

COMMON BENEFIT FEES IN MULTIDISTRICT LITIGATION

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INTRODUCTION:

In 1968, Congress enacted The Multidistrict Litigation Act.² This Act bestowed on a panel of seven federal judges (the Panel), appointed by the Chief Justice of the United States, broad powers to transfer groups of cases filed in multiple federal district courts to a single federal district court for the purpose of coordinating and conducting pretrial proceedings.³ This transfer is made without consideration of personal jurisdiction over the parties or venue requirements of 28 U.S.C §1404.⁴ In making such a transfer from the court in which the case was filed (the

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² 28 U.S.C §1407

³*See generally*, Heyburn, John G, A view from the Panel: Part of the solution, 82 Tul. L. Rev. 2225 (2008); see also Nagle, John F. From the Horse's Mouth: The Workings of the Judicial Panel on Multidistrict Litigation, 66 Def. Couns. J 341 (1999); Hansel, Gregory Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation , 19 Me. B. J. 16, 18 (2004).

⁴*See In re FMC Corp*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (Concluding transfers

transferor court) to the court designated to receive the cases (the transferee court), the Panel considers whether there are sufficient common questions of fact among these civil actions to justify centralizing them in a single district to further the convenience of the parties and witnesses and promote the just and efficient conduct of the actions.⁵ The Panel may carry out this function either upon its own initiative or in response to a motion filed with the Panel by a party in any action in which transfer may be appropriate.⁶

When the Panel finds that centralization of related actions is appropriate, a multidistrict litigation case (MDL) is formally created by the issuance of a “transfer order.”⁷ The Panel’s transfer order designates the transferee court and assigns a title and number to the MDL and identifies the related actions currently pending in federal districts outside the selected transferee forum that will be transferred pursuant to 28 U.S.C. § 1407. These cases, together with any

under section 1407 are simply not encumbered by considerations of *in personam* jurisdiction or venue).

⁵See 28 USC §1407(a) which provides, *inter alia*:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multi district litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such action.

⁶28 USC §1407 (c)

⁷*Id.*

related actions originally filed in the transferee forum, constitutes the MDL. If the Panel subsequently learns of additional related cases, it will issue “conditional transfer orders” identifying tag-along actions that will be sent to join the MDL.⁸ The finality of the transfer order is delayed for fifteen days to permit the opportunity for making an objection to the transfer.⁹ Transferor courts retain jurisdiction over cases subject to conditional transfer orders until such orders become final. From time to time, the Panel will vacate a conditional transfer order before it becomes final, typically based either on a well founded objection to transfer or in light of the dismissal or remand of an action by the transferor court.

In the early decades of Multi district Litigation, business was slow. The 1970's and 1980's saw some modest increase, but since the 1990's the work load of the Panel has substantially increased.¹⁰ This increase is generally attributed to the change in the nature of civil

⁸Panel Rule 1.1 defines tag-along actions as “a civil action pending in a district court and involving common questions of fact with actions previously transferred under section 1407.” See, Rules of Procedure of the Judicial Panel on Multi-District Litigation R. 1.1 199 FRD 425 (2001), hereinafter Panel Rules.

⁹Panel Rule 7.4

¹⁰See, *Heyburn*, supra at note 1 at 2231; U.S. Judicial Panel on Multidistrict Litigat., Statistical Analysis of Multidistrict Litigation (1980 and 2011) *available at* <http://www.jpml.uscourts.gov/statistics> (reporting that pursuant to 28 U.S.C. § 1407, between July 1, 1979 to June 30, 1980, the Panel acted upon 1,386 civil actions, and during the twelvemonth period ending September 30, 2011, the Panel acted upon 43,769 civil actions).

litigation which has placed greater emphasis on class actions, mass tort and complex litigation. Presently, with the passage of the Class Action Fairness Act (CAFA) and the general disfavor of nation wide class actions expressed by several U.S. Circuit Courts, multi district litigation is playing an increasingly significant quantitative role in all civil litigation in the United States.¹¹ Some estimates suggest that MDL cases account for more than 15% of all civil litigation in this country.¹² Many MDLs include thousands of individual cases and multiple class actions. Hundreds of lawyers from various parts of the country may be involved in a single MDL case. It is necessary for an MDL transferee judge to impose some organizational structure on the attorney representation so that the case can proceed in an effective and efficient manner.¹³ To accomplish this task, the court usually appoints a plaintiff steering committee (PSC) to speak for all of the plaintiffs and their lawyers, and a defendant(s) steering committee (DSC) to speak for the defendant(s).¹⁴ But in practice the DSC is generally selected by the defendant itself with the

¹¹See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of U.S.C.); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 747-51 (5th Cir. 1996); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299-1304 (7th Cir. 1995);

¹²Heyburn & McGovern, *Evaluating & Improving the MDL Process*, 2011 A.B.A. Sec. Litigation Vol. 38, No.4

¹³See Federal Judicial Center, *Manual for Complex Litigation* (4th ed 2004) (hereinafter, *Manual*) § 22.6.

¹⁴See *In re Chinese Manufactured Drywall: Products Liability Litigation*, MDL No.2047 (E.D. LA July 27, 2009) (pretrial order no. 7 at 1-2), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 7" hyperlink)

approval of the court.¹⁵

The committees occupy leadership roles in the litigation including conducting documentary discovery, establishing document depositories, taking depositions, arguing motions, conducting bellwether trials and, in general, carrying out the duties and responsibilities set forth in the court's pre trial orders including appearing before the court at periodic conferences or hearings.¹⁶ The MDL transferee court is theoretically tasked with the assignment of overseeing the discovery aspect of the case and remanding the various cases back to the transferor courts from whence they came for further proceedings.¹⁷ In practice, however, it is not unusual for the

(appointing Defendant's Steering Committee for the Chinese Drywall MDL); *In re Chinese Manufactured Drywall: Products Liability Litigation*, MDL No.2047 (E.D. LA July 27, 2009) (pretrial order no. 8 at 1-2), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 8" hyperlink) (appointing Plaintiff's Steering Committee for the Chinese Drywall MDL); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2005 WL 850963 at *1 (appointing Plaintiff's Steering Committee for the Vioxx MDL); *In re Vioxx prods. Liab. Litig.*, MDL No. 1657, 2005 WL 850962, at *1 (E.D. La. Apr. 8, 2005) (appointing Defendant's Steering Committee for the Vioxx MDL).

¹⁵See Manual §§ 22.61, 22.62.

¹⁶ See *In re Chinese Manufactured Drywall* (pretrial order no. 7) at 2-4; *In re Chinese Manufactured Drywall* (pretrial order no. 8) at 2-4; *In re Vioxx Prods.*, 2005 WL 850963 at *1-*9; *In re Vioxx Prods.*, 2005 WL 850962 at *1-*2.

¹⁷*Lexecon Inc. V. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)

transferee court to conduct bellwether trials and encourage a global resolution of the matter before recommending to the Panel that the case be remanded.¹⁸ All of this work consumes time and costs. While the members of the DSC are typically compensated by their client on a regular basis, the members of the PSC are not. Since the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel they employed), MDL transferee courts usually establish a procedure for creating a “common benefit fee” to compensate the members of the PSC and the members of any sub committees who have done common benefit work.¹⁹

¹⁸ The authority to remand an action to the transferor court rests with the Panel and not the transferee court. *See In re Roberts*, 178 F.3d 181, 183 (3d Cir. 1999) (holding § 1407(a) and the Supreme Court decision in *Lexecon* signify that the power to remand a transferred case to the transferor court lies with the Panel and not with the transferee district judge, a conclusion further supported by Panel Rule 14(c)). But in practice the Panel usually acts favorably on the transferee court’s recommendation. For a more in depth discussion of the use of bellwether trials in multidistrict litigation, *see* Eldon E. Fallon, Jeremy T. Grabill, and Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev, 2323 (2008)

¹⁹*See* *Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980) (explaining the Court’s historical recognition that “a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”); Manual §§ 14.11, 14.12; Carolyn A. Dubay, Trends and Problems in the Appointment and Compensation of Common Benefit Counsel in Complex Multi-District Litigation: An Empirical Study of Ten Mega MDLs, Fed. Judicial Ctr., 10 (July 2010) (noting that common benefit counsel are usually

This article discusses the history of the common benefit fee concept, how the amount of the common benefit fee is computed, the eligibility requirements for claiming common benefit fees and the method for determining how these fees should be distributed among those who have done common benefit work.

HISTORY OF THE COMMON BENEFIT FEE DOCTRINE

Under the general rule prevalent in American courts, known as the American Rule, the attorney for the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser.²⁰ Instead, the attorney for the prevailing litigant 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 the American Rule.²¹ This exception, which has become known as the common fund or common benefit doctrine, permits the creation of a common fund for the purpose of paying reasonable attorneys' fees. The fund is created by taxing persons other than a particular client for legal services beneficial to such persons thus spreading the cost of the litigation to all beneficiaries of these services.²² Under the common

compensated through the establishment of a fund specifically created for that purpose).

²⁰*See* *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986).

²¹ *See, e.g.*, *Trustees of Greenough*, 105 U.S. 527, 537 -38 (1881); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885).

²²*See* *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268 ((E.D. N. Y. 2006), 594 F.3d 113, 128 (2d Cir. 2010); *See also re Vioxx prods. Liab. Litig.*, MDL No. 1657 (E.D. LA Aug. 4,

fund concept, the funds are actually accumulated from those aligned with the successful litigant and not extracted from the defeated adversary thus, one might argue that it is not technically an exception to the American Rule.²³ But regardless of its taxonomy the common fund doctrine constitutes a departure from the traditional rule that each litigant bears his or her own costs.

This common fund doctrine was originally, and perhaps still is, most commonly applied to awards of attorneys' fees in class actions.²⁴ But this doctrine is not limited solely to class actions. It has been used in complex litigation to compensate attorneys whose work benefits

2005) (pretrial order no.19 at 1) (creating a Plaintiffs' Litigation Expense Fund to compensate attorney work performed for the common benefit and explaining that purpose of Order is "to provide for the fair and equitable sharing among plaintiffs of the cost of special services performed and expenses incurred by attorneys acting for MDL administration and common benefit of all plaintiffs in this complex litigation"); *In re Propulsid Prods. Liab. Litig.*, MDL no. 1355, (E.D. LA Dec. 26, 2011) (pretrial order no.16) *available at* <http://propulsid.laed.uscourts.gov/orders.htm> (follow "Pretrial Order 16" hyperlink).

²³See Restatement (Third) of Restitution § 30 Reporter's Note a (Tentative Draft No. 3, 1994)(commenting on the "persistent and confusing identification of common-fund recovery as an 'exception' to the American rule on attorneys' fees," and noting that in a common fund situation the funds are actually distributed "among those aligned with the plaintiff rather than extract[ed] ... from the defeated adversary") (quoting Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L. J. 651, 662 (1982)).

²⁴See, e.g., 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 13:76 (4th ed. 2002) (discussing common fund doctrine in context of class actions); Fed. R. Civ. P. 23(h).

others similarly situated.²⁵ As class actions were combined with individual actions to form MDLs, as is the modern trend, the common benefit concept migrated into the latter area.²⁶ It has been used to compensate attorneys who render legal services beneficial to all MDL plaintiffs. Courts have justified this approach by postulating that MDLs are quasi-class actions since, like class actions, they involve large numbers of cases grouped together and handled by one judge for efficiency, consistency and coordination.²⁷ The theoretical bases for the application of the

²⁵See *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) (employing common benefit doctrine to award fees and costs to litigant whose success benefitted unrelated parties by establishing their legal rights); Alan Hirsh & Diane Sheeley, Fed. Judicial Ctr., *Awarding Attorneys' Fees and Managing Fee Litigation* 51 (2nd 3d. 2005) (“Although many common fund cases are class actions ... the common fund doctrine is not limited to class actions”); Manual § 14:121.

²⁶See *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011); See *In re Oil spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179*, (E.D. LA June 15, 2012) (order) *available at*

<http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow “June 15 2012 Order” hyperlink) *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp.2d 740 (E. D. La . 2011). *In re Zyprexa, Prods. Liab. Litig.*, 433 F. Supp. 2d 268 (E.D.N.Y. 2006); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174 at *5 (D. Minn. 2008);

²⁷See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (holding the “large number of plaintiffs subject to the settlement matrix approved by court; the

utilization of special masters appointed by the court to control discovery and to assist in reaching and administering a settlement; the court's order for a huge escrow fund; and other interventions by the court" in the MDL litigation are the same characteristics of a class action and thus the MDL should be considered a quasi class action); *In re* Guidant Corp., 2008 WL 682174 at *5 (asserting "[W]hen 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 as between a party and the beneficiaries of his litigation") (quoting Sprague, 307 U.S. at 166-67); *In re* Vioxx Prods. Liab. Litig., 650 F.Supp.2d 549 (E.D. LA 2009). *See also* Edward F. Sherman, *Judicial Supervision of Attorney Fees in Aggregate Litigation: The American Vioxx Experience as Example for Other Countries*, Tul. Pub. Law Research Paper No. 09-07 at 11, available at <http://ssrn.com/abstract=1407559> (finding § 1407(a) offers some support to the argument that MDLs are quasi class actions). *But 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, 113 (maintaining MDLs do not constitute quasi class actions, as MDLs merely aggregate individual lawsuits under § 1407 to promote judicial efficiency, and those suits are not "not certified under the Rule 23 standards of commonality, typicality, numerosity, adequacy of representation, predominance, and superiority; there is no representative plaintiff; and there is no attorney appointed by the court as counsel for the entire class"); Aimee Lewis, *Limiting Justice: The Problem of Judicially Imposed Caps on contingent Fees in Mass Actions*, 31 Rev. Litig. 209, 215 (asserting a key difference between class actions and MDL cases is that MDL litigants have already brought their claims to court,

common fund concept to MDL's are the same as for class actions, namely equity and her blood-brother, quantum meruit. However, there is a difference. In class actions the beneficiary of the common benefit work is the claimant; in MDLs the beneficiary is the primary attorney (the attorney who has the representation agreement with the client). For this reason, in MDL's, the common benefit fee is extracted from the fee of the primary attorney and not the claimant as is the case with class actions. Thus in MDL's the claimant does not pay the common benefit fee; the primary attorney who is the beneficiary of the common benefit work pays it.²⁸

In addition to turning to class actions for authority to utilize the common benefit concept in MDLs, courts also find support in their inherent managerial authority, particularly in light of the complex nature of an MDL. The Fifth Circuit has long recognized that a court's power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work.²⁹ In *In Re Air Crash Disaster at Fl.*

and likely sought representation prior to those filings, while class actions include all class members whether or not they brought suit).

²⁸ See e.g. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp 640 (E.D. LA 2010) (ordering the common benefit fee of 6.5% to be extracted from the 32% fee of the primary counsel); See also *Smiley v. Sincoff* 958 F.2d 498, 500 (2d Cir. 1992) (providing that "any committee fee was to be paid by all attorneys on behalf of their clients. Plaintiffs were not to pay fees to the committee out of their own recoveries"); *In re Zyprexa Products Liability Litigation*, 467 F.Supp.2d 256, 266 (E.D. NY 2006).

²⁹ See *In Re Air Crash Disaster at Fl. Everglades on Dec. 29, 1972*, 549 F.2d 1006

Everglades on Dec. 29, 1972 (“Everglades”), the Panel transferred all federal cases arising out of a passenger plane crash near Miami to the Southern District of Florida.³⁰ The transferee court appointed a plaintiffs’ committee to coordinate discovery and pretrial matters, and then to conduct bellwether trials.³¹ The court compensated the committee through an assessment on the contingent fees of attorneys who represented MDL plaintiffs but were not on the plaintiffs committee.³² The non-committee attorneys appealed, and the Fifth Circuit upheld the district court’s authority to impose that assessment. The Fifth Circuit explained that a district court has inherent authority “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.”³³ Therefore, an MDL court “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.”³⁴ Naturally, this authority would be “illusory if it is dependent upon lead counsel’s performing the duties desired of them for no additional compensation.”³⁵ Assessment of those fees against other retained lawyers who benefitted from the work done was permissible and appropriate.³⁶

(1977)

³⁰ *Id.* at 1008.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1012.

³⁴ *Id.* at 1014.

³⁵ *Id.* at 1016.

³⁶ *See id.* at 1019-20. *See also In re Diet Drugs*, 582 F.3d 524, 546-47 (3rd Cir. 2009); *In*

Finally, in addition to justifying the use of the common benefit doctrine on principles of equity or quantum meruit, or class action procedures or their inherent authority, MDL transferee courts often derive express authority to set common benefit fees from the terms of the settlement agreement entered into by the parties and consented to by their primary attorneys. Some MDL cases utilize the “settlement class” vehicle created by Rule 23(e) of the Federal Rule of Civil

re Genetically Modified Rice Litig., 2010 WL 716190, at *4 (“An MDL court’s authority to establish a trust and to order compensations to compensate leadership counsel derives from its ‘managerial’ power over the consolidated litigation, and, to some extent, from its inherent equitable power.”); *In re Guidant*, 2008 WL 682174, at *5; *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 265-66 (E.D.N.Y. 2006); *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644, 653-56 (E.D. Pa. 2003). *See also* Manual § 22.62 (2004); Restatement (Third) of Restitution § 30 Reporter’s Note b (Tentative Draft No. 3, 1994) (“In contrast to the standard view of class-action fees, which explains them as restitutionary, the leading accounts of fees to court-appointed counsel in consolidated litigation properly emphasize factors independent of restitution to justify the imposition of a liability by court order.”) (citing *Everglades*); *In re Genetically Modified Rice Litig.*, MDL No. 06-1811, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010) (relying on common fund doctrine as an alternate basis to inherent managerial authority and concluding that “[b]oth sources of authority provide the same result”); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *4 (D. Minn. Mar. 7, 2008); *In re Vioxx Prods. Liab. Litig.*, 760 F.Supp.2d 640, 648-49 (E.D. LA 2009); *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355, 2005 WL 3541041 at *1-*2 (E.D. LA 2005).

Procedure to amicably resolve the case. As with other class actions, claimants with adequate notice must opt- out of the settlement to avoid being bound by its terms. When this procedure is utilized, the court has statutory authority to set common benefit fees pursuant to Rule 23(h) which allows the court to award reasonable attorneys' fees and nontaxable costs. But an increasing number of MDLs utilize a private settlement agreement to resolve claims. The agreement contains the terms of the settlement, setting forth the total dollar amount of the settlement and the mechanism for allocating the funds among eligible claimants. The agreement also usually contains a provision establishing a fund for common benefit work. For example, in the Vioxx Products Liability Litigation, 802 F. Supp. 2d 740, 771 (2011), section 9.2 of the Settlement Agreement governed common benefit fees and expressly authorized the transferee court to determine the amount of the common benefit attorneys' fees and provide that the fees are to be deducted from the fee of the primary plaintiff attorney. The agreement is an opt in agreement. When a claimant opts into the agreement, the claimant and the claimant's primary counsel agree to be bound by the terms of the agreement including the payment of common benefit fees. Regardless of the legal basis given to explain its use, the common benefit doctrine has been consistently used and is well established as the justification for the payment of common benefit fees in MDLs. But how is it calculated, who is eligible to receive it and how much should each applicant receive? These are inquires which will be discussed in turn in the following sections. But before proceeding to these topics it is necessary to focus on the fees of primary counsel.

FEES OF PRIMARY COUNSEL

The purpose of this article is to explore the history, computation, and distribution of

common benefit fees. But there is a symbiotic relationship between the fee for common benefit work and the fee of the primary attorney. As mentioned above the common benefit fee comes out of the fee of the primary attorney. It is a slice out of that pie so to speak. Thus before the size of that slice can be determined, some courts have found it appropriate to first consider the size of the pie (the primary attorney's fee). At the outset it is important to recognize that for a court to review the fee arrangements of attorneys appearing before it is not only controversial but unpleasant. But some courts have concluded that this comes with the territory and have occasionally found it necessary to wade into this Serbonian Bog. By and large the legal bases relied on by courts that have reviewed contingent fee contracts in MDL cases for reasonableness and altered them are similar to the justification for creating a common benefit fee fund, namely, (1) a court's equitable authority to oversee the administration of a global settlement, (2) a court's inherent authority to exercise ethical supervision over the parties and (3) the court's express authority pursuant to the terms of the MDL settlement agreement. It is useful to explore each of these bases in more detail.

The argument used by the courts supporting their equitable authority to review attorneys fees is that Rule 23 of the Federal Rules of Civil Procedure expressly provides that a district court presiding over a class action has a duty to scrutinize the attorneys fees of class counsel to assure that they are reasonable. The transferee judge in MDLs should have the same responsibility because MDLs are quasi class actions since their purpose and function is the same as the traditional class action namely efficiency and coordination before a single court. Furthermore, many MDLs contain multiple class actions along with the individual claims and it is not unusual to utilize the settlement class vehicle provided by Rule 23(e) to resolve the entire

matter. Thus Rule 23 is often an integral part of the MDL process.

With regard to a court's inherent authority to exercise ethical supervision over the parties in MDL matters courts have relied on the broad equitable powers of a federal court over an attorney's contingent fee contract. Pursuant to the court's supervisory authority, the court may address the reasonableness of a contingent fee contract even if the parties have not raised the issue.³⁷ It is argued that district courts necessarily retain the authority to examine attorney fees sua sponte because the attorneys' interest in this regard are in conflict with those of their clients.³⁸ Furthermore, the potential harm to the public's perception of the judicial process is especially acute in MDL's because of the large number of claimants involved. Disproportionate results and inconsistent standards threaten to damage the public's faith in the judicial resolution of mass tort litigation by creating an impression of inherent unfairness. A significant justification for the MDL process is that it brings coordination, efficiency, and uniformity to an inherently or, at least, potentially chaotic situation caused by the vast number of cases that make up many MDLs. Thus instead of pursuing individual discovery, filing individual motions, preparing individual trial plans, incurring expense time and time again, attorneys who participate in the MDL usually benefit, both in time and expense, from a uniform and efficient resolution procedure. The economics of scale should cut both ways. Like the attorneys the claimants should also benefit from the uniformity and efficiency of the MDL process. Their benefit should

³⁷ Rosquist v. Soo Line R.R., 692 F.2d 1107, 1111 (7th Cir. 1982)

³⁸ In re Guidant Corp. Implantable Defibrillators Products, 2008 WL 682174; Zyprexa Products Liab. Litigation, 424 F.Supp. 2d 488, 491(E.D. N.Y. 2006).

be in the form of reduced fees to reflect that uniformity and efficiency .

Finally, with regard to the court's express authority to review fees, the settlement usually contains a specific agreement regarding the court's authority regarding attorneys fees. Those opting into the settlement agree to be bound by the terms of the agreement. For example, the opt-in agreement in the Vioxx MDL provided that the transferee court had express authority to modify any provision of the Agreement in certain limited circumstances if the court determined that the provision "is prohibited or unenforceable to any extent or in any particular context but in some modified form would be enforceable." To the extent that the Settlement Agreement would be unenforceable if it resulted in excessive or unreasonable attorneys' fees that threaten the public interest and reflect poorly on the courts or system of justice, the court concluded it had express authority to examine the reasonableness of contingent fee contracts in order to protect the claimants and enforce the Settlement Agreement.³⁹ In the Vioxx case the MDL court set the primary attorney's fees at a maximum of 32% out of which the common benefit was to be paid. This created uniformity for both the litigants and primary counsel. After the primary counsel fees are established or at least considered, it is timely to turn to the common benefit fees.

METHODOLOGY FOR CALCULATING COMMON BENEFIT FEES

The transferee court must formulate some methodology for establishing the total amount of the common benefit fund and some procedure for determining how the fund should be disbursed. The total amount of the common benefit fund should be reasonable under the circumstances and the method for distributing it should be fair, transparent and based on

³⁹ In re Vioxx Products Liability Litigation, 574 F. Supp 2d 606, 614 (E.D. La. 2008)

accurately recorded data.

Over the years, courts have employed various methods for determining the reasonableness of an award of attorneys' fees. These methods include (1) the "lodestar" method, which entails multiplying the reasonable hours expended on the litigation by an adjusted reasonable hourly rate,⁴⁰ (2) the percentage method, in which the court compensates attorneys who recovered some identifiable sum by awarding them a fraction of that sum,⁴¹ or (3) a combination of both methods, the blended method, in which a percentage is selected and cross checked for reasonableness by utilizing the lodestar method.⁴² It is helpful to consider each of

⁴⁰*See* *Cooper Liquor, Inc. v Adolph Coors Co.*, 624 F.2d 575, (5th Cir. 1980); *See generally* *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (providing an analysis and discussion of the lodestar method); *Blum v. Stenson* 465 U.S. 886 (1984); *Hensley v. Eckerhart* 461 U.S. 424 (1983); Theodore Eisenberg and Geoffery P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Of Empir. L. Studies 27, 31 (2004) (summarizing the lodestar method as a means to calculate attorney fees).

⁴¹*See* *Swedish Hosp. Corp. v. Shalala* 1 F.3d 1261, 1271 (D.C. Cir. 1993) (establishing the percentage method as the sole means to calculate attorney's fees in common fund cases in the D.C. Circuit); *Camden I Condo. Ass'n v. Dunkie*, 768, 774 (11th Cir. 1991) (holding the percentage method to be the best calculation approach for common fund cases in the Eleventh Circuit); Theodore Eisenberg and Geoffery P. Miller, *supra* note 40 at 31 (summarizing the percentage method as a means to calculate attorney fees).

⁴²*See In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 640, 652 (E.D. LA 2010) (finding the

these methods in turn.

Using the loadstar method to calculate attorneys fees begins with a determination of the reasonable number of hours expended on the litigation by those seeking common benefit fees and then multiplying the total number of hours by an appropriate hourly rate.⁴³ To facilitate this process it is helpful for the transferee court, at the outset of the litigation, to fix guidelines to establish the type of activities performed and expenses incurred by counsel which may entitle them to seek payment or reimbursement from the common benefit fund.⁴⁴ These guidelines

blended method to be in line with Fifth Circuit precedent and the best means to calculate common benefit attorney fees in the instant case); *Turner v. Murphy Oil USA*, 472 F.Supp.2d 830, 861 (E.D. LA 2007); Theodore Eisenberg and Geoffery P. Miller, *supra* note 40 at 32 (summarizing the blended method as a means to calculate attorney fees).

⁴³ See *Copper Liquor, Inc v Adolph Coors Co.*, 624 F. 2d 575, 583(5th Cir. 1980).

⁴⁴ See *In re Chinese Manufactured Drywall: Products Liability Litigation*, MDL No.2047 (E.D. LA July 28, 2009) (pretrial order no. 9 at 1-2), *available at* <http://www.laed.uscourts.gov/Drywall/Orders/Orders.htm> (follow "Pretrial Order 9" hyperlink) (outlining that "all time and expenses submitted must be incurred only for work authorized in advance by the Plaintiff's Steering Committee" and that "no time spent on developing or processing any case for an individual client (claimant) will be considered or should be considered"); *In re Vioxx Prods. Liab. Litig.*,(pretrial order no.6) (detailing costs eligible for reimbursement include counsel's recorded billable hours, court costs, travel expenses, clerical expenses, communication costs. The order further establishes concrete limitations on those

should include such mundane things, among others, as per diem allowances for food, type or class of air travel, and daily rates for hotel accommodations. The Court should also provide a definition of “shared costs”(i.e. costs which the attorney is entitled to immediate reimbursement by the PSC) and “held costs”(i.e.. costs which the attorney should hold for potential reimbursement from the common benefit fund if or when the case is successfully resolved from the plaintiff’s standpoint).⁴⁵ To create a record of the type of work performed as well as the costs expended by the attorneys performing common benefit work it is also helpful for the transferee court, at an early stage in the litigation, to appoint a CPA to receive and vet records periodically submitted by counsel. Those attorneys who are seeking or plan to seek common benefit fees are expected to contemporaneously report their hours, the nature of the work performed, and the expenses incurred for common benefit work to the court appointed CPA .⁴⁶

expenses).

⁴⁵ See *In re Chinese Manufactured Drywall* (pretrial order no. 9 at 3-5); *In re Vioxx Prods. Liab. Litig.*, (pretrial order no. 6 at 6-7).

⁴⁶See *In re Oil spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179, (E.D. LA Oct. 8, 2010) (pretrial order no. 9) *available at* <http://www.laed.uscourts.gov/OilSpill/Orders/Orders.htm> (follow Pretrial Order #9" hyperlink); *In re Chinese Manufactured Drywall* (pretrial order no. 9 at 1-2); *Vioxx Products Liability Litigation*, 802 F. Supp 2d 740, 762-763 (E.D. LA 2011); *See also In re Guidant*, 2008 WL 682174, at *13; *In re Propulsid Prods. Liab. Litig*, MDL No. 1355, 2005 WL 3541041 at *1-*2 (E.D LA 2005); Manual § 14.214; *See generally* Alan Hirsh & Diane Sheeley,

These reports are reviewed by the CPA and the court on a regular basis during the course of the litigation in order to check them for compliance with the court's guidelines for recoverable costs and fees and the reasonableness of the hours reported. The CPA files with the court a monthly or bi monthly report which is entered into the record under seal for release at the appropriate time. Such records are an important factor in determining the total reasonable hours spent on the case and who actually performed the work which produced the result achieved.

Once the total reasonable hours are determined, the appropriate hourly rate must be established. This calculation starts with ascertaining the rate charged by experienced attorneys in the region for comparable work. When the attorneys come from all parts of the country, as is often the case, it is appropriate to use some average of the various rates. This figure is then adjusted upward or downward based on an analysis of twelve factors known as the Johnson Factors since they were first formulated in *Johnson v. Georgia Highway Express, Inc.*⁴⁷ These 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 imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional

Fed. Judicial Ctr., *Awarding Attorneys' Fees and Managing Fee Litigation* (2nd 3d. 2005).

⁴⁷ See *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 713, 717-19 (5th Cir. 1974).

relationship with the client; and (12) awards in similar cases.⁴⁸ This enhanced or discounted figure, as the case may be, is then multiplied by the total reasonable hours logged in the case by those seeking common benefit fees. The result is the product of the Lodestar method.

The lodestar method is not without flaws, especially when employed in common fund cases.⁴⁹ As an influential report by the Third Circuit Task Force concluded, the drawbacks of the lodestar method include: (1) increased workload on an already overtaxed judicial system, (2) inconsistent application of the approach and widely varied fee awards, (3) illusory mathematical precision unwarranted by the realities of the practice of law, (4) potential for manipulation, (5) reward of wasteful and excessive attorney effort, (6) disincentive for early settlement, (7) insufficient flexibility for judicial control of litigation, (8) discouragement of public interest litigation, and (9) confusion and lack of predictability in setting fee awards.⁵⁰

In reaction to the difficulties with the lodestar method, courts have turned to the percentage method which bases the common benefit award on a percentage of the amount

⁴⁸*Id.*; See also *Von Clark v. Butler*, 916 F.2d 255, 258 (5th Cir. 1990).

⁴⁹See Charles Silver, *Unloading the Lodestar: Toward a New Fee Procedure*, 70 Tex. L. Rev. 865, 867-68 (1992) (finding the lodestar method to be “widely condemned” and relaying the “widespread belief” that the method generates more costs than benefits).

⁵⁰ See Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check; Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics 1453, 1456 (2005) (summarizing *Court Awarded Attorney Fees, Report of the Third Circuit Task Force*, 108 F.R.D. 237 (1985)).

recovered. The popularity of the percentage method gained momentum following the publication of the aforementioned Third Circuit Task Force report in 1985. Recognizing the "contingent risk of nonpayment" in such cases, courts have found that class or lead counsel ought to be compensated "both for services rendered and for risk of loss or nonpayment assumed by carrying through with the case."⁵¹ Moreover, courts find that the percentage method provides more predictability to attorneys and class members, encourages settlement, and avoids protracted litigation for the sake of raking up hours, thereby reducing the time consumed by the court and the attorneys.⁵²

The United States Supreme Court has acknowledged the use of the percentage method in common fund cases.⁵³ The percentage method, however, should not be completely arbitrary,

⁵¹*In re Combustion, Inc.*, 968 F. Supp. 1116, 1132 (W. D. La. 1997) (summarizing the various methods used to calculate attorneys' fees); *see In re Cabletron*, 239 F. R. D. at 37 (stating that the percentage method allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure) (quotation omitted); *see also* Samuel R. Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. Pa. L. Rev. 281 (1977).

⁵² *See* Walker & Horwich, *supra*, at 1456-57 (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989)); accord *In re Diet Drugs*, 582 F. 3d at 540.

⁵³*See Camden I Condo. Ass'n v. Dunkie*, 946 F.2d 768, 773-74 (11th Cir. 1991) (reading *Blum v. Stenson*, 466 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), as the Supreme Court's "acknowledgment" of the percentage method in common fund cases); *In re Prudential-Bache Energy Income P'ships Sec. Litigation*, 1994 WL 150742, (E.D. La. Apr. 13,

devoid of all reality or inconsistent with usual fees for the type of case involved. There is no one percentage that should apply to all cases. It is dependent on the facts and circumstances of the particular case at issue. A number of courts have reviewed data compiled in empirical studies of attorneys' fees in class actions to determine what has been awarded in similar cases to assist them in computing the appropriate percentage fee in the case before them.⁵⁴ The studies reveal that the higher the settlement the lower the percentage of fee.⁵⁵ For example, in settlements between \$190,000,000 and \$900,000,000 fees between 10% and 12% have been allowed. Whereas, for settlements between \$1,000,000 and \$2,000,000 fees between 32% and 37% have been awarded. Of course, the percentages allowed in past cases are only guide posts and each case should be analyzed on its own basis with the objective of determining a reasonable fee in the case before the court.

1994) (tracing the history of the various methods).

⁵⁴*See Camden I Condo. Ass'n v. Dunkie*, 946 F.2d 768, 773-74 (11th Cir. 1991) (reading *Blum v. Stenson*, 466 U.S. 886, 900 n. 16, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), as the Supreme Court's "acknowledgment" of the percentage method in common fund cases); *In re Prudential-Bache Energy Income P'ships Sec. Litigation*, 1994 WL 150742, (E.D. La. Apr. 13, 1994) (tracing the history of the various methods); Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements, An Empirical Study, 1 J. Empirical Legal Stud. 27,31 (2004); Eisenberg and Miller, Attorney Fees and Expenses in Class Action Settlements: 1993-2008, Vol 7, Issue 2 (June 2010).

⁵⁵ *See* Eisenberg and Miller (June 2010), *supra* at note 54 at 250.

To further insure that the percentage selected is reasonable, many courts have utilized the blended method. Under this method, the amount of fee arrived at by the percentage method is cross checked by the load star method utilizing the Johnson factors. If the fee arrived at by the percentage method is within “the ball park” of the fee which would result from the load star method, its reasonableness is more sustainable. This blended approach has been used by a plethora of district courts.⁵⁶ All circuit courts, including most recently the Fifth Circuit, have approved the use of the blended method.⁵⁷ Once the total amount of the common benefit fee is

⁵⁶*In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640; *In re OCA*, 2009 WL 512081, at 19; *In re Enron Corp. Sec., Derivative & ERISA Litigation*, 586 F. Supp. 2d 732, 766, 778 (S.D.Tex. 2008); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp.2d 830, 859-61 (E.D.La.2007); *In re Educ. Testing Serv. Praxis Principles of Learning & Teaching: Grades 7-12 Litig.*, 447 F.Supp.2d 610, 628-29 (E.D.La.2006); *Batchelder v. Kerr-McGee Corp.*, 246 F.Supp.2d 525, 531 (N.D.Miss.2003); *In re Combustion, Inc.*, 968 F.Supp. At 1135-36; *In re Catfish Antitrust Litig.*, 939 F.Supp. 493, 499-501 (N.D.Miss. 1996); *Shaw v. Toshiba America Information Systems, Inc.* 91 F.Supp.2d 942 (E.D. TX 2000).

⁵⁷*See Union Asset Mgmt. Holding A.G.v. Dell, Inc* ,669 F.3d 632, 644 (5th Cir 2012). In the *Union Asset Management* holding case, the Fifth Circuit announced: “To be clear, we endorse the district courts’ continued use of the percentage method cross-checked with the *Johnson* factors. We join the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar method in common fund cases, with their analyses under either approach informed by the *Johnson* considerations.”*See also* *Goldberger v.*

established it is then necessary to determine who is eligible to receive it.

ELIGIBILITY FOR PARTICIPATION IN COMMON BENEFIT FEES

From the very beginning of an MDL, the transferee court can take steps to create a fair and open environment in which all interested attorneys have the opportunity to perform work for the common benefit of the plaintiff litigants and to establish a transparent factual record for an eventual application for common benefit fees. Of course, the appointment of a supervising plaintiffs steering committee is necessary to create centralized leadership and control of the litigation particularly in the mega MDLs.⁵⁸ But the court, the bar associations, the litigants, and the justice system, in general, have an interest in broadening the range of attorney participation in MDL cases so that the work is not confined to an elite bar of MDL attorneys which would result in exclusivity, unfairness or discrimination and inure to the disadvantage of litigants and their attorneys. To accomplish this while still preserving a centralized structure, the transferee court can encourage the PSC to create subcommittees comprised of interested plaintiff attorneys not on the PSC and assign these attorneys tasks consistent with the duties of the PSC.⁵⁹ The

Integrated Resources, Inc. 209 F.3d 43, 50 (3rd Cir. 2000) (averring the Third Circuit should not “junk” the lodestar method, and district courts can use it at their discretion and as a check on the percentage method).

⁵⁸*See generally* Manual § 10.221.

⁵⁹*See, e.g. In re Vioxx Prods. Liab. Litig.*, MDL no. 1657, (E.D. LA Apr. 8, 2005) (pretrial order no.6 at 4) (encouraging the PSC to “organize subcommittees comprised of plaintiff’s attorneys not on the PSC and assign[] them tasks consistent with the duties of the

court should announce this policy in its minute entries, in open court meetings, and on its MDL website and invite all plaintiff attorneys in the litigation who are interested in doing common benefit work to contact the PSC and coordinate their efforts through the PSC. In the mega MDL's, it is not unusual for hundreds of plaintiff attorneys to perform common benefit work in a coordinated way and become eligible for common benefit fees.⁶⁰ The number of hours expended and the type and significance of the work performed and who performed it is all recorded in the periodic reports submitted by the court appointed CPA. Such records are an important factor in determining the appropriate total amount of common benefit fee as well as the proper distribution of the common benefit fee among those who actually performed the work which produced the result achieved.

DISTRIBUTION OF COMMON BENEFIT FEES

After the total common benefit fund is established, a mechanism or procedure must be devised for determining the proper distribution of the fund among those attorneys who did the common benefit work. It is helpful for the transferee court to get input from the plaintiff attorneys who occupied leadership roles, and those who actually did the work both in the MDL

PSC”).

⁶⁰*See In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 762 (E.D. LA 2011) (describing how “all interested attorneys, including those in state court litigations, were encouraged to coordinate with the PSC and to do work for the common benefit. Over one hundred firms or attorneys availed themselves of the opportunity to do common benefit work”).

and the state courts as well as a third party, someone outside of this group, who can bring an objective perspective to the issue. But in the end, it is the transferee court's responsibility to set the common benefit fee and to determine how it is to be distributed.⁶¹

⁶¹In the *Turner v. Murphy Oil USA* case, the court initially left allocation of common benefit funds to the PSC, finding that the small number of attorneys involved in the litigation and good working relationships among the group fostered a unique situation where unanimity might be possible. The attorneys were unable to reach a consensus on a fee allocation though, so the court appointed a Special Master to generate a proposed fee allocation. *See Turner v. Murphy Oil USA, Inc.*, 472 F. Supp.2d 830 (E.D.La.2007).

In the Vioxx litigation, the transferee court appointed an allocation committee consisting of several members of the PSC as well as several attorneys who were not on the PSC but who did significant work in either the MDL or the various state court cases which coordinated with the MDL.⁶² In addition to the allocation committee, the Court appointed a Special Master to provide another perspective.

Over 100 attorneys applied for common benefit fees and submitted supporting documents. The applications and supporting material were sent to the allocation committee which proceeded to review them and set up interviews with the applicants. Each applicant was given an opportunity to explain their position and offer any other material or testimony supporting their request, (all of which was recorded and transcripts compiled).⁶³ After this was completed in an orderly but expedited fashion, the allocation committee made tentative recommendations to the Court.⁶⁴ The committee then met privately with each involved attorney and advised that attorney of the committee's proposed fee allocation for the attorney's work and invited a response. These meetings, in some few instances, resulted in minor adjustments.⁶⁵

Thereafter, the allocation committee made a final recommendation to the Court. This

⁶²*In re Vioxx Prods. Liab. Litig.*, MDL No.1657 (E.D. LA Nov. 20, 2007) (pretrial order no. 32, available at <http://vioxx.laed.uscourts.gov/Orders/Orders.htm> (follow "Pretrial Order 32" hyperlink).

⁶³*In re Vioxx Prods. Liab. Litig.*, 802 F. Supp.2d 740 ,765 (E.D. La. 2011).

⁶⁴*Id.* at 766-67.

⁶⁵*Id.* at 767.

recommendation was posted on the court's website for all to see.⁶⁶ It contained the allocation committee's recommended common benefit fee for each applicant. The applicants were given a deadline to object to the allocation committee's recommendations. Nineteen objections were received.⁶⁷ The Court met with the objectors and advised them to select a lead and liaison counsel from among their number.

The process then continued before the Special Master.⁶⁸ The transcripts and the documentation compiled by the allocation committee were sent to the Special Master for his review. The Special Master then met with lead and liaison counsel for the objectors and lead and liaison counsel for the allocation committee and set a discovery and briefing schedule and a hearing date. Several depositions were taken; the issues were briefed and the matter proceeded to a formal hearing before the Special Master where testimony and documents were admitted. Promptly thereafter the Special Master issued a report setting forth his recommendations. The report was sent to all interested parties and posted on the Court's website. A deadline for objections was set. Only four objections were received by the Court.⁶⁹

At this point the Court had before it the report of the allocation committee, the transcript and documents compiled by the allocation committee, the depositions, briefs and transcript compiled by the Special Master as well as his report and the data showing the hours logged, costs

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.* at 768.

expended and the nature of the work performed. A summary chart was prepared by the court listing the name of each fee applicant and a cross column for each category of work performed by the applicant and the total time logged in performing that task. The categories included such things as preparing pleadings, taking or assisting in depositions, written discovery, brief writing, arguing motions, trial preparation, participation in trials, appeals, settlement negotiations, administration and committee leadership. Each category was assigned a number with the categories such as participation in trials, settlement negotiation, taking depositions, brief writing and committee leadership having a larger number. A total of these numbers generally revealed the individuals who performed the most significant work in resolving the litigation .

The Court reviewed all of this material and issued its opinion setting out the allocation of the common benefit fee among the attorneys who performed common benefit work. For each attorney who sought common benefit fees, the Court discussed the type of the work performed, the hours logged, the resources expended and such other factors that inured to the common benefit of the plaintiff litigants.⁷⁰ Two of the objectors filed notices of appeal but these notices were eventually withdrawn. When the opinion became final the appropriate allocations were made.⁷¹

⁷⁰*Id.* at 774-825. *See also* Turner v. Murphy Oil USA, Inc. 582 F.Supp.2d 797; *In re* Propulsid Prods. Liab. Litig, MDL No. 1355, 2005 WL 3541041 at *1-*2 (E.D LA 2005); *See In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006).

⁷¹. *See Id.* at 774

CONCLUSION

Each MDL is usually complex and always unique. This is in the DNA of this type of litigation. There is no “one way” of dealing with the multitudinous issues which erupt during the course of the litigation. This is certainly true when it comes to determining the amount and appropriate distribution of the common benefit fee. Every MDL will have its own peculiarities which will call for some distinct approach. But whatever approach is used, it is helpful if it is developed as early as possible, is transparent, includes input from all interested participants, and contains a multi laired process for deciding the amount of each distribution.