Wrangling the beast

CREATING NEW STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS

By Jaime L. Dodge
WITH MULTIDISTRICT LITIGATION CASES OCCUPYING A FULL THIRD OF THE FEDERAL DOCKET, WOULD YOU KNOW HOW TO LITIGATE OR ADJUDICATE ONE? If your answer is a bit timid, it may well be with good reason. Although these cases are ubiquitous, for many years, a handful of prominent judges drove the development of multidistrict litigation and the treatment of mass torts more generally. But, with the expanded use of MDL in recent years, virtually every federal judge now serves as a transferor judge during his or her career. Equally important, the Judicial Panel on Multidistrict Litigation (JPML) made the decision to attempt to spread the increasing number of MDL cases across more transferee judges — such that more judges are now engaged in the management of their first MDL matters.

With this diversification of the bench, the complexity and uniqueness of many MDL matters, and the relative lack of procedural rules governing the transferee judge’s conduct of the MDL, the stage was set for innovation (whether by design or necessity). Because most leadership positions for both the plaintiffs and defendants were filled with experienced repeat-players, they were well positioned to informally share experiences about what worked and what did not. But, informal suggestions by counsel could go only so far: in the context of any given case, counsel’s recommendations will often be tinged with a strategic overlay.

This article describes a unique effort by the bench and bar, with the guidance of the Duke Law School Center for Judicial Studies, to fill that gap by removing case-specific strategic maneuvering and allowing for a candid discussion. The result was the MDL Standards and Best Practices for Large and Mass-Tort MDLs report. Understanding how the report evolved helps to shed light on why it is such a valuable contribution to the MDL bench and bar alike.

Until now, the “best” way to handle an MDL was often the result of each individual’s limited experience with MDLs. Moreover, the strategic dynamics and understood norms of operation within the MDL process remained illusive to those outside leadership — even to attorneys with clients in the MDL and transferor judges whose cases were coordinated through the MDL process. The Duke dialogue changed that.

It brought together a wide array of experiences and perspectives, not only identifying which practices are typically helpful across a range of MDL situations but also analyzing the situations in which each practice is more or less likely to succeed. Indeed, it was only with this broad base of experiences and views that a large enough range of cases could be identified to make more nuanced recommendations to judges and practitioners.

As today’s MDL judges and practitioners continue to innovate, they now have a foundation to draw upon, constructed with the collected wisdom of their peers as well as the strategic insights of leaders from both sides of the bar.

BACKGROUND
In the late 1960s, the courts and society struggled to create procedural mechanisms for addressing mass wrongs. The revision of Federal Rule of Civil Procedure 23 gave birth to the modern class action, which has in many ways dominated the landscape in the intervening decades. But it also saw the passage of 28 U.S.C. § 1407, which created multidistrict litigation.

Like the class action, MDL permitted the coordinated treatment of similar claims of wrongdoing brought by a large number of individual plaintiffs. But, there were two important differences: First, a class action permitted a single plaintiff to reach final judgment on behalf of all of the other alleged victims, whereas MDL merely coordinated pretrial proceedings. Second, because the named plaintiff in a class action could legally bind the absent class members, a more rigorous set of requirements applied to the certification of the class action than were prescribed for the formation of an MDL.

In the shadow of these distinctions, class actions became the preferred mechanism for a wide array of mass wrongs. The class action allowed a single proceeding to dispose of essentially all claims, streamlining the litigation process for the courts, providing closure to defendants, and allowing plaintiffs’ attorneys to negotiate damages based upon aggregate harm rather than just the harm to the handful of alleged victims who would likely file individual suits. MDL was in many ways reserved for the most complex and difficult cases in which individualized issues would likely prevent class certification. This stacked the deck against MDL; cases like Agent Orange and asbestos dominated the perception of MDL, giving rise to a sense that MDL was a lengthy process, with cases rarely remedied for trial, and changing the bargaining dynamic between the parties.

But, in recent years, parties and their counsel have taken a second look at MDL as the best way to resolve an ever-growing swath of mass-harm cases. Why has this happened? Two reasons come to mind: First, the Supreme Court has cobbled the availability of class-action certification, while simultaneously sanctioning contracts that waive class-action procedures. Yet, in our standardized and interconnected society, the rate of mass claims remained high and the need for a viable procedure for handling those claims persisted.

Second, counsel who had participated in MDL reported positive experiences, making it a viable forum for not just those cases now excluded from the class-action system but even an array of cases that could not be certified. MDL also seemed to provide an effective forum for resolving potentially competing or overlapping class actions.

These forces combined to generate a substantial increase in MDL, discussed in the companion article by Prof. Thomas Metzloff (see page 36). But the flexibility of MDL’s procedures also meant that both bench and bar had a far greater opportunity — and at times burden — to innovate. Although the MDL statute provided...
MDL STANDARDS

1. The transferee court, in consultation with the parties, should articulate clear objectives for the MDL proceeding and a plan for pursuing them. The objectives of an MDL proceeding should usually include: (1) the elimination of duplicative discovery; (2) avoiding conflicting rulings and schedules among courts; (3) reducing litigation costs; (4) saving the time and effort of the parties, attorneys, witnesses, and courts; (5) streamlining key issues, and (6) moving cases toward resolution (by trial, motion practice, or settlement).

2. In an MDL action with many parties with separate counsel, the transferee judge should establish a leadership structure for the plaintiffs, and sometimes for the defendants, to promote the effective management of the litigation.

3. The transferee judge should select lead counsel, liaison counsel, and committee members as soon as practicable after the JPML transfers the litigation.

4. As a general rule, the transferee judge should ensure that the lawyers appointed to the leadership team are effective managers in addition to being conscientious advocates.

5. The transferee judge should consider setting aside a portion of the anticipated monetary proceeds from the settlement and establish a common benefit fund (CBF) for the purpose of paying reasonable attorney's fees, costs, and expenses from that fund.

6. Effective coordination between the federal and state courts in an MDL action promotes cooperation in scheduling hearings and conducting and completing discovery; facilitates efficient distribution of and access to discovery work product; avoids inconsistent federal and state rulings on discovery and privilege issues, if possible; and fosters communication and cooperation among litigants and courts that may facilitate just and inexpensive determination.

7. The transferee judge should endeavor to use the MDL forum to resolve or streamline the litigation before remand to the district courts.


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Only for pretrial coordination, global settlements within the MDL became common — yet no safeguards existed. As the cases became larger and more complex, transferee judges found it prudent to select lead counsel and ultimately to provide for common benefit funds for their compensation. In time, leadership roles became more specialized but also more expansive, as evidenced most recently by the use of not just Plaintiffs’ Steering Committees but also Plaintiffs’ Executive Committees.

Recognizing the innovation by bench and bar alike that was occurring to fill the sparse statutory framework, Duke Law School’s Center for Judicial Studies — with the support of the JPML, Dean David F. Levi, and Prof. Francis McGovern — initiated what became a two-year process to synthesize and analyze the lessons learned.

DEVELOPMENT

The creation of the Standards and Best Practices report began with a two-day conference in Washington, D.C. in May 2013. The invitation-only attendee list drew together prominent defense and plaintiff-side practitioners within the MDL bar. Together, these lawyers had experiences spanning most of the mass MDLs filed in recent years, which could be brought to bear in a vigorous debate over both the primary value and secondary impacts of the variety of emerging practices.

Importantly, the center also invited the participation of not only the federal bar, but also state judges who had been tasked with presiding over parallel actions. Frequently, attorneys decide for either jurisdictional or strategic reasons to file matters in state court that would be incorporated in the MDL if they were filed in federal court. This can create more complex dynamics, necessitating a discussion of the appropriateness of federal-state court coordination. The participation of federal transferee judges, federal transferor judges, and state judges tasked with managing parallel litigation sets the stage for a robust discussion of the innovative practices of each of these judicial actors.

Arguably even more important, this discussion provided a forum for judges to speak with candor and transparency about the reasons for their actions — and the impact of other judges’ actions on their proceedings. The conference also identified a number of consensus positions, despite the broad base of attendees — in many ways an unprecedented feat within MDL. While the JPML had solicited feedback from attorneys in the past, the conference allowed for an open conversation between bench and bar about the direction of MDL techniques and practices.

Following the conference, the identified best practices were put into written form by an editorial board composed of six of the most prominent mass-MDL lawyers in the nation, working with teams of equal numbers of plaintiffs’ and defense-side counsel to continue the nonpartisan spirit of the project. Throughout 2014, we worked to develop consensus among the leadership team about which standards and best practices should be identified, and also the extent to which any particular factors should be identified as influencing whether or not a particular practice would be likely to work in a particular case.

The proposed language was then circulated to nearly a hundred members of the bar and nearly three dozen state and federal court judges with MDL expertise for comment in advance of the September 2014 Duke Law Distinguished Lawyers MDL Conference. At the September conference, each chapter was presented for comment by a panel consisting typically of a member of the bench, a plaintiff’s attorney, and a defense attorney. Each panel sought to facilitate discussion about key contested points, often resulting in the addition of further nuance to the recommendations contained in the Standards and Best Practices report.

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The open dialogue between bench and bar was striking. Judges candidly asked counsel about what was happening behind the curtain of litigation: Why are we seeing these patterns of filings? Why are rulings that are designed to create efficiency in this area so often opposed by counsel on both sides?

The Standards and Best Practices for Large and Mass-Tort MDLs was released on Dec. 19, 2014. The final recommendations were a product of compromise, but also consensus. The issues and challenges targeted were those identified by the MDL bar. The recommendations for solving those issues were wide-ranging. Some of the recommendations focus on educating new entrants to MDL about practices that, while not codified, have become commonplace or even presumptively expected. Other recommendations focused on innovative new approaches, experimental solutions created by the attorneys or judges in a particular case dealing with a unique problem that might serve as a template for solving related issues in similar cases. The report thus served as a compendium of ideas, both new and conservative, to help guide the expectations of bench and bar about what is typical in an MDL, to serve as a foundation for the promulgation of new ideas, and to inspire new innovations in future cases, built upon the ideas captured within the report’s pages.

THE BEST PRACTICES

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One resonating theme within the conference and the best practices themselves is that there is no one-size-fits-all solution that works across all MDLs. While the flexibility of MDL as a procedural device is one of its greatest virtues, it inevitably demands customized solutions that fit the needs of each individual case. The work of the drafters and commenters was not to create a firm set of practices that should be employed by rote in each MDL. Rather, it was to collect the best ideas and options, to help guide the expectations of bench and bar about what is typical in an MDL, to serve as a foundation for the promulgation of new ideas, and to inspire new innovations in future cases, built upon the ideas captured within the report’s pages.

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2 In a class action, the district court judge assigned to the case decides a motion for class certification. But, in the MDL context the cases may be individually filed in a number of jurisdictions around the country, before numerous judges. As such, the JPML decides whether the cases should be coordinated for pretrial proceedings. The JPML may do this on the request of the parties, judges, or sua sponte. If the JPML decides to coordinate the cases, it will determine which judge will serve as the transferee court, as well as determining the scope of matters that will be consolidated in the proceeding.


4 For a fuller discussion of these trends and the impact on the judiciary, see Jaime Dodge, Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation, 64 Emory L.J. 329 (2014).

The MDL Vortex Revisited

THE MODERN CONCEPT AND UNDERSTANDING OF MASS TORTS DEVELOPED AFTER THE CREATION OF THE MDL PROCESS. HOW HAS THE MASS-TORT CLAIM BEEN TREATED UNDER THE MDL PROCESS — AND TO WHAT ULTIMATE EFFECT?

by Thomas Metzloff
ONE OF THE MORE INTERESTING CASES I WORKED ON AS A YOUNG ASSOCIATE IN THE EARLY 1980S INVOLVED GEORGE STEINBRENNER, the well-known owner of the New York Yankees. He had invested in an oil and gas venture in West Virginia aptly named Yankee Energy. When the investment did not pan out, he filed suit against a wide array of defendants, including the West Virginia driller, the tax accountant who had worked on the deal, the attorney who had put together the investment documents, as well as his own personal financial advisor and assistant. Steinbrenner claimed that the defendants had received improper kickbacks and had taken other actions that were fraudulent.

The case became one of those scorched-earth lawsuits that have given U.S. litigation a bad name. Scores of depositions — some consisting of more discussion and argument among the lawyers than questions asked of deponents — were taken around the country, with most going for days if not longer. At one point, there were over 100 discovery motions pending before the district court.

In the middle of this procedural morass, one of the defendants filed a motion pursuant to Section 1407 to consolidate the Steinbrenner case and a handful of similar lawsuits involving other plaintiffs who had invested with the same West Virginia oil and gas driller. This was my first involvement with the multidistrict litigation (MDL) process. It was not something that was taught in either the basic Civil Procedure or advanced Civil Procedure courses that I had taken in law school.

My initial reaction was that these cases probably were not the type of complex, large-claim cases that surely must make up the bulk of the MDL docket. But in researching the MDL process — which at that point had only been around for a dozen years — I was surprised that many of the MDL dockets were in fact consolidations of a relatively small number of cases. Indeed, the origins of the MDL process did not define with any exactness the type of cases that could be found suitable for the process. While there were some general categories of case types that were identified as particularly appropriate, the MDL procedure was opened-ended and could be applied widely across the litigation spectrum.

We opposed the motion to consolidate, generally arguing that there were too few cases to benefit from consolidation and that the cases had significant factual variations. Also, our case was already in the later stages of discovery at the time of the Section 1407 filing. The Judicial Panel on Multidistrict Litigation (JPML) held a hearing on the case in Seattle. Several attorneys from Atlanta, Florida, and West Virginia made the long trek to Seattle for a very short 15-minute hearing. My opening comment made some reference to the Boston Red Sox not being forced to move a game in the top of the seventh inning (one of the panel judges was from Massachusetts so it seemed appropriate in a case involving the Yankees). The panel ultimately denied the motion to consolidate. We continued to slog through the trench warfare of discovery until ultimately the case was settled on the eve of trial. In retrospect, I still wonder whether MDL consolidation might have offered some benefits.

The experience demonstrated to me — as it probably did to many litigators during this time period — the potential importance of the MDL process. If the Steinbrenner case had been transferred, it could have significantly impacted the handling of the case. A new transferee judge could have established a new approach to discovery that could have radically altered the dynamics of the case.

That the MDL process has grown and evolved since those early days is clear. The question is how it has evolved. Is it still a general procedure applicable across a wide range of litigation case types? Or are there particular litigation types that have come to dominate the process as the currents of litigation have changed over time?

This question is of particular importance in the area of mass torts — those personal-injury claims that can involve hundreds or even thousands of victims of a single alleged wrong.

The conventional wisdom is that the MDL process is generally applicable to a wide range of litigation types, and that mass torts can be included as “one among many” types of lawsuits potentially subject to the MDL process. While one can view the MDL case statistics to support that view, a more careful examination of the MDL data as it now stands reveals a very different reality: Mass-tort claims have come to dominate the MDL docket. This growing trend raises questions as to how mass torts are shaped, defined, and ultimately resolved through the MDL process. Given the enormous potential liability associated with mass-tort claims, understanding the procedural processing of these claims is both interesting and important.

Historical Overview

It is useful to provide a quick overview of the origins of the MDL process focusing on the types of cases its proponents envisioned as being particularly suitable to its approach.

The MDL arose out of judicial experience with an extraordinary number of antitrust cases filed by utilities, municipalities, and others against the manufacturers of electronic equipment. Following a successful government antitrust prosecution of manufacturers of electrical equipment in the 1960s, over 1,800 civil cases were filed in over 30 different federal court districts. The discovery in those cases was extensive, and the potential for overlapping depositions and document production was obvious. To deal with this “wave of litigation [that] threatened to engulf the courts,” the Judicial Conference of the United States recommended the creation of a new “Coordinating Committee for Multiple Litigation” to recommend actions to control and manage the cases.¹

The Coordinating Committee recommended a series of uniform pretrial and discovery orders that each
district court judge could apply to the cases in their respective districts. The uniform orders established rules for centralized document depositories. These depositories made nearly 1 million documents available to the parties. The coordinating efforts also established the taking of “national” depositions in which attorneys from other cases could ask questions.

The consensus view was that the actions taken by the Coordinating Committee were greatly successful in preventing the federal courts from being overwhelmed by the electrical equipment cases. By the same token, many recognized that the coordinating process itself had some inefficiencies, as over 30 district court judges had to arrange schedules and travel. Also, because the efforts were voluntary, there was the risk that in similar future cases, some judges would not fully cooperate.

Accordingly, the Coordinating Committee drafted legislation to formalize a procedural tool to deal with situations that might arise. As a result of the recommendation, Congress in 1968 established the JPML and empowered it to transfer groups of cases and assign them to a judge for the “limited purpose of conducting pretrial proceedings.” In discussing what was encompassed in this charge, the House report noted that pretrial proceedings “generally involve deposition and discovery” but that under the federal rules additional steps would be possible, including rendering summary judgment, controlling and limiting pretrial proceedings, and imposing sanctions for “failure to make discovery or comply with pre-trial orders.”

After completion of the pretrial proceedings, the cases were to be remanded to the district where they were originally filed. There was never any expectation that the transferee judge would actively manage the case to consider a global settlement, although it was understood that some settlements may occur, such as in cases where liability was clear. The main focus for the transferee judge was to oversee the discovery process with the expectation that the cases would ultimately be remanded for trial.

It is surprising that the description used for eligible cases was “massive filings” — as if the MDL process would be reserved for a relatively small number of actions.

Having only had the electrical equipment “massive filings” as an example to justify the new procedure, it is interesting to consider what other areas of litigation might have been anticipated as especially likely to be subject to the new process at the time of the passage of the MDL procedures. The legislative history set forth the following as potential candidates for MDL treatment:

“The types of cases in which massive filings of multidistrict litigation are reasonably certain to occur include not only civil antitrust actions but also, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.”

Given the scant history of similar types of “massive filing” cases, this description has a bit of an “I know when I see it” feel to it. The electrical equipment cases had revealed a potential problem, and a simple solution had been found. It is probably not fair to assert that the MDL procedures were created as a prophylactic measure only for the extraordinary cases like the electrical equipment cases, but it was anticipated to be the exception rather than the rule.

Knowing what we now know of the MDL process, it is surprising that the description used for eligible cases was “massive filings” — as if the MDL process would be reserved for a relatively small number of actions that fit the model of the electrical equipment cases. As the history of the MDL process shows, this focus on “massive filings” has been significantly relaxed.

It is less surprising that the focus of the anticipated use of the MDL process was not more clearly centered on what we have come to refer to as mass-tort cases. When enacted in 1968, the category of mass-tort cases was not well understood. Of course, this was well prior to the Agent Orange, Dalkon Shield, and Bendectin litigations that helped develop our appreciation for the potential of mass-tort claims. In the litigation world at the time, tort claims that could potentially be suitable for the new MDL process were imagined as primarily “common disasters,” such as airplane crashes, and, to a more limited extent, product-liability cases.

**Early Experience with the MDL Process**

The MDL process quickly revealed that it was not going to be limited to exceptional cases with “massive filings.” An early study published in 1974 in the *Harvard Law Review* detailed extensive use of Section 1407. At the time of the study, the panel had considered 148 actions under Section 1407 and consolidated actions in 112 dockets for a grant rate of 75 percent. As probably anticipated, antitrust was the leading area with 35 consolidations (31 percent of the total dockets granted). Securities cases — which interestingly was not a category listed in the House report — constituted 28 of the total dockets created (25 percent). “Mass disasters” (which were primarily airplane crash cases) also constituted 28 of the dockets that were transferred. The only other category with a significant number of MDL dockets created was patent/copyright cases (11 dockets constituting 10 percent of the total dockets granted).

Significantly, product-liability cases — the category in which most of the mass-tort cases would fall in our current understanding of mass torts — were negligible. The panel considered only three potential product-liability dockets during the first six years of its operations; it denied transfer in two of the three matters.

One of those three early MDL product-liability cases is particularly interesting in the evolution of the
use of the MDL process for mass-tort cases. In *In re Oral Contraceptives Products Liability Litigation*, the JPML considered the possible consolidation of 20 different actions filed in 10 different districts based upon alleged injuries resulting from oral contraceptives manufactured by defendant G.D. Searle & Company. After citing the legislative history expressly listing product-liability cases among possible MDL candidates, the panel noted the “existence of several groups of product-liability litigation during the past two years.”

Having become aware of the multiple claims against G.D. Searle, the panel itself initiated the MDL proceedings by entering an order directing the parties to show cause why the cases should not be transferred for consolidated pretrial proceedings. Ordinarily, this number and dispersion of cases would have justified consolidation, based upon the *Harvard Law Review* study. In response to the panel’s show-cause order, however, the parties stated that there were few if any common questions of law or fact and that the transfer of the cases would not serve the convenience of the parties or witnesses. The panel refused to transfer.

One can read the panel’s decision in *In re Oral Contraceptives* in one of two ways. By its action, as well as the lack of other product-liability cases at the time, the panel could be seen as having doubts as to whether mass-tort cases were appropriate for consolidation under Section 1407. The other reading — probably the more likely given the radical increase over time of precisely these sorts of mass-tort claims being consolidated — is that the panel was expressing its opinion that this was an area where MDL consolidation should be expanded. The opinion goes out of its way to make the point that the panel was aware of the existence of these types of product-liability cases. It also made clear that its decision to deny transfer was a function of the views expressed by the parties and was without prejudice to reconsidering the issue at a later time.

The main gist of the *Harvard Law Review* study was that the panel was aggressively using Section 1407. The panel had expressed a strong preference for consolidation even in cases in which there were noncommon facts or a small number of actions. As long as there were significant common issues, the panel was likely to grant consolidation. For example, with respect to air disaster litigation — the primary type of mass tort generally recognized at the time — consolidation was routinely granted unless discovery in the actions was close to completion. The panel, driven by its charge for achieving judicial efficiency, liberally granted consolidation under Section 1407 sometimes even in the face of objections by the parties to the litigation.

Rather than set a high threshold for the number of filings needed to justify consolidation, the study found that the panel regularly ordered consolidation if there were more than five actions involved (a far cry from the described justification of “massive filings”). The *In Re Oral Contraceptives* decision was one of only two cases involving more than five actions where transfer was denied based upon a finding of an absence of common facts.

The study also noted that from the beginning of the MDL process, transferee judges as well as the panel itself demonstrated an interest in resolving the cases as opposed to remanding them to the districts in which they were originally filed. Only some of the resolutions were expressly based upon existing pretrial procedures. On occasion, for example, transferee judges granted motions to dismiss or motions for summary judgment (pretrial procedures that were clearly within the purview of pretrial procedures that the transferee judge was expected to utilize). But use of such motions was usually only to “simplify litigation by eliminating certain issues or cases and only rarely to dispose of an entire group of cases.” The study noted only a single instance when a transferee judge had granted summary judgment on the basic common issue at the end of pretrial.

While there was nothing controversial about the use of existing pretrial motions, transferee judges — with the support of the panel — also took other steps to avoid remanding. Most notable was the use of Section 1404(a), by which some judges entered orders transferring cases to their districts for the purpose of trying the case and imposing final judgment. While the practice of retaining cases for trial rather than remanding to the transferor court was controversial, there was substantial support for the practice based upon efficiency considerations. Ultimately, the Supreme Court held that this approach was inconsistent with the plain meaning of Section 1407, especially in light of the relevant legislative history.

The *Harvard Law Review* study also made clear that many MDL dockets resulted in settlements achieved through the efforts of the transferee court. For example, in antitrust cases following a successful government prosecution, the main issue was to determine damages as opposed to liability (which had already been established). In those cases, settlements were common without the need for remand.

**Evolution of the MDL Process**

Since the early 1990s and the *Harvard Law Review* study, MDL practices have continued to evolve and gradually expand. An article published as part of a symposium on multidistrict litigation by Judge John Heyburn, chair of the Judicial Panel on Multidistrict Litigation between 2007 and 2014, provides an excellent overview of the state of MDL affairs as of 2008. As of that date, the panel had considered motions in nearly 2,000 dockets involving a quarter-million cases (likely involving millions of claims).

The workload of the panel has gradually increased over time. In 1996, the panel for the first time considered more than 60 requests for consolidation; in 2007, the panel considered almost 100 claims. As of 1997, there were 161 open MDL dockets encompassing 54,000 actions. Ten years later, the number of open MDL dockets had increased to 297, encompassing over 76,000 pending actions.
In his analysis of the panel’s workload, Judge Heyburn made the special point to challenge the “common misconception” that the MDLs are mostly “mega-cases.” He noted that there were indeed some “mega-cases” in the MDL process, but that the large majority of MDLs did not fit that description. As of 2008, only 37 out of about 300 active MDLs comprised more than 100 constituent actions, while only 10 had more than 1,000. He referenced three mass-tort cases dealing with asbestosis claims (42,000 pending actions at the time), Vioxx claims (9,300 pending actions in which the judge had recently approved a settlement), and Seroque claims (5,600 pending claims). In contrast, he noted that about half of all MDLs had 10 or fewer actions. Judge Heyburn reiterated the commonly made point that MDL dockets encompassed a wide variety of litigation categories.

He did point out that recent developments limiting the use of class actions in mass litigation perhaps created the possibility of greater use of MDL procedures for such claims. As class-action devices became less available or desirable, “some litigants may be turning to the MDL process as a way of achieving some of the benefits or advantages formerly available under Rule 23.” This prediction proved to be on the money as one looks to the present composition of MDL dockets, which have come to be dominated by mass-tort cases.

Contemporary MDL Proceedings and the Ascendancy of Mass Torts

In looking at the most recent six years of MDL activity following the overview described by Judge Heyburn, MDL activity at first glance seems to have reached a plateau. The high-water mark for MDL docket requests occurred in 2009, when for the first time, the number of requests topped the century mark with 121 new docket requests. After a dip in 2010 (84 new docket requests), it again surpassed 100 new dockets in 2011. In the following three years, new docket requests have been stable, averaging about 90 requests per year (which is essentially at the same level as the last few years documented by Judge Heyburn). More noteworthy, however, is that significantly fewer new MDL docket requests have been granted recently, with a corresponding increase in denials of MDL status. While the number of new MDL dockets in 2009 (83 new dockets granted) almost equaled the record 85 docket requests granted in 2008, the number of new dockets has declined dramatically since then and is now at the levels of the early 2000s. From 2010 to 2014, a total of 241 MDL docket requests were granted (on average 48 per year). During that same period, the denial rate for MDL dockets increased, as a total 160 MDL docket requests were denied (averaging 32 per year). The overall grant rate during this period was a historically low 60 percent. By way of comparison, for the previous five-year period covering 2005–2009, the panel granted MDL docket requests in 327 cases and denied requests in only 52 cases for a grant rate of 86 percent.

But what can be said about any changes in the type of cases subject to MDL treatment? For the past couple of years, annual statistics published by the JPML have shown the distribution of the types of cases for pending MDL dockets. The data initially seems to confirm the conventional wisdom that the MDL process ranges broadly across many types of litigation, with a few areas of concentration. The statistics focusing solely on the number of MDL dockets show that there are many types of cases that are subject to MDL treatment. But there is a flip side to this coin that tells a very different story if one focuses more on the number of pending actions that comprise those MDL dockets.

If one were to think about the faces carved on to an MDL Mt. Rushmore, it would certainly include antitrust and securities actions as long-standing major categories of litigation regularly achieving MDL status. The 64 antitrust dockets constitute close to 22 percent of the pending MDL dockets (a percentage markedly similar to what was found in the earliest Harvard Law Review study). Securities would be a lesser figure, but this category still constitutes a durable 10 percent of the MDL docket. Competing for a possible position would likely be sales practices (constituting 12 percent of the dockets) or intellectual property cases (which has slipped to only 6 percent of the MDL docket).

The main nominees for the remaining “monument” status would be products liability (with 70 MDL dockets or 24 percent of the total) and the somewhat mysterious miscellaneous category with 49 dockets (17 percent of the total). Since the MDL statistics do not have a specific category for mass torts per se, if one were interested in assessing the impact of MDL litigation on mass-tort claims, it would be necessary to examine whether the largest category of cases — product liability — is comprised primarily of mass-tort cases or other types of product-liability cases.

One might even reach a preliminary conclusion that there has been a decline of sorts as it relates to at least some categories of cases most often associated with mass tort. The number of air disaster and common disaster cases (two of the nine specific categories that the MDL statistics track) has shrunk to the bottom of the list, with only three and two MDL dockets respectively constituting a paltry 2 percent of pending dockets. These categories historically — especially during the early years of the MDL process — constituted a much more significant part of the workload.

Mass Torts Dominate MDL Dockets

In drilling down into the current state of pending MDL dockets, it is possible to tell a very different story about the current state of MDL practice. Rather than being a process that is regularly used across a wide range of litigation types, it is in fact dominated by mass-tort cases at a remarkable level. The JPML statistics that simply report an overview of the mere number of MDL dockets disguise that incredible concentration of mass-tort actions through the MDL process.

The primacy of mass-tort claims in the MDL process can be demonstrated
by looking more carefully at the current cases. Using the JPML’s March 16, 2015, report (most recent as of the time of the writing of this article), one can examine in detail the 287 MDL dockets to determine which dockets fall within the mass-tort category. The results are stunning: mass-tort MDL dockets consolidated over 125,000 civil actions constituting over 96 percent of all pending actions included in all of the MDL dockets.

To develop a comprehensive list of mass-tort claims, one first includes the small number of dockets included in the air disaster and common disaster categories. The three air disaster dockets involve relatively few pending actions. The common disaster category which includes the Deepwater Horizon MDL with 2,941 pending actions — has considerably more actions.

It is then necessary to review the product-liability cases closely, as not all product-liability cases involve mass-tort claims. A careful review of the product cases reveals that 16 of the 71 product-liability MDLs are not mass-tort claims. For example, nine of the MDL dockets involve claims against building supply companies whose products (windows, shingles, decking, or cement siding) were defective but were not alleged to have caused any personal injury.16 Three other MDL dockets involved product-liability claims based upon alleged defects in engines. There were four other MDL dockets alleging damage to products such as mold in washing machines, an herbicide that damaged trees, or products that contaminated well water (but not alleged to have caused any personal injury). In contrast to the mass-tort product claims, the number of actions in these non-mass-tort product claims was modest, with the exception of the Toyota Acceleration MDL Docket that included 88 actions.17 Three other MDL dockets dealt with other types of property damage.18 Collectively, these 16 MDL dockets constituted only 561 pending civil actions. Only two of the dockets included more than 25 actions. The median number of actions per docket for these “non-mass-tort” product-liability cases was only 12 actions.

The remaining 55 product-liability cases involve claims fairly described as mass-tort claims. These claims include numerous MDL dockets against suppliers of medical devices such as artificial hips, as well as claims against pharmaceutical companies for alleged injuries resulting from drugs. Overall, these 55 MD mass-tort product-liability dockets consolidated nearly 120,000 pending civil actions. While 20 of the cases currently involve fewer than 100 current consolidated actions (probably because the matters are in the last stages of resolution), most have historically involved hundreds and indeed usually thousands of actions. The historical total of actions consolidated in these 55 product-liability cases is over 390,000 actions.19

To determine the full range of mass-tort MDL dockets, it is also necessary to peruse the miscellaneous category. It contains some of the new types of litigation that are constantly developing within the U.S. litigation system. For example, the pending list includes a number of dockets involving claims against companies such as Target and Sony for damages related to security breaches. The category also includes a variety of claims based upon unfair business practices relating to mortgages. But the MDL miscellaneous category also includes a number of mass-tort claims, such as the high-profile National Football League concussion cases (and similar claims filed against the National Hockey League and the National Collegiate Athletic Association). Overall there are seven MDL dockets in the miscellaneous category that are fairly characterized as mass-tort claims. They include a total of 2,558 pending civil actions.

**MDL Mass-Tort Docket Statistics**

Table 1 (at left) is a summary of the current MDL dockets composed of cases from four different categories: (1) common disaster; (2) air disaster; (3) those product-liability dockets that involve mass-tort claims; and (4) those miscellaneous dockets that involve mass-tort claims. The results are, again, stunning: There are a total of 67 MDL mass-tort dockets (23 percent of the total MDL dockets). Numerically, this is the largest category of MDL dockets (with a few more dockets than in the antitrust category). But the true MDL dominance of mass-torts is revealed when one examines the number of pending actions contained in those dockets. Those 67 MDL dockets include almost 125,000 pending civil actions. In comparison, the remaining non-mass-tort MDL dockets account for only about 6,000 pending cases. Thus, the mass-tort MDL dockets comprise an amazing 96 percent of the actual actions covered by MDL consolidations.

In stark contrast to the non-mass-tort product claims or other MDL dockets that typically have relatively few claims, there are numerous mass-tort MDL claims with huge numbers of consolidated actions. Table 2 (next page) is a list of the 23 MDL mass-tort dockets as of March 16, 2015, that include over 1,000 pending civil actions.

The incredible concentration of MDL pending actions in several large mass-torts cases represents an important trend. According to statistics published by the Center for Judicial Studies at Duke Law School, prior to 2004, there were only a couple of large MDL dockets (defined as including more than 1,000 pending actions).
The above analysis for the most recent information shows that the ascend-ency and concentration of “large” MDL mass-tort documents have continued and indeed accelerated. Nor has the recent increase in MDL denials mitigated the growth in mass-tort dockets. With a few minor exceptions, the denials have occurred in patent or consumer cases involving relatively few potential cases to consolidate. For example, from Oct. 1, 2013, through Sept. 30, 2014, the panel denied consolidation in 27 dockers. The vast majority of denials came in nontort areas such as labor and employment disputes, patent cases, or nontort product-liability cases. Only three of dockets involved claims that could be considered as potential mass torts. Each of the dockets was comprised of a small number of cases (averaging nine cases per docket), and presented unusual facts. For example, in one of the denied dockets involving the Mirena intrauterine device (IUD), the panel refused consolidation of nine cases filed by the same attorney that claimed neurological injuries distinct from the type of injury commonly alleged in an existing MDL docket. None of the MDL denials was in a docket with more than ten cases alleging tort claims.

It may well be that growth in mass-tort MDLs is perfectly consistent with the origins of the MDL process. Many of the mass-tort claims present the type of “massive-filing” cases that gave rise to the initial MDL legislation. Handling cases with literally thousands of claims indeed raises the specter of overburdened courts grappling with massive, duplicative discovery proceedings. So, even though Congress had not specifically anticipated the onslaught of mass-tort cases in its present form, the MDL process is arguably well suited to the development.

But what is also clear is that the MDL process has important implications for how cases are managed. What was initially designed as a simple procedure for coordinating discovery is obviously much more than that today. As Judge Alex Kozinski wrote in his dissent to the Ninth Circuit’s decision in Lexicon, “[t]he simple reality is that once a case is sucked into the MDL vortex, it seldom comes back.” While the Supreme Court has limited what Kozinski called the federal court’s “remarkable power grab” by limiting the use of transferee courts transferring actions to their own courts, the fact remains that the vast majority of cases transferred through the MDL are never remanded back to where they were filed. Instead, the cases are most often resolved through settlement as part of the MDL proceedings.

It is impossible to view the MDL process as a neutral procedure designed simply to achieve discovery efficiencies. From the beginning, the MDL process did more than that. The development represents more than a simple “power grab” by some transferee judges. It also reflects the evolution and expansion of what constitutes “pretrial” procedures since the time when Section 1407 was enacted. Not only have discovery practices radically evolved over time (requiring far more judicial supervision controlling perceived discovery abuse as well as dealing with the development of e-discovery), but numerous other changes have radically redefined the role of the judge in managing the pretrial process.

Consider just a few important changes that impact pretrial procedures: The Supreme Court reinvigorated summary judgment in the 1980s and more recently refined how district courts

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**TABLE 2**

MASS-TORT PENDING MDL DOCKETS WITH 1,000 OR MORE PENDING ACTIONS (as of March 16, 2015; all Product Liability unless noted)

<table>
<thead>
<tr>
<th>MDL #</th>
<th>Short Name</th>
<th>Pending Actions</th>
<th>Historical Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2327</td>
<td>Ethicon, Inc.</td>
<td>23,569</td>
<td>24,220</td>
</tr>
<tr>
<td>2325</td>
<td>American Medical</td>
<td>19,093</td>
<td>19,600</td>
</tr>
<tr>
<td>2326</td>
<td>Boston Scientific</td>
<td>15,429</td>
<td>15,700</td>
</tr>
<tr>
<td>2187</td>
<td>C.R. Bard</td>
<td>10,525</td>
<td>10,823</td>
</tr>
<tr>
<td>2244</td>
<td>DePuy Orthopaedics</td>
<td>7,147</td>
<td>7,240</td>
</tr>
<tr>
<td>2197</td>
<td>DePuy Orthopaedics</td>
<td>6,819</td>
<td>9,395</td>
</tr>
<tr>
<td>2299</td>
<td>Actos (Pioglitazone)</td>
<td>4,130</td>
<td>4,286</td>
</tr>
<tr>
<td>2100</td>
<td>Yasmin</td>
<td>3,502</td>
<td>11,801</td>
</tr>
<tr>
<td>2179</td>
<td>Deepwater Horizon</td>
<td>2,941</td>
<td>3,083(CD)</td>
</tr>
<tr>
<td>2428</td>
<td>Fresenius GranuFlo</td>
<td>2,925</td>
<td>2,926</td>
</tr>
<tr>
<td>2441</td>
<td>Stryker Hip Implant</td>
<td>2,316</td>
<td>2,387</td>
</tr>
<tr>
<td>2433</td>
<td>Du Pont C-8 (drinking water)</td>
<td>2,191</td>
<td>2,197(Misc)</td>
</tr>
<tr>
<td>2502</td>
<td>Lipitor</td>
<td>2,079</td>
<td>2,082</td>
</tr>
<tr>
<td>2387</td>
<td>Coloplast Corp</td>
<td>1,870</td>
<td>2,011</td>
</tr>
<tr>
<td>2391</td>
<td>Biomet Hip Implant</td>
<td>1,863</td>
<td>2,458</td>
</tr>
<tr>
<td>1964</td>
<td>NuvaRing</td>
<td>1,739</td>
<td>1,863</td>
</tr>
<tr>
<td>2385</td>
<td>Pradaxa</td>
<td>1,647</td>
<td>2,597</td>
</tr>
<tr>
<td>875</td>
<td>Asbestos</td>
<td>1,510</td>
<td>192,049</td>
</tr>
<tr>
<td>1871</td>
<td>Avandia</td>
<td>1,332</td>
<td>5,277</td>
</tr>
<tr>
<td>2434</td>
<td>Mirena IUD</td>
<td>1,212</td>
<td>1,234</td>
</tr>
<tr>
<td>2545</td>
<td>Testosterone Replacement</td>
<td>1,172</td>
<td>1,174</td>
</tr>
<tr>
<td>2272</td>
<td>Zimmer NexGen Knee</td>
<td>1,090</td>
<td>1,579</td>
</tr>
<tr>
<td>2308</td>
<td>Skechers Shoe</td>
<td>1,038</td>
<td>1,110</td>
</tr>
</tbody>
</table>

**TOTAL: 23 CASES**  
117,139 327,092

outside of the asbestos cases. Thus, for the years 1999-2003, there were only one or two non-asbestos “large” MDL dockets that included on average a total of about 3,800 pending actions consolidated through the MDL process. These few MDL dockets had only about 9 percent on average of the total MDL pending actions. In the last ten years, the concentration of the large MDL cases — virtually all of which are mass-tort cases — has risen exponentially. Thus, the same statistics from the Center for Judicial Studies show that for the years 2011–2014, there were on average 15 large MDL dockets with more than 1,000 pending actions and that those MDL dockets were, on average during this period, composed of nearly 65,000 pending actions

representing nearly 75 percent of the MDL pending actions during this time period.)
are to examine motions to dismiss. The Court also imposed important gatekeeping obligations on the district court to review the reliability of opposing parties’ expert witnesses. The role of the judge in actively managing the settlement process also has greatly evolved over this period. The use of court-ordered ADR was unheard of at the time of the enactment of Section 1407.

The point is simply that what was initially thought of as the purpose of the MDL process — coordination of “depositions and discoveries” — is in fact much more than that.

**Conclusion**

The conventional wisdom has long been that MDL has continually expanded since its inception and that it has come to play an important — and increasingly controversial — role in American litigation. It has never been limited to situations with “massive filings,” but rather was a procedural option that was utilized in a wide variety of litigation types, a bit of “one-size-fits-all” approach that impacted many litigation contexts.

The conventional wisdom needs to be refined. To be sure, there are several types of litigation that are subject to the MDL process that involve relatively modest numbers of claims. The utilization of the MDL process in those contexts has remained stable, and may indeed be decreasing (or at least not expanding as it was in the past). The reality with respect to mass-tort claims is radically different. The MDL process has come to be dominated by large mass-tort dockets typically involving thousands of underlying actions. Indeed, over 95 percent of the total actions currently consolidated through the MDL process are mass-tort cases. This represents a significant evolution in the utilization of the MDL process that initially took a restrictive approach to the mass-tort context.

Any hesitancy or concern with the appropriateness of MDL treatment is now certainly a relic of the past. The MDL process has indeed become a vortex with respect to mass torts. This is not necessarily a problem or wrong — indeed it is arguably fully consistent with original conceptualization of the MDL process. But given the reality that well over 100,000 mass-tort actions are currently consolidated through the MDL process, it is important to examine carefully and critically how the MDL works.

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6. See id. at 1012.
7. Note, supra note 4 at 1007.
8. Note, supra note 4 at 1029.
12. Heyburn, supra note 11, at 2232.
13. Id. at 2230.
14. Id. at 2232 (As the “class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning to the MDL processes as way of achieving some of the benefits or advantages formally available under Rule 23.”) (Referencing the restrictive Supreme Court decisions in Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) and Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).)
16. There are some “judgment calls” that need to be made respecting a few of the MDL dockets. For example, MDL Docket #2047 has 293 current actions dealing with defective drywall manufactured in China. Some of the cases include claims for personal injury based upon exposure to the drywall, but the dominant claims are for property damage. So, the Chinese Drywall docket were not included as mass-tort claims.
17. The exclusion of MDL #215 Toyota Acceleration is also a judgment call. In its order granting MDL status, the JPML noted that the current actions did not include personal injury claims but that it was possible that additional actions could be added that would include personal injury claims.
18. See MDL #1358 Methyl Tertiary Butyl Ether (contamination of water in wells but no personal injury claims included); MDL #2001 Whirlpool (mold in washing machines); MDL #2284 Imprelis Herbicide Marketing Product Liability (herbicide killed trees).
19. To be sure, about half of the historical actions consolidated in mass-tort MDL dockets came from the Asbestos MDL #875 with 192,049 actions. But the remaining 54 cases still consolidated over 200,000 actions. Thirty of the mass-tort product-liability cases consolidated over 1,000 actions. The median number of actions consolidated per mass-tort MDL docket is 1,179 claims with the mean number of claims being about 3,700 claims even excluding the asbestos cases.
22. In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, A., dissenting).
Bureaucratizing the Courts?

FINDING MDL’S PLACE IN THE TRADITIONAL LEGAL CULTURE

by Patrick Higginbotham
OVER THE PAST THREE DECADES three forces gained prominence in the narrative of the 1938 rules: the decline of trials with a companion embrace by bench and bar of arbitration and other trial avoidance devices, and responses by the judiciary to the generation of a large number of suits by a single event, failed product, or other mass disaster. Each of these three strands of history has drawn commentary recording an array of concerns over etiology, constitutionality, and consequence. Despite their interlaced interactions we persist in treating them as distinct phenomena. My objective in this brief writing is to suggest that in our struggle to respond in efficient ways to this challenge, we are shadowed by doubts that they are but parts of a larger albeit unattractive picture of independent inferior federal courts fading into administrative bureaucracies in full embrace of a utilitarian vision of due process, unwilling to bend to intrinsic values.

I. Responding to an event such as a plane crash, hotel fire, or defective product that produces large numbers of claims resting on common facts and often common measures of liability with efforts to forge a common resolution is rational given its patent possibilities for efficiency and fairness to individual claimants. As we work with the molding force of our traditional binary model of plaintiff versus defendant it is no surprise that this genre of complex litigation has "evolved over the last forty years" to "procedural collectivism," or "representative litigation in which the rights of purely passive claimants are adjudicated by selected parties, supposedly possessing parallel or at least similar interests, who litigate on behalf of those passive participants."1

Professors Martin Redish, Julie Karaba, Edward Sherman, and others have in thoughtful writings chronicled the passage from efforts to deploy class actions under Rule 23, with its strictures protective of class members’ rights of shared interests and represen-
tation, to MDL litigation in its present form. And commentary on its strengths and weaknesses is increasingly rich, led by Professors Francis McGovern and Samuel Issacharoff, and Elizabeth Chamblee Burch with a recent empirical look at the wielding of judicial power by the MDL judge.1 I share these concerns while respecting the creative efforts of our federal district judges — never to be underestimated. Little of the good they have been able to cobbled would have been possible without this talent and hard work. Yet their effectiveness came with a large draw upon the considerable trust they enjoy as life-tenured independents where they, as do we all, stand on the shoulders of others. So said, and it must be, is no answer to concerns of fairness and constitutionality. And the well of trust to draw from is not bottomless.

This dialogue now has definition and legs and I leave it to turn to my modest point that today’s focus on MDL is part of a larger picture of the changing roles of the inferior courts where our trial courts, the most important to these eyes, are on the leading edge; that MDL is not a culprit but an heir to a challenge to the system passed down the line by a sequence of judicial decisions essentially concluding “not this way.” And that happenstance can be a good thing in the hands of schooled MDL judges who find a way.

II. I have elsewhere expressed concern over changes in the work and methods of federal trial courts, the decline in federal trials, civil and criminal, and will not rehearse them here.1 Some while ago I observed:

> When we widen our lenses, we find disturbing trends, such as the decline of trials with federal trial courts looking like European courts. We also find a suspiciously parallel flow of dispute resolution to the administrative agencies.5

The disconnect between the power of the transferee judge and the power that the judge exercises rests on a statute that authorizes only the transfer of cases to that judge for purposes of pretrial proceeding with return to their filing homes, as the Supreme Court made clear in *Lexeon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.6 The rest of the operation finds its footing in some form of consent and assertions of implied and inherent authority sometimes on little more than empty air.7 While the Supreme Court has recently reminded in *Stern v. Marshall* that the structural protections of Article III are not so easily elided,8 consent fairly obtained and private contract remain as powerful insulating tools for the freeing of creative processes. There are mine fields. Indeed adequate representation is wrapped in that word “fairly.” And that’s where a trapped Rule 23 has passed to MDL.

I dip into this bit of the ongoing dialogue only to keep in the forefront appreciation that the path to the present station was paved by a flight from trials to comfort of paper and settlements, to the buy in to ADR and arbitration, coupled with delegation of judicial work to others, all of which push the federal courts from its binary structure toward a more polycentric administrative model — one
that risks loss of individual roles and accountability to the public. Looking to the path traveled in the search for the path forward turns light upon the risks of redefining “case or controversy” attending efforts to achieve an efficient and legally sound MDL process. One glance over the shoulder reminds that Section 1407 by its terms contemplates a handling of cases brought together to more efficiently prepare for a trial, with return to the place that Congress has said an individual had the right to file his suit. That tradition, steeped in due process concerns, is accented by recent decisions of the Supreme Court that venue choices among those authorized belongs to the parties, and that their contracted-for choice of forum trumps inquiry into the relative private conveniences under 28 U.S.C. §1404.

With the decline of trials the destination of “pretrial” became summary judgment not trial — the culture from which the MDL collects its cases. And the destination of its collection remains disposition without trial (albeit by necessity a sufficient number to achieve settlement en mass of individual suits). As apologists for the decline of trials assert, trials pose risks litigants will not take. While simplistic, to the extent it has purchase the risk of a sample trial cut from the herd is increased exponentially when it is used to inform the value of other cases gathered for coordinated pretrial. That cases are tried despite this elevated risk demonstrates their necessity; that preparation for trial is also preparation for settlement. And even a few trials serve to tether MDL to traditional process.

Defendants facing large numbers of mass-tort claims were early users of Rule 23. Unlike consumer classes where small claims would not be pursued singly and class certification effectively created liability, each one of the mass-tort cases is a threat. So defendants turned to Rule 23, as in the asbestosis cases, seeking res judicata — peace and lower transaction costs. This signifies because we must understand that centripetal forces attend these cases and their numbers. They are not the creatures of MDL. It follows that our task is to find and shape processes that address this genre of cases representing a significant percentage of the total civil caseload of federal trial judges. The difficulty is that this must be done without injury to our legal and cultural commitment to fairness to individual litigants.

III.

One of the phenomena accompanying the flight from trials has been the endorsement by the judiciary of private adjudication. Arbitration quickly enjoyed strong support from the Supreme Court as it reversed course, ending its hostility to arbitration with a warm embrace. We now have a system that encourages private dispute resolution, attractive at this level of abstraction but redolent with issues of fairness and with loss of the commitment to open courts by leaving them empty. It is a sanction of private contracts for resolving disputes wholly outside federal courts, producing an outcome that with a federal court blessing becomes a judgment of a federal district court that never heard the matter. The wisdom of contracting out dispute resolution aside, it is a present reality. Perversely, it has the seeds for validation of many MDL aggregations. Indeed, as the Supreme Court has recently made plain in Wellness International Network, Ltd v. Sharif, while party agreement cannot manufacture jurisdiction, knowing and voluntary consent vitiates many Article III concerns. Implications of Stern aside, this is a powerful endorsement of private contracting for dispute resolution. This is so even though MDL litigation today gathers cases and achieves results with processes that are little different in substance from those found to be outside the reach of Rule 23.

In answering the due-process question differences between a class of thousands of litigants gathered with a right to opt-out and thousands of claims filed in different districts and gathered by transfer to a single MDL judge may lack the force now supposed by some commentators. The settlement that reached the Supreme Court in Ortiz v. Fireboard Corporation was only half of the settlement confected. There was a parallel settlement of approximately the same size that was never challenged and was concluded with no judicial approval. This, because it was not a class action but a single settlement of large numbers of cases including many left pending in several states. Valuation of asbestosis cases was made relatively easy given their inherent similarity and the experience of counsel gained in the large numbers tried to verdict across the country. Nonetheless Ortiz remains an example of a “gathering” for settlement of large numbers of cases with a common fact pattern supported by consent — unlike its twin, which rested on a mandatory class. I will return briefly to Ortiz but for now I only urge that we look to the MDL process in operation and lift up those differences. In short, we ought ask the relevance of true differences between the MDL handling of filed suits and those gathered by a class with protected rights to opt out.

IV.

Recall that in Ortiz, Chief Justice William Rehnquist in a concurring opinion called for Congress to assist the courts in responding to the flood of asbestosis cases. The divided court vacated the multi-billion dollar settlement of an extraordinary number of pending cases for, among other shortcomings, failure to abide the strictures of Rule 23. Chief Justice Rehnquist wrote separately, saluting the “near-heroic efforts” of then-District Judge Robert Parker to achieve the rejected settlement, pleading for Congressional assistance. The Court rejected efforts to defend “mandatory class treatment through representative actions on a limited fund theory,” finding it bound to adhere strictly to its common-law definition; that to do otherwise would contravene the Rules Enabling Act. As Justices Stephen Breyer and John Paul Stevens demonstrated in dissent, this result was not inevitable. The point now is not over the
soundness of the decision. Given the Court’s plea to Congress for help, with the implication that Congress has the power to remedy what it could not, it is rather that it would be instructive to ask what form such Congressional relief might take. What changes to Rule 23 or otherwise Congress might make that the Rules Committee and Judicial Conference, constrained as they are by the Rules Enabling Act, could not make. Equally important, we must focus on what we ought to seek. This needs careful attention by MDL judges. For example, ought we seek the authority, denied in Lexecon, to retain transferred cases for trial? Although an obvious possibility, the answer is not. As Judge Eldon Fallon taught in In re Vioxx Products Liab. Litig., 1 Lexecon does service in settlement, providing a defined destination with its threat of remand. 16 Seeking answers to these questions will inform MDL practice, for illuminating the power of Congress also will lend light on the validity and force of various MDL practices and the wish list of MDL judges.

While Ortiz did not speak to the validity of classes certified under Rule 23(b)(3), Dukes closed that door for many actions. Doing so added further incentive for counsel to opt for gathering the claimants, file multiple actions, and then consolidate under Section 1407 or sometimes to leave a class embedded in the gathered cases. 17

V.

Prominent actors in the MDL game now see its role as facilitating an end by settlement or remands for trial, a retreat from the more hands-on engagement of judges in the fashioning of settlements. 18 This shift in perceived role and mission is wise in its move to both traditional and safer ground, specifically to a more legally defensible role as MDL judge. This because “facilitating” rests on choice of litigants — consent and agreement, the primacy of which rests on choice of litigants — consent and agreement, the primacy of which the Supreme Court has recently made plain. 19 Job label matters as it carries a boundary, intangible though it be. As for MDL today, the very absence of legal challenge suggests a process overarched with consent. Is it?

The efforts of Duke Law School, supported by symposia of Tulane and Emory, respond to the important task of schooling transeree judges in best practices as well as the location of the shoal waters of due process and Article III. Locating due-process limits in the fluid dynamic attending responses to the debris of failed service and product is no small task, yet it can refuse to give way to wholly utilitarian concerns. The rights to notice, to be heard, and to participate have intrinsic value, to these eyes constitutionally secured. Indeed, the opinions of the Justices in Ortiz, Concepcion, 20 and Dukes are laced with these concerns and, while directed to Rule 23, inform efforts to develop the processes of MDL.

I can only salute the effort of the many players — with special thanks to Dean David F. Levi and John Rabiej, longtime workers in the bastion of federal rulemaking, for providing the needed forum and push for self-examination.

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5 Higginbotham, supra note 4, at 505.

6 See 28 U.S.C. 1407(a) (providing that actions “may be transferred to any district for coordinated or consolidated pretrial proceedings” but requiring that “[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred”); Lexecon, Inc. v. Millberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998).

7 See, e.g., Armstrong v. LaSalle Bank Nat. Ass’n, 552 F.3d 613 (7th Cir. 2009) (concluding that parties could consent to venue in pretrial proceedings in transeree court); In re Carbon Dioxide Indus. Antitrust Litig., 229 F.3d 1321, 1326–27 (11th Cir. 2000) (same).


12 Id. at 865 (Rehnquist, C.J., concurring).

13 Id.

14 Id. at 841 (majority op.).


18 See generally Dodge, supra note 2.
