Ten Principles for Legitimizing MDLs

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Introduction

Multidistrict litigation (MDL) has a legitimacy problem. MDLs have been the target of sustained academic criticism for years. They have been called "a cross between the Wild West, twentieth-century political smoke-filled rooms, and the Godfather movies."[1] Academics have challenged the device for, among other things, depriving plaintiffs of meaningful choice of counsel,[2] for their insider-favoring opacity,[3] and for allowing courts to arrogate power to themselves not authorized by statute or rule.[4] Congress has considered at least one bill that would have seriously restricted courts' ability to oversee MDLs, and various plaintiffs and defense counsel have petitioned the Advisory Committee for the Federal Rules to enact new rules that would govern various practices in MDLs, from interlocutory appeals to supervision of settlements.[5]

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[1] Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, & the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111 (2015).

[2] Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967, 976 (1995) (noting some courts "have acknowledged the substantial disenfranchisement of nonlead counsel" but have nevertheless "upheld the lead counsel system").

[3] Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1448 (2017) (stating MDLs' "prevalence of norms over formal, legal precedent affords repeat players" critical advantages); Redish & Karaba, *supra* note 1, at 114 (criticizing "shockingly sloppy, informal, and often secretive process").

[4] *See generally* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015); David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545 (2017); Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 KAN. L. REV. 531 (2017).

[5] FAIRNESS IN CLASS ACTION LITIGATION AND FURTHERING ASBESTOS CLAIM TRANSPARENCY ACT OF 2017, H.R. 985, 115th Cong. (2017).

There is little mystery to all this interest. By recent estimates, MDLs make up somewhere between thirty and forty percent of the federal civil docket[6]—even more if one excludes prisoner cases and Social Security cases.[7] They are also a large source of revenue for others. As a recent fee dispute in the various pelvic repair systems litigations illustrates, a single consolidated MDL can represent tens—if not hundreds—of millions of dollars in fees for the law firms involved.[8] When high-value, high-profile cases are decided according to insider-developed norms and opaque procedures, observers should be concerned.

Compounding the issue, a number of MDL judges' favorite techniques—such as conducting bellwether trials and overseeing of global mass tort settlements—are founded not on rules or legislation but on the acquiescence, if not consent, of the litigants.[9] This does not mean judges cannot exert some leverage over litigants, but rather without those litigants' willing participation, creative solutions to procedural challenges will likely fail.

As a result, New York Federal District Judge Jack Weinstein has rightly observed that MDLs rely heavily on public trust in the judicial process.[10] To the extent that the public—including likely plaintiffs and

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[6] *See, e.g.*, Andrew D. Bradt, *Something Less & Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1718 (2017) ("MDL cases comprise more than a third of the federal civil docket . . . ."); Alexandra D. Lahav, *Procedural Design*, 71 VAND. L. REV. 821, 827 n.20 (2018) ("[A]pproximately thirty-nine percent of federal pending cases were MDLs.").

[7] Estimates have placed the number as high as 52% as of 2018. *See* Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload; *MDL Cases Surge to Majority of Entire Federal Civil Caseload*, RULES4MDLS (Mar. 14, 2019), https://www.rules4mdls.com/copy-of-new-data-on-products-liabil.

[8] Anderson Law Offices' Objections to Common Benefit Fee Allocation and Reimbursement of Cost Recommendations at 3, *In re* C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2187, Dkt. 7928 (S.D. W. Va. Mar. 26, 2019) (challenging distribution of $344 million common benefit fund and arguing committee members engaged in self-dealing by keeping $143 million for themselves); Mueller, *supra* note 4, at 534 ("[T]hese cases are big business, not small potatoes . . . .").

[9] *See, e.g.*, Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 27 (1998) (holding a transferee court "has no authority . . . to assign a transferred case to itself for trial").

[10] *See In re* Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 123 (E.D.N.Y. 2006) ("Public perceptions of the fairness of the judicial process in handling mass torts . . .

defendants—believes the MDL process will produce fair outcomes consistent with existing law, judges can retain the discretion to seek creative solutions free from interference from the appellate courts or the Judicial Conference Advisory Committee on Rules of Civil Procedure, and Congress, and free from resistance from litigants. However to the extent MDLs are viewed as special and somehow exempt from the federal rules, these other public forces will push back against innovative attempts to manage and resolve large numbers of claims.

It is distressing that, against this backdrop, MDL judges tend to resist efforts to create consistent rules and practices accessible, if not the general public, at least to non-MDL lawyers. However, these judges operate from a firm conviction that every MDL is unique and require creative, bespoke management from judges.[11] The plaintiffs' bar has made efforts to support that intuition.[12] MDL judges have essentially created a *federal common law of MDL procedure*. Yet, in another deviation from the norm, this common law "is rarely treated as precedential or even subject to customary appellate review."[13]

This Article aims to correct some of that problem. There is no way to mandate that intelligent, fiercely independent judges follow the federal common law they have developed over the last several decades. But it is possible to catalogue and distill the accumulation of non-precedential experience into principles that capture the best possible qualities for adjudicating MDLs, and make them apparent to both judges and litigators. Additionally, as it turns out, a careful review of MDL practice

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are a significant aspect of these complex national litigations involving thousands of parties.").

[11] *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543, 2015 WL 3619584, at *8 (S.D.N.Y. Jun. 10, 2015) ("Like snowflakes, no two MDLs are exactly alike . . . ."); Transcript of Proceedings at 3, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Jan. 9, 2018) (No. 58) ("But this is not a traditional MDL."); *see also* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1674 (2017) ("This is a type of litigation that judges insist is unique, too different from case to case to be managed by the transsubstantive values that form the very soul of the [Federal Rules of Civil Procedure].").

[12] Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 99 (2018) ("MDLs are so case-specific that 'one size fits all' rules do not make sense.") (quoting AAJ MDL working group memorandum).

[13] Gluck, *supra* note 11, at 1669.

shows that MDL courts are not quite as lawless as depicted. Rather, MDL judges have loosely adopted practices that mirror practices in traditional litigation and have worked towards greater transparency and accountability, particularly in the last ten years.

This Article identifies ten principles for managing MDLs based on the underlying premise that multidistrict litigation works best when plaintiffs and defendants willingly consent to orders. This occurs when a judge's orders serve the principles stated in Rule 1 of the Federal Rules of Civil Procedure: enabling the "just, speedy, and inexpensive" resolution of cases.[14] For MDLs, that means getting compensation to actually-injured claimants as quickly as possible, while effectively screening out those who cannot, or should not, recover for various legal or factual reasons. This underlying premise—and the principles it suggests—applies to litigants as much as it does to judges.

A Brief Introduction to Multidistrict Litigation

Given the insider-focused nature of MDLs, it makes sense to provide a brief description of the issue. The statute authorizing multidistrict litigation—28 U.S.C. § 1407—is more than fifty years old. It originally arose in response to massive antitrust litigation involving every major manufacturer in the United States in the electrical equipment industry.[15]

The use of MDLs exploded by the end of the 1990s and early 2000s after numerous federal rulings made certification of personal-injury class actions more difficult.[16] Congress—which enacted § 1407—did not anticipate this expansion of multidistrict practice, although the judges who initially drafted the section did.[17] Today, § 1407 MDLs cover pretrial proceedings for all kinds of mass litigation. As Professor Andrew Bradt has observed, "[s]eemingly every major controversy of national scope . . . is now the subject of an MDL."[18]

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[14] FED. R. CIV. P. 1.

[15] Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 854-56 (2017).

[16] *Id.* at 844.

[17] *Id.* at 839.

[18] Bradt, *supra* note 12, at 104.

The basic outline of an MDL case is straightforward. Cases are consolidated by the Judicial Panel for Multidistrict Litigation (JPML) for all pretrial proceedings in a single federal district court.[19] Those pretrial proceedings include common discovery, early dispositive motions (including motions to dismiss and summary judgment motions), and motions in limine (including motions to exclude expert testimony). Over time, MDL courts have also exercised their power to conduct trials of certain claims or plaintiffs, and to oversee settlements that may terminate large swaths of the cases comprising the MDL.

This straightforward outline masks a lot of variation. What distinguishes MDLs from class actions is the lack of representation. In class actions, one or more plaintiffs seek authorization to represent similarly-situated litigants.[20] In MDLs, each transferred case retains its individual status.[21] As a result, no certification process is necessary, aside from the JPML's initial consolidation. In addition, consolidation is a mandatory process not threatened by opt outs.[22]

MDLs can be immensely expensive, simply because there is so much more for lawyers to do to resolve claims.[23] Nonetheless, for plaintiffs' counsel, MDLs have come to represent an entire business model. Plaintiffs' lawyers in MDLs make money through volume since litigation costs per client decline the more clients one acquires.[24] MDLs are especially profitable for plaintiff firms that secure leadership positions in a given MDL.[25] Lawyers often rely on advertising to recruit clients

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[19] 28 U.S.C. § 1407(a) (2018).

[20] BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK 14-18 (2019 ed.).

[21] Gelboim v. Bank of Am., 574 U.S. 405, 413 (2015) ("Cases coordinated for MDL pretrial proceedings ordinarily retain their separate identities . . . .").

[22] Bradt, *supra* note 15, at 846-47.

[23] *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 609 n.6 (E.D. La. 2008) ("[By the time the case settled,] Vioxx-related discovery had been moving forward . . . for more than six years. Over 50 million pages of documents had been produced and reviewed, more than 2,000 depositions had been taken, and counsel for both sides had filed thousands of motions and consulted with hundreds of experts.").

[24] Kevin Pflug, *The Jersey Justice Game—Part One*, Medium (Dec. 25, 2018), https://medium.com/@kevinpflug/the-jersey-justice-game-part-one-1f393e0727bc.

[25] *See, e.g.*, Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70 (2017) ("[L]eadership receives higher common-benefit fees for reduced outputs.").

in sufficient numbers to make money.[26] Others rely on content sites that may disguise their relationships to the firms, or they outsource to third party marketing firms or referral services.[27] In medical device cases, potential plaintiffs who respond to these efforts are referred to doctors for screening and sometimes even surgery.[28]

The following principles are not mandatory, but they do illuminate a path that would deflect many of the legitimacy critiques that pervade writing and reporting about MDLs. Moreover, while these principles are most easily implemented by judges, they can also be initiated by parties to the litigation. This article proposes these prinicples through a framework that does not challenge the legitimacy of the MDL device, but instead seeks to reinforce the legitimacy of that device while preserving it for future use.

The Ten Principles

1. MDLs Have Real-World Effects

Judges seem painfully aware that the larger multidistrict cases over which they preside have effects on real world policy. Recently, while

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[26] *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), at *1 (S.D.N.Y. Jan. 29, 2018) (noting plaintiffs' counsel "paid to post a questionnaire" on a website "to attract potential plaintiffs in this litigation"); *In re* Mentor Corp. Transobturator Sling Prods., 2016 U.S. Dist. LEXIS 121608, at *6 n.2 (M.D. Ga. Sep. 7, 2016) ("[The] explosion [of filings] appears to have been fueled, at least in part, by an onslaught of lawyer television solicitations."); *In re* Welding Fumes Prods. Liab. Litig., No. 1:03 CV 17000 MDL No. 1535, 2006 WL 1173960, at *9 (N.D. Ohio Apr. 5, 2006) ("[A]dvertisements by certain lawyers identified the symptoms a neurologically injured welder might have . . . .").

[27] Pflug, *supra* note 24 ("[Lawyers c]reate websites that look like news sites, legal information repositories, non-profits, or a combination of all three. . . . The lawyer's intent that the website's sole purpose is to find clients and generate fees is hidden, if disclosed at all."); Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. TIMES, Apr. 14, 2018, https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html.

[28] *In re Welding Fume Prods. Liab. Litig.*, 2006 WL 1173960, at *6 ("[M]ost of the plaintiffs with cases pending in this MDL came to know of the possibility that they had a legal claim through their contact with lawyers, who then directed plaintiffs to attend a 'medical screening' coordinated and paid for by the attorneys."); *see also* Goldstein & Silver-Greenberg, *supra* note 27.

overseeing the early stages of the national prescription opiate litigation, Judge Polster of the Northern District of Ohio observed:

> People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary [doctrine], or unraveling complicated conspiracy theories. So my objective is to do something meaningful to abate this crisis and to do it in 2018.[29]

Judge Polster's comments—intended to encourage creative settlement efforts—caused controversy at the time about whether a judge could bypass initial case management simply because he believed the litigation's gravamen required immediate action.[30] He is hardly alone in this view; New York's recently-retired Judge Weinstein was often willing to attempt unorthodox methods when he believed the consequences outside the courtroom dictated.[31]

There is no question that litigation large enough to require consolidation under § 1407 often requires special attention to the secondary effects it has beyond the courtroom. On the predictable end, facing large lawsuits with uncertain liability can adversely affect company's stock prices, which plaintiffs' lawyers may consider when filing the lawsuits in the first place.[32] But these effects can also include unintended effects on regulation. In drug and device cases, defendant companies must inform the Food and Drug Administration of all adverse complaints, regardless of their ultimate merit.[33] Populating government databases with meritless claims skews the regulatory environment and can keep

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[29] Transcript of Proceedings at 4, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, (N.D. Ohio Jan. 9, 2018) (No. 58). Judge Polster did not succeed in this goal. Jeff Overley & Emily Field, *Opioid MDL Judge Mulls BakerHostetler DQ, Vents Frustration*, LAW360 (Feb. 6, 2019), http://www.law360.com/articles/1123746.

[30] Jeff Overley & Emily Field, *Opioid MDL to Get Litigation Track Amid Settlement Talks*, LAW360 (Mar. 7, 2018), http://www.law360.com/articles/1019484.

[31] *See, e.g.*, Hon. Jack B. Weinstein, *Federal Trial Judges: Dealing with the Real World*, 69 U. MIAMI L. REV. 355 (2015).

[32] *See, e.g.*, Jeffrey Haymond & James E. West, *Class Action Extraction*, 116 PUBLIC CHOICE 91, 103-04 (2003) (finding a statistically significant relationship between threat of class action and drop in stock price).

[33] 21 C.F.R. § 314.80 (2015) (Adverse Event Reporting for Drugs); 21 C.F.R. § 803 (2015) (Adverse Event Reporting for Medical Devices).

viable drugs or medical devices from patients who could benefit from them.

Even more distressing are the unintended social effects. Potential plaintiffs, contacted by advertisers or aggregators, may cease taking medications without consulting their doctors. Others may undergo unnecessary medical procedures.[34] Still others may experience emotional distress.[35] Whether these effects were foreseeable, they certainly were not intended. And they are, with proper diligence, largely preventable.

As a result, judges often achieve the best results in MDLs when they consider the beyond-the-courtroom effects of the litigation they oversee. Judges may occasionally be able to affect policy, but they can always mitigate the unintended effects of legal maneuvering for third parties.

2. Junk Claims Are Bad for MDLs

Scholars call it the "Field of Dreams" problem: if you set up an MDL, lawyers will populate it with claims whether the claims have merit or not.[36] There are challenges—though not necessarily problems—with managing large numbers of valid claims in consolidated litigation. Problems arise when the MDL contains patently worthless claims as well: claims clearly time-barred, claims where the plaintiff never encountered the allegedly dangerous substance or product, or simply claims that were fabricated.

One of the unfortunate problems with modern MDLs is that the consolidated lawsuits are filled with junk claims. Junk claims comprise an estimated forty percent of most MDL dockets.[37] Numerous MDL

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[34] Goldstein & Silver-Greenberg, *supra* note 27.

[35] *Id.*

[36] RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 147 (2007); *see also* Burch & Williams, *supra* note 3, at 1515; D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2187-88 (2017).

[37] *See* Malini Moorthy, *Gumming Up the Works: Multi-Plaintiff Mass Torts*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (Nov. 1, 2016), https://www.institutefor legalreform.com/resource/gumming-up-the-works-multi-plantiff-mass-torts; *see also In re* Mentor Corp. Transobturator Sling Prods., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 n.2 (M.D. Ga. Sept. 7, 2016) (noting that, of 850 cases filed, 100 were decided against plaintiffs on summary judgment, 458 were dismissed by stipulation of parties, and 74 were dismissed voluntarily).

judges have published opinions and scholarship detailing some of the most shocking examples of claim abuse in multidistrict litigation. The manager of the federal asbestos litigation, Judge Eduardo Robreno of Philadelphia, noted that the ABA had found that screening of asbestos claims resulted in "startlingly high" rates of "positive" findings of mesothelioma, "suggesting that the readings may not be neutral or legitimate."[38] Similarly, Texas Federal District Judge Janis Graham Jack, in reviewing a motion for sanctions in the *In re Silica Products Liability Litigation*, found that "[p]laintiffs' counsel . . . filed scores of claims without a reliable basis for believing that their clients had a compensable injury."[39]

The prevalence of junk claims goes beyond just the reported cases of litigation abuse. But, unfortunately, because many MDLs have lacked an early vetting phase, commentators are still not sure how many specious claims exist in each litigation.[40] That said, most practitioners and judges are aware that junk claims *do* exist in each litigation.[41]

There is strong *indirect* evidence for the prevalence of meritless claims. First, there are strong incentives to file junk claims: the lawyers, aggregators, and third-party investors for mass torts can secure big returns for comparatively little risk.[42] Because positions on steering committees are often tied to the number of clients represented, lawyers can also secure themselves a spot on the Steering Committee, or as lead counsel.[43] Second, even leaving out these overtly self-interested motives, lax evidentiary standards in many MDLs lead to filing claims that would not

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[38] Hon. Eduardo C. Robreno, *The Federal Asbestos Products Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 121 (2013).

[39] *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 677 (S.D. Tex. 2005).

[40] S. Todd. Brown, *Specious Claims & Global Settlements*, 42 U. MEM. L. REV. 559, 562 (2012).

[41] *Id.* at 606 ("Commentators and courts acknowledged asbestos screenings and their perceived shortcomings for years before the Silica MDL.").

[42] *In re Mentor Corp.*, 2016 WL 4705827, at *1 n.2 (noting an "explosion" of filing "appears to have been fueled, at least in part, by an onslaught of lawyer television solicitations"); Brown, *supra* note 40, at 598.

[43] *See, e.g.*, *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543, 2016 WL 1441804, at *9 n.4 (S.D.N.Y. Apr. 12, 2016) (involving plaintiffs' counsel that accused lead counsel of "flood[ing] the MDL with meritless cases" to gain position, a contention which the Court suggested had "some credence").

survive scrutiny.[44] Finally, there is little incentive for plaintiffs' counsel themselves to identify or eliminate meritless claims.[45]

Junk claims pose numerous problems for the administration of justice in multidistrict litigation. First, they waste resources. Identifying and eliminating junk claims requires the parties to brief—and the court to spend time deciding—various dispositive motions.[46] In addition, junk claims that lack a factual basis can require extensive plaintiff-specific discovery to unearth.[47] And that extensive discovery is rarely a one-time event; plaintiffs who lack a factual basis for their claims often will not respond to initial discovery requests because they lack the evidence to support their claims. That non-compliance winds up imposing costs on both the defendant—who must track and then report the non-compliance—and the court, which must evaluate those reports and impose sanctions where necessary.[48]

Junk claims waste more than just money. Their presence can delay resolution of meritorious claims, since weeding the junk out requires time and attention.[49] More importantly, junk claims undermine the fairness and efficacy of the MDL process itself. As discussed above, administration of MDLs works because plaintiffs and defense counsel consent to the procedural experiments MDL judges propose. Meritless claims

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[44] Brown, *supra* note 40, at 593-94 ("The ability to focus recruiting and development to a specific evidentiary target expands the claim pool to those that would stand little chance of success at trial.").

[45] *In re Mentor Corp.*, 2016 WL 4705827, at *1 ("[T]he evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action.").

[46] *Id.* ("[The] Court had to waste judicial resources deciding motions in cases that should have been dismissed by plaintiffs' counsel earlier—cases that probably never should have been brought in the first place.").

[47] *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *1 (noting the bellwether trial was voluntarily dismissed due to potential perjury and fraud by the plaintiff).

[48] *In re* C.R. Bard, No. 2:14-cv-26233, 2018 WL 2986105, at *3 (S.D. W. Va. June 12, 2018) (anticipating "directing its time and resources to noncompliant plaintiffs at the expense of other plaintiffs in this MDL").

[49] *Id.*; *see also In re* Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2327, 2018 WL 2249359, at *2 (S.D. W. Va. May 15, 2018) (considering sanctions for discovery noncompliance in part because "Ethicon has had to divert attention away from timely plaintiffs and onto this case").

breach the underlying trust this process requires.[50] To the extent defendants now view MDLs as lawless frontiers for the enrichment of selected plaintiffs' lawyers, they are far less likely to cooperate without assurances that they will not be facing litigation operating on the "garbage in, garbage out" principle.

It is possible to fight the onslaught of junk claims. As Judge Robreno learned in his management of the mature asbestos litigation, establishing a "toll gate" of merits review at the entrance to litigation can prevent non-meritorious cases from clogging up the judicial pipeline.[51] This "toll gate" is the subject of the next principle.

3. Dispositive Motions Can Quickly Resolve Many Common Issues

Motions to dismiss aimed at common, high-level issues can dispose of numerous cases at once. At the very least, ruling on legal issues early in the case can save time when those same issues recur in different contexts later in the MDL.[52] Some global (or even partial) motions for summary judgment can accomplish the same result after limited discovery.[53] The subjects of these motions can be widespread, covering novel theories of liability (such as innovator liability), common theories of general causation, the doctrine of preemption, RICO or conspiracy claims, and even the basics of individualized issues like statues of limitations.

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[50] Boyett v. Lykes Bros. S.S., 995 F.2d 223, 1993 WL 210355, at *3 (5th Cir. June 10, 1993) (sanctioning the defendant for gamesmanship resulting in the delay of MDL because its "conduct resulted in a breach of the trust that had allowed for the expeditious resolution of" the MDL).

[51] Robreno, *supra* note 38, at 186-87; *see also* Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1475 (2015).

[52] *See In re* EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., MDL No. 2785, 2019 WL 294803, at *5 (D. Kan. Jan. 23, 2019) ("[T]he court's Order denying Mylan's Motion to Dismiss the consumer class cases demonstrates the efficiencies realized by consolidating these cases in the MDL" because the same reasoning applied to subsequent motion.).

[53] *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No II) MDL 2502, 892 F.3d 624, 648 (4th Cir. 2018) ("It is well established that a transferee court may dispose of cases in an MDL through summary judgment—and indeed, they often do.").

Deciding dispositive motions on common issues is not simply a tool for defendants. Denial of dispositive motions can offer certainty for controversial legal positions, as well as conferring a settlement premium on various cases.[54] Indeed, engaging in dispositive motions as they arise often expedites resolution of MDLs. The most obvious reason is that dismissing junk claims reduces areas of litigation that will go nowhere, thus better focusing the litigation. But rulings that *preserve* claims also expedite matters, since defendants know not to waste time with arguments that will not succeed.[55] In general, litigants make decisions based on the information they know with certainty.[56] The more certainly litigants know the outcome of various claims, the more accurately they can act on the "true value" of their lawsuits.

4. Focus on the Science

The point of global dispositive motions is to discover the underlying reality of the claims populating the MDL. As at least one judge has observed, many MDLs have arisen in part because of advances in science and technology.[57] As a result, careful evaluation of experts on general or specific causation can resolve issues quickly, speeding up movement toward remand or settlement.[58] However, as at least one commentator

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[54] *See, e.g.*, Edward Brunet*, The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 692 (2012).

[55] ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 175 (2019) ("Engaging with motions to dismiss for failing to state a claim, *Daubert* criteria to test experts, motions in limine to assess pretrial evidence, summary judgment motions to suss out whether disputes over important facts exist, discovery disputes, and even bellwether trials provide judges ample opportunity to reason through a proceeding's merits publicly.").

[56] *Id*. at 108 ("When judges don't engage with the merits through pretrial motions and trials, the relative strength of plaintiffs' cases may matter little in settlement negotiations.").

[57] *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 379 F. Supp. 2d 348, 440 (S.D.N.Y. 2005) ("MTBE presents precisely the type of situation envisioned by *Sindell*, where 'advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer.'").

[58] *See In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543, 2018 WL 1638096, at *2 (S.D.N.Y. Apr. 3, 2018) (deciding that summary judgment motions filed by the defendant challenging one of the plaintiffs' theories were "premature" because expert testimony had not yet been evaluated under *Daubert*).

has observed, "*Daubert* has sometimes been under-utilized" by MDL courts.[59] There are reasons for this: science and law intersect in complicated ways in MDLs. For example, in *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, the MDL court recognized that the advancement of novel theories of liability implicated federalism principles: a federal court could not adopt "innovative theories" under state law, but it had to provide the same consideration to those theories that state courts would.[60] Relatedly, some federal MDL courts may be concerned that robust gatekeeping decisions may not receive adequate support from more permissive federal courts.[61]

When properly applied, early *Daubert* rulings can move MDLs quickly and carefully. Take, for example, the *In re Lipitor* litigation.[62] Most plaintiffs alleged that women who had used the medication Lipitor had subsequently developed diabetes.[63] The JPML consolidated more than three thousand claims into an MDL.[64] The district court and the parties agreed to try four bellwether cases, and began working up "extensive discovery," including retaining (and deposing) experts who could testify to both general causation (that is, Lipitor *can* cause diabetes) and specific causation (that is, in a given case, Lipitor *did* cause diabetes).[65] After discovery closed, Pfizer moved to exclude the testimony of plaintiffs' causation experts under Federal Rule of Evidence 702.[66] "Following extensive hearings and an opportunity for the experts to amend their reports," the trial court excluded all of plaintiffs' proposed expert testimony except an opinion that there might be a link between exceptionally high Lipitor doses (80 mg) and diabetes.[67] Since plaintiffs

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[59] Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 KAN. L. REV. 219, 248 (2017).

[60] 379 F. Supp. 2d 348, 364 (S.D.N.Y. 2005).

[61] *See, e.g.*, *In re* Roundup Prods. Liab. Litig., 390 F. Supp. 3d 1102, 1113 (N.D. Cal. Jul. 10, 2018).

[62] *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No II) MDL 2502, 892 F.3d 624, 648-49 (4th Cir. 2018).

[63] *Id.* at 629.

[64] *Id.* at 630.

[65] *Id.*

[66] *Id.*

[67] *Id.* The trial court also admitted the specific causation testimony of one expert for one case.

needed expert testimony to establish causation, and no plaintiffs came forward with further evidence, the court "granted summary judgment against all claims in the MDL," ending the litigation.[68]

The plaintiffs appealed, and the Fourth Circuit affirmed the trial court's evidentiary rulings and its summary judgment. Litigation that could have dragged on for years before petering out was resolved and affirmed on the merits without trying a single case.

5. Certifying Issues for Interlocutory Appeal Creates Needed Certainty

One of the largest impediments to resolving multidistrict litigation is the amount of uncertainty it involves. Many MDLs comprise hundreds, if not thousands, of cases. Those cases often have overlapping allegations, but also various differences. A certain number—not known at the outset—are likely to prove meritless by the end of the litigation. The more an MDL judge can do to insert a measure of certainty into the litigation, the more easily she can resolve a large number of the cases.

One of the quickest ways to inject certainty would be to encourage more appellate review of difficult rulings. As Professor Abbe Gluck has observed, the lack of appellate review "means that little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across jurisdictions."[69] That said, the MDL judge can always certify important questions (such as proper application of law in a global motion to dismiss, or the correct application of *Daubert* standards in a close ruling on a particular expert) to interlocutory review by the appropriate court of appeals. Indeed, the Supreme Court sees interlocutory review as a completely appropriate tool for MDL litigants and judges.[70]

Some MDL judges are already experimenting with this process. In the *Chinese Drywall* MDL, New Orleans Federal District Judge Eldon Fallon certified several questions involving a recurring issue of personal

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[68] *Id.* at 631.

[69] Gluck, *supra* note 11, at 1706.

[70] Gelboim v. Bank of Am., 574 U.S. 405, 415 (2015) ("District Courts may grant certification under [Rule 54(b)], thereby enabling plaintiffs in actions that have not been dismissed in their entirety to pursue immediate appellate review.").

jurisdiction for interlocutory appeal.[71] Similarly, back in 2008, Eastern District of New York Judge Jack Weinstein allowed for interlocutory appeal of a denial of summary judgment in the *Zyprexa* litigation.[72] Most recently, Judge Jesse Furman of the Southern District of New York allowed interlocutory appeal of a summary judgment ruling against plaintiffs in the General Motors *Ignition Switch* litigation, noting that "in no small part because of the significance of the Court's ruling to resolution of this complex litigation, the Court concludes that appellate review would be worthwhile."[73]

Critics worry that interlocutory review may slow down the progress of an MDL more than speed it along, but this concern need not stand in the way of a more liberal appeals process. The parties (or the judge certifying the question) can easily request expedited review.[74] Given the size of many MDL dockets, such a request will likely grab the appellate court's attention. At the same time as the appeal is pending, discovery on non-affected issues or claims can proceed so less time is lost.[75]

Interlocutory review is not necessary in every circumstance.[76] Nor is discretionary review a panacea: the *ad hoc* nature of discretionary review may, if not applied correctly, undermine confidence in the appellate system.[77] But judiciously (and expeditiously) applied, interlocu-

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[71] *See, e.g.*, *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 528 (5th Cir. 2014) (noting the lower court certified an interlocutory appeal after denying a motion to dismiss on jurisdictional grounds).

[72] *In re* Zyprexa Prod. Liab. Litig., 253 F.R.D. 69, 76 (E.D.N.Y. 2008) (noting the interlocutory appeal of a summary judgment denial).

[73] *In re* Gen. Motors LLC Ignition Switch Litig., 427 F. Supp. 374, 377 (S.D.N.Y. 2019).

[74] 9TH CIR. R. 27-12. The Ninth Circuit, for example, allows for expedited review of interlocutory appeals on a showing of "good cause." Although the non-inclusive textual definition does not include large or aggregated cases, there is a sound argument that a ruling that could affect hundreds of cases currently on the docket would be a good candidate for expedited review. *See id*.

[75] *See, e.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 14-MD-2543, slip op. Dec. 12, 2019, at 32 (noting other issues that could proceed during pendency of appeal).

[76] *See, e.g.*, *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2047, 2018 WL 4816135, at *6 (E.D. La. Oct. 4, 2018) (denying certification of interlocutory appeal on timeliness grounds).

[77] Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1662-63 (2011).

tory review is an excellent way to add certainty to a highly uncertain area of litigation.

6. MDL Discovery Should Be a Two-Way Street

One of the great advantages MDL practice offers to plaintiffs, defendants, and judges is the consolidation of discovery. In theory, this benefits all sides, including defendants, for whom consolidation should reduce the amount of duplicative discovery they would face in numerous individual actions. MDLs, however, have historically imposed lopsided discovery, affording the plaintiffs the opportunity to take sweeping discovery of the defendants, while remaining slower to give defendants the opportunity to examine the cases against them.[78]

Starting an individualized discovery track can keep the litigation moving and increase efficiency.[79] Selecting bellwether trials requires parties to know the cases in their inventories, which is helped by plaintiff-specific discovery.[80] Given the problem of junk claims, offering a comprehensive look at the inventory of claims facing an MDL defendant can assist both case management and even facilitate settlement discussions. As Judge Jack has recognized, since much of the information defendants look for is in the plaintiffs' possession already—and since plaintiffs' counsel took on the responsibility of representing these individual plaintiffs—providing that information is not unduly burdensome.[81]

Judge Robreno's handling of the notorious "black hole" asbestos MDL offers an excellent example of how two-sided discovery proves more efficient than one-sided discovery. As he pointed out, the asbestos MDL stalled in part because "[a]ggregation stopped progress on individual cases while the parties and the court worked on global solutions. Once the global solutions proved unfeasible, the parties did not return to the task of processing the cases individually."[82] In other words, the search

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[78] *See generally* JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORT, NOT THE MASS (Wash. Legal Found. 2009).

[79] *In re* C.R. Bard, No. 2:14-cv-26233, 2018 WL 2986105, at *1 (S.D. W. Va. June 12, 2018).

[80] Hon. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TULANE L. REV. 2323, 2344 (2008).

[81] *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 632 (S.D. Tex. 2005).

[82] Robreno, *supra* note 38, at 126.

for aggregated solutions had stopped the individual processing of cases completely, leaving a "black hole" for twenty-year old claims.[83] In order to put the cases back on track, Judge Robreno "disaggregated" them into "one plaintiff-one claim" cases, and set up definitive schedules and show-cause orders to keep the discovery into the individual plaintiffs' claims moving.[84] The end result was the disposition or remand of more than 180,000 cases that had been languishing for more than a decade.[85]

In addition to the efficiencies it generated, the "one plaintiff-one claim" approach did something far more important: it restored "litigants' confidence in the process."[86] As Judge Robreno described the process, plaintiffs had come to believe the MDL simply existed to dismiss cases wholesale or otherwise deprive them of their chances in front of a jury, while defendants believed that it was designed to coerce them into settlement or to forfeit legitimate defenses.[87] Engaging in discovery on both sides allowed defendants to eliminate less meritorious cases, while meritorious plaintiffs saw their claims "move to the head of the line."[88] The outcomes did not unilaterally favor one side or the other, but both remained satisfied enough to participate.

Both recent statistics and caselaw suggest that MDL courts have found two-way discovery to work well.[89] For example, Judge Joseph Goodwin of the Southern District of West Virginia, overseeing the various pelvic mesh MDLs, "decided to conduct pretrial discovery and motions practice on an individualized basis" in order to "efficiently and effectively manage" the seven MDLs he oversaw.[90] As part of that effort, Judge

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[83] *Id.*

[84] *Id.* at 127.

[85] *Id.* at 186.

[86] *Id.* at 188-89.

[87] *Id*.

[88] *Id*. at 189.

[89] *See* Margaret S. Williams, *Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008-2018*, at 3 (Fed. Jud. Ctr. 2019), https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf (finding 81% of MDLs with more than 100 actions ordered plaintiff fact sheets, with a median order time of 187 days).

[90] *See, e.g.*, *In re* Boston Scientific Corp. Pelvic Repair Sys. Prods. Liab. Litig., MDL No. 2326, No. 2:16-cv-05014, 2018 WL 2182703, at *1 (S.D. W. Va. May 9, 2018).

Goodwin issued pretrial orders setting deadlines for each plaintiff to provide a basic Plaintiff Fact Sheet to the defendants on pain of sanctions. Similarly, in one of his first pretrial orders in *In re FEMA Trailer Formaldehyde Products Liability Litigation*, Judge Engelhardt of the Eastern District of Louisiana required plaintiffs to serve fact sheets within thirty days of transfer to the MDL.[91]

Requiring basic information from both sides is simple, cost-effective, and actually works to reduce the number of meritless claims in large proceedings. In fact, the biggest challenge courts face is how to ensure each side responds in a timely fashion.

7. Do Not Fear Sanctions

MDLs comprise of hundreds of cases and can involve hundreds of lawyers. Judges have various collaborative tools at their disposal to manage these mobs, but sometimes it makes sense for the judge to employ the stick as well as the carrot. Sanctions are available for those who do not comply with their discovery obligations under Rule 11 for pleadings, Rule 37 for discovery, § 1927 for vexatious or duplicative litigation, and according to the inherent power of the court. Sanctions may not be appropriate in every case.[92] But there are a number of circumstances in multidistrict litigation when they are an effective tool for ensuring both efficiency and fairness. Most obviously, when parties engage in full-fledged litigation abuse, like the mass filing of worthless claims, there is no question sanctions are necessary.

Sanctions can also be an appropriate tool for ensuring the parties remain responsive to each other.[93] Keeping an MDL with hundreds or

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[91] MDL No. 07-1873, 2012 WL 85248, at *1, *3 (E.D. La. Jan. 11, 2012) (dismissing two cases for failure to serve Plaintiff Fact Sheets).

[92] 28 U.S.C. § 1927 (2018); FED. R. CIV. P 11(c); FED. R. CIV. P. 37(a)(4); *see, e.g.*, *In re* Welding Fume Prods. Liab. Litig., No. 1:03 CV 17000, 2006 WL 1173960, at *3 (N.D. Ohio Apr. 5, 2006) (refusing to impose sanctions on plaintiffs' counsel after the voluntary withdrawal of two bellwether cases just before trial).

[93] *See, e.g.*, *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., MDL No. 07-1873, 2011 WL 6022198, at *3 (E.D. La. Dec. 2, 2011) (dismissing plaintiff's claims due to a failure to comply with a fact sheet requirement); *In re C.R. Bard*, No. 2:14-cv-26233, 2018 WL 2986105, at *2 (S.D. W. Va. June 12, 2018) ("[A] 'willingness to resort to sanctions' in the event of noncompliance can ensure that the engine remains

thousands of cases moving requires keeping the parties themselves moving. As Judge Goodwin rightly observed, failing to meet one's discovery obligations can slow down defendants from dealing with timely claims as they chase down information from plaintiffs who do not have, or will not share, the information necessary to evaluate their claims.[94] Sanctions are also appropriate when lawyers for either side engage in strategic behavior that delays the overall MDL proceedings.[95]

Given the various criticisms of MDLs as "black holes" for claims, keeping the cases moving while still paying attention to individual details is vital for the litigation's legitimacy. Remaining willing to impose sanctions to keep cases on track is an important tool for doing so.

8. Bellwether Trials Only Work if They Are Representative

Bellwether trials are one of the most attention-getting aspects of MDL practice, with good reason. Trials are inherently dramatic, and headlines about large verdicts generate clicks. That said, bellwether trials are designed to create information for parties to settle cases, not generate large verdicts.[96] As Louisiana Federal District Judge Eldon Fallon describes the process:

> By injecting juries and fact-finding into litigation, bellwether trials assist in the maturation of disputes by providing an opportunity for coordinating counsel to *organize* the products of common pretrial discovery, *evaluate* the

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in tune, resulting in better administration of the vehicle of multidistrict litigation.") (quoting *In re* Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1232 (9th Cir. 2006)).

[94] *In re* Ethicon, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 2:18-cv-00014, 2018 WL 2249359, at *2 (S.D. W. Va. May 15, 2018) ("[E]thicon has had to divert attention away from timely plaintiffs and onto this case . . . .").

[95] Boyett v. Lykes Bros. S.S., No. 92-3322, 1993 WL 210355, at *3-4 (5th Cir. June 10, 1993) (affirming § 1927 sanctions on the defense counsel who strategically withheld a jurisdictional objection to an MDL case until after the trial had begun).

[96] Fallon et al., *supra* note 80, at 2332 ("The ultimate purpose of holding bellwether trials . . . 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.").

> strengths and weaknesses of their arguments and evidence, and *understand* the risks and costs associated with the litigation.[97]

When they function properly, bellwether trials can provide important information that informs the terms of later settlements.[98] The global settlement in the *Vioxx* cases, for example, developed after the completion of six bellwether trials overseen by the MDL court.[99]

Bellwether trials are far from perfect devices, however. Any given trial has a certain amount of "noise" based on the factual nuances of the case and the amount of natural sympathy the plaintiff evokes.[100] In addition, bellwether trials become less informative as trial pools are infected with junk claims, gamed by strategic counsel, and as the pool of available cases shrinks due to lack of *Lexecon* waivers.[101] Defendants, for example, are not waiving venue as often anymore.[102] Plaintiffs have begun to consider not participating as well.[103] Courts can still conduct trials based on cases properly originating in the jurisdiction, but those are far less likely to prove to be truly representative.

Another difficulty bellwether trials face is that they have become increasingly costly. Bellwether trials appear to be cost-effective in larger-

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[97] *Id.* at 2325 (emphasis added); *see also In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543 (JMF), 2016 WL 1441804, at *9 (S,D.N.Y. Apr. 12, 2016) ("[B]ecause the primary purpose of bellwether trials is to provide data points for settlement discussions with respect to the universe of cases, the goal is to select the 'best' representatives of the universe of cases, not outliers likely to result in victory for one side or the other.").

[98] Fallon et al., *supra* note 80, at 2344 ("A bellwether is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation . . . .").

[99] *Id.* at 2335-37.

[100] Loren H. Brown et al., *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 670 (2014).

[101] Fallon et al., *supra* note 80, at 2354; *see* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 n.1 (1998).

[102] *See, e.g.*, *In re* Mentor ObTape Transobturator Sling Prod. Liab. Litig., No. 4108-MD-2004, 2017 WL 4785378, at *3 (M.D. Ga. Oct. 20, 2017) (noting Mentor did not waive its rights under *Lexecon*).

[103] *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prod. Liab. Litig., MDL No. 2100, 2010 WL 4024778, at *1 (S.D. Ill. Oct. 13, 2010) (noting the plaintiffs "are threatening the Court with the '*Lexecon* card'").

scale MDLs that house more than a thousand claims,[104] but grow exponentially less cost-effective as the scale declines.[105] For example, in the *General Motors LLC Ignition Switch Litigation*, the court noted that, to prepare for the first two bellwether trials, the parties "filed and briefed over forty motions *in limine*, two substantial summary judgment motions, two *Daubert* motions, two motions (or the equivalent) with respect to the admissibility of 'Other Similar Incident' evidence, and a motion for judgment as a matter of law, resulting in approximately twenty opinions of the Court."[106]

Many participants do not treat bellwether trials as data points to discover the value of claims, but instead as opportunities to inflate (or deflate) the value of settlements by registering early victories for their positions.[107] As a result, at least one MDL judge has candidly admitted that he has "not found the bellwether process particularly helpful if its primary purpose is to give the parties assistance in evaluating the value of the transferred cases."[108]

Creating truly informative bellwether trials requires judicial involvement in bellwether selection. The method of selecting bellwether trials is critical, since it will heavily influence how much information the trials produce. Bellwether selection is often influenced by the amount of information each side has at the time of selection.[109] Therefore, the more discovery into plaintiffs' claims, the more likely it is that defendants will

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[104] Fallon et al., *supra* note 80, at 2349.

[105] *Id*. at 2366.

[106] *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-MD-2543, 2016 WL 1441804, at *4 (S.D.N.Y. Apr. 12, 2016). This was in addition to the general MDL pretrial discovery.

[107] *Id.* at *9 ("[B]ecause the primary purpose of bellwether trials is to provide data points for settlement discussions with respect to the universe of cases, the goal is to select the 'best' representatives of the universe of cases, not outliers likely to result in victory for one side or the other."); *see also* Alexandra Lahav (@alahav), TWITTER (Mar. 12, 2019, 3:59 PM), https://mobile.twitter.com/alahav/status/1105604316050718720 ("I wish that each of these trials was not weighed so heavily. They are data points . . . .").

[108] Clay D. Land, *Multidistrict Litigation After 50 Years: A Minority Perspective from the Trenches*, 53 GA. L. REV. 1237, n.23 (2019).

[109] Brown et al., *supra* note 100, at 671.

be able to find representative plaintiffs.[110] Sometimes some of that discovery is built into the process explicitly.[111]

Plaintiffs in particular tend to game the selection of bellwether trials to give themselves an advantage.[112] The most common tactic is simply to dismiss bellwether plaintiffs that the defendant selected,[113] or who turn out to have problematic facts once discovery commences.[114]

Various, easily achievable reforms would mitigate—if not cure—some of the worst gamesmanship. Reforming the selection process is the most important of these. Some academics advise random sampling for bellwether selection.[115] In addition, some judges have begun instituting rules where, if a bellwether plaintiff is voluntarily dismissed, the next selection for trial goes to the defense, which discourages gamesmanship.[116]

Allowing the trial workup phase to translate to larger actions in the MDL would help as well. Bellwether plaintiffs are subject to pretrial motions.[117] As a result, bellwether trials can speed up subsequent motions

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[110] Fallon et al., *supra* note 80, at 2344.

[111] *See, e.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *3 ("The process involved an initial selection of eighteen cases as to which the parties would engage in case-specific fact discovery; the selection of five of those cases to be potential 'Early Trial Cases'; and the exercise of two strikes by each party on the other's list, resulting in six Early Trial Cases to proceed to expert discovery and, presumptively, trial.") (citations omitted).

[112] Brown et al., *supra* note 100, at 665 ("[W]e found that the plaintiffs' selections did, in fact, differ significantly from the random selections. We were surprised to find, however, that the defense selections—while numerically different from the random selections—did not differ significantly from the random selections.").

[113] *See, e.g.*, *In re* Welding Fumes Prods. Liab. Litig., MDL No. 1535, 2010 WL 7699456, at *3 (N.D. Ohio June 4, 2010) (involving plaintiffs who voluntarily dismissed second and third bellwether plaintiffs before trial).

[114] *See, e.g.*, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *5 (dismissing the *Reid* case—the fourth bellwether trial—with prejudice after discovery with no explanation or warning).

[115] Brown et al., *supra* note 100, at 683.

[116] *In re* Fosamax Prods. Liab. Litig. No. 1:06-MD-1789-JFK, 2008 WL 5159778, at *4 (S.D.N.Y. Dec. 9, 2007); *see also* Brown et al., *supra* note 100, at 675.

[117] *See, e.g.*, *In re* Norplant Contraceptive Prods. Liab. Litig., 955 F. Supp. 700, 711 (E.D. Tex. 1997) (granting summary judgment against five bellwether plaintiffs on learned intermediary doctrine grounds).

since certain aspects of motions to dismiss, summary judgment motions, or motions in limine will repeat across plaintiffs in an MDL.[118]

9. Good Settlements Require Good Information

Courts and litigants often favor "global" resolutions of MDLs, particularly global settlements.[119] The attractions are obvious: judges get to clear crowded dockets, defendants get global peace, and steering committee counsel get big returns on their investment.

Although remand to trial courts is the statutory endgame for the MDL process, many judges consider settlement before remand to be a marker of success in an MDL.[120] MDL settlements, however, present a host of legal and ethical issues for the participants to resolve.[121] Lawyers for plaintiffs often represent tens or hundreds of separate clients, each requiring personal communication,[122] and many of whose interests may come into conflict with each other if they are sharing a limited fund. Since global settlements often require plaintiffs' counsel to convince plaintiffs to accept the same terms, even if particular settlements would offer better terms for particular claimants,[123] the potential for violating ethical rules abounds.

The presence of third-party litigation funders further complicates settlement negotiations because it changes what was essentially a two-

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[118] *See, e.g.*, *In re* Genetically Modified Rice Litig., No. 4:06MD1811, 2011 WL 882954, at *1 (E.D. Mo. Mar. 11, 2011) (noting similar summary judgment rulings in bellwether trials); *In re* Gen. Motors LLC Ignition Switch Prods. Liab. Litig., No. 15-CD-8224, 2017 WL 4417693, at *7 (S.D.N.Y. Oct. 3, 2017) (noting parties are supposed to meet and confer regarding the applicability of in limine orders from previous bellwether trials).

[119] *See, e.g.*, *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) ("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.").

[120] *See, e.g.*, Mueller, *supra* note 4, at 535 ("[T]here have always been judges for whom the MDL process is an invitation to push as far as possible toward concluding the cases gathered in this way.").

[121] *See generally id.* at 553.

[122] *See* MODEL RULES OF PROF'L CONDUCT 1.2(a) (2016) (stating a lawyer "shall abide by a client's decision whether to settle a matter").

[123] Mueller, *supra* note 4, at 555.

party negotiation (counsel for the plaintiff and counsel for the defense) into a multi-party settlement.[124] The reality is even more complicated, as most MDL settlement negotiations occur between defense counsel and plaintiffs' counsel who represent multiple individual plaintiffs with varying interests of their own. Regardless, funders add an extra dimension to the settlement because they add a "behind the table" constituent who must be satisfied, even if their particular needs (such as meeting a specific return on investment) are not known to everyone negotiating.[125] Finally, like in class actions, MDL settlements are rife with agency problems where counsel's incentives (larger fees) lead them to pursue different goals than their clients.[126]

As a result, mindful judges face strong incentives to intervene in the settlement process to ensure settlements are fair to individual litigants.[127] The difficulty is that judges often lack the authority to actually oversee the problematic aspects of settlements.[128] That has not stopped numerous MDL courts from reserving the power to review any global settlements reached in cases they oversee.[129] These arrogations have proven controversial.[130] That said, judges' invocations of "quasi-class action" powers to approve or reject settlements have no basis in the Federal Rules of Civil Procedure, and violate the principle underlying their other discretionary moves: that the parties have consented to the authority they wield.

In fact, strong intervention in the settlement process may not be necessary. Judges can influence settlement for the better by serving a

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[124] ANDREW TRASK & ANDREW DEGUIRE, BETTING THE COMPANY: COMPLEX NEGOTIATION STRATEGIES IN LAW & BUSINESS 63-66 (2013).

[125] *Id*. at 69-70.

[126] *See, e.g.*, Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275, 2293-94 (2017).

[127] Burch, *supra* note 4, at 76; Jaros & Zimmerman, *supra* note 4, at 551-52.

[128] This is not always the case, however. MDL courts have the power to review class-wide settlements under Rule 23(e). *See, e.g.*, *In re* Silicone Gel Breast Implant Prods. Liab. Litig., No. CV92-P-10000-S, 1994 WL 114580, at *3 (N.D. Ala. Apr. 1, 1994) (stating the court will determine whether the settlement is "fair, adequate, and reasonable, [and] is in the best interest of the class").

[129] *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 611 (E.D. La. 2008) (explaining how courts have the authority to review global settlements).

[130] *See generally* Burch, *supra* note 4, at 71; Jaros & Zimmerman, *supra* note 4, at 545; Mueller, *supra* note 4, at 531.

facilitative, information-enabling role.[131] Good settlements require good information. Uncertainty about law and facts, and therefore claim values, is a large impediment to quickly settling claims in an MDL. Put another way, settlement operates on a "garbage in, garbage out" principle: if the parties do not have accurate information about their inventories of claims, or the law governing them, they are more likely to either over- or under-value any comprehensive settlement. If the parties' valuations are wrong in different directions, they are less likely to reach an agreement at all. By deciding far-reaching motions quickly and accurately, acceding to valid requests for interlocutory review, and by overseeing discovery of both the key allegations against defendants and the key facts about individual plaintiffs, courts assist parties in reaching the "right" valuations for various claims quickly and accurately.

Judges can also address the thornier agency problems in global settlements by requiring leadership counsel to publicize certain information. Courts have wide discretion to appoint leadership for MDLs.[132] By tying leadership appointments to commitments to follow the appropriate ethical rules and report on certain aspects of the settlement process—including what funders may have interests in the settlement—judges can encourage transparency about the settlement process, and give participating plaintiffs (and their individual counsel) the ability to say "no" to settlements that do not serve their interests. No system for policing aggregate settlements is perfect, but one based on consent and transparency should minimize the opportunity for conflicts of interest to develop.

10. Remand Is Not Failure

Judges assigned to an MDL tend to believe—rightly or wrongly—that they have the responsibility to resolve the entire litigation, not just the pretrial issues. As recently as 2018, Judge Polster, presiding over the nationwide *Prescription Opiate* litigation, announced that his goal for consolidation went far beyond preparing cases for trial in their home courts:

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[131] Jaros & Zimmerman, *supra* note 4, at 568.

[132] *See, e.g.*, Burch, *supra* note 25, at 81-83.

> [T]he resolution I'm talking about is really—what I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of pills that are out there and make sure that the pills out there are being used properly.[133]

Judge Polster's goal was particularly ambitious, but many judges do take seriously the idea that they should "resolve" the cases transferred to them.[134] From that perspective, remand of cases to their originating courts looks like failure, not a natural end to the consolidation process. Indeed, those who study MDLs estimate that judges return fewer than three percent of consolidated cases to their originating courts.[135]

But remand does not mean an MDL has failed. According to the text of § 1407, remand is the intended endgame for MDL consolidation.[136] Anecdotally, judges seem more inclined to remand constituent cases than in the past. Judge Fallon, for example, recently remanded a number of the constituent cases in the *Chinese Drywall* litigation to their originating courts. He observed: "Given the extensive motions practice and bellwether trials that have occurred in this MDL, the Court finds it appropriate to transfer the cases back to the transferor courts . . . . This Court recognizes that parties may still need to conduct some discovery before trial. Nevertheless, this discovery is case-specific . . . ."[137]

To be fair, the gravamen of *Chinese Drywall*—allegedly defective building materials that created health issues including respiratory problems[138]—has not received the same sort of urgent press coverage as

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[133] Transcript of Proceedings at 9, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804 (N.D. Ohio Jan. 9, 2018) (No. 58).

[134] MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) (encouraging judges to settle cases while consolidated).

[135] Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400-01 (2014).

[136] 28 U.S.C. § 1407(a) (2018) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."); *see* Land, *supra* note 108, at 1239 ("This language supports the conclusion that the transferee forum's focus should be on pretrial proceedings designed to prepare the individual cases for remand to their forums of origin.").

[137] *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., MDL No. 2047, 2018 WL 3972041, at *5 (E.D. La. Aug. 20, 2018).

[138] *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 168 F. Supp. 3d 918, 922 (E.D. La. 2016).

the "opioid epidemic."[139] But courts are best equipped to resolve the specific legal and factual disputes presented to them; and litigants who seek larger solutions are usually inventive enough to use the many tools of the legal system to request them.

What many are discovering is that when MDL courts do not confine themselves to either the scope of § 1407 or the issues parties agree to present, litigants will seek to move themselves out of the jurisdiction.[140] In addition, as discussed above, parties' refusal to execute *Lexicon* waivers[141] can force the MDL court to transfer cases back to their originating courts for trial.[142]

Conclusion

Multidistrict litigation faces a legitimacy crisis, but this can be fixed. The primary criticisms MDLs face stem from three issues: (1) an inability to get compensation to meritorious claimants quickly and inexpensively, (2) a lack of apparent authority for certain practices, and (3) an opacity of process that stems from a desire for flexibility. The ten principles discussed above address these issues head-on. Early vetting, two-way discovery, and readier use of sanctions will help move along meritorious claims while eliminating meritless ones. Willingness to certify interlocutory questions, focusing on pretrial (rather than policy) issues, emphasizing science, and embracing remand will bring MDLs in line with § 1407 statutory authority and insulate experimental decisions or novel legal theories. Emphasizing the representative nature of bellwether trials, the need for good information for settlements, and the importance of

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[139] *See, e.g.*, *Opioid Crisis Fast Facts*, CNN, https://www.cnn.com/2017/09/18/health/opioid-crisis-fast-facts/index.html (updated June 21, 2020, 9:39 AM ET) (containing links to cnn.com coverage).

[140] *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., MDL 1596, Nos. 04-MD-01596 (JBW), 08-CV-3249 (JBW), 2009 WL 1953398, *1 (E.D.N.Y. July 2, 2009) ("Dispositive motions had to be decided at an early stage of the litigation since plaintiff had moved for remand.").

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

[142] *See, e.g.*, *In re* Mentor Obtape Transobturator Sling Prod. Liab. Litig., No. 4108-MD-2004, No. 4:16-cv-300, 2017 WL 4785378, at *3 (M.D. Ga. Oct. 20, 2017) (remanding a case where the defendant did not waive his rights under *Lexecon*).

appellate checks will make the process more open and accessible. Legislation and rulemaking are two ways to confer legitimacy. Open commitment to emphasizing resolution on the merits over mass settlement is another way that maintains the independence and experimentation that MDL advocates wish to preserve.