CHAPTER 7: MULTIDISTRICT LITIGATION: CENTRALIZED CASE MANAGEMENT, LITIGATION, AND RESOLUTIONS

A multidistrict aggregation is, and is not, like any other case. The courts have recognized that heightened judicial attention is both warranted and required, and that effective, active, and balanced case management is at a premium in MDLs. The admonition of Fed. R. Civ. P. 1, that the civil rules "should be construed, administered, and employed, by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding," applies with full force to multidistrict litigation. Therein lies the challenge. As the Third Circuit explained,

> "Complex multidistrict cases *** demand much from transferee courts. The MDL process requires a judge to move hundreds or thousands of cases towards resolution while respecting each litigant's individual rights. Managing an MDL may be "fundamentally . . . no different from managing any other case." *** But the complexity of most MDLs makes it harder to safeguard the procedural values which underlie all cases while simultaneously pursuing an efficient resolution on the merits. MDL judges have risen to this challenge by devising efficient, effective, and fair case management techniques." Home Depot USA, Inc. v. LaFarge North America, Inc., 59 F.4th 55, 65 (3rd Cir. 2023).

In so doing, MDL courts, like others, must balance the often-in-tension values of "judicial economy," "finality," "fairness to litigants," and "the monetary aspects" of principled case management. Among the techniques MDL judges may employ in exercising their "considerable authority" to "effectively and fairly manage complex cases" are case management orders that apply rulings in an exemplar case to others; provide for master complaints (or consolidated class action complaints); include discovery management orders; group related cases; designate test cases for "bellwether "trials; appoint lead counsel and committees; and assess "common benefit fees" to "compensate attorneys who work for the common benefit of all plaintiffs." *Home Depot*, 59 F.4th at 65-69. All of these techniques, with examples from actual MDL practice, are described in greater detail in this chapter.

A. SETTING THE STAGE FOR MDL CASE MANAGEMENT.

Once created and assigned to a transferee judge through the issuance of a Transfer Order by the Judicial Panel on Multidistrict Litigation (JPML or the Panel), a newly minted "MDL" must be promptly organized and launched if it is to fulfill its statutory purpose of coordinating hundreds or thousands of individually filed cases, or dozens of class actions, sharing common questions of fact to achieve judicial efficiency, and to reduce cost, delay, and duplication of time and effort by the parties. The act of gathering this multitude of cases in a single court is simply the first step toward this goal. Aggregation is not self-executing, and the role of the transferee judge is administrative and managerial, as well as adjudicative.

B. *Case Management in Operation.*

1. The Initial Case Management Conference

Operationally, the now-appointed transferee judge must prioritize discovery and other pretrial proceedings to: (1) adduce the evidence relevant to the common fact questions that have brought the case together, (2) rule on common pretrial motions (including dispositive motions, such as motions to dismiss and for summary judgment), (3) decide "*Daubert*" motions regarding the qualifications of key experts, (4) foster the resolution of the case, including, where appropriate, through use of test or "bellwether" trials, and, only then to (5) remand any unresolved cases to their transferor courts, ideally ready for trial.

As noted above, the Panel selects judges in whom it has confidence as active case managers. In oft-repeated Panel language across all types of cases, the judge it chooses to preside over an MDL is "a skilled jurist who is well-versed in the nuances of complex and multidistrict … litigation who will steer this matter on a prudent course." *E.g.*, Transfer Order, *In re Hyundai Vehicle Theft Litigation*, MDL No. 3052 (J.P.M.L. 12/13/2022).; or "a highly experienced transferee judge who...will manage these proceedings efficiently," Transfer Order, *In re Roblox Corporation Child Sexual Exploitation And Assault Litigation*, MDL No. 3168 (J.P.M.L. 12/20/25).

Such steering starts immediately. Shortly after transfer, contemporary transferee judges issue an initial Order to counsel for the parties, which essenitally tracks the procedures of Fed. R. Civ. P. 16.1 below. While transferee judges enjoy broad discretion in how they approach their case management responsibility, communication among transferee judges, and among counsel who regularly appear in MDLs, has produced a system of conventions and best practices such that the case management process has become fairly systematized and predictable. Seeking further uniformity, or at least predictability, some MDL constituencies began to urge the Advisory Committee for the Federal Rules of Civil Procedure to create rules for MDLs. Multidistrict litigation, like any other civil actions pending the federal district courts, are governed by the Federal Fules of Civil Procedure, and much of the business of MDL case management, including regular status of scheduling conferences, has proceeded under the auspices of Fed. R.Civ.P.16, the pretrial conference rule. Beginning in 2017, advocates for special rules for MDLs urged a series of proposals. Over the course of seven years of study, interaction with bar groups and judges, and the publication of a series of drafts, the rulemaking process culminated in the publication approval of Fed. R.Civ.P.16.1. It gained Supreme Court and Congressional approval and became effective on December 2025, though many MDL transferee judges had already begun to use it in setting the agenda and expectations for their initial conferences before its formal enactment. The

text of Fed.R.Civ.P.16.1 is set forth below.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 16.1. Multidistrict Litigation

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

(b) Report for the Conference.

(1) ***Submitting a Report***. The transferee court should order the parties to meet and to submit a report to the court before the conference.

(**2**) ***Required Content: the Parties' Views on Leadership Counsel and Other Matters***. The report must address any matter the court designates -- which may include any matter in Rule 16 -- and, unless the court orders otherwise, the parties' views on:

(A) whether leadership counsel should be appointed and, if so:

(i) the timing of the appointments;

(ii) the structure of leadership counsel;

(iii) the procedure for selecting leadership and whether the appointments should be reviewed periodically.

(iv) their responsibilities and authority in conducting pretrial activities and any role in resolution of the MDL proceedings;

(v) the proposed methods for regularly communicating with and reporting to the court and nonleadership counsel;

(vi) any limits on activity by nonleadership counsel; and

(vii) whether and when to establish a means for compensating leadership counsel;

(B) any previously entered scheduling or other orders that should be vacated or modified;

(C) a schedule for additional management conferences with the court;

(D) how to manage the direct filing of new actions in the MDL proceedings; and

(E) whether related actions have been -- or are expected to be -- filed in other courts, and

whether to adopt methods for coordinating with them.

(3) ***Additional Required Content: the Parties' Initial Views on Various Matters***. Unless the court orders otherwise, the report also must address the parties' initial views on:

(A) whether consolidated pleadings should be prepared;

(B) how and when the parties will exchange information about the factual bases for their claims and defenses;

(C) discovery, including any difficult issues that may arise;

(D) any likely pretrial motions;

(E) whether the court should consider any measures to facilitate resolving some or all actions before the court;

(F) whether any matters should be ref erred to a magistrate judge or a master; and

(G) the principal factual and legal issues likely to be presented.

(4) ***Permitted Content***: The report may include any other matter that the parties wish to bring to the court's attention.

(c) **Initial Management Order**. After the conference, the court should enter an initial management order addressing the matters in Rule 16. l (b) and, in the court's discretion, any other matters. This order controls the course of the proceedings unless the court modifies it.

Notably, Rule 16.1 provides the parties an opportunity, at the very outset of all MDL proceedings, to provide input on the issues each side considers most important and germane to the conduct of pre-trial proceedings in the newly centralized litigation. The parties need not wait until the actual initial conference to be heard on these matters: they have the opportunity to identify and discuss them in their pre-conference submissions. The interactive nature of MDL case management, which has evolved in practice, is now formalized in a civil rule tailor-made for MDL complexities.

2. Procedure and Criteria for Appointment of Lead Lawyers and Committees

One of the most important early case management decisions is the selection and appointment of the group of counsel who will lead the case. While such leadership structures vary with the size and type of the litigation, they will typically include one or more Lead Counsel, a Liaison Counsel, and one or more Committees of counsel, styled as Steering or Executive Committees. In large and complex mass tort cases or those involving challenging technical or medical issues, there may be specialist committees as well. The court may ask for counsels' input on the nature and size of the leadership structure.

The Federal Judicial Center's *Manual for Complex Litigation*, first published in the early days of multidistrict litigation, revised over the years to reflect the evolution of centralized case management practices, now in its Fourth Edition (with a Fifth Edition in preparation, forthcoming in 2026), serves as the leading benchbook for transferee judges and a handbook for MDL practitioners. The Fourth Edition, published in 2004, has in many respects been eclipsed by developing practices, and is currently under revision. It provides a general articulation of the rationale for the appointment of lead counsel and committees; the factors courts should consider in appointing such counsel, and a prompt for courts to consider how to compensate this service. *Manual For Complex Litigation*, Fourth (Federal Judicial Center 2004), §§ 10.2-10.225; 22-62. Using this general template, transferee judges have developed a wide variety of approaches to the organizational structures, number, and type of counsel they appoint. These variations reflect the needs of cases that may vary greatly in size, subject matter, and levels of complexity, reflecting the operations, (and often repeated mantra) of MDL transferee judges that "one size does not fit all." *See* Arthur R. Miller, "What are Courts for? Have We Forsaken the Procedural Gold Standard", 78 Louisiana L. Rev. 739, 806 (Spring 2018); The Elements of Case Management, Third Ed. (Federal Judicial Center 2017). The new "MDL rule", Fred.R.Civ.P.16.1, includes general guidance regarding appointment of counsel but still leaves the particulars to individual judicial discretion.

While the court may appoint a lead or liaison counsel to coordinate the defense side in a multiple defendant case, the court's focus is usually on organizing and appointing counsel to lead, and to serve for the common benefit of, the myriad plaintiffs now converged before the court. In earlier years, courts usually relied upon the plaintiffs to organize themselves, a process called "self ordering." While some courts still prefer this approach, the trend has been toward direct judicial involvement in designing the leadership structure and in selecting and appointing the lawyers to populate it.

Below is a typical initial order issued by the transferee judge in a large combined mass tort/class action MDL. This first order sets forth the basic

organization of the litigation, in a way that seems predictive of the procedure now prescribed in Fed.R.Civ.P.16.1, and details the procedures and criteria for the selection of Liaison Counsel, Lead Counsel, and the Plaintiffs' Steering Committee. The second order appoints the leadership counsel and describes the appointees' roles and duties in the litigation:

IN RE JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION, MDL NO. 2913

United States District Court for the Northern District of California, 2019.

Before WILLIAM H. ORRICK, TRANSFEREE JUDGE

Pretrial Order No. 1

* * *

The Judicial Panel on Multidistrict Litigation ("the Panel") has transferred certain product liability and marketing sales practices actions relating to JUUL Labs. Inc.'s products to this Court for coordinated pretrial proceedings. As the number and complexity of these actions warrant holding a single, coordinated initial status conference for all actions …, the Court ORDERS as follows:

1. *Applicability of Order*

Prior to the initial case management conference and entry of a comprehensive order governing all further proceedings in this case, the provisions of this Order shall govern the practice and procedure in those actions that were transferred to this Court by the Panel. This Order also applies to all related cases filed in all divisions of the Northern District of California and all "tag- along actions" later filed in, removed to, or transferred to this Court.

2. *Coordination*

The civil actions transferred to this Court or related to the actions already pending before this Court are coordinated for pretrial purposes. Any "tag-along actions" later filed in, removed to, or transferred to this Court, or directly filed in the Northern District of California, will automatically be coordinated with this action without the necessity of future motions or orders. This coordination does not constitute a determination whether the actions should be consolidated for trial, nor does it have the effect of making any entity a party to any action in which he, she, or it has not been named, served, or added in accordance with the Federal Rules of Civil Procedure. To facilitate the efficient coordination of cases in this matter, all parties to this action shall notify the Panel of other potential related or "tag-along" actions of which they are aware or become aware.

3. *Master Docket File*

The Clerk of Court will maintain a master docket case file under the style "*In Re: JUUL Labs, Inc., Marketing, Sales Practices, and Products*

Liability Litigation" and the identification "MDL No. 2913." When a pleading is intended to apply to all actions, this shall be indicated by the words: "This Document Relates to: ALL ACTIONS." When a pleading is intended to apply to fewer than all cases, this Court's docket number for each individual case to which the document relates shall appear immediately after the words "This Document Relates to."

4. *Filing*

Each attorney of record is obligated to become a Northern District of California ECF User and be assigned a user ID and password for access to the system. If she or he has not already done so, counsel shall register forthwith as an ECF User and be issued an ECF User ID and password. Forms and instructions can be found on the Court's website at www.cand.uscourts.gov/cm-ecf. All documents shall be e-filed in the Master file, 19-md-02913. Documents that pertain to one or only some of the pending actions shall also be e-filed in the individual case(s) to which the document pertains. Registration instructions for pro se parties who wish to e-file can be found on the Court's website at www.cand.uscourts.gov/ECF/proseregistration.

5. *Appearances*

Counsel who are not admitted to practice before the Northern District of California must file an application to be admitted *pro hac vice*. *See* N.D. Cal. Civil Local Rule 11-3. The requirement that *pro hac vice* counsel retain local counsel, see N.D. Cal. Civil Local Rule 11- 3(a)(3) and 11-3(e), is waived and does not apply to this MDL action. The Court generally requires in person as opposed to telephonic appearances for any counsel wishing to participate in a hearing and allows attorneys to listen to the proceedings by telephone if they do not intend to speak.

6. *Liaison Counsel*

Prior to the initial status conference, counsel for the plaintiffs and counsel for defendants shall, to the extent they have not already done so, confer and seek consensus on the selection of a candidate for the position of liaison counsel for each group who will be charged with essentially administrative matters. For example, liaison counsel shall be authorized to receive orders and notices from the Court on behalf of all parties within their liaison group and shall be responsible for the preparation and transmittal of copies of such orders and notices to the parties in their liaison group and perform other tasks determined by the Court. Liaison counsel shall be required to maintain complete files with copies of all documents served upon them and shall make such files available to parties within their liaison group upon request. Liaison counsel are also authorized to receive orders and notices from the Panel or from the transferee court on behalf of all parties within their liaison group and shall be responsible for the preparation and transmittal of copies of such orders and notices to the parties in their liaison group. The expenses incurred in performing the

services of liaison counsel shall be shared equally by all members of the liaison group in a manner agreeable to the parties or set by the Court failing such agreement. Appointment of liaison counsel shall be subject to the approval of the Court.

7. *Lead Counsel & Plaintiffs' Steering Committee*

The Court will consider the appointment of lead counsel(s) and a Plaintiffs' Steering Committee ("PSC") to conduct and coordinate the pretrial stage of this litigation with the defendants' representatives or committee. The Court requires individual application for a lead counsel or steering committee position. Any attorney who has filed an action in this MD litigation may apply for a lead counsel or steering committee position or both.

Applications/nominations for plaintiffs' lead counsel(s) and PSC positions must be e-filed in master case no. 19-md-02913 on or before **October 16, 2019**. A courtesy copy must be mailed directly to chambers.

Each attorney's application shall include a resume no longer than two pages and a letter no longer than three pages (single-spaced) addressing the following criteria:

(1) professional experience in this type of litigation, including MDL experience as lead or liaison counsel and/or service on any plaintiffs' committees or subcommittees;

(2) the names and contact information of judges before whom the applicant has appeared in the matters discussed in response to No. 1 above;

(3) willingness and ability immediately to commit to time-consuming litigation;

(4) willingness and ability to work cooperatively with other plaintiffs' counsel and defense counsel;

(5) access to resources to prosecute the litigation in a timely manner;

(6) willingness to serve as lead counsel, a member of a steering committee, or both;

(7) any other considerations that qualify counsel for a leadership position.

Applications may also include an attachment indicating the names of other counsel who have filed cases in this MDL litigation and support the applicant's appointment as lead counsel or a PSC member.

The main criteria for membership in the PSC will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation.

* * *

8. *Date of Initial Status Conference and Conference Agenda*

Matters relating to pretrial proceedings in these cases will be addressed at an initial status conference to be held on **November 8, 20**19, at 2:00 p.m., in Courtroom 2, 17th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California. Counsel are expected to familiarize themselves with the *Manual for Complex Litigation*, Fourth ("*MCL 4th*") and be prepared at the conference to suggest procedures that will facilitate the expeditious, economical, and just resolution of this litigation. The items listed in *MCL 4th* Sections 22.6 (case management orders), 22.61 (initial orders), 22.62 (organization of counsel), and 22.63 (subsequent case management orders) shall, to the extent applicable, constitute a tentative agenda for the conference If the parties have any suggestions as to any case management orders or additional agenda items, these suggestions shall be filed with the Court by **October 23, 2019**.

9. *Position Statement*

Plaintiffs and defendants shall submit to the Court by **October 23, 2019**, a brief written statement indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. These statements will not be binding, will not waive claims or defenses, and may not be offered in evidence against a party in later proceedings. The parties' statements shall identify all cases that have been transferred to or related before this Court, and shall identify all pending motions in those cases. The statements shall also list all related cases pending in state or federal court (that have not already been transferred to this Court), together with their current status, including any discovery taken to date, to the extent known.

10. *Initial Conference Appearances*

Each party represented by counsel shall appear at the initial status conference through the party's attorney who will have primary responsibility for the party's interest in this litigation. Parties not represented by counsel may appear in person or through an authorized and responsible agent. To minimize costs and facilitate a manageable conference, parties with similar interests may agree, to the extent practicable, to have an attending attorney represent the party's interest at the conference. A party will not by designating an attorney to represent the party's interest at the conference be precluded from other representation during the litigation, nor will attendance at the conference waive objections to jurisdiction, venue or service.

11. *Response Extension and Stay*

Defendants are granted an extension of time for responding by motion or answer to the complaint(s) until a date to be set by this Court. Pending the initial case management conference and further orders of this Court, all outstanding discovery proceedings are stayed, and no further discovery

shall be initiated. Moreover, all pending motions must be re-noticed for resolution once the Court sets a schedule for any such motions. Any orders, including protective orders, previously entered by any transferor district court shall remain in full force and effect unless modified by this Court upon application.

12. *Preservation of Evidence*

All parties and counsel are reminded of their duty to preserve evidence that may be relevant to this action, including electronically stored information. Any evidence preservation order previously entered in any of the transferred actions shall remain in full force and effect until further order of the Court. Until the parties reach an agreement on a preservation plan for all cases or the Court orders otherwise, each party shall take reasonable steps to preserve all evidence that may be relevant to this litigation. Counsel, as officers of the court, are obligated to exercise all reasonable efforts to identify and notify parties and non-parties, including employees of corporate or institutional parties, of their preservation obligations.

13. *Communication With The Court*

Unless otherwise ordered by this Court, all substantive communications with the Court shall be in writing and e-filed. The Court recognizes that cooperation by and among plaintiffs' counsel and by and among defendants' counsel is essential for the orderly and expeditious resolution of this litigation. The communication of information among and between plaintiffs' counsel and among and between defendants' counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorneys' work product, and cooperative efforts contemplated above shall in no way be used against any plaintiff by any defendant or against any defendant by any plaintiff. Nothing contained in this provision shall be construed to limit the rights of any party or counsel to assert the attorney-client privilege or attorney work product doctrine.

14. *Date of Initial Case Management Conference*

Once the structure for plaintiffs' representation has been determined, the Court will set a date for an initial case management conference, which will address discovery and other issues.

IT IS SO ORDERED.

Dated: October 2, 2019

A post-Rule 16.1 *Pretrial Order No. 1*, issued on December 17, 2025, in the above-referenced *Roblox* MDL, specified the matters to be addressed at the initial case management conference as follows:

i. The appointment of lead counsel for the plaintiffs, and any further needs for organizational structure;

ii. the responsibilities and authority of lead counsel in conducting pretrial activities, facilitating resolution of the MDL proceedings, and reporting to the court and non-

leadership counsel;

iii. the status of all litigation pending in this MDL matter;

iv. any previously entered scheduling or other orders that should be stayed or vacated;

v. priority claims and defenses likely to be presented;

vi. factual and legal threshold issues likely to be presented;

vii. whether consolidated pleadings should be prepared and a schedule for such;

viii. a plan and schedule for exchange of information about the factual bases for parties' claims and defenses;

ix. the possibility of bifurcating proceedings to address threshold issues before any plaintiff-specific questions;

x. a schedule for discovery;

xi. steps taken to preserve relevant evidence, including electronically stored information; and

xii. whether any matters should be referred to a magistrate judge or master.

NOTES AND QUESTIONS

1. You are a lawyer representing an individual plaintiff in one of the personal injury cases the Panel has transferred to the JUUL MDL. What is your reaction to receiving the above Pretrial Order No. 1? What are your considerations in deciding whether to apply for a leadership position?

2. Which leadership position, if any, would you choose? Would your considerations or decisions be any different if you represented many individual plaintiffs (as opposed to only one or two) in the *Roblox* MDL, or if you had filed one of the consumer class actions that was also centralized in the JUUL MDL? If you were counsel in a proposed class actionthat is part of the MDL? If your client was a governmental litigant (state attorney general, local government, or Indian Tribe)?

3. The leadership criteria listed in paragraph 7 of the JUUL orders have developed over time, from the *Manual*'s suggestions, and the experiences of other transferee judges with previously successful (or unsuccessful) MDL experiences. The criteria have also borrowed, from those for the appointment of class counsel in Rule 23 class actions. As set forth in Fed. R. Civ. P. 23(g)(1)(A), Judicial appointment of class counsel requires consideration of counsel's experience in the type of litigation at issue and the specific case itself, "knowledge of the applicable law," and "the resources that counsel will commit to representing the class."

4. Why do you think the MDL leadership criteria include the "willingness and ability to work cooperatively with other plaintiffs' counsel and defense counsel"? How would you demonstrate this?

Below is the result of the JUUL leadership application process:

IN RE JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION , MDL NO. 2913

United States District Court for the Northern District of California, 2019.

Before WILLIAM H. ORRICK, TRANSFEREE JUDGE

Order Appointing Plaintiffs' Leadership and Steering Committee Members

* * *

I received an impressive array of applicants for plaintiffs' leadership positions in this MDL. I have reviewed the applications …. I could easily have appointed several more counsel to the Steering Committee but decided that a greater number would be too unwieldy, particularly at the outset of the case. Considering the diversity and number of cases filed (or anticipated to be filed) in this MDL, the claims and injuries asserted in those cases, the leadership-applicant firms who have filed or anticipate filing those cases, the geographic distribution of the cases, as well as the geographic location of leadership-applicants, I APPOINT the following individuals to the Plaintiffs' Steering Committee of this MDL.

CO-LEAD COUNSEL: Sarah London (who shall also act as liaison counsel), Dean Kawamoto, Ellen Relkin and Dena Sharp.

PLAINTIFFS' FEDERAL/STATE COURT LIAISON COUNSEL: Khaldoun Baghdadi and Leslie LaMacchia.

PLAINTIFFS' GOVERNMENT ENTITY LIAISON COUNSEL: Thomas Cartmell.

PLAINTIFFS' STEERING COMMITTEE: [names of specific lawyers omitted].

In general, **Co-Lead Counsel** are responsible for coordinating the activities of plaintiffs during pretrial proceedings and shall:

(a)determine (after such consultation with other members of Plaintiffs' Steering Committee and other co-counsel as may be appropriate) and present to the Court and opposing parties the position of the plaintiffs on all matters arising during pretrial proceedings;

(b) coordinate the scheduling and conduct of discovery on behalf of plaintiffs consistent with the requirements of Fed. R. Civ. P. 26(b)(1), 26(2), and 26(g), as well as the preparation of protocols for individual, class, and public entity discovery and the development of platforms to allow for equitable and efficient use of discovery secured through this MDL;

(c)suggest, in consultation with defendants, the ordering, priority, and response to pending and anticipation motions;

(d) coordinate, at the appropriate juncture, the selection of trial team(s) and selection of cases to resolve common issues and "bellwether"

trials;

(e) conduct settlement negotiations on behalf of plaintiffs, but not enter binding agreements except to the extent expressly authorized;

(f) delegate specific tasks to PSC Members other counsel in a manner to ensure that pretrial preparation for the plaintiffs is conducted efficiently and effectively;

(g) enter into stipulations with opposing counsel as necessary for the conduct of the litigation;

(h) prepare and distribute periodic status reports to the Court and parties;

(i) monitor time and expenses of all plaintiffs' counsel consistent with the mandates of Common Benefit Orders entered by the Court and administer the Common Benefit Fund to ensure that the litigation moves forward expeditiously while unnecessary expenditures of time and funds are avoided; and

(j) perform such other duties as may be necessary for effective and efficient coordination of plaintiffs' pretrial activities or authorized by further order of the Court.

In general, **Plaintiffs' Liaison Counsel and Plaintiffs' Steering Committee Members** shall consult with and operate with the guidance of Co-Lead Counsel.

The appointment as Co-Lead Counsel, Liaison Counsel, or a general PSC Member is a personal appointment. The appointees cannot be substituted by other attorneys, including members of the appointee's law firm, except with my prior approval. The appointment to the PSC is for one year from the date of this Order. Appointees may apply to be reappointed when their term expires, by submitting an application on or before December 21, 2020, detailing the nature and scope of their work on behalf of the PSC during the prior year. The PSC appointments may be revoked or amended at any time by my order. In addition, as this case develops, I may revisit these appointments and add members to the PSC as needed.

I authorize Co-Lead Counsel to appoint, without my prior approval, members of the PSC or other counsel to do such work as they deem necessary to the most effective and efficient management of this litigation. I recognize that I did not appoint many excellent counsel who offer important strengths to plaintiffs. ….

*** * * IT IS SO ORDERED.**

Dated: December 20, 2019

NOTES AND QUESTIONS

1. The MDL leadership criteria place a premium on complex litigation experience. How could you support your application for a leadership

position if this were your first MDL experience? Does the introductory paragraph of the JUUL Order above provide any clues?

2. The JUUL Order appoints individual lawyers, not law firms, to the leadership positions. Why do you think this is?

3. The emphasis on experience in MDL leadership appointment has led to a critique of what some commentators call the "repeat player" syndrome: those who have been appointed before leverage earlier appointments into later ones, creating a cadre of career MDL lead counsel that might seem to have a "lock" on the process; and creating, the familiar "first job" problem. How does one get to an initial appointment as an MDL counsel if one needs MDL experience to get it? For a variety of views on the "repeat player" phenomenon, see Elizabeth Chambler Burch & Margaret S. Williams, "Repeat Players in Multidistrict Litigation: The Social Network," 102 Cornell L. Rev. 1445 (2017); Andrew D. Bradt & D. Theodore Rave, "It's Good to Have the Haves On Your Side: A Defense of Repeat Players in Multidistrict Litigation," 108 Geo. L. J. 73 (October, 2019).

4. *Diversity and Inclusion in the Selection of Plaintiffs' Leadership Counsel*

Judicial concerns with the "repeat player" situation, and a desire to address and correct for it by widening the path to litigation leadership, by including younger lawyers, women, and attorneys of color in MDL leadership positions, led courts to affirmatively consider diversity as a positive factor in appointment to leadership. But an early diversity initiative, in the context of a Rule 23(g) class counsel appointment in complex antitrust litigation, drew fire from a Supreme Court justice:

MARTIN V. BLESSING,
Supreme Court of the United States,
571 U.S. 1040 (2013)

[The petition for writ of certiorari is denied.]

* * *

Statement of Justice ALITO, respecting the denial of the petition for writ of certiorari.

The petition in this case challenges a highly unusual practice followed by one District Court Judge in assessing the adequacy of counsel in class actions. This judge insists that class counsel "ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics."

* * *

The uniqueness of this practice weighs against review by this Court, but the meaning of the Court's denial of the petition should not be misunderstood.

I.

In 2008, the Nation's only two providers of satellite digital audio radio services, Sirius Satellite Radio, Inc., and XM Satellite Holdings, Inc.,

merged to form a new company, Sirius XM Radio, Inc. (Sirius). *** Their subscribers claimed the merger violated antitrust laws and filed several class actions that were joined in a consolidated complaint and assigned to Judge Harold Baer, Jr., of the Southern District of New York. ***

In July 2010, class plaintiffs moved to certify a federal antitrust class. *** [Rule 2.3 requires] adequate class counsel; subsection (g) orders the district court to consider four particular indicators of adequacy. It provides also that the district court "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. Rule Civ. Proc. 23(g)(1)(B).

Citing that provision, Judge Baer ordered that the three law firms appointed as interim counsel (and subsequently elevated to permanent counsel) "ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics."

* * *

Following certification in the present case, Sirius and class counsel reached a settlement that drew objections. Under the deal, Sirius would freeze its prices for five months and pay class counsel $13 million in attorney's fees. *** Sirius would pay no cash to class members. Nicolas Martin, a class member and petitioner here, objected, not only to those terms, but also to Judge Baer's reliance on race and gender in assessing the adequacy of class counsel.

* * *

I.

Based on the materials now before us, I am hard-pressed to see any ground on which Judge Baer's practice can be defended. This Court has often stressed that "[r]acial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). Court-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge.

Before reaching this constitutional question, however, a court would have to consider whether the challenged practice can be reconciled with Rule 23(g), which carefully regulates the appointment of class counsel. The appointment of class counsel is a sensitive matter. Because of the fees that class counsel may receive—witness the present case in which counsel was awarded $13 million for handling a case in which the class members received no compensation—any deviation from the criteria set out in the Rule may give rise to suspicions about favoritism. There are more than 600 district judges, and it would be intolerable if each judge adopted a personalized version of the criteria set out in Rule 23(g).

It is true that Rule 23 allows a district court to consider "any ... matter pertinent to counsel's ability to fairly and adequately represent the interests of the class," Rule 23(g)(1)(B), but I doubt that this provision can be stretched to justify the practice at issue here. It seems quite farfetched to

argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class. Indeed, if the District Court's rule were taken seriously, it would seriously complicate the appointment process and lead to truly bizarre results.

***

Where the demographics of the class can be ascertained or approximated, faithful application of the District Court's rule would lead to strange results. The racial and ethnic makeup of the plaintiff class in many cases deviates significantly from the racial and ethnic makeup of the general population or of the bar. Suppose, for example, that the class consisted of persons who had undergone a particular type of treatment for prostate cancer. Would it be proper for a district judge to favor law firms with a high percentage of male attorneys? Or if the class consisted of persons who had undergone treatment for breast cancer, would it be permissible for a court to favor firms with a high percentage of female lawyers? In some cases, the members of a class may be significantly more affluent than the general population. (A class consisting of the purchasers of stock may be an example.) To the extent that affluence correlates with race, would it be proper for a district judge in such a case to favor law firms with relatively low minority representation?

The Second Circuit did not decide whether the District Court's practice is unconstitutional or otherwise unlawful because the court held that Martin lacked standing to challenge the order at issue. Martin did not allege that he actually received inferior representation, and therefore the Second Circuit, invoking the standard used to determine whether a plaintiff has standing under Article III of the Constitution, refused to entertain Martin's objection on the ground that he had suffered no injury in fact. I find this reasoning debatable.

* * *

Whether or not Martin suffered injury in fact in the Article III sense, he unquestionably has a legitimate interest in ensuring that class counsel is appointed in a lawful manner. The use of any criteria not set out specifically in Rule 23(g) or "pertinent to counsel's ability to fairly and adequately represent the interests of the class" creates a risk of injury that a class member should not have to endure. And class members have a strong and legitimate interest in having *their* attorneys appointed pursuant to a practice that is free of unlawful discrimination. If a district judge had a practice of appointing only attorneys of a particular race or gender, would an appellate court refuse to entertain a class member's objection unless the class member could show that the attorney in question did a poor job?

Unlike the courts of appeals, we are not a court of error correction, and thus I do not disagree with the Court's refusal to review the singular policy at issue here. I stress, however, that the "denial of certiorari does not constitute an expression of any opinion on the merits." *** If the challenged appointment practice continues and is not addressed by the Court of Appeals,

future review may be warranted.

***

Pushback against express consideration of diversity factors, or specific mention of women and minorities, in MDL leadership selection processes culminated in judicial complaints filed in several Courts of Appeal, seeking sanctions against MDL judges whose orders mentioned such terms.. Here is a recent example from the Eleventh Circuit:

Judicial Complaint No. 11-25-90043

U.S. Court of Appeals for the Eleventh Circuit

March 20, 2025

Order

Michael R. Davis has filed a Complaint against District Judge M. Casey Rodgers under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364, and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States.

* * *

I. Background

In February 2025, the Judicial Panel on Multidistrict Litigation consolidated and transferred products-liability actions about an injectable contraceptive, Depo-Provera, to Judge M. Casey Rodgers for pretrial proceedings. On February 21, 2025, Judge Rodgers held a case-management conference to discuss the appointment of lead counsel. She stated that she was "not opposed ... to a [leadership] slate being proposed to the Court" and explained the characteristics that she sought for "plaintiff leadership structure." In her view, the slate needed to "fairly and efficiently lead the Plaintiffs' side of the [multidistrict litigation]," provide "balance[]," and "reflect diversity." She then elaborated on the need for diversity—specifically female representation—in the leadership slate:

> I think diversity is still an important thing to strive for, so diversity, you know, of all types, but particularly in this litigation, because of the Plaintiffs, I want that particular diversity reflected in the leadership. Now, that doesn't mean I'm looking for every single leader[] to be a female, but females need to be adequately represented in your leadership.

On February 23, 2025, Judge Rodgers entered an order that described the case-management conference and reiterated the need for female representation on the leadership slate. The order stated that "the Court prefers a balanced leadership team that reflects diversity of all types and, in particular, leadership should reflect the diversity of the individual Plaintiffs that comprise this litigation." The order added that the diversity requirement did "not by any means suggest that every single position requires female

counsel, but simply that females should be adequately represented within leadership."

On February 27, 2025, Michael R. Davis filed a complaint of misconduct against Judge Rodgers. The complaint alleges that Judge Rodgers "made statements that improperly suggested that sex would be a relevant factor in selecting leadership counsel for the multidistrict litigation." It highlights her statement that "females need to be adequately represented in [plaintiffs'] leadership." * * * The complaint alleges that "[b]y implying that sex-rather than qualifications, experience, or merit-should influence selection for MDL leadership, Judge Rodgers engaged in conduct that constitutes impermissible bias and judicial misconduct."

The complaint * * * cites Judicial-Conduct Rule 4(a)(3), which defines judicial misconduct to include "[i]ntentional discrimination on the basis" of several characteristics, including "sex, gender, [and] gender identity." * * * It also alleges that Judge Rodgers violated the Due Process Clause of the Fifth Amendment to the United States Constitution, which "prohibits government officials, including federal judges, from engaging in sex-based discrimination." The complaint requests that "appropriate corrective action be taken to ensure that all attorneys, regardless of sex, are afforded equal treatment in these proceedings."

On February 28, 2025, Judge Rodgers entered a pretrial order that invited all the plaintiffs' attorneys involved in the multidistrict litigation to apply for a leadership position. The order omitted any reference to the applicants' sex. Instead, it listed other qualifications, including "MDL experience, mass tort experience, trial experience, settlement experience, . . . issue-specific experience, . . . [and] the ability to make the necessary time and financial commitments to effectively serve as leadership." The order also stated that "[t]he Court w[ould] consider any further relevant information an Applicant wishes to disclose" before "appoint[ing] a leadership team with members whose talents, experience, and knowledge make them uniquely situated to effectively, fairly, and efficiently represent the interests of the Plaintiffs as a whole throughout the litigation." The application form attached to the order asked the applicant to provide various information but omitted any reference to the applicant's sex.

On March 13, 2025, Judge Rodgers allowed nearly 70 applicants for lead counsel to give presentations. During the hearing, she stated on the record that her appointment decisions would not "give any preference to female attorneys in order to avoid the appearance of any impermissible sex discrimination." Instead, the appointments would be "based solely on individual merit." The case remains pending.

As specified in the Judicial Conduct Act and under the Judicial-Conduct Rules, I reviewed the complaint and conducted a "limited inquiry." *See* 28 U.S.C. § 352(a); Rules For Jud.-Conduct & Jud.-Disiability Proc. R. ll(a), (b). This inquiry included inviting Judge Rodgers to respond in writing to the complaint and speaking with her personally.

Judge Rodgers acknowledged the concerns created by her statements at the case-management conference. As she explained in the attached letter, she "acknowledged that [her] statements could be construed as creating a preference for female attorney representation in leadership positions during the selection process." Judge Rodgers's letter explains that she has taken actions to "assure the parties and public that it was not [her] intention to discriminate against anyone." To that end, she explained that her February 28, 2025 order * * * [and] her on-the-record statement, made during the hearing on March 13, 2025 * * *. She "believe[s] these steps have ameliorated the concerns raised" and "regret[s] any misunderstanding."

II. Discussion

* * *

Together, the Judicial-Conduct Rules, the Code of Conduct, and the Constitution prohibit federal judges from engaging in discrimination based on sex. * * * The Rules' prohibition on discrimination based on "sex, gender, [or] gender identity" contains no exception for the appointment oflead counsel in multidistrict litigation based on the identity of the plaintiffs. Likewise, the Code's requirement that a "judge should respect and comply with the law" contains no carveout for "diversity" requirements that turn on the consideration of impermissible characteristics like sex, race, or religion.

Justice Alito reached a similar conclusion in a statement respecting the denial of the petition for writ of certiorari in *Martin v. Blessing*, where he reviewed a district judge's "unique[]" practice of requiring counsel in class-action cases to ensure that the lawyers on the case "fairly reflect[ed] the class composition in terms of relevant race and gender metrics." 571 U.S. 1040, 1040-41 (2013). Justice Alito explained that the Supreme Court "has often stressed that racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal." *Id.* at 1042 (citation and internal quotation marks omitted). And he added that "[c]ourt-approved discrimination based on gender is similarly objectionable, and therefore it is doubtful that the practice in question could survive a constitutional challenge." *Id.* For these reasons, he stated, "[i]t seems quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race and gender of counsel mirror the demographics of the class." *Id.* at 1043.

What Justice Alito described in 2013 as the "unique[]" practice in *Blessing* has since been touted as a "best practice" in multidistrict litigation. Commentators openly encourage judges who preside over these actions to consider impermissible characteristics like sex or race when they appoint leadership counsel. *See, e.g.*, Ralph Chapoco, *Calls for Lawyer Diversity Spread to Complex Class Litigation*, Bloomberg L. (July 30, 2020, 3:45 AM) * * * (presenting scholar's view that "[t]he lack of diversity" in multidistrict-litigation leadership "is a particular problem because having the same group of attorneys, often white males, can harm litigants");

Stephen R. Bough & Elizabeth Chamblee Burch, *Collected Wisdom on Selecting Leaders and Managing MDLs*, 106 Judicature 69, 69-72 (2022) (collecting "case-management wisdom" that encourages judges to consider "identity diversity"—like "race, ethnicity, age, gender, [and] physical limitations"—when appointing "[multidistrict litigation] leadership"); Barbara J. Rothstein & Catherine R. Borden, Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges 12 n .14 (Fed. Jud. Ctr. 2011) (describing with approval a district judge in a multidistrict litigation action who "was proactive in considering qualified women and minorities for leadership positions" and who "directed the Plaintiffs' Steering Committee to do so as well").

Classifications for appointed counsel based on sex violate the Constitution, the Code of Conduct, and the Judicial-Conduct Rules. To be sure, district judges managing multidistrict-litigation should account for diversity in the form of "experience[], skill, knowledge, geographical distributions, ... backgrounds, ... [and] the nature of the actions and parties" when they select lead counsel for plaintiffs. [See committee note to proposed Federal Rule of Civil Procedure 16.l(c)(l))]. And in class actions, judges "may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(l)(B). But notions of counsel's "ability to fairly and adequately represent the interests of the class" must exist within the bounds of the rules that govern judicial conduct, and those bounds prohibit discrimination based on sex.

The Judicial-Conduct Rules permit a chief judge to "conclude a complaint proceeding" if he "determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint." * * *

Judge Rodgers's voluntary corrective actions warrant the conclusion of this proceeding. Her written response makes clear to the parties and the public that her appointments in this case and others will consider "individual merit" alone and "will not give any preference to female attorneys." Her recent order in the litigation and the application for a leadership position both omit any reference to sex. And her on-the-record statements during the March 13, 2025, hearing confirm that she does not intend to encourage the attorneys to discriminate based on sex or to engage in discrimination herself. In the light of these developments, I conclude that Judge Rodgers has taken appropriate voluntary corrective action that acknowledges and remedies the problems created by her statements. For this reason, this Complaint proceeding is CONCLUDED.

* * *

William H. Pryor, Chief Judge

NOTES AND QUESTIONS

1. Do you agree with Justice Alito's analysis that consideration of diversity could lead to "bizarre" results or inadequate representation of the class? If this would or could occur, how might judges prevent such results while continuing to utilize diversity as a selection factor?

2. If the Supreme Court had granted review in *Martin v. Blessing* and actually outlawed the consideration of diversity in class action appointments, how could the courts, or applicant law firms themselves, continue to encourage younger lawyers, attorneys of color, women and LGBTQ+ lawyers to pursue leadership positions?

3. Despite the warning from the Supreme Court – or at least several of its members – that consideration of the diversity of class counsel applicants was antithetical to the express criteria of Fed. R. Civ. P. 23(g) and the rights of the class members to adequate representation, MDL and class action courts continued to find ways to include diversity as an appropriate consideration, and as a factor that enhances, rather than contradicts, the integrity of the appointment process and the quality of leadership counsel.

4. The judicial invocation of diversity as a guiding principle in selection of leadership counsel has not gone unnoticed in the legal media, as a 2021 Reuter's article illustrates Reuters, On The Case, January 25, 2021https://www.reuters.com/article/us-otc-diversity/the-needle-is-moving-another-mdl-judge-cites-diversity-in-lead-counsel-appointments-idUSKBN29U2CV (noting various MDL judges who have appointed diverse leadership teams). This has become a more challenging task, given the ongoing efforts by organizations such as the America First Legal Foundation and Judicial Watch, Inc., to sanction; judges who used phrases indicative of "race, sex, age or any immutable characteristic," such as "women and minorities," and to thus secure the omission of such references from MDL judges' leadership selection criteria. *See, e.g., In re Complaints Nos. 07-24-9008, et seq.* (Judicial Council of the Seventh Circuit 3/21/2024). MDL judges continue to consider the need for leadership that reflects the demographics and conditions of the client constituencies who must be adequately represented, as illustrated in the *Zantac* MDL leadership order below:

5. In mass tort MDLs, which typically consist of hundreds or thousands of individual personal injury or wrongful death lawsuits, rather than multiple class actions, with such consistent actions having been initiated by many lawyers in many courts, the transferee judge, in selecting and appointing lead counsel and committees, is not constrained by a specific civil rule. Rather, courts look to the Federal Judicial Center's *Manual for Complex Litigation*, which offers the following general guidance an appointment of Lead/Liaison Counsel and Committees:

"Complex litigation often involves numerous parties with common or similar interests but separate counsel. Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents

arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems." *Manual*, §10.22

6. Does the *Manual* provide more flexibility to courts in considering diversity in leadership appointments than does Rule 23(g)?

7. Judicial supervision and control of the application and appointment process has become nearly a given. §10.22 of the *Manual* continues to advise,

> "In some cases the attorneys coordinate their activities without the court's assistance, and such efforts should be encouraged. More often, however, the court will need to institute procedures under which one or more attorneys are selected and authorized to act on behalf of other counsel and their clients with respect to specified aspects of the litigation. To do so, invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel."

Courts no longer simply confirm proposed "slates" of leadership counsel that have emerged from negotiations among interested counsel. What the *Manual* suggested diplomatically in 2004 has now become the norm.

* * *

IN RE: ZANTAC (RANITIDINE) PRODUCTS LIABILITY LITIGATION , MDL NO. 2924

United States District Court for the Southern District of Florida, 2020.

BEFORE ROBIN L. ROSENBERG, UNITED STATES DISTRICT JUDGE

PRETRIAL ORDER# 20

Order Establishing the Plaintiffs' Leadership Structure, Appointing Leadership Members and Designating Leadership Duties and Responsibilities

***

On May 6 and 7, 2020, the Court held interviews of sixty-two (62) applicants for leadership positions in this multi-district litigation (MDL). The Court, having reviewed all submissions by counsel, including all applications for leadership positions pursuant to PTO# 1, all disclosures and certifications submitted pursuant to PTO #16, and all initial census data submitted pursuant to PTO #15, and having considered the interviews conducted by videoconference, due to the inability of the Court to conduct

the interviews in person in light of the coronavirus pandemic, issues this Order to, among other things, (1) establish the Plaintiffs' leadership structure; (2) appoint the Plaintiffs' leadership members; and (3) designate the Plaintiffs' leadership duties and responsibilities.

I. *Plaintiff's Leadership*

The Court is grateful to all counsel who had the interest and took the time to apply for leadership positions through their written submissions and oral presentations. It is an enormous personal commitment of time, dedication and resources to lead an MDL of this size and nature. There were many well-qualified candidates for leadership positions and choosing among the applicants was a difficult task. In doing so, the Court has considered many factors, including the individual applicant's skill, experience, background, ethical standards, professionalism, collaboration, other leadership positions, and reputation earned from colleagues and judges in other litigation.

***

In addition to the individual applicant's profile, the Court also considered the depth and quality of the applicant's firm, the experience and qualifications of any co-counsel, and the depth and quality of co-counsel's firm. In so doing, the Court sought to draw not only from the many prominent nationally known firms that sought leadership, but also from smaller firms as well as newer firms, recognizing that each type of firm brings unique and different capacities to the litigation.

The Court also sought to appoint a diverse leadership team that is representative of the inevitable diversity of the Plaintiffs in this case, and a team that affords younger and slightly less experienced attorneys an opportunity to participate in a leadership role in an MDL. The Court sought to create a team that would collectively bring to bear both wisdom and judgment, and also new approaches and ideas. The Court was particularly impressed by the number of applicants who have started their own firms, especially the number of female founding partners who applied for roles in this litigation - while also noting that at only 31% female applicants, much work remains to be done to give judges an applicant pool that reflects the diversity of not only our society but our profession, particularly at the senior levels of leadership. So too, the Court noted that only a small subset of the applicants identified as non-Caucasian, and that no attorneys identified as LGBTQ or disabled, underscoring the breadth of these continuing challenges. However, quantitative metrics are only one measure. Through the interview process, the applicants displayed a remarkable diversity of life experiences, whether as veterans, immigrants, or individual life stories not easily categorized here but which the Court values. The Court hopes that as the litigation moves forward, the leadership team will endeavor to build on the diversity of its team. The Court also hopes that all counsel and parties will be mindful in using this MDL to provide an opportunity for a broader array of attorneys to have experiences that position them to take on more senior roles in future MDLs.

***

The Court hopes and assumes that counsel appointed to leadership positions will take full advantage of the range of talent among other counsel, whether through the formation of appropriate subcommittees or otherwise—and that other counsel, including those who applied for leadership positions, will provide assistance as appropriate. In particular, the Court believes that certain staffing decisions should be left to its Lead Counsel, to ensure the leadership team will function well together—with both creative and diverse ideas, and yet a common vision. The Court hopes the Lead Counsel will consider drawing upon the resources of the many excellent firms not selected in this order as they build those subcommittees, in furtherance of their vision for the litigation. The Court will consider additional Steering Committee appointments as the litigation advances, recognizing the work performed by subcommittee members. The quality of the litigation will be greatly enhanced by the collective input of the talent of all of the attorneys in the litigation, guided and supported by the leadership team. Many attorneys gain invaluable experience and earn outstanding reputations from the work that they contribute to an MDL, without any formal leadership position, and this does not go unnoticed by their colleagues and the Court.

***

II. *Plaintiff's Leadership Structure*

The Court puts the following leadership structure in place based on all of the available information that the Court has at this time. * * *

a) Co-Lead Counsel

The Court appoints four (4) Co-Lead Counsel for all economic loss, medical monitoring and injury/wrongful death cases (collectively, "Lead Counsel"). Lead Counsel will have the duties outlined in the MANUAL FOR COMPLEX LITIGATION (FOURTH) ("MCL Fourth") Section 10.221, which include formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. The authority, duties and responsibilities of Lead Counsel are more specifically set forth in Section B, below.

b) Steering Committee

The Court establishes a Steering Committee for all economic loss, medical monitoring, and injury/wrongful death cases. The Steering Committee will have the duties outlined in the *Manual for Complex Litigation (Fourth) ("MCL Fourth"*) Section 10.221, which include preparing briefs or conducting portions of the discovery program. The Steering Committee is established to ensure that all group members' interests and positions are represented in decision making.

c) Plaintiffs' Liaison Counsel

The Court previously appointed Francisco Maderal as the Plaintiffs' Liaison Counsel, in PTO #5. Plaintiffs' Liaison Counsel will be responsible for facilitating communications with the Court and counsel in this action. Liaison counsel will also assist all counsel in complying with the rules and procedures of this Court. In addition, Mr. Maderal will serve in an ex-officio capacity on the Steering Committee; in this role he will have the same responsibilities as all other members of the Steering Committee.

d) Leadership Development Committee

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The LDC consists of attorneys who applied for leadership positions in this MDL, but whom the Court did not select for appointment to the PSC. The Court was impressed by the insights of each of these applicants and sees the potential in each of them to become leaders within the MDL bar. The Court believes these attorneys will benefit from the mentorship and experience gained from participation in a large and complex MDL, and that the MDL will equally benefit from their enthusiasm and fresh perspective. The attorneys appointed to the LDC, most of whom have not previously been appointed to an MDL steering committee, shall be mentored by and work with those attorneys appointed to the PSC. It is the Court's expectation that the PSC members will actively mentor and work closely with the attorneys appointed to the LDC so they have the opportunity to play a meaningful role in various aspects of this MDL, including subcommittee assignments, and thereby gain further experience in preparation for future service on steering committees.

The Court also directs that Special Master Dodge shall meet periodically with LDC members individually, and with the Co-Chairs of the LDC, to ensure that they are receiving appropriate opportunities for their ability and skills, including the opportunity to present before this Court.

NOTES AND QUESTIONS

1. As seen in the *JUUL* and *Zantac* leadership-related case management orders above, Diversity has been an important leadership selection factor at the district/MDL transferee court level. One reason may be that the process of MDL centralization itself replaces individual plaintiffs' other choices of counsel with a judicially-chosen group to lead and coordinate the activities that individual lawyers would otherwise perform, on a one-to-one basis, with their clients. Do you think this consideration makes centralized leadership more acceptable to the individual plaintiffs now aggregated in an MDL? Do the above materials, including the *Juul* and *Zantac* judges' remarks, encourage you to chart a path to a future leadership position? If you are considering a litigation career, how do they impact your consideration as to whether to choose the representation of plaintiffs, or defendants, in aggregate litigation? Do you think the courts should be more, or less, involved in consideration of diversity, with respect to plaintiffs' lawyers? Defense counsel? Why do courts seem to be less concerned with diversity in the defense firms that appear in aggregate litigation?

2. It has been stated that in specifying a leadership structure and in populating it with attorneys from multiple law firms, the court is in essence creating a *de facto* law firm, and, in specifying the respective duties of its members, serving as its managing partner for the duration of the MDL. Should that judicial approach be encouraged?

3. Some commentators have voiced skepticism and concern with this level of judicial involvement in configuring an *ad hoc* entity (of any composition) to prosecute the claims of myriad plaintiffs, and have advanced alternative proposals, such as adopting the "lead plaintiff" model

employed by statute in federal securities class actions. *See* Charles Silver & Geoffrey P. Miller, "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and A Proposal," 63 Vand. L. Rev. 107, 159-77 (2010).

C. *The Need for Compensation of Counsel Working for the "Common Benefit" and Evolving Judicial Responses*

1. The *Florida Everglades* Decision Adopts the Supreme Court's Common Benefit Doctrine for MDLs

The counsel appointed by the MDL court to serve in leadership positions will be conducting the litigation on behalf, and for the benefit of, the larger group of plaintiffs in the case. The selection and appointment of plaintiffs' counsel, and the need to devise a means of compensating them, arises from the profoundly different prevailing models employed by plaintiff and defendant counsel.

The defendants in MDLs typically select their own litigating counsel, advance or reimburse their counsels' costs, and pay their fees on an hourly and ongoing basis, periodically throughout the case and regardless of outcome (although outside counsel may negotiate incentives, bonuses or discounts). While litigation firms compete, often intensely, for a defense client's business, they typically do so outside the view of court. Their "beauty contests," in marked contrast to the court-supervised and public, leadership MDL plaintiff appointments, are conducted in private. [cite].

In contrast, plaintiffs use the contingency fee system: their lawyers advance the costs of the litigation, forego hourly fees, and are paid a percentage of their client's recovery (if there is one) at the conclusion of the case. Those plaintiffs' lawyers selected for leadership, then, are working on a doubly contingent basis: they are collectively advancing all of the plaintiffs' costs, expending the time and effort necessary to conduct the centralized proceedings, for the common benefit of all plaintiffs, and taking on the responsibilities and risks that the individual lawyers would otherwise (but no longer) need to incur.

The courts recognized what some have termed the "free rider" problem in the very early days of MDL litigation, and adopted a longstanding equitable doctrine, developed by the Supreme Court in the nineteenth century, to provide a common benefit compensation mechanism in modern MDLs. *See In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (First Cir. 1992): "A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and, to that end, may employ measures reasonably calculated to avoid "unjust enrichment of persons who benefit from a lawsuit without shouldering its costs."

The following *Florida Everglades* decision, arising from one of the earliest MDLS, remains the bedrock of continuing judicial efforts to design and enforce the equitable reallocation of attorneys' fees and costs to solve the "fee order problem" and incentivize lawyers to step forward to serve in leadership positions.

In re AIR CRASH DISASTER AT FLORIDA EVERGLADES ON DECEMBER 29, 1972.

United States Court of Appeals,
Fifth Circuit

549 F.2d 1006 [date]

April 4, 1977

This is a dispute over attorney fees awarded to a small group of plaintiffs' counsel who were designated by the district court as lead or liaison counsel for plaintiffs' side in a massive consolidated multidistrict case. The fees were awarded out of fees receivable by other plaintiffs' counsel.

The consolidated case embraced more than 150 claims for death and injuries arising from the crash of a large Eastern Airlines passenger plane near Miami, Florida. The District Court for the Southern District of Florida appointed as "lead counsel" for plaintiffs a "Plaintiffs' Committee," and counsel for the Committee, who between themselves represented 60 plaintiffs. The real appellees in interest are the lawyers composing the Committee and its counsel. While the nominal appellants are persons who were plaintiffs below, the real appellants in interest are two of the law firms required by the court to contribute to the fees of the Committee. None of the parties plaintiff or defendant in the primary litigation is actively involved in this appeal.

* * *

Originally the authority of the Committee was limited to leading and coordinating discovery and other pre-trial matters. Later it was broadened to include service as lead counsel to prepare and conduct test cases on the issue of liability. The two test cases were never tried. The extensive discovery and pre-trial preparation carried on by the Committee were largely responsible for an ultimate concession of liability by defendant Eastern on the eve of trial and the consequent settlement of many cases. The court awarded compensation to the Committee for their work as lead counsel by ordering each other attorney representing a plaintiff, except those attorneys who had actively participated in the pre-trial activities, to pay to the Committee a part of the fee that he was entitled to receive from his client.

We hold that the district judge had the power to award compensation to the Committee to be paid by other plaintiff counsel out of the fees they were entitled to receive. But we hold that the power was exercised in an erroneous manner, and, therefore, reverse and remand the case for setting of appropriate fees.

* * *

On November 16, ten days before trial was scheduled to begin, the defendant Eastern conceded liability, and the defendants Lockheed and the United States agreed to contribution toward the payment of claims without conceding liability. With these stipulations by the three defendants, trial on the issue of liability became unnecessary and the parties began to negotiate settlements.

The court set for hearing the matter of attorney fees, directed the Committee to submit to the court and all counsel "a detailed list of expenses incurred and such other data as they deem necessary," and requested from other plaintiff counsel recommendations with respect to the computation of fees. *** On December 5 the court entered its order awarding the Committee and counsel a fee of 8% of the settlement obtained by each plaintiff who had retained counsel not a member of the Plaintiffs' Committee, payable out of the fee of the attorney for each such plaintiff. The 8% payment was to include the $60,411.11 expenses incurred by the Committee. This fee was 8% of what was then and is now an unknown amount of total damages recovered by some 80 plaintiffs (not including the 60 clients of members of the Committee). The 8% was not to be an additional expense to each plaintiff but was to be taken from his retained lawyer's fee.

The rationale of the district judge was threefold. He considered that his approach was a necessary incident to achievement of the goals of multidistrict litigation; he found that the Committee had performed duties beyond their responsibilities to their own clients; and he relied upon *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939), the leading "equitable fund" case. With respect to the first the court stated:

> The goal of the expeditious processing of all actions arising from a common disaster each claim for relief being a potentially protracted case can only be accomplished by avoiding duplicitous discovery, conflicting contemporaneous rulings by coordinate district and appellate courts, and fostering the convenience of parties and witnesses.

With respect to the Committee's extra duties and responsibilities the district judge held:

> Delegated with the responsibility of preparing and prosecuting an action, on behalf of all plaintiffs, replete with complex case, statutory and regulatory law, and opposed by formidable defense counsel, the appointed counsel had to completely disassociate themselves from any responsibilities to other clients.
>
> * * *
>
> After careful scrutiny of such conscientious execution of appointed counsels' preparation of the plaintiffs' case, this Court is constrained to observe that if, in fact, an element of unjust enrichment exists in the Court's percentage award of attorneys fees, the beneficiaries are the attorneys whose time was not so consumed in the manner outlined above, but who shall receive all but eight percent (8%) of the attorneys fees originally contemplated by them.
>
> * * *

The appellants do not challenge the power of the court to appoint counsel to perform duties such as were assigned in this case but only its power to order that "lead counsel" be paid out of the fees of employed attorneys. Appellants approach the case as though it were purely a private contest over fees between competing lawyers. This approach is a nostalgic

luxury no longer available in the hard-pressed federal courts. It overlooks the much larger interests which arise in litigation such as this.

Each case in the consolidated case was private in its inception. But the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large. The power of the court must be assayed in this semi-public context.

A trial court has managerial power that has been described as "the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254, 57 S. Ct. 163, 166, 81 L. Ed. 153, 158 (1936). *See also* reference in *MacAlister v. Guterma*, 263 F.2d 65, 69 (CA2, 1958), discussed *infra*, to "the traditional exercise of the court's inherent powers over the administration and supervision of its own business." Managerial power is not merely desirable. It is a critical necessity. The demands upon the federal courts are at least heavy, at most crushing. Actions are ever more complex, the number of cases greater, and in the federal system we are legislatively given new areas of responsibility almost annually. Our trial and appellate judges are under growing pressure from the public, the bar, the Congress and from this court to work more expeditiously. In most instances these pressures reflect fully justified societal demands. But court resources and capacities are finite. We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants. These considerations are at the heart of steps to create procedures for handling complex litigation.

* * *

It is not open to serious question that a federal court in a complex, consolidated case may designate one attorney or set of attorneys to handle pre-trial activity on aspects of the case where the interests of all co-parties coincide. *MacAlister v. Guterma*, 263 F.2d 65 (CA2, 1958), is perhaps the leading case on the court's power to appoint and rely on lead counsel. Chief Judge Kaufman's opinion contains these pertinent passages on the issue of judicial power:

The purpose of consolidation is to permit trial convenience and economy in administration. Toward this end Rule 42(a) in addition to providing for joint trials in actions involving common questions of law and fact specifically confers the authority to "make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." *** . . . . An order consolidating . . . actions during the pre-trial stages, together with the appointment of a general counsel may in many instances prove the only effective means of channeling the efforts of counsel along constructive lines and its implementation must be considered within the clear contemplation of the rule.

. . . It would be anomalous indeed if the use of consolidation before trial were excluded from the mounting arsenal of pre-trial devices now made available to the trial judge. ***

. . . The advantages of this procedure should not be denied litigants in the federal courts because of misapplied notions concerning interference with a party's right to his own counsel.

Id. at 68-69.

* * *

While recognizing the need for lead counsel, and the power of the court to appoint such counsel, appellants say that the Committee must work without any compensation other than that coming from their own clients. We hold that the district court had the power to direct that the Committee and its counsel be compensated and that requiring the payment come from other attorneys was permissible.

First, if lead counsel are to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no additional compensation.

* * *

The power of the court to order compensation, and payment of it in the manner directed in this case, is reinforced by the body of law concerning the inherent equitable power of a trial court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation. This expanding jurisprudence has moved beyond the literal limits of its original bounds.

Trustees v. Greenough, 105 U.S. 527, 26 L. Ed. 1157 (1881) is the headwaters American case. A trust estate had been collusively dissipated by its trustees. One of the trust's beneficiaries, acting alone and bearing his own costs, labored 11 years in litigation to recover the estate's looted assets and in addition to secure damages. These sums were paid into the trust by the malfeasant trustees and accepted by all other beneficiaries of the trust. The Supreme Court held that the residue of the estate which was being administered under the trial court's direction by an appointed receiver could be properly used to compensate the laboring beneficiary for his costs, including attorney's fees. The Court noted that the fees of the trustees (had they properly administered the trust) would be chargeable to the trust under the familiar rule that a trust must bear the expenses of its own administration. The beneficiary seeking compensation had simply performed the trustees' duty. To deny him contribution from the other beneficiaries

> would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage. He has worked for them as well as for himself . . . (t)hey ought to contribute their due proportion of the expenses which he has fairly incurred. To make them a charge on the fund is the most equitable way of securing such a contribution. 105 U.S. at 532, 266.Ed.1160.

***

The best-known case is *Sprague v. Ticonic National Bank*, *supra*, written by Justice Frankfurter and cited by the district judge in his order granting the fee in this case. The suit was not a class action. The claim for

reimbursement of fees was made by the client. The fund was identifiable, consisting of earmarked bonds in the trust department of a bank in receivership under the aegis of a federal court. Perhaps more significant than the decision is the language explaining that the award of fees in a fund case is rooted in the inherent powers of equity:

> Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation. Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

307 U.S. at 166-67, 59 S. Ct. at 780, 83 L. Ed. at 1187.

In the present case there is not a fund in the sense of identified items already in the hands of a court appointee, but this is not a necessity. Determination of whether a fund exists is a combination of traditional and pragmatic concepts centering around the power of the court to control the alleged fund.

* * *

The unusual feature of the present case compared with most common fund cases is that the payment was directed to be made by the retained lawyers. This is not as startling as at first glance. The court could have required that all settlements be paid into court and that lead counsel file claims for services. Before approving any settlement the court could have ruled on the competing claims of client, employed counsel and lead counsel to the total proceeds. It could have charged the client's portion with the 8% and then granted the client an equivalent credit on his contingent obligation to the retained lawyer who had shared in the benefits of the Committee's work. The court took the more direct route to the same result.

Because the payment was assessed against the attorneys this case does not quite fit in the equitable fund cases. It need not precisely fit. Greenough and its progeny are largely private sector cases. They do not involve the larger interests which we have described, whose vindication commands affirmative intervention by the court and the assignment of additional responsibilities to some attorneys, inuring to the benefit of other attorneys.

Arguably, plaintiff counsel such as the appellants in this case who elected not to participate in the pre-trial activities and accepted the benefit of the Committee's work impliedly consented to the fact and the manner of payment. *See Doherty v. Bress*, 104 U.S. App. D.C. 308, 262 F.2d 20 (1958), *cert. denied* 359 U.S. 934, 79 S. Ct. 649, 3 L. Ed. 2d 636 (1959). But we prefer not to rest our decision on that artificial ground. It would tend to force non-lead counsel to participate although one of the ends is participation by a limited number of attorneys.

* * *

NOTES AND QUESTIONS

1. The common benefit fee assessment system articulated in *Florida Everglades* has become a common fixture in MDL case management, as a way to spread the costs of prosecution among the beneficiaries, while incentivizing counsel to step forward to shoulder the economic burden of a leadership position. There also continues to be, nearly 50 years after *Florida Everglades* was decided, a lively debate as to the necessity, equity, and utility of the common benefit system, including critiques by noted scholars and commentators. See Charles Silver and Geoffrey P. Miller, "The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal", 63 Vand. L. Rev. 107 (2010). Despite their characterization as "widely used and well established", Eldon E. Fallon, "Common Benefit Fees In Multidistrict Litigation", 74 La. L. Rev. 371, 379 (2014), common benefit assessment orders continue to be challenged at the district and appellate levels, by counsel opposed to sharing or having limitations put upon their contingent fee contracts with their clients. Thus, the recent Tenth Circuit decision affirming a complex and interrelated set of class counsel and common benefit fees in *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th 1126 (10th Cir. 2023), addressed the same challenges to judicial authority, and the same policy considerations, as had the Fifth Circuit in *Florida Everglades* 46 years earlier.

2. Meanwhile, common benefit orders have become a fixture in multidistrict cases. It is standard practice for courts to compensate attorneys who work for the common benefit of all plaintiffs by setting aside a fixed percentage of settlement proceeds." *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 265 (E.D.N.Y. 2006); *In re Zyprexa Prods. Liab. Litig.,* 594 F. 3d 113, 128-30 (2d Cir. 2010. The American Law Institute has endorsed the use of common benefit fees to compensation lawyers for work they do on behalf of others in the aggregate litigation context. *See Principles of the Law Aggregate Litigation* § 2.07, cmt. G (recommending that the use of common discovery obtained during the pendency of a class action, or by analogy, the aggregate phase of an MDL) be compensated by "order of the class-action court to sequester a portion of any recovery obtained by the exiting claimant to account for the benefit obtained from the class discovery"). Courts have developed with is often terms a "hold-back" mechanism, a provision in a common benefit Order that directs the defendant to "hold back" the common benefit assessment from the plaintiff and bay it into a court-supervised common benefit fund instead. The common benefit system has remained controversial among plaintiffs' counsel, who often view it as a tax on what would otherwise be their unreduced counsel fees.

3. As a plaintiffs' counsel not appointed to a leadership position, what would your reaction to a common benefit assessment be? Would it depend upon the number of cases you had? The amount or percentage of the assessment? Can you develop an alternative compensation system for leadership counsel? Does there need to be any assessment system at all?

4. William B. Rubenstein's comprehensive section on common benefit fees in non-class MDLs, *Newberg and Rubenstein on Class Actions*,

Common Benefit Fees, Sections 15: 112-118 (Sixth Ed. 2023), notes the intersection of Rule 23 class actions and MDLs. This apparently ongoing convergence is exemplified by the "borrowing" by MDL courts of class action procedures and principles – significantly, the ongoing supervisorial responsibilities of courts in class actions – to MDLs that are not organized as formal class actions.

5. Professors Charles Silver and Geoffrey P. Miller use the phrase "quasi-class" to describe this borrowing phenomenon. 63 Vand. L. Rev. 107. Judge Jack B. Weinstein appears to have originated the phrase in articulating the analogy in *In re Zyprexa Product Liability Litigation* (MDL 1596),424 F. Supp. 2d 488, 490 (EDNY 2006), in exercising the court's "power to control legal fees in a coordinated litigation of many individual related cases-in effect, a quasi-class action." Judge Fallon adopted the terminology and concept in the *Vioxx* MDL, 650 F.Supp.2d 549,554 (E.D.La. 2009), as did Judge Frank in *In re Guidant Corp. implantable Defibrillators Prod. Liab. Litig.* (MDL 1708), 2008 WL 682174 (D. Minn. 2008). As a plaintiffs' lawyer in a non-class action MDL, would you accept this analogy as useful, or would you oppose it as intrusive? As a defendants' counsel, would you find it useful, or threatening?

6. As a plaintiffs' lawyer in a non-class action MDL, would you accept this analogy as useful, or would you oppose it as intrusive? As a defendants' counsel, would you find it useful, or threatening? Would your answers to 6, above, depend upon the size, or the stage (e.g., trial, settlement) of the litigation?

2. Common Benefit Orders in Current MDL Practice

As seen in the materials above, the individually represented plaintiffs' lawyers (IRPAs) are typically compensated on a contingency fee basis: they receive a percentage of the amount they recover for their clients. Dennis E. Curtis & Judith Resnik, "Contingency Fees in Mass Torts" Access, Risk and the Provision of Legal Services When Layers of Lawyers Work For Individuals and Collectives of Clients," 47 DPLLR 425 (1998). The imposition of a common benefit assessment shifts a percentage of that percentage into a common benefit fund. The allocation of the common benefit fund is made, by court order, on the basis of both quality and quantum of common benefit work.

Time-keeping and time reporting is essential to ensure precision and fairness in the reimbursement of costs and the compensation of time. Time-and-cost-reporting now starts at the inception of the MDL, and is strictly controlled by the court. Early MDL case management orders now typically provide detailed protocols for time and expense keeping and reporting by appointed leadership and by additional counsel authorized by the leadership to perform common benefit tasks. The thoroughness of the court-supervised work evaluation and fee allocation process described and affirmed in *In re Sygenta AG Mir. 162 Com. Litigation*, 61 F.4th 1126 (10th Cir. 2023) was made possible by such protocal. The *Sygenta* decision describes judicial authority over the fees of class common benefit and IRPA lawyers at its most expansive.

In *Sygenta,* corn farmers brought multi-jurisdiction class actions, which included a federal multidistrict litigation (MDL), state-court actions, and another federal action, against a maker of genetically modified corn seed, alleging that its distribution

of seed caused China to refuse to import United States corn for a period. After the parties entered global settlement of all actions for aproximately $1.5 billion, the MDL transfer court, approved the settlement, apportioning roughly $503 million of the settlement for attorney fees to be allocated among the various law firms that had represented plaintiffs, either as class counsel or as individual counsel. The MDL court subsequently entered a series of orders specifically allocating fees and expenses among different jurisdictions and to particular law firms, which several law firms appealed. The Court of Appeals affirmed the fee order, holding that the court did not abuse its discretion in placing a 10% cap on certain contingent-fee contracts when awarding fees to firms with such contracts, or in allocating the $503 million attorney-fee pool into four pools (common-benefit pools for three jurisdictions, and a fourth pool for individually retained attorneys), and allocating fees within each pool. The appellate decision also upheld the MDL court's authority to consider and adopt the state court's recommended allocation of fees and allocating 12% of $503 million attorney-fee pool to individually retained attorneys, with the balance allocated to class counsel in three jurisdictions.

3. The Relationship Between Appointed Lead Counsel and Committees, and Lawyers Representing Individual Litigants

Many courts have been reluctant to rewrite rules of professional responsibility, import class action concepts into non-class aggregations, or establish special ethical rules for MDLs; preferring instead to address specific issues as they arise. The answers to questions regarding duties and relationships between appointed and IRPA counsel are not set forth in any statute or rule; MDL courts tend to address them on an *ad hoc* basis. Are court-appointed plaintiffs' leadership counsel the "fiduciaries" of all plaintiffs in the MDL? What residual roles, powers, and responsibilities do plaintiffs' individual counsel retain?

One influential example is the decision of the MDL transferee judge Jesse Furman in *In re General Motors LLC Ignition Switch Litigation*, *MDL No. 2543*, 2015 WL 1441804 (SDNY 2016) below:

IN RE GENERAL MOTORS LLC IGNITION SWITCH, MDL NO. 2543

United States District Court, S.D. New York.
2016 WL 1441804

Opinion and Order

JESSE M. FURMAN, United States District Judge.

This multi-district litigation * * * relates to highly publicized defects in certain General Motors ("GM") branded vehicles and associated vehicle recalls. The MDL includes putative class actions seeking to recover for economic losses allegedly sustained by certain GM car owners and approximately 3,000 individual personal injury or wrongful death claims. As is common in litigation of this scale and complexity, early on in the process, the Court appointed plaintiffs' lawyers to leadership positions, including three lawyers as Co-Lead Counsel *** and ten other lawyers to an Executive Committee. The Court directed Berman and Cabraser to focus on economic class claims and Hilliard to focus on personal injury and wrongful death claims, but the three have, in most respects, acted as a team. As a team, they and the plaintiffs' lawyers answering to them have accomplished a massive amount in a relatively short amount of time: In little more than a year and a half, they have taken

or defended over three hundred depositions; reviewed or produced millions of pages of documents; briefed dozens of discovery-related issues; and brought or opposed close to fifty *in limine*, summary judgment, and *Daubert* motions for two trials held in January and March of this year.

* * *

All appeared to be going smoothly for the MDL plaintiffs (and in the MDL as a whole) until January, when the first "bellwether" personal injury case went to trial. On January 22, 2016, after it came to light that the Plaintiff in that case, Robert Scheuer, may have committed perjury and fraud, the case was voluntarily dismissed. The next business day, a handful of plaintiffs represented by attorney Lance Cooper (the "Cooper Plaintiffs"), one of the lawyers appointed to the Plaintiffs' Executive Committee, filed a Motion To Remove Lead Counsel, initially seeking to remove all three Lead Counsel, but later clarifying that they sought the removal only of Hilliard.

* * *

BACKGROUND

A. Plaintiffs' Counsel Leadership Appointments and Duties

* * *

* * * the responsibilities of counsel were discussed at the September 4, 2014, status conference, and memorialized in Order Nos. 12 and 13.***In particular, Order No. 13 detailed the respective duties of Co-Lead Counsel, the two Liaison Counsels, and the Executive Committee. *** That Order stated that "Lead Counsel will be responsible for prosecuting any potential common benefit claims, as well as coordinating the pretrial proceedings conducted by counsel for the individual Plaintiffs." Such responsibility included the duty to "coordinate the initiation and conduct of discovery on behalf of the Plaintiffs"; "delegate specific tasks to other counsel in a manner to ensure that pretrial preparation for the Plaintiffs is conducted effectively, efficiently and economically"; and "organize themselves and agree on a plan for conducting the MDL on behalf of all Plaintiffs." "In performing these duties as Lead Counsel," Order No. 13 continued, "Mr. Berman and Ms. Cabraser will focus on economic class claims and Mr. Hilliard will focus on individual Plaintiffs" (that is, personal injury and wrongful death claims). (*Id*. at 4). To the extent relevant here, the Order also enumerated various "duties and responsibilities" of the Executive Committee, including the need to assist Lead Counsel in various ways.

Order No. 13 further reminded counsel that "[a]ll attorneys have an obligation to keep themselves informed about the litigation so that they can best represent their respective clients." *** Order No. 12 memorialized the process, discussed at the September 2014 status conference, for any plaintiffs' counsel to raise issues with the Court if counsel felt that Lead Counsel was unable adequately to represent his or her views at any status conference. ***The Order made clear that Lead Counsel was expected to take the lead in speaking on behalf of all plaintiffs and that, barring permission, would be the only counsel to speak at conferences on behalf of plaintiffs. Nevertheless, the Order provided a means by which any other plaintiffs' counsel could be heard. Specifically, if counsel did "not feel that Lead Counsel [could] adequately represent their views," counsel was invited either to put issues on the agenda for a particular status conference via Lead Counsel and counsel for Defendants or to submit a letter motion to the Court requesting permission to be heard.

* * *

In short, although Cooper was on notice of the ways in which he could be heard if he felt that Lead Counsel was not acting in the interests of all plaintiffs and has, in fact, made clear that he can make himself heard, he sat on his hands, voicing concerns only after the high-profile collapse of the first bellwether trial. Cooper's failure to make himself heard sooner is all the more striking because he himself was appointed by the Court to the Plaintiffs' Executive Committee and thus had various "duties and responsibilities" of his own. (*See* Order Nos. 8, 13). In an ironic twist, Cooper argues that Lead Counsel owed fiduciary duties to all plaintiffs and violated those duties in various ways. *** To the extent that is true, however, Cooper himself owed fiduciary duties to all plaintiffs as well, and thus had an obligation—above and beyond the obligation of plaintiffs' lawyers not appointed to a leadership position—to raise the sorts of allegations he makes now in a timely fashion.

* * *

Throughout their motions, the Cooper Plaintiffs assert that Hilliard owes all plaintiffs in the MDL fiduciary duties. *** Notably, however, they cite no legal authority for that proposition. They also fail to cite—and the Court has not found—any legal authority addressing the standard to be used in evaluating whether lead counsel in multi-district litigation consolidated proceedings (or their equivalent) should be removed. In the absence of such authority, it is tempting to look to the Rule 23 class action context, where courts have generally held that lead counsel should be removed only in "exceptional circumstances." *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 179, 186-87 (2d Cir. 1987).

* * *

But the duties owed by lead counsel in the class action context are undoubtedly stronger than the duties owed by Hilliard here. In the class context, lead counsel serve as counsel for all members of the class. Significantly, absentee class members do not have their own separate counsel; instead, they rely on counsel for the class to represent their interests. *See, e.g., Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001) (noting fiduciary duties of class representatives and class counsel towards other members of the class (citing cases)); *Maywalt*, 67 F.3d at 1077-78 ("Both class representatives and class counsel have responsibilities to absent members of the class."). Here, by contrast, Hilliard does not serve as counsel for all personal injury and wrongful death plaintiffs in the MDL; instead, each of those plaintiffs is represented by counsel of his or her choice, whether Hilliard or someone else (such as Cooper). That is not to say that Hilliard does not have significant authority vis-à-vis all personal injury and wrongful death plaintiffs. He plainly does, as he speaks on their behalf (to both New GM and the Court) and has the authority to make any number of decisions that are binding, either literally or effectively, on all personal injury and wrongful death plaintiffs. But, in contrast to absentee members of a class action, the personal injury and wrongful death plaintiffs in this MDL (at least those who are not independently represented by Hilliard) have their own counsel. Those counsel not only can, but per Order No. 13 are required to, monitor the progress of the litigation. Andthose counsel have various means at their disposal to ensure that the rights and interests of their clients are protected in the event that they believe Hilliard

has taken steps that are not in their clients' interest. It follows that, while the duties Hilliard owes to personal injury and wrongful death plaintiffs represented by other counsel are significant, they are not as strong as the duties that lead counsel owes to absentee members of a class action. From that premise, it follows further that the standard for removal of counsel is at least as demanding here as in the Rule 23 context, and probably even more demanding.

* * *

It is inevitable in litigation of this size and complexity that there will tensions among plaintiffs' counsel — whose interests are mostly aligned, but sometimes competing. Given that, and with the benefit of 20/20 hindsight, it is no doubt easy to criticize some decisions that Lead Counsel have made in this complex and multi-faceted litigation and to present select examples of the push and pull among high-powered plaintiffs' counsel that could appear unseemly. In the final analysis, however, the Court is not persuaded that the tensions and conflicts here were anything more than the "normal give and take of any MDL."

* * *

Multi-district litigation of this sort is a complex affair. With so much at stake — in terms of money, ego, and otherwise — it is hardly surprising that conflicts would erupt among counsel, even counsel who are ostensibly on the same "side" and share a common adversary. Nevertheless, the Court finds it regrettable that Cooper levied his broadsides against Lead Counsel in the way he did, rather than taking steps in a more measured and productive (not to mention timely) manner to address or raise any problems that he perceived. In other words, assuming there is any merit to his allegations, he did himself — and, by extension, the plaintiffs in the MDL — a disservice by waiting to raise them until after the (admittedly embarrassing) collapse of the Plaintiff's case in the *Scheuer* trial and then raising them in the way he did. Through its bottom-line Order and this more detailed Opinion, the Court hopes that any clouds of uncertainty hovering over the status of Lead Counsel, the bellwether trial schedule, and the pending settlement have been lifted, thereby promoting the orderly management of the MDL and additional settlements. The Court also hopes that plaintiffs' counsel will stop litigating their grievances with one another and return to focusing on their common adversary, New GM, and on obtaining relief for their respective clients. That is, the Court hopes that counsel — and their clients — can return to focusing on what is truly at stake in this litigation: determining whether and to what extent the plaintiffs in these proceedings are entitled to relief for injuries caused by the acknowledged ignition switch defect in millions of General Motors cars.

* * *

NOTES AND QUESTIONS

1. As shown in *Syngenta,* the need to allocate common benefit revenue

equitably among multiple counsel, and to support and enforce such allocations, has necessitated the use of detailed timekeeping and reporting protocols. As noted in the JUUL Case Management Order No. 5: Common Benefit Order—Timekeeping and Expenses Protocol, the Court prescribed such a detailed protocol, and explained its purpose and function as follows:

> This Order is entered to provide standards and procedures for the fair and equitable sharing among Plaintiffs, and their counsel, of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all Plaintiffs in this complex litigation. * * * Participating Counsel shall be eligible to receive common benefit attorneys' fees and reimbursement of costs and expenses only if the time expended, costs incurred, and activity in question were (a) for the common benefit of Plaintiffs; (b) timely submitted; (c) not duplicative; and (d) reasonable in the determination of Lead Counsel and the Court or its designee. * * * Any counsel intending to seek payment of common benefit attorneys' fees and reimbursement of common benefit costs and expenses agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the award and allocation of common benefit attorneys' fees and expense reimbursements in this matter. * * *

As a plaintiffs' lawyer used to working on a contingent basis rather than working (or billing) by the hour, how would you react to such a protocol? How would it factor into your decision whether to seek a leadership position that carries with it a common benefit responsibility? To volunteer to do common benefit work on an ad hoc basis?

3. At some point in the litigation – the *Manual on Complex Litigation* urges this be done early – on MDL court will enter its actual common benefit assessment order, which specifies the percentage assessment that will be deducted and "held back" from individual recoveries (usually from the attorney's share), and how the resulting common benefit fund will be administered and allocated. Here is the *JUUL* case management order following up on its earlier common benefit time-and-costs reporting protocol, to actually set the assessment percentage and establish the common benefit fund itself:

IN RE JUUL LABS, INC., MARKETING, SALES PRACTICES, AND PRODUCTS LIABILITY LITIGATION , MDL NO. 2913

United States District Court for the Northern District of California, 2020.

Before WILLIAM H. ORRICK, TRANSFEREE JUDGE

Case Management Order No. 5a:
Establishing a Common Benefit Fee and Expense Fund

* * *

I. *Governing Principles—The Common Benefit Doctrine*

9. This Order is entered to provide for the fair and equitable sharing, among all beneficiaries, of the value of the services performed and expenses incurred by attorneys acting for the common benefit of all plaintiffs in this complex litigation. This is accomplished by directing Defendants who have

appeared in these proceedings, and over whom this Court has exercised jurisdiction, in the event of settlement, verdicts, and/or other recoveries, to either hold back or self-fund a designated percentage of their related settlements. The Court's authority derives from the Supreme Court's common benefit doctrine, as established in *Trustees v. Greenough*, 105 U.S. 527 (1881); *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884); *Sprague v. Ticonic National Ba*nk, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co*., 396 U.S. 375 (1970); and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980).

10. Courts have properly exercised their inherent case management authority to apply the common benefit doctrine in MDL proceedings. [numerous citations omitted]

11. Use of the common benefit doctrine to compensate attorneys who work for the common good of all plaintiffs is necessary for MDLs to be an effective means for the timely and economic resolution of cases. * * *

II. *Application and Scope*

12. This Order applies to:

a) All cases or claims now or later subject to the jurisdiction of this Court in this MDL, regardless of whether the case is resolved while the case is pending before this Court, after a remand from this Court to the transferor court, or in bankruptcy;

b) All cases or claims, filed or unfiled, in which any counsel associated with any one case filed in or transferred to this MDL has a fee interest;

c) Coordinated Actions as that term is defined in an anticipated Coordination Order, to the extent attorneys in those actions also have fee interests in cases filed or transferred to this MDL, sign the Participation Agreement, or utilize the work product of this MDL;

d) All cases or claims settled pursuant to an MDL-negotiated or supervised settlement agreement; and,

e) All cases or claims of clients of any counsel who signed the Participation Agreement as defined herein, whether the case was filed, unfiled or tolled.

III. *State-Federal Coordination*

A. *Coordination with the Consolidated California State Court Litigation*

13. Coordination on discovery and case management between the Lead Actions will be effectuated as set forth in the anticipated Coordination Orders to be entered by this Court and the JCCP Court and otherwise where practicable and appropriate, through cooperation between the leadership counsel for the MDL and the JCCP.

* * *

IV. *Plaintiffs' JUUL Fee and Expenses Accounts*

15. The MDL Plaintiffs' Liaison Counsel is directed to establish two bank accounts (the "Accounts") to receive and disperse funds provided in this Order (the "Funds"). These Funds will be held subject to the direction of this Court. The first fund shall be designated as the "JUUL Fee Fund" and the second should be designated as "JUUL Expense Fund" respectively.

* * *

18. No disbursement shall be made from the Accounts other than by Order of this Court pursuant to a petition requesting an award of fees and reimbursement of expenses (a "Petition"). No Petition shall be filed without leave of Court.

* * *

21. Unless otherwise agreed to by Defendants and the MDL PSC, details of any individual settlement agreement, individual settlement amount, and individual amounts deposited into the Accounts shall be treated as confidential by the Administrator and shall not be disclosed by the Administrator to the MDL PSC, the Court, or the Court's designee, unless the Court requests that it receive that information in camera.

* * *

V. *Appointment of the Special Master for Common Benefit Review and Dispute Resolution*

26. The Lead Actions have advised the Court that they have reached an agreement that Retired Judge Gail A. Andler, formerly of the Orange County Superior Court Complex Department, presently with the mediation group JAMS in Irvine, California, would be an appropriate special master to audit reported common benefit time and costs, and to resolve any common benefit disputes that may arise between any parties authorized to submit common benefit time and or expenses (the "Common Benefit Special Master").

* * *

IV. *Participation Agreement and Eligible Participating Counsel*

* * *

29. The Participation Agreement can be entered into by plaintiffs' attorneys on a voluntary basis. The Participation Agreement is a private and cooperative agreement between the MDL PSC and plaintiffs' attorneys only. It is not an agreement with any Defendants.

30. There is no need for an attorney who already has a case filed in or transferred to this Court to sign the Participation Agreement, because they are automatically subject to the Common Benefit Orders CMO-5 and CMO-5(a), and any amendments (unless they met the criteria of a remand for wrongful removal as set forth in footnote 3) with regard to all cases in which they have a fee interest, regardless of whether any of their other cases are filed in other jurisdictions, or not yet filed.

31. Plaintiffs' attorneys who execute the Participation Agreement are hereinafter referred to as "Participating Counsel." Plaintiffs' attorneys who do not execute the Participation Agreement and who are not deemed signatories to the Participation Agreement, or are otherwise not bound to common benefit assessments pursuant to CMO-5 and CMO5(a), and any amendments are hereinafter referred to as "Non-Participating Counsel."

32. All counsel for Coordinated Actions must sign the Participation Agreement in order to obtain MDL Common Benefit Work Product, and if otherwise authorized, to submit for common benefit time and costs.

33. Participating Counsel who execute the Participation Agreement shall be entitled to access to the Common Benefit Work Product for use in all of the cases or claims of their clients, whether the case or claim has been filed or not, and if filed, for use in any court in which it was filed even if not filed in this MDL, and for use for the benefit of non-filed claims, including any for which a tolling agreement exists. All claims or cases of a counsel who has executed the Participation Agreement shall be assessed whether the claim or case has or had not been filed, and all claims or cases in which a counsel who has executed the Participation Agreement has a fee interest shall be assessed.

* * *

35. Non-Participating Counsel, who do not execute the Participation Agreement and who are not deemed to have executed the Participation Agreement, or who are not subject to a Parallel common benefit order or interim agreement with the MDL PSC, shall have no right of access to the Common Benefit Work Product. However, in the event it is determined that such counsel in any fashion benefitted from the Common Benefit Work Product or the administrative functions of the PSCs, then all cases and claims of clients of such counsel, whether filed or not, shall be subject to the assessment described in this Order. It is deemed that the fair liquidated damages for such unauthorized use of the Common Benefit Work Product is equal to the assessment percentage(s) set by this Order. The Court will also consider an application by the MDL PSC for payment of its fees and costs to enforce this Order with respect to any unauthorized procurement or use of the Common Benefit Work Product.

* * *

A. *Calculating the Assessment*

39. For any attorney subject to an assessment under the terms of this Order, the assessment is owed on the "Gross Monetary Recovery" on all of that attorney's cases or claims.

40. A Gross Monetary Recovery occurs when a plaintiff agrees or has agreed—for monetary consideration—to settle, compromise, dismiss, or reduce the amount of a claim (a "Settlement") or, with or without

trial, recover a judgment for monetary damages or other monetary relief, including compensatory, and/or abatement costs and/or punitive damages (a "Judgment"), with respect to any JUUL-related claims (individual or class), including but not limited to the private, public, or government entity plaintiffs (including cities, counties, school districts, Indian tribes, state attorney generals, and participating States).

41. The Gross Monetary Recovery:

a. Excludes court costs that are to be paid by Defendant(s); and,

b. Includes the present value of any fixed and certain payments to be made in the future, such as those that come about as a result of a structured settlement of a claim or payments for future abatement costs.

B. *Defendants' Obligations*

* * *

43. For cases subject to an assessment, Defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Accounts based on the allocations set forth in paragraph 37 above as a credit against the Settlement or Judgment. No orders of dismissal of any Plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of Plaintiff's and Defendants' counsel that the assessment, where applicable, will be withheld and will be deposited into the Accounts at the same time the settlement proceeds are paid to settling counsel. If for any reason the assessment is not or has not been so withheld, the Plaintiff and his/her/their counsel are jointly responsible for paying the assessment into the Accounts promptly.

* * *

C. *Other Rights*

46. Nothing in this Order is intended to impair the attorney/client relationship or any contingency fee contract deemed lawful by the attorneys' respective bar rules and/or state court nor otherwise interfere with public entities' rights to, and exercise of, control in their respective cases.

VII. *Common Benefit Work*

* * *

49. All submissions and applications for common benefit fees and/or costs, whether made by counsel performing such work in the Lead Actions or in state courts, must comply with the procedures, requirements and guidelines of CMO-5, as amended, or the corresponding JCCP Order. Counsel performing common benefit work in courts other than the Lead Actions, who have not previously submitted their time and costs under CMO-5, shall have 45 days to do so from the date that counsel signs the Participation Agreement. However, submitted time must have been

contemporaneously recorded, well-documented, and not reconstructed after the fact, and if not pre-authorized, show good cause for the late submission. Attorneys authorized to do work by Co-Lead Counsel in the Lead Actions shall submit their time to the Common Benefit Special Master (with copies to their respective Co-Leads of the MDL or JCCP) in the form of spreadsheets and documentation to be specified by the Common Benefit Special Master. If an attorney applies for common benefit fees or costs in this Court, all of the cases in which the attorney and/or his or her law firm are counsel of record are subject to the full assessment. This Court retains the discretion to amend or supplement CMO-5, and this Order, as necessary and appropriate to reflect ongoing developments in the litigation.

* * *

IX. *Further Proceedings and Continuing Jurisdiction*

60. The payment of attorneys' fees and expenses for any class action settlement or recovery is governed by Federal Rule of Civil Procedure 23(h) or any analogous state court procedural rules. This Order is without prejudice to such other assessments of or awards of fees and costs as may be ordered by this Court under Federal Rule of Civil Procedure 23(h) or any analogous state court procedural rules, the common benefit doctrine, or that may be provided by contract between attorneys and clients.

61. The intent of this Order is to establish, secure, and supervise a fund to promote the purposes and policies of the common benefit doctrine and provide a source for equitable payment of services rendered and costs incurred for the benefit of plaintiffs.

62. If all parties to a future settlement agree that exceptional circumstances warrant a departure from the holdback obligations, or other provisions of this Order, they shall submit affidavits thereon and request appropriate relief from the Court.

63. Any disputes or requests for relief from or modification of this Order will be decided by the Court in the exercise of its continuing jurisdiction over the parties, and authority and discretion under the common benefit doctrine.

IT IS SO ORDERED.

Dated: May 27, 2020

NOTES AND QUESTIONS

1. The *JUUL* common benefit order specifically set the common benefit assessment at 7% (5% fees/2% costs). This percentage is consistent with assessments approved by other MDL courts. As reported in *Newberg and Rubenstein on Class Actions* (5th ed.) § 15.117, the median MDL common benefit percentage combined fees and costs and is 6%, with the mean percentage at 7.32%.

2. The *JUUL* common benefit assessment order above provides a

window into the day-to-day tasks that comprise the process of moving the aggregation of cases centralized in an MDL through the discovery and pretrial motion process, to ready the cases for trial, potentially to try some of them in the MDL itself, and to address information on the merit and values of the centralized claims to enhance the prospects of a comprehensive resolution. Since, as is often said, every procedure has a price tag – and the common-benefit-related orders above create an infrastructure to both conduct, and reimburse, such procedures, it is apparent why the common benefit system has become indispensable to MDL case management. Was this indispensability inevitable? Could alternative systems have been devised to address the perceived need in MDLs to reduce duplication of cost, time, and effort by charging a few to do the work for the many? Can you design such a structure?

D. *Judicial Enforcement of Common Benefit Orders*

The scope of common benefit orders can vary; some MDL courts take a narrow view of their jurisdiction over state court parties and counsel, and do not enforce common benefit fee assessments against them. For a thoughtful and evolution of this view, *See In re Roundup Products Liability Litigation*, 544 F. Supp.3d. (N.D. Cal. 2022). Other courts assure that all beneficiaries of the common benefit efforts share in its costs by enforcing the Participation Agreement that are often a feature of their orders. The *JUUL* Participation Agreement provisions are typical of contemporary practice. The Ninth Circuit took a contract enforcement approach to affirming the common benefit assessment on state lawyers by enforcing a similar participation agreement in *In re Bard IVC Filters Product Liability Litigation*, 81 F.4th 897 (9th Cir. 2023), affirming the *Bard IVC* MDL transferee judge's order excerpted below.

IN RE BARD IVC FILTERS PRODUCTS LIABILITY LITIGATION, (D. ARIZONA 2022)

603 F.SUPP.3D 822

Before DAVID G. CAMPBELL, SENIOR UNITED STATES DISTRICT JUDGE

I. *Background*

This multidistrict litigation ("MDL") involves personal injury cases brought against Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, "Bard"). Bard manufactures and markets medical devices, including blood clot filters. The MDL Plaintiffs each received implants of Bard filters and claim they were defective and caused serious injury or death.

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CMO 6 was issued early in the MDL to provide for the fair and equitable sharing among plaintiffs and their counsel of the burden of litigating this complex case. A common benefit fun was established to ensure that attorneys who performed work that benefited all plaintiffs and their counsel would be reasonably compensated. Compensable common benefit work included meetings and conference calls, discovery, document review, expert retention and discovery, motion practice, court appearances, plaintiff-specific discovery and motion practice on bellwether cases, bellwether trials, and settlement efforts.

***

CMO 6 established a total common benefit assessment amount of 8%, which included 6% for attorneys' fees and 2% for expenses. In May 2019, the Court found that significant unanticipated common benefit work justified an increase in the attorneys' fees assessment percentage to 8%, but declined to increase the 2% assessment for expenses.

As a member of the PSC, BCM [the objecting law firm] was included as "Participating Counsel" under CMO *6.* As Participating Counsel, BCM agreed to the terms of the "Participation Agreement" which were incorporated into CMO 6. *** Under the agreement, an attorney is entitled to receive and use common benefit work "created by those attorneys who have also executed, or have been deemed to have executed, the Participation Agreement[,] ... regardless of the venue in which the attorney's cases are pending." *Id.* at 15. In return, Participating Counsel agreed to pay common benefit assessments from the gross recoveries obtained in all cases benefitting from common benefit work, including MDL cases and "all un-filed cases, tolled cases, and/or cases filed in state court in which [Participating Counsel] have a fee interest[.]"

***

BCM moves to exempt and reduce client recoveries from common benefit assessments. BCM contends that no assessment should be paid by BCM clients whose cases were filed in federal court after the MDL closed, were filed in state court, or were never filed in any court. BCM further contends that assessments for its cases that were at one time part of the MDL should "be capped at the average fee and costs amount paid on those cases that settled solely as the result of common fund work." *Id.* The Common Benefit Fee and Cost Committee opposes the motion. Doc. 22149. Bard has filed a brief urging BCM to be mindful of its confidentiality obligations under the various settlement agreements and asking the Court to deny BCM's request to conduct discovery regarding the value of other settlements.

BCM primarily relies on Judge Chhabria's decision *In re Roundup Products Liability Litigation,* 544 F. Supp. 3d 950 (N.D. Cal. 202 1), in urging the Court to exempt BCM's unfiled cases, state court cases, and post-MDL federal court cases from common benefit assessments. The Court will address the decision in *Roundup,* showing that it faced a very different set of facts than this case, and then will address the basis for the Court's authority to hold BCM and its clients to the terms of CMO 6 and the Participation Agreement.

II. *The Roundup Decision.*

Plaintiffs' lead counsel in *Roundup* requested an order requiring that "whenever anyone in the country recovers money from Monsanto based on allegations that its Roundup product caused their cancer, 8.25% of their recovery be held back and placed into a [common benefit] fund to compensate lawyers who took the lead in litigating against Monsanto." 544 F. Supp. 3d at 952. The proposed order would apply to any person who recovers money from Monsanto, "regardless of whether their lawyer was involved in the MDL or used MDL work product." *Id.* at 957.

Judge Chhabria understandably found this request "far-reaching" and "breathtaking [in] nature," and largely denied it. *Id.* at 952-53, 957; *see also id.* at 968 (noting "how badly lead counsel overreached when they asked the Court to tax every Roundup- related recovery by anyone in the country, regardless of any connection to the MDL"). With respect to recoveries by people who were not plaintiffs in the MDL but who hired a lawyer with a client in the MDL, Judge Chhabria found that he could not "exert authority over the recovery of a person with so tenuous a connection to the MDL." *Id.* at 963. He concluded that "[n]either the common fund doctrine nor the district court's inherent power to control its docket justifies an order affecting the recovery of a non party merely because they happened to hire a lawyer with a client in the MDL." *Id.* And he found that the "same logic applies to disputes where the claimant has not filed a lawsuit in any court." *Id.* at 964.

Judge Chhabria did not address the question presented here. Although he found it "questionable whether a district court has authority ... over the recovery of someone whose lawyer signs a participation agreement," 544 F. Supp. 3d at 967, he ultimately took no position on this issue because he decided not to exercise any such authority he did have, *id.* at 968.

Judge Chhabria's decision was influenced by several factors that are not present here.

First, in contrast to the very broad fee requests at issue in *Roundup,* the common benefit assessments in this case apply only to unfiled or state court cases whose attorneys elected to become Participating Counsel in this MDL.

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Second, the *Roundup* court noted that much of the common benefit work in that case had been placed on the public docket and was available to any member of the public for free. The court found "[i]t would not be appropriate to take money from anyone's recovery based on access to that information." *Id.* at 972. This MDL is different. The common benefit work in this case includes millions of pages of reviewed documents, substantial ESI discovery, scores of depositions (including trial preservation depositions after the MDL closed), and numerous experts retained and developed by the MDL's lead counsel.

***

Anticipating that some attorneys would need to try cases on remand from the MDL, the PEC created a trial package and made it available to Participating Counsel.*** The trial package is designed to assist counsel on remand in presenting their clients' cases at trial. It contains almost all the work product developed in the MDL and qualifying pre-MDL cases, including tens of thousands of documents, motions, transcripts, exhibits, corporate documents, legal memos, and post- bellwether preservation depositions that can be played at trial in lieu of live testimony. *See id.* The trial package is maintained in a secure online business repository (Dropbox), with access strictly controlled by one PEC law firm * * * The trial package and other common benefit work represent the efforts of more than 200 attorneys and staff who spent more than 100,000 hours creating MDL work product. The Court cannot conclude, as did the *Roundup* court, that the common benefit work in this case conferred little benefit on BCM and other Participating Counsel.

Third, Judge Chhabria found no correlation between the lawyers who signed the participation agreement in his case and those who were granted access to common benefit work. This was because lead counsel "did not take the time to ensure ... that attorneys who requested access to MDL work product signed the agreement." 544 F. Supp. 3d at 972. As a result, Judge Chhabria found "it would not be reasonable to require a holdback from the recoveries of non –parties whose attorneys happened to sign the participation agreement[.]" *Id.* The same is not true here. The PEC took reasonable measures to ensure that only Participating Counsel receive access to common benefit work.*** More will be said about this below.

Fourth, to the extent lawyers for nonparties actually received access to confidential common benefit work, the *Roundup* court doubted "that access to that work product is what truly advanced the ball for those attorneys and their clients." *Id.* In this case, the Court has no doubt that BCM's use of the trial package advanced the ball for its clients. BCM reached a settlement with Bard that includes more than 500 clients, and accessed the trial package more than 5,000 times while representing those clients between January 2020 and the present.*** BCM claims that this fact "proves nothing, as BCM clearly was entitled to access that material an unlimited number of times[.]" * * * But BCM enjoyed unlimited access only because it signed on as Participating Counsel and agreed that common benefit assessments would "apply to all un-filed cases, tolled cases, and/or cases filed in state court in which [BCM has] a fee interest[.]" * * * BCM argues that had it "simply downloaded the materials to its own internal database, [it] could have made exactly the same use of those materials while accessing them via the Drop box site fewer than a dozen times." * * * True, but the point is that BCM enjoyed access to the MDL work product – whether online or by downloading it- only because it entered into the Participation Agreement and agreed to pay common benefit assessments. *Roundup's* concern about claimants paying for work that did not benefit them simply is not present here.

Fifth, because of the very large verdicts returned in three *Roundup* trials ($289 million, reduced to $20.5 million; $80 million, reduced to

$25 million; and $2.55 billion, reduced to $87 million), the *Roundup* court expressed doubt about whether lead counsel needed any more compensation for their work. 544 F. Supp. 3d at 969 ("Yes, the lead lawyers invested a great deal of time and money in these cases, but now they're likely making so much from settling their own 'inventories' that they can each afford to buy their own island."). The same is not true here. The three bellwether trials in this MDL resulted in a plaintiffs verdict of $3.6 million and two defense verdicts. Lead counsel will not be buying islands from their earnings, and whether they will receive full compensation for the time and resources they devoted to the MDL remains an open question.

Sixth, the *Roundup* court noted that much of the settlement leverage acquired by plaintiffs suing Monsanto came from two verdicts in state court trials, rather than from work done in the MDL.* * * Again, this case is different. Although BCM suggests that the seven cases it took to trial after the MDL resulted in larger confidential settlements for its clients than settlements reached in the MDL*** the results in BCM's seven trials were not better than the bellwether trial results. BCM's trials resulted in four plaintiffs' verdicts totaling $7.1 million, and three defense verdicts. The average recovery per trial for BCM was $1.01 million ($7.lM/7), while the average result from the three bellwether trials was $1.2 million ($3.6M/3).

Seventh, the *Roundup* court did not set a common benefit assessment amount at the beginning of the *Roundup* MDL and had not set an amount at the time it addressed these issues. 544 F. Supp. 3d at 956 ("[A] holdback percentage for the common benefit fund has yet to be set."). In contrast, this Court set the original 8% holdback percentage less than five months after the MDL started. As a result, BCM has known since 2016 that this assessment would be required of it and its clients, and has been able to take this fact into account not only in the fee agreements it reached with its clients but also in its settlement negotiations with Bard. The same certainty was not available to counsel in *Roundup*.

***

In short, the *Roundup* court faced very different circumstances than this case. Those circumstances surely influenced Judge Chhabria's evaluation of his power to make common benefit assessments against plaintiffs who did not participate in the MDL. This Court reaches different conclusions about its power to hold BCM and its clients to the agreements and orders entered from the beginning of this case.

II. *The Court Has Authority to Impose the Common Benefit Assessments.*

Roundup and other cases have addressed three possible sources of authority for an MDL court's power to impose common benefit assessments on plaintiffs in and out of the MDL: (1) the federal MDL statute, (2) inherent judicial power, and (3) the common fund doctrine. The Court will address each of these possible sources and relevant reliance interests.

A. MDL Statute.

The Court agrees with *Roundup* and other cases that the MDL statute is procedural in nature and does not clearly confer on federal courts the power to create a common benefit fund or make assessments for that fund. *See Roundup,* 544 F. Supp. 3d at 958; *In re Genetically Modified Rice Litig.,* 764 F.3d 864 (8th Cir. 2014) (citing *In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litigation-II,* 953 F.2d 162, 165 (4th Cir. 1992)). But the statute is not entirely irrelevant. It provides that the Judicial Panel on Multidistrict Litigation will transfer cases - potentially a very large number of cases - to MDL judges for "coordinated or consolidated pretrial proceedings [.]" 28 U.S.C. § 1407(b). MDL judges clearly may exercise such inherent powers as are necessary to manage and complete those pretrial proceedings. And in an MDL like this one, with more than 8,000 cases, the appointment and oversight of lead plaintiffs' counsel is essential. That appointment and oversight necessarily requires the MDL court to address how lead counsel will be paid for their extensive MDL work on behalf of all plaintiffs. Thus, although the MDL procedural statute is not itself a source of power for a court to establish and oversee a common benefit fund, it creates a complex and consolidated litigation process that makes the exercise of the court's inherent power uniquely necessary. *Seein re Nat'l Opiate Prescription Litig.,* No. 1:17-md-2804, at *2 (N.D. Ohio May 9, 2022)
* * *

The Court adds one observation here. In *Roundup,* Judge Chhabria quoted Judge Furman's observation in *In re General Motors LLC Ignition Switch Litigation,* 477 F. Supp. 3d 170 (S.D.N.Y. 2020), that "[a] subset of plaintiffs' lawyers do the lion's share of the work, but that work accrues to the benefit of all plaintiffs. If those other plaintiffs were not required to pay any costs of that work, high-quality legal work would be under-incentivized and, ultimately, under-produced." *Id.* at 174; *see Roundup,* 544 F. Supp. 3d at 962. This Court would go even further. Without a common benefit fund mechanism, MDL courts would not only be unable to attract good counsel for leadership roles, they would be unable to attract any counsel. Lead MDL counsel invest thousands of hours in attorney time and millions of dollars in costs. No counsel would be willing to do so without some assurance that their time and costs would be repaid if the MDL ultimately were successful, and not every MDL will have the lucrative recoveries seen in *Roundup,* where lead counsel's contingent fees from their own clients are sufficient to cover their substantial investment in common benefit work. An MDL court's ability to perform the task assigned to it by the MDL statute necessarily requires the power to assure reasonable compensation for the efforts of lead counsel.

B. *Inherent Power.*

"[I]t is well established that federal courts ... possess certain inherent powers, 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases[.]" *Gen. Motors LLC Ignition Switch Litig.,* 477 F. Supp. 3d at 189 (quoting *Link v. Wabash R.R.* Co., 370 U.S. 626, 630-31 (1962)); * * *Fed.Jud. Ctr., *Manual for Complex Litigation, Fourth§* 10.1 (2004) (explaining that once cases are consolidated under the

umbrella of an MDL court's pretrial jurisdiction, "the court's express and inherent powers enable the judge to exercise extensive supervision and control [over the] litigation").

While a district court's inherent managerial power is particularly important in a large MDL like this one, the power is not unlimited. As Judge Furman explained in *General Motors,* " 'the outer boundaries of a district court's inherent powers' have never been 'precisely delineated,' but courts have articulated certain limiting principles." 4 77 F. Supp. 3d at 189 (quoting *Dietz v. Bouldin,* 579 U.S. 40, 45 (2016)). First, "the exercise of an inherent power must be a reasonable response to the problems and needs confronting the court's fair administration of justice." *Id.* Second, it "cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Id.* Third, "federal courts may not enforce their orders - particularly those regulating conduct outside of the courtroom - against 'the entire universe of potential violators.'" *Id.* (quoting *Eli Lilly* & Co. *v. Gottstein,* 617 F.3d 186, 195 (2d Cir. 2010)).

CMO 6 falls within these limits. "It is beyond dispute that the Court may 'establish fee structures designed to compensate [lead counsel] for their work on behalf of all plaintiffs involved in [this MDL]." *Id.* at 189-90 (quoting *Smiley v. Sincoff,* 958 F.2d 498, 501 (2d Cir. 1992)). CMO 6's common benefit assessments "ensure that [lead counsel are] appropriately 'compensated for their work not only by their own clients, but also by those other parties on whose behalf the work is performed and on whom a benefit has been conferred.'" *Id.* at 190 (quoting *In re Worldcom, Inc. Sec. Litig.,* 2004 WL 2549682, at *2 (S.D.N.Y. Nov. 10, 2004)). And as explained above, "the expectation of such payments is critical to incentivize counsel to do such work in the first place." *Id.* Imposing assessments in this MDL "is thus 'a reasonable response to the problems and needs confronting the [C]ourt's fair administration of justice.'" *Id.*

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The Court's exercise of its inherent power to impose common benefit assessments on BCM's unfiled and state court cases is bolstered by the fact that BCM knowingly entered into the Participation Agreement incorporated into CMO 6. The Third Circuit addressed a similar situation in *In re Avandia Marketing, Sales Practices & Products Liability Litigation,* 617 Fed. Appx 136 (3d Cir. 2015). In that case, a law firm entered into a participation agreement with the plaintiffs' steering committee, pursuant to which it agreed to pay 7% of the recovery on its clients' claims into a common benefit fund in exchange for use of the steering committee's work product. *Id.* at 138. The district court incorporated the agreement into a common benefit fund order, which mandated an assessment on "all *Avandia* claims, regardless of whether those claims are subject to the jurisdiction of the MDL, tolled, untiled, or filed in another jurisdiction if, among other things, the attorney signed on to the Participation Agreement[.]" *Id.* at 138-39 (quotation marks and brackets omitted). When a global settlement was reached, the firm argued that its state court cases should not be subject to any assessment. *See id.* The district court disagreed, reasoning both that the firm had "used MDL

work product" in its state court cases and that the "Participation Agreement covered all claims for which [the firm] served as counsel at the time of resolution." *Id.* at 140.

The Third Circuit affirmed on the ground that the firm was bound by the district court's common benefit order. "A district court that supervises a multidistrict litigation," the Circuit explained, "has - and is expected to exercise - the ability to craft a plaintiffs' leadership organization to assist with case management. Included in that ability is the power to fashion some way of compensating the attorneys who provide class-wide services." *Id.* at 141 (citation and quotation marks omitted). The district court "permitted the Steering Committee to, essentially, trade work product for a share in the recovery in cases *not* before the MDL." *Id.* at 141 (emphasis in original). Because the district court incorporated the Steering Committee's agreement with the firm into its own order, and the breach of an agreement incorporated into a court order is a violation of the order itself, the district court "had jurisdiction to determine whether [the law firm] breached [its] agreement and, if so, to remedy that breach." *Id.* at 142 * * *

The same reasoning applies here. As Participating Counsel, BCM knowingly assented to the terms of the Participation Agreement which were incorporated into CMO 6. BCM took advantage of those terms when it repeatedly accessed common benefit work for the good of its clients, and when it applied for and received payments of common benefit funds for its own common benefit work, including its state court work.*** *see also Nat'l Opiate Prescription Litig.*, No. 1:17-md-2804, at *13 ("MDL courts appear virtually unanimous on their authority to subject a recovery in a nonMDL forum to an appropriate assessment if the plaintiffs or their counsel *actually used* common benefit work product.")***

Although BCM does not address what it told its clients about the common benefit assessments that would apply to their claims in light of the Participation Agreement and CMO 6, it surely informed them of those obligations and obtained their agreement. Ethical rules required BCM to advise their clients of the terms of their fee arrangements - which would include the common benefit fund assessments established by the Court and to which BCM had agreed- and to include those terms in their written agreements.***

What is more, BCM and its clients clearly benefitted from the MDL work product. BCM not only received the trial package containing a vast amount common benefit work ready for use in trials, but BCM also was not required in its unfiled and state court cases to take scores of depositions of Bard witnesses and general causation experts that were taken in the MDL. Nor was BCM required to obtain and review the numerous documents and ESI produced during consolidated pretrial discovery in the MDL. And it was lead MDL counsel, not BCM, who successfully opposed Bard's numerous motions in limine on general causation experts and its motion for summary judgment on preemption grounds. * * *

In addition, the Court made many key legal and evidentiary rulings in the MDL that would affect remanded and transferred cases, including rulings on discovery matters, privilege and work product issues, *Daubert*

challenges, the admissibility of evidence regarding the FDA clearance process, Bard's Simon Nitinol Filter, and scores of deposition designations for trial. As explained to other courts in the Court's final remand and transfer order, "[b]ecause all general fact and expert discovery has been completed in this MDL, the courts receiving cases need not be concerned with facilitating general expert, corporate, and third-party discovery." *Id.* at 31. The receiving courts also were provided a stipulated designation of record that included all significant rulings made in the MDL.

BCM does not state how closely the courts in its seven trials followed these MDL rulings, but the four trials it identifies all occurred in federal court* * *, and those courts were specifically advised of key MDL rulings and encouraged by this Court to follow them* * *. Thus, although BCM notes that it had to take a number of depositions and produce experts, the vast majority of these undoubtedly were plaintiff-specific matters that were not addressed in the MDL. * * * BCM's cases for its clients were built on the foundation of the MDL work. It is simply incorrect to assert that they did not benefit from that work.

For all these reasons, the Court concludes that it has the inherent power to enforce the terms of CMO 6 and the Participation Agreement, to hold BCM to its promise to pay the Court-ordered common benefit assessments on recoveries obtained in its unfiled and state court cases, and to hold BCM's clients to the agreement made by their counsel and surely included in their fee agreements with BCM. Judge Furman reached the same conclusion: "[T]he Court concludes that it had both jurisdiction and authority to mandate assessments on the settlements of ... unfiled claims. It follows that the Court may, and will, enforce Order No. 42 as written." *Gen. Motors LLC Ignition Switch Litig.,* 4 77 F. Supp. 3d at 192; *see also In re Vioxx Prods. Liab. Litig.,* 760 F. Supp.2d 640, 648 (E.D. La. 2010) * * *

C. *Common Fund Doctrine.*

"[U]nder the 'American Rule,' the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546, 561, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986). Likewise, the attorney for the prevailing litigant generally must look to his or her own client for payment of attorneys' fees. "Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule, known as the common fund or common benefit doctrine, that permits the creation of a common fund in order to pay reasonable attorneys' fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries." *In re Vioxx Prods. Liab. Litig.,* 2013 WL 1856035, at *3 (E.D. La. Apr. 30, 2013) (citing *In re Zyprexa Prods. Liab. Litig.,* 594 F.3d 113, 128 (2d Cir. 2010) (Kaplan, J., concurring)); *see also In re Xarelto (Rivaroxaban) Prods. Liab. Litig.,* 2020 WL 1433923, at *3 (E.D. La. Mar. 24, 2020) (explaining that the common benefit doctrine "serves to encourage attorneys to accept the considerable risks associated with prosecuting complex, multi-plaintiff matters for the benefit and protection of all plaintiffs' rights").

The common fund doctrine typically has been used to award attorneys' fees in class actions. *** "As class actions morph into multidistrict litigation, as is the modern trend, the common benefit concept has migrated into the latter area. The theoretical bases for the application of this concept to MDLs are the same as for class actions, namely equity and her blood brother, quantum meruit." *Manual for Complex Litigation* (Fourth)§ 14.121; * * *

In light of the equitable principles underlying the common fund doctrine, "MDL courts have consistently cited the ... doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs." *Vioxx Prods. Liab. Litig.,* 2013 WL 1856035, at *3 [citing cases].

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The Court cannot conclude, as did the *Roundup* court, that the common fund doctrine is limited solely to cases where a lawyer's work creates a *res* that resides in the court and from which others seek to recover. The doctrine has been applied repeatedly to MDL cases.*** *see also Van Gernert v. Boeing* Co., 590 F.2d 433, 437 (2d Cir. 1978) (noting that "the common fund doctrine has not been restricted to equitable actions in which the court exercised control over a 'res'").

Nor does the Court find the historical beginnings of the common fund doctrine to be meaningfully different from its applications in MD Ls. Although it is true that MD Ls generally do not produce an actual fund paid into court on which all plaintiffs can draw, the advantage conferred on all plaintiffs by a successful MDL prosecution is no less real. The equitable reality underlying the common fund doctrine - that substantial work and expense by few has conferred a significant financial benefit on many- is the same. And it certainly is true in this case. BCM and its clients, in and out of the MDL, stood on the foundation created by the MDL common benefit work, freely and frequently accessed that work, and secured substantial financial benefits from it. The compelling equities of the common benefit doctrine apply fully here. *See Nat'l Opiate Prescription Litig.,* No. 1:17-md-2804, at *12 ("MDL courts, using their equity powers when applying the common benefit doctrine, regularly extend that authority over counsel's other, non-MDL cases in order to 'preempt .. . the free-rider problem[.]'") (quoting *Gen. Motors LLC Ignition Switch Litig.,* 477 F. Supp. 3d at 181).

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D. *Reliance Interests.*

Reliance interests are also relevant. * * * *Roundup,* 544 F. Supp. 3d at 970. The common benefit fund was established early in this MDL to ensure that attorneys who performed work for all plaintiffs and their counsel would be reasonably compensated. * * * In reliance on that arrangement, in which BCM was a full and knowing participant, the PSC managed and litigated this complex MDL to a conclusion, tried three bellwether cases, withstood Bard's preemption challenge, and amassed evidence and experts useable by all plaintiffs and their counsel. *See* Doc.

18038 at 4. The PSC and other attorneys who performed compensable common benefit work justifiably relied on Participating Counsel's agreement to pay common benefit assessments on all cases in which Participating Counsel have a fee interest. Now, more than six years after BCM agreed to pay assessments on all its cases in return for access to common benefit work, and after obtaining and utilizing that work, BCM seeks to avoid paying assessments on its non-MDL cases. * * * Simple fairness requires that its request be denied.

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The Court determined that an 8% assessment for attorneys' fees and a 2% assessment for expenses would be appropriate for the extensive common benefit work to be done in this MDL. * * * BCM cites no legal authority suggesting that established assessment percentages should be changed merely because participating counsel obtained recoveries in remanded cases without relying entirely on common benefit work. And the Committee notes that other courts have rejected requests to exempt attorneys and cases from assessments when attorneys and their clients have benefited from MDL work product.* * *

BCM seeks to have the assessments applied only to the portion of the recoveries "fairly traceable" to the use of common benefit work. * * * But BCM does not explain how this approach would be feasible, even if appropriate. Other courts have rightly found such a proposal impractical. *See Diet Drugs Prods. Liab. Litig.,* 553 F. Supp. 2d at 497 (explaining that "a case by case analysis was untenable" as the court would need to "wade into the morass" of determining which of the materials and services available through the work of the common benefit attorneys were actually used in particular cases). Also untenable is BCM's proposal that assessments for its remanded cases "be capped at the average fee and costs amount paid on those cases that settled solely as the result of common fund work." * * * As the Committee notes, there is no realistic way to reliably trace what factors led to Bard's decision to settle with BCM or other plaintiffs' lawyers. If BCM's post-remand efforts enhanced the value of its settlements, BCM and its clients will benefit financially from that increased value. The overall results were, however, due at least in part to the work done in the MDL, and the Court will not attempt to parse the value between the common benefit work and BCM's work.

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* * *

NOTES AND QUESTIONS

1. In affirming the *Bard* district court decision on appeal, the Ninth Circuit endorsed the district court's analysis, holding that the court properly exercised its authority over the MDL to order common benefit assessments from recoveries in non-MDL cases when (1) counsel voluntarily consented to the district court's authority by signing or agreeing to a participation agreement that required such assessments, in exchange for access to common benefit work product; (2) the participation agreement was incorporated into a court order; and (3) as a result of entering into the participation agreement, counsel received access to the common benefit work product. Since these three criteria were met regarding the challenged assessments, they were enforceable. The *Bard* appellate decision recounts the history of common benefit assessments in MDLs, gathering cases from multiple circuits at various stages of multidistrict litigation's evolution, and emphasizes that, although the assessments came from cases outside the MDL, including state court actions and unfiled cases, they were proper applications of the district court's authority to manage the MDL and the parties and counsel who came before it, including counsel who signed onto the participation agreement. The appellate decision noted as well the "reliance interest" of the counsel who did the common benefit work, who " managed and litigated this complex MDL to a conclusion, tried three bellwether cases,…and amassed evidence and experts useable by all plaintiffs and their counsel…thus…attorneys who performed common benefit work justifiably relied on participating counsels' agreements to pay common benefit assessments." 81 F. 4th at 905. The Ninth Circuit further observed that the appellant counsel challenging the common benefit order's application to them "took advantage of the terms of the participation agreement" by assessing " common benefit work for the good of its clients, and when it applied for and received payments of common benefit funds for its own common benefit work, including its state court work." *Id*.

2. In the *In re Syngenta AG MIR 162 Corn Litigation*, the district and appellate courts addressed and enforced federal court common benefit assessment orders and attorneys fee allocations in a uniquely complex, $1.5 billion multi-jurisdictional global settlement, resolving claims by corn farmers and other corn industry claimants against the maker of genetically modified corn seed. Plaintiffs in the MDL, a related federal litigation, and numerous state court suits all similarly alleged that defendant's distribution of its seed infiltrated their crops, causing China (which banned genetically modified imports) to refuse entry of US corn. The complex settlement of these economic loss claims in turn spawned a complex fee award and allocation challenge. The MDL judge approved a total fee award of $503 million, and allocated it, under contractual provisions, Rule 23 fee award jurisprudence, and equitable common benefit principles, among class counsel and numerous firms representing individual plaintiffs, who had participated in the federal and/or state cases. The Tenth Circuit's decision affirming this Herculean labor, itself spans 99 pages. *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th 1126 (10th Cir. 2023).

3. The ongoing debate among plaintiffs' counsel, and among MDL courts themselves, as to the origin, nature, and extent of an MDL court's authority to impose a common benefit assessment against the fees of plaintiffs' counsel is exemplified by the *Bard IVC* decision, which compares and contrasts its determination with that of another MDL court in another large mass tort litigation, the *Roundup* MDL. The *Bard IVC* and *Roundup* MDL courts took very different approaches to the reach and exercise of their authority in connection with the enforcement of their common benefit enforcement decisions. The Ninth Circuit reconciled these approaches in its *Bard* decision, while months earlier the Tenth Circuit, in its *Syngenta* decision, addressed the same issues that had been raised by nonleadership counsel in *Bard* and *Roundup*. Each decision involved a careful analysis of the case-specific facts, and of the recurring interests in play. Are different case management or judicial policies and philosophies in play? Should Congress, the Civil Rules Committee, or some other authority set forth a more specific or stricter common benefit rule? What are the pros and cons of judicial discretion in this area?

4. The *Bard* court noted the creation of a "trial package" that it provided to other counsel for use in their trials on remand. *81 F.4th at 902.* What would such a trial package contain? Why would it be of benefit to the Participating Counsel?

5. To what extent would the *Bard* court have enforced its 8% assessment for fees and 2% assessment for expenses had there not been a Participation Agreement signed by objectors? Could the ability to enforce the assessment have been based solely on this agreement, without a common benefit order in their remanded cases?

6. The *Bard* MDL court seems to invoke the common benefit mechanism as an antidote to the tragedy of the commons as the opinion noting that without a common benefit fund mechanism, MDL courts would not only be unable to attract good counsel for leadership roles, they would be unable to attract any such counsel. The *Bard* opinion catalogues, in great detail, the type and magnitude of document review, discovery, experts, pre-trial, and trial preparation work done by such counsel: a schematic of the MDL mechanism itself at work. *Id. 902.* Do you agree that this work would simply not get done absent a common benefit mechanism? What other incentives or consequences – carrots or sticks – could be deployed by MDL courts to get the necessary work or an MDL case in a "just, speedy, and inexpensive" manner, as Fed. R. Civ. P. 1 exhorts?

7. The *Roundup* MDL court, by contrast, described the lead counsel as more than amply compensated by the perks of leadership itself: they tried a successful case generating millions of dollars in punitive damages, and settled their own large "inventories" of cases, presumably for better value than non-leaders, to the extent, as the *Roundup* court quipped, "that they can each afford to buy their own island." *Roundup*, 544 F.Supp.3d at 969. The *Bard IVC* district court decision compared that purported windfall with the harder-won, and lesser in magnitude, recovery of its lead lawyers. "Lead counsel will not be buying islands from their earnings, and whether they will receive full compensation for all the time and resources the devoted to the MDL remains an open question." 81 F.4th at 603 F. Supp. 3d. 822, 829 (D. Ariz. 2022).

8. The term "common benefit assessment" generally refers to the percentage tax on plaintiffs' attorneys' fees at the end of their cases. No

assessment applies if they receive nothing for their clients. There is simply nothing to tax. The lead lawyers themselves also pay an "assessment", but they do so shortly after their appointment, and on a recurring basis throughout the litigation, to fund the costs of discovery, experts, and other bills as they come due. These front-end assessments can amount to millions of dollars per lead lawyer in a large case, and if the litigation fails, such advanced costs are lost.

9. Counsel seeking to avoid being "taxed" by common benefit assessments raise a series of arguments that would exempt the circumstances of a particular litigation, or of particular counsel, from the common benefit reach. In the *Chinese Drywall* MDL, for example, a "global" class settlement involving most of the federal and state cases was followed by a set of individual settlements in Florida cases. The MDL court exercised its case management authority to apply its common benefit order to these individual settlements, awarding the class counsel 45% of the attorneys' fees in the Florida individual settlements, which appear to have been an effort to escape such assessment. The Florida attorneys cried foul,and appealed; the court of appeal affirmed. *Amorin v. Taishan Gypsum Co., Ltd.*, 851 Fed. App. 730 (11th Cir. 2021).

10. The *Amorin* decision refers to and endorsed the "*Johnson* factors" the MDL court used in awarding the fee. *See Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). For over 45 years, courts have applied the *Johnson* factors to fee determinations, in both class and non-class action contexts, and in MDLs nationwide. The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *See Johnson*, 488 F.2d at 717–19.

E. *MDL Case Management Templates for Organizing and Coordinating Pretrial Motion and Discovery Practice*

The foregoing orders and decisions reveal much about the internal workings and day-to-day case management decisions of MDL courts. Not surprisingly, the details of the work to be done, how much of it has done and by whom, and its value to the litigants and the court emerge most vividly when it is time to pay the bill. But leadership selection and common benefit assessments are not the only occasions upon which case management guidance is called for. The initial, stage-setting functions of early case management orders, such as the *JUUL* orders above, must be augmented as the case – and the discovery and pretrial work – of an MDL proceeding goes on. The following *Pretrial Order No. 7* from the *McKinsey* MDL is illustrative.

IN RE: MCKINSEY & CO., INC. NATIONAL PRESCRIPTION OPIATE CONSULTANT LITIGATION

United States District Court, Northern District of California.
Case No. 3:21-md-02996-CRB

Pretrial Order No. 7: Initial Case Management Order

I. *Scope of Order*

1. This Initial Case Management Order ("CMO") is intended to conserve judicial resources, reduce duplicative service, avoid duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation. See Federal Rule of Civil Procedure ("FRCP") 1. This CMO shall govern the practice and procedure in those actions transferred to this Court by the Judicial Panel on Multidistrict Litigation ("the Panel") pursuant to its Transfer Order of June 7, 2021 (Dkt. No. 1), any "tag-along" actions transferred to this Court by the Panel pursuant to the Panel's Rules of Procedure, and all related actions that have been or will be originally filed in, transferred to, or removed to this Court and assigned thereto. These cases will be referred to as the "MDL Proceedings."

2. This Order and all subsequent Case Management Orders shall be binding on all parties and their counsel in all cases currently pending or subsequently transferred to *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, MDL No. 2996, and shall govern each case in the proceedings unless the order explicitly states that it does not apply to specific cases or that it applies only to specific cases. The provisions of this CMO, and any subsequent case management order issued in the MDL proceedings, shall supersede any inconsistent provisions of the Local Rules for the United States District Court, Northern District of California. The coordination of MDL Proceedings, including certain of these cases that have been or may be directly filed into this MDL, does not constitute a waiver of any party's rights under *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). This CMO shall not be construed to affect the governing law or choice-of-law rules in any case subject to the CMO.

3. This Order may be amended by the Court on its own motion, and any party may apply at any time to this Court for a modification or exception to this Order. The Court expects it will issue subsequent case management orders addressing the cases mentioned in this CMO and other MDL proceedings.

II. *Cases Before this Court*

4. The inclusion of any action in *In re McKinsey & Co., Inc. National Prescription Opiate Consultant Litigation*, MDL No. 2996, whether such action was or will be filed originally or directly in the United States District Court for the Northern District of California or was or will be transferred or

removed from some other court, shall not constitute a determination by this Court that jurisdiction or venue is proper in this District. No reference in this Order to actions filed originally or directly in the United States District Court for the Northern District of California shall constitute a waiver of any party's contention that jurisdiction or venue is proper or improper.

III. *Master Complaints*

5. The Plaintiffs' Steering Committee ("PSC") shall file and serve Master Complaints for each category of Plaintiffs (Political Subdivisions, American Indian Tribes, Third Party Payors, NAS Children, School Districts) no later than December 6, 2021. Unless the Court orders otherwise, Defendants will not be required to respond to or move against each individual complaint filed in these MDL proceedings other than the Master Complaints. Defendants reserve the right to move under any applicable federal rule for dismissal of one or more Master Complaints, including but not limited to filing the Initial Motions (defined below) outlined in Section IV. Insofar as any ruling with regard to any Master Complaint addresses issues that are also raised by any individual action in these MDL Proceedings, such ruling shall also apply to that action.

IV. *Initial Motions*

6. McKinsey will file its motion seeking dismissal of the claims brought by political subdivisions and other similarly situated plaintiffs on the grounds that the claims are barred by the Attorney General settlement (the "AG Settlement Motion") no later than [date specified].

7. McKinsey will file its motion seeking dismissal of the claims of certain Plaintiffs for lack of personal jurisdiction pursuant to FRCP 12(b)(2) (the "Initial Personal Jurisdiction Motion," and, together with the "AG Settlement Motion," the "Initial Motions") on the same schedule set forth above for the AG Settlement Motion, and the motion shall be heard with the AG Settlement Motion on March 31, 2022. Plaintiffs reserve the right to oppose such a motion on the merits, including the argument that personal jurisdiction should be resolved after discovery.

8. McKinsey does not waive and shall be deemed to have preserved any defenses not addressed in the Initial Motions filed pursuant to the foregoing provisions, including but not limited to insufficient service and lack of personal jurisdiction, and nothing herein shall preclude the filing of additional Rule 12 or other dispositive motions following the Court's ruling on the Initial Motions or at any other time permitted by the Court. ***

9. Within 10 days of the Court's ruling on the Initial Motions, the parties shall meet and confer about a process and timetable for briefing any additional motions to dismiss pursuant to FRCP 12(b) that McKinsey intends to file, as well as next steps in the litigation, and shall submit joint or opposing proposals to the Court.

V. *Pleadings*

a. Direct Filing

10. In order to eliminate delays associated with transfer to this Court of cases filed in or removed to other federal district courts, any Plaintiff whose case would be subject to transfer to these MDL proceedings may file its case directly in this District rather than in the original transferor forum, provided that the Plaintiff whose case would be subject to transfer indicates in its Complaint the original forum in which the case would have been filed but for this direct filing provision. Direct filing shall not constitute a waiver of any party's contention that jurisdiction or venue is improper or that the action should be dismissed or transferred. Direct filing shall not impact the choice of law or jurisdictional analysis to be applied in the case; any such direct filed cases shall be treated as if they were transferred from the judicial district(s) sitting in the state(s) where the case(s) originated and would have been filed but for this direct filing provision.

11. At the conclusion of pretrial proceedings, if any claims remain in any direct filed case(s), and if the Court deems it appropriate, the Court will file a suggestion of remand with the JPML to the judicial district(s) sitting in the state(s) where the case(s) originated and would have been filed but for this direct filing provision.

12. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue. Fed. R. Civ. P. 4(d)(5).

b. Response Extension

13. With the exception of the Initial Motions set forth in Section IV, McKinsey is granted an extension of time for responding by motion or answer to the MCCs and to any complaint filed in a case that is either transferred to these MDL proceedings or filed directly in these proceedings until a date set by this Court.

* * *

17. All parties shall have an ongoing obligation to meet and confer with Plaintiffs' Lead Counsel, McKinsey's Counsel, and any other party to whom a motion may be directed on any application or motion in an effort to resolve outstanding issues before bringing them to the Court. The moving party shall have an obligation to certify in the moving papers that such meet and confer took place and identify which party or parties oppose the application or motion. No party may bring an application or motion except in accordance with the provisions of this section, unless otherwise ordered by the Court or agreed to by Plaintiffs' Lead Counsel and McKinsey's Counsel.

VII. *Status Conferences and Agendas*

18. This Court will convene periodic Status Conferences at the request of Plaintiffs' Lead Counsel or McKinsey's Counsel, or on its own

motion. To aid the Court and the parties in preparing for such conferences, Plaintiffs' Lead Counsel and McKinsey's Counsel shall confer at least ten (10) calendar days prior to each future status conference to attempt to agree upon a proposed agenda for the conference. The parties shall submit a joint agenda to the extent they agree and separate agendas for items on which they do not agree, not less than three (3) court days prior to the conference. The agendas are intended to aid and apprise the Court of the items or issues which the parties desire to raise at the Status Conference. The Court may amend or augment the agendas as it deems appropriate.

IT IS SO ORDERED.

* * *

NOTES AND QUESTIONS

1. The *McKinsey* MDL Initial Case Management Order includes several procedures that have become standard practices in MDLs, including the filing of Master Complaints – which select and gather the claims asserted in the underlying actions into a single pleading, to which motions to dismiss and other challenges are directed – and "direct filing," the practice of filing new related cases in the transferee district itself, saving the JPML and court clerks across the country from the repetitious administrative chores of filing, transfers, and re-filing cases that clearly should be included in the MDL for pretrial purposes. Note that the direct filing procedure expressly does not alter ultimate determinations of proper venue for trial purposes, or of choice of law. Why is there such a limitation on the effect of "direct filing?"

2. There is no direct statutory authority for the "Master Complaint" procedure, although Rule 42 does allow for severance of claims or issues and consolidation of cases, claims and issues. But most MDLs do not formally consolidate the cases before them. An exception is the practice of joining the class action complaints centralized in an MDL into a "consolidated amended class action complaint" as set forth in the *McKinsey* order. This consolidated class action is often intended to be tried in the transferee court, unlike the centralized individual actions (including those directly filed in the MDL transferee court), which are "just visiting" for coordinated discovery and pretrial purposes.

F. *Efficient Conduct of Discovery Relevant to the Common Questions of Fact that Justify MDL Centralization*

Discovery plays a central role in every civil action. A major goal of the reorganization of the Federal Rules in the 1930s was to clarify, simplify, and expand the process by which civil litigants can ask their adversaries (and third parties) to produce potentially relevant, non-privileged information. The basic philosophy underlying discovery is that claims should be litigated based on a complete record of the underlying facts. By allowing litigants to access evidence prior to trial, discovery narrows the

issues, eliminates the possibility of unfair surprise, and—most importantly—ensures that trials "achieve substantial justice."

Multidistrict litigation places an additional premium upon achieving all the necessary and appropriate information, from often resistant adversaries and third parties, without undue cost and delay, and, because common facts are the multidistrict glue, in a way that enables the information to be used in the many cases that comprise the MDL, and even to share it with similar cases in other jurisdictions, such as state courts.

When the multidistrict litigation statute was enacted in 1968, discovery under the Federal Rules of Civil Procedure involved requests for production of physical files and paper documents, depositions were conducted in-person in a courthouse or lawyer's office convenient to the witnesses, and the thousands or millions of documents produced in discovery were indexed and stored in document depositories. Section 1407's requirement that transfer of cases be done "for the convenience of parties and witnesses" meant a search for a transferee district close to these documents and witnesses, such as a defendant company's headquarters; or, fairly that, a geographically central location well-served by major airports. Convenience involved lessening the burdens – for the parties and witnesses, not the lawyers – of traveling in real time through real space. This statutory "convenience" factor gave rise to the tradition, still alive (though arguably obsolete) today, of oral arguments at MDL Panel hearings touting the superiority of the airports, hotels, and restaurants of the advocate's desired transferee district. Elizabeth Cabraser, *The JPML Hearing: A Plaintiffs' Perspective*, 80 UMKC L.Rev. 827 (2021).

As technology has advanced to enable the electronic transmission and storage of information, the physical location of documents and witnesses has become less important became less dispositive While successive editions of the Moral For Complex Litigation have evolved in terms of discovery segment prescriptions, but, having last been revised in 2004, the fourth and current iteration does not fully encompass contemporary discovery practice, which is conducted largely through the review, analysis, and exchange of electronically stored information ("ESI") and is now typically managed through a series of customized case management orders, such as the [titles] from the [name] MDL reproduced below. The preservation of ESI has been of increasing importance to parties and courts, since it is often not retained by businesses in the normal course.

The fact that company records no longer consist of physical correspondence, memos, records and files preserved at the company headquarters or warehoused nearby; but rather emails, voice messages, texts, and cloud-based data, has occasioned the need for earlier, more explicit, and more sophisticated evidence preservation orders, at the enactment of new rule, Fed. R. Civ. P. 37(e), prescribing sanctions for failure to preserve electronically stored information ("ESI") that cannot be restored or replaced through additional discovery. If such an irretrievable loss of ESI, through intentional failure to preserve it causes prejudices to another party, the court may preserve the lost information was unfavorable to the party destroying or losing it, so instruct the jury, or even dismiss the action or enter a default judgment. Fed. R. Civ. P. 37(e)(1)-(2) (as amended

effective December 1, 2015). These protective measures, early in the case, to prevent such loss and preserve the ESI that is the object and focus of the work of the MDL have become a case management priority.

Some courts, such as the Northern District of California, have developed their own guidelines and checklists in order to address evolving technology, systematize and streamline ESI discovery, and reduce discovery dropouts. The Northern District of California Guidelines for the discovery of Electronically Stored Information are posted on its website at https://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines-12-1-2015.pdf. Its Checklist For Rule26(f) Meet and Confer Regarding Electronically Stored Information is posted at https://www.cand.uscourts.gov/filelibrary/1118/ESI_Checklist-12-1-2015.pdf. Courts and practitioners have utilized these and similar guides and checklists to develop case management orders governing the conduct of discovery in specific MDLs.

NOTES AND QUESTIONS

1. The 21st century has seen the shift of the centralized discovery that is a core function of multidistrict litigation from "paper" discovery of physical documents and files, to discovery of electronically stored information. Courts now direct the parties to construct litigation-specific "ESI protocols" to govern the conduct of virtual discovery. Orders currently being negotiated by the parties and considered by courts are increasingly sophisticated, as the legal profession and the courts strive to keep up with accelerating advances in ESI storage and retrieval techniques, now augmented by artificial intelligence ("AI"), and running changes are often made during the course of litigation to existing orders as technology improves, and lawyers learn what works and what does not. For an example of the ongoing development of ESI orders, see the March 15, 2024 "Order on ESI Protocol Disputes" on *In re: Uber Technologies, Inc. Passenger Assault Litigation*, MDL No. 3084 (N.D.Cal.), posed on the court;s website at Card.uscourts.gov/2024/03/345-PTO-9-Order-on-ESI-Protocol-Disputes.pdf and, generally, The Sedona Conference, "Commentary on ESI Evidence & Admissibility, Second Edition," 22 Sedona, Conf.J.83 (2021). Organizations of lawyers and judges, such as the discovery-focused Sedona Conference, are developing their own guidelines and best practices, with a running series of publicly-available guidebooks and commentaries on various aspects of ESI discovery. *See* thesedonaconference.org/sites/default/files/publications. Law firms increasingly rely on lawyers, paralegals, information specialists, and ESI consultants to assist in crafting protocols that will produce the largest volume of relevant information most quickly, and at the lowest cost.

2. Would you consider specializing in this area of litigation practice? How do you think the advent of artificial intelligence (AI) will change discovery practices and strategy?

3. After an ESI protocol, and provisions for other forms of "written" or "document" discovery are in place and the production of such information is well underway, this information is used to determine what witnesses will be deposed, and what documents and information will be

used to cross-examine them. A deposition protocol must be developed to govern the orderly progress of depositions: who may take them, where they may be taken, how long they will last, and other procedural and logistical considerations. It is not unusual for hundreds of depositions to be conducted on an ambitious schedule, with multiple depositions proceeding simultaneously. The transcripts and video recordings are intended to be used not only in class action or bellwether trials, but to be organized into "trial packages" for use in trials of underlying actions after removal to their courts of origin. An orderly and uniform depositions process is a necessity. The JUUL deposition protocol below exemplifies the nuts and bolts of the MDL deposition process.

4. The deposition protocol in *JUUL* refers to "Coordinated Actions": cases in both federal and state courts that have agreed to coordinate their discovery through the MDL, to avoid duplication of costs and efforts. The order's reference to "JCCP" is to California state courts cases coordinated in California's analog to the MDL mechanism, "Judicial Council Coordinated Proceedings." Other states, such as Texas, New Jersey, and West Virginia, also have statutory provisions or rules of court to create what are essentially intra-state mini-MDLs. *See Zachary Cloptan and D. Theodore Rave*, "MDL in the States", 115 Nw. L. Rev. 1649 (2021). As MDL deposition protocols now typically provide, the courts agree that if these rules are followed, the deposition may be used in any or all of the Coordinated Actions, for pretrial motions or at the trials. There is no federal or state statute requiring or forbidding such inter-jurisdictional coordination. Both federal and state judges are encouraged to do so, however, on an *ad hoc* basis. Because the discovery process is an intensive and expensive one, substantial savings to the litigants can be achieved, and judicial economy (the wise use of limited judicial resources) can be promoted by agreements across courts to utilize a joint or coordinated discovery process under the same ground rules.

5. What if you represent one or a few individual plaintiffs, in the MDL or in a "Coordinated" State Court action and want to take your own depositions? What opportunities does the deposition protocol afford you? Could you object if you don't think these opportunities are efficient?

G. *Case Management Goes Online: The Rise of Remote Discovery and Virtual Hearings*

The COVID pandemic of 2020-2022 led to the closure of courthouses and law offices and the necessary switch to remote hearings, conferences, and depositions. Unless discovery was to come to a screeching and protracted halt during lockdown, imposing intolerable delays on the progress of MDL litigation, lawyers and courts had to improvise. They did. The MDL Panel itself switched to remote hearings. Courts held their conferences via "Zoom" or other remote video or audio platforms. Lawyers learned how to conduct cross-examinations remotely. Of course, protocols were required. The JUUL *Case Management Order No. 11 re Remote*

Depositions, issued during the pandemic "lockdown," is a typical response to the COVID crisis, to keep the work of MDLs on track.

This Order, and others issued to cope with the pandemic's necessity of operating remotely, sought to enable depositions (and court hearings as well) to proceed unabated, rather than having hundreds of active civil cases grind to a halt. These orders focused on the mechanics of witness and attorney conduct, introduction of documents and exhibits into evidence, audio and video recording, responses to technical difficulties, and other nuts-and-bolts aspects of translating traditionally in-personproceedings to those done virtually, on Zoom or similar platform. In large part they worked. Courts and litigants, recognizing the time and cost savings of such virtual proceedings, have continued, post-pandemic, to employ them today. Most courts now conduct some or all pretrial proceedings by Zoom, or utilize a hybrid Zoom/in-person approach, at least for more routine, recurring events, such as status conferences. Virtual hearings and depositions have become a standard tool to reduce cost in both complex and routine civil cases, and have been upheld as complying with due process. *See, e.g., Henderson v. Zitek*, 2024 WL 4006 *4 (E.D. Wis. 2024).

NOTES AND QUESTIONS

1. While the COVID pandemic has abated, the move to remote hearings, conferences, depositions, and even trials has not reversed itself. Courts and litigants have applauded the savings in travel time and costs of conducting conferences and meetings remotely, and have continued to schedule virtual proceedings. Many judge and lawyers see the value in in-person proceedings when important motions or jury trials are involved, and maintain a mixed or hybrid calendar that intersperses in-court and virtual hearings. Remote depositions have not been seamless, despite detailed guidelines, but in-person depositions impose high costs and travel burdens, and a face-to-face cross-examination is not always justified. Over the next few years, a new balance between remote and in-person proceedings will likely be struck in MDLs; one which will vary with the size and subject matter of the MDL, and the attitudes of the judges and lawyers involved in them. The Federal Civil Rules Advisory Committee is working on proposed amendments to enable increased use, with appropriate safegaurds, of virtual live testimony in civil trials.

2. Would you be more comfortable with an in-person, or remote status conference? Deposition? Oral argument on pre-trial motion? Jury trial? Bench trial? Why? Do you think due process or other constitutional interests could be involved in in-person vs. remote proceeding? How does the cooperation requirement of Fed.R.Civ.P.1 factor into your considerations? Are younger lawyers more likely to be more comfortable with remote litigation?

H. *Discovery Obligations of Plaintiffs*

The ESI and deposition protocols above are designed primarily to

obtain the "common" discovery—the information and testimony relevant to the common questions of fact that justify centralization under the MDL statute. Plaintiffs have a discovery obligation also. In MDLs involving thousands of plaintiffs, courts have achieved relative economies of scale by simplifying the discovery obligations of the plaintiffs, replacing formal interrogatories, which are often cumbersome and subject to serial objections, with simplified information devices, such as the frequently used "Plaintiff Fact Sheet" procedure. The parties negotiate a Plaintiff Fact Sheet ("PFS") to address the basic facts relevant to each individual's claims.

In a pharmaceutical or medical device mass tort case, the PFS would report basic individual demographic information and details on date and duration of use of the drug or device at issue. This information enables the parties or the court to determine the scope of the litigation, numbers of claims, geographic and demographic data of the plaintiff population, essentially the "census" data necessary to accomplish informed case management. Plaintiffs who repeatedly fail to provide PFS information may ultimately have their cases dismissed.

Courts have, over the years, devised sanctions or deterrents to enforce PFS requests. In *Home Depot v. LaFarge*, 59 F. 4th, 55, 66 (3rd Cir. (2023), the court described various case management orders, including what have been dubbed *Lone Pine* orders, as "essential tools in helping the court weed out non-meritorious claims. . . an MDL court needs to have broad discretion to keep the parts in line by entering *Lone Pine* orders that drive true despaition on their merits." *Id.* One of the most controversial of these mechanisms is the "*Lone Pine* Order," named after a case management order issued by a district court frustrated with the lack of pretrial progress in *Lore v. Lone Pine Corp.*, 1986 WL637507 (D.N.J. 1986). The history and evolving use of the *Lone Pine* order is detailed by Professor Nora Freeman Engstrom in "The Lessons of *Lone Pine*", 129 Yale L.J. 2 October, 2019. As the article explains, Lone Pine orders have become a popular feature of the mass-tort landscape. Such orders generally require each plaintiff to supply prima facie evidence of injury, exposure, and causation by a set deadline. Dismissal is the usual penalty for failure to comply. Lone Pine and similar orders are authorized by Federal Rule of Civil Procedure 16, specifically Rule 16(c)(2)(L), a catch-all provision authorizing district courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties ... or unusual proof problems." As Professor Engstrom posits,

By putting plaintiffs' claims to an early test and purging those who don't make the grade (or extinguishing the entire case, if all plaintiffs' submissions fall short), Lone Pine orders, it is said, help courts zero in on (and, ideally, address) gaps in the plaintiffs' evidence. This early scrutiny can, in turn, save defendants time, money, and aggravation; conserve scarce judicial resources; expedite the resolution of claims; deter the filing of groundless suits; and safeguard the integrity of trial processes. Indeed, to their many enthusiastic supporters, Lone Pine orders are an elegant means to achieve the aim of the Federal Rule of Civil Procedure 1: the "just, speedy, and inexpensive determination" of unwieldy and wickedly complex disputes.

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Lone Pine orders are often issued by MDL courts in mass tort cases. They typically require plaintiffs to make three distinct evidentiary showings: (1) that they were exposed to the defendant's product or contaminant and the circumstances of this exposure, (2) that they have suffered, or are suffering a disease of injury, and (3) that this disease or injury is caused by ingestion, implantation or use of the product at issue. Usually an expert affidavit or report is required that expressly connects (1) with (2). If a plaintiff fails to submit the requested information by the court-imposed deadline or if the submission is deficient, the suit may be dismissed with prejudice.

Lone Pine orders and plaintiff fact sheets ("PFS") share the same basic purpose: they both seek to standardize and expedite individual plaintiff-side discovery in aggregate actions. Both seek to identify and purge those plaintiffs with noncolorable claims. And to the extent that some claims remain following *Lone Pine* or fact-sheet processes, both seek to streamline and rationalize the ensuing litigation.

But prototypical *Lone Pine* orders also differ from PFS in four crucial respects. First, *Lone Pine* orders typically inquire as to specific causation. They demand evidence that product or contaminant *x* actually caused plaintiff's injury or ailment *y*. PFS, do not. Second, *Lone Pine* orders demand that plaintiffs supply information from qualified experts (sometimes from experts whose testimony would pass muster under *Daubert* and Rule of Evidence 702). Plaintiff fact sheets, by contrast, demand information from only the plaintiff and only information that is easily obtainable or already in the plaintiff's possession. Third, owing to their heavy reliance on notoriously pricey medical experts, *Lone Pine* orders are expensive; to enter a *Lone Pine* order is to impose a costly burden on plaintiffs. Fact sheets, by contrast, "offer plaintiffs' counsel an easy and inexpensive opportunity to satisfy initial discovery obligations." A final key difference, which lurks below the surface, is that plaintiff fact sheets are relatively uncontroversial, whereas, particularly within the plaintiffs' bar, *Lone Pine* orders' reception has been decidedly mixed.

NOTES AND QUESTIONS

1. *Lone Pine* orders is often unnecessary? A plaintiff fact sheet ("PFS") is a standardized court-approved form, usually negotiated and agreed upon by the lead lawyers on teach side, that must be completed by a court-imposed deadline, often in lieu of formal interrogatories. These forms require each plaintiff to submit basic information about their background (including her education and employment), their injury, any past claims for compensation (whether via the tort system or otherwise), and the identity of their diagnosing physician. Plaintiff fact sheets also typically include a blanket authorization, signed by the plaintiff, which permits the defendant to collect

the plaintiff's medical and employment records without running afoul of privacy laws. If a plaintiff fails to complete the fact sheet by the court-imposed deadline, or if her submission is deficient, her suit may be dismissed with prejudice. MDL courts may dismiss cases for repeated failures to provide PFS. While usually generous with extensions, at some point in the proceedings courts grant a final extension, and dismiss complaints of noncompliant plaintiffs. This is what the *National Prescription Opiates* MDL judge did, invoking Rule 41(b) to dismiss such cases for failure to prosecute, noting "PFSs are an important tool that can aid judicial efficiency in large-scale complex litigation, such as the Opioid MDL . . . . As a discovery mechanism, requiring PFSs early in litigation may aid in facilitating settlement negotiations. . . . this Court has always been very generous in providing many opportunities for the plaintiffs to supply PFSs. There can be little doubt that any continued failure . . . at this point—nearly five years after [the first PFS order]—must be due to 'willfulness, bad faith, or fault." *Order Regarding Failures to Submit Plaintiff Fact Sheets, In re: National Prescription Opiate Litig.* (N. Ohio 4/6/2023).

2. *Lone Pine* orders and PFS systems present alternative solutions to the ongoing challenge of devising a "just, speedy, and inexpensive" process for obtaining and organizing case-specific information from the plaintiffs in the thousands of individual cases that constitute mass tort MDLs. In order to comport with the principles of Fed. R. Civ. P. 1, economic feasibility, fairness, efficiency, and practicality are all essential, and all must be balanced. Can you think of other procedures, mechanisms, or technologies that might be developed or utilized to accomplish the goal of cost-effective at expenditure determination of mass claims on their individual merits? The "Proof of Use" protocol, excerpted below, utilized in the *Depo-Provera* mass sort MDL illustrates one contemporary approaches.

In Re Depo-Provera Products Liability Litigation

United States District Court for the Northern District of Florida, 2025.

Pretrial Order No. 17 (Threshold Proof of Use and Injury Requirements)

Plaintiffs and Defendants (collectively "Parties") agree that all Plaintiffs with filed cases must provide (a) initial documentary proof of use for each named Defendant's product, and (b) initial documentary proof of their alleged meningioma injury. The Parties have asked the Court to enter this Order governing the process for obtaining and producing this information. The Court agrees this process is important to the efficient and effective management of the MDL.

This Order governs all actions properly filed in, removed to, or transferred to this MDL. Other than as set forth in this Order, there will be no discovery of any Plaintiff until further order of the Court. All Plaintiffs,

however, must preserve all relevant evidence in their possession, custody, or control, as required by law and this Order.

The term "Plaintiff Proof of Use/Injury Questionnaire" refers to the questions and document production requirements as shown on the attached form. See Exhibit A. The Parties have agreed to use the online MDL Centrality System, as designed and provided by BrownGreer PLC, to complete and serve the materials subject to this Order. The Plaintiff Proof of Use/Injury Questionnaire will be available for online completion and submission through MDL Centrality in every Plaintiff's portal.

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The Court understands that there may be cases in this MDL where Plaintiffs have requested prescription, medical insurance, and pharmacy records but lack definitive product identification. The parties intend to confer and work out a separate proof of use/injury protocol for this situation. The parties' proposed protocol on this issue is due within 14 days.

Any Plaintiff's answers to the Plaintiff Proof of Use/Injury Questionnaire will be made under penalty of perjury, will be treated as interrogatory responses pursuant to Federal Rule of Civil Procedure 33, and will be subject to Federal Rules of Civil Procedure 26 and 37.

The Plaintiff Proof of Use/Injury Questionnaire deadline may only be extended by: (i) the Court on a showing of good cause, or (ii) agreement of the parties with leave of Court.

A procedure for tracking and addressing deficiencies will be entered separately, after further consultation between the Parties and BrownGreer.

SO ORDERED this 14th day of March, 2025.

Plaintiff Proof of Use/Injury Questionnaire

1. Case Information

A. Plaintiff Full Name (if acting in representative capacity, full name of product user):

First: _____

Middle: _____

Last: _____

B. Date of Birth (if acting in representative capacity, Date of Birth of product user): _____

C. Address:

Street: _____

City: _____ State: _____ Zip: _____

D. Attorney(s) of record (if applicable):

Counsel Name: _____

Firm Name: _____

E. N.D. Fla. Civil Action Number: ____ -cv- _____

F. MDL-Centrality Plaintiff ID: _____

2. Product Use

A. Provide beginning month/year and end month/year for each depot medroxyprogesterone ("DMPA") product used by the product user. If use was not continuous, provide beginning and end date for each period of use.

B. Does Plaintiff/Injured Party currently have records (i.e., prescription, medical, insurance, or pharmacy records) that demonstrate he or she was administered medroxyprogesterone acetate?

( ) Yes ( ) No

C. If no, have the following been requested?

Prescription records	( ) Yes ( ) No	Date of request: _____
Medical records	( )Yes ( ) No	Date of request: _____
Insurance records	( ) Yes ( ) No	Date of request: _____
Pharmacy records	( ) Yes ( ) No	Date of request: _____

3. Injury

A. Has Plaintiff/Injured Party been diagnosed with meningioma?

( ) Yes ( ) No

B. Date of meningioma diagnosis (if diagnosed more than once, indicate each date):

Diagnosis 1: _____

Diagnosis 2: _____

Diagnosis 3: _____

Diagnosis 4: _____

Diagnosis 5: _____

4. Document Production Requirement

Upload and produce via MDL-Centrality the following:

A. Documents sufficient to show Plaintiff was administered DMPA.

B. Documents sufficient to show Plaintiff has been diagnosed with meningioma consistent with your response to question 3.B.

5. Declaration

I declare under penalty of perjury subject to 28 U.S.C. § 1746 that all the information I have provided in this Questionnaire is true and correct, to the

best of my knowledge, and that all documents submitted on my behalf in connection with this Questionnaire are genuine and true and correct copies of their originals. I further acknowledge that the responses contained in this Form will be treated as interrogatory responses pursuant to Federal Rule of Civil Procedure 33 and will be subject to Federal Rules of Civil Procedure 26 and 37.

Date: _____ Signature: _____

Print Name: _____

In Re Depo-Provera Products Liability Litigation

United States District Court for the Northern District of Florida, 2025.

Pretrial Order No. 22 (Identification of Deficiencies in Threshold Proof of Use and Injury Requirements)

Every Plaintiff with an action pending in the MDL is required to complete a Plaintiff Proof of Use/Injury Questionnaire ("Questionnaire") and provide threshold documentary proof of their use of Depo-Provera and meningioma diagnosis ("threshold documentation"). *See* Pretrial Order ("PTO") No. 17. The Parties have conferred and agreed on a process for identifying potential deficiencies in the Questionnaire and threshold documentation each Plaintiff submits. The Court agrees that an efficient and organized process for evaluating Plaintiffs' threshold proof of product use and injury documentation is important to the effective management of the MDL.

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Turning to the threshold documentation requirements, Plaintiffs' Proof of Use documentation must include the following:

1. The Plaintiff's name;

2. The date of the action recorded in the document (such as date prescribed, date dispensed, etc.);

3. The name of a Requisite Product; and

4. That the Requisite Product was administered to the Plaintiff (i.e., that it was prescribed, sold, dispensed, cost reimbursed or covered by insurance, or other action sufficient to indicate the use or dispensation of the Requisite Product to or by the Plaintiff).

***

Plaintiffs must also provide Proof of Injury that includes the following:

1. The Plaintiff's name;

2. The Requisite Physical Injury diagnosed;

3. That a diagnosis of the Requisite Injury was made for the Plaintiff;

4. The date of diagnosis; and

5. The date of diagnosis shown in the documentation must be within one year of the date of diagnosis claimed by Plaintiff in the Questionnaire itself.

***

BrownGreer will review the completed Questionnaires and threshold documentation for deficiencies as outlined in the protocol attached as Exhibit A, which allows Plaintiffs an opportunity to cure any deficiencies that BrownGreer identifies. After that review and cure period, BrownGreer will inform the Court of any Plaintiff who has failed to cure a deficiency in a Questionnaire or the threshold documentation submitted. The Court will then issue an Order to Show Cause on the individual docket, with deadlines for the individual Plaintiff's response and any additional briefing by the defense, as well as page limits for the brief(s). If necessary, a hearing will be conducted and if, after any hearing, the Court concludes that Plaintiff has failed to comply with this Order and PTO 17, the action may be dismissed with prejudice for a willful failure to comply with orders and deadlines of the Court.

Finally, the Court recognizes that some number of Plaintiffs, despite diligent efforts, may be unsuccessful in obtaining threshold documentation because their alleged use of the product, which has been on the market for decades, occurred many years ago. The Court intends to consult with the Parties and address this concern once the scope of this potential issue is better understood. In the interim, Plaintiffs are reminded that long-ago use does not excuse them from attempting to collect documentary proof with diligence.

SO ORDERED this 6th day of May, 2025.

[Exhibit A Flowchart outlining "Proof of Use and Proof of Injury Review Process" and footnotes listing Requisite Products and Requisite Injuries omitted]

NOTES AND QUESTIONS

1. The *Depo-Provera* Orders above provide the parties and the court with detailed information on the many cases (over 1,400) centralized in the MDL. Many MDLs involve thousands or even hundreds of thousands of claims. The J.P.M.L. website tracks MDLs by the number of actions in each MDL docket, and lists 40 MDLs with 1,000 or more actions. jpml.uscourts.gov, "MDL Statistics Report-Distribution of Pending MDL Dockets by Actions Pending" (12/2/2025).

2. Because the MDL authorizing statute employes the MDL function of facilitating and coordinating discovery into common questions of fact (which generally focus on the defendants' conduct, product, and

knowledge), it is not surprising that formal discovery into the specifics of the plaintiffs' claims are stayed. If you are representing an MDL defendant, what concerns does this raise? What would you wish to urge upon an MDL court in terms of obtaining information on the claims comprising the MDL? How would you fashion a fair and efficient mechanism for obtaining the basic plaintiff-specific information you want in order to assess whether and when to pursue a "global" resolution, or how to assess which individual claims to settle or take to trial?

3. As a plaintiffs' counsel, what information-gathering proposals, from either defense counsel or the Court, would you be willing to adopt? Why? As a lead counsel, for either side,what information would you want from a fact-gathering process in order to make your strategic pretrial, trial and settlement decisions?

I. *Dispositive Proceedings in MDLs*

Strictly speaking, the statutory jurisdiction of MDL transferee courts extends only through pretrial proceedings. Unless a case has been originally filed and properly served in the transferee court, *see Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), or the parties agree (a "*Lexecon* waiver"), that case cannot be tried in the transferee court. It must be remanded to its transferor court at the close of pretrial proceedings. But pretrial proceedings include not only centralized discovery, but motions that may be dispositive as to some or all of the claims or defenses of some or all of the parties. A dramatic example of the disposition of a substantial part of an entire MDL proceeding at one stroke is the December, 2022 *Omnibus Order on All Pending Daubert Motions and Defendants' Summary Judgment Motion* by the transferee judge in *Zantac (Ranitidine) Prods. Liab. Litig.* (MDL No. 2924),644 F. Supp. 3d 1075 (S.D.Fl. 2022). This opinion, spanning over 340 pages, disqualified all of the plaintiffs' causation experts and, leaving them with no means of proving that the subject drug could cause disease, and dismissed their cases. Recall the comprehensive and detailed structuring of the plaintiffs' leadership group by the *Zantac* transferee court, including innovations such as leadership training committee and an express endorsement of diversity. This careful and inclusive structuring did not itself guarantee plaintiffs' success, and the *Zantac* MDL came to a dramatic close, at least at the trial level.

Another pretrial dispositive mechanism is summary judgment, either a plenary motion for summary judgment (as granted in *Zantac*), or a more surgical motion for partial summary adjudication as to specific issues. *See* Fed. R. Civ. P. 56(a). Through summary judgment and partial summary judgment decisions, the MDL transferee court can, in practical effect, determine issues impacting some, or all, of the cases, with a preclusive, and streamlining, effect on the posture of the issues remaining for adjudication after remand.

The preclusive, or binding effect, of pretrial motions, and even trials, such as bellwether trials, is explored more fully in the Basics of Preclusion

and Finality section of this volume, which addresses preclusive and doctrines such as law of the case, Rule 42 consolidated trials, Rule 23c(4) issue trials, and MDL and class action courts' attempts, both successful and unsuccessful, to give preclusive effect in federal cases to their own decisions and orders, and to jury findings.

* * *

J. *Coordination Between MDL and State Courts*

As illustrated by the *JUUL* deposition protocol discussed above, MDL judges must grapple with the reality that, at least in MDLs comprised of tort plaintiffs asserting state law claims, limitations on federal diversity jurisdiction may result in many cases that share common fact questions with the MDL litigation, but remain outside its formal control. The potential to lose much of the economies and efficiencies sought through centralization would occur if duplicative discovery was, in fact, occurring in other courts.

Early in their experience with MDLs, judges and academics addressed the problem posed by mass litigation raising common issues and involving common facts across multiple jurisdictions. In the United States, state courts, aside from the (rare) prospect of review by the United States Supreme Court on constitutional issues, operate independently of the federal court system. While in some states' legislatures or courts followed the example of 28 U.S.C. § 1407, and created their own procedures to coordinate similar cases on an intra-state basis, neither § 1407 itself nor any other federal law either required or enabled federal/state coordinated proceedings. The American Law Institute ("ALI") sought to solve this problem, and other challenges (such as non-uniform choice of law doctrines) by creating a model statute that would allow for both state-to-state and federal/state consolidation, and include state judges in the decisions of the MDL Panel. The result of the ALI's project, a comprehensive volume entitled *Complex Litigation Statutory Recommendations and Analyses with Reporter's Study: A Model System for State-to-State Transfer and Coordination*, begun in the mid-1980s and published in 1994, provided, as a recommended statutory framework, a complete solution to these problems. It was ahead of its time. Legislative interest was negligible. A fuller realization of the problems the ALI foresaw and sought to solve was still years away.

Because no statute requires federal and state courts to coordinate, they must do so on their own initiative, or an *ad hoc* basis, ideally assisted by the parties, who would, at least in theory, likewise desire the savings in cost and effort obtained through coordinated proceedings and a shared discovery effort. *See Judicial Federalism in Action: Coordination of Litigation in Federal and State Courts* (Federal Judicial Center 1992); *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* (Federal Judicial Center 2013). This *Pocket Guide* is a joint project of the Federal Judicial Center and the National Center for State Courts, and is available, together with a *Multijurisdiction website* providing model coordination orders, at

fjc.gov. The *Pocket Guide* summarizes the advantages of coordination across courts as follows:

Coordination can help judges address many of the challenges created by multijurisdiction litigation. Obviously, litigating similar cases in multiple jurisdictions can strain the resources of the parties and result in unnecessary duplication of effort and considerable inefficiencies. Moreover, the decisions or actions of a single court can significantly effect cases pending in other jurisdictions, sometimes to the detriment of the parties' interest and the fairness of the overall resolution. For example, when one judge schedules a trial, witnesses involved will be unavailable for deposition or trial in another court during that time . . . . Judges should not surrender their responsibility to manage their own cases and their responsibility to apply the law of their jurisdiction to legal issues. However, it is wise for judges to consider the impact of their decisions on the broader litigation. Every judge involved in the broader litigation will want the other judges to consider how their decisions impact his or her cases, which is why coordination is important. In the end, it is a matter of mutual respect and comity.

Coordination also promotes constructive collaboration, not only by the judges, but also by counsel working with the judges presiding in the various jurisdictions. In the end, it may also promote a more optimal outcome for the parties than would have resulted from a piecemeal approach.

Pocket Guide at 2-3.

NOTES AND QUESTIONS

1. Cases centralized in an MDL, and the related cases pending in state courts, by definition share common questions of fact. Fact issues are resolved through the process of formal and informal discovery, deposition, and trials. As the *Pocket Guide* points out, the practical ability of multiple courts conducting simultaneous trials involving the same witnesses is limited—courts must take turns. An "everything, everywhere, all at once" approach to simultaneous trials will not work—at least not yet. Can you think of ways to maximize the number of trials that could be conducted, once discovery is complete, to most fully and economically utilize judicial resources?

2. Aggregate litigation judicial management employs a cluster of "C word" concepts: communication, coordination, collaboration" to exemplify good multijurisdictional case management. Are these concepts in tension with the fundamentals of the adversary process? What, if any, concerns would you have about judicial coordination if you represented a defendant in an MDL? A plaintiff in a state court case?

3. As noted in the *Florida Everglades* opinion, aggregate litigation management techniques have been embodied in a series of editions of *the Manual For Complex Litigation*, published and periodically updated by the Federal Judicial Center, the educational arm of the federal judiciary. The

following excerpts from the Fourth Edition of the *Manual* summarize suggestions for coordination across multiple jurisidictions:

20. MULTIPLE JURISDICTION LITIGATION

Manual for Complex Litigation, Fourth Edition (Federal Judicial Center 2004)

20.31. Coordination

Increasingly, complex litigation involves related cases brought in both federal and state courts. Such litigation often involves mass torts ***. Some sets of cases may involve numerous claims arising from a single event, confined to a single locale (such as a plane crash or a hotel fire). Other more-complicated litigations may arise from widespread exposure to harmful products or substances dispersed over time and place.

No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court ***

State and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation. State judges, for example, can bring additional resources that might enable an MDL transferee court to implement a nationwide discovery plan or a coordinated national calendar. There are, however, potential disadvantages of cooperative activity. Coordination can delay or otherwise affect pending litigation, conferring an advantage to one side in contentious, high-stakes cases. Such litigation activates strategic maneuvering by plaintiffs and defendants. For example, plaintiffs may seek early trial dates in jurisdictions with favorable discovery rules.

State and federal judges also have initiated state-federal cooperation between jurisdictions to minimize conflicts that distract from the primary goal of resolving the parties' disputes.

20.313. Specific Forms of Coordination

Pretrial motions and hearings. State and federal judges have often worked together during the pretrial process. They have jointly presided over hearings on pretrial motions, based on a joint motions schedule, sometimes alternating between state and federal courthouses. Joint hearings have used coordinated briefs so that one set of briefs can be used in both state and federal courts, with supplements for variations in the applicable laws and choice-of-law questions.

Cooperative approaches might also include jointly appointing a special master, court-appointed expert, or other adjunct to assist the courts with some aspect of the litigation. Some state courts are not authorized to appoint

such adjuncts and may wish to share the benefits of the federal authority.

At a minimum, judges should exchange case-management orders, master pleadings, questionnaires, and discovery protocols. This simple step can encourage judges to adopt the same or similar approaches to discovery and pretrial management.

Also, consider joint appointments of lead counsel, committees of counsel, or liaison counsel to coordinate activities between the courts. Having some overlapping membership among counsel in state and federal cases facilitates cooperation by establishing channels of communication.

Pretrial discovery. State and federal judges have considerable experience coordinating and managing nationwide discovery. For example, courts may issue joint orders for the preservation of tangible, documentary, and electronic evidence and for coordinating the examination of evidence by experts in both state and federal proceedings. Early attention to questions concerning expert evidence may be necessary to take advantage of various options for managing such evidence, including the possibility of appointing common experts.

* * *

Procedures to minimize duplicative discovery activity include consolidating depositions of experts who will testify in numerous cases and maintaining document depositories. It is important to remember that the rulings of a single court can become preemptive; for example, the first court to reject a particular privilege claim likely will cause the material sought to be protected to become discoverable for the entire litigation.

Specific elements of discovery coordination have included

- creating joint federal-state, plaintiff-defendant document depositories, accessible to attorneys in all states;
- ordering coordinated document production and arrangements for electronic discovery;
- ordering discovery materials from prior state and federal cases to be included in the document depository;
- scheduling and cross-noticing joint federal-state depositions;
- designating state-conducted depositions as official MDL depositions;
- enjoining attorneys conducting federal discovery from objecting to use of that discovery in state courts on the grounds that it originated in federal court;
- adopting standard interrogatories developed by state judges for litigation in their cases; and
- coordinating rulings on discovery disputes, such as the assertion of privilege, and using parallel orders to promote uniformity to the

extent possible.

Settlement. State and federal judges should consider conducting joint comprehensive settlement negotiations, hearings, and alternative dispute resolution procedures to establish case values. Insurance coverage disputes may require special attention and coordination because resolution of the primary litigation may depend on resolution of the coverage dispute.

Trial. State and federal judges have developed coordinated management plans for an entire litigation. Joint trials, where separate state and federal juries sit in the same courtroom and hear common evidence, present substantial procedural and practical difficulties, but differences in state and federal procedures have not been insurmountable barriers to useful coordination. Any coordination must be flexible because cases in some state courts will reach trial sooner than those in others. State and federal courts should establish a mechanism to coordinate trial dates so that they do not unduly burden parties or their attorneys with multiple conflicting trial settings. Judges may also set the order and location of trials cooperatively to provide better information as to the diverse range of value of the cases included in the mass tort.

1. Coordination between judges handling multiple cases is not only likely, it is encouraged by the *Manual* and is widely embraced as a necessary tool for effective case management. For a useful discussion of the appropriateness of informal coordination, *see Dunlavey v. Takeda Pharmaceuticals America, Inc.*, 2012 WL 3715456 (W.D. La. 2012).

2. Transferee courts recognize that transfer may place especially heavy burdens on the transferee plaintiffs, as they have not selected the lawyers who are actually managing their cases. *See, e.g., In re Medtronic, Inc., Implantable Defibrillator Product Liability Litigation*, 434 F. Supp. 2d 729 (D. Minn. 2006).

3. The opportunity to coordinate state and federal proceedings plays in important part of the consideration given transfer by the Judicial Panel on Multidistrict Litigation. In numerous cases this has been expressly considered in selection of a transferee district by the Panel. [just pick the best two as examples]

If state court litigation is concentrated in a single state, the opportunity to coordinate state and federal proceedings should be a powerful force favoring that forum as a transferee district.

I. *Joint Federal/State Case Management Orders*

Innovative approaches to coordination of state and have included telephone and face-to-face conferences between judges and the holding of joint hearings on discrete issues. A recent innovation for bridging the state-federal gap in these cases is the issuance of joint orders by Federal and State courts. For example, in *In re: Bextra and Celebrex Marketing, Sales Practices and Product Liability Litigation*, MDL No. 1699 (N.D. Calif.) the MDL litigation relating to personal injury and consumer claims involving

two prescription drugs, the transferee judge, Hon. Charles Breyer of the Northern District of California, appointed Hon. Fern M. Smith as Special Master. *Pretrial Order No. 11* of the Bextra/Celebrex MDL, bestows broad Rule 53 powers:

> Scope of Special Master's Duties. *Pursuant to Rule 53(b)(2)(A), the Special Master shall assist the Court with matters such as case management, trial selection and case resolution procedures, scheduling orders, specially-assigned discovery motions and disputes, facilitation of inter-jurisdictional coordination, and other matters in which the Court wishes to utilize her services.*

In the state court cases involving the same claims, Hon. Shirley W. Kornreich of the New York Supreme Court entered a similar order appointing Judge Smith as Special Master in the New York cases; similar orders were entered in other states. The result of this multi-jurisdictional cross-appointment process is that a single jointly appointed judicial officer (such as a Special Master) may exercise a means of control over the litigation. In addition to being an experienced retired federal judge, Judge Smith served as Director of the Federal Judicial Center, was a major contributor to the Fourth Edition of *Manual for Complex Litigation* and thus had significant experience in complex case management. While Judge Smith initially served as a discovery master in these corinated federal and state proceeings, she later served as a mediator and facilitator of global settlements in thefederal and state cases.

NOTES AND QUESTIONS

1. The use of coordinated special master orders in the *Bextra/Celebrex* litigation is an early example of the expanding use of Rule 53 "special master" procedures for appointment of judicial delegees to take daily charge of specific case management tasks that would otherwise be handled by the court itself. The costs of such special master services are typically shared by the parties, rather than as a public expense. What advantages or concerns do you see with this approach?

2. In the JUUL and Volkswagen "Clean Disel" MDLs, which featured related proceedings in multiple state courts, the courts appointed a variant of the Rule 53 special master, a "settlement master" which specificed powers to conduct and supervise settlement negotiations, and, not incidentally, to serve as an informal, off-the-record-channel communication between and among the parties and the court. The Volkswagen Pretrial Order No. 6: Appointment of Robert S. Mueller [former head of the F.B.I.] as Settlement Master grants him the authority: to schedule at his discretion any settlement discussions; to decide who shall participate in discussions, including what party represemtativesare needed; and to choose where and how the discussions are to occur. To facilitate settlement discussions, Mr. Mueller may have ex parte communications with any party and party representative. If a party does not want Mr. Mueller to share any of the contents of an ex parte communication with another party, the sharing party

shall make that desire clear to Mr. Mueller…upon the agreement of all participating parties; Mr. Mueller may communicate "confidential information" to the Court without violating this Order or rules governing confidentiality of settlement discussions. Mr. Mueller may otherwise communicate with the Court regarding non-confidential matters, including procedural issues and updates on the progress of settlement communications." Would you be comfortable conducting settlement discussions with opposing counsel under such auspicies? Why or why not?

3. To what extent do the personalities of the judges and lawyers in the federal and state litigations impact the prospects for, and the success of, Federal/State coordination?

4. Would a rule or statute dictating federal/state coordination procedures be more effective? What features should such a rule or statute include?

5. The *Joint Coordination Order* in the *General Motors Ignition MDL* excerpted below drew on the earlier suggestions of the *Manual* and precursor coordination orders to coordinate access to development of, and use of discovery and depositions for use at trials in the MDL cases, and also in the individual cases pending in many state courts arising from crash deaths and injuries allegedly involving faulty GM ignitions. One of the innovations of the General Motors Ignition Switch MDL, now a common practice, was the Court's order that designated counsel maintain a publicly acceptable website with all order, schedules and dealines in the litigation, for the benefit of the courts, parties and the public MDL-specific websites, established early in the cazse and maintained throughout the proceedings, are now a common feature of major MDLs, and other large aggregate proceedings, including class actions. See gmignitionmdl.com; camplejeunecourtinfo.com.

IN RE GENERAL MOTORS LLC IGNITION SWITCH LITIGATION
MDL NO. 2543

United States District Court, Southern District of New York, 2014

JOINT COORDINATION ORDER

* * *

WHEREAS, a federal proceeding captioned *In re General Motors LLC Ignition Switch Litigation*, MDL Docket No. 2543 (the "MDL Proceeding"), is pending before the Hon. Jesse M. Furman in the United States District Court for the Southern District of New York (the "MDL Court");

WHEREAS, several other actions involving the same subject matter as the MDL Proceeding have been filed in the courts of a number of states and in federal courts (the "Related Actions");

WHEREAS, the MDL Proceeding and the Related Actions involve many of the same factual allegations and circumstances and many of the same parties, and discovery in those various proceedings will substantially overlap;

* * *

NOW, THEREFORE, IT IS ORDERED that the parties are to work together to coordinate discovery to the maximum extent feasible in order to avoid duplication of effort and to promote the efficient and speedy resolution of the MDL Proceeding and the Coordinated Actions and, to that end, the following procedures for discovery and pretrial proceedings shall be adopted:

A. Discovery and Pretrial Scheduling

1. All discovery and pretrial scheduling in the Coordinated Actions will be coordinated to the fullest extent possible with the discovery and pretrial scheduling in the MDL Proceeding. The MDL Proceeding shall be used as the lead case for discovery and pretrial scheduling in the Coordinated Actions. This Order does not operate to vacate discovery or pretrial scheduling in a Coordinated Action that predates its entry; such is left to the judgment and discretion of the Court in that Action.

2. Lead Counsel shall create a single electronic document depository for use of all MDL counsel as well as counsel in Coordinated Actions, subject to provision by the MDL Court of an order for the equitable spreading of depository costs among users.

3. New GM shall apprise the MDL Court, Lead Counsel, Plaintiff Liaison Counsel and Federal-State Liaison Counsel every two weeks of matters of significance (including hearings, schedules, dead-lines, and trial dates) in Related Actions to enable the MDL Court and the parties to effectuate appropriate coordination, including discovery co-ordination, with these cases.

* * *

5. The parties in a Coordinated Action may take discovery (whether directed to the merits or class certification) in a Coordinated Action only upon leave of the Court in which the Coordinated Action is pending. Such leave shall be obtained on noticed motion for good cause shown, including why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding.

B. Use of Discovery Obtained in the MDL Proceeding

6. Counsel representing the plaintiff or plaintiffs in a Coordinated Action will be entitled to receive all discovery taken in the MDL Proceeding, provided that such discovery responses and documents shall be used or disseminated only in accordance with the terms of the MDL Discovery Orders. Counsel representing a party in the MDL Proceeding shall be entitled to receive all discovery taken in any Coordinated Action; any such discovery responses and documents shall be used or disseminated only in accordance with the terms of the MDL Discovery Orders.

* * *

8. Depositions taken in the MDL Proceeding may be used in the Coordinated Actions, subject to and in accordance with the terms of the MDL Discovery Orders, as if they had been taken under the applicable civil discovery rules of the respective jurisdictions. Depositions taken in a Coordinated Action may be used in the MDL Proceeding, subject to and in accordance with the terms of the MDL Discovery Orders, as if they had been taken under the applicable discovery rules of the MDL Court.

* * *

9. In order to facilitate the dissemination of information and Orders in the MDL, the MDL Court—or the parties if the MDL Court so prefers—will create and maintain a website devoted solely to this MDL. The site will contain sections through which the parties, counsel, and the public may access Court Orders, Court opinions, Court minutes, Court calendars, frequently asked questions, court transcripts, the MDL docket, current developments, information about leadership in the MDL, and appropriate contact information.

* * *

* * *

K. *The Paradox of MDL Trials and the Development of the Bellwether Trial System*

Once the discovery process is completed and the cases are ready for trial, the MDL transferee Court typically files a suggestion of remand with the Judicial Panel on Multidistrict Litigation under the Panels' Rule 10.1(b). The Panel then follows its remand procedures set forth in Panel Rule 10.2 (or 10.3, if a party moves for removal on its own). Ideally, the once-centralized cases return to their transferor court with all common discovery done, leaving only case-specific discovery to be completed (some of which may already have been done in the MDL) and trial to be set. Of course, cases may have been dismissed on motion, or settled individually, or *en masse*, while centralized in the MDL.

In theory (and by Supreme Court fiat in *Lexecon*) the MDL is for pretrial purposes only. In practice, few cases complete the circuit from filing in (or removal to) the transferor court, to centralization in the transferee court, and then back to the transferor court for trial. MDL case management resolves most of these cases by means other than individual trials. In the process of so doing, and indeed to protect that process, a MDL court may itself try some cases, selected by the parties as representative of the litigation as a whole. These cases are informative, rather than preclusive: they are not binding on the entire MDL. Instead, they are intended to inform the parties as to the merits and value (if any) of the cases as a whole, to guide the parties in structuring a comprehensive settlement, or at least to streamline the trial further cases as unsuccessful claims or theories are standard, and primary ones are refined. The bellwether process does not have its origin in a specific rule or statute; instead, it was developed by MDL transferee judges as a case management tool, and is now litigated in many, if not most MDLs (primarily mass tort MDLs) as an expected stage of MDL proceedings, prior to decentralization by remand.

The following excerpts of the definitive bellweather article, by an MDL transferee judge who did much to develop the bellwether trial process in its current form, explains the purpose of the bellwether process, and now it worked in the *Vioxx* litigation, a pioneering mass tort MDL.

3. BELLWETHER TRIALS IN MDL PROCEEDINGS
ELDON E. FALLON, JEREMY T. GRAYBILL, ROBERT PITARD

82 Tul L. Rev. 2323, 2324, 2330–31, 2337–47, 2365–67 (2008).

I. *Introduction*

* * *

[This article discusses] the primary practical consideration for courts and counsel in employing bellwether trials, namely the method of selecting bellwether cases from a wider group of related lawsuits. * * *

II. *Overview of the Multidistrict Litigation Process*

* * *

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

III. *The Rise of Bellwether Trials*

* * *

C. *Benefits of the Modern Approach*

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

> * * * If a representative group of claimants are tried to verdict, the results of such trials can be beneficial for litigants who desire to

settle such claims by providing information on the value of the cases as reflected by the jury verdicts.[72]

Another significant benefit of bellwether trials is that they provide a vehicle for putting litigation theories into practice. As most experienced litigators know, trials rarely proceed exactly as planned. In addition to the unexpected logistical problems that may arise, one can never be sure how certain arguments and evidence will "play" before a trier of fact. In multidistrict litigation, these uncertainties are often exacerbated by variations that exist among the circumstances of consolidated claimants and by the sheer volume of relevant material produced during discovery.

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

1. Trial Packages

The bellwether process can benefit all consolidated litigants in an MDL by providing the impetus for coordinating attorneys to assemble "trial packages." As noted above, bellwether trials force litigants to organize and streamline the massive wealth of material that is often produced during pretrial discovery in multidistrict litigation. Trial packages are a valuable by-product of this forced organization, and can be distributed to litigants and local counsel when an MDL is dissolved and individual cases are remanded to transferor courts for trial.

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

To the extent that trial lawyers can be analogized to actors in a play, it is helpful to think of coordinating counsel as playwrights in this aspect of the bellwether process. A bellwether trial forces these playwrights to draft

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

their manuscripts in a relatively short period of time—that is, to develop fully the presentation of their clients' cases within the MDL. Multiple bellwether trials allow counsel to hone their presentations, making minor adjustments based on previous performances and the realities of litigation.

* * *

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

2. Enhancing Global Settlements

* * * By virtue of the temporary national jurisdiction conferred upon it by the MDL Panel, the transferee court is uniquely situated to preside over global settlement negotiations. Indeed, the centralized forum created by the MDL Panel truly provides a "once-in-a-lifetime" opportunity for the resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time. Transferee courts can contribute to the fulfillment of this important role through the initiation and management of the bellwether trial process.

"[M]ass tort litigation frequently proceeds from an immature stage to a mature stage and, thereafter, to what one might call a peacemaking stage, where efforts focus on the crafting of a comprehensive settlement." When the MDL Panel first centralizes related cases in a transferee court, chances are that the litigation is still in its "immature" stage * * *.

Over time, as the litigation matures, both litigants and counsel begin to shift their focus to the potential for global resolution. By bringing fact-finding to the forefront of multidistrict litigation, bellwether trials can make a significant contribution to the maturation of disputes and, thus, can naturally precipitate settlement discussions.

In addition to this valuable contribution, bellwether trials also allow MDL litigants and their lawyers to gain an understanding of the litigation that is exponentially more grounded in reality than that which has traditionally persisted in the absence of jury trials. * * *

IV. *The Selection Process*

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

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

At the very outset, it must be noted that the sheer number and type of feasible trial-selection processes are limited only by the ingenuity of each transferee court and the coordinating attorneys. * * * [E]ach transferee court that chooses to conduct its own bellwether trials must consider all the unique factual and legal aspects specific to its litigation and then fashion an appropriate, custom-made trial-selection formula.

***

A. *Cataloguing the Entire Universe of Cases*

Before the transferee court and the attorneys can determine which cases to set for trial, they should first ascertain the makeup of the MDL. The rationale behind cataloguing and dividing the entire universe of cases within the MDL is simple. A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation * * *.

To discharge this task effectively, the transferee court and the attorneys should each conduct a census of the entire litigation and identify all the major variables. * * *

In any given MDL, there will be innumerable variables differentiating each case from the others. Rather than attempt to delineate every identifiable variable, the transferee court and the attorneys should focus on those variables that can be easily identified, are substantively important, and provide clear lines of demarcation—*i.e.*, the major variables. By identifying the major variables, the transferee court and the attorneys can create sensible and easily ascertainable groupings by which to categorize the entire MDL, providing manageability and order to what may otherwise appear to be a massive, chaotic conglomeration of loosely analogous cases. * * *

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

* * *

B. *Creating a Pool of Potential Bellwether Cases*

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

* * *

C. *Case-Specific Discovery*

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

D. *Selecting Individual Cases from the Pool for Trial*

Near the conclusion of case-specific discovery in the cases comprising the trial-selection pool, the transferee court and coordinating counsel can begin the final step of selecting the actual cases to serve as bellwether trials. In anticipation of the exercise of trial-selection picks, the transferee court, with the input of the attorneys, should have set forth the method by which the final selections will be made. As can be imagined, there are multiple methods, or any combination of methods, that can be used, such as (1) random selection, (2) selection by the transferee court, and (3) selection by the attorneys. * * *

* * *

V. *Conclusion*

* * * [T]he injection of juries and fact-finding into multidistrict litigation through the use of bellwether trials can greatly assist in the maturation of disputes. * * *

* * * [But] there are some potential disadvantages associated with the practice. First, bellwether trials are often exponentially more expensive for the litigants and attorneys than a normal trial. * * * Second, tactical opportunities can arise for trial counsel to become familiar with the rulings, expectations, customs, and practices of one transferee judge. Astute trial lawyers will learn the tendencies or preferences of any judge with repeated exposure, and given the realities of representation, such opportunities may be subject to exploitation. Finally, because bellwether trials are typically held in the transferee court's judicial district, the informational output is generally limited to the views of one local jury pool. * * * But even

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

NOTES AND QUESTIONS

1. Judge Fallon and his co-authors characterize the primary purposes of bellwether trials as providing non-binding information and testing theories and defenses in a trial setting. How do bellwether trials accomplish these ends? Do bellwether trials thereby enhance the utility of MDL proceedings? If so, how?

2. One of the benefits of bellwether trials is the creation of "trial packages," which provide individual attorneys with databases of material, background information, and expert reports that can be used if the cases get remanded. Given the relatively few cases get remanded, is this justification a legitimate basis for conducting bellwether trials?

3. What are the potential disadvantages of having bellwether trials? Which are the most concerning and why? Do these disadvantages suggest that courts should generally resist the idea of conducting bellwether trials?

4. Judge Fallon identifies three methods of bellwether case selection: (1) random selection, (2) selection by the transferee judge, and (3) selection by the parties – that is by counsel on each side. In this last scenario, a process analogous to jury selection may be specified: each "side" picks a certain number of cases and each may "strike" one or more of the other side's picks.

5. If you represented plaintiffs (or defendants), which method would you prefer? Could a combination of these methods be used? What other methods would you design?

6. One issue with the bellwether selection process, as it evolves as a non-statutory, non-rule based case management mechanism, is that it cannot prevent a plaintiff from dismissing a case perceived as a weak case, or a defendant to settle out a case perceived as a strong one. To what extent does this affect the purposes of the bellwether system? How would you correct for this?

7. Another criticism of the bellwether system is its cost. Bellwether trials are not summary trials; to the contrary, the parties devote extensive resources to them, precisely because they may forecast the ultimate outcome of the case. What techniques or limitations would you impose, as an MDL judge, on the bellwether process in your case to increase economy and efficiency?

L. *Evolving Models for Centralized Case Management*

As described above by Judge Fallon, there are constraints and limitations on the number of bellwether trials a transferee court can conduct itself. While some bellwether trials have included multiple plaintiffs, defendants sometimes object to this approach. Regardless of the number of plaintiffs joined in a single trial, the court can only try one case at a time.

Many or most of the cases transferred to an MDL for pretrial purposes are not properly venued for trials there (absent a "*Lexecon* waiver" by both sides: a rare occurrence). The transferee court could coordinate with state courts, and "adopt" trials in these courts as additional bellwethers; Judge Fallon describes this practice in his article. When transferee courts are not ready to suggest removal en masse to the Panel, but wish to remand selective cases to serve as MDL bellwethers, they must persuade the Panel that this approach makes sense.

As noted in D. Theodore Rave and Francis McGovern, "A Hub-and-Spoke Model of Multidistrict Litigation," 84 Law & Contemp. Probs., 21 (2021), this was done in the *National Prescription Opiates Litigation* (MDL No. 2804), and may serve as a model for other courts in the future. The concept of selective remand derives from another innovative concept: the idea of the MDL transferee court as the "hub" of a mute-court system with other federal district courts (and sometimes state courts as well) as the "spokes." This "hub and spoke" model of organization, is designed to utilize multiple courts to try bellwether cases simultaneously or in quick succession, by a variety of judges under multiple states' laws. This article acknowledges and builds upon the insights and innovations of the late Francis McGovern, a distinguished professor and frequently-appointed Special Master who served the federal and state courts for over forty years, from the early days of asbestos mass torts through the unprecedentedly complex *National Prescription Opiates* litigation. His goal throughout was to develop and refine case management techniques and global resolution mechanisms that both suited the particular circumstances (and personalities) of each litigation, and served as inspirations for further innovation and improvement.

As Professor Rave and McGovern describe it, MDLs work well in the main, but can be so complex, especially when involving multiple defendants and products, that centralized case management alone does not suffice. The MDL itself can become a "bottleneck. These "mega mass torts" require staged, strategic remands to selected auxiliary courts, once the basic common discovery has been completed in the "hub.

As the article describes the hub-and-spoke model of MDL case management as "one of systematic aggregation followed by strategic disaggregation, it proceeds in five basic steps:

1. Aggregate mass tort cases into a single MDL (the hub);

2. Commence common discovery and pretrial case management;

3. Identify similarities and differences among plaintiffs, defendants, causes of action, and remedies;

4. Strategically disaggregate the mass tort by remanding test cases or groups of cases to transferor courts (the spokes);

5. Maintain the hub MDL as a forum for potential global or partial settlements.

* * *

NOTES AND QUESTIONS

1. The "Hub-and-Spoke" article traces the history of MDL case management in the context of the quest for what might be called "just right" aggregation: not too much, and not too little. If you were an MDL Goldilocks, what level and type of aggregation, from the models and examples described by Rave and McGovern, would you consider "just right"?

2. What mechanisms would you use (or invent) to improve upon the examples and models described by the authors?

3. As a judge, from a case management perspective, which of the aggregation/coordination models described in these chapters would you favor? Would you invent your own?

4. Strategically, as counsel for a defendant that is a recurring or central MDL target, which model would you seek to persuade an MDL transferee judge to adopt?

5. As a plaintiff's counsel, would your choice be the same? Why, or why not?