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VI. USA

Rules for American MDL Proceedings?

Prof. Richard Marcus, UC Law San Francisco (formerly UC Hastings), San Francisco/USA[1]

Introduction

For a long time, and for many good reasons, American aggregate litigation has been distinctive, and also seemed undesirable to many outside the US. During the last third of the 20th century, the main procedural device for that litigation was the class action. Though the American class action continues to be important and prominent, in the 21st century the class-action device has been somewhat eclipsed by the use of multidistrict litigation procedures under a statute enacted in 1968.[2] Of all civil actions in the US federal court, a very significant percentage – some say more than 50 % – are now subject to a transfer order including them in "centralized" MDL proceedings.

Despite the prominence of MDL proceedings in American federal courts, there is no reference to them in the Federal Rules of Civil Procedure. The class action procedure is, of course, governed by our Rule 23,[3] which has been amended three times in the last quarter century, most recently in 2018. Though many litigants – on both the plaintiff and defendant side – have welcomed multidistrict treatment, some repeat defendants began to raise questions about the absence of rules to govern these important litigations.

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1 Coil Chair in Litigation, UC Law San Francisco (formerly UC Hastings). Copyright © 2023, Richard Marcus. This article is largely based on my experience working as a Reporter for the US Advisory Committee on Civil Rules since 1996, addressing proposed changes to the Federal Rules of Civil Procedure, the rules for the US federal courts. Much of what it describes is reflected in the agenda books and minutes of the US Judicial Conference Advisory Committee on Civil Rules, which develops possible amendments to those rules. Those agenda books and minutes are prepared for each meeting of this committee, and can be found on the official website of the US Administrative Office of the US Courts, www.uscourts.gov. These materials are stored under the heading "Records of the Rules Committees" on that website. In this article, I speak only for myself and not on behalf of the Advisory Committee.

2 28 U.S.C. § 1407.

3 Fed. R. Civ. P. 23.

Beginning in 2017, there was pressure to adopt statutory or rule changes responsive to these defense-side concerns. The legislative effort did not bear fruit, but the rules committee created an MDL Subcommittee, which engaged in an extensive outreach effort involving judges and lawyers experienced in MDL proceedings. Along the way, many of the initial proposals were shelved or adapted. In June 2023, a draft amendment of a new Federal Rule of Civil Procedure 16.1 was approved for publication and public comment. That comment period will run from August 2023 to February 2024, and afterwards the Advisory Committee will decide whether to recommend formal adoption of the new rule.

This article seeks to put these US developments into a larger perspective on the assumption that they will at least be of interest to those outside America. In many ways, the long arm of American litigation can affect parties outside the country. Moreover, there seem to be increasing moves toward providing collective legal redress outside the US. The ELI/UNIDROIT European Rules of Civil Procedure, promulgated in 2020, contain more flexible rules on collective litigation than have prevailed in many countries.[4] And a "landmark" EU directive is said to be "set to reshape the landscape for consumer class actions."[5] In the UK, in 2021 the Competition Appeal Tribunal approved certification of a class action in "the first British judicial certification of a class action of its kind," seeking some $19 billion in excessive payment fees.[6] No doubt these snippets overlook many significant developments, but they do show that there is reason to consider new developments in the US brand of aggregate litigation.

There is no reason to think that other countries will slavishly follow the American course, though knowing about it may be useful in learning from it. But that requires considerable context, and the article begins with consideration of joinder of multiple parties, which is the sort of thing aggregate litigation can magnify. It then examines the post-1966 American experience with class-action litigation, largely as an example of the learning curve that emerged in this country. Against that background, it turns to the low profile of MDL proceedings for the first several decades after Congress adopted the MDL statute in 1968, and then describes the varying (and sometimes contradictory) criticisms aimed at those proceedings, mainly by some defense interests and by legal academics.

The final substantial section of the Article then reviews the gradual evolution of the actual proposal that will be put out for public comment in August 2023. (The actual proposal is included in an Appendix to this Article.) The conclusion, for the present, is both that the proposal does not do the more-aggressive things some wan-

4 For discussion, see Astrid Stadler, Emmanuel Jeuland & Vincent Smith (eds.), Collective and Mass Litigation in Europe: Model Rules of Effective Dispute Resolution (2020).

5 See Keir Baker & Chris Warren-Smith, Representative Actions Directive Impacts EU Consumer Lass Actions, Bloomberg Law News, Jan. 24, 2023.

6 See Jonathan Browning, Mastercard Set to Face U.K.'s Largest Class Action Over Fees, Bloomberg News, Aug. 18, 2021.

ted to see, and that it may ultimately not be adopted. If it is adopted, it could come into effect on Dec. 1, 2025.

I. "Simple" Party Joinder

For a long time, the common law had a very restrictive attitude toward party joinder. Though plaintiffs could join in the same suit only if they asserted a "joint" legal right in the case, that was a very limited category. That would not include, for example, the personal injury claims of a husband and wife both injured in an auto accident. (It might be that if they jointly owned the car they would have a joint claim for damage to the car, though that might have to be asserted in a separate suit from the personal injury claims.) The legal right to sue for personal injuries was regarded as "several," rather than "joint," so that joinder was not allowed. In the mid-20th century, Professor Chafee objected that he had as much trouble discerning whether certain legal issues were "common" or "several" as he did in deciding whether some ties were green or blue.[7]

Not only was the determination whether rights were "joint" or "several" often tricky, it also seemed a peculiar standard for permitting joinder of willing plaintiffs. True, one might wish to prevent one person from trying to adjudicate another person's legal rights,[8] but if both wanted to assert their rights in the same legal proceeding it seemed odd to insist that they file separate lawsuits and that the common defendant defend separate lawsuits. Moreover, from a judicial perspective, it might often seem wasteful to require separate proceedings to resolve the same factual question – for example, whether defendant was legally liable for the auto crash.

Gradually joinder rules were relaxed to accommodate these intensely practical concerns. That relaxation was central to the 1938 Federal Rules of Civil Procedure, which permitted multiple plaintiffs to join together in a suit against a defendant so long as their various claims presented common questions (e.g., who was legally responsible for the auto crash) and arose out of the same event or transaction.[9] But the archetypal lawsuit was still regarded as a one-on-one contest in court.[10]

But if that one-on-one contest could be transformed into a one-on-many contest that might produce strategic benefits for at least some of the participants. For example, to the extent that plaintiff sought to prove that defendant's actions caused a certain type of harm, there might be considerable value to the plaintiff side in having many plaintiffs before the court. So joinder of multiple plaintiffs may strengthen the plaintiffs' cause in a way that would not be true in one-on-one litigation.

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7 Zechariah Chafee, Some Problems of Equity 257 (1950).

8 This is one concern that underlies the "standing" doctrine in US law.

9 See Fed. R. Civ. P. 20(a)(1)(A), now permitting joinder whenever "any question of law or fact common to all plaintiffs will arise in the action" and the various claims arise out of "the same transaction, occurrence, or series of transactions or occurrences."

10 See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1282–84 (1976). Chayes described the "traditional conception of litigation of adjudication" as involving what he described as a "bipolar" contest.

The American embrace of broad tort principles of products liability in the 1960s somewhat reinforced this benefit of presenting multiple plaintiffs in a single case. Writing in the mid-1980s, Professor Priest recognized that this development in tort law was "a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system."[11] This development "generates complicated legal and economic issues – of industrywide apportionment of liability, probabilistic causation, and retroactive liability – that would have appeared bizarre to a lawyer dealing with defective products in the 1950s."[12] One consequence was to introduce more attention to whether others were injured by the challenged product, another incentive to broad joinder on the plaintiff side.

For other reasons, plaintiffs may derive advantages from casting their nets wide and suing many defendants. As with joinder of plaintiffs, Rule 20 permits plaintiffs to join multiple defendants if the claims against all of them raise common questions and relate to the same transaction or occurrence. For one thing, multiple defendants offer multiple potential sources of settlement money. And to the extent some of the multiple defendants could be proven to be really bad actors, the jury might infer that proof that some of the defendants were really bad actors might suggest that the other defendants were similarly wicked.

American evidence law partly recognizes the risk of such "guilt by association," both with regard to the defendant before the court and with regard to co-defendants. One example is evidence of past similar misconduct by the defendant, particularly if it takes the form of "character evidence" – offered to prove a propensity to act in a certain way.[13] This proscription on "character" evidence shows that there may be an incentive to find ways around the rule excluding such proof, and the evidence rule has exceptions.[14] This rule is "one of the most cited Rules in the Rules of Evidence."[15] In political contests, one might regard such efforts to prove bad conduct by the other side as "mud slinging," but in a jury trial it may be a very inviting tactic. And mud slinging at one defendant may tarnish them all in a multi-defendant case. Though other parties are often entitled to an instruction that the evidence be

11 George Priest, The Invention of Enterprise Liability: A critical History of the Intellectual Foundations of Modern Tort Law, 14 J. Legal Stud. 461, 461 (1985).

12 Id. at 462.

13 See Fed. R. Evid. 404(a)(1): "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." It might be noted that if such evidence is characterized instead as evidence of "habit," it can be used to prove conduct on a specific instance consistent with the "habit." The dividing line between "habit" evidence and "character" evidence can sometimes be tricky.

14 See Fed. R. Evid. 404(b) (listing grounds on which evidence of past bad acts can be admitted in criminal cases.).

15 Fed. R. Evid. 404(b), Committee Note to 1991 amendments.

considered only as to the defendant proved to have engaged in the bad act,[16] the fact that it is necessary to have a rule requiring that the jury be so instructed means that opposing parties will try hard to get such evidence in, and that there is a risk that juries will not follow such instructions. So joinder of multiple defendants may often be attractive, though perhaps sometimes offset by the prospect of facing a battery of defense counsel.

By the 1960s, these developments in tort law and joinder provisions had begun to produce what is now called the "mass tort" phenomenon. A leading early example was presented by some 1500 product liability suits brought in the early 1960s by users of the drug MER/29.[17] One thing the parties to these cases considered was attempting to have something like MDL treatment employed even though the MDL statute did not yet exist. (It is examined in a Section III of this Article.) When that did not work, the parties cooperatively agreed to some coordinated handling of the cases. But the defendant objected to combination of a large number of cases for trial because it was "concerned about the prejudicial effect of bringing to one jury's attention in a consolidated trial the fact of a large number of injuries," and the assigned judge declined to combine the cases for trial because "[t]he conglomerate mass effect might easily excite the jury to the detriment of the defendant."[18]

The point here is that the pressures 21st century "mass tort" litigation presents are not different in kind from those presented even in litigation involving far fewer plaintiffs, but the stakes in litigation can escalate dramatically as the litigation cast expands under liberal joinder rules. Indeed, as I have observed, "fairly often torts and civil procedure seem to be joined at the hip."[19] In other words, tort doctrine may fuel escalation, but procedure is often the handmaiden to the escalation. For much of the last third of the 20th century, that escalation was mainly a result of the class action, to which we turn next.[20]

16 See Fed. R. Evid. 105, requiring the court to "restrict the evidence to its proper scope [e.g., against only the defendant who committed the bad act] and instruct the jury accordingly."

17 For a discussion of this litigation, see Paul Rheingold, The MER/29 Story – An Instance of Successful Mass Disaster Litigation, 56 Calif. L. Rev. 116 (1968).

18 Id. at 126.

19 Richard Marcus, Brave New World: Technology and Tort Practice, 49 Swn. L. Rev. 455 (2021).

20 It bears mention that another rule – Fed. R. Civ. P. 42(a) – permits courts to combine or consolidate separately-filed actions, but that can happen only if the cases are all pending before the same district court. Some district courts, by local rule, have a "related case" procedure that permits the consolidation or coordination of multiple cases before the same district court but assigned to different judges of that court. The major point about MDL proceedings – examined in Sections III and IV of this Article – is that the Judicial Panel on Multidistrict litigation can transfer and coordinate cases from all across the federal court system without the participation of the individual districts involved or the judges to whom the cases were assigned in the normal course.

II. The 1966 Amendment to Rule 23

The previous section was about party joinder in individual cases, but at least (on the plaintiff side) it is usually true that joinder occurs only if the parties want it to occur. Until 1966, America's Rule 23 did not play a dramatic role in litigation escalation. But in 1966 the rule was extensively amended as part of an overall package of amendments to the joinder rules. As our Supreme Court has noted, the rule "didn't create the modern class action until 1966."[21] Probably the main innovation in 1966 that made the class action formidable built on the same foundations as the party joinder rule – "common questions." If the court found that those common questions "predominated," and that a class action would be superior to other methods of adjudication, it could "certify" a class.[22] In certifying the class, the court would also define the class, and class members would not have to take any action to "join" the suit. Instead, they would be given an opportunity to "opt out."[23]

The 1966 amendments to the class-action rule were something of a leap into the unknown. Whether the amendment would turn out to be a big deal was uncertain. Professor Wright, who was a member of the committee that approved the amendments to the joinder rules, including the class-action rule, anticipated at the time that the new procedure would be employed very rarely.[24] Others forecast more dramatic results. Another member of the committee that drafted the amendments to the rule said that the changes were "the most radical act of rulemaking since the Rule 2 'one form of action' merger of law and equity."[25]

As it turned out, the 1966 amendment to Rule 23 was followed by a period of fairly heady enthusiasm. By the end of the 1970s, Professor Miller (soon to become Reporter of the Advisory Committee on Civil Rules) wrote that about the "first phase" of Rule 23 litigation during the 1970s:

> Enthusiasm for the class action fed upon itself, and the procedure fell victim to its overuse by its champions and misuse by some who sought to exploit it for reasons external to the merits of the case. Mistakes, in most cases honest mistakes of faith, were made. By the end of this first phase, class action practice had been given a very black eye.[26]

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21 Epic Systems, Inc. v. Lewis, 138 S.Ct. 1612, 1624 (2018).

22 Fed. R. Civ. P. 23(b)(3).

23 Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring notice to class members telling them "that the court will exclude from the class any member who requests exclusion").

24 Charles Alan Wright, Recent Changes to the Federal Rules of Procedure, 42 F.R.D. 552, 567 (1966). That is not how things turned out, as explained in text below. Professor Wright soon recognized that his forecast had "proved quite ill-founded." Charles Alan Wright, Class Actions, 47 F.R.D. 169, 179 (1969).

25 See John Rabiej, The Making of Class Action Rule 23 – What Were We Thinking?, 24 Miss. Coll. L. Rev. 323, 325 n.10 (2005) (quoting John Frank).

26 Arthur Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664, 678 (1979).

It may be that the American class action still wears that black eye in the rest of the world in part due to this early experience with the new procedural device.

Professor Miller forecast in 1979 that that the initial tumult would abate, and indeed there was considerable push-back in the US (somewhat detailed below).[27] It does seem that much of the rest of the world continues to have a negative attitude toward the American class action, however. For example, Professor Walker of Canada introduced the topic of collective litigation during a conference in Moscow in 2012 by saying: "everyone, at least outside the United States, seems also to agree that they do not want to adopt U.S.-style class actions in their legal systems."[28] But that does not mean there is widespread retreat in this country for the basic class-action structure. As the very prominent Judge Patrick Higginbotham observed in a case in 2021:

> Since its early days, Rule 23. .. has played an increasingly important role in addressing the challenges of aggregating large numbers of persons seeking recompense for a single event or for injuries suffered from a common set of facts – product failures, myriad disasters at the hand of man and nature. With all its difficulties in application, the class action device has proved to be a powerful workhorse to the benefit of plaintiffs and defendants so as now to be essential.[29]

Indeed, there may even be some softening of the opposition to opt-in class actions in Europe. The ELI/UNIDROIT European Rules of Civil Procedure, for example, foresee giving judges some latitude to employ an opt-in method, particularly in cases involving small individual stakes for class members.[30]

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27 For details, see Richard Marcus, Bending in the Breeze: American Class Actions in the Twenty-First Century, 65 DePaul L. Rev. 497 (2016).

28 Janet Walker, Who's Afraid of U.S. Style Class Actions?, 18 Sw. J. Int'l L. 509, 509 (2011). It might be noted that one could regard the class action practice in Australia as even more permissive, as it evidently dispenses with the need to "certify" the class.

29 Prantil v. Arkema, Inc., 986 F.3d 570, 574 (5th Cir. 2021).

30 See ELI/UNIDROIT Model European Rules of Civil Procedure, Rule 215 – Types of Collective Proceedings:
(1) collective proceedings shall operate on an opt-in basis unless the court makes an order under Rule 215(2).
(2) The court may order that the proceedings will include all group members who have not opted-out of the proceedings under Rule 215(3) where it concludes that:
(a) the group members' claims cannot be made in individual actions because of their small size; and
(b) a significant number of group members would not opt-in to the collective proceeding.
(3) Where the court makes an order under Rule 215(2) it must set a deadline for group members to notify the court that they wish to opt-out. In exceptional circumstances the court may permit group members to opt-out after the deadline has expired.
(4) The court shall decide to whom and how notification under rule 215(3) shall be given.

Beginning in the 1970s, the American Supreme Court clamped down on free and easy class certification. As summed up by an American district judge in 2014:

> Going forward, the clear directive to plaintiffs seeking class certification – in any type of case – is that they will face a rigorous analysis by the federal courts, will not be afforded favorable presumptions from the pleadings or otherwise and must be prepared to prove with facts – and by a preponderance of the evidence – their compliance with the requirements of Rule 23.[31]

Another point that began to be clear in the 1980s was that the 1966 drafters had not focused sufficiently on settlement procedures. Indeed, it seemed that they originally assumed that certified class actions would routinely be tried and result in court judgments on the merits. Though the reformers did say a class action could be settled only with court approval, they said virtually nothing more about the topic. Yet judgments on the merits did not become the norm. Instead, the norm became pitched battles over class certification, particularly as the more exacting certification requirements outlined above went into effect, followed by classwide settlement if certification were granted.

During the 1980s and 1990s, another major development was the emergence of mass tort litigation. In 1982, Johns Manville, a very large American company, filed a bankruptcy petition even though it was operating at a profit because it had been sued so frequently for personal injuries associated with exposure to asbestos, its main product at the time. The 1966 drafters had sought to deter class certification in such cases, but courts with many such cases began to experiment with class certification. Reviewing the certification of an asbestos class action in 1986, the Fifth Circuit affirmed and observed: "The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."[32]

But defendants were understandably reluctant to "bet the company" on a class-action trial, even if initially limited to liability, leaving damages for later determination. Thus, the idea of "settlement certification" came into vogue – defendants would reach a settlement agreement with proposed class counsel that included class certification (thereby binding the entire class by res judicata) if the court accepted the settlement package. That prospect raised concerns that the defendant could "shop" for a pliant plaintiff lawyer and make a deal with that lawyer.[33] This possibi-

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31 In re Kosmos Energy Ltd. Securities Litigation, 299 F.R.D. 133, 139 (N.D. Tex. 2014).

32 Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

33 See Ace Heating & Plumbing Co. v. Crane co., 453 F.2d 30, 33 (3d Cir. 1971), noting that before certification the plaintiff lawyer would lack the bargaining leverage of threatening to take the case to trial. "[A] person who unofficially represents the class during settlement negotiations may be under strong pressure to conform to the defendant's wishes [because] a negotiating defendant may not like his 'attitude' and may try to reach settlement with another member of the class." In the same vein, see Koby v. ARS National Services, Inc., 846 F.3d 1071, 1079 (9th Cir. 2017): "When, as here, a class settlement is negotiated prior to formal class certification, there is an increased risk that the named plaintiffs and their class counsel will breach their fiduciary obligations they owe to the absent class members."

lity came to be known as the "reverse auction" risk – defendant to pit plaintiff lawyers against one another to find out which would accept the lowest settlement figure (perhaps larded with a generous attorney fee award to counsel). At the same time, defendants were firmly opposed to agreeing that cases they were trying to settle on a class-action basis were properly certifiable for trial if the settlement fell through. Thus the "settlement certification" idea came with a caveat – if the settlement agreement were not approved and implemented defendants could energetically resist certification for trial.

An abiding question was whether "settlement certification" could be granted only under the same criteria as certification for trial. One court of appeals said in 1995 that certification for settlement could occur only when the court also ruled that settlement for trial was justified.[34] Asbestos litigation soon put this idea to the test. In *Amchem Products, Inc. v. Windsor*,[35] the Supreme Court in 1997 rejected the district court's approval of a settlement of all personal injury asbestos claims nationwide. It recognized that "the 'settlement only' class has become a stock device,"[36] but held that the settlement before the Court overlooked too many differences among class members to permit the class action settlement to bind them all. Two years later, in *Ortiz v. Fibreboard Corp.* it took the same view of a settlement class certification even though the defendant there lacked the funds to fully compensate the class and denial of certification could leave many class members entirely uncompensated because other claimants had exhausted available funds.[37]

Mass tort litigation also brought Rule 23 reform back into play. In 1991, the Judicial Conference of the United States responded to the press of mass tort litigation in general, and asbestos litigation in particular, by asking the rulemakers to consider changes to the rule in light of these developments.[38] In 1996, a package of proposed rule amendments, largely focused on revising the Rule 23(b)(3) class certification criteria, was published for public comment.[39] Among the proposals was adoption of a new Rule 23(b)(4)recognizing and providing criteria for "settlement class certification." There was an outporing of reaction to these proposals, and eventually the Chair of the Advisory Committee had all the records of the Committee's five-year study of Rule 23 and the public commentary and public hearing on the proposals bound into a four-volume set. While the proposals were pending, the Supreme

34 In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (3d Cir. 1995).

35 521 U.S. 591 (1997).

36 Id. at 618.

37 See Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).

38 See memorandum from Judge Patrick Higginbotham, Chair of the Advisory Committee on Civil Rules, to Judge Aliscemarie Stotler, Chair, of the Standing Committee on Rules of Practice and Procedure, 167 F.R.D. 535, 535–36 (1996) (transmitting Rule proposed 23 revisions with recommendation that they be published for public comment).

39 See Proposed Amendments of the Federal Rules of Civil Procedure, 167 F.R.D. 523 (1996).

Court decided the *Amchem* case. Thereafter, the Advisory Committee decided in 1997 not to pursue any of the proposed amendments of the class certification provisions of the rule.[40]

After 1997, the Advisory Committee did not propose any change in the standards for class certification. In it did propose important changes to the rule dealing with procedures for handling class actions, however.[41]

According to many, the Supreme Court decisions in *Amchem* and *Ortiz* marked the end of the mass tort class action. That conclusion may be debated, but it did soon appear that litigants seeking to resolve mass torts began looking for another device. As Dean Sherman observed in 2008, their gaze fell on the MDL process.[42] So we turn our attention to MDL.

III. The Advent of MDL

As noted above, the introduction of the "modern class action" in the US produced something of a sensation, at least in legal circles. The almost simultaneous introduction of MDL received much less notice during the ensuing decades.[43]

The stimulus for this statute was an outburst of litigation very different from the mass tort asbestos litigation that placed such stress on Rule 23 in the 1990s. Instead, it was an outburst of individual antitrust actions brought in the wake of governmental actions against all the major makers of electrical equipment in the country. These cases came to be known as the *Electrical Equipment Cases*. The plaintiffs in these cases were the "direct purchasers" of large pieces of electrical equipment, mainly governmental entities, utilities and some private companies. Eventually, the defendants in the governmental action pled guilty, and a "tidal wave of civil litigation followed" – some 2,000 cases, involving over 25,000 claims and filed in 35 different federal districts. Faced with the risk that "the district court calendars throughout the country could well have broken down," Chief Justice Warren appointed a Co-

40 It did proceed with an amendment to add Rule 23(f), permitting immediate appeal (in the discretion of the court of appeals) of decisions granting or denying class certification.

41 These amendment fortified the criteria and procedures regarding court approval of a proposed class-action settlement (whether before or after certification) and added provisions regarding appointment of class counsel in Rule 23(g) and award of attorney fees to class counsel in Rule 23(h). For an examination of this period of rule reform, see Richard Marcus, Revolution v. Evolution in Class Action Reform, 96 N.C. L. Rev. 903 (2018).

42 Edward Sherman, The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible, 82 Tulane L. Rev. 2205 (2008). See also Thomas Willging & Emery Lee, From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after *Ortiz*, 58 U. Kan. L. Rev. 776 (2010).

43 See Richard Marcus, Edward Sherman, Howard Erichson & Andrew Bradt, Complex Litigation: Cases and Materials on Advanced Civil Procedure 124 (7th ed. 2021): "In 1968, Congress approved the statue authorizing MDL by unanimous consent and President Johnson signed it with virtually no fanfare."

ordinating Committee of judges to oversee and guide the litigation, and all of the cases were settled by the end of 1966.[44]

The statute created a new body in the federal judiciary – the Judicial Panel on Multidistrict Litigation, composed of seven circuit or district judges from around the country, no more than one from any of the country's 13 judicial circuits.[45] This Panel could transfer cases involving "common questions of fact" to a single judge (selected by the Panel) without regard to ordinary limitations on personal jurisdiction or venue.[46] That judge then could conduct "coordinated or consolidated pretrial proceedings," but unless the cases are fully resolved before the MDL transferee judge the Panel was to remand them to their original districts "at the conclusion of such pretrial proceedings."[47] The Panel did not exercise any authority over the conduct of the transferred cases, however, and its transfer orders are not subject to appellate review.[48]

Congress early approached the Panel's transfer power somewhat diffidently. An early proposal was that the MDL transferee judge be limited to regulating discovery, perhaps to avoid overreaching by this judge.[49] But that limitation was not included in the final statute, in part because the scope of discovery could depend heavily on rulings on motions to dismiss claims or defenses, or for summary judgment with regard to them. If the transferee judge could not make such rulings, that might significantly curtail the judge's ability to regulate and limit discovery. But the statute did somewhat curtail the Panel's authority. Not only could it transfer cases only for "pretrial" proceedings (rather than for trial), it could not transfer any action brought by the United States making a claim under the antitrust laws,[50] though it could otherwise transfer some other antitrust actions for both pretrial and trial.[51]

Though the MER/29 litigation[52] involved an early attempt (before the statute's adoption) to use the coordinating effort in a mass tort setting, MDL grew prominent in the 1970s and 1980s mainly in relation to antitrust and securities fraud litigation. This is not to say the MDL was unimportant, but at least it was overlooked. As Professor Resnik said in 1991, MDL had been something of a "sleeper" while mass

44 See id. at 124–25.

45 See 28 U.S.C. § 1407(d).

46 See 28 U.S.C. § 1407(b).

47 See 28 U.S.C. § 1407(a).

48 See 28 U.S.C. § 1407(e).

49 See Roger Trangsrud, Transfer Alternatives in Mass Tort Litigation, 70 Cornell L. Rev. 779, 807 (1985) ("Congress intended that any power of the transferee judge to make legal rulings be an adjunct to the discovery process, a practical necessity to factual discovery.").

50 See 28 U.S.C. § 1407(g).

51 See 28 U.S.C. § 1407(h) (regarding any action brought under section 4C of the Clayton Act, which authorizes private antitrust actions by parties injured by a violation of the antitrust laws, the sort of claims made in the Electrical Equipment cases that prompted the MDL experiment).

52 See supra text accompanying note 17.

tort class actions were causing great controversy.[53] Not until 1985 was it featured in a law school casebook.[54] As late as 2004, a state bar journal article in Maine implied that most lawyers in that state had never even heard of the Panel.[55]

But by then MDL had surely grown in importance, and it held the promise of becoming a vehicle for resolution of increasingly frequent dispersed litigation in the US.[56] Whether or not Congress assumed most cases would return to their "home" districts, rather early on it was clear that was not happening. Thus, in 1978 a judge who was a member of the Panel reported in an article that only about 5 % of transferred cases were ever returned to their originating districts.[57] Not only could transferee judges resolve claims by deciding motions to dismiss or for summary judgment, they also could press the parties toward settlement. By the 1980s, the "ADR Movement" had gained momentum as an adjunct to more general judicial management of civil litigation, so that cases not resolved by pretrial merits motions might nevertheless end in the transferor court.

Moreover, transferee judges themselves might regard getting cases settled as their objective. In 2006, a district judge noted in a reported decision that "[i]t is almost a point of honor among transferee judges. .. that cases so transferred shall be settled rather than sent back to their home courts for trial."[58] A decade later, another judge told an academic researcher that "[i]t's the culture of transferee courts. You have failed if you transfer it back."[59] In some cases, the "threat" by the transferee to recommend that the Panel remand cases might itself be a stimulus to settlement.

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53 Judith Resnik, From "Cases" to "Litigation," 54 Law & Contemp. Probs. 5, 47 (Summer 1991).

54 See Richard Marcus & Edward Sherman, Complex Litigation: Cases and Materials on Advanced Civil Procedure 210–32 (section of Chp. III addressing "Transfer Under Multidistrict Litigation Procedures" (1st ed. 1985)). In the seventh edition, published in 2021, multidistrict litigation coverage has expanded to become a new chapter 4.

55 See Gregory Hansel, Extreme Litigation: An Interview With Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation, 2 Maine Bar J. 16, 16 (2004): 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 that your case is 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. Who is this court? How and why can it transfer tens of thousands of perfectly well-situated federal lawsuits to new districts?.

56 For discussion, see Richard Marcus, Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power, 82 Tulane L. Rev. 2245 (2008).

57 See Stanley Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 583 (1978).

58 DeLaventura v. Columbia Acorn Trust, 417 F.Supp.2d 147, 152 (D. Mass. 2006).

59 Abbe Gluck, Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure, 165 U. Pa. L. Rev. 1669, 1673 (2017) (quoting an unidentified judge).

Meanwhile, with the advent of the 21st century, the number of individual cases subject to Panel transfer orders began to escalate. During the 20th century, these orders were relatively infrequent and received little notice; recall the 2004 Maine state bar article assuming readers had never even heard of the Panel.[60] But gradually, and then more rapidly, the cache of transferred actions increased. Some on the plaintiff side may have come to assume the Panel would always centralize product liability cases. By 2010, a plaintiff-side lawyer was complaining about "the Panel's new reluctance to transfer products liability cases," which she said left the plaintiff lawyer "out on your own."[61]

There certainly is no question that centralization by the Panel came to be very important. By 2021, Dean Klonoff recognized that "the success or failure of an entire category of litigation may turn on whether the cases are centralized into an MDL."[62] No longer was MDL a secret. Instead it rapidly became a new *cause celebre* from various perspectives. We turn to that now.

IV. The Reaction to the Emergence of MDL

The MDL developments in the early 21st century have prompted substantial responses from two quarters, working (it seems) somewhat at cross-purposes.

One source is the American legal academic community. From paying no attention to MDL for decades, American academics somewhat suddenly became enamored of it as a topic for research and writing, perhaps even somewhat to the exclusion of class actions, which had long been a major focus.

Actually, the semi-academic focus on MDL might be traced somewhat to the mid 1990s. During that decade, the American Law Institute pursued its Complex Litigation Project, which ended up focusing on consolidation as a major cure to mass tort (and other complex litigation) ills.[63] This project, somewhat prompted by the asbestos litigation challenges faced by American courts, hit on consolidation of such cases before a single judge as a good way to overcome these obstacles. It even recommended combining cases from federal court with cases in state court, possibly even before a state court judge. That would require the creation of what one might call a "super MDL Panel" to assign such cases, something Congress could probably do but did not do. More recently, the ALI has sponsored a Project on Aggregate Litigation[64] focusing on both class actions and multidistrict consolidation. This set of proposals has found some judicial adherents, but has not produced formal legislative or rulemaking action.

American legal academics have, however, begun to make up the relative slack that characterized the first four decades of the MDL Panel's existence. Perhaps the most

60 See supra note 55.

61 Leslie O'Leary, Out on Your Own, Trial Mag., Nov., 2010, at 36.

62 Robert Klonoff, The Judicial Panel on Multidistrict Litigation: The Virtues of Unfettered Discretion, 89 U.M.K.C. L. Rev. 1003, 1005 (2021).

63 American Law Institute, Complex Litigation Project (1994).

64 American Law Institute, Principles of Aggregate Litigation (2010).

prominent example of that academic reaction is Professor Burch. Beginning around a decade ago, she undertook a very thorough examination of MDL proceedings, particularly in mass tort cases. In 2017, she published a Cambridge University Press book entitled *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation*.[65] That same year, with a co-author, she published an article entitled *Repeat Players in Multidistrict Litigation: The Social Network*,[66] challenging the so-called "insiders" control of these proceedings. In 2021, together with Professor Gluck of Yale, she published an article entitled *MDL Revolution*.[67] More recently, she has published an article entitled *Justice in Multidistrict Litigation: Voices From the Crowd*.[68] This article reported on the results of a survey of MDL claimants, focusing particularly on their satisfaction with the way they were treated by their lawyers and the judges in those proceedings.

Among academics, there has seemed to be an undercurrent of suspicion that the Panel had gone beyond the intentions of the framers of the statute (and of Congress, to the extent it had clear intentions). But recent and very thorough research by Professor Bradt shows that – at least as to what the framers were saying to one another – the current use of MDL is not a surprise development.[69] He recognizes that "it is fair to say that MDL has exploded,"[70] but not that this explosion contradicts the intentions of the judges who designed the statute. To the contrary:

> What stands out most from the drafters' papers is that they did not intend the role of the MDL statute, or the powers it confers on judges, to be modest. Nor did they intend its use to be exceptional. Quite the opposite is true. The drafters believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way.[71]

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65 Elizabeth Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation (Cambridge U. Press 2017).

66 Elizabeth Burch & Margaret Williams, Repeat Players in Multidistrict Litigation, 102 Cornell L. Rev. 1445 (2017).

67 Abbe Gluck & Elizabeth Burch, MDL Revolution, 96 N.Y. U. L. Rev. 1 (2021).

68 Elizabeth Burch & Margaret Williams, Justice in Multidistrict Litigation, 107 Cornell L. Rev. 1835 (2022). For a skeptical review of this article, see Lynn Baker & Andrew Bradt, Anecdotes and Data in Search for Truth About Multidistrict Litigation, 107 Cornell L. Rev. Online 249 (2022). Professors Baker and Bradt emphasize that the survey received a minuscule response rate and also suffered from selection bias because outreach to claimants appeared to encourage them to bad experiences. They urge that "Burch and Williams go on to make various broad and serious allegations about MDL more generally based solely on the reports of their limited group of survey respondents," and conclude that "their data cannot support their conclusions." Id. at 250–51.

69 See Andrew Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831 (2017).

70 Id. at 845.

71 Id. at 839.

True, the drafters may not have broadly publicized their expectations, and Congress may not have appreciated the potential impact of the legislation it endorsed unanimously more than 50 years ago (long before Professor Bradt did his research), but there have been a number of other fairly radical changes in federal litigation in the last half century (including the class action) so the emergence of MDL as what the framers actually expected need not be viewed as unique.

The new focus on MDL proceedings is hardly limited to a few academics, however. The American Bar Association published a book entitled *The Rising Behemoth: Multidistrict and Mass Tort Litigation in the United States* in 2020.[72] And other academics have raised other questions about the way in which such proceedings are conducted. Some of these articles question what they regard as "ad hoc procedure" developed by judges and tailored to the specifics of the MDL proceedings before them,[73] and liken the actions of these judges to what governmental agencies do in managing public benefits programs.[74]

A significant academic contention is that plaintiff-side lawyers – often appointed as "leadership counsel" by judges presiding over MDL proceedings – have reached "back room deals" with defendants that benefit them at the expense of plaintiffs before the court. In a sense, this resembles the "reverse auction" concern in putative class actions[75] who might be tempted to agree to a cheap settlement in order to secure a handsome attorney fee award.

For some of these academics, the sensible solution is to emulate the class action more fully. In MDL proceedings – as in class actions – they urged that the court should have the authority to approve any proposed settlement.[76] In addition, the court should have final word over attorney fee awards to plaintiff counsel[77] and a rule should set criteria for appointment of leadership counsel.[78] For example, Professor Mullenix observed: "The non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation."[79]

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72 Douglas Smith, The Rising Behemoth: Multidistrict and Mass Tort Litigation in the United States (ABA 2020).

73 See Pamela Bookman & David Noll, Ad Hoc Procedure, 92 N.Y.U. L. Rev. 767 (2017).

74 David Noll, MDL as Public Administration, 118 Mich. L. Rev. 403 (2019).

75 See supra note 33.

76 See Fed. R. Civ. P. 23(e) (describing criteria and procedures for judicial approval of proposed class-action settlements).

77 See Fed. R. Civ. P. 23(h) (addressing attorney fee awards to class counsel).

78 See Fed. R. Civ. P. 23(g) (setting criteria for appointment of class counsel).

79 Linda Mullenix, Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act, 37 Rev. of Lit. 129, 135 (2018).

Though it may be true that class actions resemble governmental agency action, added guardrails could provide value.[80] In sum, the main academic criticism has been that claimants – usually individual plaintiffs who have hired lawyers and filed lawsuits – are getting short shrift because they are "trapped" in the MDL proceeding.

And there is a possibly telling contrast with class actions. In class actions for money damages under Rule 23(b)(3), class members are entitled to opt out. True, they have to take action to avoid being bound, but at least they can do so. Plaintiffs in MDL proceedings have no such right. To the contrary, ordinarily they have hired their own lawyers and filed their own lawsuits, only to find that the Panel has sent the cases to a judge who may be far away and likely is burdened with a large number of similar cases. But they have no right to insist on having their cases sent back to their home jurisdictions. Even the MDL transferee judge can't undo a transfer by the Panel; only the Panel can do so.

These plaintiff-side concerns might be illustrated by an early mass tort transfer ordered by the Panel, in asbestos litigation. The Panel had already rejected five motions to centralize asbestos personal injury litigation in the federal courts when in 1991 it finally entered such a transfer order.[81] Finally, the Panel decided transfer should be ordered. It is probably not coincidental that the Judicial Conference that same year asked the rulemakers to consider changes to Rule 23 to deal with mass torts.[82] And the Panel took the step with keen appreciation that it might meet resistance, promising plaintiffs that the transfer would not "result in their actions entering some black hole never to be seen again."[83]

It might be said that the defense side reactions to the growth of MDL (somewhat reflected in the ABA book cited above) point in exactly the opposite direction. Although the academic reaction largely focused on the risk that worthy plaintiff claims might be compromised for a song, the defense side critique was that MDL mass tort proceedings had subjected defendants to huge liabilities to claimants who had no

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80 On that score, it is worth noting that Professor Kaplan, then Reporter of the Advisory Committee, encountered such reactions in the 1960s. See Benjamin Kaplan, A Prefatory Note, 10 Boston Coll. Ind. & Com. L. Rev. 497, 500 (1969):

> There are some who are repelled by these massive, complex, unconventional lawsuits because they call for so much judicial initiative and management. We hear talk that it all belongs not to the courts but to administrative agencies. But by hypothesis we are dealing with cases that are not handled by existing agencies, and I do not myself see any subversion of judicial process here but rather a fine opportunity for its accommodation to new challenges of the times. The class action takes its place in a larger search for pliant and sensitive procedures. I confess that I am exhilarated, not depressed, by experimentation which spies out carefully the furthest possibilities of the new Rule.

A similar argument could be made for creative procedures by MDL transferee judges.

81 In re Asbestos Products Liability Litigation, 771 F. Supp. 415 (J.P.M.L. 1991).

82 See supra note 38.

83 771 F. Supp. at 127 n. 29.

valid claims at all but instead had been recruited by modern-day and Internet-enabled "ambulance chasers."

In this telling, it is the defendants who are the big losers, particularly pharmaceutical companies and makers of medical products such as replacement body parts like hips or implants. Were they facing individual suits, these defendants urge, they would be entitled to demand that plaintiffs initially disclose some evidence they intend to use to prove their cases[84] and then to pursue discovery from plaintiffs and third parties (such as plaintiffs' doctors) regarding the validity of the claims and the extent of claimed injuries. In the MDL setting, however, defendants contended that they were too often prevented from doing individual discovery. In part, that might be due to the transferee court's emphasis on "common" issues, which might mainly focus on the potential grounds for defendants' liability rather than the circumstances of individual plaintiffs. And there is sometimes an argument that discovery about individual plaintiffs should be deferred until cases were remanded to the originating court and set for trial.

Meanwhile, some defendants contended that some transferee judges held them "hostage" in the MDL proceedings, almost trying to pressure them into a settlement of most or all the claims involved. Defendants said that they were unable to evaluate claims individually and consequently also unable to discuss aggregate settlements, but that judges pressed them to make offers anyway. Often, they said, they made motions to dismiss or for summary judgment that should have been granted as to specific claims or all the claims as a group. Since these claims were often based on state tort law, defendants might raise pre-emption, relying on federal approval of marketing the medical products involved. Similarly, they might urge dismissal on the ground that existing tort law did not support a claim for fear of future harm due to use of a medical product when plaintiffs did not allege any present injury. Another recurrent issue was whether plaintiffs' causation experts – essential to show that plaintiffs' medical conditions were caused by defendants' products – provided sufficiently reliable evidence to be admissible at trial.[85] If the court ruled the expert testimony was not sufficiently reliable to be admissible, that could provide a ground for summary judgment against all the claims.

Given these circumstances, defendants also contended that some plaintiff lawyers regularly file numerous claims without screening them to make sure they had at least surface validity. In many instances, they argued, these lawyers relied on "claims generators" who used the Internet or phone outreach to solicit claims, and then "sold" these claims to the lawyers. In a significant percentage of instances, defendants argued, it ultimately turned out that many of the claimants never had used the product in question, or they had never suffered the harm the product allegedly

84 See Fed. R. Civ. P. 26(a)(1)(A) (requiring parties to disclose at the outset the witnesses and document on which they will rely to prove their claims or defenses).

85 See Fed. R. Evid. 702 (conditioning admission of expert opinion testimony on a judicial finding that it is reliable).

caused. According to defendants, these lawyers were not complying with the rules' requirement that they make claims only after verifying that they were supported by existing evidence or likely to be provable after an opportunity for discovery.[86]

Many plaintiff lawyers responded that they do carefully scrutinize claims before they file them, emphasizing that they ordinarily work on a contingency fee basis, and do not get paid (or get their costs reimbursed) unless the claim produces a judgment or settlement. Defense representatives agreed that some plaintiff lawyers did a good job and had the facts at their command when settlement discussions occurred, and indeed that defendants might offer better deals to the clients of these lawyers than what some called the "1–800" lawyers.

But there certainly was some reason to suspect that some lawyers were making claims without such rigorous review.[87] And it is clear that at least some lawyers use online and telephonic outreach to attract clients. For example, consider a book entitled *Mass Torts, A to Z*, distributed free of charge at plaintiff lawyer conventions.[88] The book includes a series of articles by plaintiff lawyers. The introduction to the book. The introduction to the book lauds the author teaching this lawyer "how to turn garbage into gold" and "how to sign up cases nationally with efficiency, substance, and profitability."[89] Another contribution, entitled "Pay Per call," refers to "a case that costs $100 per lead or call," but adds that "if you are buying Roundup and 3M [both subjects of major MDL proceedings], you should not expect the same cost per case or lead."[90] Other chapters in this book strike similar themes.[91] More recently, it has been reported that lawyers seeking clients to make claims about tain-

86 See Fed. R. Civ. P. 11(b)((3) (providing that by signing a complaint a lawyer is certifying that, "after an inquiry reasonable under the circumstances," the lawyer avers that the claim "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

87 Francesca Mari, The Lawyer Whose Clients Didn't Exist, The Atlantic, May 2020, provided an in-depth report on claims involved in the MDL proceeding growing out of the explosion of the Deepwater Horizon oil rig in the Gulf of Mexico.

88 Edward Lake, Mass Torts, A to Z (Game Changer Publishing).

89 Harlan Schillinger, introduction, in Mass Torts, A to Z, supra note 88, at 1–2.

90 Adam Warren, Cost Per Call,In Mass Torts, A to Z, supra note 88, at 9.

91 See, e.g., Scott Fuentes (Partner, Local Conversion Center), Call Center Outsource in the U.S., id at 38:
Having a call center that works with more than 300 law firms and over two dozen advertising firms gave us tremendous insight in the impact of the pandemic on the legal industry.. .. . In the tort world, we just finished up a series of large mass tort campaigns, including Opioids and Boy Scout Abuse. Then the pandemic hit. Some firms struggled to adjust while others flourished. Ultimately many firms needed to outsource their calls to a center like ours and for good reason.
Jared Johnson, Pay Per Click, id. at 71, offers the following: "Google has ranked legal advertising as one of the top three most expensive clicks year after year, with per-click costs exceeding $500+. With excalating costs, you cannot afford to make a mistakes, as mistakes can cost millions." Steven Gacovino, Single Event/Mass Torts/Class Action, id. at 87 adds the following (with emphasis added):

ted water at Camp Lejeune, a US Marine base, have spent more than $145 million on TV and social media advertising.[92]

Objecting defendants argued that they were deprived of the protections the procedure rules provide as transferee judges adapted conventional procedures for individual litigation to the MDL context. Academics have also criticized this "ad hoc" procedure design.[93] But from the perspective of some defendants this behavior has enabled transferee judges to deprive them of the protections the rules would provide in ordinary litigation. At least some courts have rejected this argument. "MDLs are not some kind of border country, where the rules are few and the law rarely makes an appearance.. .. The rule of law applies in multidistrict litigation under 28 U.S.C. § 1407 just as it does in any individual case."[94] But the ordinary rules that require a "final judgment" before appellate review can be obtained[95] meant that they had no way of testing denials by transferee judges of motions to dismiss or for summary judgment before giving serious thought to possible settlement.

Meanwhile, it seems clear that both sides engage in considerable jockeying about whether to seek or support MDL transfer. For example, a quarter century ago a leading defense-side lawyer outlined considerations a defendant facing an imminent burst of related litigation against it might take into account in deciding whether to pursue MDL status. A defendant might want to initiate MDL transfer proceedings simply to gain time to "organize a defense, negotiate a global settlement or file a bankruptcy proceeding."[96] Defendants may also consider it desirable to slow down the federal-court cases with an MDL petition while state-court cases move forward

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> [M]ass tort advertising did well because people were captive [during the pandemic] home watching TV, on their social media, on their computers and we were able to sustain through the most difficult part of the pandemic. As such, *mass tort procurement has gone on virtually uninterrupted* and, in fact, during the worst part of the pandemic potential clients were more attentive to commercials.

92 See Roy Strom, Camp Lejeune Ads Surge Amid "Wild West" of Legal Finace, Tech, Bloomberg Law News, Jan. 30, 2023.

93 See supra note 73.

94 In re National Prescription Opiate Litigation, 956 F.3d 838, 841–44 (6th Cir. 2020). The ruling in the case – granting a writ of mandamus, an extraordinary appellate remedy – overturned the district court's decision to permit the plaintiffs to file another amended complaint. Ordinarily, under the ordinary rules, such a decision would be left up to the district court. So one might argue that this decision actually employed a more restrictive attitude about procedure because of the MDL nature of the proceedings, but it is also worth emphasizing that this MDL is truly exceptional.

95 See 28 U.S.C. § 1291.

96 Mark Hermann, To MDL or Not to MDL? A Defense Perspective, 24 Litigation Magazine 43 (Summer 1998).

if those state courts appear to be more congenial places to litigate.[97] But defendants may want to oppose transfer for strategic reasons.[98]

Plaintiffs can also make strategic decisions about whether to favor or oppose centralization. Some may regard MDL transfer as critical to "evening the playing field" with large defendants.[99] And it surely must occur that plaintiff counsel can be influenced by their expectations about whether they will get prominent roles as "leadership counsel" in the combined proceedings. Lawyers who do not want to be in an MDL proceeding may, for example, file their cases in state courts and arrange to prevent removal to federal court (which would be followed by transfer to the MDL transferee court) by making sure there are nondiverse defendants[100] or sue defendants in their home jurisdictions.[101]

So even though one can say that "[c]onsolidation holds out a bland, somewhat technocratic, uncontroversial face to the world,"[102] MDL consolidation has, in the 21st century become intensely controversial. That controversy has, in turn, prompted calls for statutory or rule changes to cure perceived drawbacks of present MDL practices, to which we now turn.

V. The Push for Statutory or Rule Reform

The Appendix to this Article sets out the rule proposal that will be published for public comment beginning in August 2023. This Section chronicles its emergence in response to the contending concerns outlined in the prior Section. It is based on the author's extensive involvement in this process over a five year period, and largely draws from the official records of the Administrative Office of the United States

97 Id.

98 See Lori McGroder & Iain Kennedy, When Coordination Isn't Key: Why and How to oppose MDL Centralization, Bloomberg Class Action Report, June 8, 2016, offering the following considerations:

(a) The "Field of Dreams" problem. ("If you build it, they will come"): The creation of an MDL may prompt a surge of new cases. An example is a pharmaceutical litigation in which only about 50 actions had been filed, but a year after MDL centralization more than 2,300 were on file.

(b) Avoiding MDL may exert downward pressure on total settlement figures.. .. "Fragmented cases may allow a defendant to better leverage its relative size and resources."

(c) Having cases in many courts many courts may allow the defendant more latitude to strategically select cases to push to trial, thus creating momentum in its favor, and to control the pace of discovery.

99 See note 61 supra (regarding a plaintiff lawyer left "out on her own" when the Panel denied a motion to transfer).

100 Under 28 U.S.C. § 1332(a) a case cannot be in federal court on grounds of diversity – often the only ground for federal-court jurisdiction in mass tort litigation – if there are co-citizens on both sides of the case, even if there is diversity of citizenship between most plaintiffs and most defendants.

101 See 28 U.S.C. § 1441(b)(2) (forbidding removal of a case that can be in federal court under § 1332(a) if "any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought").

102 Richard Marcus, Confronting the Consolidation Conundrum, 1995 B.Y.U. l. Rev. 879, 887.

Courts, where great detail can be found in agenda books and minutes of the various Advisory Committee meetings described below.[103]

An opening shot in the reform effort came in early 2017. The Fairness in Class Action and furthering Asbestos Claim Transparency Act of 2017[104] did indeed address class action practice.[105] In its section 105, however, it also included "Multidistrict Litigation Proceedings Procedures" as amendments to the Multidistrict Litigation Act, adding new subsections to that statute that addressed topics that also became the subject of rules proposals:

> *Early "vetting" of claims*: A proposed new section 1407(i) would require that any plaintiff "seeking redress for personal injury" make a submission within 45 days "to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury." Within 90 days of that submission, the transferee judge would have to decide whether the submission was sufficient, and to dismiss with prejudice unless plaintiff tendered a sufficient submission within 30 days.
>
> *Immediate appellate review of transferee orders*: A new section 1407(k)(1) would replace the ordinary final judgment rule and require courts of appeals to accept immediate appeal from any order that "may materially advance the ultimate termination of one or more civil actions in the proceedings."

These provisions could have resulted in considerable burdens for the federal courts. The "vetting" provision called for the judge to review and evaluate claimant submissions *sua sponte*, without the benefit of any defense arguments about the adequacy of the submissions. And in MDL proceedings involving hundreds or thousands of claims, adhering to the 90-day requirement (a deadline the bill said "shall not be extended") could be a huge burden, particularly for a transferee district judge also carrying a normal civil and criminal caseload. The appellate review provision, in turn, would apply to any order in any individual action and call for the appellate court to determine whether immediate review if that might materially advance the ultimate termination of that one action.[106]

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103 For any who want background, the easiest way to get more information is to visit the official website – www.uscourts.gov – click on "Rules and Policies" and then on "Records of the Rules Committees," which will connect with both agenda books and minutes of Advisory Committee meetings. All one need do is pick the pertinent meeting by meeting date.

104 H.R. 985, 115th Cong., 1st Sess. (March 13, 2017).

105 See id. § 103.

106 It is worth noting that there is already a statute empowering the court of appeals to accept an interlocutory appeal when doing so could materially advance the ultimate determination of the case. See 28 U.S.C. § 1292(b). But that statute authorizes such early appellate review only if the district court certifies that immediate resolution of the issue would materially advance resolution of the case, and that the issue is a pure issue of law on which there is good reason for uncertainty about whether the district court's decision was correct.

This bill was rapidly passed by the House of Representatives in March, 2017, but the Senate did not take action on it and the bill lapsed upon the seating of a new Congress in January 2019.

Proposals were also made to the rulemakers in 2017, and those prompted the appointment of an MDL Subcommittee announced during the Advisory Committee's Nov. 4, 2017, meeting.[107] Prominent features of the rules proposals resembled the bill before Congress. Based on assertions that often 30 % to 40 % of the claims included in MDL mass tort proceedings proved unsupportable, the rule proposal sought to apply particularized pleading requirements to such claims at the outset. In addition (and contrary to the general joinder provisions of Rule 20)[108] the proposal urged that each personal injury plaintiff must file his or her own complaint. A stated reason for this requirement was to require each plaintiff to pay a full filing fee. As in the bill before Congress, there would be a relatively immediate requirement that the claimant promptly present "significant evidentiary support" showing exposure to the allegedly harmful product and harm of the sort it allegedly caused.

From this beginning, the MDL Subcommittee embarked on a multi-year triage effort that involved literally dozens of meetings and conferences that also produced research results included in the agenda books for Advisory Committee meetings in 2018.[109] Many of the issues initially proposed for inclusion in the rules were not ultimately pursued. Rather than provide a blow-by-blow description of the evolution of consideration of these issues, it seems preferable to provide background for the current proposal by noting points considered. These points are examined with much greater detail in the pertinent materials accessible via the U.S. courts website.[110]

"*Vetting" or screening claims*: The Advisory Committee early noted the "Field of Dreams" possibility that a Panel transfer order itself could prompt outreach efforts that may produce many claimants who don't actually have viable claims. Federal Judicial Conference (FJC) empirical research showed that in large MDL proceedings there frequently was an order that claimants fill out what came to be known as "plaintiff fact sheets" (PFSs) including information about their use of the subject

107 See agenda book for Nov. 4, 2017, meeting and minutes of that meeting.

108 See Section 1 supra.

109 See agenda books and minutes for Advisory Committee on Civil Rules meetings on April 10, 2018, and Nov. 1, 2018.

110 See particularly agenda book for April 2–3, 2019, meeting at 207–75; agenda book for the Oct. 29, 2019, meeting at 189–223; agenda book for the April 1, 2020, meeting at 145–85; agenda book for the Oct. 16, 2020, meeting at 151–89; agenda book for the April 23, 2021, meeting at 159–71; agenda book for the March 29, 2022, meeting at 243–65; agenda book for the Oct. 12, 2022, meeting at 172–92; agenda book for the March 28, 2023, meeting at 110–19. Though this listing includes many pages of discussion, the point is not so much to dwell on the specifics of each issue as to follow the evolution of the rulemaking project. The description in text is a somewhat subjective overview from one involved as Reporter from the outset; the official filings control and the author's memory does not.

product and the alleged consequences for them of use of that product.[111] But trying to draft a rule that would suitably address the concerns with unfounded claims presented numerous substantial challenges:

(1) *Contents of required disclosure*: The bill before Congress called for "evidentiary support." Whether that should be required in a rule might lead to debates about whether anything is "evidentiary" if it is not admissible under the Federal Rules of Evidence. Given the complexity of those evidence rules, that could complicate application of a disclosure requirement.

More basically, whatever the nature of the required showing, it would seem to have to be tailored to the specific MDL proceeding. On this score, the FJC research showed that though they were used in the great majority of large MDL proceedings, such PFSs varied with the subject matter of the suits. A one-size-fits-all directive seemed counter-productive. Moreover, the FJC research indicated that the drafting of these tailored PFS orders took considerably more time than the bill before Congress contemplated for the "vetting" it commanded. A further complication was that sometimes these efforts also produced an order for defendant fact sheets (DFSs) when defendants had information important at the outset, such a lot or batch numbers for pharmaceutical products or user lists for implanted medical devices they had manufactured. But including DFSs in a rule for all MDL proceedings would present even greater difficulties.

(2) *Types of claims covered*: As explained above, during its first decades the MDL procedure was most prominent in "commercial" litigation like antitrust suits or securities fraud cases. The bill before Congress called for disclosures of specifics only in actions for "personal injury." Though that term might be easy to apply in many cases, in others it might prove difficult. For example, consider an MDL about a data breach involving medical records. Could plaintiffs claim emotional distress damages? Is that a personal injury? Other sorts of claims raised in MDL proceedings might present such difficulties. Consider, for example, the recent litigation on behalf of adolescent users of social media products claiming that Facebook, Google, and other providers of those products had designed them to "addict" teenagers, thereby causing harm.[112] Would these be personal injury claims? What sort of specifics would have to be provided about individual teenage users of these products?

(3) *Size of MDL proceeding*: It quickly became clear that although there are usually about two dozen "mega" MDLs with more than 1,000 claims pending at any given time, most MDLs do not involve so many claims. Should a rule set a numerical threshold to trigger this disclosure requirement? What should that number be? Should it focus on the number of actions or the number of plaintiffs? Given reports that a Panel transfer order may prompt additional filings (the "Field of Dreams"

111 See Margaret Williams, Emery Lee III & Jason Cantone, Plaintiff Fact Sheets in Multidistrict Litigation: Products Liability Proceedings 2008–2018 (March 2019).

112 See In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, M.D.L. No. 3047 (J.P.M.L., Oct. 6, 2022) (centralizing cases before the Northern District of California).

issues), should that numerical requirement be applied at the time the Panel directs transfer, or should it take account of additional filings thereafter? If it does take account of additional filings, does the disclosure requirement apply to the original cases or only the new ones? Additional complications could result when the court and the parties create a "registry" of claims on behalf of potential plaintiffs who have not yet sued, as has been done in some courts. Should the count include those potential claims held in abeyance?

(4) *Enforcement*: The bill before Congress required the judge to dismiss without prejudice, even in the absence of a defense motion if the initial submission was found inadequate and the plaintiff did not cure it within 30 days of a court finding of inadequacy. It also forbade any extension of the time to complete these tasks (either for the court or the plaintiff). Existing PFS practice includes the possibility that defendants may call deficient responses to the plaintiff's attention, and then seek dismissal from the court if the deficiencies are not cured, and such motions have been granted.[113] But making dismissal with prejudice mandatory whenever a deadline was missed seemed out of step with other rules.[114]

(5) *The "census" alternative*: During the time the MDL Subcommittee was considering these issues, several MDL transferee courts had experimented with an abbreviated version of a PFS sometimes referred to as a "census" form.[115] Experience with these efforts suggested that a more flexible approach could be used.

Ultimately, the decision was not to propose specific disclosure requirements but instead to suggest that the court direct the parties to propose a method for exchanging information about the claims and defenses.[116]

Expanded interlocutory review: The argument for providing appellate review of certain orders before final judgment emphasizes the crucial importance of some pretrial rulings that in MDL proceedings may assume much greater importance than in ordina-

113 For an illustration, see In re Taxotere (Docetaxel) Products Liability Litigation, 966 F.3d 351 (5th Cir. 2020). In that MDL, defendants could file a "notice of deficiency" in an electronic database, and then serve a "notice of non-compliance" on those who failed to comply and, if there were continued failure, add the plaintiff's name to a "call docket" bringing the case before the district court. The court in this instance gave the plaintiff in question additional time she did not fully comply and the court then dismissed her claim with prejudice. On appeal, plaintiff claimed she was "blindsided" by the court's dismissal order. The court of appeals upheld the dismissal, stressing that plaintiff had abundant opportunities to comply and also that an MDL transferee court must have authority to establish and enforce a "firm" cutoff date.

114 Compare Fed. R. Civ. P. 37(a)(1), which permits a motion to compel compliance with discovery only after the moving party first confers with the deficient party in an effort to resolve the matter without court involvement. Then, only if the court orders discovery and the other side does not comply with the order can the aggrieved party seek dismissal with prejudice under Rule 37(b). True, the situations are not identical since a PFS usually is embodied in a court order, but the "slack" provided by Rule 37(a) contrasts with required dismissal whenever a plaintiff fails within 30 days to cure a deficiency.

115 It may be worth noting that Judge Robin Rosenberg (S.D. Fla.) is one of those judges, and served as Chair of the MDL Subcommittee as it was winding up its work. She is now Chair of the entire Advisory Committee.

116 See proposed Rule 16.1(c)(4) in the Appendix.

ry litigation because the stakes are so high in large MDL proceedings. In one sense, similar reasons explained the 1998 addition to the class action rule of discretionary interlocutory review of decisions granting or denying class certification. Proponents argued that similar discretionary review should be available for rulings of the MDL transferee court. But these arguments raised significant counter-arguments that were discussed in detail over the years of the work of the MDL Subcommittee. Here are some:

(1) *Mandatory or discretionary*: The bill before Congress appeared to make review mandatory. The class-certification review in Rule 23(f) is explicitly subject to the discretion of the court of appeals. Making review mandatory would not be entirely unprecedented. There is, for example, a right to appeal immediately from the grant or denial of an injunction.[117] But one could say the grant or denial of an injunction can cause immediate harm, while pretrial rulings in MDL proceedings ordinarily would mean that defendants that wanted appellate review would have to wait until later to get it.

(2) *Limiting immediate review to certain types of orders*: The bill before Congress called for mandatory review whenever that review might "materially advance the ultimate termination of one or more actions" before the transferee judge. The range of rulings that might fit this description – possibly even including discovery rulings or sanctions – is very broad. Before the MDL Subcommittee, the proponents of amendment focused on "cross-cutting issues," i.e. issues affecting many cases. Whether the court of appeals – even granted discretion to decide whether to review – could readily determine on its own whether the issue raised bore on only one or many (how many?) of the cases before the district court could pose a challenge.

Proponents of amendment urged that paradigm instances included pre-emption arguments that state tort law could not provide remedies for marketing devices approved by federal regulators, rulings on jurisdiction, and rulings on the admissibility of expert causation testimony would be paradigms of the sorts of rulings that should be subject to immediate review. But a review of actual efforts to obtain appellate review through existing avenues for appellate review indicated that in fact defendants have sought review of rulings on a much broader array of motions.

Here a contrast to the rule provision for discretionary appellate review of class-certification decisions seems pertinent. Though such orders may be entered in cases involves claims of many types – antitrust, securities fraud, data breach, discrimination, environmental damages, etc. – the basic question on appeal involves application of the class-action rule to this litigation. The research on interlocutory MDL appeals under existing avenues for interlocutory review showed that these appeals involved a wide variety of pretrial motions and raised a wide array of divergent legal arguments, quite different from the relative consistency of applying the requirements of the class-action rule in different settings.

(3) *Existing avenues provide sufficient flexibility*: A statute already authorizes discretionary appellate review when the district court certifies that an order resolves a pure issue of law, that the issue of law is uncertain enough to warrant worries that the district court's ruling would be overturned, and that getting that question

117 See 28 U.S.C. § 1292(a)(1).

answered promptly would materially advance the ultimate termination of the action.[118] Under this statute, the district court can at least apprize the appellate court about why immediate review is needed. Research indicated that this appeal route was rarely used in MDL proceedings. Proponents of amendment urged that they did not want to ask transferee judges to certify for immediate review for fear of antagonizing them. It was not clear why shutting the transferee judge out of the decision whether to permit an immediate appeal would not also raise risks of generating judicial antagonism.

(4) *Interlocutory review could cause major delays, particularly in certain circuits*: Permitting immediate review would not automatically stay proceedings in the district court. But particularly when the argument is that resolution of the issue presented on appeal might resolve all or most of what was pending before the district court (cross-cutting motions) it could often make no sense for costly litigation nevertheless to proceed in the district court. And in at least some circuits, the lag time to get an appellate decision may be two years or more. Unless there is good reason to expect the court of appeals will find that the district judge was wrong about a legal issue (as the current statute requires the district judge to certify in support of immediate review) the net result may be a major delay for no real purpose. One creative suggestion was that under a new rule the court of appeals could be permitted to grant review only if it ensured "expedited" review. But a rule granting these appeals priority over other appeals (e.g., criminal cases, national security matters, etc.) would seem dubious.

In the end, the MDL Subcommittee reached the conclusion that the case had not been made for expanding routes to interlocutory appellate review, and no provision of that sort appears in the proposed rule presented in the Appendix.

Judicial role in appointing and compensating leadership counsel and in review of proposed settlements: A recurrent point among academic critics of current MDL procedures is that they lack the protections afforded unnamed members of a class. In class actions, the judge must appoint class counsel and the rule specifies criteria for the court to use in making that decision.[119] If a settlement is proposed, the class members must be given notice of the specifics of the settlement and permitted to object to it. The settlement may be effectuated only if the judge finds it fair, reasonable and adequate.[120] If the proposed settlement includes class certification for purposes of effectuating the settlement, class members who do not like the settlement can opt out.[121] For those class members who object rather than opting out, they can appeal approval of the settlement if the judge approves it over their objections.

A number of academics urge that similar features be included in rules for MDL proceedings. Some contend that current MDL practice relies on a "social network"

118 28 U.S.C. § 1292(b)(2).
119 See Fed. R. Civ. P. 23(g).
120 See Fed. R. Civ. P. 23(e).
121 See Fed. R. Civ. P. 23(c)(2)(B).

of lawyers on the plaintiff side who make "back room deals" that mainly benefit them. And surveys of some MDL claimants reveal unhappiness with the performance of their lawyers. So introducing something like the class-action setup in MDL proceedings might serve a valuable purpose.

The MDL Subcommittee gave extended attention to these issues. Selection of leadership counsel can be very important, and leadership counsel sometimes play a major role in settlement negotiations. Careful selection of those lawyers is an important judicial function. Ensuring that they can be compensated for their work in their leadership capacity, but also that they are not over-compensated, is similarly important. A common method has been for the court to create a "common benefit fund" to compensate leadership counsel and direct defendants to deposit a specified portion of each settlement into the fund, which can later be distributed by court order.[122]

Despite these points, the Subcommittee was also acutely aware of the differences between class actions and MDL proceedings. It is true that class members get notice of a proposed settlement and can object. But if the judge approves the settlement over their objections, though they can appeal that approval they are otherwise legally bound by the deal. So in this sense, the appointment power of a judge in a class action creates something like an attorney-client relationship between the appointed lawyer and the class members, even though they have no role in that appointment process. Partly for that reason, the class action rule also says that class counsel owes primary professional obligations to the class members rather than the class representatives who were counsel's original clients.[123] The "clients" – even the class representatives who originally hired the attorney – cannot "fire" class counsel.[124]

MDL proceedings are significantly different.[125] Judicial appointment of leadership counsel does not make them the attorneys of other plaintiffs who have hired other lawyers. Instead, lawyers who represent those other plaintiffs (sometimes called "individually retained plaintiff lawyers – IRPAS) continue to represent them.

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122 It should be noted that use of such common benefit fund orders has generated controversy on occasion. A prominent example is In re Roundup Products Liability Litigation, 544 F.Supp.3d 950 (N.D. Cal. 2021). In that case, the MDL transferee judge entered such an order early in the proceedings, and later reexamined it, providing a warning and invitation to adopt a rule dealing with MDL proceedings (id. at 953):

> The fact that counsel is even requesting such a far-reaching order – a request that has some support from past MDL practice – suggests that courts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gone totally out of control.

123 See Fed. R. Civ. P. 23(g)(4).

124 See Committee Note to 2003 amendments to Rule 23: "The class representatives do not have an unfettered right to 'fire' class counsel."

125 It is true that some cases begun as class actions ultimately are resolved using the class action device, and in this instance there is a certain layering of MDL practices and class-action procedures.

As is true of almost all clients, they can fire their attorneys and hire new ones. The judge cannot force any plaintiff to accept a settlement the judge regards as "fair."[126] And the judge is not in a particularly good position to determine whether a settlement is fair for a given plaintiff; that plaintiff's lawyer is usually better situated. By the same token, the judge cannot "reject" a settlement that a willing plaintiff and defendant want to accept. Though the judge can limit litigation activities by IRPAs such as filing motions and initiating discovery in order to manage the overall proceeding, that does not sever the attorney-client relationship these lawyers have with the clients who hired them.

Given the central importance of settlement in MDL proceedings as in most litigation, the rule proposal takes note of the potential role of counsel and the court in regard to settlement even though it does not empower the court to "approve" or "reject" a proposed settlement. Instead, it invokes the existing authority of judges regarding settlement that applies to all civil litigation.[127] It also calls for care in the selection of leadership counsel if they are appointed and highlights a variety of additional matters experience has shown often assume great importance in MDL proceedings.

Conclusion

After much effort, the proposed solution to developing MDL rules is mainly to emphasize the wide variety of important topics a judge should consider up front at the beginning of MDL proceedings. That is the goal of the Rule 16.1 proposal set forth in the Appendix. It stops short of the solutions proposed by critics of current MDL proceedings. It is not earth-shaking. But it may provide judges and lawyers with a framework to improve the handling of these important litigations. American aggregate litigation is not going to fade away. And "[m]ultidistrict litigation resolves transferred cases at a fraction of the cost of individual litigation."[128] Ideally, if adopted, this proposed rule will prompt improvements. For the present, however, it is not possible to foresee whether the amendment will go forward. The public comment awaits, and only time will tell.

From the perspective of the rest of the world, it is worth noting that the American experience may also offer something to emulate. To take the VW Diesel litigation as an illustration, using MDL procedures the litigation was centralized before the federal district court in San Francisco, leading to a settlement using the class-action device that provided a buy-back remedy to American purchasers of the cars. As reported in the *New York Times*, "Volkswagen owners in the United States will receive about $20,000

126 This point is made clear in the Committee Note to the 2003 amendment to Rule 23: "the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole."

127 See proposed Rule 16.1(c)(1)(C) and 16.1(c)(9) in the Appendix.

128 Jay Tidmarsh & Daniela Peinaldo Welsh, The Future of Multidistrict Litigation, 51 Conn. L. Rev. 769, 789 (2019).

per car as compensation for the company's diesel deception. Volkswagen owners in Europe at most get a software update and a short length of plastic tubing."[129] The EU Commissioner of Industry told a German newspaper that "Volkswagen should voluntarily pay European car owners compensation comparable with that which it will pay U.S. consumers."[130] Perhaps there is something worth emulating here.

APPENDIX

Below is the Rule 16.1 proposal set to go out for public comment in August 2023, with the comment period ending in February 2024. Thereafter decisions will have to be made on whether to go forward with the rule, make changes, or shelve the effort. The proposed rule is accompanied by a Committee Note designed to assist courts and lawyers in using its provisions.

Rule 16.1. Multidistrict Litigation

(a) Initial MDL Management Conference. After the Judicial Panel on Multidistrict Litigation orders the transfer of actions, the transferee court should schedule an initial management conference to develop a management plan for orderly pretrial activity in the MDL proceedings.

(b) Designating Coordinating Counsel for the Conference. The transferee court may designate coordinating counsel to:

(1) assist the court with the conference; and

(2) work with plaintiffs or with defendants to prepare for the conference and prepare any report ordered under Rule 16.1(c).

(c) Preparing a Report for the Conference. The transferee court should order the parties to meet and prepare a report to be submitted to the court before the conference begins. The report must address any matter designated by the court, which may include any matter listed below or in Rule 16. The report may also address any other matter the parties wish to bring to the court's attention.

(1) whether leadership counsel should be appointed, and if so:
   (A) the procedure for selecting them and whether the appointment should be reviewed periodically during the MDL proceedings;
   (B) the structure of leadership counsel, including their responsibilities and authority in conducting pretrial activities;
   (C) their role in settlement activities;
   (D) proposed methods for them to regularly communicate with and report to the court and nonleadership counsel;
   (E) any limits on activity by nonleadership counsel; and
   (F) whether and, if so, when to establish a means for compensating leadership counsel;

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129 Jack Ewing, New Strategy Against VW, N.Y. Times, Aug. 16, 2016, at B1.

130 Robert Weninger, The VW Diesel Emissions Scandal and the Spanish Class Action, 23 Colum. J. Eur. L. 91k, 99 (2016).

(2) identifying any previously entered scheduling or other orders and stating whether they should be vacated or modified;
(3) identifying the principal factual and legal issues likely to be presented in the MDL proceedings;
(4) how and when the parties will exchange information about the factual bases for their claims and defenses;
(5) whether consolidated pleadings should be prepared to account for multiple actions included in the MDL proceedings;
(6) a proposed plan for discovery, including methods to handle it efficiently;
(7) any likely pretrial motions and a plan for addressing them;
(8) a schedule for additional management conferences with the court;
(9) whether the court should consider measures to facilitate settlement of some or all actions before the court, including measures identified in Rule 16(c)(2)(I);
(10) how to manage the filing of new actions in the MDL proceedings;
(11) whether related actions have been filed or are expected to be filed in other courts, and whether to consider possible methods for coordinating with them; and
(12) whether matters should be referred to a magistrate judge or a master.

(d) Initial MDL Management Order. After the conference, the court should enter an initial MDL management order addressing the matters designated under Rule 16.1(c) – and any other matters in the court's discretion. This order controls the MDL proceedings until the court modifies it.

Committee Note

The Multidistrict Litigation Act, 28 U.S.C. § 1407, was adopted in 1968. It empowers the Judicial Panel on Multidistrict Litigation to transfer one or more actions for coordinated or consolidated pretrial proceedings, to promote the just and efficient conduct of such actions. The number of civil actions subject to transfer orders from the Panel has increased significantly since the statute was enacted. In recent years, these actions have accounted for a substantial portion of the federal civil docket. There previously was no reference to multidistrict litigation in the Civil Rules and, thus, the addition of Rule 16.1 is designed to provide a framework for the initial management of MDL proceedings.

Not all MDL proceedings present the type of management challenges this rule addresses. On the other hand, other multiparty litigation that did not result from a Judicial Panel transfer order may present similar management challenges. For example, multiple actions in a single district (sometimes called related cases and assigned by local rule to a single judge) may exhibit characteristics similar to MDL proceedings. In such situations, courts may find it useful to employ procedures similar to those Rule 16.1 identifies for MDL proceedings in their handling of those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance.

Rule 16.1(a). Rule 16.1(a) recognizes that the transferee judge regularly schedules an initial MDL management conference soon after the Judicial Panel transfer occurs to develop a management plan for the MDL proceedings. That initial MDL management conference ordinarily would not be the only management conference held during the MDL proceedings. Although holding an initial MDL management conference in MDL proceedings is not mandatory under Rule 16.1(a), early attention to the matters identified in Rule 16.1(c) may be of great value to the transferee judge and the parties.

Rule 16.1(b). Rule 16.1(b) recognizes the court may designate coordinating counsel – perhaps more often on the plaintiff than the defendant side – to ensure effective and coordinated discussion and to provide an informative report for the court to use during the initial MDL management conference.

While there is no requirement that the court designate coordinating counsel, the court should consider whether such a designation could facilitate the organization and management of the action at the initial MDL management conference. The court may designate coordinating counsel to assist the court before appointing leadership counsel. In some MDL proceedings, counsel may be able to organize themselves prior to the initial MDL management conference such that the designation of coordinating counsel may not be necessary.

Rule 16.1(c). The court ordinarily should order the parties to meet to provide a report to the court about the matters designated in the court's Rule 16.1(c) order prior to the initial MDL management conference. This should be a single report, but it may reflect the parties' divergent views on these matters. The court may select which matters listed in Rule 16.1(c) or Rule 16 should be included in the report submitted to the court, and may also include any other matter, whether or not listed in those rules. Rules 16.1(c) and 16 provide a series of prompts for the court and do not constitute a mandatory checklist for the transferee judge to follow. Experience has shown, however, that the matters identified in Rule 16.1(c)(1)-(12) are often important to the management of MDL proceedings. In addition to the matters the court has directed counsel to address, the parties may choose to discuss and report about other matters that they believe the transferee judge should address at the initial MDL management conference.

Rule 16.1(c)(1). Appointment of leadership counsel is not universally needed in MDL proceedings. But, to manage the MDL proceedings, the court may decide to appoint leadership counsel. This provision calls attention to a number of topics the court might consider if appointment of leadership counsel seems warranted.

The first is the procedure for selecting such leadership counsel, addressed in subparagraph (A). There is no single method that is best for all MDL proceedings. The transferee judge has a responsibility in the selection process to ensure that the lawyers appointed to leadership positions are capable and experienced and that they will responsibly and fairly represent all plaintiffs, keeping in mind the benefits of different experiences, skill, knowledge, geographical distributions, and backgrounds. Courts have considered the nature of the actions and parties, the qualifications of each individual applicant, litigation needs, access to resources, the different

skills and experience each lawyer will bring to the role, and how the lawyers will complement one another and work collectively.

MDL proceedings do not have the same commonality requirements as class actions, so substantially different categories of claims or parties may be included in the same MDL proceeding and leadership may be comprised of attorneys who represent parties asserting a range of claims in the MDL proceeding. For example, in some MDL proceedings there may be claims by individuals who suffered injuries, and also claims by third-party payors who paid for medical treatment. The court may sometimes need to take these differences into account in making leadership appointments.

Courts have selected leadership counsel through combinations of formal applications, interviews, and recommendations from other counsel and judges who have experience with MDL proceedings. If the court has appointed coordinating counsel under Rule 16.1(b), experience with coordinating counsel's performance in that role may support consideration of coordinating counsel for a leadership position, but appointment under Rule 16.1(b) is primarily focused on coordination of the Rule 16.1(c) meeting and preparation of the resulting report to the court for use at the initial MDL management conference under Rule 16.1(a).

The rule also calls for a report to the court on whether appointment to leadership should be reviewed periodically. Periodic review can be an important method for the court to manage the MDL proceeding.

In some MDL proceedings it may be important that leadership counsel be organized into committees with specific duties and responsibilities. Subparagraph (B) of the rule therefore prompts counsel to provide the court with specifics on the leadership structure that should be employed.

Subparagraph (C) recognizes that, in addition to managing pretrial proceedings, another important role for leadership counsel in some MDL proceedings is to facilitate possible settlement. Even in large MDL proceedings, the question whether the parties choose to settle a claim is just that – a decision to be made by those particular parties. Nevertheless, leadership counsel ordinarily play a key role in communicating with opposing counsel and the court about settlement and facilitating discussions about resolution. It is often important that the court be regularly apprised of developments regarding potential settlement of some or all actions in the MDL proceeding. In its supervision of leadership counsel, the court should make every effort to ensure that leadership counsel's participation in any settlement process is appropriate.

One of the important tasks of leadership counsel is to communicate with the court and with nonleadership counsel as proceedings unfold. Subparagraph (D) directs the parties to report how leadership counsel will communicate with the court and nonleadership counsel. In some instances, the court or leadership counsel have created websites that permit nonleadership counsel to monitor the MDL proceedings, and sometimes online access to court hearings provides a method for monitoring the proceedings.

Another responsibility of leadership counsel is to organize the MDL proceedings in accord with the court's management order under Rule 16.1(d). In some MDLs, there may be tension between the approach that leadership counsel takes in handling pretrial matters and the preferences of individual parties and nonleadership counsel. As subparagraph (E) recognizes, it may be necessary for the court to give priority to leadership counsel's pretrial plans when they conflict with initiatives sought by nonleadership counsel. The court should, however, ensure that nonleadership counsel have suitable opportunities to express their views to the court, and take care not to interfere with the responsibilities non-leadership counsel owe their clients.

Finally, subparagraph (F) addresses whether and when to establish a means to compensate leadership counsel for their added responsibilities. Courts have entered orders pursuant to the common benefit doctrine establishing specific protocols for common benefit work and expenses. But it may be best to defer entering a specific order until well into the proceedings, when the court is more familiar with the proceedings.

Rule 16.1(c)(2). When multiple actions are transferred to a single district pursuant to 28 U.S.C. § 1407, those actions may have reached different procedural stages in the district courts from which cases were transferred ("transferor district courts"). In some, Rule 26(f) conferences may have occurred and Rule 16(b) scheduling orders may have been entered. Those scheduling orders are likely to vary. Managing the centralized MDL proceedings in a consistent manner may warrant vacating or modifying scheduling orders or other orders entered in the transferor district courts, as well as any scheduling orders previously entered by the transferee judge.

Rule 16.1(c)(3). Orderly and efficient pretrial activity in MDL proceedings can be facilitated by early identification of the principal factual and legal issues likely to be presented. Depending on the issues presented, the court may conclude that certain factual issues should be pursued through early discovery, and certain legal issues should be addressed through early motion practice.

Rule 16.1(c)(4). Experience has shown that in MDL proceedings an exchange of information about the factual bases for claims and defenses can facilitate efficient management. Some courts have utilized "fact sheets" or a "census" as methods to take a survey of the claims and defenses presented, largely as a management method for planning and organizing the proceedings.

The level of detail called for by such methods should be carefully considered to meet the purpose to be served and avoid undue burdens. Whether early exchanges should occur may depend on a number of factors, including the types of cases before the court. And the timing of these exchanges may depend on other factors, such as whether motions to dismiss or other early matters might render the effort needed to exchange information unwarranted. Other factors might include whether there are legal issues that should be addressed (e.g., general causation or preemption) and the number of plaintiffs in the MDL proceeding.

Rule 16.1(c)(5). For case management purposes, some courts have required consolidated pleadings, such as master complaints and answers in addition to short form complaints. Such consolidated pleadings may be useful for determining the scope

of discovery and may also be employed in connection with pretrial motions, such as motions under Rule 12 or Rule 56. The relationship between the consolidated pleadings and individual pleadings filed in or transferred to the MDL proceeding depends on the purpose of the consolidated pleadings in the MDL proceedings. Decisions regarding whether to use master pleadings can have significant implications in MDL proceedings, as the Supreme Court noted in Gelboim v. Bank of America Corp., 574 U.S. 405, 413 n.3 (2015).

Rule 16.1(c)(6). A major task for the MDL transferee judge is to supervise discovery in an efficient manner. The principal issues in the MDL proceedings may help guide the discovery plan and avoid inefficiencies and unnecessary duplication.

Rule 16.1(c)(7). Early attention to likely pretrial motions can be important to facilitate progress and efficiently manage the MDL proceedings. The manner and timing in which certain legal and factual issues are to be addressed by the court can be important in determining the most efficient method for discovery.

Rule 16.1(c)(8). The Rule 16.1(a) conference is the initial MDL management conference. Although there is no requirement that there be further management conferences, courts generally conduct management conferences throughout the duration of the MDL proceedings to effectively manage the litigation and promote clear, orderly, and open channels of communication between the parties and the court on a regular basis.

Rule 16.1(c)(9). Whether or not the court has appointed leadership counsel, it may be that judicial assistance could facilitate the settlement of some or all actions before the transferee judge. Ultimately, the question whether parties reach a settlement is just that – a decision to be made by the parties. But as recognized in Rule 16(a)(5) and 16(c)(2)(I), the court may assist the parties in settlement efforts. In MDL proceedings, in addition to mediation and other dispute resolution alternatives, the court's use of a magistrate judge or a master, focused discovery orders, timely adjudication of principal legal issues, selection of representative bellwether trials, and coordination with state courts may facilitate settlement.

Rule 16.1(c)(10). Actions that are filed in or removed to federal court after the Judicial Panel has created the MDL proceedings are treated as "tagalong" actions and transferred from the district where they were filed to the transferee court.

When large numbers of tagalong actions are anticipated, some parties have stipulated to "direct filing" orders entered by the court to provide a method to avoid the transferee judge receiving numerous cases through transfer rather than direct filing. If a direct filing order is entered, it is important to address matters that can arise later, such as properly handling any jurisdictional or venue issues that might be presented, identifying the appropriate transferor district court for transfer at the end of the pretrial phase, how time limits such as statutes of limitations should be handled, and how choice of law issues should be addressed.

Rule 16.1(c)(11). On occasion there are actions in other courts that are related to the MDL proceedings. Indeed, a number of state court systems (e.g., California and New Jersey) have mechanisms like § 1407 to aggregate separate actions in their courts. In addition, it may sometimes happen that a party to an MDL proceeding

may become a party to another action that presents issues related to or bearing on issues in the MDL proceeding.

The existence of such actions can have important consequences for the management of the MDL proceedings. For example, avoiding overlapping discovery is often important. If the court is considering adopting a common benefit fund order, consideration of the relative importance of the various proceedings may be important to ensure a fair arrangement. It is important that the MDL transferee judge be aware of whether such proceedings in other courts have been filed or are anticipated.

Rule 16.1(c)(12). MDL transferee judges may refer matters to a magistrate judge or a master to expedite the pretrial process or to play a part in settlement negotiations. It can be valuable for the court to know the parties' positions about the possible appointment of a master before considering whether such an appointment should be made. Rule 53 prescribes procedures for appointment of a master.

Rule 16.1(d). Effective and efficient management of MDL proceedings benefits from a comprehensive management order. A management order need not address all matters designated under Rule 16.1(c) if the court determines the matters are not significant to the MDL proceedings or would better be addressed at a subsequent conference. There is no requirement under Rule 16.1 that the court set specific time limits or other scheduling provisions as in ordinary litigation under Rule 16(b)(3)(A). Because active judicial management of MDL proceedings must be flexible, the court should be open to modifying its initial management order in light of subsequent developments in the MDL proceedings. Such modification may be particularly appropriate if leadership counsel were appointed after the initial management conference under Rule 16.1(a).