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One Size Doesn't Fit All: Multidistrict Litigation, Due Process, And the Dangers of Procedural Collectivism

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ONE SIZE DOESN'T FIT ALL: MULTIDISTRICT LITIGATION, DUE PROCESS, AND THE DANGERS OF PROCEDURAL COLLECTIVISM

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INTRODUCTION

Given the manner in which complex litigation has evolved over the last 40 years, it is surprising that no one has previously coined the phrase, "procedural collectivism." That phrase, after all, effectively describes what has taken place during that time: what are, in their pristine, substantive form, individually held rights which have no pre-litigation connection whatsoever are routinely grouped together for purposes of collective adjudication. This is done, often regardless of whether the individual claimants desire such a grouping or even whether such a grouping will hurt the interests of those claimants more than help them.

"Procedural collectivism," we should emphasize, does not refer to all forms of aggregate litigation. We do not intend to include, for example, aggregate litigation in which all aggregated parties determine for themselves how to protect or pursue their own legal rights in the course of the litigation. [1] Rather, we refer solely to 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.

There are two forms of such litigation: class actions and multidistrict litigation. While class actions have generally been somewhat on the decline in recent years, multidistrict litigation

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[1] Examples include Rule 20 Permissive Joinder, Rule 22 Impleader, and Rule 24 Intervention.

practice has become so pervasive as to be almost routine. Both courts and scholars have expressed concern about what they see as the pathologies of the modern class action, among which are the threat posed by the controversial procedure to the constitutionally protected interests of those passive claimants. The Constitution protects such interests under the Due Process Clause of the Fifth Amendment, which guarantees that neither life, liberty, nor property may be deprived without due process of law.[2] The clause is triggered in the class action context, because the absent class members' claims are deemed "choses in action," which are classified as protected property interests.[3]

There are legitimate reasons why the Due Process Clause is needed to police the class action process.[4] All too often, neither representative parties nor their attorneys give sufficient attention to the interests of absent claimants.[5] But in important ways the current practice of multidistrict litigation actually makes the modern class action appear to be the pinnacle of procedural due process by comparison. At least in the class action context, the choice of representative party is controlled by explicit rule-based requirements. The representative parties' claims must share significant common issues with the claims of the absent parties. Their claims must also be typical of those of the absent parties, and they must adequately represent those absent parties.[6] Moreover, these determinations are usually made in the context of a transparent

[2] U.S. Const. Amend. V.
[3] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) ("The due Process Clause protects civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances."); Standard Oil Co. v. State of N.J. by Parsons, 341 U.S. 428, 459. (1951) (There is no fiction… in the fact that choses of action… held by the corporation, are property.").
[4] *See, e.g.*, Hansberry v. Lee, 3 11 U.S. 32 (1940); Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); Stephenson v. Dow Chemical Co., 273 F. 3d 249 (2d Cir 2003).
[5] *See, e.g.*, Lane v. Facebook, Inc., 696 F.3d 811 (9th Cir. 2012); cert. denied sub nom. Marek v. Lane, 134 S. Ct. 8 (2013).
[6] Fed. R. Civ. P. 23(a).

process of adversary adjudication. Finally, in at least the bulk of modern class actions—those brought pursuant to Rule 23(b)(3)—absent class members are given the right to opt out of the proceeding in order either to pursue their own claims individually or choose simply not pursue them at all.[7]

In stark contrast, multidistrict litigation involves something of a cross between the Wild West, twentieth century political smoke-filled rooms, and the Godfather movies. The substantive rights of litigants are adjudicated collectively without any possibility of a transparent, adversary adjudication of whether the claims grouped together actually have a substantial number of issues in common, whether the interests of the individual claimants will be fully protected by those parties and attorneys representing their interests, or whether the individual claimants would have a better chance to protect their interests by being allowed to pursue their claims on their own. Another important difference between class actions and multidistrict litigation is that unlike class actions, *all* plaintiffs grouped together in multidistrict litigation have what are called "positive value" claims, meaning claims that are sufficiently large to stand on their own.[8] This is so by definition, because multidistrict litigation covers only those plaintiffs who have already filed their own individual actions.[9] In contrast, numerous absent class members have "negative value" claims, meaning their claims are insufficient to stand on their own, and most of them have probably never even thought about bringing suit in the first place. Thus, often far more will be at stake for the passive member of a multidistrict litigation than for the absent member of a class. Finally, whereas relatively few class actions are mandatory, *all* multidistrict litigations are

[7] Fed. R. Civ. P. 23(c)(2).
[8] John C. Coffee, Jr., *The Regulations of Entrepreneurial Litigation*: *Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 905 (1987).
[9] *See* discussion *infra* at xx.

mandatory. The plaintiff whose claim is grouped together with countless others is given no choice in the matter.

One might respond that while the collective adjudicatory procedure in class actions will end in a final resolution which bars class members from future pursuit of their individual claims, the same is not true in the case of multidistrict litigation. On the contrary, claims are grouped together solely for purposes of "pre-trial" activities, including pleading motions, discovery and summary judgment.[10] Actual trials, to the extent they take place, will usually be conducted either on a voluntary basis in the transferee court or on an individual basis in the district in which the individual plaintiff filed suit.[11] But even casual observation reveals that the notion that multidistrict litigation is purely a preliminary procedural device is more theoretical than real. It is the rare multidistrict proceeding indeed that ever returns its members to their individual districts for adjudication on the merits.[12] But even if we were to take the process on face value as merely a collectivist form of pre-trial practice the interference with the individual litigant's control of the adjudication of her own claim remains substantial. There are usually many different pre-trial strategies that litigants can choose, but for the overwhelming number of unwilling participants in a multidistrict litigation that choice is, as a practical matters, removed from them and their chosen attorney.

Moreover, given the often extremely loose connection among the claims of the individual plaintiffs, it is certainly conceivable that some plaintiffs will have stronger claims and/or stronger fact situations than others. Yet due to multidistrict litigation, they are all brought down to the lowest common denominator, and represented by attorneys whom they have not chosen or likely

[10] *See* discussion *infra* at xx.
[11] *See* discussion *infra* at xx.
[12] *See* discussion *infra* at xx.

even met and who have never been formally adjudicated to adequately represent their interests. And individual plaintiffs have no meaningful opportunity to challenge either the legitimacy of their inclusion in the multidistrict process or the propriety of the representation chosen for them by judges in the judicial equivalent of a smoke-filled room.

To be sure, scholars have long debated the merits of multidistrict litigation.[13] But what seems to have been lost in the shuffle in all of that scholarly debate is any serious discussion of the serious undermining of the individual plaintiffs' right to procedural due process to which the multidistrict litigation procedure gives rise. The Due Process Clause requires that before property rights may be taken away by governmental practice, the individual must be given some form of fair procedure by which it can protect her property interests in her claim. At its core, that protection has been construed to require some form of "day in court," during which the litigant has the opportunity to plead his case openly before a neutral adjudicator.[14] There appear to be two methodologies and rationales for this constitutional guarantee: what can be called the paternalism and autonomy models.[15]

The paternalism version of due process demands that those who represent the legally protected interests of individual litigants adequately represent those interests in good faith. The importance of this version of the constitutional guarantee has long been recognized in the

[13] Others have analyzed multidistrict litigation and even critiqued plaintiffs' lack of autonomy, but none has done so from a due process perspective. *See, e.g.*, Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. Rev. 87, 91 (2011) [hereinafter Burch, *Litigating Together*] ("My prescriptive objective is to enable plaintiffs to litigate together and self-govern through social norms and deliberative democracy ideals, such as arguing, bargaining, and voting."); *see also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989) (calling attention to plaintiffs' lack of autonomy in mass trials).
[14] *See* discussion *infra* at xx.
[15] *See* Martin H. Redish, Wholesale Justice 140-47 (2009).

shaping of the modern class action.[16] It may be seriously questioned whether such paternalism fully satisfies due process concerns when the litigant is available to legally protect his own interests and wishes instead to choose his own representative to litigate on his behalf.[17] Such an individualist-based choice flows from a conception of due process as protecting a form of "meta"-autonomy—in other words, an individual's autonomy in choosing how to exercise his liberty to participate in the governmental process. And governmental decision making includes the judicial process as much as it does the legislative or executive processes.[18]

The debate between paternalism and autonomy as the ultimate rationale for the day-in-court ideal has great relevance to the class action debate. However, the dispute between these alternatives turns out to be purely academic in the context of multidistrict litigation, because that process miserably fails the dictates of the due process right to one's day in court from *either* perspective. From the perspective of the paternalism model of the day-in-court ideal, the failure of multidistrict litigation procedure to provide any opportunity for a transparent, adversary-based adjudication of the adequacy and accountability of the chosen representative parties and attorneys as representatives of all of the non-participating litigants constitutes an unambiguous violation of the constitutionally dictated right to one's day in court.[19] The crude, almost random process by which claims are grouped together only compounds those due process problems.[20]

Nor does multidistrict litigation fare any better from the perspective of the autonomy rationale. Individual litigants who possess positive value claims and have already demonstrated the desire to pursue those claims on an individual basis are forced into a process in which their

[16] *See* discussion *infra* at xx.
[17] *See* discussion *infra* at xx.
[18] *See* discussion *infra* at xx.
[19] *See* discussion *infra* at xx.
[20] *See* discussion *infra* at xx.

substantive rights will be significantly impacted if not resolved, by means of a shockingly sloppy, informal, and often secretive process in which they have little or no right to participate and in which they have very little say concerning the propriety of their inclusion in the process in the first place. It is difficult to comprehend how this process could even arguably be deemed to satisfy the Due Process Clause's "day-in-court" ideal, regardless of the assumed underlying rationale for that guarantee.

It might be responded that the individual litigants do have the right to opt out of any settlement reached in the course of the multidistrict litigation, and therefore their due process rights have not been compromised. But it should be recalled that even if a litigant does withdraw from the collective settlement, his right to control adjudication of his own claim will have been substantially compromised by the collective, lowest-common-denominator control of the pre-trial process, including all important discovery and pre-trial motions.

More importantly, wholly apart from this serious due process concern, the option to remove oneself from a proposed settlement does not solve the significant constitutional problems to which multidistrict litigation gives rise. First of all, the settlement has been determined on a one-size-fits-all collectivist basis, helping those plaintiffs with weaker individual cases while harming those plaintiffs whose individual claims are factually or legally stronger than the median. Yet in making the decision of whether or not to accept the settlement, the individual litigant has no idea of where his claim fits into this pecking order. While the individual plaintiff might reach out to his chosen attorney for advice as to whether or not to accept settlement, it must be recognized that the collective settlement may well have compromised the relationship between individual attorney and his client. The attorney knows at this point that if her client accepts the settlement, she will receive a fee while doing virtually nothing to have earned it. If,

on the other hand, the client chooses to opt out of the settlement, any fee is now rendered uncertain and at best would come only after the investment by the attorney of substantial effort to bring the individual litigation to a successful resolution. This potentially conflicting interest gives rise to the serious danger of a conflict in the attorney's fiduciary obligation to her client.

It is true that, at least as a doctrinal matter, the due process calculus has in its modern form always included consideration of utilitarian concerns.[21] Thus, one might argue that this seemingly indefensible undermining of the individual's right to his day in court when his legally granted rights are at stake may be justified by the pragmatic need to limit the expenditure of governmental resources required by numerous individual litigations. But no court has even attempted to make that calculus, much less balance it against the significant interference with the individual litigants' right to their day in court. This is so, for the simple reason that no court appears to have even considered, much less ruled upon, a due process challenge to multidistrict litigation. In any event, surely at *some* point there must be a floor on the individual's right to her day in court, lest the due process guarantee be rendered little more than a cynical sham. The sweeping deprivations of an individual's ability to protect his legal rights brought about by multidistrict litigation cannot be justified by naked concerns of pragmatism if the concept of due process is to mean anything.

When the dust settles, then, there appears to be no way that the multidistrict litigation process, at least as currently constituted, can be deemed to stisfy the requirements of due process. In short, multidistrict litigation is unconstitutional. This does not necessarily mean that the process is incapable of revision in order to satisfy due process by including measures demonstrating some respect for the rights of the individual litigants who are being herded into

[21] *See* discussion *infra* at xx..

the process. But one cannot even reach that issue until one first decides that the process, as presently constituted, is unconstitutional. The Procrustean Bed that is multidistrict litigation, whereby the claims of each individual are crudely and artificially reshaped into fitting some generic lowest common denominator, unambiguously violates the Fifth Amendment's Due Process Clause. The purpose of this Article is to establish just that.

In the first section of this Article, we explore the history and structure of multidistrict litigation.[22] The second section explains the mechanics of the process, thereby revealing the serious dangers to individual rights to which this form of procedural collectivism gives rise.[23] In the third section, we discuss the nature of the due process problems from the perspective of constitutional doctrine and theory.[24] In the final section, we consider possible means of revising the multidistrict process in order to preserve the system's beneficial goals while showing greater respect for the integrity of the individual and his right to his day in court.

I. HISTORY AND STRUCTURE OF MULTIDISTRICT LITIGATION

Congress enacted the Multidistrict Litigation Statute[25] in response to the first modern mass litigation in the early 1960s, which stemmed from allegations of price-fixing in the electrical equipment industry.[26] Large-scale litigation was quite daunting in an era when the fax and copy machines were just coming into widespread commercial use, and personal computers and the Internet were decades in the distance. Chief Justice Earl Warren created the Coordinating Committee for Multiple Litigation of the United States District Courts to coordinate discovery

[22] *See* Section I, *infra*.
[23] *See* Section II, *infra*.
[24] *See* Section III, *infra*.
[25] 28 U.S.C. §1407(a) (2000).
[26] *See* Richard L. Marcus, *Cure-All For an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2260–62 (2008) (describing the litigation that gave rise to MDL).

among the electrical equipment antitrust cases. His project was successful, his idea legislatively codified, and multidistrict litigation was born.[27]

MDL refers to "coordinated or consolidated pretrial proceedings" in related cases taking place before a single federal district judge.[28] Since its inception in the late 1960s, MDL has become more and more common, to the point where today its use could almost be called routine. Over the same period, the numbers of mass torts and antitrust cases have also grown, almost exponentially. Also during that time, class actions became popular and then tapered off somewhat as a method of providing a national solution to mass litigation. The majority of MDLs occur in products liability and antitrust cases, but the Judicial Panel on Multidistrict Litigation approves consolidation in a wide variety of substantive legal areas.[29] The Panel, made up of seven federal judges, decides whether an individual lawsuit is better suited to group treatment for pretrial purposes. If several cases are found to share at least one common factual question and the panel determines that consolidated proceedings will be relatively convenient for the parties and save judicial resources,[30] the Panel may transfer those cases to a specified federal district judge, who will preside over coordinated pretrial matters in one consolidated action. The Panel may do so *sua sponte*, which means that seven federal judges can decide on their own to move

[27] *See* Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 48–49 (2007).
[28] 28 U.S.C. § 1407.
[29] *See* UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, CALENDAR YEAR STATISTICS OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf (depicting the areas of law in which MDLs are currently pending).
[30] *See* 28 U.S.C. § 1407(a).

thousands of cases into one forum. Since 1968, they have decided to do so in over 400,000 cases involving millions of individual claims.[31]

The Panel can only transfer cases into an MDL for pretrial matters; the transferee court's jurisdiction extends only that far. But as a practical matter, for almost all cases transferred into an MDL, there is no trial, let alone post-trial matters, left to conduct back in the transferor district. Settlement is the endgame in almost all instances. To get there, the transferee court appoints a small group of attorneys to strategize, conduct discovery, and try test cases on behalf of the group of plaintiffs. This appointed group is frequently called a steering committee; it steers the strategy for discovery and guides the course for all other pretrial matters. The steering committee effectively replaces the plaintiffs' chosen representatives and is expected to represent the interests of all plaintiffs in the MDL, no matter how varied they may be. Every claimant enters MDL having made the decision to hire a particular lawyer and file suit against a particular defendant in a particular jurisdiction. But once her case is transferred to a MDL, the district judge decides who will really represent her interests in the MDL. Suddenly, all of the decisions the claimant made about exercising her rights through litigation—which lawyer to hire, when and where to file a lawsuit, and against whom—have been replaced by decisions made by federal judges and court-sanctioned attorneys.

II. THE MECHANICS OF MULTIDISTRICT LITIGATION

At the present time, close to 100,000 individual suits are part of an active multidistrict litigation ("MDL").[32] By some estimates, close to one third of all pending federal civil cases are

[31] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2013 (*available at* www.jpml.uscourts.gov).

[32] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS (*available at*

part of an MDL.[33] On the order of the Judicial Panel on Multidistrict Litigation, individual suits that share "one or more common questions of fact"—a "lenient"[34] standard—may be transferred to "any district" for all pretrial matters.[35] The chosen district may even be one that neither has personal jurisdiction over the parties nor constitutes a legally authorized venue for the individual suits.[36] That court then has complete jurisdiction over all pretrial matters, including discovery, motions for class certification, *Daubert* motions, dispositive motions such as summary judgment, and pretrial settlement. Centralized management of numerous cases in an MDL aims to avoid duplicative discovery and increase efficiency in factually similar cases.[37] At the conclusion of

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http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-19-2014.pdf).

[33] Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 762 (2012); *id.* at 784 (citing Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011)). Others estimate the number to be a smaller, but still quite significant, 15%. *See* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014) (citing John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION, no. 3, Spring 2012, at 26).

[34] Bradt, *supra* note 33, at 786; *see also* Marcus, *supra* note 26, at 2269 ("[T]he Panel's willingness to combine cases, and its confidence that combination will be for the advantage of litigants as well as serve judicial economy, is sometimes striking.").

[35] 28 U.S.C. §1407(a) (2000). "The common questions of fact must be complex, numerous, and incapable of resolution through other procedures such as informal coordination." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.33.

[36] *See* Fallon, *Common Benefit Fees*, *supra* note 33, at 371; Bradt, *supra* note 33, at 786 n.156. The Honorable Eldon E. Fallon is a United States District Judge for the Eastern District of Louisiana. He is currently presiding over two pending MDLs. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS (*available at* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-February-19-2014.pdf); *see* http://vioxx.laed.uscourts.gov/Intro.htm.

[37] "Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with regard to class certification; and conserve the resources of the parties, their counsel and the judiciary." *In re* Baycol Products Liability Litig., 180 F.Supp.2d 1378, 1380 (J.P.M.L. 2001). *See also In re* Korean Air Lines Co., Ltd., 642 F.3d 685, 699 (9th Cir. 2011) ("A district judge exercising authority over cases transferred for pretrial proceedings 'inherits the entire pretrial jurisdiction that the transferor district judge would have exercised if the transfer had not occurred.'") (citing 15 Charles Alan

pretrial procedures, cases transferred by the Panel into a single MDL proceeding are supposed to be remanded to the districts in which they were originally filed—the transferor districts. In practice, however, consolidation into an MDL more often than not leads to settlement, not remand.[38] This is especially true in the realm of products liability suits,[39] cases transferred into an MDL frequently never emerge. This Part describes the process by which cases become part of an MDL. It explains MDL case management and the scope of MDL courts' authority.

1. Initiating MDL

As of late 2013, 462,501 individual actions had been consolidated into 1230 MDL.[40] The Panel identifies pending civil actions that share one or more common questions of fact.[41] It uses its transfer powers to "avoid duplicative or possibly overlapping discovery," "whenever there is a prospect of overlapping classes," and to "'eliminate the possibility of colliding pretrial rulings by courts with coordinate jurisdiction."[42] By statute, consolidation and transfer of multiple actions into a single MDL is appropriate when it "will be for the convenience of the parties and

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Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 3866 (3d ed. 2010)); *In re* Phenylpropanolamine Prods. Liab. Litig., 460 F.3d 1217, 1232 (9th Cir. 2006) (transferee judge's power "includes authority to decide all pretrial motions").

[38] *See* UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012 (2012) (*available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf).

[39] Ninety percent of pending cases that are part of a MDL are products liability claims. Bradt, *supra* note 33, at 784 (citing Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1667 (2011)).

[40] UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2013 (*available at* www.jpml.uscourts.gov); UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012 (2012) (*available at* http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf).

[41] John F. Nangle, *From the Horse's Month: The Workings of the Judicial Panel on Multidistrict Litigation*, 66 Def. Counsel J. 341, 34 (1999).

[42] Marcus, *supra* note 26, at 2270 (quoting *In re* Westinghouse Elec. Corp. Uranium Contracts Litig., 405 F. Supp. 316, 319 (J.P.M.L. 1975)).

witnesses and will promote the just and efficient conduct of such actions."[43] The Panel seems to focus primarily on the question of whether transfer will be more efficient than allowing the suits to proceed independently.[44] In making this determination, the Panel relies on the parties' attorneys to advise it about facts and circumstances relevant to "whether and where transfer should be effected in order to secure the just and expeditious resolution of all involved actions."[45] When it perceives that consolidation will save judicial resources, "transfer is almost inevitable."[46] Common questions of fact do not have to predominate over other questions, and arguments against transfer because of the existence of non-common issues are unlikely to prevail.[47]

A party dissatisfied with the Panel's decision may move for reconsideration.[48] On appeal, transfer orders are reviewable only by an extraordinary writ to the court of appeals possessing jurisdiction over the district court handling the MDL. However, an order denying transfer may not be the subject of an appeal.[49]

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[43] 28 U.S.C. § 1407(a). *See In Re* "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F.Supp. 244, 255–56 (J.P.M.L. 1969) (describing several factors relevant to the Panel's decision about whether to consolidate into MDL); *see also* Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1002 (1974) ("Section 1407 thus directs the Panel to balance gains in efficiency and economy for the judiciary and some parties against inconvenience, added expense, and loss of forum choice for others.").

[44] Note, *supra* note xx, at 1009 ("[T]he Panel has made the likelihood of significant judicial savings the operative factor in transfer decisions.").

[45] Nangle, *supra* note 41, at 343.

[46] Note, *supra* note xx, at 1003.

[47] *Id.* at 1006 ("The Panel's response has been to transfer all the cases and leave to the transferee judge any problems created by noncommon facts or conflicting interests among parties on the same side of a case."). This is contrast to Rule 23(b)(3) class actions, in which common questions of law or fact must predominate. FED. R. CIV. PRO. 23(b)(3); *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2565 (2011) (Ginsburg, J., concurring in part and dissenting in part) (suggesting that the majority opinion imported a predominance requirement into Rule 23(a)(2), which requires potential classes to share common questions of law or fact).

[48] MDL R. P. 11.1(c).

[49] Ostolaza & Hartmann, *supra* note 27, at 62; 28 U.S.C. § 1407(e).

When the Panel decides to create an MDL, it designates a specific federal district court and a specific federal district judge to preside.[50] The Panel's choices are not guided by any particular set of factors; they are not cabined by statute or by the Multidistrict Rules of Procedure.[51] The selected judge (the "transferee judge") and court (the "transferee court") need not already have one of the consolidated cases on their docket,[52] though parties may lobby the Panel for a specific court or judge on that basis. The Panel might choose a particular judge for his or her experience with similar cases or other complex or multidistrict litigation. The condition of a potential transferee court's docket appears relevant, as do the distribution of MDLs throughout the country,[53] the location of relevant evidence, and the "willingness and motivation" of the potential transferee judge.[54]

Prior to consolidation, to this point most of the parties' disagreements have tended to focus on where the consolidation will take place; parties have preferred venues and district judges.[55] When lobbying for transfer to a particular district, parties may not argue about applicable district and circuit law in potential courts (which may be more favorable to the plaintiffs or the defendants in a given set of facts); they are limited to administrative and convenience arguments.[56] Plaintiffs might strategically file cases in a particular district and then

[50] 28 U.S.C. § 1407(b).
[51] Ostolaza & Hartmann, *supra* note 27, at 57–59.
[52] *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 990 F. Supp. 834, 835–36 (J.P.M.L. 1998).
[53] Ostolaza & Hartmann, *supra* note 27, at 60.
[54] Bradt, *supra* note 33, at 787. *See also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.33 ("[T]he Panel looks for an available and convenient transfer forum, one that (1) is not overtaxed with other MDL cases, (2) has a related action pending on its docket, (3) has a judge with some degree of expertise in handling the issues presented, and (4) is convenient to the parties.") (internal citations omitted).
[55] Bradt, *supra* note 33, at 786–87.
[56] *See* Nangle, *supra* note 41, at 343 ("[I]n selecting a transferee district, the panel does not consider the litigants' dissatisfaction with past or anticipated rulings of the transferee court. Nor

argue that the Panel should assign the MDL to that district because cases are already pending there. If those cases have advanced further in the discovery process, such that a particular presiding judge appears to be leading the pack of cases to be transferred, this strategy might prove effective. On the other side, defendants might argue that creation of an MDL is premature or that because only a few plaintiffs' lawyers are involved, the parties can informally coordinate the cases without formally consolidating them.

After the Panel creates an MDL, later-filed "tag-along" cases which share common questions of fact with the previously transferred cases may be added to the MDL. A party to a tag-along case may seek a transfer order from the Panel,[57] which then reviews the complaint and docket sheet before issuing a conditional transfer order.[58] Or, if the defendants agree not to object, tag-along cases can be filed directly in the transferee court, without regard to whether personal jurisdiction and venue would be proper in that court absent the MDL.[59]

2. MDL Management and Steering Committees

A single MDL can involve thousands of plaintiffs and thousands of lawyers.[60] Rather than deal directly with scores of attorneys, transferee courts appoint a limited number of lawyers

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does the panel consider the governing appellate law of the transferee district. And most empathically, the panel does not sit in review of decisions of the transferee court.").

[57] The Panel may conditionally transfer the tag-along into the MDL for fifteen days, allowing the parties an opportunity to oppose the transfer. When any transfer request is pending before the Panel, the potential transferor district court's authority is not affected—it can rule on pending pretrial motions, including motions to remand to state court. Until an effective transfer order is entered with the clerk of the transferor court, this remains true. Ostolaza & Hartmann, *supra* note 27, at 63; *see* MDL R. P. 7.1.

[58] Nangle, *supra* note 41, at 342.

[59] Bradt, *supra* note 33, at 795–96.

[60] Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2338 n.74 (2008) [hereinafter Fallon et al., *Bellwether Trials*]; *see, e.g.*, *In re* Zyprexa Products Liability Litigation, 594 F. 3d 113, 116 (2d Cir. 2010) (per curiam).

to serve on "steering committees" to manage the litigation.[61] Because "'[t]he purpose of consolidation is to permit a trial convenience and economy in administration,'"[62] they assert, a failure to designate lead counsel would be inefficient and counter to the very idea of MDLs. As a result, "the litigation is run in many ways by a relatively small number of counsel appointed to the case-management committees established by the court."[63]

Counsel appointed to management or leadership roles act on behalf of other counsel and parties, not just the clients who retained them. MDL judges have total discretion to designate various leaders or committees among the involved attorneys—they are not required to use any particular titles or assign any particular duties. These designations fall into four general categories: liaison counsel, lead counsel, trial counsel, and committees of counsel.[64] "Liaison counsel" is essentially an administrator located near the transferee court who facilitates

[61] Though transferee courts appoint committees to represent both plaintiffs and defendants, "in practice, the DSC [Defendants' Steering Committee] is generally selected by the defendant itself with the approval of the court." Fallon, *Common Benefit Fees*, *supra* note 33, at 373.

[62] *In re* Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 737 F.Supp. 396, 398 (E.D. Mich. 1989) (quoting *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1014–15 (5th Cir. 1977)). *See In re* Korean Air Lines Co., Ltd., 642 F.3d 685, 700 (9th Cir. 2011) ("In discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak.").

[63] Bradt, *supra* note 33, at 791; *see also* Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 508–10 (2011) [hereinafter Burch, *Group Consensus*] ("Presently, plaintiffs in nonclass aggregation have few opportunities for participation, voice, and control. . . . Realistically, lawyers drive multidistrict litigation."); William W. Schwarzer, Alan Hirsch, & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529, 1547 & n.110 (1995) (asserting, "Aggregation tends to diminish plaintiffs' control over their claims," and citing an example where nine lawyers or law firms represented over 10,000 claimants); Jones Ward PLC, *MDL Primer: Multi-District Litigation 101*, THE RECALL LAWYERS (Aug. 5, 2011, 5:03 PM), http://www.the-recall-lawyers.com/2011/08/mdl-primer-multi-district-liti.html ("After the [Plaintiffs' Steering Committee] is appointed by the court, the lawyers on the PSC will control the litigation for all of the non-PSC members. All case strategy and much of the day-to-day work is completed by the PSC and the various 'sub-committees' created by the PSC.").

[64] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

communications between the court and other counsel; this designee need not be an attorney. "Lead counsel" is responsible for formulating and presenting positions on substantive and procedural issues. This attorney (or attorneys) presents written and oral arguments to the MDL court, works with opposing counsel on discovery issues, conducts depositions, hires expert witnesses, manages support services for the MDL, and ensures that schedules are kept. "Trial counsel" function as the principal attorneys at trial, and they coordinate the other members of the trial team. "Committees of counsel," often called steering, coordinating, management, or executive committees, are appointed when there are sufficient dissimilarities among group members to warrant representation of those disparate interests on a larger litigation leadership team.[65]

The transferee judge has complete control over designating attorneys to play specific roles in the MDL. In some cases, attorneys can apply to be on a steering committee or to take on another leadership role. Though MDL judges entertain objections to applicants or nominees,[66] selection to committee is not the result of a traditional adversary process refereed by the court.[67] In selecting counsel for leadership roles, the transferor judge may consider factors such as

[65] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

[66] *See, e.g.*, *In re* San Juan Dupont Plaza Hotel Fire Litigation, No. MDL 721, 1989 WL 168401, at *6–11 (D. Puerto Rico Dec. 2, 1988) (describing the purpose of the plaintiffs' steering committee, the main criteria for membership thereon, the primary responsibilities of the committee, and procedures for application and nomination to the committee, including written objections to potential members); *see also In re* Bendectin Litig., 857 F.2d 290, 297 (6th Cir. 1988) (describing the process by which attorneys were appointed to the Lead Counsel Committee, the plaintiffs' failure to show cause why certain attorneys should not be appointed, and declaring, "In complex cases, it is well established that the district judge may create a Plaintiffs' Lead Counsel Committee") (citing *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773–74 (9th Cir.1977); *In Re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1014–15 (5th Cir.1977); *Farber v. Riker–Maxson Corp.*, 442 F.2d 457, 459 (2d Cir.1971)).

[67] *But see* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224 ("[A]n evidentiary hearing may be necessary to bring relevant facts to light and to allow counsel to state their case for appointment and answer the court's questions about their qualifications").

"physical (e.g., office facilities) and financial resources; commitment to a time-consuming, long-term project; ability to work cooperatively with others; and professional experience particular to this type of litigation."[68] Among attorneys, "[t]here is often intense competition for appointment by the court as designated counsel, an appointment that may implicitly promise large fees and a prominent role in the litigation."[69] Attorneys sometimes make side agreements about who will lobby to be appointed to a leadership role.[70] These pre-formed coalitions, which may be influential in establishing a MDL in the first place, often determine who ends up on the steering committee. Of course, this backroom dealing is not transparent to individual claimants, and may not be open to first-time MDL attorneys, either.

Selection for membership on the steering committee entails an enormous amount of work, but it can also come with a huge payoff—certainly larger than the contingency fee expected from representing one or even several individual plaintiffs—because attorneys who do work for the common benefit of the group typically receive a portion of every single plaintiff's payout. In re *Zyprexa Products Liability Litigation*[71] provides one example of how MDL courts commonly establish attorney compensation structures for the council appointed to steer the litigation. There, the MDL court capped attorneys' fees and created a common benefit fund, generated by a mandatory set-aside from all settlements and judgments in the MDL, to compensate members of the plaintiffs' steering committee. The court also established fee

[68] *San Juan Dupont Plaza Hotel Fire*, No. MDL 721, at *6.
[69] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224.
[70] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224.
[71] 594 F. 3d 113 (2d Cir. 2010) (per curiam).

restrictions and appointed special settlement masters with discretion to order reductions or increases of fees in negotiated settlement agreements.[72]

Appointment to the steering committee often reaps subsequent career benefits, as well. After an attorney is selected for one steering committee, she may call herself an experienced MDL litigator the next time he participants in an MDL. That credential makes the next transferee judge more likely to appoint him to a subsequent steering committee. The pattern repeats. Because the transferee judge has complete control over appointment to leadership roles, and there is fierce competition for those lucrative positions, experience in a prior MDL can tip the scales in favor of one attorney over another. In this way, the group of powerful MDL plaintiffs' attorneys remains relatively small, and newcomers face formidable barriers to entry that they cannot overcome on their own accord. Due to this positive feedback loop, if an individual plaintiff hires his local attorney for any reason other than the attorney's MDL experience, the odds of that local attorney being selected for a leadership role are quite low. Claimants are unaware of this when they retain counsel and decide to file a lawsuit, because unless they are tag-along plaintiffs, they are unaware that they will eventually be transferred into an MDL.

The existence of a steering committee simultaneously lowers barriers to entry for tag-along plaintiffs, which may cause huge increases in the number of plaintiffs in a single MDL.[73] When attorneys appointed by the court will do the bulk of the work, the cost of participation to the individual claimant is lowered. He might even file *pro se*, foregoing the cost of retaining a

[72] For more details about fee arrangements for steering committee members, see discussion *infra* at xx.

[73] For example, during the twelve-month period ending September 30, 2013, the Panel transferred 5521 cases into MDLs, whereas 40,988 actions were filed directly in transferee courts during that time. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2013 (*available at* www.jpml.uscourts.gov).

lawyer of his own, with the knowledge that a court-sanctioned attorney will litigate his case on his behalf, and that the case will likely never emerge from the MDL. Tag-along plaintiffs who file directly into an MDL do not have to make the same kind of investment as other plaintiffs, so it is possible that their claims are not strong enough to warrant filing individual lawsuits. If so, tag-along plaintiffs could dilute the overall strength of plaintiffs' claims, which could result in a weaker bargaining position for all the plaintiffs when settlement negotiations begin.

In the unlikely event that individual cases are remanded back to their jurisdictions of origin, the discovery conducted by the steering committee restricts what the individual claimant and her lawyer can do upon remand. Because one of the fundamental ideas behind consolidation into MDL is to avoid duplicative discovery, on remand, transferor courts are hesitant to grant additional discovery requests.[74] As a more formal matter, transferee courts have authority to enter pretrial orders that "govern the conduct of the trial" back in a transferor court.[75] Furthermore, decisions made before trial can be outcome-determinative; they dictate viable arguments and strategies. In these ways, even though the consolidated proceedings are restricted to pretrial matters, the steering committee exercises real and enormous influence over the direction of an individual's claim.

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[74] *See, e.g.*, Pavlou v. Baxter Healthcare Corp., 2004 WL 912585, *1 (S.D.N.Y. April 29, 2004) (on remand from MDL, affirming magistrate judge's order limiting potential deponents and topics of deposition because "Plaintiffs had sufficient opportunity to seek discovery during the MDL proceedings. To rule otherwise would undermine the MDL proceedings.").

[75] Fallon et al., *Bellwether Trials*, *supra* note 60, at 2329 n.17 (quoting *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 636 (N.D. Ill. 1996)); *see also* Marcus, *supra* note 26, at 2264 (quoting Judge Weigel, an original member of the Panel, who "opined that the transferee judge's orders must be respected by the transferor judge") (citing Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978)).

3. Bellwether Trials

As the Supreme Court made explicit in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,[76] a transferee court's authority extends only to pretrial matters; it cannot try a transferred case without the parties' consent.[77] Within the limits of § 1407 and *Lexecon*, though, MDL courts often work to obtain consent from some parties to conduct "bellwether" trials, which serve as a means of gathering information about the strengths and weaknesses of each side's arguments and often facilitate global settlement negotiations.[78] They are an expected element of the information-gathering process undertaken in transferee courts. These bellwether trials are, for the most part, information-gathering tools; while they of course bind the immediate parties, they are not binding on other parties in the MDL.[79] However, though their holdings can be used offensively as collateral estoppel by plaintiffs in future cases, subject to the normal limits on that doctrine.[80] Cases selected as bellwether trials are usually tried by members of the appointed leadership team,[81] not by the attorneys of record in the individual cases. As such, bellwether

[76] 523 U.S. 26 (1998).
[77] This limitation does not extend to cases brought under section 4C of the Clayton Act. The Panel can consolidate actions brought under that provision and transfer them for both pretrial and trial. 28 U.S.C. § 1407(h).
[78] The method of selecting cases for bellwether treatment varies among MDLs. The process can involve grouping like cases and selecting from each group, allowing plaintiffs and defendants to propose cases featuring their strongest arguments, or some other process determined by the transferee court. *See* Fallon et al., *Bellwether Trials*, *supra* note 60, at 2343–49 (describing the selection process). *See also In re* Vioxx Prod. Liability Litig., 879 F.Supp. 23 719, 723 (E.D. La 2012) ("Millions of documents were discovered and collated. Thousands of depositions were taken and at least 1,000 discovery motions were argued. After a reasonable period for discovery, the Court assisted the parties in selecting and preparing certain test cases to proceed as bellwether trials."). There is no explicit requirement that cases selected for bellwether trials be typical of all claims.
[79] Bradt, *supra* note 33, at 789–90; Fallon et al., *Bellwether Trials*, *supra* note 60, at 2338.
[80] *See* Parklane Hosiery v. Shore, 439 U.S. 322 (1979).
[81] Fallon et al., *Bellwether Trials*, *supra* note 60, at 2360 n.121.

trials give coordinating council an opportunity to "organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation."[82]

Assuming the claims selected for bellwether treatment are "typical" of the group of claims, bellwether trials facilitate settlement by valuing cases in a way that can be extrapolated to other claims.[83] The utility of a bellwether verdict depends on whether the tried claim is a truly representative test.[84] But even if the transferee court conducts several bellwether trials in an attempt to account for claims of different strengths, they cannot account for all the unique features of all claims in the MDL. Relying on the results of bellwether trials to evaluate settlement offers can over- or under-value individual claims, and there is no telling which is occurring more often.

If cases in an MDL are remanded to their jurisdictions of origin, bellwether trials may be useful for their creation of "'trial packages'" which local counsel can use in subsequent trials.[85] These packages typically include items such as discovery documents, background information, expert reports, deposition and trial testimony, information about potential witnesses, court rulings and transcripts, and coordinating counsel's work product.[86] But bellwether trials' primary

[82] *Id.* at 2338.
[83] Alexandra Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577–78 (2008).
[84] This is appropriate given the origin of the term "bellwether." "The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray, and so it is in the mass tort context." *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). *See also* Fallon et al., *Bellwether Trials*, *supra* note 60, at 2324.
[85] Fallon et al., *Bellwether Trials*, *supra* note 60, at 2325. *See also id.* at 2340 ("Ultimately, the availability of a trial package ensures that the knowledge acquired by coordinating counsel is not lost if a global resolution cannot be achieved in the transferee court.").
[86] *Id.* at 2339.

function is to facilitate settlement in the transferee court.[87] Bellwether trials prioritize fact-finding and force appointed counsel to develop their theories of the case. This "contribution[s] to the maturation of disputes" "can naturally precipitate settlement discussions" because each side has "test driven" their theories before live juries.[88] Jury verdicts inform both sides about the relative strengths and weaknesses of their various strategies and arguments. Knowing the persuasive value of bellwether trials when it comes time to negotiate a possible global settlement, "coordinating council often pull out all the stops," making bellwether trials "exponentially more expensive for the litigants and attorneys than a normal trial."[89] The more expensive the bellwether trial, the more likely the parties are to rely on its outcome in assessing the value of the remaining claims, because the parties have more riding on the bellwether trial being a useful tool. Similar to the preference for appointing experienced MDL litigators to leadership positions, reliance on bellwether trials is a self-reinforcing feature of MDLs.

Bellwether trials are not perfect predictors. Even if the transferee court conducts multiple bellwether trials that are representative of several subgroups of claims, the most useful bellwether cases for the greatest number of plaintiffs are not the extraordinary claims. So although the process of trying bellwether cases facilitates global settlement, by design it does not account for the unique characteristics of a particularly weak or strong claim.

4. Settlement

Settlement is the fate of almost all cases that are part of an MDL. Approximately 97% of MDL cases terminate in transferee districts; thus, relatively few are remanded back to the

[87] "The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar." *Chevron*, 109 F.3d at 1019.
[88] Fallon et al., *Bellwether Trials*, *supra* note 60, at 2342.
[89] *Id.* at 2366.

districts' in which they were originally filed.[90] Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle. Because a primary objective of consolidation into MDL is to avoid multiple federal judges having to deal with the same issues, some judges perceive failure to achieve a global settlement as a failure.[91] Transferee courts tend to take an active role in settlement negotiations. They appoint special settlement masters[92] and take a hands-on approach.[93] As Judge Fallon described, it is "not unusual" for a transferee court to "encourage a global resolution of the matter before recommending to the Panel that the case be remanded."[94] Individual litigants, whose personal litigation goals may or may not be monetary,[95] face pressure to accept defendants' monetary offers because their attorneys work for contingency fees.

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[90] As of September 30, 2013, 462,501 individual actions had been subjected to § 1407 proceedings. The Panel remanded 13,432, or about 3%, of those. 359,548 actions terminated in the transferee court. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2013 (*available at* www.jpml.uscourts.gov). *See* Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 U. KAN. L. REV. 775, 801 (2010) (noting several MDL settlements that "suggest that the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements").

[91] *See* Marcus, *supra* note 26, at 2265 ("Almost inevitably, transferee judges are likely to feel that they have some responsibility to attempt to resolve the cases they have gotten—'The other judges are relying on me to finish this job.'").

[92] *See, e.g.*, *In re* Zyprexa Products Liability Litigation, 594 F. 3d 113 (2d Cir. 2010); *In re* Methyl Tertiary Butyl Ether (MTB) Prod. Liab. Litig., 578 F.Supp.2d 519, 522 (S.D.N.Y. 2008); *In re* Agent Orange Prod. Liab. Litig., 597 F.Supp. 740, 760 (E.D. N.Y. 1984).

[93] *See, e.g.*, *In re* Patenaude, 210 F.3d 135, 139–40 (3d Cir. 2000) (describing transferee courts' resistance to remand unless "all avenues of settlement were exhausted"). Transferee courts even "may require individuals to attend settlement conferences." *In re* Korean Air Lines Co., Ltd., 642 F.3d 685, 699 (9th Cir. 2011) (citing *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo., on Nov. 15, 1987, 720 F.Supp. 1433, 1436 (D. Colo. 1988)).

[94] Fallon, *Common Benefit Fees*, *supra* note 33, at 373–74.

[95] *See* Burch, *Group Consensus*, *supra* note 63, at 516–17 (citing the September 11th Victims Compensation Fund as an example of claimants whose goals transcended financial compensation); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96

Currently, the aggregate settlement rule governs global MDL settlements. It requires that each claimant give "informed consent" to a settlement, based on knowledge of the settlement terms, including other claimants' payouts.[96] However, that safety valve may be short-lived. The American Law Institute (ALI) recently published *Principles of the Law of Aggregate Litigation*.[97] The ALI proposal would allow clients, at the time they retained representation, to agree to be bound by an aggregate settlement approved by supermajority vote of all claimants. Clients could empower their lawyers "in advance, to negotiate binding settlements on their behalf as part of a collective resolution of claims."[98] Although the ALI proposal is just that—a proposal—it demonstrates the pervasiveness of settlement in MDLs and the apparent consensus that facilitating global settlement is a certain function, if not the main purpose, of consolidation into an MDL.

5. Attorney Compensation

The huge responsibility placed on members of court-selected steering committees comes with potentially huge payoffs. Transferee courts structure compensation plans for lead counsel that reflect their responsibility to and efforts on behalf of the group. The courts justify that exercise of authority in the following way: "If lead counsel is to be an effective tool the court must have means at its disposal to order appropriate compensation for them. The court's power is illusory if it is dependent upon lead counsel's performing the duties desired of them for no

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CORNELL L. REV. 265, 312–13 (2011) (arguing that tort law "is not simply a device for transferring wealth").

[96] Erichson & Zipursky, *supra* note 95, at 296.

[97] AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010).

[98] Erichson & Zipursky, *supra* note 95, at 293.

additional compensation.'"[99] To compensate appointed counsel, courts set up common benefit funds from which they will later withdraw lead counsel's fees and costs. They also enter orders requiring some portion of all claim payments, including settlements and judgments arising after cases are transferred back to their original jurisdictions, to be paid into the common benefit funds.[100] The "common benefit fee" comes from the fee that would be paid to the claimant's selected attorney—not from the claimant's portion.[101] In this way, MDL splits the attorney fee the plaintiff agreed to at the outset between retained counsel and appointed counsel. The contingent percentage of the plaintiff's recovery remains the same, but the retained counsel must share that percentage with the steering committee.

Transferee courts also establish how much lead counsel will be paid from the common funds. Many rely on a Fifth Circuit case, *Johnson v. Georgia Highway Express, Inc.*,[102] which established a 12-factor guideline for determining a reasonable fee for each committee member.[103]

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[99] *In re* Guidant Corp. Implantable Defibrillators Products Liability Litigation, 2008 WL 682174 at *5, MDL No. 05–1708 (D. Minn., March 7, 2008) (quoting *In re* Air Crash Disaster at Florida Everglades, 549 F.2d 1006, 1016 (5th Cir. 1977)).

[100] *See, e.g.*, *In re* Protegen Sling and Vesica System Products Liability Litigation, 2002 WL 31834446 at *1, Nos. 1:01–01387, 1387 (D. Md., April 12, 2002) ("The obligation shall follow the case to its final disposition in any United States court including a court having jurisdiction in bankruptcy."). The process described is most typical for plaintiffs' steering committees; clients typically compensate the defendants' steering committees on a periodic basis. Fallon, *Common Benefit Fees*, *supra* note 33, at 374.

[101] Fallon, *Common Benefit Fees*, *supra* note 33, at 376.

[102] 488 F.2d 714 (5th Cir. 1974).

[103] *See, e.g.*, *In re* Guidant Corp. Implantable Defibrillators Products Liability Litigation, 2008 WL 682174 at *6, MDL No. 05–1708 (D. Minn., March 7, 2008). The *Johnson v. Georgia Highway Express, Inc.* factors are: "(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 for similar work in the community; (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 relationship with the client; and (12) awards in similar

In allocating fees, courts must "conform to 'traditional judicial standards of transparency, impartiality, procedural fairness, and ultimate judicial oversight.'"[104] They do so with input from lead attorneys, but ultimate discretion lies with the transferee court,[105] whose cost awards are subject to abuse of discretion review by the appellate court.[106] The transferee court cannot abdicate its responsibility of closely scrutinizing fee awards to appointed counsel.[107] Not surprisingly, given the large number of cases and attorneys involved, cost and fee allocation is a complicated and time-consuming part of MDL management. It can be difficult if not impossible for the transferee court to adequately predict what the nature of lead counsel's expenses will be as the MDL progresses, so all players must remain flexible and engaged in this part of MDL management. If they are not actively involved along the way, dissatisfied plaintiffs (or their retained attorneys) may forego their opportunity to object to costs incurred and then requested by the steering committee.[108]

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cases." *Id.* at *7 (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719–20 (5th Cir. 1974)).

[104] *In re* Vioxx Products Liability Litigation, 802 F.Supp.2d 740, 772 (2011) (quoting *In re* High *Sulfur Content Gasoline Products Liability Litigation*, 517 F3d. 227, 234 (5th Cir. 2008)).

[105] Fallon, *Common Benefit Fees*, *supra* note 33, at 387. District courts' derive authority to establish these structures from their equitable powers. Settlement agreements also sometimes give express consent to the transferee judge setting common benefit fees. *See id.* at 378–80.

[106] *In re* San Juan Dupont Hotel Fire Litig., 111 F.3d 220, 228 (1st Cir. 1997). *See also In re* High Sulfur Content Gasoline Prod. Liability Litig., 517 F.3d 220, 227 (5th Cir. 2008) ("We must determine whether the record clearly indicates that the district court has utilized the *Johnson* framework as the basis of its analysis, has not proceeded in a summary fashion, and has arrived at an amount that can be said to be just compensation.") (internal quotation marks and citation omitted).

[107] *High Sulfur Content Gasoline Prod. Liability Litig.*, 517 F.3d at 227.

[108] *See, e.g.*, *San Juan Dupont Hotel Fire Litig.*, 111 F.3d at 228 ("[A]ll litigants must share in their mutual obligation to collaborate with the district court *ab initio* in fashioning adequate case management and trial procedures, or bear the reasonably foreseeable consequences for their failure to do so.").

III. **MDL'S DUE PROCESS DIFFICULTIES**

As the foregoing description of MDL procedures illustrates, a case transferred into an MDL proceeding looks drastically different from a typical lawsuit, and presumably these procedures are not what the individual plaintiff expects when he files his claim. Despite this elaborate set of procedures and the enormous number of cases involved in MDLs, the constitutional validity of this process has gone almost completely unexamined. In the name of efficiency, multidistrict litigation—including its attendant procedures—has been embraced virtually without question.[109] This unqualified acceptance assumes that consolidation into MDL is totally benign, and that individual claims retain their individualism even when they are temporarily adjudicated in a group with like cases. It also assumes—without any basis—that MDL procedures satisfy procedural due process.

The plain language of § 1407 and the Supreme Court's decision in *Lexecon* have probably contributed to the unquestioning acceptance of the constitutionality of MDL, because both emphasize that transferee courts have jurisdiction solely over pretrial matters. But consolidation into MDL, originally envisioned as a temporary transfer to facilitate convenience and avoid duplicative discovery, now all but guarantees that transferred cases will never return to their original jurisdictions for trial. The Panel's transfer orders are mandatory, one-way tickets to transferee districts—"black holes."[110] They are non-transferrable and non-negotiable.[111] Instead

[109] *See* Marcus, *supra* note 26, at 2248 ("The Panel's activities have generally not caused the sort of controversy the class action produced.").
[110] *See* Fallon et al., *Bellwether Trials*, *supra* note 60, at 2330 ("Indeed, the strongest criticism of the traditional MDL process is the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again.").
[111] "Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order—from a court you have never heard of—declaring your case a 'tag-along' action and transferring it to another federal court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation." Gregory Hansel, *Extreme*

of being temporarily and conveniently consolidated for discovery, individual claims become part of a massive group of cases plodding toward settlement.[112] Although it is true that transferee courts have jurisdiction only over pretrial matters, individual claims are fundamentally transformed by virtue of their consolidation into MDL. And transfer back to the original jurisdiction--in the rare instances in which it actually takes place--cannot "save" the constitutionality of what happens in the transferee district.

Each claimant in an MDL has an individually held, constitutionally protected property right at stake. Those rights are guaranteed by the Fifth Amendment, which protects life, liberty, and property against deprivation absent due process of law.[113] The "property" at stake in an MDL is the "chose in action." This historically established concept refers to the right to sue to enforce a legally protected claim, even the unlitigated right to sue.[114] Under the Fifth Amendment, then, MDL claimants cannot be deprived of their rights to a chose in action without due process of law.[115] MDL is a collection of individual lawsuits; it is not a vindication of some kind of substantively established group-held right. The constitutionality of MDL must therefore be assessed from the perspective of each litigant on an individual basis. As in other consolidated representative litigation (for example, class actions), MDL raises concerns about whether collectivization unconstitutionally modifies the claimants' individually held rights.

In MDL, individual litigants, for all practical purposes, lose a substantial degree of control over the procedural fate of their claims. For example, for the overwhelming number of

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Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation, 19 ME. B.J. 16, 16 (2004).

[112] *See supra* Sections I, II.

[113] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

[114] Sheldon v. Sill, 49 U.S. 441, 444 (1850).

[115] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest . . . .").

claimants, the lawyers they hired are not selected for the court-appointed steering committee, which drives strategic and tactical decisions. This impedes their ability to exercise control over the direction and course of their litigation. The lack of assurance that the selected attorneys can and will provide full and fair representation for each individual claimant is also unconstitutional, because it does not comport with even the procedural protections afforded to absent class members in a class action, which are constitutionally dubious to start.

This Part expands on these ideas and assesses whether the changes inherent in forced transfer into an MDL comport with the constitutional guarantees of procedural due process. It concludes that MDL fails to satisfy those guarantees. It begins with a discussion of the day-in-court ideal as the constitutional baseline for procedural due process. It argues that the day-in-court ideal is the *sine qua non* of constitutional due process—the basic structure upon which the adversarial system is built. Scholars disagree about the theoretical justifications for the day-in-court ideal, but no matter whether one subscribes to the autonomy model of the day-in-court ideal or is satisfied with a paternalistic notion of one's right to his day in court, MDL fails to provide a constitutionally adequate opportunity to litigate.

A. The Constitutional Baseline: Due Process and the Day-in-Court Ideal

Before delving into the constitutional merits of MDL, it is important first to identify the constitutional mandate against which MDL should be measured. In any given adjudication, the constitutional inquiry concerns exactly what process is "due". The Due Process Clause, on its face, does not provide a straightforward answer to that question, nor to the question of who gets to provide the answer. In attempting to answer the question of what procedures the Due Process Clause demands, the Supreme Court has repeatedly reaffirmed a "deep-rooted historic

tradition,"[116] a principle that is "as old as the law" and "of universal justice": "no one should be personally bound until he has had his day in court."[117]

The so-called "day-in-court ideal" is at the heart of constitutionally guaranteed procedural due process, according to the Court, and is central to the American conception of the adversarial model of litigation. Litigants, judges, and scholars frequently refer to the right to an individual day in court when they analyze whether due process requires, or forbids, a certain procedure. In some ways, "an individual day in court" has become a reflexive, shorthand description of what due process means. For a variety of reasons, MDL severely undermines the day-in-court ideal by depriving individual litigants of their opportunity to protect their interests through the litigation process. But before one can successfully indict MDL as a due process violation, one must first establish two things: (1) What does the day-in-court ideal specifically encompass? (2) In what way does deprivation of one's day in court undermine the set of constitutionally dictated normative precepts encompassed by the concept of procedural due process? It is to answering these questions that our analysis now turns.

At the outset, it is important to define what an individual day in court entails. The right to one's own day in court means a right to meaningful control over litigation strategy and goals, including choice of legal representative.[118] It requires a "full and fair opportunity to litigate,"[119]

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[116] Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999).

[117] Mason v. Eldred, 73 U.S. 231, 239 (1867). *See also, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008); Martin v. Wilks, 490 U.S. 755, 761–62 (1989); Rock v. Arkansas, 483 U.S. 44, 51 (1987); Hansberry v. Lee, 311 U.S. 32, 40 (1940).

[118] Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1890 (2009) [hereinafter Redish & Katt, *Procedural Due Process and the Day-in-Court Ideal*] ("'Autonomy' means that the individual has the right to choose how to fashion his own representation and to participate in the process as he sees fit"); *see* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be

which means, as one of us has written, a "full opportunity to prepare [one's] own arguments and evidence."[120] At base, meaningful participation in the adjudicatory process—the day-in-court ideal—includes, in the words of a respected scholar, "the right to observe, to make arguments, to present evidence, and to be informed of the reasons for a decision."[121]

The Supreme Court has identified the "two central concerns of procedural due process" to be "the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process."[122] The day-in-court ideal takes account of both of these concerns. First, an individual day in court helps achieve accurate outcomes (thus avoiding "unjustified or mistaken deprivations") because the stakeholders, those who will be most affected by the outcome and are the most motivated to protect their own rights, participate in the decision-making process. In addition, individual participation is inherently valuable in a democratic system because it legitimizes the adjudicating entities in the minds of the litigants.[123] It fosters citizens' roles in democratic governance, which includes a legitimate, authoritative judiciary.[124]

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heard at a meaningful time and in a meaningful manner.") (internal quotations and citations omitted).

[119] Taylor v. Sturgell, 553 U.S. 880, 892 (2008).

[120] Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953–1971*, 51 DEPAUL L. REV. 359, 391 (2001) [hereinafter Redish, *Tobacco Wars*].

[121] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 280 (2004).

[122] Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[123] Solum, *supra* note 121, at 274 ("Procedures that purport to bind without affording meaningful participation are fundamentally illegitimate."); *see also* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHIC. L.J. 545, 554 (2012) [hereinafter Lahav, *Due Process*] ("Dignitary theory dovetails with social-psychological studies of procedural justice finding that people perceive outcomes as more legitimate when the participants are given the opportunity to be heard."); Redish & Katt, *Procedural Due Process and the Day-in-Court Ideal*, *supra* note xx, at 1893–94.

[124] Redish & Katt, *Procedural Due Process and the Day-in-Court Ideal*, *supra* note xx, at 1889–90. *See also* Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the*

B. The Foundations of Due Process Theory

Recognition of these and other benefits of an individual day in court does not, in itself, reveal the complex set of values underlying this procedural guarantee. Understanding the theoretical grounding for the day-in-court ideal helps one to grasp the importance of the tradition, and determine the constitutional floor of procedural due process. Procedural due process can be thought to foster a variety of non-mutually exclusive values. But in reverse-engineering the day-in-court ideal as a manifestation of procedural due process, it is necessary to recognize a foundational conceptual dichotomy in due process theory. On the one hand, one may employ due process theory as a means of deciding which particular procedures are required to provide the individual whose constitutionally protected interests are at stake with a full and fair opportunity to defend those interests—in other words, exactly what procedures are essential to the exercise of the individual's right to her day in court. On the other hand, one may draw on due process theory in order to decide whether, in a particular situation, the individual has a constitutional right to her day in court in the first place. Those are not identical questions. Indeed, the theoretical analysis required to answer each of them is, in certain ways, fundamentally different.

When a court decides whether a particular procedure is required by due process in the course of an adjudicatory hearing, the traditional debate has been between the purely utilitarian approach adopted by the Supreme Court in its decisions in *Mathews v. Eldridge*[125] and

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Foundations of Procedural Due Process, 95 CAL. L. REV. 1573, 1582 (2007) ("The procedural due process guarantee is appropriately viewed as a constitutional outgrowth of democracy's normative commitment to [ ] process-based political autonomy."); Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 996–97 (1993) (describing the benefits of direct participation to public law remedies).

[125] 424 U.S. 319.

Connecticut v. Doehr[126] on the one hand and the so-called "dignitary" interest in permitting the individual to feel an appropriate level of respect from his government, on the other hand. Under the utilitarian test currently in vogue in the Supreme Court, a court is to balance competing utilitarian concerns: (1) the extent to which the procedure in question increases the likelihood of an accurate decision; (2) the nature of the individual's interest at stake; (3) the extent to which use of the procedure would burden government, and (4) the extent to which the use of the procedure would burden the other party or parties.[127] In contrast, the dignitary model, advocated by certain scholars, places primary emphasis on an inquiry into the extent to which the procedure is necessary to allow the individual to believe that he has had a full and fair opportunity to plead his case, regardless of the impact of that procedural opportunity on the reaching of an accurate decision.[128]

One does not reach constitutional questions about the need for specific procedures, however, until one first concludes that the individual has a right to her day in court in the first place. It is generally assumed that before the individual's property interests may be undermined or taken away at least *some* form of governmental process is required. Here, too however, there exists a significant dichotomy as to the underlying rationale for that right. And, it is important to note, the choice between those theoretical alternatives is likely to have significant practical consequences for the shaping of a litigant's due process right to her day in court. That dichotomy is between the "paternalism" rationale for the day-in-court ideal and the "autonomy" rationale for the individual's right to her day in court. Under the former rationale, the sole concern is that

[126] 501 U.S. 1.
[127] Connecticut v. Doehr, 501 U.S. at 10.
[128] *See generally* Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28 (1976).

individual litigants' interests are, in fact, adequately protected by an advocate—whether or not of the individual's choosing—whose interests overlap with those of the absent parties and who possesses the resources and experience to advocate effectively on behalf those absent parties whose legal rights and interests are being adjudicated.

Under the paternalism rationale for the day-in-court ideal, whether the absent party consents to the choice of advocate is irrelevant. In some situations, of course, it will be impractical, if not impossible, for the absent party to exercise choice even if she were permitted to do so. But under the exclusive focus on paternalism, the individual litigant's choice is irrelevant: the key is not whether the absent party has made a choice, but rather solely whether the absent party's legally protected interests have in fact been adequately represented. In effect, the paternalism model of the day-in-court ideal views the representative as a type of guardian, exercising protective authority over his wards who are categorically presumed to be unable to protect those interests themselves.

In stark contrast to the paternalism model of the day-in-court ideal is what can appropriately be described as the "autonomy" rationale for one's right to her day in court. The autonomy model views resort to the litigation process as simply one of several means by which the individual in a liberal democratic society is permitted to participate in the governmental process—whether executive, legislative or judicial—in an effort to protect her own interests. In exercising the right to participate in the governing process, the individual is universally given the right to choose (within outer limits set by the law designed to preserve societal order and safety) how most effectively to influence decisions of a democratically shaped government. For example, government may not choose a representative to speak on behalf of the individual if she prefers either to choose her own representative or represent her interests herself. Nor can

government tell the individual how to shape her appeal for governmental change in law or policy.[129] Such participatory choices are an essential part of the legitimizing function performed by preservation of the individual's right to seek to influence governmental decision making. And this form of "meta"-autonomy (i.e., autonomy as to how to participate in the processes of democratic self-government—or, if you will, democratic "autonomy") logically applies to an individual's efforts to influence the judicial branch to protect his rights or interests as much as it does to the individual's attempts to influence the other branches of government. All three branches are, after all, part of a democratic government whose Constitution is committed to recognition of the individual as an integral whole, worthy of respect.

In shaping the individual's due process right in the context of procedural collectivism, the Supreme Court has, all but exclusively, emphasized the paternalism model of the day-in-court ideal: there is no requirement that the individual litigant be given the opportunity to choose how best to represent his own rights and interests, as long as those chosen to represent those interests can be assumed to do so adequately.[130] Thus, in both *Hansberry v. Lee*[131] and *Amchem Products, Inc. v. Windsor,*[132] the Supreme Court found due process violated when a conflict in goals existed between the representative parties and the absent claimants.[133] But the Court has never extended similar recognition to the individual litigant's meta-autonomy right to choose how best to represent her own legally protected interests. For example, two out of the three categories of class actions authorized by the current version of Rule 23—a rule, after all, promulgated by the

[129] See Cohen v. California, 403 U.S. 15 (1971) (individual has First Amendment right to display in public a jacket saying "Fuck the Draft" on the back).
[130] The paternalistic version of the day-in-court ideal is explored in Redish, Wholesale Justice *supra* note 15, at 140-47.
[131] 311 U.S. 32 (1940).
[132] 521 U.S. 591 (1997).
[133] *See also* Stephenson v. Dow Chemical Co., 273 F. 3d 249 (2d Cir. 2001), 539 U.S. 111 (2003).

Supreme Court itself—are mandatory; members of the class are forcibly grouped together, even if they believe they are themselves better able to protect their own interests or even believe that they prefer not to pursue those interests legally. It is true that in one decision, *Phillips Petroleum Co. v. Shutts,*[134] the Court upheld a state class action against a due process challenge only on the express condition that absent claimants be given the right to opt out of the class.[135] But while lower courts have on occasion read that decision more broadly,[136] careful reading of the Court's opinion makes clear that the only reason for the requirement of a class member's option to withdraw from the class was the constitutional infirmity of lack of personal jurisdiction which would have resulted without the absent claimant's consent.[137]

One can, of course, make a strong case to support the need for paternalism as a means of assuring a full and fair day in court in the absence of an individual's ability to protect her own interests. It is in this manner that the Due Process Clause may serve an appropriate guardian-like function. However, it would be dangerous to assume paternalism is a sufficient condition, as well as a necessary one. Where circumstances permit, due process is appropriately construed to provide the individual with autonomy to choose how—and indeed, if—to protect her own interests through resort to the adjudicatory process.

When one considers the implications of MDL for the Due Process Clause, it matters little, if at all, whether one chooses to view the paternalism model of due process as merely necessary or instead as both necessary and sufficient. From either perspective, MDL fails miserably. This is in stark contrast to the other well-known form of procedural collectivism, the modern class

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[134] 472 U.S. 797 (1985).
[135] Id. at 811-12.
[136] *See, e.g.*, Brown v. Ticor 982 F. 2d 386 (9th Cir. 1992), *cert. granted in part Sub nom.*, Ticor Title Ins. Co v. Brown, 510 U.S. 810 (1993); *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994).
[137] 472 US. at 811-12.

action. By both rule[138] and judicial decision,[139] class action procedure has taken care to assure that the paternalism model be satisfied. And while one of us has already severely criticized modern class action procedure because of its failure to satisfy the dictates of the autonomy model,[140] at least under the most common form of class action--that created by Rule 23(b)(3)--individual class members are given the right to opt out of the class proceeding,[141] thereby satisfying at least the minimum level of litigant choice and control demanded by the autonomy model.[142] But as our analysis will soon demonstrate, MDL satisfies the guarantees of neither the paternalism nor autonomy models of procedural due process. The inescapable conclusion, then, is that as presently structured, MDL is unambiguously unconstitutional.

C. Applying the Day-in-Court Ideal to MDL

On the surface, MDL practice seems largely innocuous; the Panel merely temporarily transfers cases to a different district court for pretrial matters. But for a variety of reasons transfer effectively amounts to the end of the road for the overwhelming majority of cases. This is troublesome from a constitutional perspective, because not even the most minimal protection of the day-in-court ideal from the perspective of either the paternalism or autonomy models is satisfied.

Recall that unlike the class action, where most absent class members have not even considered individual suit and often possess claims not large enough to justify such suit, MDL applies only to claimants who have already chosen their own attorney and already filed suit. Yet

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[138] *See* Fed. R. Civ. P. 23(a); 23(b). *See* discussion *supra* at xx.
[139] *See* cases cited in notes 131-33, *supra*.
[140] *See*, Redish, Wholesale Justice, supra note 15, at 135-75.
[141] Fed. R. Civ. P. 23(c)(2).
[142] *See* discussion *supra* at xx. It could be argued that an opt-out procedure is insufficient to satisfy the autonomy model because it preps on the inertia of abut class members, and that instead autonomy demands use of an opt-in procedure. That issue, however, is irrelevant to MDL, since it provides for neither procedure.

with no formal, open, and adversary participation by those claimants, the transferee court selects the attorneys who actually drive the litigation. This means that transfer into an MDL is by no means innocuous when it comes to the due process right to an individual's day in court. MDL plaintiffs in no sense meaningfully participate in, much less control, their day in court.[143] Nor are there any assurances that those in charge of the litigation we are adequately representing the interest of the individual claimants.

One key way that litigants control their day in court is by selecting their attorneys. This is often the first expression of their autonomy: they seek the advice of counsel when they consider whether to even file a claim. Lawyers are contractually and ethically bound to vigorously represent their clients' interests--and no one else's--in court. Indeed, it would, undoubtedly be unethical for an attorney to represent two parties in the same litigation when their interests potentially differ. Permitting litigants to choose their representatives is central to providing a full and fair opportunity to litigate. The foundations of due process dictate that that choice belongs to the parties alone. But claimants forced into an MDL are deprived of that essential choice.[144] By virtue of his case's transfer into the MDL—a move that the plaintiff cannot prevent—his chosen lawyer will invariably not be the one actually representing his interests in the course of all the important MDL. Rather, the lawyers on the court-appointed steering committee will take over, and they will do so without the protective assurances of either there adequacy, their good faith, or the extent to which the interests of the absent litigants truly overlap or any other controls.

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[143] Sturm, *supra* note 90, at 1001 ("Lawyers' control over the process detracts from the client's sense of autonomy and responsibility.").

[144] "In fact, a party loses some control over the litigation as soon as she is forced to share the litigating stage with even one other litigant." Robert G. Bone, *Rethinking the 'Day in Court' Ideal and Nonparty Preclusion*, 67 N.Y.U.L. REV. 193, 198 n.16 (1992) [hereinafter Bone, *Rethinking the 'Day in Court' Ideal*]. "Indeed, the judicial willingness to sacrifice party control in the aggregation context seems inconsistent with the firm commitment to individual litigant control in the preclusion area." *Id.*

Thus, the method of choosing the attorneys who will represent the claimants in an MDL satisfy neither the autonomy or the paternalism models of the day-in-court ideal. When a transferee judge appoints a steering committee, she does so at her discretion, outside the strictures of any Federal Rule, or statute, or adversary proceeding. Appointment to the steering comes after nothing more than a judge-designated period of nominations and written objections.[145] A more formalized, uniform adjudicatory approach could conceivably parallel the adequacy of representation protection of Rule 23(a)(4),[146] or the narrow "adequate representation" exception to the rule against nonparty preclusion.[147] Without such safeguards, however, the process fails to guarantee that the appointed representatives will zealously advocate on behalf of absent litigants in the same way that their hired representative presumably would have.

The dangers of MDL from the perspective of the paternalism model are exacerbated by the extremely loose connection required among the claims.[148] Wholly apart from the absence of a procedurally adequate method to determine the legitimacy of the attorneys in charge, there exist serious problems in having MDL satisfy the paternalism model of due process. Committee members' obligations to the mass of plaintiffs may undermine or dilute an individual plaintiff's unique interests, needs, or desires. If one plaintiff's best interests conflict with the majority's best interests (or even a small group's interests), how can the steering committee vigorously represent both? Indeed, one may question how these potentially conflicting responsibilities can be handled

[145] *See* discussion *supra* at xx.
[146] FED. R. CIV. PRO. 23(a)(4) ("the representative parties will fairly and adequately protect the interests of the class").
[147] *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008) ("[W]e have confirmed that, 'in certain limited circumstances,' a nonparty may be bound by a judgment because he was 'adequately represented by someone with the same interests who was a party' to the suit.") (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 298 (1996)).
[148] *See* discussion *supra* at xx.

ethically.[149] The Model Rules of Professional Conduct define conflicts of interest between concurrent clients broadly, and include even the "significant risk" of adversity among clients.[150] MDL plaintiffs often seek the same thing—the largest cut possible of the defendant's limited funds. Their success can come at another plaintiff's expense. This is similar to what happens when one lawyer represents multiple parties seeking to form a joint venture. In that scenario, the lawyer is "likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others."[151] Thus, even if the chosen attorneys are assumed to be fully competent and acting in good faith, it is impossible to be assured that in the one-size-fits-all practice of MDL, they will be able effectively to protect the rights of individual claimants.

In contrast, the modern class action demands close linkage among the claims, for the very purpose of assuring due process.[152] MDL claimants, on the other hand, are left in "a procedural no-man's-land,"[153] at the mercy of the transferee judge[154] and attorneys whose obligations are to the interests of many plaintiffs, which may not necessarily align with those of an individual plaintiff.

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[149] *See id.* at 97.

[150] Model Rule 1.7(a) says, "A concurrent conflict of interests exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (1983).

[151] *Id.* at 1.7 cmt.

[152] *See* discussion *supra* at xx.

[153] Burch, *Litigating Together*, *supra* note13, at 95.

[154] For an example of the criteria used to select members of a plaintiffs' steering committee, see *In re* San Juan Dupont Hotel Fire Litigation, No. MDL 721, 1989 WL 168401, at *6 (D. Puerto Rico Dec. 2, 1988). There, the transferee court listed "physical (e.g., office facilities) and financial resources; commitment to a time-consuming, long-term project; ability to work cooperatively with others; and professional experience particular to this type of litigation" as the main criteria for membership on the PSC.

Moreover, the MDL judge's selection of lead counsel is not subject to effective appellate review, even though the choice may turn out to be outcome-determinative in many ways, including whether a plaintiff's claim will settle in the transferee court (and for how much), resolved on summary judgment, or be transferred back to the transferor jurisdiction. Repeat MDL plaintiffs' counsel can work behind closed doors to lobby for specific attorneys to be named to the steering committee. This makes it extremely difficult for a newcomer attorney to receive enough support to be selected for a leadership role.[155] The individual plaintiff's wishes are easily lost in this series of smoke-filled rooms, and only a narrow group of plaintiffs' attorneys are appointed to leadership roles.

Ignoring the claimant's choice of lawyer disrespects the claimant and undermines the procedural autonomy that the Due Process Clause is intended to protect. Similarly, the established process of appointing lead counsel and ceding control to the court-appointed committees further undermines the paternalism model of the day-in-court ideal by failing to build in safeguards to assure the choice of adequate representatives who are able to zealously advocate on behalf of *all* claimants.

In addition to the fact that appointed counsel are selected by the court, rather than by the individuals they represent, MDL claimants do not enjoy a traditional attorney-client relationship with the members of the court-appointed steering committee. The small group of attorneys

[155] A recent survey of about 90 attorneys who practice in MDL cases indicates that snubbed attorneys resent this reality. As the surveyor wrote, "A substantial group of local plaintiffs' counsel resent the panel's role in facilitating national plaintiffs' counsels' 'takeover' of their cases. They criticize a repeat-player syndrome in the selection of plaintiffs' MDL counsel." Judge John G. Heyburn II, chair of the Judicial Panel on Multidistrict Litigation, responds: "We know that our orders can effectively disenfranchise some local plaintiffs' counsel. In every case, we ask ourselves whether centralization sufficiently promotes justice and efficiency, so much so that we should inconvenience some for the benefit of the whole." Heyburn & McGovern, *supra* note 33, at 30.

chosen for leadership roles is charged with representing all of the possibly thousands of plaintiffs, whose cases have facts that are often only loosely linked. This arrangement treats plaintiffs as an indivisible group rather than as individuals who are integral wholes, worthy of respect. Individual claimants do not have a direct line to the steering committee in the way they would with their own lawyers. Steering committee members act as gatekeepers to discovery materials obtained from defendants. Even if they were to freely grant access to those materials, committee members constitute a hurdle that is absent from the traditional attorney-client relationship. This severely attenuated attorney-client relationship between each claimant and the steering committee "inhibit[s] a client's ability to monitor her case as she would in an individual lawsuit."[156] This, too, violates both the autonomy and paternalism models of the day-in-court ideal.

If an individual plaintiff or her lawyer disagrees with a strategic choice made by lead counsel, she faces a steep uphill battle to reassert control over her representation.[157] That can hardly be characterized as a "full and fair opportunity to litigate" on her own terms. Because claimants forced into MDL effectively lose their chosen representatives, and the appointed representatives' loyalties are often likely to be divided, MDL falls far short of providing the

[156] Burch, *Litigating Together*, *supra* note 13, at 95 (advocating a plaintiff-consensus approach to managing non-class aggregate litigation).

[157] *See, e.g.*, *In re* San Juan Dupont Hotel Fire Litigation, No. MDL 721, 1989 WL 168401, at *10 (D. Puerto Rico Dec. 2, 1988) (outlining the procedure to be followed when an individual plaintiff's counsel disagrees with the PSC, stressing "that counsel must not repeat any question, argument, motion, or other paper propounded or filed, or actions taken by the PSC" and warning that "[f]ailure to abide by these terms shall result in sanctions against counsel personally"). In *In re* Bendectin Litigation, 857 F.2d 290, 297 (6th Cir. 1988), a group of plaintiffs complained that the transferee judge's appointment of lead counsel denied them the right to freely choose counsel. None responded to the judge's order to show cause why the selected attorneys should not be appointed. The Sixth Circuit found no error in the appointment, noting that the practice of appointing such committees is "well established" and the plaintiffs' "failure below to object to such a procedure."

"deep-rooted historic tradition" of an individual's day in court. Due process demands much more.

Another non-traditional feature of the relationship between appointed lead counsel and individual claimants is the compensation structure common among MDLs. In consolidated proceedings, "the attorney's loyalty divides not only between clients, but also between clients and self-interest."[158] Compensation for attorneys who work on behalf of the group depends upon the value of every plaintiff's settlement or judgment.[159] As a result, lead counsel may push hard for settlement as opposed to remand, prefer a quick settlement in favor of a protracted discovery period, or advocate for settlement terms that may not be particularly favorable to some or many plaintiffs. The First Circuit has acknowledged existence of this "inherent conflict[] of interest" "between the PSC and individual plaintiffs in mass-tort MDLs."[160] But even after doing so, the court affirmed in substantial part an order awarding over $10 million to the appointed plaintiffs' steering committee, in large part because the plaintiffs did not object soon enough.[161] MDL plaintiffs, their chosen attorneys, and the appointed steering committee all want the largest common fund possible, so that they can maximize their individual cuts. Still, how to allocate a common fund will usually be contentious,[162] and at that point plaintiffs' and MDL counsel's

[158] Burch, *Litigating Together*, *supra* note xx, at 98.
[159] *See* discussion *supra* at xx. *See also* Trangsrud, *supra* note 13, at 83 ("The inherent tensions of contingency fee representation have been intensified to such an extent by the mass trial that the adversary system may break down.").
[160] In re San Juan Dupont Plaza Hotel Fire Litig., 111 F.3d 220, 238 (1st Cir. 1997).
[161] *Id.* ("[D]espite reasonable notice of the obvious peril to their own financial interests, and their clear obligation to forfend against it from the outset, appellants did not turn serious attention to the PSC cost reimbursement regime deficiencies until the Gordian knot could no longer be undone. . . . [T]he request relief has been rendered impracticable, through appellants' inaction . . . .").
[162] *Id.* at 227 ("[I]nternecine differences as to subsidiary matters—particularly the appropriate allocations from the common fund for their respective attorney fees and costs—are commonplace.").

interests become adverse. Complicating matters further is the fact that at the same time, the retained attorneys who were not selected for a leadership role want to guard their fees. That goal may impact the nature of their advice about settling or agreeing to specific settlement terms. All of this is to say that MDL muddles the traditional relationship between attorney and client, creating new adverse incentives. It introduces additional tension between attorneys' best interests and clients' best interests.

At the most basic level, MDL plaintiffs are not "given a meaningful opportunity to present their case[s],"[163] as demanded by the Due Process Clause. Individual claims lose their individual identities when they are clumped together in an MDL. Even if the transferee court were to employ a more exacting standard than § 1407[164] to group like cases together for purposes of conducting discovery or bellwether trials, gone is the chance for unique discovery requests or personalized (let alone risky) litigation strategy. The primary idea behind MDL is to "coordinate" pretrial proceedings and the court-selected steering committee or lead counsel is responsible for ensuring that such coordination occurs.[165] Rather than facilitating participation in democratic governance, however, the practice of judicial selection of certain attorneys to run an MDL hinders individuals' ability to participate in the legal system on their chosen terms.

One might argue that this concern about control over litigation strategy is exaggerated because lawyers, rather than litigants, make most of the strategic choices, anyway. While it may be true that an individual's chosen representative may make the strategic choices day to day, the very act of choosing one's representative is a clear expression of litigant autonomy protected by due process. Consider an analogy to speech. No matter the relative merits of the steering

[163] Mathews v. Eldridge, 424 U.S. 319, 349 (1976).
[164] Section 1407 requires that there be "one or more common questions of fact" among cases that are to be consolidated into a MDL. 28 U.S.C. § 1407(a).
[165] *See generally* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 40.22.

committee compared to the litigant's retained attorney, selecting a representative to work towards an individual's litigation goals is the individual's prerogative and, indeed, is the foundation of the day-in-court ideal. MDL unconstitutionally undermines that choice.

It is true that theoretically, MDL only involves a temporary transfer for pretrial purposes; claimants' individual days in court await them back in the transferor courts. It is also true that no one is forcing these claimants to accept settlement offers in the transferee court; they can always hold out for remand to their preferred jurisdictions, where they will have the opportunity to have their personally chosen lawyers represent them, and can attempt to implement their own strategies. But this view demonstrates an incomplete understanding of the power of transferee courts. First, all players in an MDL, including the judge, face enormous pressures to achieve a global resolution in the transferee district. Not least of these pressures is the duration of the litigation to that point, which is usually several years, at a minimum. Second, even if a claimant does elect to wait for remand, the steering committee has already dictated the direction of the suit. Transferor judges on remand are disinclined to grant discovery requests that seem at all duplicative of work the steering committee already did, or that seem like something the claimant should have asked the steering committee to address. Transferee judges make decisions about expert testimony that carry over to remand, as well. In addition, transferee judges can and do rule on dispositive motions, so there is no guarantee that all parts of the litigant's claim will survive summary judgment in the transferee district.

If the day-in-court ideal stems from a democratic commitment to demonstrating respect for individual autonomy, then a set of procedures that undermines litigants' choices cannot satisfy the constitutional demand for an individual's day in court. In other words, a procedure cannot satisfy the right to a constitutionally dictated day in court if it does not protect the very

values that gave rise to the constitutional right in the first place. Multidistrict litigation disrespects that individual autonomy. It does not provide claimants with the choices and control that are necessary to satisfying the individual's right to a day in court.

D. Utilitarianism, Due Process, and MDL

We have already demonstrated the seemingly insurmountable due process problems to which MDL gives rise. However, the question arises whether a utilitarian calculus of due process would justify multidistrict litigation because of the litigation efficiency it is assumed to provide. Respect for individual autonomy dictates the right to an individual day in court, but perhaps that right is not absolute. Like the right to free speech, the constitutional guarantee of a day in court may not be without limits; interests dictating such a right must be weighed against other interests when determining whether the government must provide a particular procedure or opportunity in a particular case. The day-in-court ideal is admittedly not always the most efficient way to adjudicate rights. Indeed, there always exists inherent inefficiency in guaranteeing procedural due process in the first place. Reflecting that reality, the Supreme Court has fashioned a utilitarian test for determining whether specific procedures are required in specific circumstances. But even a utilitarian view of due process cannot save the unconstitutionality of MDL.

Utilitarians argue that the paramount goal of all due process analyses must be accurate outcomes because they maximize social welfare.[166] According to this approach, the process that is "due" is the one most likely to prevent unjustified or mistaken deprivations, at the lowest cost.[167] To determine the value of a given procedure, these theorists rely on the procedure's

[166] Mashaw, *supra* note 129, at 47.
[167] *E.g.*, Bone, *Procedure, Participation, Rights*, *supra* note 144, at 1028; *see also* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 111 (1979) ("An

effect on accuracy and its relative cost compared to other available procedures. If a procedure is likely to produce more accurate outcomes, and the increased likelihood of accuracy is greater than the relative cost of the procedure, then the procedure is "due."[168]

i. The *Mathews-Doehr* Test

The Supreme Court endorsed a utilitarian view of the Due Process Clause in *Mathews v. Eldridge*. *Mathews* considered what process was due prior to deprivation of Social Security benefits.[169] There, the Court emphasized, "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[170] In laying out its oft-cited three-part test for identifying "the specific dictates of due process," the *Mathews* Court specifically identified "the probable value, if any, of additional or substitute procedural safeguards" as a key component of the due process inquiry.[171] The Court proceeded to examine the "fairness and reliability" of the pre-deprivation procedures at issue.[172] It referred to "the risk of error inherent in the truth finding process."[173] The *Mathews* Court also assessed the public cost of a particular procedure, including "the administrative burden and other

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act or practice is good or just in the utilitarian view insofar as it tends to maximize happiness, usually defined as the surplus of pleasure over pain.").

[168] Bone, *Procedure, Participation, Rights*, *supra* note xx, at 1017 ("[F]ew people, if any, would think that reducing the risk of error is always important enough to justify substantial social investments that could otherwise be used to improve roads, schools, public health, and the like."). *See also* Mashaw, *Three Factors in Search of a Theory of Value*, *supra* note 166, at 48 ("[U]tility theory can be said to yield the following plausible decision-rule: "void procedures for lack of due process only when alternative procedures would so substantially increase social welfare that their rejection seems irrational.'"); Solum, *supra* note 121, at 244–47 (describing and critiquing the "accuracy model").

[169] 424 U.S. 319 (1976). See discussion supra at xx.

[170] Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (internal quotations and citations omitted).

[171] *Id.* at 335.

[172] *Id.* at 343.

[173] *Id.* at 344.

societal costs."[174] Finally, it left open the possibility that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[175] Accuracy may be the paramount interest, but at some point it is outweighed by the cost of achieving it. The Court extended this utilitarian view of the Due Process Clause to include suits between private citizens in *Connecticut v. Doehr*.[176] There it applied the *Mathews* test to a Connecticut statute that allowed prejudgment attachment of real estate without notice, a hearing, a showing of extraordinary circumstances, or a requirement that the party seeking attachment post a bond.[177] It concluded that the Connecticut statute did not satisfy due process, as measured by the *Mathews* three-prong analysis. *Doehr* solidified the Court's commitment to using utilitarian balancing to determine whether due process demands a specific procedure.

As already noted,[178] the *Mathews* test was designed primarily, if not exclusively, to determine whether *particular procedures* are required by the Due Process Clause, rather than whether there is a right to a day-in-court in the first place. In *Mathews*, the Court faced only the question of "what process is due prior to the initial termination of benefits, pending review."[179] It outlined the elaborate procedures available to Social Security beneficiaries whose benefits are terminated, which included an evidentiary hearing after initial termination of benefits.[180] The *Mathews* test, then, did was not fashioned in a case asking *whether* a day in court was required,

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[174] *Id.* at 347.
[175] *Id.* at 348.
[176] 501 U.S. 1 (1990). The Court altered the third *Mathews* factor slightly, describing it as "principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11.
[177] *Id.* at 4.
[178] *See* discussion *supra* at xx.
[179] *Id.* at 333.
[180] *Id.* at 339.

but *when* it was. This is an important distinction. Though it clearly embraced a utilitarian approach to measuring procedural due process requirements, *Mathews* was not a case about an exception to the day-in-court ideal *per se*. The fact remains, however, that a utilitarian concern with burdens and efficiency always remains the elephant in the room in any due process analysis. It is therefore necessary to consider the extent to which efficiency concerns should be deemed to temper our stinging due process critiques on multidistrict litigation.

The most immediate response to reliance on the utilitarian calculus is that it completely ignores any concern with individual dignity or autonomy, which are properly deemed to provide the theorectical DNA of the Due Process Clause. Yet while respect for individual autonomy justifies the day-in-court ideal in the first place, the *Mathews-Doehr* test ignore it entirely. The *Mathews-Doehr* balancing test explicitly considers the likelihood that a particular procedure will produce more accurate decisions, which outcome-based theorists consider the paramount goal of process. This is a limited view of the goals of due process protections; indeed, "[r]ights in a utilitarian system are strictly instrumental goods."[181] But the *Mathews-Doehr* doctrine and its utilitarian supporters ignore the other benefits of individual participation in litigation, such as individual autonomy or dignity. Ignoring the effect on individual dignity is a mistake. For one thing, procedural rights have inherent value beyond maximizing social welfare. They also serve instrumental values because they facilitate social goods beyond accurate judicial decision-making, such as a vital, participatory democracy and governmental legitimacy. Were it to be applied to the day-in-court question, the *Mathews-Doehr* test might too easily dismiss an individual day in court simply because it would be more convenient, efficient, or easier for the government not to provide one. Conceptions of procedural due process that focus exclusively on

[181] Posner, *supra* note xxx, at 116.

outcomes and interest-balancing are under-inclusive because they fail to account for the full breadth of values promised and protected by the Due Process Clause.[182]

An individual day in court demonstrates the government's respect for the individual by giving her a chance to speak for herself. Thus, in the words of one scholar, "[a]llowing individuals the freedom to act on and to govern their own legal affairs is a political and moral good."[183] At the very least, then, utilitarianism cannot be deemed the *only* value underlying our nation's commitment to due process. The choice of a form of forced wholesale justice, where the interests and needs of individual litigants are almost cavalierly ignored in favor of the myopic pursuit of efficiency, cannot possibly be deemed consistent with the dictates of due process, either as a normative or descriptive matter.

In any event, the day-in-court ideal *does* foster the utilitarian concern with accurate decision-making. The entire adversary system is premised on a notion of "litigation capitalism": the litigants' incentive to prevail gives that litigant the incentive to marshal the strongest possible case on her behalf. With both sides engaging in such a process, the passive adjudicator is informed in the most effective way possible. Where either the claimant or the defendant is denied an effective opportunity to present her case, the accuracy of the final decision is placed in serious doubt.

Viewed in this light, it is by no means clear that MDL actually fosters accuracy in decision making. An individual claimant's attorney, who is presumably familiar with the specific facts of her client's case and is motivated solely to vindicate and protect those interests, is in the

[182] *See* Mashaw, *Three Factors in Search of a Theory of Value*, *supra* note 129, at 48 ("As applied by the *Eldridge* Court the utilitarian calculus tends, as cost-benefit analyses typically do, to 'dwarf soft variables' and to ignore complexities and ambiguities.").
[183] Tidmarsh, *supra* note xx, at 1142.

best position to assist the judge in reaching an accurate resolution of the litigation. [184] In contrast, where MDL attorneys know little or nothing of individual plaintiffs' cases when they control discovery or shape settlement, and the cases which have been herded together often are likely to have relatively little in common, accuracy in the resolution of individual suits is, at best, open to serious question.

MDL management is unbound by specific rules, so transferee judges do not conduct the coordinated proceedings uniformly. Each transferee judge selects lawyers to hold leadership positions on her own terms. Appointment to the steering committee is not the result of an adversarial process and it is not subject to any test for adequacy of representation. Similarly, bellwether trials occur without any guarantee that the tried cases are typical of the claims of the plaintiffs participating in the MDL. The results of those bellwether trials are then used to facilitate settlement and evaluate the strength of various arguments. Even if cases are transferred back to the districts in which they were originally filed, the work of the steering committee and the pretrial orders entered by the MDL judge permanently impact the ultimate resolution of the claims. Transferee judges cannot and do not make individual rulings on all issues for all cases consolidated into the MDL. The fact that these procedures are unregulated makes it impossible to evaluate their accuracy for purposes of the *Mathews-Doehr* test, but the process smacks of a mass-produced form of rough justice. An individual lawsuit in federal district court, on the other hand, is the most accurate procedure available. The "probable value" of individual proceedings is high, because individual litigation would ensure that each claimant exercised control over how his rights were asserted.

[184] Sturm, *supra* note 90, at 985 ("Adversarial presentation by parties' lawyers enhances the likelihood of reaching a correct decision.").

Even assuming that MDL procedures are not as likely to be accurate as individual litigation would be, it might be argued that the government's interest in reducing litigation burdens justifies MDL. MDL seems attractive because it saves resources by forcing claimants to litigate as a group, instead of as hundreds or thousands of individuals in parallel actions. If MDL leads to outcomes that are at least as accurate as adjudication of individual claims does, then this cost saving is permitted under the utilitarian model of due process. Judge James F. Holderman put it this way: "Without the centralized control of a MDL transferee judge, the cost of duplicative discovery and e-discovery in each case consolidated as a MDL action for pretrial purposes would be a significant detriment to each case's litigants and justice in America as a whole."[185]

Judge Holderman's argument may be intuitively attractive, given the stated purpose of MDL and the sobering idea of thousands of cases stemming from one event. But assessments of the empirical benefits of MDL are not uniformly positive. Even members of the Panel recognize that "centralization does not benefit all parties equally and that, for some parties, it can be actually less efficient."[186] By several accounts, MDL takes much longer than individual litigation.[187] It is also at times inconvenient, for both plaintiffs and defendants.[188] All this is to

[185] James F. Holderman, *Sua Sponte: A Judge Comments*, 38 LITIGATION, no. 3, Spring 2012, at 27.
[186] Heyburn & McGovern, *supra* note 33, at 32.
[187] *See, e.g.*, Delaventura v. Columbia Acorn Trust, 417 F. Supp. 2d. 147, 150 (D. Mass. 2006) ("as compared to the processing time of an average case, MDL practice is slow, very slow); Fallon et al., *Bellwether Trials*, *supra* note 60, at 2325 (noting the "traditional delay associated with MDL practice" and that "The relevant comparison is not between a massive MDL and an 'average case,' but rather between a massive MDL and the alternative thousands of similar cases clogging the courts with duplicative discovery and the potential for unnecessary conflict.").
[188] *See In re* "East of the Rockies" Concrete Pipe Antitrust Cases, 302 F. Supp. 244, 254 (J.P.M.L. 1969) (Weigel, J., concurring) ("[C]oordination and consolidation may impair, not further, convenience, justice and efficiency. . . . There are a number of inherent inconveniences in transfers for coordinated or consolidated pretrial. Some plaintiffs are temporarily deprived of

say that it is not at all clear that MDL as it now functions is actually advancing the government's interests in efficiency and saving litigation resources.

Applying the *Mathews-Doehr* factors, then, MDL features an immeasurably high risk of inaccuracy or erroneous deprivations. At the same time, whether MDL actually advances the government's interest in efficiency is uncertain at best. The private interest in vindicating an alleged wrong through a fair, reasonably accurate process outweighs the potential efficiency gains of MDL. This means that MDL does not even survive the *Mathews-Doehr* analysis even assuming its relevance. Even assuming MDL is more efficient than individual litigation, the uncertainty surrounding whether MDL leads to erroneous deprivations or inaccurate results is too great a risk to take when constitutionally protected interests are at stake.

IV. IS MDL CONSTITUTIONALLY SALVAGEABLE?

For all of the reasons discussed in detail throughout this Article, MDL, as currently structured, must be deemed unconstitutional, because it infringes individual claimants' procedural due process rights. Measured in terms of autonomy, paternalism, utilitarianism, or dignitary theories, procedural due process demands considerably more protection of the individual litigants' interest than MDL provides. But this conclusion does not necessarily mean that it is impossible to fashion a similar coordination procedure possessing many of MDL's benefits that nevertheless satisfies procedural due process. If so, however, Congress and the Panel would need to make significant changes to ensure that each MDL claimant is able to fully exercise his right to an individual day in court. The due process guarantee of a "full and fair opportunity to litigate" is not mutually exclusive of efficient, streamlined discovery and other

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their choices of forum and some defendants may be forced to litigate in districts where they could not have been sued. Considerable time and trouble are involved in the sheer mechanics of transferring and remanding.").

pretrial procedures. But when they are in tension, due process calls for prioritization of litigant autonomy over efficiency. The tie goes to litigant autonomy because respecting individuals' choices reaps benefits that advance the American notion of the relationship between government and governed that lies at the heart of our constitutional structure.

The primary goal of this Article is not to prescribe one particular solution or "fix" for the constitutional problems described here. The key to avoiding constitutional difficulties, however, is to recognize that if the benefits of MDL are to be achieved, they must be achieved through the free choice of the individual litigants to take part in the collectivist process. This would satisfy the autonomy concerns of due process. In other words, to ensure due process, transfer into an MDL must be elective instead of mandatory. Claimants who choose transfer would benefit from the steering committee's large-scale discovery and other features of MDL. Especially if they were hoping only to settle their individual cases, they very well may choose this option. But if they preferred a faster resolution, or wanted more than money, or did not care to travel, or trusted their retained lawyer more than a stranger from across the country, they might opt out of consolidation. Opting in or staying out, however, must be their prerogative. Under this approach, participating in an MDL would become a strategic choice rather than a forced path.

Moreover, in order to satisfy the paternalism due process concerns, other adjustments need to be made. First, Congress should establish a uniform procedure for selecting attorneys to serve in leadership roles. As it stands, each transferee court appoints steering committees according to their own procedures and criteria. Instead, appointment should be the result of a process open to all affected parties and their retained representatives. The process should be designed to ensure that the leadership committees are made up of attorneys with different backgrounds and whose clients represent a wide array of the claims involved in the MDL, similar

to the typicality requirement for class actions. Attorneys should not be permitted to trade favors of support behind closed doors, and the group of plaintiffs' attorneys who are appointed should not be a closed circle.

In order to reduce due process difficulties, transferee courts could also make changes to case management to ensure a more active, symbiotic relationship between steering committee members, other attorneys involved in the MDL, and the claimants. Communication between a plaintiff and the steering committee should be as fluid as it would be between the plaintiff and her retained counsel if her claim had not been transferred into an MDL. All retained plaintiffs, not just those appointed to leadership roles, should--to the extent feasible--have some opportunity to take part in strategic decisions. If an individual plaintiff prefers a different strategy or wants to make a specific discovery request, ways to provide such opportunities should at least be explored.

An even more radical solution might be to coordinate and share discovery among cases that feature at least one common question of fact, but to do so remotely, without transferring the cases into a single district court. The advent of electronic discovery, video conferencing, and cloud-based data sharing are already transforming discovery practices. Those technologies could facilitate the type of coordination and sharing that the MDL designers wanted in the first place. This type of cooperation could be more efficient, too.

Some of these suggested changes may seem burdensome, if not inefficient. They undoubtedly will require more time, effort, and creativity than the current procedures do, which may make MDL, as modified, less attractive. But constitutional rights cannot be sacrificed for mere convenience. These ideas are not meant to represent the perfect answer to MDL's insufficient due process safeguards. Rather, they are designed to provide only a starting point for

a much-needed conversation about reconciling the day in court ideal with the overwhelming nature of mass torts and similar cases, which are often swept into MDLs.

CONCLUSION

Although Anglo-American jurisprudence does have a venerable history of representative litigation, it is important to understand the fundamental differences between the historically acceptable form of representative litigation on the one hand and the procedural collectivism of the post-1966 era, on the other. Historically, the only form of binding representative litigation involved claims that were legally intertwined in a substantive, pre-litigation context.[189] In those instances, the claims of the various plaintiffs are already linked at the point at which litigation begins--either by choice or by substantive law. In contrast, the modern forms of procedural collectivism--the class action and multidistrict litigation--give rise to a far greater threat to the values embodied in the Due Process Clause. In these situations, substantive rights which are, in their pristine form, held solely by the individual, are lumped together--often quite crudely--in a manner which may significantly interfere with the individual claimants' due process right to their day in court.

We are not so naïve as to believe that, in the modern day of complex litigation, it is feasible to avoid all forms of procedural collectivism. But there are ways to achieve the advantages of such collectivism without so blatantly undermining core procedural rights of the individual claimants the way current MDL practice does. Indeed, with all of its serious drawbacks and problems, modern class action procedure provides a stark contrast to MDL practice. Whereas class action in every case requires a transparent judicial finding of adequate

[189] See Redish, Wholesale Justice, *supra* note 15, at 1-12.

representation of the interests of absent claimants, MDL has no such requirement.[190] Whereas in most class actions absent class members have the right to opt out of the proceeding, MDL provider no means either for withdrawing from the proceeding or even meaningfully challenging the legality or propriety of inclusion within it.

If our traditions and values of due process mean anything, the individual's right to a day in court must be preserved, even within the broader framework of procedural collectivism. Multidistrict litigation unconstitutionally infringes the procedural due process rights of claimants forced into all-important consolidated pretrial proceedings against their will.

Surprisingly, this Article is the first to present a frontal assault on the constitutionality of MDL. In advancing this attack, the Article has sought to expose an extremely popular complex litigation procedure that today impacts a significant percentage of civil cases. MDL may seem to provide a cure-all to the difficulties of attempting to certify class actions on a massive scale, but it faces even greater constitutional roadblocks than does the modern class action. Despite its arguable efficiencies and perceived conveniences (which themselves are open to question[191]), multidistrict litigation stealthily transforms fundamental characteristics of numerous claims so that they are unrecognizable as distinct actions filed by individual plaintiffs. Moreover, it may well do so even against the will of those plaintiffs, without providing them with meaningful recourse to challenge either their inclusion in the collectivist process or the adequacy of their representation in that process. Upon close examination, while multidistrict litigation promises respect for the individual day in court, it delivers only a "Wild West" form of rough group justice, on the court-appointed steering committee's terms. Due process cannot tolerate such a system.

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[190] *See* discussion *supra* at xx.
[191] *See* discussion *supra* at xx.