential for global resolution.[80] By bringing

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already form a setting ripe for plaintiffs' lawyers and defendants to begin discussions about a comprehensive peace.").

78. *Id.* at 12; *see* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688-94 (1989) (recognizing that mass disputes can mature and ultimately be resolved through a hybrid process of consolidation, resolution of common issues, and acquisition of knowledge regarding the valuation of individual claims); *see also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1841-45 (1995) (expanding on this view and focusing on styles of judicial management).

79. NAGAREDA, *supra* note 27, at 14-15.

80. *See id.* at 54-57 ("When mass tort litigation reaches the mature stage, the game changes from the resolution of cases to the crafting of a comprehensive peace . . . . The basic thrust of the shift is from litigation of individual claims in the tort system to creation of private administrative systems for the compensation of claimants in the future."). Professor Nagareda goes on to describe the motivations underlying this inevitable shift:

> Savvy lawyers on opposing sides have not hit upon the ideal of comprehensive peace by happenstance; rather, observed behavior reveals an underlying truth. The prospect of mass liability extending over years or decades—especially, liability of such a scope as to threaten the viability of the defendant as a business firm—generates huge uncertainty. For plaintiffs, the main uncertainty concerns the availability of resources to compensate persons who happen to develop disease later rather than sooner. For defendants, uncertain and potentially firm-threatening liability can cripple their ability to draw upon the capital markets to support their continued business operations.

Id. at x.

fact-finding to the forefront of multidistrict litigation, bellwether trials can make a significant contribution to the maturation of disputes and, thus, can naturally precipitate settlement discussions.[81]

In addition to this valuable contribution, bellwether trials also allow MDL litigants and their lawyers to gain an understanding of the litigation that is exponentially more grounded in reality than that which has traditionally persisted in the absence of jury trials.[82] To grasp fully how bellwether trials can enhance the ultimate resolution of a given dispute, one must understand the structure of modern mass tort settlements: "[I]n the period since the [Supreme] Court's decisions [in *Amchem Products, Inc. v. Windsor*[83] and *Ortiz v. Fibreboard Corp.*[84]], a rough consensus has emerged about the desirability of moving toward some manner of grid-based solution once mass tort litigation has matured."[85] These "grid-based solutions" are so-called because they "use grids to match medical conditions with compensation payouts in a systematic manner."[86] By allowing juries an initial opportunity to carry out such matching on an ad hoc, case-by-case basis, bellwether trials essentially supply counsel with "raw" data around which a more fair and equitable grid-based compensation system can ultimately be constructed.

IV. THE SELECTION PROCESS

After the threshold determination to utilize bellwether trials, the transferee court and coordinating counsel should focus on the

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81. *See, e.g.*, Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 959 (1995) ("Individual cases proceeding through trial, verdict, and appeal in a variety of jurisdictions gradually reveal the behavior of juries and judges, clarify the applicable rules of law, and render the expected value of individual claims more predictable.").

82. *See, e.g.*, Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) (extolling the "inevitable uncertainties of the direct democracy of the American jury"). Judge Young may be correct that "the 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice," and that when "[f]act finding is relegated to a subsidiary role[,] . . . bargaining focuses instead on ability to pay [and] the economic consequences of the litigation." *Id.* at 150, 155 (footnotes omitted). The use of bellwether trials obviously recognizes the important institutional role of the jury system, but it can also broaden the focus of settlement negotiations in multidistrict litigation beyond these traditional considerations.

83. 521 U.S. 591 (1997).

84. 527 U.S. 815 (1999).

85. NAGAREDA, *supra* note 27, at 97. For an informative overview of the various structural components of modern mass tort settlement programs, see generally Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1362-75 (2005).

86. NAGAREDA, *supra* note 27, at 223.

mechanics of the trial-selection process. If bellwether trials are to serve their twin goals as informative indicators of future trends and catalysts for an ultimate resolution, the transferee court and the attorneys must carefully construct the trial-selection process. Ideally, the trial-selection process should accurately reflect the individual categories of cases that comprise the MDL in toto, illustrate the likelihood of success and measure of damages within each respective category, and illuminate the forensic and practical challenges of presenting certain types of cases to a jury. Any trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact.

At the very outset, it must be noted that the sheer number and type of feasible trial-selection processes are limited only by the ingenuity of each transferee court and the coordinating attorneys. This Part will discuss possible alternatives and offer recommendations to consider in drawing up a trial-selection blueprint, taking into account the experiences learned through the *Propulsid* and *Vioxx* MDLs and the paths taken in other MDLs. Notwithstanding the views espoused here, it is important to note that no one process is a paragon for all MDLs. Instead, each transferee court that chooses to conduct its own bellwether trials must consider all the unique factual and legal aspects specific to its litigation and then fashion an appropriate, custom-made trial-selection formula.

There are three separate but equally important sequential steps that will streamline any trial-selection process and allow that process to achieve its full potential, regardless of the type of MDL. The first step requires the transferee court and the attorneys to catalogue the entire universe of cases that comprise the MDL and then to divide the cases into several distinct, easily ascertainable categories of cases. The second step necessitates that the transferee court and the attorneys select a manageable pool of cases, which reflects the various categories and contains cases that are both amenable to trial in the MDL and close to being trial-ready. Once the pool has been constructed, all the cases comprising the pool should be set on a fast track for case-specific discovery. Third, near the conclusion of the case-specific discovery, the transferee court and the attorneys should select a predetermined number of individual cases within the sample and set these cases for trial. Each of these steps will be discussed in turn.

A. Cataloguing the Entire Universe of Cases

Before the transferee court and the attorneys can determine which cases to set for trial, they should first ascertain the makeup of the MDL. The rationale behind cataloguing and dividing the entire universe of cases within the MDL is simple. A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation; therefore, it is imperative to know what types of cases comprise the MDL. Otherwise, the transferee court and the attorneys risk trying an anomalous case, thereby wasting substantial amounts of both time and money. Thus, to ensure that the cases ultimately tried are emblematic of all the cases comprising the MDL, the transferee court and the attorneys must determine the composition of the MDL prior to engaging in any further trial-selection steps.

To discharge this task effectively, the transferee court and the attorneys should each conduct a census of the entire litigation and identify all the major variables.[87] This initial step in the bellwether process will require that the attorneys have some knowledge about the individual cases in the MDL. In the *Vioxx* MDL, this was achieved with limited case-specific discovery through the exchange of plaintiff and defendant profile forms.[88] Of course, each MDL is unique, and it would be nonsensical to suggest that the major variables in a products liability MDL would be the same as those in an antitrust, common disaster, or securities MDL.[89] Likewise, it would be equally unrealistic to suggest that even two MDLs within the same subject matter would share the same major variables. As it would be ill-conceived simply to cut and paste the major variables of one MDL to another, regardless of how similar the two MDLs may be, each transferee court and coordinating counsel must perform this task anew.

In any given MDL, there will be innumerable variables differentiating each case from the others. Rather than attempt to

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87. *See, e.g.*, *In re* Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig., MDL No. 05-1726, 2007 WL 846642, at *3-4 (D. Minn. Mar. 6, 2007). In an unpublished amended order, the *Medtronic* transferee court set forth six categories of cases based on the parties' recommendations. *See In re* Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig., MDL No. 05-1726 (D. Minn. Apr. 12, 2007) (amended order on bellwether actions).

88. *See In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790-91 (E.D. La. 2007).

89. The MDL Panel divides MDLs into ten separate subject-matter categories: (1) air disaster, (2) antitrust, (3) contract, (4) common disaster, (5) employment practices, (6) intellectual property, (7) miscellaneous, (8) products liability, (9) sales practices, and (10) securities. *See* U.S. Judicial Panel on Multidistrict Litig. Docket Information, http://www.jpml.uscourts.gov/Docket_Info/docket_info.html (last visited June 13, 2008).

delineate every identifiable variable, the transferee court and the attorneys should focus on those variables that can be easily identified, are substantively important, and provide clear lines of demarcation—i.e., the major variables. By identifying the major variables, the transferee court and the attorneys can create sensible and easily ascertainable groupings by which to categorize the entire MDL, providing manageability and order to what may otherwise appear to be a massive, chaotic conglomeration of loosely analogous cases. To put it summarily, these groupings will act as guideposts, focusing the attorneys on the most predominant and important issues in the litigation.

After the transferee court and the attorneys have each separately evaluated the composition of the MDL and considered all the major variables, the transferee court should hold a status conference at which time it and the attorneys should discuss all of the relevant variables in an attempt to reach a consensus on which variables are the most predominant and important. By the conclusion of this status conference, the court should determine how the MDL will be divided and, more importantly, the attorneys should know why the groupings have been chosen.

By way of illustration, the major variables ultimately decided upon in the *Vioxx* MDL were (1) type of injury (heart attack, stroke, or other), (2) period of ingestion (short-term versus long-term), (3) age group (older or younger than sixty-five), (4) prior health history (previous cardiovascular injuries or not), and (5) date of injury (before or after a certain label change).[90] Each of these variables could be easily identified, appeared to be substantively important, and provided a clear line of demarcation. In addition, these variables allowed the court to separate the entire litigation into meaningful divisions and focused the attorneys on the most predominant and important issues, ensuring that the cases ultimately tried were representative of the entire census.

At first glance, it may appear to be counterintuitive to focus only on a small group of variables, even if they are the most predominant

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90. Regarding the type of injury, although the plaintiffs alleged injuries in the *Vioxx* MDL other than heart attack or stroke, these two injuries so predominated that such cases promised to be the most informative. Similarly, the cases in the *Propulsid* MDL were divided into categories based on the type of injury alleged. *See In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003) ("The Court further noted that it wished to proceed to trial on three types of cases involving Propulsid: wrongful death cases, personal injury cases, and the sustained prolonged QT cases seeking medical monitoring.").

and important. If the rationale behind bellwether trials is for the attorneys to ascertain the range of value or forensic challenges of each case, then it would be ideal to understand the importance of all the variables. Indeed, only after accounting for every variable in an individual case can an attorney fully appreciate that case. Although that thought process is true in some respects, it must be tempered by the realities of modern mass tort litigation. Time simply will not allow a transferee court, tasked with its MDL pretrial duties as well as the duties attendant to its regular docket, to try enough cases so that the attorneys can fully appreciate how every factual nuance of a case will unfold at trial. If a transferee court intends to try only a small representative sampling of bellwether trials, as the *Vioxx* and *Propulsid* transferee courts did, it must limit the attorneys' focus to approximately four to five variables.[91] If a transferee court places more variables in play, it risks the chance that some of the variables at issue will not be accounted for during the bellwether trials and that the most predominant and important issues may be lost among the mass amalgamation of variables.

B. Creating a Pool of Potential Bellwether Cases

After determining the composition of the MDL and creating groupings by which to divide the MDL, the transferee court and coordinating counsel should begin the process of creating a pool of cases that accurately represents the different divisions within the MDL from which the bellwether cases will be selected. This step requires the transferee court and the attorneys to (1) determine the size of the pool, (2) determine who will select the cases to fill the pool and how they will do so, and (3) fill the pool with cases that are both amenable to trial within the MDL and close to being trial-ready.

1. Determining the Size of the Pool

The first phase in creating a proper pool of potential bellwether cases is determining the size of the ultimate pool to be formed. In calculating the size of the pool, the transferee court and the attorneys

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91. Of course, a transferee court may take a more ambitious approach and set a greater number of cases for bellwether trials. In such instances, a transferee court may find it prudent to place more variables in play, allowing for a greater number of divisions and groupings. A transferee court that takes this approach, however, must remain cognizant of the ultimate purpose of bellwether trials and be vigilant of the law of diminishing returns, understanding that at some point the costs inherent to trying additional bellwether trials will outweigh the benefits.

must ensure that the pool is large enough to account for all of the major variables previously identified, but small enough to be manageable and time-efficient.

If the pool is too large, then an inordinate amount of time will be spent analyzing which cases should fill the pool, conducting case-specific discovery once the pool is filled, and selecting the actual cases to be tried once case-specific discovery has been completed. Not only will this result in an inefficient use of time, it may turn the trial-selection process into an unwieldy mess ripe with countless conflicts, rather than a finely tuned process.

If the pool is too small, then there is a risk that too few of the major variables will be properly represented. In addition, a small pool may inadvertently commingle aspects of the second step (selecting cases to fill the trial-selection pool) and third step (selecting cases from the trial-selection pool to be tried), by essentially forcing the attorneys to select which cases will be tried before completion of case-specific discovery. This is so because the smaller the pool of cases, the less choice the transferee court can afford to pick cases from the pool. For instance, if the transferee court intends to try five cases and the pool itself is only five to ten cases, then the ability to pick, veto, or strike cases within the pool is greatly diminished, and the second step essentially eliminated. This is problematic because, as can often happen, a case that appears to be favorable or representative early in the litigation process (when the pool is initially filled) may be eventually determined to be unrepresentative or grossly unfavorable once case-specific discovery is complete. Therefore, a small pool may force the attorneys to try unrepresentative or disparately unfavorable cases.

Unfortunately, there is no precise numerical size that will guarantee a manageable trial-selection pool while simultaneously accounting for the major variables. Thus, to determine the satisfactory number, each transferee court must consider several factors, such as the number of cases it intends to try, the number of major variables at issue, and how it intends to conduct the actual selection of cases for trial from the pool. Although it may be imprudent to recommend a set size for the pool, the *Propulsid* and *Vioxx* experiences reflect that a pool consisting of twenty cases should be satisfactory for situations in which the transferee court intends to hold approximately six trials, with four to five major variable groupings, while giving each side of attorneys a few vetoes or strikes during the final trial-selection phase. Nevertheless, common sense dictates that the greater the number of

trials to be held, the greater the number of variables at issue, and the greater the discretion afforded in selecting which cases will be tried, the larger the pool should be.

2. Filling the Pool

After determining the size of the pool from which cases will be selected for bellwether trials, it becomes necessary to determine who will fill the pool and how they will do so. There are essentially three ways to fill the pool: random selection, selection by the transferee court, and selection by the attorneys.

a. Random Selection

Under the random-selection option, the trial-selection pool is filled with a prearranged number of cases selected randomly from the total universe of cases in the MDL or from various logical subsets of that group.[92] This method is easy to perform, but it can be problematic. If cases are selected at random, there is no guarantee that the cases selected to fill the trial-selection pool will adequately represent the major variables. Because the primary goal in filling the trial-selection pool is to narrow the field of potential bellwether cases to those that are representative, a selection method that may potentially frustrate this purpose by permitting unrepresentative cases to serve as bellwether trials should be rejected.

b. Selection by the Transferee Court

Alternatively, the transferee court can select which cases will fill the pool. Being an unbiased neutral, the transferee court's selections are likely to be more focused on cases that are truly representative of the litigation and not on cases that present the best opportunity for success at trial.[93]

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92. The transferee court in the *Bextra & Celebrex* MDL employed a hybrid method, allowing the attorneys to agree on a certain group of cases as pool-candidates and then permitting a subset of pool-candidates to be randomly selected to fill the pool. *See In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. Nov. 17, 2006) (pretrial order no. 18 at 2-4) (describing the initial selection of plaintiffs for discovery and trial pool), *available at* http://ecf.cand.uscourts.gov/cand/bextra/content/files/pretrial_order_18.pdf.

93. *See, e.g.*, *In re* Welding Fume Prods. Liab. Litig., MDL No. 1535, 2006 WL 2505891, at *2 (N.D. Ohio Aug. 28, 2006) (selecting fifteen cases for case-specific discovery); *see also In re* Baycol Prods. Liab. Litig., MDL No. 1431 (D. Minn. July 18, 2003) (pretrial order no. 89 at 2) (providing that the court will determine eligible cases to be tried if

Although the existence of a neutral arbiter is undoubtedly a great benefit, it is highly unlikely that the transferee court can properly conduct this task on its own. Given their inherent costs, bellwether trials will generally only be utilized in large-scale MDLs. Such MDLs typically consist of thousands of individual cases. Some cases will be filed directly in the transferee court. Some will be filed in, or removed to, other federal district courts and then transferred to the transferee court by the MDL Panel. Still others may be pending in state court awaiting trial. The transferee court simply does not have the resources available, or the familiarity with each individual case, to conduct this task adequately.[94] Therefore, this option should also be avoided.

c. Selection by the Attorneys

The last available option is to allow coordinating counsel to fill the trial-selection pool with cases. The attorneys are in the best position to know, or ascertain, the true census of the litigation. In addition, they have the most staff resources available. Although there may be some incentive for the attorneys to focus more on selecting cases that will be successful at trial than those that are truly representative, the attorneys, with the transferee court's encouragement, must be mindful that unrepresentative cases, even if they are successful at trial, will do little to resolve the entire litigation and will have little predictive value. Additionally, the transferee court can take steps to curb this behavior by giving the attorneys veto or strike power during the subsequent trial-selection step. Accordingly, of the three possible alternatives, allowing the attorneys to fill the trial-selection pool will likely be the best, if not the only feasible, option.

Assuming the transferee court opts to allow the attorneys to fill the pool, there are three separate ways in which the court can allow the attorneys to accomplish their task: (1) allowing one side to pick all of the cases, (2) dividing the selections evenly between the two sides, or (3) requiring the attorneys to agree on all the cases jointly. These three alternatives will be discussed in turn.

First, the transferee court can give one side (plaintiffs or defendant(s)) the right to pick all of the cases that will fill the pool. Thus, if the transferee court determines that there should be fifteen

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the parties are unable to agree), *available at* http://www.mnd.uscourts.gov/Mdl-Baycol/pretrial_minutes/baycol89.ord.pdf.

94. Even if the attorneys prepare briefs outlining the potential cases, similar to a final pretrial order, it is still doubtful that the transferee court's selections will be as knowledgeable as the attorneys' picks.

cases in the trial-selection pool, it would authorize the coordinating attorneys from one side to select all fifteen cases. The rationale behind this option is that, if the side that picks loses all or a majority of the bellwether trials, then there would likely be little or no merit to that side's position and the litigation could likely be resolved quickly and easily. The primary downside to this option is that, in permitting only one side to fill the entire trial-selection pool, the transferee court opens the door for the inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism.

Second, the transferee court can divide the selections evenly between the two sides.[95] For example, if the transferee court determines that there should be twenty cases in the pool, then each side would be allowed to select ten. The obvious rationale behind this option is equity and fairness between the sides. The primary problem with this option, however, is that it does not eliminate or minimize the chance that the attorneys will select favorable, rather than representative, cases.

Third, the transferee court can require that the sides jointly agree on all of the cases selected to fill the trial-selection pool.[96] The reasoning being that, if the sides can agree on the cases, the cases will likely be representative and fair to both sides.[97] Of the three options, the last one is the best, but it is also the most difficult to effectuate. With so much at stake, it may be difficult for the attorneys to agree on which cases should fill the trial-selection pool. The transferee court can serve as a catalyst to assure fairness and remind the attorneys that the bellwether trial concept is designed specifically to help them predict how the litigation may unfold and ultimately resolve the litigation. Indeed, for the transferee court, it may often be less challenging and less time-consuming to perform only its MDL discovery duties, leaving the trial duties to the transferor courts on

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95. *See, e.g.*, *In re* Guidant Defibrillators Prods. Liab. Litig., MDL No. 05-1708, 2006 WL 905344, at *3 (D. Minn. Mar. 23, 2006) (pretrial order no. 8) (expressing the court's preference for party input in selecting representative trials); *In re* Guidant Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (pretrial order no. 9 at 2) (allowing each party to select twenty potential bellwether cases), *available at* http://www.mnd.uscourts.gov/Mdl-Guidant/Pretrial_Minutes/05md1708pto9050306.pdf.

96. *E.g.*, *In re Baycol Prods. Liab. Litig.* (pretrial order no. 89 at 2).

97. In addition, a transferee court can implement a mix of these processes. *See, e.g.*, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.* (pretrial order no. 18 at 2) (allowing the plaintiffs and defendants to each select ten cases out of a pool of forty-five cases, and then selecting the remaining twenty-five cases randomly from a list agreed on by both sides).

remand. This, however, will make global resolution of the litigation next to impossible. Moreover, by being stubborn in their advocacy, as opposed to participating in meaningful, good-faith negotiations, the attorneys will lose an opportunity to resolve their clients' cases effectively and efficiently.

Thus, in having the attorneys fill the trial-selection pool, the transferee court should first have the sides attempt to utilize the third option. Only once it appears that the sides are unable to agree jointly on which cases should fill the pool, despite judicial encouragement, should the transferee court opt to implement one of the other two methods.

3. Limitations on Cases To Be Considered

After determining *how* to fill the trial-selection pool, the transferee court should focus on several additional issues concerning *which* cases should be considered for the pool. Indeed, not every case in an MDL should be considered for trial, nor will every case be susceptible to trial within the MDL. There are two specific limitations on which cases should and can be considered as potential bellwether cases. The first limitation is purely discretionary and cautions that only cases that are close to being trial-ready be considered as candidates to fill the pool. The second limitation is imposed by current law and requires that cases be amenable to trial before the transferee court.

a. Trial-Ready Cases

The discretionary limitation that bellwether trial candidates be trial-ready should be imposed as a means to streamline the trial-selection process. Once the trial-selection pool is filled, the attorneys must begin case-specific discovery in those cases. This process should not be any different than the discovery phase of any non-MDL case. Like the normal case, the discovery process can go smoothly and quickly or can be long and complicated. An important factor in how the discovery process proceeds is the shape the case is in when it is filed and when discovery begins. Bellwether trial-candidate cases are no different from the typical non-MDL case—the less information that is known when a case is selected to fill the pool, the longer the discovery process will be. Therefore, to ensure that the case-specific discovery process progresses in an expeditious manner, it is vital that

only cases that are close to being trial-ready be considered to fill the trial-selection pool.

Of course, few, if any, cases will be trial-ready in the sense that all witnesses are lined up and all expert reports and testimony are prepared such that the case can proceed to trial in a matter of weeks. Instead, in this context, trial-ready means that the attorneys have adequate proof of the important, basic information.[98] For example, in the *Propulsid* and *Vioxx* MDLs, this meant that the attorneys had access to the plaintiffs' medical files and sufficient evidence tending to prove who had prescribed the drug, that the litigants had taken the drug, and what damages were allegedly suffered.[99] The importance of being trial-ready in this sense, other than the accelerated manner in which the case can be prepared, is that it prevents the unfortunate situation where a case is proposed and accepted to fill the pool, but the attorneys later discover that the existence of one of these preliminary matters is uncertain or even challenged.

b. Cases Amenable to Trial

Just as some cases may not be able to be adequately discovered prior to the selection of bellwether trials, some cases may not be amenable to trial by the transferee court. To understand which cases are amenable to trial and why, it is necessary to discuss how cases find their way into an MDL.

In the MDL context, there have been two traditional sources from which cases originate: (1) those cases filed in, or removed to, federal district courts across the country and transferred to the transferee court by the MDL Panel and (2) those cases for which venue is proper in the transferee court's judicial district and are therefore filed directly into

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98. *See id.* at 4 (limiting selections to those plaintiffs who had filled out the Plaintiff Fact Sheets and provided the authorizations and responsive documents pursuant to pretrial order no. 6).

99. The parties will usually be required to provide all of this information early on in the litigation pursuant to a global pretrial discovery order. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. June 29, 2006) (pretrial order no. 18C) (governing the provision of Plaintiff Profile Forms, Merck Profile Forms, and medical authorizations); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. Jan. 31, 2001) (pretrial order no. 9) (governing the provision of Plaintiff Profile Forms and medical authorizations). Notwithstanding such a requirement, the parties may occasionally fail to provide this information. Cases in which this basic level of disclosure is not complete should not be considered for bellwether trials, and may even be subject to dismissal if the parties fail to comply after additional prompting. *See In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1232-34 (9th Cir. 2006); Acuna v. Brown & Root Inc., 200 F.3d 335, 340-41 (5th Cir. 2000).

the MDL.[100] The distinctions between these two separate categories of cases, as well as a third recently conceived hybrid category, are vitally important to the determination of which cases are amenable for trial by the transferee court.

Absent extraordinary circumstances, the vast majority of cases within an MDL will come from the first category.[101] For instance, at just over the two-year mark into the *Vioxx* MDL, approximately 6000 cases had been transferred into the Eastern District of Louisiana by the MDL Panel, whereas only roughly 350 cases had been filed directly into the Eastern District of Louisiana by Louisiana citizens—a significant difference.[102]

Another key distinction between the two categories is the applicable substantive law. With respect to cases founded upon diversity jurisdiction and transferred by the MDL Panel, the transferee court is bound to apply the law of the transferor forum, that is, the law of the state in which the action was originally filed, including the transferor forum's choice-of-law rules.[103] In cases filed directly in the transferee court's district, the transferee court must apply the law of the state in which it sits.[104] Thus, for instance, if a case had been originally filed in the United States District Court for the Southern District of New York and then transferred by the MDL Panel to the *Vioxx* MDL in the Eastern District of Louisiana, the transferee court would apply New York's choice-of-law rules and perhaps New York substantive law; but for a similar case filed directly into the *Vioxx* MDL in the Eastern District of Louisiana, the court would apply Louisiana's choice-of-law rules and perhaps Louisiana substantive law.

At initial glance, it may appear that these two distinctions, especially the numerical disparity, have little bearing on the trial-selection process. For one, why would it matter if the mathematical ratio between the sources of cases is dramatically skewed? As long as the transferee court can try representative cases, regardless of their origin, it would seem that the purposes behind bellwether trials are achievable. Likewise, federal courts routinely handle cases that involve interstate and international parties that require the application of substantive laws of jurisdictions other than the forum state. Why

100. *See In re* Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 903 (E.D. La. 2007).
101. *See id.*
102. *See id.*
103. *See* Ferens v. John Deere Co., 494 U.S. 516, 523-25 (1990).
104. *See Vioxx*, 478 F. Supp. 2d at 903.

then would a microcosmic case that is essentially the functional equivalent of a typical binary trial present any abnormal difficulties?

Notwithstanding such logical observations, the interfusion of these two distinctions wreaks havoc on a transferee court's trial powers when considered in light of the Supreme Court's *Lexecon* decision.[105] As mentioned above, pursuant to *Lexecon*, a transferee court cannot try cases transferred to it by the MDL Panel, unless the litigants consent to trial before the transferee court.[106] The import of this holding can be quite debilitating to the effectiveness of bellwether trials. If litigants in cases transferred by the MDL Panel do not consent to trial, the universe of cases amenable to trial in an MDL is extremely limited in both number and applicable law. For example, had none of the non-Louisiana litigants consented to trial in the *Vioxx* MDL, the total universe of triable cases would have been approximately 350 and all would have been tried under Louisiana law, which does not allow recovery of punitive damages. In litigation like the *Vioxx* MDL (which involved different types of injuries to different types of people in different jurisdictions, each of whom had a different prescribing physician who conducted his or her own independent review of the drug's warning label and the relevant literature over the course of several years during which the label changed multiple times), as well as most modern MDLs which share a host of variables, a total universe of 350 cases, or a like number, all tried under a single state's substantive law would render the bellwether trials of limited value. Under such circumstances, the complete universe of triable cases, without any tactical assistance or creative approaches, will regularly be too limited to justify the time and expense common to the bellwether process.[107]

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105. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998); *supra* notes 17-18 and accompanying text.

106. *Lexecon*, 523 U.S. at 40. A party's consent may be express or implied through conduct. *See In re* Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1325-27 (11th Cir. 2000); Armstrong v. La Salle Bank, N.A., No. 01 C 2963, 2007 WL 704531, at *2-6 (N.D. Ill. Mar. 2, 2007); Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 266530, at *4-5 (N.D. Ohio Feb. 1, 2006).

107. Just because a case is currently pending in state court does not mean that it should not be considered for trial within the MDL or that a transferee court will not be able to obtain jurisdiction over it. The first case tried in the *Vioxx* MDL—the *Plunkett* case—had been pending in Florida state court for several years when the *Vioxx* transferee court and the attorneys agreed to set it as the first bellwether trial. *See supra* notes 45-58 and accompanying text. To effectuate this decision, the attorneys agreed that (1) the plaintiff would seek a voluntary dismissal without prejudice from the Florida state court (obviously informing the Florida state court of the purported bellwether plan and seeking the state court's permission), (2) the plaintiff would then file the case directly into the *Vioxx* MDL,

In recent years, thanks to scientific and technical advances, many aspects of our society have grown at increased rates and have inevitably become more complex. With these advances have come the increased development and production of products, as well as an increased ability to market and sell products nationally and internationally. Perhaps as an inevitable consequence of the mass-production and mass-marketing of an increased number of products, broad-based complex litigation has also increased at a high rate. In turn, with the recent statutory and judicial discouragement of class actions,[108] the federal court system has found itself turning to the MDL's broad remedial powers more frequently than ever before.[109] Attendant to this growth and despite the best efforts of all involved, inevitable delays associated with the transfer of cases from transferor courts to the transferee court have occurred. With greater sources of litigation subject to MDL consideration and larger numbers of individual cases subject to MDL transfer, it has become increasingly more time-consuming and expensive for an individual case to find its way into a transferee court.

In response to these realties, a third source from which cases in an MDL may originate has developed. Under this third category, the transferee court permits plaintiffs who do not reside in the judicial district encompassing the transferee court to file cases directly into the MDL.[110] This procedure obviates the expense and delay inherent with plaintiffs having to file their cases in local federal courts around the country after the creation of an MDL and then waiting for the MDL Panel to transfer the "tag-along" cases to the transferee court.[111] In

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and (3) the defendant would waive its venue and statute of limitations objections. *Id.* All three of these steps went smoothly and the *Plunkett* case was enveloped by the MDL, proceeding to trial approximately three months after the parties agreed to set it as the first bellwether trial.

Likewise, in other MDLs, the fact that a case is not presently within the transferee court's jurisdiction, or even within the federal court system, does not preclude its amenability to trial in the MDL. Creative thinking and attorney cooperation can provide the transferee court and the attorneys with the ability to try representative cases that would otherwise be untriable. Indeed, this sort of flexibility suggests that perhaps the primary perceived benefit of legislatively overruling *Lexecon*, namely authorizing transferee courts to try cases transferred by the MDL Panel, may be outweighed by the unintended consequence of a diminished threat of remand.

108. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Castano v. Am. Tobacco Co., 84 F.3d 734, 746-51 (5th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299-1304 (7th Cir. 1995).

109. *See* discussion *supra* notes 2 and 20.

110. *See In re* Vioxx Prods. Liab. Litig., 478 F. Supp. 2d 897, 903-04 (E.D. La. 2007).

111. *See id.* at 904.

addition, it eliminates the judicial inefficiency that results from two separate clerk's offices having to docket and maintain the same case and three separate courts (the transferor court, the MDL Panel, and the transferee court) having to preside over the same matter.[112] In its Pretrial Order No. 11, the *Vioxx* transferee court recognized the beneficial aspects of this form of direct filing and thus permitted the use of the direct filing mechanism.[113] At just past the two-year anniversary of the *Vioxx* MDL, approximately 2000 cases had been filed directly into the *Vioxx* MDL by non-Louisiana citizens.[114]

Besides its efficiency aspects, direct filing can also play an important role in the trial-selection process. A case filed directly into the MDL, whether by a citizen of the state in which the MDL sits or by a citizen of another jurisdiction, vests the transferee court with complete authority over every aspect of that case. This is because the transferee court is no longer cognizable as the transferee court under 28 U.S.C. § 1407, but is technically the forum court.[115] Therefore, by

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112. Direct filing also avoids any unfortunate situations that may arise when a transferor court acts on a motion after being divested of its jurisdiction by a transfer order from the MDL Panel becoming final. When the MDL Panel orders a case transferred from a transferor court to a transferee court, the transferor court is deprived of jurisdiction until such time, if at all, the case is returned to it. *See, e.g.*, Astarte Shipping Co. v. Allied Steel & Export Serv., 767 F.2d 86, 87 (5th Cir. 1985); *In re* Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 664 F.2d 114, 118 (6th Cir. 1981); *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 229-30 (D.N.J. 1997); *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 495-96 (J.P.M.L. 1968). Thus, any orders issued by the transferor court after the final transfer are null and without effect, *Plumbing Fixture*, 298 F. Supp. at 496, and the transferee court is empowered to modify or rescind those orders. *Astarte*, 767 F.2d at 87; *Upjohn*, 664 F.2d at 118. In the *Vioxx* MDL, the transferee court vacated two remand orders from two different transferor courts, because those transferor courts ordered remand after the MDL Panel's transfer order became final. *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Sept. 5, 2007) (order relating to Coker v. Merck & Co., No. 07-3998); *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Mar. 13, 2006) (order relating to Hendershot v. Merck & Co., No. 05-6134). This is "unfortunate" because the transferee court, itself a district court, is essentially forced to abrogate another district court's order.

113. *See Vioxx*, 478 F. Supp. 2d at 904.

114. *See id.*

115. *But see In re* Vioxx Prods. Liab. Litig., 522 F. Supp. 2d 799, 812-13 (E.D. La. 2007) (noting the "fictional" quality of the transferee court's status as the forum state in cases filed directly into an MDL by nonforum citizens). Indeed, the practice of allowing cases to be filed directly into an MDL can create difficult choice-of-law issues for the transferee court, including whether the transferee forum's choice-of-law principles must be applied in such cases. *See In re* Express Scripts, Inc., PBM Litig., MDL No. 1672, 2007 WL 4333380, at *1-2 (E.D. Mo. Dec. 7, 2007) (applying the choice-of-law rules of the transferee forum); *In re* Bausch & Lomb Inc. Contacts Lens Solution Prods. Liab. Litig., MDL No. 1785, 2007 WL 3046682, at *2-3 (D.S.C. Oct. 11, 2007) (avoiding this choice-of-law issue by finding that no conflict existed among the potentially applicable state laws); *Vioxx*, 478 F. Supp. 2d at 903-05 & n.2 (discussing the implications of direct filing, but ultimately applying the choice-of-law rules of the transferee forum). Ultimately, if a transferee court is going to employ

filing cases directly into the MDL, plaintiffs, in effect, waive their *Lexecon* objections, thereby subjecting their cases to trial within the MDL.[116]

c. Waiver Considerations

Of the three potential sources of cases, each of which is capable of producing hundreds of bellwether candidates, only cases deriving from one source—those filed directly into the MDL by residents of the state in which the transferee court sits—are amenable to trial without the consent of the parties. From a realistic standpoint, this typically will not suffice to warrant the cost and effort necessary to conduct fruitful bellwether trials. Thus, as a predicate for meaningful bellwether trials, the parties must be willing to waive their objections as to cases from the remaining two sources. Encouragement by the transferee court can be helpful in securing waivers.[117]

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direct filing in any given MDL, it should encourage the parties to think about the choice-of-law issues that may arise as a result and, ideally, the transferee court should include a choice-of-law provision in the pretrial order authorizing direct filing.

116. Conceivably, there are two ways in which nonresident plaintiffs can preserve their *Lexecon* objections while still taking advantage of the speed and cost benefits of direct filing. First, as part of a pretrial order allowing for direct filing, the transferee court, at the behest of the parties, could stipulate that direct filing into the MDL does not serve as a waiver of *Lexecon* objections. The transferee court, however, may be unwilling to do this because such an order places self-imposed conditions on the transferee court's jurisdiction. Second, an individual plaintiff could potentially preserve his *Lexecon* objection by making a notation of such in his complaint. While this alternative appears attractive, it may not be effective. Although there is no case law on the subject, it is doubtful that a litigant can unilaterally place conditions on a court order. Without an order allowing direct filing by a nonresident plaintiff, such plaintiffs have no right to file directly into the MDL. This right is the sole product of the transferee court's order, although it is conceivable that a plaintiff could file an action directly into the MDL, despite improper venue, and just hope that its filing is not challenged on venue grounds. Thus, if the transferee court does not acknowledge a plaintiff's right to preserve his *Lexecon* objection or affirmatively permit such preservation, a plaintiff may not have that right at all. On a related point, at least one court has held that a *Lexecon* waiver has no effect on the applicable choice-of-law principles. *See In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 489 F. Supp. 2d 932, 934-35 (D. Minn. 2007) (applying the choice-of-law rules of the transferor forum in a case transferred by the MDL Panel and selected as the first bellwether trial).

117. There are two methods of encouragement: the carrot and the stick. The carrot method involves the transferee court explaining the benefits of the bellwether trial process and how those benefits cannot be fully achieved unless the parties are willing to consent to the most representative cases serving as bellwether trials. The stick method involves the transferee court, faced with obstinate attorneys refusing to provide consent, unilaterally setting cases filed directly into the MDL by citizens of the forum state for trial. Preparation of these "stick" cases for trial will likely be just as rigorous and expensive as preparation of a "carrot" case, but will be devoid of the institutional benefits and freedom of choice that are available when the attorneys are permitted to select their own bellwether trials. Thus, a

As illustrated above, the type of waiver required, and which parties must effectuate it for each case, depends on the origin of the case. For cases transferred to the transferee court by the MDL Panel pursuant to § 1407, the parties must each waive their *Lexecon* objections before that case can be set for trial. To effectuate *Lexecon* waivers, the parties should each consider the merits of all cases individually and, under circumstances with which each feels comfortable, waive their *Lexecon* objections on a case-by-case basis.

For cases filed directly into the MDL by nonresident plaintiffs, the defendant, and only the defendant, must waive its sustainable venue and venue-related objections.[118] To do so, the defendant can effectuate one of two venue waivers: (1) a full waiver or (2) a pretrial waiver. Under the full-waiver approach, the defendant waives all of its available venue objections as to all cases (those already within the MDL and those that will later become part of the MDL) through a stipulated pretrial order. Once such a stipulated pretrial order is entered, the transferee court is free to set any of these cases for trial. Under the pretrial-waiver approach, a defendant waives its available venue objections through a stipulated pretrial order, just as it would under a full-waiver approach, but expressly limits this waiver to pretrial proceedings only. That way, the defendant allows cases to become part of the MDL through an overarching waiver, but preserves its right to object to venue if the transferee court ever schedules these cases for trial. If the defendant later decides to waive its venue objections fully and permit a case to proceed to trial, the defendant can then execute a full waiver for that case alone. As part of Pretrial Order No. 11 in the *Vioxx* MDL, Merck effectuated a pretrial waiver, waiving any and all venue objections as to pretrial proceedings only.[119] Then, for the five bellwether cases that proceeded to trial in the *Vioxx* MDL, Merck subsequently waived its venue objections fully.

Much can be made of when and whether counsel and their respective clients should consent to trial within the transferee court. For instance, it is plausible to suggest that consent should only be given for each side's strongest cases. The thought being that, if the

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transferee court, by signaling its willingness to use its "stick," can persuade the attorneys to choose the "carrot."

118. This is true unless a plaintiff reserves the right to object to venue if his case is set for trial or stipulates that direct filing is only for expediency and discovery purposes, and not for trial.

119. *In re* Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. May 18, 2005) (pretrial order no. 11 at 1-2), *available at* http://vioxx.laed.uscourts.gov/Orders/Orders.htm (follow "Pretrial Order No. 11" hyperlink).

bellwether trials will set the tone for global resolution, or be considered as a proximate indicator for future non-MDL trials, then it would be foolish to offer weaker cases voluntarily and risk negatively affecting the outcome for the remaining cases. Likewise, on a micro level, counsel and client in an individual, weaker case certainly would not want to serve as a sacrificial lamb for the benefit of the remaining consolidated parties.

Notwithstanding a litigator's natural instincts to put forward only his or her best cases and reserve weaker ones, it must be remembered that bellwether trials are not meant to be stand-alone victories or defeats. Instead, their true purpose is to serve as an archetype for how the litigation will proceed. If one side, therefore, can cast aside with conviction its defeats as being atypical, the bellwether trials will have failed in their ultimate purpose. Thus, although a favorable verdict is always of the utmost importance, counsel's initial concerns should not be whether an individual victory is probable, but whether resolution of a specific case will aid in resolution of the entire litigation. Similarly, the parties must temper their personal aversion to the risk of an adverse jury verdict with the realization that (1) for a plaintiff, a favorable verdict at trial may result in a greater recovery than would be received through settlement; and (2) for a defendant, favorable verdicts at trial may result in a more favorable settlement in the remaining cases.

From a practical standpoint, the attorneys and litigants must provide their consent to trial prior to nominating a case to fill a spot in the trial-selection pool. If consent is not obtained at this stage, a situation can develop where the attorneys or the litigants can back out of their commitment to try a given case.[120] To determine whether to

120. An unfortunate incident developed in the *Vioxx* MDL that illustrates the importance of obtaining consent to trial within an MDL at the beginning of the trial-selection process. For various reasons, the *Vioxx* transferee court accorded the attorneys a vast amount of leeway in selecting cases for bellwether trials, prior to implementing a formal and rigid trial-selection process. *See In re* Vioxx Prods. Liab. Litig., MDL No. 1657, 2005 WL 3665985, at *1 (E.D. La. Dec. 16, 2005) (discussing the relatively informal process initially adopted). After the selection of the first case, the parties began negotiating which case would be picked as the second bellwether trial. At the conclusion of this drawn-out process, which was riddled with many letters to the court and status conferences, the parties agreed to set a second case for trial. As part of the agreement, lead counsel in the second case, who was also a member of the Plaintiffs' Steering Committee, stipulated that he and his client would only consent to trial if the case were tried in the state where the case had been originally filed. To move the trial-selection process along and to honor the agreement of the attorneys, the *Vioxx* transferee court proceeded to contact the proper officials and obtain the requisite permission to travel to the transferor forum and conduct the second trial. Before the trial was set to begin, however, plaintiff's counsel unexpectedly withdrew the case from consideration, reporting that his client refused to consent to trial. Although the attorneys had represented

afford consent, counsel should begin examining all cases within the MDL as soon as possible to determine whether they would be good candidates for a bellwether trial and should continue to investigate tag-along cases as they are added to the MDL on a rolling basis. This inquiry should principally be the duty of the coordinating counsel which, unlike individual local counsel, have a broad perspective of the entire litigation and the means and authority to conduct this task most properly. In discharging their duties, coordinating counsel should examine cases not only to ascertain whether they are representative of the entire litigation, but also to discover whether the consent of the individual litigant and the litigant's local counsel to try the case can be obtained.[121] Importantly, coordinating counsel should focus on identifying the best cases (i.e., the most representative) to propose as bellwether trials, rather than culling out the weakest ones. At this stage, counsel should be focused on deciding which cases should be proposed as bellwether candidates, not on striking any cases from further consideration.

C. Case-Specific Discovery

Once the trial-selection pool has been assembled, each of the cases within the pool must undergo case-specific discovery. This discovery process will typically be no different from that which occurs in an ordinary case, and thus requires no additional explanation here.

D. Selecting Individual Cases from the Pool for Trial

Near the conclusion of case-specific discovery in the cases comprising the trial-selection pool, the transferee court and coordinating counsel can begin the final step of selecting the actual

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that all of the necessary consents had been obtained, the attorneys apparently never received the client's consent formally and, in light of *Lexecon*, the *Vioxx* transferee court was precluded from either forcing the selected case to trial or dismissing it for failure to prosecute. As a result, another case had to be selected.

121. It should not be difficult to determine whether the individual litigants or local counsel object to trial in the MDL. For a defendant, the Defendants' Steering Committee, which is generally handpicked by the defendant, usually consists of the defendants' personal attorneys, so it should be easy for them to answer such questions. For plaintiffs, the Plaintiffs' Steering Committee will most likely be comprised of attorneys who represent a large number of plaintiffs and are highly knowledgeable of the subject matter. Given their number of cases, their knowledge, and their status, these attorneys will often be willing, if not excited, to offer one or more of their cases as bellwether candidates. For example, in the *Vioxx* MDL, four of the five bellwether cases were filed and tried by members of the Plaintiffs' Steering Committee. Even though one case was filed and tried by a nonmember, it was nevertheless overseen by a member of the Plaintiffs' Steering Committee.

cases to serve as bellwether trials. In anticipation of the exercise of trial-selection picks, the transferee court, with the input of the attorneys, should have set forth the method by which the final selections will be made. As can be imagined, there are multiple methods, or any combination of methods, that can be used, such as (1) random selection, (2) selection by the transferee court, and (3) selection by the attorneys. Indeed, the alternative methods at this stage of the bellwether process in large part mirror the approaches that can be used earlier in the process to fill the trial selection pool.[122] In addition to these various selection methods, the transferee court can permit the attorneys to exercise a predetermined number of strikes or vetoes to eliminate cases in the pool from consideration prior to the actual selection. Again, the appropriate method is case-specific and may be different for each MDL.

1. Random Selection

The first trial-selection method is random selection.[123] Here, the bellwether trials are picked at random from the previously established trial-selection pool, whether picked out of a hat[124] or pursuant to a more sophisticated method.[125] Random selection appears to be a fair and sensible method of picking bellwether cases given that it is based purely on chance and neither side is given a tactical advantage over the other.[126] In addition, random selection is an efficient means of selecting cases because it does not require much time or any analysis by the transferee court or the attorneys. But despite its favorable appearance, random selection presents two problems that may weigh against its implementation.

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122. *See supra* Part IV.B.2.

123. *See, e.g.*, *In re* Norplant Contraceptive Prods. Liab. Litig., MDL No. 1038, 1996 WL 571536, at *1 (E.D. Tex. Aug. 13, 1996).

124. *See In re* Prempro Prods. Liab. Litig., MDL No. 1507 (E.D. Ark. June 20, 2005) (order regarding bellwether trial selection); *In re* Prempro Prods. Liab. Litig., MDL No. 1507 (E.D. Ark. July 14, 2005) (letter order). Information about these two orders can be found on a Web site dedicated to this multidistrict litigation. *See* Prempro Product Liability, http://www.are.uscourts.gov/mdl/index.cfm (last visited June 13, 2008).

125. In the *Bextra & Celebrex* MDL, the transferee court had attorneys use a third-party randomizer computer program as a random selection method. *See In re* Bextra & Celebrex Mktg. Sales Practice & Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. Nov. 17, 2006) (pretrial order no. 18) (describing the initial selection of plaintiffs for discovery and trial pool), *available at* http://ecf.cand.uscourts.gov/cand/bextra/content/files/pretrial_order_18.pdf.

126. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 6, § 22.315.

First, if the selection is purely random, a distinct possibility exists that one or more of the major variables identified during the first phase of the trial-selection process will not be represented during the bellwether trials. For instance, if a trial-selection pool of fifteen cases has been created and there are five cases each representing short-term, mid-term, and long-term ingestion of a pharmaceutical product, there exists the possibility that one of the three categories will not be represented if the transferee court conducts five bellwether trials. The failure to represent a major variable at trial would be a major setback in the trial-selection process, compromising the value of the entire process. Of course, to combat this possibility, the transferee court could further segregate the trial-selection pool before selecting cases for trial. That is, the transferee court could divide the entire trial-selection pool into smaller pools representing the separate categories within each major variable and require that at least one case from each of the smaller subpools be selected randomly for trial.

The second, and chief, complaint against using random selection is that it detaches the attorneys from the process. Victories and defeats at trial are not the only information sought to be gained from bellwether trials. The attorneys should be interested in how best to present their cases at trial and in developing a familiarity with the strategic decisions that must be made prior to setting foot in the courtroom. By allowing the attorneys to have some hand in selecting which cases they will eventually have to try, the attorneys are provided an opportunity to make trial-selection choices that further their own agendas. For instance, different trial attorneys have different styles of preparing for and presenting a case at trial. If the coordinating attorneys are afforded an opportunity to pick which cases are eventually tried, they can control who gets to conduct the bellwether trials and learn first-hand how each style of preparation and presentation unfolds in front of an actual jury.[127] By imposing random selection, the transferee court precludes the coordinating attorneys from meeting these goals, which may inhibit the potential of a mass resolution of the litigation.[128]

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127. *See supra* Part III.C.

128. Moreover, although random selection may be a theoretically attractive method for selecting bellwether trials, and, indeed, although some courts and commentators have suggested that it may even be of constitutional significance when the results of bellwether trials are used to bind related claimants, random selection is of considerably less importance when bellwether trials are employed in practice for nonbinding informational purposes.

2. Selection by the Transferee Court

The next method of trial-selection is selection by the transferee court. Pursuant to this method, the attorneys prepare individual reports (either jointly or separately) for each case within the trial-selection pool, outlining (1) the facts of each case (those agreed-on and those in contention), (2) the major legal issues in each case, and (3) their positions on why each case should or should not be selected as a bellwether case by the transferee court. This method is advantageous because it permits the transferee court to ensure that each of the predetermined major variables is represented at trial and that the cases ultimately selected are fair to both sides.

The major problem with this method, like that of random selection, is that it minimizes attorney participation. Unlike random selection, the attorneys are permitted to argue for and against the selection of specific cases, addressing their own internal reasons for wanting to try a particular case. Permitting the attorneys to present their personal goals, however, will not ensure that the attorneys are allowed to effectuate them. Moreover, the attorneys may not want to share their internal motives with the transferee court or opposing counsel. This process will also be considerably more time-consuming for both the transferee court and the attorneys, requiring the attorneys to prepare reports for each case and the transferee court to analyze the merits of each case.

3. Selection by the Attorneys

The final trial-selection method is selection by the coordinating attorneys. This method may be employed in different ways by either allowing one side to select all of the bellwether cases or by allowing each side to make alternating selections.[129]

Under the first variety of this selection method, one side of coordinating attorneys selects all of the bellwether cases from the pool. The reasoning behind this approach is that if one side is allowed the opportunity to pick all of the bellwether cases and that side ultimately loses all or most of the trials, then it can reasonably be surmised that that side's theories are essentially without merit. This method was

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129. Of course, it would likely be best if the coordinating attorneys could mutually agree on which cases to set for bellwether trials. This option, however desirable, may not be realistically achievable because the stakes may be too great and the perceived values of the cases too divergent for the attorneys to reach an amicable agreement. In the *Vioxx* litigation, only one case—the first one—was selected by agreement. *See* discussion *supra* note 107.

utilized in the *Propulsid* MDL.[130] The advantages of this approach are that it is efficient, necessitating engagement by only one side in the trial-selection step (although both sides of coordinating attorneys should have been continuously analyzing the strengths and weaknesses of the cases from the outset anyway), and at least furnishes one side of coordinating attorneys the ability to participate. The disadvantage is that it gives the selecting side of coordinating attorneys a potentially unfair advantage. In addition, with the power to control which cases are set for trial, the selecting side of attorneys may disregard their responsibility to select cases that represent the major variables and instead choose cases that increase their ability to prevail at trial.

Under the second variety of this method, both sides of coordinating attorneys make selections by exercising alternating picks. For example, one side of coordinating attorneys would select the first case from the pool to be tried as a bellwether trial and then the other side of coordinating attorneys would select the second case. The process would continue in this alternating fashion until the full allotment of cases is reached. This approach is likely fairer than allowing one side to select all of the cases and it also ensures that both sides are involved in the process. Of course, this approach may be slightly less efficient than the previous alternatives because both sides of attorneys are involved. Moreover, although allowing the attorneys to select the bellwether cases will not absolutely guarantee that all of the major variables are represented, it must be remembered that the designation of major variables is a tool used to help focus the attorneys on the important aspects of the litigation. If both sides of coordinating attorneys, after the close of case-specific discovery, knowingly and intentionally choose to disregard the ostensible aid of the major variables in selecting bellwether cases, then such is their prerogative. Given that this approach institutes fairness and attorney participation, while maintaining efficiency and placing the burden of ensuring representative cases on those with the most at stake in the trial-selection process, this methodology is probably the most useful approach. Indeed, this method was utilized in the *Vioxx* MDL. There, the transferee court permitted each side of coordinating attorneys to select five cases.[131] From the collective group of ten cases, each side of coordinating attorneys was permitted to veto two cases from the other

130. *See In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003).

131. *See In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 791 (E.D. La. 2007).

side's list of five cases.[132] The remaining six cases were then set for trial on a rotating basis, starting with the plaintiffs' selection.[133]

4. Strikes or Vetoes

Regardless of which method is ultimately employed, a transferee court should consider allowing each side of coordinating attorneys to veto or strike from consideration a predetermined number of cases in the trial-selection pool.[134] No matter how diligently the attorneys or the transferee court fill the trial-selection pool, the possibility will always remain that, after the close of case-specific discovery, an unrepresentative case or a grossly unfavorable case will wind up in the trial-selection pool. By permitting the attorneys to strike or veto cases, the transferee court can minimize the chance that one of these outliers is selected as a bellwether trial, without having to disturb the preordained method of trial selection. In this way, if the abnormal case rears its head, the attorneys are equipped to deal with it on their own, without seeking court intervention.

V. CONCLUSION

Although the MDL process has traditionally been limited to establishing a centralized forum for coordinated pretrial discovery, transferee courts can play an important role in effectively and efficiently resolving multidistrict litigation by employing some version of the nonbinding bellwether process described in this Article. Once this process is completed and several cases are selected and given trial dates, transferee courts and counsel are free to prepare for the bellwether trials as they would any other case. Indeed, in the *Vioxx* and *Propulsid* MDLs, the transferee court essentially utilized its normal trial schedule, addressing various motions in limine and objections to both exhibits and deposition testimony in advance of each trial. Potential jurors filled out questionnaires prior to the first day of trial, and voir dire was often then able to be completed in several hours on day one. Most of the trials lasted between two to three weeks in accordance with time limits imposed by the court.

As discussed above, the injection of juries and fact-finding into multidistrict litigation through the use of bellwether trials can greatly

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132. *See id.*

133. *See id.*

134. The number of vetoes or strikes should be proportionate to the number of cases in the trial-selection pool.

assist in the maturation of disputes. At a minimum, the bellwether process provides counsel an opportunity to develop their cases and gain practical litigation experience. This can lead to the development of trial packages by coordinating counsel which can be used by local counsel in the event that a global resolution cannot be reached. But the objective results obtained through bellwether trials often do precipitate settlement negotiations and also ensure that all of the parties to such negotiations are grounded by the real-world evaluations of the litigation by multiple juries. Indeed, these experiences, coupled with the alternative of dispersed litigation in courts across the country, supply a strong impetus for global resolution.

Despite the overwhelming benefits of nonbinding informational bellwether trials, there are some potential disadvantages associated with the practice. First, bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. This is to be expected to a degree, as coordinating counsel often pull out all the stops for bellwether trials given the raised stakes. For example, in the *Vioxx* MDL, both sides employed teams of lawyers and utilized jury selection consultants, shadow juries, and mock juries. Live trial testimony was streamed from the courtroom into separate "war rooms" in the courthouse and to remote locations around the country so that attorneys could follow along and, in some instances, draft various motions in real time. All of these bells and whistles add up; indeed, holding multiple trials on this stage can quickly swell the cost of multidistrict litigation. Second, tactical opportunities can arise for trial counsel to become familiar with the rulings, expectations, customs, and practices of one transferee judge. Astute trial lawyers will learn the tendencies or preferences of any judge with repeated exposure, and given the realities of representation, such opportunities may be subject to exploitation. Finally, because bellwether trials are typically held in the transferee court's judicial district, the informational output is generally limited to the views of one local jury pool. And in a country as diverse as ours, local communities are bound to exhibit divergent tendencies and beliefs. Of course, to the extent that this reality raises concerns, the transferee judge can travel to different districts to hold bellwether trials before different jury pools.[135] But even recognizing

135. As mentioned above, the transferee court in the *Vioxx* MDL did just this by holding the first bellwether trial in Houston, Texas, albeit fortuitously as a result of evacuating New Orleans for Hurricane Katrina. In addition, the *Vioxx* transferee court arranged to travel to another district for a subsequent bellwether trial, but ultimately these plans were not carried out. *See* discussion *supra* note 120.

these disadvantages, the use of bellwether trials proves on balance an effective tool in resolving complex multidistrict litigation.

ONE SIZE DOESN'T FIT ALL: MULTIDISTRICT LITIGATION, DUE PROCESS, AND THE DANGERS OF PROCEDURAL COLLECTIVISM

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INTRODUCTION

Given the manner in which complex litigation has evolved over the last forty years, it is surprising that no one has previously coined the phrase "procedural collectivism." That phrase, after all, effectively describes what has taken place during that time: what are, in their pristine substantive form, individually held rights that have no pre-litigation connection whatsoever are routinely grouped together for purposes of collective adjudication. This is often done regardless of whether the individual claimants desire such a grouping or even whether such a grouping will hurt the interests of those claimants more than help them.

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"Procedural collectivism," we should emphasize, does not refer to all forms of aggregate litigation. We do not intend to include, for example, aggregate litigation in which all aggregated parties determine for themselves how to protect or pursue their own legal rights in the course of the litigation.[1] Rather, we refer solely to representative litigation in which the rights of purely passive claimants are adjudicated by selected parties, supposedly possessing parallel or at least similar interests, who litigate on behalf of those passive participants.

There are two forms of such litigation: class actions and multidistrict litigation ("MDL"). While class actions have generally been somewhat on the decline in recent years,[2] MDL practice has become so pervasive as to be almost routine.[3] Both courts and scholars have expressed concern about what they see as the pathologies of the modern class action, among which is the threat posed by the controversial procedure to the constitutionally protected interests of those passive claimants.[4] The Constitution protects such interests under the Due Process Clause of the Fifth Amendment, which guarantees that neither life, liberty, nor property may be deprived without due process of law.[5] The clause is triggered in the class action context because the absent class members' claims are deemed "choses in action," which are classified as protected property interests.[6]

There are legitimate reasons why the Due Process Clause is needed to police the class action process. All too often, neither representative parties nor their attorneys give sufficient attention to the interests of absent claimants.[7] But in important ways, the current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison. At least in the class action context, the choice of representative party is controlled by explicit rule-based requirements. The representative parties' claims must

[1] *See, e.g.*, FED. R. CIV. P. 20 (permissive joinder); *id.* 22 (interpleader); *id.* 24 (intervention).

[2] *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) ("The class action device, once considered a 'revolutionary' vehicle for achieving mass justice, has fallen into disfavor." (citation omitted)).

[3] *See infra* notes 56-57 and accompanying text.

[4] *See, e.g.*, Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action*, 62 FLA. L. REV. 617, 641-51 (2010).

[5] U.S. CONST. amend. V.

[6] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) ("The . . . Due Process Clause[] protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); Standard Oil Co. v. New Jersey, 341 U.S. 428, 439 (1951) ("There is no fiction . . . in the fact that choses of action . . . held by the corporation, are property.").

[7] *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811, 828-29 (9th Cir. 2012) (Kleinfeld, J., dissenting) ("Facebook users [aside from the named plaintiffs] who had suffered damages from past exposure of their purchasers got no money . . . . Class counsel, on the other had [sic], got millions."), *cert. denied sub nom.* Marek v. Lane, 134 S. Ct. 8 (2013).

share significant common issues with the claims of the absent parties.[8] Their claims must also be typical of those of the absent parties, and they must adequately represent those absent parties.[9] Moreover, these determinations are usually made in the context of a transparent process of adversary adjudication.[10] Finally, in at least the bulk of modern class actions—those brought pursuant to Rule 23(b)(3)—absent class members are given the right to opt out of the proceeding in order either to pursue their own claims individually or choose simply not to pursue them at all.[11]

In stark contrast, MDL involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies. The substantive rights of litigants are adjudicated collectively without any possibility of a transparent, adversary adjudication of whether the claims grouped together actually have a substantial number of issues in common, whether the interests of the individual claimants will be fully protected by those parties and attorneys representing their interests, or whether the individual claimants would have a better chance to protect their interests by being allowed to pursue their claims on their own.[12] Another important difference between class actions and MDL is that unlike class actions, *all* plaintiffs grouped together in MDL have what are called "positive value" claims, meaning claims that are sufficiently large to stand on their own.[13] This is so by definition, because MDL covers only those plaintiffs who have already filed their own individual actions.[14] In contrast, numerous absent class members have "negative value" claims, meaning their claims are insufficient to stand on their own,[15] and most of them have probably never even thought about bringing suit in the first place. Thus, often far more will be at stake for the passive member of an MDL than for the absent member of a class. Finally, whereas relatively few class actions are mandatory, *all* MDLs are mandatory.[16] The plaintiff whose claim is grouped together with countless others is given no choice in the matter.

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[8] FED. R. CIV. P. 23(a)(2).

[9] *Id.* 23(a)(3)-(4).

[10] *See In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) ("In deciding whether to certify a class . . . the district court must make whatever factual and legal inquiries are necessary and must consider all relevant evidence and arguments presented by the parties.").

[11] FED. R. CIV. P. 23(c)(2).

[12] *See infra* notes 203-206 and accompanying text.

[13] *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation*: *Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 905 (1987) (recognizing that some class members have independently unmarketable claims).

[14] *See* 28 U.S.C. § 1407(a) (2012) (allowing consolidation of pretrial proceedings "[w]hen civil actions . . . are *pending* in different districts" (emphasis added)).

[15] *See* Coffee, *supra* note 13, at 905.

[16] *See infra* notes 156-157 and accompanying text (describing the mandatory nature of MDL).

One might respond that while the collective adjudicatory procedure in class actions will end in a final resolution which bars class members from future pursuit of their individual claims, the same is not true in the case of MDL. On the contrary, claims are grouped together solely for purposes of "pretrial" activities, including pleading motions, discovery and summary judgment.[17] Actual trials, to the extent they take place, will usually be conducted either on a voluntary basis in the transferee court or on an individual basis in the district in which the individual plaintiff filed suit.[18] But even casual observation reveals that the notion that MDL is purely a preliminary procedural device is more theoretical than real. It is the rare multidistrict proceeding indeed that ever returns its members to their individual districts for adjudication on the merits.[19] But even if we were to take the process at face value as merely a collectivist form of pretrial practice, the interference with the individual litigant's control of the adjudication of her own claim remains substantial. There are usually many different pretrial strategies that litigants can choose, but for the overwhelming number of unwilling participants in an MDL, that choice is, as a practical matter, removed from them and their chosen attorney.[20]

Moreover, given the often extremely loose connection among the claims of the individual plaintiffs, it is certainly conceivable that some plaintiffs will have stronger claims and/or stronger fact situations than others, yet due to MDL, they are all brought down to the lowest common denominator. And they are represented by attorneys whom they have not chosen or likely even met and who have never been formally adjudicated to adequately represent their interests. Also individual plaintiffs have no meaningful opportunity to challenge either the legitimacy of their inclusion in the multidistrict process or the propriety of the representation chosen for them by judges in the judicial equivalent of a smoke-filled room.[21]

To be sure, scholars have long debated the merits of MDL.[22] But what seems to have been lost in the shuffle in all of that scholarly debate is any

[17] *See infra* notes 59-62 and accompanying text (describing the mechanics of MDL).

[18] *See* 28 U.S.C. § 1407(a).

[19] *See infra* note 133 and accompanying text.

[20] *See infra* note 93 and accompanying text (describing court-appointed counsel's substantial control over the MDL).

[21] *See* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants*, 42 UCLA L. REV. 967, 976 (1995) (observing that, while some courts "have acknowledged the substantial disenfranchisement of nonlead counsel," they have nevertheless "upheld the lead counsel system"); *infra* notes 74-76 and accompanying text (describing a party's uphill battle when challenging transfer).

[22] Others have analyzed MDL and even critiqued plaintiffs' lack of autonomy, but none has done so primarily from a due process perspective. *See, e.g.*, Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 91 (2011) [hereinafter Burch, *Litigating Together*] ("My prescriptive objective is to enable plaintiffs to litigate together and self-govern through social norms and deliberative democracy ideals, such as arguing, bargaining, and voting."); Roger H. Trangsrud, *Mass Trials in Mass Tort*

serious discussion of MDL's serious undermining of the individual plaintiffs' right to procedural due process. The Due Process Clause requires that before property rights may be taken away by governmental practice, the individual must be given some form of fair procedure by which she can protect her property interests.[23] At its core, that protection has been construed to require some form of "day in court," during which the litigant has the opportunity to plead his case openly before a neutral adjudicator.[24] There appear to be two methodologies and rationales for this constitutional guarantee: what can be called the "paternalism" and "autonomy" models.[25]

The paternalism version of due process demands that those who represent the legally protected interests of individual litigants adequately represent those interests in good faith.[26] The importance of this version of the constitutional guarantee has long been recognized in the shaping of the modern class action.[27] It may be seriously questioned whether such paternalism fully satisfies due process concerns when the litigant is available to legally protect his own interests and wishes instead to choose his own representative to litigate on his behalf.[28] Such an individualist-based choice flows from a conception of due process as protecting a form of "meta"-autonomy—in other words, an individual's autonomy in choosing how to exercise his liberty to participate in the governmental process. And governmental decision-making includes the judicial process as much as it does the legislative or executive processes.[29]

The debate between paternalism and autonomy as the ultimate rationale for the day-in-court ideal has great relevance to the class action debate. However, the dispute between these alternatives turns out to be purely academic in the context of MDL, because that process miserably fails the dictates of the due process right to one's day in court from *either* perspective. From the perspective of the paternalism model of the day-in-court ideal, the failure of MDL procedure to provide any opportunity for a transparent, adversary-based adjudication of the adequacy and accountability of the chosen representative

Cases, 1989 U. ILL. L. REV. 69, 69 (calling attention to plaintiffs' lack of autonomy in mass trials).

[23] *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 547 (1985) (holding that a public school board deprived an employee of due process by not providing him with a "pretermination opportunity to respond").

[24] *See infra* Part III.A (describing the day-in-court ideal).

[25] *See* MARTIN H. REDISH, WHOLESALE JUSTICE 140-47 (2009) (discussing these models in the context of class actions).

[26] *See id.* at 140.

[27] *See infra* notes 181-184 and accompanying text.

[28] *See infra* notes 203-206 and accompanying text (questioning whether a steering committee can protect the interests of a plaintiff whose interests conflict with those of the majority).

[29] REDISH, *supra* note 25, at 4 ("No one can doubt that the adjudication in the courts is as much a part of the governing process as are the actions of the legislative or executive branches.").

parties and attorneys as representatives of all of the non-participating litigants constitutes an unambiguous violation of the constitutionally dictated right to one's day in court.[30] The crude, almost random process by which claims are grouped together only compounds those due process problems.[31]

Nor does MDL fare any better from the perspective of the autonomy rationale. Individual litigants who possess positive-value claims—and have already demonstrated the desire to pursue those claims on an individual basis—are forced into a process in which their substantive rights will be significantly affected, if not effectively resolved, by means of a shockingly sloppy, informal, and often secretive process in which they have little or no right to participate, and in which they have very little say concerning the propriety of their inclusion in the process in the first place. It is difficult to comprehend how this process could even arguably be deemed to satisfy the Due Process Clause's day-in-court ideal, regardless of the assumed underlying rationale for that guarantee.

One might respond that the individual litigants do have the right to opt out of any settlement reached in the course of the MDL,[32] and therefore their due process rights have not been compromised. But it should be recalled that even if a litigant does withdraw from the collective settlement, his right to control adjudication of his own claim will have been substantially compromised by the collective, lowest common denominator control of the pretrial process, including all important discovery and pretrial motions.

More importantly, wholly apart from this serious due process concern, the option to remove oneself from a proposed settlement does not solve the significant constitutional problems to which MDL gives rise. First of all, the settlement has been determined on a one-size-fits-all collectivist basis, helping those plaintiffs with weaker individual cases while harming those plaintiffs whose individual claims are factually or legally stronger than the median.[33] Yet when making the decision of whether or not to accept the settlement, the individual litigant has no idea of where his claim fits into this pecking order. While the individual plaintiff might reach out to his chosen attorney for advice as to whether or not to accept settlement, it must be recognized that the collective settlement may well have compromised the relationship between individual attorney and his client. The attorney knows at this point that if her client accepts the settlement, she will receive a fee while doing virtually nothing to have earned it. If, on the other hand, the client chooses to opt out of

[30] *See infra* notes 197-202 and accompanying text.

[31] *See infra* notes 203-206 and accompanying text.

[32] Lori J. Parker, *Cause of Action Involving Claim Transferred to Multidistrict Litigation*, 23 CAUSES OF ACTION 185 § 25 (2d ed. 2003) ("Opting out is the option available to plaintiffs who do not wish to accept a class settlement.").

[33] *See* S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 412-13 (2013) (arguing that a collectivist, democratic settlement vote can reduce "fair compensation for those who believe they have suffered a loss").

the settlement, any fee is now rendered uncertain and at best would come only after the attorney invests substantial effort to bring the individual litigation to a successful resolution. This potentially conflicting interest gives rise to the serious danger of a conflict in the attorney's fiduciary obligation to her client.[34]

It is true that, at least as a doctrinal matter, the due process calculus has in its modern form always included consideration of utilitarian concerns.[35] Thus, one might argue that this seemingly indefensible undermining of the individual's right to his day in court when his legally granted rights are at stake may be justified by the pragmatic need to limit the expenditure of governmental resources required by numerous individual litigations. But no court has even attempted to make that calculus, much less balance it against the significant interference with the individual litigant's right to his day in court. This is so, for the simple reason that no court appears to have even considered, much less ruled upon, a due process challenge to MDL. In any event, surely at *some* point there must be a floor on the individual's right to his day in court, lest the due process guarantee be rendered little more than a cynical sham. The sweeping deprivations of an individual's ability to protect his legal rights brought about by MDL cannot be justified by naked concerns of pragmatism if the concept of due process is to mean anything.

When the dust settles, then, there appears to be no way that the MDL process, at least as currently constituted, can satisfy the requirements of due process. In short, MDL is unconstitutional. This does not necessarily mean that the process is incapable of revision in order to satisfy due process by including measures demonstrating some respect for the rights of the individual litigants who are being herded into the process. But one cannot even reach that issue until one first decides that the process, as presently constituted, is unconstitutional. The Procrustean Bed that is MDL, whereby the claims of each individual are crudely and artificially reshaped into fitting some generic lowest common denominator, unambiguously violates the Fifth Amendment's Due Process Clause. The purpose of this Article is to establish just that.

In the first section of this Article, we explore the history and structure of MDL. The second section explains the mechanics of the process, thereby revealing the serious dangers to individual rights to which this form of procedural collectivism gives rise. In the third section, we discuss the nature of the due process problems from the perspective of constitutional doctrine and theory. In the final section, we consider possible means of revising the multidistrict process in order to preserve the system's beneficial goals while showing greater respect for the integrity of the individual and his right to his day in court.

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[34] *See* Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles*, 62 FORDHAM L. REV. 1357, 1364 (1994).

[35] *See infra* Part III.D (discussing the background and implications of this utilitarian calculus in the MDL context).

I. HISTORY AND STRUCTURE OF MULTIDISTRICT LITIGATION

Congress enacted the Multidistrict Litigation Statute[36] in response to the first modern mass litigation in the early 1960s, which stemmed from allegations of price-fixing in the electrical equipment industry.[37] Large-scale litigation was quite daunting in an era when fax and copy machines were just coming into widespread commercial use, and personal computers and the Internet were decades in the distance. Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation of the United States District Courts to coordinate discovery among the electrical equipment antitrust cases.[38] His project was successful and his idea legislatively codified; MDL was born.[39]

MDL refers to "coordinated or consolidated pretrial proceedings" in related cases taking place before a single federal district judge.[40] Since its inception in the late 1960s, MDL has become more and more common, to the point where today its use could almost be called routine.[41] Over the same period, the number of mass torts and antitrust cases has also grown, almost exponentially.[42] Also during that time, class actions became popular and then tapered off somewhat as a method of providing a national solution to mass litigation.[43] The majority of MDLs occur in products liability and antitrust cases, but the Judicial Panel on Multidistrict Litigation approves consolidation in a wide variety of substantive legal areas.[44] The Panel, made up of seven federal judges, decides whether an individual lawsuit is better suited to group

[36] Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407 (2012)).

[37] *See* Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2260-62 (2008).

[38] Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 49 (2007).

[39] *See id.* at 48-50.

[40] 28 U.S.C. § 1407(a).

[41] *See* John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Spring 2012, at 26, 30.

[42] *See generally* Judith Resnik, *From "Cases" to "Litigation,"* 54 L. & CONTEMP. PROBS. 6 (1991) (describing shifting attitudes towards mass tort litigation from the 1960s to the 1990s).

[43] *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 781-84 (2012) (summarizing developments that are making it harder to certify class actions); Klonoff, *supra* note 2, at 731.

[44] *See* CALENDAR YEAR STATISTICS OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 10 (2013), http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf (last visited Oct. 26, 2014), *archived at* http://perma.cc/A3JE-VZP7 (depicting the areas of law in which MDLs are currently pending).

treatment for pretrial purposes.[45] If several cases are found to share at least one common factual question and the panel determines that consolidated proceedings will be relatively convenient for the parties and save judicial resources,[46] the Panel may transfer those cases to a specified federal district judge, who will preside over coordinated pretrial matters in one consolidated action.[47] The Panel may do so *sua sponte*, which means that seven federal judges can decide on their own to move thousands of cases into one forum.[48] Since 1968, they have decided to do so in over 400,000 cases involving millions of individual claims.[49]

The Panel can only transfer cases into an MDL for pretrial matters; the transferee court's jurisdiction extends only that far.[50] But as a practical matter, for almost all cases transferred into an MDL, there is no trial, let alone post-trial matters, left to conduct back in the transferor district.[51] Settlement is the endgame in almost all instances.[52] To get there, the transferee court appoints a small group of attorneys to strategize, conduct discovery, and try test cases on behalf of the group of plaintiffs.[53] This appointed group is frequently called a steering committee; it steers the strategy for discovery and guides the course for all other pretrial matters.[54] The steering committee effectively replaces the plaintiffs' chosen representatives and is expected to represent the interests of all plaintiffs in the MDL, no matter how varied they may be.[55] Every claimant enters MDL having made the decision to hire a particular lawyer and file suit against a particular defendant in a particular jurisdiction. But once her case is transferred to an MDL, the district judge decides who will really represent her interests in the MDL. Suddenly, all of the decisions the claimant made about exercising her rights through litigation—which lawyer to hire, when and where

[45] 28 U.S.C. § 1407(a), (d).

[46] *See id.* § 1407(a).

[47] *Id.* § 1407(b).

[48] *Id.* § 1407(c)(1).

[49] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION FISCAL YEAR 2013 at 2 http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-2013_1.pdf (last visited Oct. 26, 2014), *archived at* http://perma.cc/9TQK-GYJ9 [hereinafter STATISTICAL ANALYSIS].

[50] *See* 28 U.S.C. § 1407(a).

[51] *See infra* note 133.

[52] *See infra* notes 133-137 and accompanying text (describing the transferee judge's incentive to encourage a settlement).

[53] *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014) ("The committees occupy leadership roles in the litigation—conducting documentary discovery, establishing document depositories, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set for in the court's pretrial orders . . . .").

[54] *Id.*

[55] *Id.*

to file a lawsuit, and against whom—have been replaced by decisions made by federal judges and court-sanctioned attorneys.

II. THE MECHANICS OF MULTIDISTRICT LITIGATION

At the present time, close to 100,000 individual suits are part of an active MDL.[56] By at least one estimate, close to one third of all pending federal civil cases are part of an MDL.[57] On the order of the Judicial Panel on Multidistrict Litigation, individual suits that share "one or more common questions of fact"—a "lenient"[58] standard—may be transferred to "any district" for all pretrial matters.[59] The chosen district may even be one that neither has personal jurisdiction over the parties nor constitutes a legally authorized venue for the individual suits.[60] That court then has complete jurisdiction over all pretrial matters, including discovery, motions for class certification, *Daubert* motions, dispositive motions such as summary judgment, and pretrial settlement.[61] Centralized management of numerous cases in an MDL aims to avoid duplicative discovery and increase efficiency in factually similar cases.[62] At the conclusion of pretrial procedures, cases transferred by the Panel into a single MDL proceeding are supposed to be remanded to the districts in which

[56] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS, http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-19-2014.pdf (last visited Oct. 26, 2014), *archived at* http://perma.cc/DB8E-ZXTL.

[57] Bradt, *supra* note 43, at 762. Others estimate the number to be smaller, closer to fifteen percent of all civil litigation, which is still quite significant. *See* Fallon, *Common Benefit Fees*, *supra* note 53, at 373 (citing Heyburn & McGovern, *supra* note 41, at 26).

[58] Bradt, *supra* note 43, at 786; *see also* Marcus, *supra* note 37, at 2269 ("[T]he Panel's willingness to combine cases, and its confidence that combination will be for the advantage of the litigants as well as serve judicial economy, is sometimes striking.").

[59] 28 U.S.C. § 1407(a) (2012). "The common questions of fact must be complex, numerous, and incapable of resolution through other available procedures such as informal coordination." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.33 (2004).

[60] *See* Bradt, *supra* note 43, at 786 n.156; Fallon, *Common Benefit Fees*, *supra* note 53, at 371.

[61] *See In re* Korean Air Lines Co., 642 F.3d 685, 699 (9th Cir. 2011) ("A district judge exercising authority over cases transferred for pretrial proceedings 'inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred.'" (quoting 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3866 (3d ed. 2010)); *In re* Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1231 (9th Cir. 2006) (observing that a transferee judge's power "includes authority to decide all pretrial motions").

[62] "Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with regard to class certification; and conserve the resources of the parties, their counsel and the judiciary." *In re* Baycol Prods. Liab. Litig., 180 F. Supp. 2d 1378, 1380 (J.P.M.L. 2001).

they were originally filed—the transferor districts.[63] In practice, however, consolidation into an MDL more often than not leads to settlement, not remand.[64] This is especially true in the realm of products liability suits.[65] This Part describes the process by which cases become part of an MDL. It explains MDL case management and the scope of MDL courts' authority.

A. *Initiating MDL*

As of late 2013, 462,501 individual actions had been consolidated into 1230 MDLs.[66] The Panel identifies pending civil actions that share one or more common questions of fact.[67] It uses its transfer powers to "avoid duplicative or possibly overlapping discovery . . . whenever there is a prospect of overlapping classes," and to "'eliminate the possibility of colliding pretrial rulings by courts of coordinate jurisdiction.'"[68] By statute, consolidation and transfer of multiple actions into a single MDL is appropriate when it "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[69] The Panel seems to focus primarily on the question of whether transfer will be more efficient than allowing the suits to proceed independently.[70] In making this determination, the Panel relies on the parties' attorneys to advise it about facts and circumstances relevant to "whether and where transfer should be effected in order to secure the just and expeditious

[63] 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .").

[64] *See* UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012 1, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf (last visited Oct. 26, 2014), *archived at* http://perma.cc/CMT8-W5LQ.

[65] Ninety percent of pending cases that are part of an MDL are products liability claims. Bradt, *supra* note 43, at 784 (citation omitted).

[66] STATISTICAL ANALYSIS, *supra* note 49.

[67] John F. Nangle, *From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 DEF. COUNS. J. 341, 341 (1999) ("[U]nder Section 1407, [the Panel] has the responsibility of . . . identifying civil actions pending in different federal courts involving one or more common questions of fact . . . .").

[68] Marcus, *supra* note 37, at 2270 (quoting *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975)).

[69] 28 U.S.C. § 1407(a) (2012). *See In re* "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 255-56 (J.P.M.L. 1969) (describing several factors relevant to the Panel's decision about whether to consolidate into an MDL); Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1002 (1974) ("Section 1407 thus directs the Panel to balance gains in efficiency and economy for the judiciary and some parties against inconvenience, added expense, and loss of forum choice for others.").

[70] *The Judicial Panel and the Conduct of Multidistrict Litigation*, *supra* note 69, at 1009 ("[T]he Panel has made the likelihood of significant judicial savings the operative factor in transfer decisions.").

resolution of all involved actions."[71] When it perceives that consolidation will save judicial resources, "transfer is almost inevitable."[72] Common questions of fact do not have to predominate over other questions, and arguments against transfer because of the existence of non-common issues are unlikely to prevail.[73]

A party dissatisfied with the Panel's decision may move for reconsideration.[74] On appeal, transfer orders are reviewable only by an extraordinary writ to the court of appeals possessing jurisdiction over the district court handling the MDL.[75] However, an order denying transfer may not be the subject of an appeal.[76]

When the Panel decides to create an MDL, it designates a specific federal district court and a specific federal district judge to preside.[77] The Panel's choices are not guided by any particular set of factors; they are not cabined by statute or by the Multidistrict Rules of Procedure.[78] The selected judge (the "transferee judge") and court (the "transferee court") need not already have one of the consolidated cases on their docket,[79] though parties may lobby the Panel for a specific court or judge on that basis.[80] The Panel might choose a particular judge for his or her experience with similar cases or other MDLs.[81] The condition of a potential transferee court's docket appears relevant, as do the distribution of MDLs throughout the country,[82] the location of relevant

[71] Nangle, *supra* note 67, at 343.

[72] *The Judicial Panel and the Conduct of Multidistrict Litigation*, *supra* note 69, at 1003.

[73] *Id.* at 1006 ("The Panel's response has been to transfer all the cases and leave to the transferee judge any problems created by noncommon facts or conflicting interests among parties on the same side of a case."). This is in contrast to Rule 23(b)(3) class actions, in which common questions of law or fact must predominate. FED. R. CIV. P. 23(b)(3); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2565-67 (2011) (Ginsburg, J., concurring in part and dissenting in part) (suggesting that the majority opinion imported a predominance requirement into Rule 23(a)(2), which requires potential classes to share common questions of law or fact).

[74] J.P.M.L. R. P. 11.1(c).

[75] 28 U.S.C. § 1407(e) (2012).

[76] *Id.* ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."); Ostolaza & Hartmann, *supra* note 38, at 62.

[77] 28 U.S.C. § 1407(b).

[78] Ostolaza & Hartmann, *supra* note 38, at 57-59.

[79] *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 990 F. Supp. 834, 835-36 (J.P.M.L. 1998) (ordering consolidation of many actions into a district that contained none of them).

[80] *See, e.g.*, *id.* at 835 (listing districts to which the parties lobbied for transfer).

[81] Ostolaza & Hartmann, *supra* note 38, at 60.

[82] *Id.*

evidence, and the "willingness and motivation" of the potential transferee judge.[83]

Prior to consolidation, most of the parties' disagreements have tended to focus on where the consolidation will take place; parties have preferred particular venues and district judges.[84] When lobbying for transfer to a specific district, parties may not argue about applicable district and circuit law in potential courts (which may be more favorable to the plaintiffs or the defendants in a given set of facts); they are limited to administrative and convenience arguments.[85] Plaintiffs might strategically file cases in a particular district and then argue that the Panel should assign the MDL to that district because cases are already pending there. If those cases have advanced further in the discovery process, such that a particular presiding judge appears to be leading the pack of cases to be transferred, this strategy might prove effective. On the other side, defendants might argue that creation of an MDL is premature or that, because only a few plaintiffs' lawyers are involved, the parties can informally coordinate the cases without formally consolidating them.

After the Panel creates an MDL, later-filed "tag-along" cases that share common questions of fact with the previously transferred cases may be added to the MDL.[86] A party to a tag-along case may seek a transfer order from the Panel,[87] which then reviews the complaint and docket sheet before issuing a conditional transfer order.[88] Or, if the defendants agree not to object, tag-along cases can be filed directly in the transferee court, without regard to whether

[83] Bradt, *supra* note 43, at 787. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.33 (2004) ("[T]he Panel looks for an available and convenient transfer forum, usually one that (1) is not overtaxed with other MDL cases, (2) has a related action pending on its docket, (3) has a judge with some degree of expertise in handling the issues presented, and (4) is convenient to the parties.") (internal citations omitted).

[84] Bradt, *supra* note 43, at 786-87.

[85] *See* Nangle, *supra* note 67, at 343 ("[I]n selecting a transferee district, the panel does not consider the litigants' dissatisfaction with past or anticipated rulings of the transferee court. Nor does the panel consider the governing appellate law of the transferee district. And most empathically, the panel does not sit in review of decisions of the transferee court.").

[86] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (describing the transferee judge's management of tag-along actions).

[87] The Panel may conditionally transfer the tag-along into the MDL for fifteen days, allowing the parties an opportunity to oppose the transfer. Ostolaza & Hartmann, *supra* note 38, at 63. When any transfer request is pending before the Panel, the potential transferor district court's authority is not affected—it can rule on pending pretrial motions, including motions to remand to state court. Until an effective transfer order is entered with the clerk of the transferor court, this remains true. Nangle, *supra* note 67, at 342-43; *see* J.P.M.L. R. P. 7.1.

[88] Nangle, *supra* note 67, at 342.

personal jurisdiction and venue would be proper in that court absent the MDL.[89]

B. *MDL Management and Steering Committees*

A single MDL can involve thousands of plaintiffs and thousands of lawyers.[90] Rather than deal directly with scores of attorneys, transferee courts appoint a limited number of lawyers to serve on "steering committees" to manage the litigation.[91] Because "'[t]he purpose of consolidation is to permit a trial convenience and economy in administration,'"[92] they assert, a failure to designate lead counsel would be inefficient and counter to the very idea of MDLs. As a result, "the litigation is run in many ways by a relatively small number of counsel appointed to the case-management committees established by the court."[93]

Counsel appointed to management or leadership roles act on behalf of other counsel and parties, not just the clients who retained them.[94] MDL judges have total discretion to designate various leaders or committees among the involved

[89] Bradt, *supra* note 43, at 795-96.

[90] Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2339 n.74 (2008) [hereinafter Fallon et al., *Bellwether Trials*]; *see, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 594 F.3d 113, 116 (2d Cir. 2010) (per curiam) (involving an MDL "brought by thousands of plaintiffs").

[91] Though transferee courts appoint committees to represent both plaintiffs and defendants, "in practice, the [Defendants' Steering Committee] is generally selected by the defendant itself with the approval of the court." Fallon, *Common Benefit Fees*, *supra* note 53, at 373.

[92] *In re* Air Crash Disaster at Detroit Metro. Airport on August 16, 1987, 737 F. Supp. 396, 398 (E.D. Mich. 1989) (quoting *In re* Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1014 (5th Cir. 1977)); *In re* Korean Air Lines Co., 642 F.3d 685, 700 (9th Cir. 2011) ("In discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak.").

[93] Bradt, *supra* note 43, at 791; *see* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 508-10 (2011) [hereinafter Burch, *Group Consensus*] ("Presently, plaintiffs in nonclass aggregation have few opportunities for participation, voice, and control. . . . Realistically, lawyers drive multidistrict litigation."); William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1547 & n.110 (1995) (asserting that "[a]ggregation tends to diminish plaintiffs' control over their claims" and citing an example in which nine lawyers or law firms represented over 10,000 claimants); Lawrence L. Jones II, *MDL Primer: Multi-District Litigation 101*, JONES WARD PLC (Aug. 5, 2011), http://www.the-recall-lawyers.com/2011/08/mdl-primer-multi-district-liti.html, *archived at* http://perma.cc/LHS6-AW36 ("After the [Plaintiffs' Steering Committee ("PSC")] is appointed by the court, the lawyers on the PSC will control the litigation for all of the non-PSC members. All case strategy and much of the day-to-day work is completed by the PSC and the various 'sub-committees' created by the PSC.").

[94] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

attorneys—they are not required to use any particular titles or assign any particular duties. These designations fall into four general categories: liaison counsel, lead counsel, trial counsel, and committees of counsel.[95] "Liaison counsel" is essentially an administrator located near the transferee court who facilitates communications between the court and other counsel; this designee need not be an attorney.[96] "Lead counsel" is responsible for "formulating . . . and presenting positions on substantive and procedural issues."[97] This attorney (or attorneys) presents written and oral arguments to the MDL court, works with opposing counsel on discovery issues, conducts depositions, hires expert witnesses, manages support services for the MDL, and ensures that schedules are kept.[98] "Trial counsel" function as the principal attorneys at trial, and they coordinate the other members of the trial team.[99] "Committees of counsel," often called steering, coordinating, management, or executive committees, are appointed when there are sufficient dissimilarities among group members to warrant representation of those disparate interests on a larger litigation leadership team.[100]

The transferee judge has complete control over designating attorneys to play specific roles in the MDL.[101] In some cases, attorneys can apply to be on a steering committee or to take on another leadership role.[102] Though MDL judges entertain objections to applicants or nominees,[103] selection to committee

[95] *Id.*

[96] *See id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations*, 63 VAND. L. REV. 105, 118-19 (2010) (mentioning that judges are "free to pick the lawyers they want[] because the standards governing appointments of attorneys to managerial positions are extremely weak" and few if any attorneys appeal unfavorable appointment decisions, much less win a reversal).

[102] *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *6 (D. P.R. Dec. 2, 1988) (describing nomination process for positions on Plaintiffs' Steering Committee).

[103] *See In re* Bendectin Litig., 857 F.2d 290, 297 (6th Cir. 1988) (describing the process by which attorneys were appointed to the Lead Counsel Committee, the plaintiffs' failure to show cause why certain attorneys should not be appointed, and declaring, "[i]n complex cases, it is well established that the district judge may create a Plaintiffs' Lead Counsel Committee") (citing *In re* Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1014-15 (5th Cir. 1977); Vincent v. Hughes Air West, Inc., 557 F.2d 759, 773-74 (9th Cir. 1977); Farber v. Riker–Maxson Corp., 442 F.2d 457, 459 (2d Cir. 1971)); *San Juan Dupont Plaza Hotel*, 1989 WL 168401, at *5-11 (describing the purpose of the plaintiffs' steering committee; the main criteria for membership thereon; the primary responsibilities of the committee; and procedures for application and nomination to the committee, including written objections to potential members).

is not the result of a traditional adversary process refereed by the court.[104] In selecting counsel for leadership roles, the transferor judge may consider factors such as "physical (e.g., office facilities) and financial resources; commitment to a time-consuming, long-term project; ability to work cooperatively with others; and professional experience particular to this type of litigation."[105] Among attorneys, "[t]here is often intense competition for appointment by the court as designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation."[106] Attorneys sometimes make side agreements about who will lobby to be appointed to a leadership role.[107] These pre-formed coalitions, which may be influential in establishing an MDL in the first place, often determine who ends up on the steering committee.[108] Of course, this backroom dealing is not transparent to individual claimants, and may not be open to first-time MDL attorneys, either.

Membership on the steering committee entails an enormous amount of work, but it can also come with a huge payoff—certainly larger than the contingency fee expected from representing one or even several individual plaintiffs—because attorneys who do work for the common benefit of the group typically receive a portion of every single plaintiff's payout. *In re Zyprexa Products Liability Litigation*[109] provides one example of how MDL courts commonly establish attorney compensation structures for the council appointed to steer the litigation. There, the MDL court capped attorneys' fees and created a common benefit fund, generated by a mandatory set-aside from all settlements and judgments in the MDL, to compensate members of the plaintiffs' steering committee.[110] The court also established fee restrictions and appointed special settlement masters with discretion to order reductions or increases of fees in negotiated settlement agreements.[111]

Appointment to the steering committee often reaps subsequent career benefits as well. After an attorney is selected for one steering committee, she may call herself an experienced MDL litigator the next time she participates in an MDL. That credential makes the next transferee judge more likely to

[104] *But see* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224 (2004) ("[A]n evidentiary hearing may be needed to bring relevant facts to light or to allow counsel to state their case for appointment and answer questions from the court about their qualifications . . . .").

[105] *San Juan Dupont Plaza Hotel*, 1989 WL 168401, at *6.

[106] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224 (2004).

[107] *Id.*

[108] *See* Brown, *supra* note 33, at 398 ("In some cases, participants will agree to the entire composition of the steering committee and iron out any objections before presenting a list to the judge.").

[109] 594 F.3d 113 (2d Cir. 2010) (per curiam).

[110] *Id.* at 115.

[111] *Id.* at 116. For more details about fee arrangements for steering committee members, see discussion, *infra* Part II.E (discussing the methods by which steering committees are compensated).

appoint her to a subsequent steering committee.[112] The pattern repeats. Because the transferee judge has complete control over appointment to leadership roles, and there is fierce competition for those lucrative positions, experience in a prior MDL can tip the scales in favor of one attorney over another.[113] In this way, the group of powerful MDL plaintiffs' attorneys remains relatively small, and newcomers face formidable barriers to entry that they cannot overcome on their own accord.[114] Due to this positive feedback loop, if an individual plaintiff hires his local attorney for any reason other than the attorney's MDL experience, the odds of that local attorney being selected for a leadership role are quite low. Claimants are unaware of this when they retain counsel and decide to file a lawsuit, because unless they are tag-along plaintiffs, they are unaware that they will eventually be transferred into an MDL.

The existence of a steering committee lowers barriers to entry for tag-along plaintiffs, which may cause huge increases in the number of plaintiffs in a single MDL.[115] When attorneys appointed by the court will do the bulk of the work, the cost of participation to the individual claimant is lowered. The claimant might even file *pro se*, foregoing the cost of retaining a lawyer of his own, with the knowledge that a court-sanctioned attorney will litigate his case on his behalf, and that the case will likely never emerge from the MDL. Tag-along plaintiffs who file directly into an MDL do not have to make the same kind of investment as other plaintiffs, so it is possible that their claims are not strong enough to warrant filing individual lawsuits. If so, tag-along plaintiffs could dilute the overall strength of plaintiffs' claims, which could result in a weaker bargaining position for all the plaintiffs when settlement negotiations begin.

In the unlikely event that individual cases are remanded back to their jurisdictions of origin, the discovery conducted by the steering committee restricts what the individual claimant and her lawyer can do upon remand. Because one of the fundamental ideas behind consolidation into MDL is to avoid duplicative discovery, on remand, transferor courts are hesitant to grant additional discovery requests.[116] As a more formal matter, transferee courts

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[112] *See* Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391, 392 (2014) ("[P]revious experience in an MDL or other complex litigation is always considered.").

[113] *See id.*

[114] *See id.* at 392-93 (remarking on the danger of repeat MDL plaintiffs' attorneys becoming an "exclusive club").

[115] For example, during the twelve-month period ending September 30, 2013, the Panel transferred 5521 cases into MDLs, whereas 40,988 actions were filed directly in transferee courts during that time. STATISTICAL ANALYSIS, *supra* note 49.

[116] *See, e.g.*, Pavlou v. Baxter Healthcare Corp., No. 98Civ.4526, 2004 WL 912585, at *1 (S.D.N.Y. April 29, 2004) (affirming, on remand from MDL, a magistrate judge's order limiting potential deponents and topics of deposition because "[p]laintiffs had sufficient opportunity to seek discovery during the MDL proceedings. To rule otherwise would

have authority to enter pretrial orders that "'govern the conduct of the trial'" back in a transferor court.[117] Furthermore, decisions made before trial can be outcome-determinative; they dictate viable arguments and strategies. In these ways, even though the consolidated proceedings are restricted to pretrial matters, the steering committee exercises real and enormous influence over the direction of an individual's claim.

C. *Bellwether Trials*

As the Supreme Court made explicit in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[118] a transferee court's authority extends only to pretrial matters; it cannot try a transferred case without the parties' consent.[119] Within the limits of § 1407 and *Lexecon*, though, MDL courts often work to obtain consent from some parties to conduct "bellwether" trials, which serve as a means of gathering information about the strengths and weaknesses of each side's arguments and often facilitate global settlement negotiations.[120] Bellwether trials are an expected element of the information-gathering process undertaken in transferee courts. These bellwether trials are, for the most part, information-gathering tools; while they of course bind the immediate parties, they are not binding on other parties in the MDL.[121] However, their holdings can be used offensively as collateral estoppel by plaintiffs in future cases,

undermine the MDL proceedings.").

[117] Fallon et al., *Bellwether Trials*, *supra* note 90, at 2329 n.17 (quoting *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 636 (N.D. Ill. 1996)); *see* Marcus, *supra* note 37, at 2264 (citing Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978)) (quoting Judge Weigel, an original member of the Panel, who "opined that the transferee judge's orders must be respected by the transferor judge").

[118] 523 U.S. 26 (1998).

[119] *Id.* at 28 (holding that a transferee court "has no . . . authority" "to assign a transferred case to itself for trial"). This limitation does not extend to cases brought under Section 4C of the Clayton Act; the Panel can consolidate actions brought under that provision and transfer them for both pretrial and trial. 28 U.S.C. § 1407(h) (2012).

[120] The method of selecting cases for bellwether treatment varies among MDLs. The process can involve grouping like cases and selecting from each group, allowing plaintiffs and defendants to propose cases featuring their strongest arguments, or some other process determined by the transferee court. *See* Fallon et al., *Bellwether Trials*, *supra* note 90, at 2343-51 (describing the selection process); *see also In re* Vioxx Prod. Liab. Litig., 869 F. Supp. 2d 719, 723 (E.D. La. 2012) ("Millions of documents were discovered and collated. Thousands of depositions were taken and at least 1,000 discovery motions were argued. After a reasonable period for discovery, the Court assisted the parties in selecting and preparing certain test cases to proceed as bellwether trials."). There is no explicit requirement that cases selected for bellwether trials be typical of all claims.

[121] Bradt, *supra* note 43, at 789-90; Fallon et al., *Bellwether Trials*, *supra* note 90, at 2337-38.

subject to the normal limits on that doctrine.[122] Cases selected as bellwether trials are usually tried by members of the appointed leadership team, not by the attorneys of record in the individual cases.[123] As such, bellwether trials give coordinating counsel an opportunity to "organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation."[124]

Assuming the claims selected for bellwether treatment are "typical" of the group of claims, bellwether trials facilitate settlement by valuing cases in a way that can be extrapolated to other claims.[125] The utility of a bellwether verdict depends on whether the tried claim is a truly representative test.[126] But even if the transferee court conducts several bellwether trials in an attempt to account for claims of different strengths, they cannot account for all the unique features of all claims in the MDL. Relying on the results of bellwether trials to evaluate settlement offers can over- or undervalue individual claims, and there is no telling which is occurring more often.

If cases in an MDL are remanded to their jurisdictions of origin, bellwether trials may be useful for their creation of "trial packages," which local counsel can use in subsequent trials.[127] These packages typically include items such as discovery documents, background information, expert reports, deposition and trial testimony, information about potential witnesses, court rulings and transcripts, and coordinating counsel's work product.[128] But bellwether trials'

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[122] *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (holding that earlier SEC action could be used offensively as collateral estoppel in later shareholder derivative suit).

[123] *See* Fallon et al., *Bellwether Trials*, *supra* note 90, at 2360 n.121 (noting that members of the steering committee tend to represent a significant number of plaintiffs, have extensive knowledge of the subject matter, and offer their cases to be tried as bellwether cases).

[124] *Id.* at 2338.

[125] Alexandra Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577-78 (2008) (explaining that bellwether trials "assist in valuing cases and to encourage settlement").

[126] This is appropriate given the origin of the term "bellwether":

> The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context.

In re Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). *See also* Fallon et al., *Bellwether Trials*, *supra* note 90, at 2324.

[127] Fallon et al., *Bellwether Trials*, *supra* note 90, at 2325 ("At a minimum, the bellwether process should lead to the creation of 'trial packages' that can be utilized by local counsel upon the dissolution of MDLs."); *see id.* at 2340 ("Ultimately, the availability of a trial package ensures that the knowledge acquired by coordinating counsel is not lost if a global resolution cannot be achieved in the transferee court.").

[128] *Id.* at 2339.

primary function is to facilitate settlement in the transferee court.[129] Bellwether trials prioritize fact-finding and force appointed counsel to develop their theories of the case. These "contribution[s] to the maturation of disputes" "can naturally precipitate settlement discussions" because each side has "test driven" its theories before live juries.[130] Jury verdicts inform both sides about the relative strengths and weaknesses of their various strategies and arguments.[131] Knowing the persuasive value of bellwether trials when it comes time to negotiate a possible global settlement, "coordinating council often pull out all the stops," making bellwether trials "exponentially more expensive for the litigants and attorneys than a normal trial."[132] The more expensive the bellwether trial, the more likely the parties are to rely on its outcome in assessing the value of the remaining claims, because the parties have more riding on the bellwether trial being a useful tool. Similar to the preference for appointing experienced MDL litigators to leadership positions, reliance on bellwether trials is a self-reinforcing feature of MDLs.

Bellwether trials are not perfect predictors. Even if the transferee court conducts multiple bellwether trials that are representative of several subgroups of claims, the most useful bellwether cases for the greatest number of plaintiffs are not the extraordinary claims. So although the process of trying bellwether cases facilitates global settlement, by design it does not account for the unique characteristics of a particularly weak or strong claim.

D. *Settlement*

Settlement is the fate of almost all cases that are part of an MDL. Approximately 97% of MDL cases terminate in transferee districts; thus, relatively few are remanded back to the districts in which they were originally filed.[133] Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle. Because a primary objective of consolidation into MDL is to avoid multiple federal judges having to deal with the same issues, some judges perceive failure to achieve a global settlement as

[129] "The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar." *Chevron*, 109 F.3d at 1019.

[130] Fallon et al., *Bellwether Trials*, *supra* note 90, at 2342.

[131] *See id.* (explaining that bellwether trials let attorneys gain an understanding more grounded in reality due to the presence of a jury).

[132] *Id.* at 2366.

[133] As of September 30, 2013, 462,501 individual actions had been subjected to § 1407 proceedings. STATISTICAL ANALYSIS, *supra* note 49. The Panel remanded 13,432, or about 3%, of those. *Id.* 359,548 actions terminated in the transferee court. *Id.; see* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 801 (2010) (observing several MDL settlements that "suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements").

a failure.[134] Transferee courts tend to take an active role in settlement negotiations. They appoint special settlement masters[135] and take a hands-on approach.[136] As Judge Fallon described, it is "not unusual" for a transferee court to "encourage a global resolution of the matter before recommending to the Panel that the case be remanded."[137] Individual litigants, whose personal litigation goals may or may not be monetary,[138] face pressure to accept defendants' monetary offers because their attorneys work for contingency fees.

Currently, the aggregate settlement rule governs global MDL settlements. It requires that each claimant give "informed consent" to a settlement, based on knowledge of the settlement terms, including other claimants' payouts.[139] However, that safety valve may be short-lived. The American Law Institute ("ALI") recently published *Principles of the Law of Aggregate Litigation*.[140] The ALI proposal would allow clients, at the time they retained representation, to agree to be bound by an aggregate settlement approved by supermajority vote of all claimants.[141] Clients could empower their lawyers "in advance, to negotiate binding settlements on their behalf as part of a collective resolution of claims."[142] Although the ALI proposal is just that—a proposal—it demonstrates the pervasiveness of settlement in MDLs and the apparent consensus that facilitating global settlement is a certain function, if not the main purpose, of consolidation into an MDL.

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[134] *See* Marcus, *supra* note 37, at 2265 ("Almost inevitably, transferee judges are likely to feel that they have some responsibility to attempt to resolve the cases they have gotten—'The other judges are relying on me to finish this job.'").

[135] *See, e.g.*, *In re* Zyprexa Prod. Liab. Litig., 594 F.3d 113, 116 (2d Cir. 2010); *In re* Methyl Tertiary Butyl Ether (MTB) Prod. Liab. Litig., 578 F. Supp. 2d 519, 522 (S.D.N.Y. 2008); *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 760 (E.D.N.Y. 1984).

[136] *See, e.g.*, *In re* Patenaude, 210 F.3d 135, 139-40 (3d Cir. 2000) (describing transferee courts' resistance to remand unless "all avenues of settlement were exhausted"). Transferee courts even "may require individuals to attend settlement conferences." *In re* Korean Air Lines Co., Antitrust Litig., 642 F.3d 685, 699 (9th Cir. 2011) (citing *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987, 720 F. Supp. 1433, 1436 (D. Colo. 1988)).

[137] Fallon, *Common Benefit Fees*, *supra* note 53, at 373-74.

[138] *See* Burch, *Group Consensus*, *supra* note 93, at 516-17 (citing the September 11th Victims Compensation Fund as an example of claimants whose goals transcended financial compensation); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 312-13 (2011) (arguing that tort law "is not simply a device for transferring wealth").

[139] Erichson & Zipursky, *supra* note 138, at 296.

[140] ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

[141] Erichson & Zipursky, *supra* note 138, at 293.

[142] *Id.*

E. *Attorney Compensation*

The huge responsibility placed on members of court-selected steering committees comes with potentially huge payoffs. Transferee courts structure compensation plans for lead counsel that reflect their responsibility to and efforts on behalf of the group. The courts justify that exercise of authority in the following way: "'[I]f lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation.'"[143] To compensate appointed counsel, courts set up common benefit funds from which they will later withdraw lead counsel's fees and costs.[144] They also enter orders requiring some portion of all claim payments, including settlements and judgments arising after cases are transferred back to their original jurisdictions, to be paid into the common benefit funds.[145] The "common benefit fee" comes from the fee that would be paid to the claimant's selected attorney—not from the claimant's portion.[146] In this way, MDL splits the attorney fee the plaintiff agreed to at the outset between retained counsel and appointed counsel. The contingent percentage of the plaintiff's recovery remains the same, but the retained counsel must share that percentage with the steering committee.

Transferee courts also establish how much lead counsel will be paid from the common funds. Many rely on a Fifth Circuit case, *Johnson v. Georgia Highway Express, Inc.*,[147] which established a twelve-factor guideline for determining a reasonable fee for each committee member.[148] In allocating fees,

[143] *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708, 2008 WL 682174, at *5 (D. Minn. Mar. 7, 2008) (quoting *In re* Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1016 (5th Cir. 1977)) (alterations in original).

[144] Fallon, *Common Benefit Fees*, *supra* note 53, at 374-75 (describing the practice of creating a common fund to spread the cost of the litigation across all beneficiaries).

[145] *See, e.g.*, *In re* Protegen Sling and Vesica System Prod. Liab. Litig., Nos. 1:01-01387, 1387, 2002 WL 31834446, at *1 (D. Md., April 12, 2002) ("The obligation shall follow the case to its final disposition in any United States court including a court having jurisdiction in bankruptcy."). The process described is most typical for plaintiffs' steering committees; clients typically compensate the defendants' steering committees on a periodic basis. Fallon, *Common Benefit Fees*, *supra* note 53, at 374.

[146] Fallon, *Common Benefit Fees*, *supra* note 53, at 376 (justifying the common benefit fee's extraction from the primary attorney because the primary attorney is the beneficiary of the common benefit work).

[147] 488 F.2d 714 (5th Cir. 1974).

[148] *See, e.g.*, *Guidant Corp. Implantable Defibrillators*, 2008 WL 682174, at *7 (explaining that courts have wide discretion in applying the elements of the *Johnson* twelve-factor test). The *Johnson* factors are:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for

courts must "conform to 'traditional judicial standards of transparency, impartiality, procedural fairness, and ultimate judicial oversight.'"[149] They do so with input from lead attorneys, but ultimate discretion lies with the transferee court,[150] whose cost awards are subject to abuse of discretion review by the appellate court.[151] The transferee court cannot abdicate its responsibility of closely scrutinizing fee awards to appointed counsel.[152] Not surprisingly, given the large number of cases and attorneys involved, cost and fee allocation is a complicated and time-consuming part of MDL management. It can be difficult if not impossible for the transferee court to adequately predict what the nature of lead counsel's expenses will be as the MDL progresses, so all players must remain flexible and engaged in this part of MDL management. If they are not actively involved along the way, dissatisfied plaintiffs (or their retained attorneys) may forego their opportunity to object to costs incurred and then requested by the steering committee.[153]

III. MDL'S DUE PROCESS DIFFICULTIES

As the foregoing description of MDL procedures illustrates, a case transferred into an MDL proceeding looks drastically different from a typical lawsuit, and presumably these procedures are not what the individual plaintiff expects when he files his claim. Despite this elaborate set of procedures and

> similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Id. (citing *Johnson*, 488 F.2d at 719-20).

[149] *In re* Vioxx Prod. Liab. Litig., 802 F. Supp. 2d 740, 772 (E.D. La. 2011) (quoting *In re* High Sulfur Content Gasoline Prod. Liab. Litig., 517 F.3d 227, 234 (5th Cir. 2008)).

[150] Fallon, *Common Benefit Fees*, *supra* note 53, at 387. District courts derive authority to establish these structures from their equitable powers. *Id.* at 379-80 (explaining how courts derive this equitable authority from Rule 23 of the Federal Rules of Civil Procedure). Settlement agreements also sometimes give express consent to the transferee judge setting common benefit fees. *See id.* at 378-80 ("[S]ettlements usually contain[] a specific agreement addressing the court's authority regarding attorneys' fees.").

[151] *In re* San Juan Dupont Hotel Fire Litig., 111 F.3d 220, 228 (1st Cir. 1997). *See High Sulfur Content Gasoline*, 517 F.3d at 227 ("We must determine whether the record clearly indicates that the district court has utilized the *Johnson* framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation." (internal quotation marks and citation omitted)).

[152] *See High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d at 227 (admonishing the district court for "abdicat[ing] its responsibility to ensure that the individual awards recommended by the Fee Committee were fair and reasonable").

[153] *See, e.g.*, *San Juan Dupont Hotel Fire Litig.*, 111 F.3d at 228 ("[A]ll litigants must share in their mutual obligation to collaborate with the district court *ab initio* in fashioning adequate case management and trial procedures, or bear the reasonably foreseeable consequences for their failure to do so.").

the enormous number of cases involved in MDL, the constitutional validity of this process has gone almost completely unexamined. In the name of efficiency, MDL—including its attendant procedures—has been embraced virtually without question.[154] This unqualified acceptance assumes that consolidation into MDL is totally benign and that individual claims retain their individualism even when they are temporarily adjudicated in a group with like cases. It also assumes—without any basis—that MDL procedures satisfy procedural due process.

The plain language of § 1407 and the Supreme Court's decision in *Lexecon* have probably contributed to the unquestioning acceptance of the constitutionality of MDL, because both emphasize that transferee courts have jurisdiction solely over pretrial matters.[155] But consolidation into MDL, originally envisioned as a temporary transfer to facilitate convenience and avoid duplicative discovery, now all but guarantees that transferred cases will never return to their original jurisdictions for trial. The Panel's transfer orders are mandatory, one-way tickets to transferee districts—"black holes."[156] They are non-transferrable and non-negotiable.[157] Instead of being temporarily and conveniently consolidated for discovery, individual claims become part of a massive group of cases plodding toward settlement. 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.

Each claimant in an MDL has an individually held, constitutionally protected property right at stake. Those rights are guaranteed by the Fifth Amendment, which protects life, liberty, and property against deprivation absent due process of law.[158] The "property" at stake in an MDL is the "chose in action." This historically established concept refers to the right to sue to enforce a legally protected claim, even the unlitigated right to sue.[159] Under the

[154] *See* Marcus, *supra* note 37, at 2248 ("The Panel's activities have generally not caused the sort of controversy the class action produced.").

[155] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

[156] *See* Fallon et al., *Bellwether Trials*, *supra* note 90, at 2330 ("Indeed, the strongest criticism of the traditional MDL process is the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again.").

[157] "Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order—from a court you have never heard of—declaring your case a 'tag-along' action and transferring it to another federal court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation." Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16, 16 (2004).

[158] U.S. CONST. amend. V.

[159] Sheldon v. Sill, 49 U.S. 441, 444 (1850) (defining a "chose in action" as a right "which can be realized only by suit").

Fifth Amendment, then, MDL claimants cannot be deprived of their rights to a chose in action without due process of law.[160] MDL is a collection of individual lawsuits; it is not a vindication of some kind of substantively established group-held right. The constitutionality of MDL must therefore be assessed from the perspective of each litigant on an individual basis. As in other consolidated representative litigation (for example, class actions), MDL raises concerns about whether collectivization unconstitutionally modifies the claimants' individually held rights.

In MDL, individual litigants, for all practical purposes, lose a substantial degree of control over the procedural fate of their claims. For example, for the overwhelming number of claimants, the lawyers they hired are not selected for the court-appointed steering committee, which drives strategic and tactical decisions.[161] This impedes their ability to exercise control over the direction and course of their litigation. The lack of assurance that the selected attorneys can and will provide full and fair representation for each individual claimant is also unconstitutional because it does not comport with even the procedural protections afforded to absent class members in a class action, which are constitutionally dubious to start.

This Part expands on these ideas and assesses whether the changes inherent in forced transfer into an MDL comport with the constitutional guarantees of procedural due process. It concludes that MDL fails to satisfy those guarantees. It begins with a discussion of the day-in-court ideal as the constitutional baseline for procedural due process. It argues that the day-in-court ideal is the *sine qua non* of constitutional due process—the basic structure upon which the adversarial system is built. Scholars disagree about the theoretical justifications for the day-in-court ideal, but no matter whether one subscribes to the autonomy model of the day-in-court ideal or is satisfied with a paternalistic notion of one's right to his day in court, MDL fails to provide a constitutionally adequate opportunity to litigate.

A. *The Constitutional Baseline: Due Process and the Day-in-Court Ideal*

Before delving into the constitutional merits of MDL, it is important first to identify the constitutional mandate against which MDL should be measured. In any given adjudication, the constitutional inquiry concerns exactly what process is "due." The Due Process Clause, on its face, does not provide a straightforward answer to that question, nor to the question of who gets to provide the answer. In attempting to answer the question of what procedures the Due Process Clause demands, the Supreme Court has repeatedly reaffirmed a "deep-rooted historic tradition,"[162] a principle that is "as old as the law" and

[160] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest . . . .").

[161] *See supra* Part II.B (explaining the selection process and power of steering committees).

[162] Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (internal quotation marks

"of universal justice": "no one should be personally bound until he has had his day in court."[163]

The so-called day-in-court ideal is at the heart of constitutionally guaranteed procedural due process, according to the Court, and is central to the American conception of the adversarial model of litigation. Litigants, judges, and scholars frequently refer to the right to an individual day in court when they analyze whether due process requires, or forbids, a certain procedure. In some ways, "an individual day in court" has become a reflexive, shorthand description of what due process means. For a variety of reasons, MDL severely undermines the day-in-court ideal by depriving individual litigants of their opportunity to protect their interests through the litigation process. But before one can successfully indict MDL as a due process violation, one must first establish two things: (1) What does the day-in-court ideal specifically encompass? and (2) In what way does deprivation of one's day in court undermine the set of constitutionally dictated normative precepts encompassed by the concept of procedural due process? It is to answering these questions that our analysis now turns.

At the outset, it is important to define what an individual day in court entails. The right to one's own day in court means a right to meaningful control over litigation strategy and goals, including choice of legal representative.[164] It requires a "full and fair opportunity to litigate,"[165] which means, as one of us has written, a "full opportunity to prepare [one's] own arguments and evidence."[166] At base, meaningful participation in the adjudicatory process—the day-in-court ideal—includes, in the words of a respected scholar, "the right to observe, to make arguments, to present evidence, and to be informed of the reasons for a decision."[167]

omitted).

[163] Mason v. Eldred, 73 U.S. 231, 239 (1867). *See* Taylor v. Sturgell, 553 U.S. 880, 892-93 (2008) (pronouncing the general rule that persons are not bound by cases in which they are not parties); Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").

[164] Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1890 (2009) ("'Autonomy' means that the individual has the right to choose how to fashion his own representation and to participate in the process as he sees fit."); *see* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations omitted).

[165] *Taylor*, 553 U.S. at 892.

[166] Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 391 (2001) [hereinafter Redish, *Tobacco Wars*].

[167] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 280 (2004).

The Supreme Court has identified the "two central concerns of procedural due process" to be "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process."[168] The day-in-court ideal takes account of both of these concerns. First, an individual day in court helps achieve accurate outcomes (thus avoiding "unjustified or mistaken deprivations") because the stakeholders—those who will be most affected by the outcome and are the most motivated to protect their own rights—participate in the decision-making process.[169] In addition, individual participation is inherently valuable in a democratic system because it legitimizes the adjudicating entities in the minds of the litigants.[170] It fosters citizens' roles in democratic governance, which includes a legitimate, authoritative judiciary.[171]

B. *The Foundations of Due Process Theory*

Recognition of these and other benefits of an individual day in court does not, in itself, reveal the complex set of values underlying this procedural guarantee. Understanding the theoretical grounding for the day-in-court ideal helps one to grasp the importance of the tradition and determine the constitutional floor of procedural due process. Procedural due process can be thought to foster a variety of non-mutually exclusive values. But in reverse engineering the day-in-court ideal as a manifestation of procedural due process, it is necessary to recognize a foundational conceptual dichotomy in due process theory. On the one hand, one may employ due process theory as a means of deciding which particular procedures are required to provide the individual whose constitutionally protected interests are at stake with a full and fair opportunity to defend those interests—in other words, exactly what

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[168] Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[169] *See* Solum, *supra* note 167, at 259 ("[P]rocedural fairness requires that those affected by a decision have the option to participate in the process by which the decision is made.").

[170] *See* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHIC. L.J. 545, 554 (2012) ("Dignitary theory dovetails with social-psychological studies of procedural justice finding that people perceive outcomes as more legitimate when the participants are given the opportunity to be heard."); Redish & Katt, *supra* note 164, at 1893-94 ("[I]ndividual participation in the litigation process as a means of vindicating his rights adds legitimacy to judicial outcomes."); Solum, *supra* note 167, at 274 ("Procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.").

[171] Redish & Katt, *supra* note 164, at 1889-90 (describing "process-based theory['s]" "facilitation of the citizen's role in democratic governance"). *See* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CAL. L. REV. 1573, 1582 (2007) ("The procedural due process guarantee is appropriately viewed as a constitutional outgrowth of democracy's normative commitment to . . . process-based political autonomy."); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 996-97 (1993) (describing the benefits of direct participation to public law remedies).

procedures are essential to the exercise of the individual's right to her day in court. On the other hand, one may draw on due process theory in order to decide whether, in a particular situation, the individual has a constitutional right to her day in court in the first place. Those are not identical questions. Indeed, the theoretical analysis required to answer each of them is, in certain ways, fundamentally different.

When a court decides whether a particular procedure is required by due process in the course of an adjudicatory hearing, the traditional debate has been between the purely utilitarian approach adopted by the Supreme Court in its decisions in *Mathews v. Eldridge*[172] and *Connecticut v. Doehr*[173] on the one hand, and the so-called "dignitary" interest in permitting the individual to feel an appropriate level of respect from his government, on the other hand. Under the utilitarian test currently in vogue in the Supreme Court, a court is to balance competing utilitarian concerns: (1) the extent to which the procedure in question increases the likelihood of an accurate decision, (2) the nature of the individual's interest at stake, (3) the extent to which use of the procedure would burden government, and (4) the extent to which the use of the procedure would burden the other party or parties.[174] In contrast, the dignitary model, advocated by certain scholars, places primary emphasis on an inquiry into the extent to which the procedure is necessary to allow the individual to believe that he has had a full and fair opportunity to plead his case, regardless of the impact of that procedural opportunity on the reaching of an accurate decision.[175]

One does not reach constitutional questions about the need for specific procedures, however, until one first concludes that the individual has a right to her day in court in the first place. It is generally assumed that before the individual's property interests may be undermined or taken away at least *some* form of governmental process is required.[176] Here too, however, there exists a significant dichotomy as to the underlying rationale for that right. And, it is important to note, the choice between those theoretical alternatives is likely to have significant practical consequences for the shaping of a litigant's due process right to her day in court. That dichotomy is between the "paternalism" rationale for the day-in-court ideal and the "autonomy" rationale for the individual's right to her day in court.[177] Under the former rationale, the sole concern is that individual litigants' interests are, in fact, adequately protected

[172] 424 U.S. 319 (1976).

[173] 501 U.S. 1 (1991).

[174] *Id.* at 10-11.

[175] *See* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976).

[176] *See Mathews*, 424 U.S. at 333 ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.").

[177] *See supra* note 25 and accompanying text.

by an advocate—whether or not of the individual's choosing—whose interests overlap with those of the absent parties and who possesses the resources and experience to advocate effectively on behalf those absent parties whose legal rights and interests are being adjudicated.[178]

Under the paternalism rationale for the day-in-court ideal, whether the absent party consents to the choice of advocate is irrelevant. In some situations, of course, it will be impractical, if not impossible, for the absent party to exercise choice even if she were permitted to do so. But under the exclusive focus on paternalism, the individual litigant's choice is irrelevant: the key is not whether the absent party has made a choice, but rather solely whether the absent party's legally protected interests have in fact been adequately represented. In effect, the paternalism model of the day-in-court ideal views the representative as a type of guardian, exercising protective authority over his wards who are categorically presumed to be unable to protect those interests themselves.

In stark contrast to the paternalism model of the day-in-court ideal is what can appropriately be described as the "autonomy" rationale for one's right to her day in court. The autonomy model views resort to the litigation process as simply one of several means by which the individual in a liberal democratic society is permitted to participate in the governmental process—whether executive, legislative, or judicial—in an effort to protect her own interests.[179] In exercising the right to participate in the governing process, the individual is universally given the right to choose (within outer limits set by the law designed to preserve societal order and safety) how most effectively to influence decisions of a democratically shaped government. For example, government may not choose a representative to speak on behalf of the individual if she prefers either to choose her own representative or represent her interests herself. Nor can government tell the individual how to shape her appeal for governmental change in law or policy.[180] Such participatory choices are an essential part of the legitimizing function performed by preservation of the individual's right to seek to influence governmental decision-making. And this form of "meta"-autonomy (i.e., autonomy as to how to participate in the processes of democratic self-government—or, if you will, democratic "autonomy") logically applies to an individual's efforts to influence the judicial branch to protect his rights or interests as much as it does to the individual's attempts to influence the other branches of government. All three branches are, after all, part of a democratic government whose Constitution is committed to recognition of the individual as an integral whole, worthy of respect.

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[178] *See* REDISH, *supra* note 25, at 140.

[179] *See supra* note 29 and accompanying text.

[180] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (individual has First Amendment right to display in public a jacket saying "Fuck the Draft" on the back).

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.[181] Thus, in both *Hansberry v. Lee*[182] and *Amchem Products, Inc. v. Windsor*,[183] the Supreme Court found due process violated when a conflict in goals existed between the representative parties and the absent claimants.[184] But the Court has never extended similar recognition to the individual litigant's meta-autonomy right to choose how best to represent her own legally protected interests. For example, two out of the three categories of class actions authorized by the current version of Rule 23—a rule, after all, promulgated by the Supreme Court itself—are mandatory; members of the class are forcibly grouped together, even if they believe they are themselves better able to protect their own interests or even believe that they prefer not to pursue those interests legally.[185] It is true that in one decision, *Phillips Petroleum Co. v. Shutts*,[186] the Court upheld a state class action against a due process challenge only on the express condition that absent claimants be given the right to opt out of the class.[187] But while lower courts have on occasion read that decision broadly,[188] careful reading of the Court's opinion makes clear that the only reason for the requirement of a class member's option to withdraw from the class was the constitutional infirmity of lack of personal jurisdiction which would have resulted without the absent claimant's consent.[189]

One can, of course, make a strong case to support the need for paternalism as a means of assuring a full and fair day in court in the absence of an individual's ability to protect her own interests. It is in this manner that the

[181] The paternalistic version of the day-in-court ideal is explored in REDISH, *supra* note 25, at 140-47.

[182] 311 U.S. 32 (1940).

[183] 521 U.S. 591 (1997).

[184] *Hansberry*, 311 U.S. at 45; *Amchem Prods.*, 521 U.S. at 626; *see also* Stephenson v. Dow Chemical Co., 273 F.3d 249, 260-61 (2d Cir. 2001), *aff'd by an equally divided court*, 539 U.S. 111 (2003).

[185] *See* Rima M. Daniels, *Monetary Damages in Mandatory Classes: When Should Opt-Out Rights be Allowed?*, 57 ALA. L. REV. 499, 499 n.1 (2005) ("Classes certified under 23(b)(1) or (b)(2) are known as 'mandatory' classes because absent class members have no inherent right to remove themselves.").

[186] 472 U.S. 797 (1985).

[187] *Id.* at 811-12.

[188] *See, e.g.*, Brown v. Ticor Title Ins. Co., 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 510 U.S. 810 (1993), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994) (holding minimal due process protection requires opportunity for plaintiff to remove himself from the class where forum court had personal jurisdiction over plaintiff).

[189] *Shutts*, 472 U.S. at 811-12.

Due Process Clause may serve an appropriate guardian-like function. However, it would be dangerous to assume paternalism is a sufficient condition, as well as a necessary one. Where circumstances permit, due process is appropriately construed to provide the individual with autonomy to choose how—and indeed, if—to protect her own interests through resort to the adjudicatory process.

When one considers the implications of MDL for the Due Process Clause, it matters little, if at all, whether one chooses to view the paternalism model of due process as merely necessary or instead as both necessary and sufficient. From either perspective, MDL fails miserably. This is in stark contrast to the other well-known form of procedural collectivism, the modern class action. By both rule[190] and judicial decision,[191] class action procedure has taken care to assure that the paternalism model be satisfied. And while one of us has already severely criticized modern class action procedure because of its failure to satisfy the dictates of the autonomy model,[192] at least under the most common form of class action—that created by Rule 23(b)(3)—individual class members are given the right to opt out of the class proceeding,[193] thereby satisfying at least the minimum level of litigant choice and control demanded by the autonomy model.[194] But as our analysis will soon demonstrate, MDL satisfies the guarantees of neither the paternalism nor autonomy models of procedural due process. The inescapable conclusion, then, is that as presently structured, MDL is unambiguously unconstitutional.

C. *Applying the Day-in-Court Ideal to MDL*

On the surface, MDL practice seems largely innocuous; the Panel merely temporarily transfers cases to a different district court for pretrial matters. But for a variety of reasons, transfer effectively amounts to the end of the road for the overwhelming majority of cases. This is troublesome from a constitutional perspective, because not even the most minimal protection of the day-in-court ideal from the perspective of either the paternalism or autonomy models is satisfied.

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[190] *See* FED. R. CIV. P. 23(a)-(b) (requiring parties be "fairly and adequately protect[ed]" and allowing a class action if "prosecuting separate actions" "would substantially impair or impede [individual class members'] ability to protect their interests"); *supra* note 185 and accompanying text.

[191] *See supra* note 184 and accompanying text.

[192] *See* REDISH, *supra* note 25, at 135-75.

[193] FED. R. CIV. P. 23(c)(2)(B)(v) ("[T]he court will exclude from the class any member who requests exclusion . . . .").

[194] *See supra* note 164 and accompanying text. It could be argued that an opt-out procedure is insufficient to satisfy the autonomy model because it preys on the inertia of class members, and that instead autonomy demands use of an opt-in procedure. That issue, however, is irrelevant to MDL, which provides for neither procedure.

Recall that unlike the class action, where most absent class members have not even considered individual suit and often possess claims not large enough to justify such suit,[195] MDL applies only to claimants who have already chosen their own attorney and already filed suit.[196] Yet with no formal, open, and adversary participation by those claimants, the transferee court selects the attorneys who actually drive the litigation. This means that transfer into an MDL is by no means innocuous when it comes to the due process right to an individual's day in court. MDL plaintiffs in no sense meaningfully participate in, much less control, their day in court.[197] Nor are there any assurances that those in charge of the litigation are adequately representing the interests of the individual claimants.

One key way that litigants control their day in court is by selecting their attorneys. This is often the first expression of their autonomy: they seek the advice of counsel when they consider whether to even file a claim. Lawyers are contractually and ethically bound to vigorously represent their clients' interests—and no one else's—in court. Indeed, it would undoubtedly be unethical for an attorney to represent two parties in the same litigation when those parties' interests potentially differ. Permitting litigants to choose their representatives is central to providing a full and fair opportunity to litigate. The foundations of due process dictate that that choice belongs to the parties alone. But claimants forced into an MDL are deprived of that essential choice.[198] By virtue of his case's transfer into the MDL—a move that the plaintiff cannot prevent—his chosen lawyer will almost certainly not be the one actually representing his interests in the course of all the important MDL determinations. Rather, the lawyers on the court-appointed steering committee will take over and they will do so without the protective assurances of their adequacy, good faith, or the extent to which the interests of the absent litigants truly overlap.[199] Thus, the method of choosing the attorneys who will represent the claimants in an MDL satisfies neither the autonomy nor the paternalism models of the day-in-court ideal.

When a transferee judge appoints a steering committee, she does so at her discretion, outside the strictures of any Federal Rule, statute, or adversary proceeding. Appointment to the steering committee comes after nothing more

[195] *See supra* note 15 and accompanying text.

[196] *Supra* note 14 and accompanying text.

[197] Sturm, *supra* note 171, at 1001 ("Lawyers' control over the process detracts from the client's sense of autonomy and responsibility.").

[198] "In fact, a party loses some control over litigation as soon as she is forced to share the litigating stage with even one other litigant." Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 198 n.16 (1992). "Indeed, the judicial willingness to sacrifice party control in the aggregation context seems inconsistent with the firm commitment to individual litigant control in the preclusion area." *Id.*

[199] *See supra* notes 90-93 and accompanying text.

than a judge-designated period of nominations and written objections.[200] A more formalized, uniform adjudicatory approach could conceivably parallel the adequacy of representation protection of Rule 23(a)(4),[201] or the narrow "adequate representation" exception to the rule against nonparty preclusion.[202] Without such safeguards, however, the process fails to guarantee that the appointed representatives will zealously advocate on behalf of absent litigants in the same way that their hired representative presumably would have.

The dangers of MDL from the perspective of the paternalism model are exacerbated by the extremely loose connection required among the claims.[203] Wholly apart from the absence of a procedurally adequate method to determine the legitimacy of the attorneys in charge, there exist serious problems in having MDL satisfy the paternalism model of due process. Committee members' obligations to the mass of plaintiffs may undermine or dilute an individual plaintiff's unique interests, needs, or desires. If one plaintiff's best interests conflict with the majority's best interests (or even a small group's interests), how can the steering committee vigorously represent both? Indeed, one may question how these potentially conflicting responsibilities can be handled ethically.[204] The Model Rules of Professional Conduct define conflicts of interest between concurrent clients broadly, including even the "significant risk" of adverseness among clients.[205] MDL plaintiffs often seek the same thing—the largest cut possible of the defendant's limited funds. Their success can come at another plaintiff's expense. This is similar to what happens when one lawyer represents multiple parties seeking to form a joint venture. In that scenario, the lawyer is "likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others."[206] Thus, even if the chosen attorneys are fully competent and acting in good faith, it is impossible to be

[200] *See supra* notes 101-104 and accompanying text.

[201] FED. R. CIV. P. 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class.").

[202] *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008) ("[W]e have confirmed that, 'in certain limited circumstances,' a nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit." (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996))).

[203] *See supra* note 58 and accompanying text (describing the lenient standard by which claims are aggregated).

[204] *See* Burch, *Litigating Together*, *supra* note 22, at 97 (examining "how to effectively and ethically represent multiple clients when one client's best interest conflicts with the majority's best interests").

[205] A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (1983).

[206] *Id.* R. 1.7 cmt.

assured that in the one-size-fits-all practice of MDL, they will be able to effectively protect the rights of individual claimants.

In contrast, the modern class action demands close linkage among the claims, for the very purpose of assuring due process.[207] MDL claimants, on the other hand, are left in "a procedural no-man's-land,"[208] at the mercy of the transferee judge[209] and attorneys whose obligations are to the interests of many plaintiffs, which may not necessarily align with those of an individual plaintiff.

Moreover, the MDL judge's selection of lead counsel is not subject to effective appellate review, even though the choice may turn out to be outcome-determinative in many ways, including whether a plaintiff's claim will settle in the transferee court (and for how much), resolved on summary judgment, or be transferred back to the transferor jurisdiction. Repeat MDL plaintiffs' counsel can work behind closed doors to lobby for specific attorneys to be named to the steering committee. This makes it extremely difficult for a newcomer attorney to receive enough support to be selected for a leadership role.[210] The individual plaintiff's wishes are easily lost in this series of smoke-filled rooms, and only a narrow group of plaintiffs' attorneys are appointed to leadership roles.

Ignoring the claimant's choice of lawyer disrespects the claimant and undermines the procedural autonomy that the Due Process Clause is intended to protect. Similarly, the established process of appointing lead counsel and ceding control to the court-appointed committees further undermines the paternalism model of the day-in-court ideal by failing to build in safeguards that assure the choice of adequate representatives who are able to zealously advocate on behalf of *all* claimants.

In addition to the fact that appointed counsel are selected by the court, rather than by the individuals they represent, MDL claimants do not enjoy a traditional attorney-client relationship with the members of the court-appointed

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[207] *See supra* notes 8-9 and accompanying text.

[208] Burch, *Litigating Together*, *supra* note 22, at 95.

[209] For an example of the criteria used to select members of a plaintiffs' steering committee, see *In re* San Juan Dupont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *6 (D. P.R. Dec. 2, 1988). There, the transferee court listed "physical (e.g., office facilities) and financial resources; commitment to a time-consuming, long-term project; ability to work cooperatively with others; and professional experience particular to this type of litigation" as the main criteria for membership on the plaintiffs' steering committee. *Id.*

[210] A recent survey of about ninety attorneys who practice in MDL cases indicates that snubbed attorneys resent this reality. As the surveyor wrote, "A substantial group of local plaintiffs' counsel resent the panel's role in facilitating national plaintiffs' counsels' 'takeover' of their cases. They criticize a repeat-player syndrome in the selection of plaintiffs' MDL counsel." Judge John G. Heyburn II, chair of the Judicial Panel on Multidistrict Litigation, responds: "We know that our orders can effectively disenfranchise some local plaintiffs' counsel. In every case, we ask ourselves whether centralization sufficiently promotes justice and efficiency, so much so that we should inconvenience some for the benefit of the whole." Heyburn & McGovern, *supra* note 41, at 30.

steering committee. The small group of attorneys chosen for leadership roles is charged with representing all of the possibly thousands of plaintiffs, whose cases have facts that are often only loosely linked. This arrangement treats plaintiffs as an indivisible group rather than as individuals who are integral wholes, worthy of respect. Individual claimants do not have a direct line to the steering committee in the way they would with their own lawyers. Steering committee members act as gatekeepers to discovery materials obtained from defendants.[211] Even if they were to freely grant access to those materials, committee members constitute a hurdle that is absent from the traditional attorney-client relationship. This severely attenuated attorney-client relationship between each claimant and the steering committee "inhibit[s] a client's ability to monitor her case as she would in an individual lawsuit."[212] This, too, violates both the autonomy and paternalism models of the day-in-court ideal.

If an individual plaintiff or her lawyer disagrees with a strategic choice made by lead counsel, she faces a steep uphill battle to reassert control over her representation.[213] That can hardly be characterized as a "full and fair opportunity to litigate" on her own terms. Because claimants forced into MDL effectively lose their chosen representatives, and the appointed representatives' loyalties are often likely to be divided, MDL falls far short of providing the "deep-rooted historic tradition" of an individual's day in court.[214] Due process demands much more.

Another non-traditional feature of the relationship between appointed lead counsel and individual claimants is the compensation structure common among MDLs. In consolidated proceedings, "the attorney's loyalty divides not only between clients, but also between clients and self-interest."[215] Compensation for attorneys who work on behalf of the group depends upon the value of every

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[211] *See* Fallon, *Common Benefit Fees*, *supra* note 53, at 373 (observing committee's role in conducting and overseeing discovery).

[212] Burch, *Litigating Together*, *supra* note 22, at 95 (advocating a plaintiff-consensus approach to managing non-class aggregate litigation).

[213] *See, e.g.*, *San Juan Dupont Plaza Hotel*, 1989 WL 168401, at *10 (outlining the procedure to be followed when an individual plaintiff's counsel disagrees with the PSC, stressing "that counsel must not repeat any question, argument, motion, or other paper propounded or filed, or actions taken by the PSC" and warning that "[f]ailure to abide by these terms shall result in sanctions against counsel personally"). In *In re Bendectin Litigation*, a group of plaintiffs complained that the transferee judge's appointment of lead counsel denied them the right to freely choose counsel. None responded to the judge's order to show cause why the selected attorneys should not be appointed. The Sixth Circuit found no error in the appointment, noting that the practice of appointing such committees is "well established" and the plaintiffs' "failure below to object to such a procedure." *In re* Bendectin Litig., 857 F.2d 290, 297 (6th Cir. 1988).

[214] *See supra* note 162 and accompanying text.

[215] Burch, *Litigating Together*, *supra* note 22, at 98.

plaintiff's settlement or judgment.[216] As a result, lead counsel may push hard for settlement as opposed to remand, prefer a quick settlement in favor of a protracted discovery period, or advocate for settlement terms that may not be particularly favorable to some or many plaintiffs. The First Circuit has acknowledged existence of this "inherent conflict[] of interest" "between the PSC and individual plaintiffs in mass-tort MDLs."[217] But even after doing so, the court affirmed in substantial part an order awarding over $10 million to the appointed plaintiffs' steering committee, in large part because the plaintiffs did not object soon enough.[218] MDL plaintiffs, their chosen attorneys, and the appointed steering committee all want the largest common fund possible so that they can maximize their individual cuts. Still, how to allocate a common fund will usually be contentious,[219] and at that point, plaintiffs' and MDL counsel's interests become adverse. Complicating matters further is the fact that at the same time, the retained attorneys who were not selected for a leadership role want to guard their fees. That goal may impact the nature of their advice about settling or agreeing to specific settlement terms. All of this is to say that MDL muddles the traditional relationship between attorney and client, creating new adverse incentives. It introduces additional tension between attorneys' best interests and clients' best interests.

At the most basic level, MDL plaintiffs are not "given a meaningful opportunity to present their case[s]" as demanded by the Due Process Clause.[220] Individual claims lose their individual identities when they are clumped together in an MDL. Even if the transferee court were to employ a more exacting standard than § 1407[221] to group like cases together for purposes of conducting discovery or bellwether trials, gone is the chance for unique discovery requests or personalized (let alone risky) litigation strategy. The primary idea behind MDL is to "coordinate" pretrial proceedings and the court-selected steering committee or lead counsel is responsible for ensuring

[216] *See supra* notes 143-146 and accompanying text (discussing common benefit fund attorney compensation); *see also* Trangsrud, *supra* note 22, at 83 ("The inherent tensions of contingency fee representation have been intensified to such an extent by the mass trial that the adversary system may break down.").

[217] *In re* San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 238 (1st Cir. 1997).

[218] *Id.* ("[D]espite reasonable notice of the obvious peril to their own financial interests, and their clear obligation to forfend against it from the outset, appellants did not turn serious attention to the PSC cost reimbursement regime deficiencies until the Gordian knot could no longer be undone. . . . [T]he requested relief has been rendered impracticable, through appellants' inaction . . . .").

[219] *Id.* at 227 ("[I]nternecine differences as to subsidiary matters—particularly the appropriate allocations from the common fund for their respective attorney fees and costs—are commonplace.").

[220] Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

[221] Section 1407 requires that there be "one or more common questions of fact" among cases that are to be consolidated into an MDL. 28 U.S.C. § 1407(a) (2012).

that such coordination occurs.[222] Rather than facilitating participation in democratic governance, however, the practice of judicial selection of certain attorneys to run an MDL hinders individuals' ability to participate in the legal system on their chosen terms.

One might argue that this concern about control over litigation strategy is exaggerated because lawyers, rather than litigants, make most of the strategic choices, anyway. While it may be true that an individual's chosen representative may make the strategic choices day to day, the very act of choosing one's representative is a clear expression of litigant autonomy protected by due process. No matter the relative merits of the steering committee compared to the litigant's retained attorney, selecting a representative to work towards an individual's litigation goals is the individual's prerogative and, indeed, is the foundation of the day-in-court ideal. MDL unconstitutionally undermines that choice.

It is true that theoretically, MDL only involves a temporary transfer for pretrial purposes; claimants' individual days in court await them back in the transferor courts. It is also true that no one is forcing these claimants to accept settlement offers in the transferee court; they can always hold out for remand to their preferred jurisdictions, where they will have the opportunity to have their personally chosen lawyers represent them, and can attempt to implement their own strategies.[223] But this view demonstrates an incomplete understanding of the power of transferee courts. First, all players in an MDL, including the judge, face enormous pressures to achieve a global resolution in the transferee district. Not least of these pressures is the duration of the litigation to that point, which is usually several years, at a minimum.[224] Second, even if a claimant does elect to wait for remand, the steering committee has already dictated the direction of the suit. Transferor judges on remand are disinclined to grant discovery requests that seem at all duplicative of work the steering committee already did, or that seem like something the claimant should have asked the steering committee to address.[225] Transferee judges make decisions about expert testimony that carry over to remand, as well. In addition, transferee judges can and do rule on dispositive motions, so there is no guarantee that all parts of the litigant's claim will survive summary judgment in the transferee district.

If the day-in-court ideal stems from a democratic commitment to demonstrating respect for individual autonomy, then a set of procedures that

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[222] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.22 (2004) (listing plaintiffs' lead counsel's responsibilities for coordinating pretrial proceedings).

[223] *See supra* notes 118-119 and accompanying text (emphasizing that a transferor court's authority extends only to pretrial matters; it cannot assign itself a case for trial).

[224] *See* Cory Tischbein, *Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation*, 16 U. PA. J. CONST. L. 233, 258 (2013) ("MDL courts consistently take several years to conduct discovery alone."); *see also infra* note 253.

[225] *See supra* note 116 and accompanying text.

undermines litigants' choices cannot satisfy the constitutional demand for an individual's day in court. In other words, a procedure cannot satisfy the right to a constitutionally dictated day in court if it does not protect the very values that gave rise to the constitutional right in the first place. MDL disrespects that individual autonomy. It does not provide claimants with the choices and control that are necessary to satisfy the individual's right to a day in court.

D. *Utilitarianism, Due Process, and MDL*

We have already demonstrated the seemingly insurmountable due process problems to which MDL gives rise. However, the question arises whether a utilitarian calculus of due process would justify MDL because of the litigation efficiency it is assumed to provide. Respect for individual autonomy dictates the right to an individual day in court, but perhaps that right is not absolute. Like the right to free speech, the constitutional guarantee of a day in court may not be without limits; interests dictating such a right must be weighed against other interests when determining whether the government must provide a particular procedure or opportunity in a particular case.[226] The day-in-court ideal is admittedly not always the most efficient way to adjudicate rights. Indeed, there always exists inherent inefficiency in guaranteeing procedural due process in the first place. Reflecting that reality, the Supreme Court has fashioned a utilitarian test for determining whether specific procedures are required in specific circumstances.[227] But even a utilitarian view of due process cannot save the constitutionality of MDL.

Utilitarians argue that the paramount goal of all due process analyses must be accurate outcomes because they maximize social welfare.[228] According to this approach, the process that is "due" is the one most likely to prevent unjustified or mistaken deprivations, at the lowest cost.[229] To determine the value of a given procedure, these theorists rely on the procedure's effect on accuracy and its relative cost compared to other available procedures.[230] If a procedure is likely to produce more accurate outcomes, and the increased

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[226] *Cf.* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . . .").

[227] *See supra* note 174 and accompanying text (outlining this test).

[228] Mashaw, *supra* note 175, at 47.

[229] *See* Bone, *supra* note 198, at 239 ("[A]n efficiency-based, outcome-oriented theory aspires to that level of accuracy that minimizes social costs, including the error costs of incorrect decisions and administrative or direct costs of adjudication itself, and it dictates that one should forego even substantial accuracy gains if one must invest even greater amounts to achieve those gains."); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111 (1979) ("An act or practice is right or good or just in the utilitarian view insofar as it tends to maximize happiness, usually defined as the surplus of pleasure over pain.").

[230] *See, e.g.*, Bone, *supra* note 198, at 239.

likelihood of accuracy is greater than the relative cost of the procedure, then the procedure is "due."[231]

E. *The* Mathews-Doehr *Test*

The Supreme Court endorsed a utilitarian view of the Due Process Clause in *Mathews v. Eldridge*. *Mathews* considered what process was due prior to deprivation of Social Security benefits. There, the Court emphasized, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[232] Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[233] In laying out its oft-cited three-part test for identifying "the specific dictates of due process," the *Mathews* Court specifically identified "the probable value, if any, of additional or substitute procedural safeguards" as a key component of the due process inquiry.[234] The Court proceeded to examine the "fairness and reliability" of the pre-deprivation procedures at issue.[235] It referred to "the risk of error inherent in the truth finding process."[236] The *Mathews* Court also assessed the public cost of a particular procedure, including "the administrative burden and other societal costs."[237] Finally, it left open the possibility that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[238] Accuracy may be the paramount interest, but at some point it is outweighed by the cost of achieving it.

The Court extended this utilitarian view of the Due Process Clause to include suits between private citizens in *Connecticut v. Doehr*.[239] There it

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[231] *See* Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011, 1017 (2010) ("[F]ew people, if any, would think that reducing the risk of error is always important enough to justify substantial social investments that could otherwise be used to improve roads, schools, public health, and the like."); Mashaw, *supra* note 175, at 48 ("[U]tility theory can be said to yield the following plausible decision-rule: 'Void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational.'"); Solum, *supra* note 167, at 244–47 (describing and critiquing the "accuracy model").

[232] *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

[233] *Id.*

[234] *Id.* at 335.

[235] *Id.* at 343.

[236] *Id.* at 344.

[237] *Id.* at 347.

[238] *Id.* at 348.

[239] The Court altered the third *Mathews* factor slightly, describing it as "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut v. Doehr*, 501 U.S. 1, 11 (1990).

applied the *Mathews* test to a Connecticut statute that allowed prejudgment attachment of real estate without notice, a hearing, a showing of extraordinary circumstances, or a requirement that the party seeking attachment post a bond.[240] It concluded that the Connecticut statute did not satisfy due process, as measured by the *Mathews* three-prong analysis.[241] *Doehr* solidified the Court's commitment to using utilitarian balancing to determine whether due process demands a specific procedure.

As already noted, the *Mathews* test was designed primarily, if not exclusively, to determine whether *particular procedures* are required by the Due Process Clause, rather than whether there is a right to a day in court in the first place.[242] In *Mathews*, the Court faced only the question of "what process is due prior to the initial termination of benefits, pending review."[243] It outlined the elaborate procedures available to Social Security beneficiaries whose benefits are terminated, which included an evidentiary hearing after initial termination of benefits.[244] The *Mathews* test, then, was not fashioned in a case asking *whether* a day in court was required, but *when* it was. This is an important distinction. Though it clearly embraced a utilitarian approach to measuring procedural due process requirements, *Mathews* was not a case about an exception to the day-in-court ideal *per se*. The fact remains, however, that a utilitarian concern with burdens and efficiency always remains the elephant in the room in any due process analysis. It is therefore necessary to consider the extent to which efficiency concerns should be deemed to temper our stinging due process critiques of MDL.

The most immediate response to reliance on the utilitarian calculus is that it completely ignores any concerns with individual dignity or autonomy, which are properly deemed to provide the theoretical DNA of the Due Process Clause. Yet while respect for individual autonomy justifies the day-in-court ideal in the first place, the *Mathews-Doehr* test ignores it entirely. The *Mathews-Doehr* balancing test explicitly considers the likelihood that a particular procedure will produce more accurate decisions, which outcome-based theorists consider the paramount goal of process. This is a limited view of the goals of due process protections; indeed, "[r]ights in a utilitarian system are strictly instrumental goods."[245] But the *Mathews-Doehr* doctrine and its utilitarian supporters ignore the other benefits of individual participation in litigation, such as individual autonomy or dignity. Ignoring the effect on individual dignity is a mistake. For one thing, procedural rights have inherent

[240] *Id.* at 4.

[241] *Id.* at 24.

[242] *See supra* notes 172-175 and accompanying text (contrasting *Mathews* and *Doehr*'s emphasis on procedures with the dignitary model's emphasis on an opportunity to plead a case).

[243] *Mathews*, 424 U.S. at 333.

[244] *Id.* at 339.

[245] Posner, *supra* note 229, at 116.

value beyond maximizing social welfare. They also serve instrumental values because they facilitate social goods beyond accurate judicial decision-making, such as a vital, participatory democracy and governmental legitimacy. Were it to be applied to the day-in-court question, the *Mathews-Doehr* test might too easily dismiss an individual day in court simply because it would be more convenient, efficient, or easy for the government not to provide one. Conceptions of procedural due process that focus exclusively on outcomes and interest-balancing are underinclusive because they fail to account for the full breadth of values promised and protected by the Due Process Clause.[246]

An individual day in court demonstrates the government's respect for the individual by giving her a chance to speak for herself. Thus, in the words of one scholar, "[a]llowing individuals the freedom to act on and to govern their own legal affairs is a political and moral good."[247] At the very least, then, utilitarianism cannot be deemed the *only* value underlying our nation's commitment to due process. The choice of a form of forced wholesale justice, where the interests and needs of individual litigants are almost cavalierly ignored in favor of the myopic pursuit of efficiency, cannot possibly be deemed consistent with the dictates of due process, either as a normative or descriptive matter.

In any event, the day-in-court ideal *does* foster the utilitarian concern with accurate decision-making. The entire adversary system is premised on a notion of "litigation capitalism": the litigants' incentive to prevail gives that litigant the incentive to marshal the strongest possible case on her behalf. With both sides engaging in such a process, the passive adjudicator is informed in the most effective way possible. Where either the claimant or the defendant is denied an effective opportunity to present her case, the accuracy of the final decision is placed in serious doubt.

Viewed in this light, it is by no means clear that MDL actually fosters accuracy in decision-making. An individual claimant's attorney, who is presumably familiar with the specific facts of her client's case and is motivated solely to vindicate and protect those interests, is in the best position to assist the judge in reaching an accurate resolution of the litigation.[248] In contrast, where MDL attorneys know little or nothing of individual plaintiffs' cases when they control discovery or shape settlement, and the cases which have been herded together often are likely to have relatively little in common, accuracy in the resolution of individual suits is, at best, open to serious question.

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[246] *See* Mashaw, *supra* note 175, at 48 ("As applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities.").

[247] Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1142 (2008).

[248] Sturm, *supra* note 171, at 985 ("Adversarial presentation by parties' lawyers enhances the likelihood of reaching a correct decision.").

MDL management is unbound by specific rules, so transferee judges do not conduct the coordinated proceedings uniformly. Each transferee judge selects lawyers to hold leadership positions on her own terms.[249] Appointment to the steering committee is not the result of an adversarial process, and it is not subject to any test for adequacy of representation. Similarly, bellwether trials occur without any guarantee that the tried cases are typical of the claims of the plaintiffs participating in the MDL. The results of those bellwether trials are then used to facilitate settlement and evaluate the strength of various arguments.[250] Even if cases are transferred back to the districts in which they were originally filed, the work of the steering committee and the pretrial orders entered by the MDL judge permanently impact the ultimate resolution of the claims. Transferee judges cannot and do not make individual rulings on all issues for all cases consolidated into the MDL. The fact that these procedures are unregulated makes it impossible to evaluate their accuracy for purposes of the *Mathews-Doehr* test, but the process smacks of a mass-produced form of rough justice. An individual lawsuit in federal district court, on the other hand, is the most accurate procedure available. The "probable value" of individual proceedings is high, because individual litigation would ensure that each claimant exercised control over how his rights were asserted.

Even assuming that MDL procedures are not as likely to be accurate as individual litigation would be, it might be argued that the government's interest in reducing litigation burdens justifies MDL. MDL seems attractive because it saves resources by forcing claimants to litigate as a group, instead of as hundreds or thousands of individuals in parallel actions. If MDL leads to outcomes that are at least as accurate as adjudication of individual claims does, then this cost saving is permitted under the utilitarian model of due process. Judge James F. Holderman put it this way: "Without the centralized control of a MDL transferee judge, the cost of duplicative discovery and e-discovery in each case consolidated as a MDL action for pretrial purposes would be a significant detriment to each case's litigants and justice in America as a whole."[251]

Judge Holderman's argument may be intuitively attractive, given the stated purpose of MDL and the sobering idea of thousands of cases stemming from one event. But assessments of the empirical benefits of MDL are not uniformly positive. Even members of the Panel recognize that "centralization does not benefit all parties equally and that, for some parties, it can be actually less efficient."[252] By several accounts, MDL takes much longer than individual litigation.[253] It is also at times inconvenient, for both plaintiffs and

[249] *See supra* note 103 and accompanying text.

[250] *See supra* notes 129-132 and accompanying text.

[251] James F. Holderman, *Sua Sponte: A Judge Comments*, LITIGATION, Spring 2012, at 27, 27.

[252] Heyburn & McGovern, *supra* note 41, at 32.

[253] *See* Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150 (D. Mass. 2006)

defendants.[254] All this is to say that it is not at all clear that MDL, as it now functions, is actually advancing the government's interests in efficiency and saving litigation resources.

Applying the *Mathews-Doehr* factors, then, MDL features an immeasurably high risk of inaccuracy or erroneous deprivations. At the same time, whether MDL actually advances the government's interest in efficiency is uncertain at best. The private interest in vindicating an alleged wrong through a fair, reasonably accurate process outweighs the potential efficiency gains of MDL. This means that MDL does not survive the *Mathews-Doehr* analysis even assuming its relevance. Even assuming MDL is more efficient than individual litigation, the uncertainty surrounding whether MDL leads to erroneous deprivations or inaccurate results is too great a risk to take when constitutionally protected interests are at stake.

IV. IS MDL CONSTITUTIONALLY SALVAGEABLE?

For all of the reasons discussed in detail throughout this Article, MDL, as currently structured, must be deemed unconstitutional, because it infringes on individual claimants' procedural due process rights. Measured in terms of autonomy, paternalism, utilitarianism, or dignitary theories, procedural due process demands considerably more protection of the individual litigants' interests than MDL provides. But this conclusion does not necessarily mean that it is impossible to fashion a similar coordination procedure possessing many of MDL's benefits that nevertheless satisfies procedural due process. If so, however, Congress and the Panel would need to make significant changes to ensure that each MDL claimant is able to fully exercise his right to an individual day in court. The due process guarantee of a "full and fair opportunity to litigate" is not mutually exclusive with efficient, streamlined discovery and other pretrial procedures. But when they are in tension, due process calls for prioritization of litigant autonomy over efficiency. The tie goes to litigant autonomy because respecting individuals' choices reaps benefits that advance the American notion of the relationship between government and governed that lies at the heart of our constitutional structure.

("[A]s compared to the processing time of an average case, MDL practice is slow, very slow); Fallon et al., *Bellwether Trials*, *supra* note 90, at 2325, 2330 (observing the "traditional delay associated with MDL practice" and that "[t]he relevant comparison is not between a massive MDL and an 'average case,' but rather between a massive MDL and the alternative of thousands of similar cases clogging the courts with duplicative discovery and the potential for unnecessary conflict").

[254] *See In re* "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring) ("[C]oordination and consolidation may impair, not further, convenience, justice and efficiency. . . . There are a number of inherent inconveniences in transfers for coordinated or consolidated pretrial. Some plaintiffs are temporarily deprived of their choices of forum and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding.").

The primary goal of this Article is not to prescribe one particular solution or "fix" for the constitutional problems described here. The key to avoiding constitutional difficulties, however, is to recognize that if the benefits of MDL are to be achieved, they must be achieved through the free choice of the individual litigants to take part in the collectivist process. This would satisfy the autonomy concerns of due process. In other words, to ensure due process, transfer into an MDL must be elective instead of mandatory. Claimants who choose transfer would benefit from the steering committee's large-scale discovery and other features of MDL. Especially if they were hoping only to settle their individual cases, they very well may choose this option. But if they preferred a faster resolution, or wanted more than money, or did not care to travel, or trusted their retained lawyer more than a stranger from across the country, they might opt out of consolidation. Opting in or staying out, however, must be their prerogative. Under this approach, participating in an MDL would become a strategic choice rather than a forced path.

Moreover, in order to satisfy the paternalism due process concerns, other adjustments need to be made. First, Congress should establish a uniform procedure for selecting attorneys to serve in leadership roles. As it stands, each transferee court appoints steering committees according to its own procedures and criteria. Instead, appointment should be the result of a process open to all affected parties and their retained representatives. The process should be designed to ensure that the leadership steering committees are made up of attorneys with different backgrounds and whose clients represent a wide array of the claims involved in the MDL, similar to the typicality requirement for class actions. Attorneys should not be permitted to trade favors of support behind closed doors, and the group of plaintiffs' attorneys who are appointed should not be a closed circle.

In order to reduce due process difficulties, transferee courts could also make changes to case management to ensure a more active, symbiotic relationship between steering committee members, other attorneys involved in the MDL, and the claimants. Communication between a plaintiff and the steering committee should be as fluid as it would be between the plaintiff and her retained counsel if her claim had not been transferred into an MDL. All retained plaintiffs' attorneys, not just those appointed to leadership roles, should—to the extent feasible—have some opportunity to take part in strategic decisions. If an individual plaintiff prefers a different strategy or wants to make a specific discovery request, ways to provide such opportunities should at least be explored.

An even more radical solution might be to coordinate and share discovery among cases that feature at least one common question of fact, but to do so remotely, without transferring the cases into a single district court. The advent of electronic discovery, video conferencing, and cloud-based data sharing are already transforming discovery practices.[255] Those technologies could facilitate

[255] *See, e.g.*, Virginia Llewellyn, *Electronic Discovery Best Practices*, 10 RICH. J.L. &

the type of coordination and sharing that the MDL designers wanted in the first place. This type of cooperation could be more efficient, too.

Some of these suggested changes may seem burdensome, if not inefficient. They undoubtedly would require more time, effort, and creativity than the current procedures do, which may make MDL, as modified, less attractive. But constitutional rights cannot be sacrificed for mere convenience. These ideas are not meant to represent the perfect answer to MDL's insufficient due process safeguards. Rather, they are designed to provide only a starting point for a much-needed conversation about reconciling the day-in-court ideal with the overwhelming nature of mass torts and similar cases, which are often swept into MDL.

CONCLUSION

Although Anglo-American jurisprudence does have a venerable history of representative litigation, it is important to understand the fundamental differences between the historically acceptable form of representative litigation on the one hand and the procedural collectivism of the post-1966 era on the other. Historically, the only form of binding representative litigation involved claims that were legally intertwined in a substantive, pre-litigation context.[256] In those instances, the claims of the various plaintiffs are already linked at the point at which litigation begins—either by choice or by substantive law. In contrast, the modern forms of procedural collectivism—the class action and MDL—give rise to a far greater threat to the values embodied in the Due Process Clause. In these situations, substantive rights which are, in their pristine form, held solely by the individual, are lumped together—often quite crudely—in a manner which may significantly interfere with the individual claimants' due process right to their day in court.

We are not so naïve as to believe that, in the modern day of complex litigation, it is feasible to avoid all forms of procedural collectivism. But there are ways to achieve the advantages of such collectivism without so blatantly undermining core procedural rights the way current MDL practice does. Indeed, with all of its serious drawbacks and problems, modern class action procedure provides a stark contrast to MDL practice. Whereas class action in every case requires a transparent judicial finding of adequate representation of the interests of absent claimants, MDL has no such requirement.[257] Whereas in most class actions absent class members have the right to opt out of the proceeding, MDL provides no means either for withdrawing from the

TECH. 51 (2004), *available at* http://jolt.richmond.edu/v10i5/article51.pdf, *archived at* http://perma.cc/U6L5-3XPX ("With preparation and the proper technology . . . the document review and production process can be easier and more efficient than procedures used in the 'paper world.'").

[256] *See* REDISH, *supra* note 25, at 1-12.

[257] *See supra* notes 9-10 and accompanying text.

proceeding or even meaningfully challenging the legality or propriety of inclusion within it.[258]

If our traditions and values of due process mean anything, the individual's right to a day in court must be preserved, even within the broader framework of procedural collectivism. MDL unconstitutionally infringes the procedural due process rights of claimants forced into all-important consolidated pretrial proceedings against their will.

Surprisingly, this Article is the first to present a frontal assault on the constitutionality of MDL. In advancing this attack, the Article has sought to expose an extremely popular complex litigation procedure that today impacts a significant percentage of civil cases. MDL may seem to provide a cure-all to the difficulties of attempting to certify class actions on a massive scale, but it faces even greater constitutional roadblocks than does the modern class action. Despite its arguable efficiencies and perceived conveniences (which themselves are open to question),[259] MDL stealthily transforms fundamental characteristics of numerous claims so that they are unrecognizable as distinct actions filed by individual plaintiffs. Moreover, it may well do so even against the will of those plaintiffs, without providing them with meaningful recourse to challenge either their inclusion in the collectivist process or the adequacy of their representation in that process. Upon close examination, while MDL promises respect for the individual day in court, it delivers only a "Wild West" form of rough group justice, on the court-appointed steering committee's terms. Due process cannot tolerate such a system.

[258] *See supra* note 21 and accompanying text.

[259] *See supra* notes 252-254 and accompanying text.