2019

The Future of Multidistrict Litigation

Jay Tidmarsh
Daniela Peinado Welsh

Follow this and additional works at: https://opencommons.uconn.edu/law_review

Recommended Citation
https://opencommons.uconn.edu/law_review/423
Essay

The Future of Multidistrict Litigation

JAY TIDMARSH & DANIELA PEINADO WELSH

The occasion for this Essay is the fiftieth anniversary of the enactment of the multidistrict-litigation statute, 28 U.S.C. § 1407. Multidistrict litigation has quietly become a central feature of federal litigation, sweeping one-third or more of all federal civil cases each year into aggregate proceedings. Recent commentary on multidistrict litigation has been highly critical of the “Wild West” quality of the proceedings, which arguably benefit repeat-player lawyers at the expense of their clients’ interests and autonomy. Reform of the process now seems likely. This Essay begins by describing the features, most historically contingent, that have brought multidistrict litigation to this crossroads. Using these features as its foundation, the Essay demonstrates that they have combined to create a form of action not unlike an opt-in class action, but without the formal procedural protections that class actions contain. Turning to the future, the Essay suggests alternate paths for reform: one that brings multidistrict litigation into closer alignment with Rule 23 and one that pulls multidistrict litigation back to a more modest discovery-coordinating process that mirrors Congress’s original design for § 1407. Both paths leave large, albeit different, gaps in the handling of aggregate litigation. The Essay closes by arguing that the two paths can be blended into a better multidistrict process.
ESSAY CONTENTS

INTRODUCTION ........................................................................................................ 771
I. HOW WE GOT HERE ............................................................................................. 774
II. WHERE WE ARE .................................................................................................. 782
III. WHERE WE SHOULD GO .................................................................................... 789
   A. TOWARD AN OPT-IN CLASS ACTION ....................................................... 789
   B. BACK TO DISCOVERY COORDINATION ................................................. 795
   C. BOTH FORWARD AND BACK: A MIDDLE GROUND ............................. 797
CONCLUSION ........................................................................................................... 798
The Future of Multidistrict Litigation

JAY TIDMARSH * & DANIELA PEINADO WELSH **

INTRODUCTION

The anniversary of major legislation creates an occasion to reflect on its accomplishments and future direction. Now in its fiftieth year, the multidistrict litigation (MDL) statute, 28 U.S.C. § 1407, was not regarded as major legislation when it was created.¹ And the MDL process began modestly enough. In its first nine years, the Judicial Panel on Multidistrict Litigation² consolidated fewer than 5,600 federal civil actions in total.³

Today, however, the MDL process is arguably the central feature in federal litigation. Over the past five years, the Judicial Panel has consolidated an average of slightly more than 42,100 civil actions each year.⁴ Presently, more than 143,500 cases—or substantially more than one-


² Section 1407 established the Judicial Panel, a seven-member body composed of federal judges and tasked with determining both whether to transfer cases pending in different federal districts and, if consolidation is appropriate, which the district judge should preside over the proceeding. See 28 U.S.C. § 1407(a), (b), (d) (2012).

³ Of this number, the Panel transferred 3,075 actions. Another 2,498 actions were originally filed in transferee districts and then consolidated. Stanley A. Weigel, The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts, 78 F.R.D. 575, 583 n.62 (1978).

⁴ Of this number, the Panel on average consolidated slightly more than 5,450 cases per fiscal year. An average of just over 36,650 actions per year were originally filed in transferee districts and then consolidated. See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIG. (2015), (2016), (2017), (2018) [hereinafter STATISTICAL ANALYSIS], available at https://www.jpml.uscourts.gov/statistics-info?field_type_value_1%5B%5D=Fiscal+Year (listing the number of actions that were transferred, originally filed in transferee courts, and subject to § 1407 proceedings each fiscal year from September 1968 to September 2018). For the most recent year-end statistical analysis, see id. (2018). Each year’s analysis provides both actions transferred or filed in the present year and an adjusted total of cases transferred or filed in the prior year. The figures provided in the text and in this note use the adjusted figures for each fiscal year except 2018, for which an adjusted total is not yet available.
third of all federal civil lawsuits—are pending in an MDL proceeding.\(^5\)

Because most cases are finally resolved in the MDL forum,\(^6\) the cadre of “transferee judges”\(^7\) who oversee MDL proceedings dispense the only justice that one-third of all federal civil litigants receive. MDL proceedings also exercise outsized influence on state court litigation: transferee judges often coordinate pretrial activities with their state court counterparts,\(^8\) and global settlements in MDL cases are sometimes held open to state court litigants as well.\(^9\)

The Congress that created § 1407 did not envision this expansive role.\(^10\)

The MDL process was designed to coordinate repetitive discovery, a task

---

\(^{5}\) See U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report — Distribution of Pending MDL Dockets by District 5 (2019), https://www.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-April-15-2019.pdf (reporting 143,664 pending MDL cases). Because reports on pending civil cases lag behind the reports on pending MDL cases, the most recent apples-to-apples comparison is from September 2018, when 156,511 MDL cases were pending, Statistical Analysis, supra note 4, at 5, out of a total of 372,820 pending federal civil cases, Admin. Office of U.S. Courts, U.S. District Courts — Civil Cases Filed, Terminated, & Pending tbl.C–1 (2018), https://www.uscourts.gov/sites/default/files/data_tables/0930.2018.pdf. Thus, as of September 2018, 42.0% of all federal civil lawsuits were a part of an MDL proceeding.

\(^{6}\) See Statistical Analysis (2018), supra note 4, at 3 (explaining that since its inception in 1968 through September 2017, the MDL process has resulted in the transfer of 673,104 cases, of which 516,593 cases had been terminated; only 16,728 of the terminated cases—or 3.24%—had been remanded to their original transferor forums).

\(^{7}\) The “transferee judge” is the judge to whom the seven-member Judicial Panel on Multidistrict Litigation assigns a multidistrict proceeding. See Weigel, supra note 3, at 575–77 (describing the roles of the Judicial Panel, the transferor court, and the transferee court).


\(^{9}\) See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/ AJB), 2008 WL 682174, at *3 (D. Minn. Mar. 7, 2008) (detailing settlement terms that were crafted to include MDL plaintiffs, plaintiffs in state court cases, and potential plaintiffs who had not yet filed lawsuits); Margaret S. Thomas, Morphing Case Boundaries in Multidistrict Litigation Settlements, 63 Emory L.J. 1339, 1381 (2014) (describing the “emergence of the transjurisdictional MDL settlement trend”).

\(^{10}\) The push for a multidistrict litigation statute began in 1961, when Chief Justice Warren appointed the Coordinating Committee for Multiple Litigation of the United States District Courts. The Committee was established to consider ways to cope with discovery problems in multiple-district litigation, particularly antitrust cases. See Francis J. Nyhan, Comment, A Survey of Federal Multidistrict Litigation, 15 Vill. L. Rev. 916, 919 (1970). As Professor Bradt’s pathbreaking account about the passage of § 1407 has shown, the judges and scholars who shepherded the MDL statute to passage were prescient enough to envision the modern scope of multidistrict litigation. See Bradt, supra note 1, at 916 (“[T]he MDL statute is now playing essentially the role [the statute’s proponents] expected it would.”). Our point is different: Nothing in § 1407’s legislative history suggested that members of Congress were aware that the statute would have its present impact; indeed, it is unlikely that the statute would have received unanimous support in both chambers had members of Congress foreseen multidistrict litigation’s trajectory. Cf. id. at 882 (noting ways in which the judges pushing to secure passage of § 1407 were sometimes disingenuous in their representations).
that transferee judges were to accomplish through common discovery orders, centralized document depositories, and depositions that could be used in individual cases on remand.\textsuperscript{11} Once discovery concluded, the statute required the Panel to remand to their transferor forums all cases not resolved in the MDL proceeding.\textsuperscript{12}

The evolution of multidistrict litigation into a mass-resolution form has divided commentators. Seizing on the lack of formal structures or individual protections, many have expressed concerns that MDL proceedings have become the Wild West of aggregation law, with all of the agency costs and diminished autonomy of class actions but little of Rule 23’s judicial authority to check the rapacity and self-interest of repeat-player MDL counsel.\textsuperscript{13} But other commentators regard the flexibility in the present MDL system as a desirable, or at least a necessary, means to ensure that mass wrongdoers are held to account and that victims receive a modicum of justice—justice that alternative measures cannot provide as efficiently, if at all.\textsuperscript{14}

\textsuperscript{11} These three techniques—and only these techniques—merited specific mention in the House and Senate reports on the legislation that became 28 U.S.C. § 1407. They were highlighted because the impetus behind the Judicial Conference’s request to establish a multidistrict proceeding was a set of nettlesome electrical equipment antitrust lawsuits that the coordinated efforts of the thirty-odd federal judges had resolved. Their success resulted from adoption of the three techniques. See H.R. REP. NO. 1130 (1968), \textit{as reprinted in} 1968 U.S.C.C.A.N. 1898, 1899; S. REP. NO. 90-454, at 3–4 (1967); Weigel, \textit{ supra} note 3, at 575.

\textsuperscript{12} See 28 U.S.C. § 1407(a) (2012) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .”).


\textsuperscript{14} See, e.g., Bradt, \textit{ supra} note 1, at 914–15 (“MDL’s incorporation of traditional norms of individual control insulate the structure from the kinds of due process attacks that plagued the class action . . . . In a world in which trials are increasingly rare and pretrial procedure is dominant, . . . MDL is the poster child for twenty-first-century procedure.”) (footnotes omitted); Abbe R. Gluck, \textit{Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure}, 165 U. PA. L. REV. 1669, 1675 (2017) (describing interviews with MDL judges who described MDLs as “immensely satisfying” and who “resist[ed] at all cost imposing rules—whether in the [Federal Rules of Civil Procedure] or through uniform federal procedural common law—on the MDL process”); \textit{id. at} 1710 (“MDLs demand that we pay attention to the nationalization of litigation, the limits of the [Federal Rules],
The present debate suggests that multidistrict litigation is not yet in a stable resting place. This Essay takes a long-term view of multidistrict litigation’s progression, focusing on how past practices have both created its present instability and have marked the path for its future development. Part I describes six practices, each contingent at the time that it developed, that have transformed § 1407 into its present form. Part II argues that these practices have pushed the MDL proceedings close to a de facto opt-in class action. This movement has generated predictable problems—as well as predictable proposed solutions, which, if enacted, would cement the MDL process into a class-action form.

Part III sketches two alternative visions for multidistrict litigation in the next half-century. One vision extends the present trend line, positing changes in other doctrinal and structural practices that seem inevitable if the MDL process continues on its present path toward an opt-in class action. This vision is not above criticism: it strikes the balance between autonomy and collective action decidedly in favor of the latter, leaving unoccupied the ground between autonomous individual litigation and collective redress that the MDL process once occupied.

Giving greater weight to individual autonomy, the second vision requires a retreat toward the discovery-coordinating ground that § 1407 was meant to claim. A simple doctrinal change, reversing one of the six past practices, will accomplish this rollback. This vision enhances the control of plaintiffs over their cases—albeit at the cost of less efficient resolution of aggregate litigation in the short term.

Both directions have flaws. We close by suggesting that the alteration of another past practice can blend the two visions into an MDL process that achieves greater benefits with fewer side effects.

I. HOW WE GOT HERE

Of the six developments that have shaped the MDL process, three involve specific powers assumed by the transferee judge, two arise from other doctrinal changes that affected the scope of multidistrict proceedings, and one concerns the structural relationship between the Judicial Panel and transferee judges. By the early 2000s, this constellation of factors had
ripened to form the core of the present MDL process.

The first development occurred almost immediately: early transferee judges asserted the power to rule on all pretrial motions—including dispositive motions to dismiss or for summary judgment—that arose during the MDL proceeding.\textsuperscript{18} Although not a given, this exercise of power was no surprise. Section 1407(b) gave the transferee judge the power to conduct “pretrial proceedings,” and dispositive motions are undeniably part of the pretrial process.\textsuperscript{19} The House Report contemplated that “the transferee district court would have authority to render summary judgment [and] to control and limit pretrial proceedings.”\textsuperscript{20} But a fair-minded reading of the Report shows that this statement was very much a secondary thought. Most of the House Report focused on the beneficial effects that consolidating litigation would have on discovery.\textsuperscript{21} For its part, the Senate Report focused entirely on the transferee court’s power to superintend common discovery; it was silent about the power to rule on dispositive motions.\textsuperscript{22} The Senate Report noted, however, that “remand to the originating district . . . will be desirable” to conduct supplemental case-specific discovery.\textsuperscript{23}

Some early cases, and even a few later ones, expressed doubt about the transferee court’s broad power to enter a judgment affecting all consolidated cases, as opposed to a limited power to resolve a specific case on grounds unique to that case.\textsuperscript{24} But such hesitance dissipated, and today the MDL

\textsuperscript{18} See FED. R. CIV. P. 12(b)(1)–(7) (listing seven case-dispositive motions to dismiss); FED. R. CIV. P. 56(a) (permitting the entry of summary judgment when no genuine issue of material fact precludes the entry of judgment as a matter of law); Humphreys v. Tann, 487 F.2d 666, 667–68 (6th Cir. 1973) (rejecting the argument that the MDL transferee court “did not have the authority or power to grant summary judgment”); Kaiser Indus. Corp. v. Wheeling-Pittsburgh Steel Corp., 328 F. Supp. 365, 371 (D. Del. 1971) (“[W]hile the impetus for the adoption of the legislation was a desire to simplify discovery procedures in multidistrict litigation, it was the intent of Congress to grant to the transferee district court under § 1407 the power to pass upon all pretrial motions, including motions to dismiss, motions for judgment on the pleadings, or motions for summary judgment.”). The Judicial Panel acknowledged, without negative comment, that transferee judges were exercising these powers. See, e.g., In re Multidistrict Private Civil Treble Damage Antitrust Litig. Involving Gypsum Wallboard, 302 F. Supp. 794, 794 (J.P.M.L. 1969) (“Motions to quash service or dismiss for lack of jurisdiction are being routinely considered by courts to which multidistrict litigation has previously been transferred . . . .” (footnote omitted)).

\textsuperscript{19} Cf. 28 U.S.C. § 636(b)(1)(A) (2012) (providing magistrate judges the power to determine “any pretrial matter” with certain exceptions, including “a motion . . . for summary judgment [or] to dismiss”).

\textsuperscript{20} See H.R. REP. NO. 1130, supra note 11, at 3.

\textsuperscript{21} See id. (discussing the “desirable improvements in judicial administration” and the “substantial benefit” that would result from implementation of a Judicial Panel on Multidistrict Litigation).

\textsuperscript{22} See S. REP. NO. 90–454, supra note 11, at 2, 4–5 (1967).

\textsuperscript{23} Id.

\textsuperscript{24} See, e.g., In re Donald J. Trump Casino Sec. Litig.—Taj Mahal Litig., 7 F.3d 357, 367 (3d Cir. 1993) (“Apparently, transferee courts frequently terminate consolidated cases in practice.”); In re Multidistrict Private Civil Treble Damage Antitrust Litig. Involving Motor Vehicle Air Pollution Control Equip., 52 F.R.D. 398, 402 (C.D. Cal. 1970) (“The function of the judge assigned cases pursuant to . . . Section 1407, is to coordinate pretrial proceedings with the view of returning cases to the transferor judge in condition to be tried expeditiously to the benefit of all parties to the litigation.”). In its early opinions
court is seen as a forum for resolving any pretrial matter.

The second development involved a particular pretrial motion: the motion to transfer under 28 U.S.C. § 1404. Unlike § 1407(a), § 1404(a) permits a judge in any federal case to transfer a case to another district "where it might have been brought" for all purposes, including trial. Transferee judges in MDL litigation soon began to engage in a practice known as "self-transfer": stepping into the shoes of the judges from the transferor forums, MDL judges entered § 1404 orders transferring multidistricted cases for all purposes, including trial, to the transferee district itself. Although self-transfer did not always work (some consolidated cases could not have been brought originally in the MDL forum), in many instances a single order permitted the transferee judge to exercise plenary authority over consolidated cases.

Lexecon abruptly terminated nearly thirty years of this practice, holding that self-transfer thwarted the Judicial Panel’s statutory obligation to remand cases to their transferor forums for trial. By then, however, the die had been cast. MDL courts viewed themselves as the forum for achieving the final resolution of big, sprawling lawsuits. Although Lexecon may have banned one technique to bring MDL cases to conclusion, few cases in the 1990s were going to trial anyway. Summary judgment and global settlements (aided, perhaps, by a few bellwether trials) became MDL judges’ tools of recognizing the power of a transferee judge to grant a dispositive motion, the Judicial Panel always discussed the power in terms of motions to quash service of process or to dismiss a specific lawsuit—not in terms of a power to resolve the entire litigation. See, e.g., In re Duarte, Cal. Air Crash Disaster on June 6, 1971, 354 F. Supp. 278, 279 (J.P.M.L. 1973) (observing that the defendant’s motion to dismiss for lack of personal jurisdiction is “clearly a pretrial motion which may appropriately be decided by the transferee court”); Gypsum Wallboard, 302 F. Supp. at 794 (same).

As a result of an amendment in 2011, § 1404(a) also permits transfer to a district “to which all parties have consented.” Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112–63, § 204, 125 Stat. 758, 764 (2011). Before this amendment, cases could be transferred only to a district in which venue would have been proper had the case been filed there originally. See, e.g., Hoffman v. Blaski, 363 U.S. 335, 366 (1960) (Frankfurter, J., dissenting) (“[R]estrict transfer as the Court does to those very few places where the defendant was originally amenable to process . . . .”).

For the earliest appellate imprimatur on self-transfer, see Pfizer, Inc. v. Lord, 447 F.2d 122, 124 (2d Cir. 1971) (“[W]hile the Multidistrict Litigation Panel would have no power to transfer these cases for trial under section 1404(a), the judge to whom the cases have been assigned has such power here as he would in any other case.”).

See, e.g., id. (commenting approvingly on self-transfer where transfer by the Panel would have been impossible).


See Eldon E. Fallon et al., Bellwether Trials in Multidistrict Litigation, 82 Tul. L. Rev. 2323, 2338 (2008) (“[B]ellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.”).
choice to wrestle mass disputes to the ground.\textsuperscript{31} Today, remand of a multidistricted case to its transferor forum for trial is a rare event.\textsuperscript{32}

The third development was the transferee judges’ assertion of the authority to appoint lead counsel for MDL plaintiffs. Relying on their inherent judicial power, courts had previously appointed lead counsel in actions consolidated under Rule 42(a).\textsuperscript{33} By means of the adequate-representation doctrine, courts also asserted the power to appoint counsel in class actions brought under Rule 23.\textsuperscript{34} It was but a short step for transferee judges to claim the same power. Once again, however, the step was far from a given. The 1972 edition of \textit{Manual for Complex Litigation} counseled against judicial selection of lead counsel, advocating instead that the lawyers work out their own structure.\textsuperscript{35} This view shifted rapidly. By 1977, a pair of influential decisions resolved the matter decisively in favor of the MDL court’s power to appoint.\textsuperscript{36}

The influence of the appointment power on the present structure of multidistrict litigation cannot be overstated. Appointing lead counsel establishes the dynamic, familiar in corporate and class-action settings, in which control of an asset is divided from its ownership—a division that imports all of the agency-cost baggage of the corporate and class-action worlds into multidistrict litigation.\textsuperscript{37} Appointment of counsel also limits the

\textsuperscript{31} See, e.g., \textit{In re FedEx Ground Package Sys., Inc., Emp’t Practices Litig.}, No. 3:05–MD–527 RLM, 2017 WL 2672767, at *1–2 (N.D. Ind. June 19, 2017) (describing a combination of processes, including summary judgment, potential bellwether trials, and mediation that led the parties to negotiate a class-action settlement); see also \textit{In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.}, 55 F.3d 768, 784 (3d Cir. 1995) (“The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.”); \textit{id.} (“[C]ourts should favor the use of devices that tend to foster negotiated solutions to these actions.”).

\textsuperscript{32} See supra note 6 (observing that in 2017, only 16,600 of 626,938 multidistrict cases were remanded by the Panel).

\textsuperscript{33} \textit{Fed. R. Civ. P.} 42(a). The seminal case is \textit{MacAlister v. Guterma}, 263 F.2d 65, 67 (2d Cir. 1958).

\textsuperscript{34} \textit{Dolgow v. Anderson}, 43 F.R.D. 472, 496–97 (E.D.N.Y. 1968) (holding that class counsel adequately represented the class), \textit{rev’d on other grounds}, 438 F.2d 825 (2d Cir. 1970). A 2003 amendment to Rule 23 added an explicit requirement that the court appoint class counsel only after considering a number of factors addressing “counsel’s ability to fairly and adequately represent the interests of the class.” \textit{Fed. R. Civ. P.} 23(g)(1)(B). Rule 23(g) confirmed existing best practices; cases had been examining the adequacy of class counsel since the 1966 amendment to Rule 23.

\textsuperscript{35} \textit{Manual for Complex Litigation} § 1.92 (1972) (“While the court should not, in the absence of exceptional circumstances, select and appoint lead counsel, the court can request the parties to select such counsel and encourage the use of lead counsel.”).

\textsuperscript{36} \textit{Vincent v. Hughes Air W., Inc.}, 557 F.2d 759, 759–61 (9th Cir. 1977) (holding that the district court had authority to appoint lead counsel); \textit{In re Air Crash Disaster at Fla. Everglades on December 29, 1972}, 549 F.2d 1006, 1011–12 (5th Cir. 1977) (affirming the court’s power to appoint lead counsel).

claims and arguments of plaintiffs, making it easier for transferee judges to generate broadly applicable procedural, substantive, or evidentiary rulings that can channel the litigation into a global summary judgment or settlement. Finally, the power to appoint counsel creates a repeat-player phenomenon, in which informal norms, connections, and relationships triumph over formal legal structures—a dynamic that may lead MDL counsel to “privilege self-interest over clients’ interests.”

The fourth factor in the rise of the modern MDL is the decline of the class action. During the 1980s, some courts began to take an expansive view of class actions, making them more available to handle mass litigation seeking damages. In the mid-1990s, however, influential appellate-court decisions substantially curbed this growth, and in the later 1990s a pair of Supreme Court decisions acted as further retardants. With some exceptions, the Supreme Court has maintained its dubious attitude toward the broad use of class actions ever since. And lower courts have followed suit.

Pushing Rule 23 toward the sideline has not, however, ended the types of mass disputes that class actions might have addressed. Without the class action as a viable alternative in many cases, the MDL process has stepped


39 See, e.g., Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 472–73 (5th Cir. 1986) (certifying a Rule 23(b)(3) class in an asbestos case); In re Agent Orange Prod. Liab. Litig., 506 F. Supp. 762, 787–92 (E.D.N.Y. 1980) (certifying a Rule 23(b)(3) class in a toxic-tort case; rejecting certification under Rules 23(b)(1) and 23(b)(2)).

40 See Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (rejecting a Rule 23(b)(3) class for lawsuits of smokers claiming deceptive advertising); In re Am. Med. Sys., Inc., 75 F.3d 1069, 1090 (6th Cir. 1996) (rejecting a Rule 23(b)(3) class in a medical-device case); In re Rhone–Poulenc Rorer Inc., 51 F.3d 1293, 1297–99 (7th Cir. 1995) (rejecting a Rule 23(b)(3) class in a case of tainted blood products).

41 See Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (rejecting an asbestos settlement class action for its failure to meet the terms of Rule 23(b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (rejecting an asbestos settlement class action for its failure to meet the terms of Rule 23(a)(4) and 23(b)(3)).

42 See, e.g., Comcast Corp. v. Behrend, 569 U.S. 27, 29–36 (2013) (rejecting an antitrust class for failing to meet the terms of Rule 23(b)(3)); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 338–39 (2011) (rejecting an employment-discrimination class for failing to meet the terms of Rule 23(a)(2) and 23(b)(2)). The trend is not universal. See, e.g., Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (holding that common statistical proof can be used to satisfy Rule 23(b)(3)’s predominance requirement); Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 459 (2013) (holding that materiality is a common question that can help to satisfy Rule 23(b)(3)’s predominance requirement).

43 See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 307 (3d Cir. 2008) (rejecting a Rule 23(b)(3) class in an antitrust case); In re Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 27 (2d Cir. 2006), clarified on reh’g, 483 F.3d 70, 72–73 (2d Cir. 2007) (rejecting a Rule 23(b)(3) class in a securities-fraud case); In re St. Jude Med., Inc., Silicones Heart Valve Prods. Liab. Litig., 425 F.3d 1116, 1117 (8th Cir. 2005) (rejecting a Rule 23(b)(2) medical-monitoring class). Again, the trend is not universal. See, e.g., Klay v. Humana, Inc., 382 F.3d 1241, 1246 (11th Cir. 2004) (certifying a Rule 23(b)(3) class for federal RICO fraud claims, but not for state-law claims).
into the breach—not as the ideal vehicle for aggregating related cases, perhaps, but as the only device with any reasonable prospect of achieving single-forum resolution of dispersed litigation.

This marginalization does not mean that class actions have no role in multidistrict litigation. On the contrary, in circumstances in which class actions remain viable, the avoidance of dueling, overlapping class actions is a common reason that the Judicial Panel cites to consolidate cases. Moreover, MDL judges sometimes use settlement class actions to achieve global settlements. Nonetheless, as commentators have observed, the center of power in aggregate litigation has shifted from class actions to multidistrict litigation. In the wake of this development, some transferee judges now view the MDL as a “quasi-class action,” in which a single, mass resolution of all claims is the goal.

A fifth factor contributing to the shape of the modern MDL process is external to, but constitutive of, MDL practice. Beginning before MDLs or

44 See Emery G. Lee III et al., Multidistrict Centralization: An Empirical Examination, 12 J. EMPIRICAL LEGAL STUD. 211, 221–22 (2015) (describing the rise in the number of requests for MDL treatment over the past twenty years).

45 Indeed, “[m]ore than seventy-five percent of MDLs involve class actions.” Gluck, supra note 14, at 1695.

46 See, e.g., In re Litig. Aアising from Termination of Ret. Plan for Emps. of Fireman’s Fund Ins. Co., 422 F. Supp. 287, 290 (J.P.M.L. 1976) (“Another compelling reason for transfer of these actions to a single district for coordinated or consolidated pretrial proceedings is the need to eliminate the possibility of overlapping or inconsistent class determinations by courts of coordinate jurisdiction.”). But see In re S. Ry. Emp’t Practices Litig., 441 F. Supp. 926, 927 (J.P.M.L. 1977) (declining to consolidate two cases with potentially overlapping class actions); cf. In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig., 598 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009) (centralizing five non-overlapping putative statewide class actions for discovery purposes, but suggesting that the transferee judge may eventually wish to request remand of the cases to their transferor forums for separate class-certification determinations).

47 See, e.g., Samuel Issacharoff & D. Theodore Rave, The BP Oil Spill Settlement and the Paradox of Public Litigation, 74 LA. L. REV. 397, 400–02 (2014) (describing how an MDL proceeding relied on settlement class actions to resolve claims arising from the Gulf oil spill); Mullenix, supra note 13, at 539 (“This proliferation of MDL proceedings has been married to the settlement class device.”). MDL judges sometimes accomplish global settlements without reliance on Rule 23. See, e.g., In re Zyprexa Prods. Liab. Litig., 233 F.R.D. 122, 122 (E.D.N.Y. 2006) (acknowledging that a case had “many of the characteristics of a class action,” even though it was not a settlement class action).


49 See In re Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549, 554 (E.D. La. 2009) (“While an MDL is distinct from a class action, the substantial similarities between the two warrant the treatment of an MDL as a quasi-class action.”); Zyprexa Prods. Liab. Litig., 233 F.R.D. at 122 (stating that the Zyprexa products-liability MDL “may be properly characterized as a quasi-class action, subject to general equitable powers of the courts”).
post-1966 class actions stalked the earth, but then strongly confirmed by MDL and class-action practices of the past fifty years, strong judicial management is now a fundamental tenet of complex litigation.\textsuperscript{50} Indeed, the case-management approach has spread far beyond the complex cases that gave it birth and has been the new normal for all federal litigation since 1983.\textsuperscript{51}

Case management is not, however, a set of defined practices to be applied uniformly in each case. To the contrary, case management provides judges with a range of possible tools to aid in narrowing issues and developing evidence, as well as the discretion to apply different, outcome-affecting techniques to different cases.\textsuperscript{52}

A common component of case management is to seek resolution through issue-narrowing dispositive motions or settlement.\textsuperscript{53} Trial is often regarded as a failure of the management process.\textsuperscript{54} Transferee judges and MDL lawyers who have grown up in this case-management culture therefore see MDL proceedings as their responsibility to resolve—in other words, to dispose of on motion or to settle.\textsuperscript{55} In this mindset, remand of cases to their

\textsuperscript{50} On the development of case management as a response to post-World War II antitrust cases and its movement into the litigation mainstream, see JAY TIDMARSH & ROGER TRANSGRUD, MODERN COMPLEX LITIGATION 716–17 (2d ed. 2010); Judith Resnik, Managerial Judges, 96 HARV. L. REV. 374, 390–91 (1982) (discussing the “new ‘forms’” of litigation involving increased judicial management).

\textsuperscript{51} See Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 DUKE L.J. 1, 55 (2010) (“[A]mendments to Rule 16 and Rule 26 reflected the [rulemakers’] continued commitment to case management as an effective means to combat cost and delay and to encourage rational, merits-based settlements.” (footnote omitted)).

\textsuperscript{52} See Fed. R. Civ. P. 16(b)–(c) (listing more than twenty case-management techniques, a few of which are mandatory but most of which are discretionary); Elizabeth Warren & Jay Lawrence Westbrook, Searching for Reorganization Realities, 72 WASH. U. L.Q. 1257, 1285 (1994) (noting that in certain bankruptcy cases, “different forms of judicial case management may significantly affect outcomes”); Kenneth M. Vorrasi, England’s Reform to Alleviate the Problems of Civil Process: A Comparison of Judicial Case Management in England and the United States, 30 J. LEGIS. 361, 373 (2004) (observing that in the United Kingdom, “the enhanced case management powers—calling for efficient track allocation—authorize judges to make outcome-determinative decisions about each case.”).

\textsuperscript{53} See Fed. R. Civ. P. 16(c)(2)(A) (permitting the judge to “consider and take appropriate action” with respect to “formulating and simplifying the issues, and eliminating frivolous claims or defenses”); id. at 16(c)(2)(E) (permitting the judge to “consider and take appropriate action” with respect to “the appropriateness and timing of summary adjudication under Rule 56”); id. at 16(c)(2)(I) (permitting the judge to “consider and take appropriate action” with respect to “settling the case”).

\textsuperscript{54} See Edward Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 TUL. L. REV. 1, 50 (1987) (“The judicial management movement seems to have created an attitude that a trial represents judicial failure.” (citation omitted)). On the evolution of case management from an issue-narrowing system to a settlement-fostering system, see E. Donald Elliott, Managerial Judging and the Evolution of Procedure, 53 U. CHI. L. REV. 306, 322–26 (1986).

\textsuperscript{55} See Eduardo C. Robreno, The Federal Asbestos Product Liability Multidistrict Litigation (MDL–875): Black Hole or New Paradigm?, 23 WIDENER L.J. 97, 144 (2013) (“As a matter of judicial culture, remanding cases is viewed as an acknowledgment that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process. That view, together with the business model of aggregation and consolidation of cases for settlement, interfered with the litigation of individual cases in the MDL court.” (footnote omitted)).
transfer or forums is defeat.

A final factor contributing to the scope of modern multidistrict litigation is structural and, for this reason, easy to overlook. At a very early day, the Judicial Panel decided to take a hands-off approach to the management and progress of transferred actions. The Panel fulfills its exact statutory mandate: deciding whether to consolidate, before whom to consolidate, and whether to remand.56 But it proclaims no interest in reviewing the transferee judge’s day-to-day management of the proceeding.57 This approach is consistent with the language of § 1407,58 but it also leaves the transferee judge as a virtually unchecked force in the pretrial phase. This division of responsibility also means that neither the Panel nor the transferee judge bears full responsibility for the present posture of multidistrict litigation.

Each of these six developments is justifiable on its own. No development is inconsistent with the terms of § 1407 or with the efficient processing of multidistrict litigation.59 At the same time, each expands the power of transferee judges and stunts the growth of doctrines or institutions that might check the judge’s authority. Although multidistrict litigation has inched towards the class-action model, analogous protections have not followed. Unlike a judge in a class action, an MDL judge has no formal power to review a multidistrict settlement;60 and with no judicial determination on the settlement’s merits, there is no final judgment from which MDL plaintiffs might appeal and no way to contest the fairness of the settlement. A plaintiff who agrees to settle also waives the right to appeal the transferee judge’s other pretrial rulings, some of which likely shaped the

56 See 28 U.S.C. § 1407(a)–(b) (2012) (granting the Panel the authority to transfer actions for consolidated pretrial proceedings, to remand actions, and to select the judge or judges to whom the actions are assigned).

57 See, e.g., In re Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 421 (J.P.M.L. 1991) (“The Panel has neither the power nor the disposition to direct the transferee judge in the exercise of his powers and discretion in pretrial proceedings.”) (quoting In re Plumbing Fixture Cases, 298 F. Supp. 484, 489 (J.P.M.L. 1968)); In re Prot. Devices & Equip. & Cent. Station Prot. Serv. Antitrust Cases, 295 F. Supp. 39, 40 (J.P.M.L. 1968) (“Determination of all matters involving questions of class actions shall be left to the sound judgment of [the transferee judge].”). The Panel has sometimes been sensitive to management and comity concerns, timing a transfer decision to permit a transferor judge to rule on a pending motion. See In re Droplets, Inc., Patent Litig., 908 F. Supp. 2d 1377, 1378 (J.P.M.L. 2012) (noting that the pendency of a dispositive motion in one case weakened the argument for consolidation).

58 See 28 U.S.C. § 1407(b) (granting the Panel the power to select the transferee judge, but not the power to review day-to-day management).

59 See id. at (a)–(h) (explaining the scope of a Judicial Panel’s authority).

60 Cf. FED. R. CIV. P. 23(e)(2) (requiring, in most instances, a judge to approve a class-action settlement “only after a hearing and on finding that it is fair, reasonable, and adequate”); see Andrew D. Bradt & D. Theodore Rave, The Information-Forcing Role of the Judge in Multidistrict Litigation, 105 CALIF. L. REV. 1259, 1298 (2017) (noting that most MDLs “structure the settlement as a private agreement, and all of the claimants who opt in stipulate to the voluntary dismissal of their claims under Rule 41.”) further noting that “[i]t is in this situation where the MDL judge’s authority to review the settlement is most questionable”). Some MDL judges have claimed such a power in unique cases. See infra note 86 and accompanying text.
scope of the relief that the settlement provides. Because MDL plaintiffs’ lawyers can employ a number of powers to herd their plaintiffs toward settlement,\(^61\) no plaintiff may remain to challenge the work of the transferee judge.\(^62\)

In short, a series of historically contingent developments has constructed a judicial form that puts the litigants, the lawyers, and the transferee judge on an island, with the judge and lawyers enjoying nearly unmaintainable authority to resolve MDL cases.

II. WHERE WE ARE

Concentrating on the major developments that have brought multidistrict litigation to its present juncture also reveals an essential truth: the present MDL system operates as a *de facto* opt-in class action, with the “class” comprising the MDL plaintiffs who litigate together. At first blush, this claim seems overdrawn. Although Rule 23 once permitted opt-in, or “spurious,” class actions,\(^63\) the 1966 amendments abolished the form.\(^64\) Today Rule 23 authorizes only three mandatory class actions\(^65\) and one opt-out class action.\(^66\)

Furthermore, multidistrict litigation lacks important attributes of a true class action. Most obvious, no class representative sues on behalf of similarly situated claimants,\(^67\) each MDL plaintiff asserts his or her own claim, and each MDL plaintiff retains his or her own lawyer.\(^68\) Structural and procedural protections for absent class members—the right to adequate

---

\(^{61}\) See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2177 (2017) (describing settlement provisions and other mechanisms that “tend to strongly encourage claimants to accept the deal and provide opportunities for defendants to back out if too few do”); Burch & Williams, *supra* note 38, at 1504 (further describing four of the most common settlement provisions designed to force claimants’ acquiescence).

\(^{62}\) Cf. Gluck, *supra* note 14, at 1706 (explaining that the non-appealability of most discovery orders and the effort to achieve consensus result in decision-making that evades appellate review).

\(^{63}\) See FED. R. CIV. P. 23(a)(3) (1938) (permitting a class action when the right sought to be enforced was “several, and there [was] a common question of law or fact affecting the several rights and a common relief [was] sought”); 7A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1752, at 30–31 (3d ed. 2005) (stating that the judgment in a “spurious” class action under former Rule 23(a)(3) directly bound those class members who had either brought the suit or intervened in it but not those class members who never became parties); Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 176–77 (2016) (describing the “opt-in mechanism” of former Rule 23(a)(3)).

\(^{64}\) The only widely available opt-in form is the Fair Labor Standard Act’s collective action. See 29 U.S.C. § 216(b) (2018) (permitting employees to bring wage-violation actions on behalf of similarly situated employees, provided that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party”).

\(^{65}\) See FED. R. CIV. P. 23(b)(1)–(2) (providing three forms of mandatory class action).

\(^{66}\) See FED. R. CIV. P. 23(b)(3) (providing an opt-out class action).

\(^{67}\) See FED. R. CIV. P. 23(a) (authorizing “[o]ne or more members of a class [to] sue or be sued as representative parties on behalf of all members” when certain conditions are met).

\(^{68}\) Cf. FED. R. CIV. P. 23(g)(1) (“Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.”).
representation, the right to opt out of certain class actions, the right to notice about a pending settlement and certain other litigation events, the right to object to any proposed settlement, the right to judicial review and approval of any settlement, and the right to judicial control over class counsel’s fees—also do not carry over to multidistrict litigation. Finally, a class action is certified for all purposes, not just for pretrial proceedings.

These formal differences between an opt-in class action and multidistrict litigation diminish when the MDL process is examined functionally. The touchstone for both the spurious class action and multidistrict consolidation is “common” questions of law or fact. Although MDL proceedings have no representative parties, class representatives usually have limited responsibilities. For the most part, they are figureheads in litigation controlled by counsel. Their formal absence from MDL proceedings is even less meaningful given that, much like class representatives, bellwether plaintiffs in multidistrict litigation carry the torch in forging a settlement.

In addition, even though MDL plaintiffs formally file individual

---

69 See Fed. R. Civ. P. 23(a)(3)–(4) (requiring that the class representative possess claims or defenses “typical of the claims or defenses of the class” and that the class representative “fairly and adequately protect the interests of the class”); Hansberry v. Lee, 311 U.S. 32, 45 (1940) (holding that due process requires adequate representation in order for a judgment to bind class members).
70 See Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring that notice of a right to opt out be provided to members of a Rule 23(b)(3) class); Fed. R. Civ. P. 23(c)(4) (permitting a judge to provide a second opt-out opportunity to members of a previously certified (b)(3) class at the time of settlement). Class actions seeking monetary relief are almost always filed under Rule 23(b)(3). See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (“[I]ndividualized monetary claims belong in Rule 23(b)(3).”).
71 See Fed. R. Civ. P. 23(c)(2)(A) (stating that, for mandatory class actions, “the court may direct appropriate notice to the class”); Fed. R. Civ. P. 23(c)(2)(B) (requiring that, for a (b)(3) opt-out class action, “the court must direct to class members the best notice that is practicable under the circumstances” and detailing the contents of the notice); Fed. R. Civ. P. 23(e)(1) (“The court must direct notice in a reasonable manner to all class members who would be bound by [a settlement] proposal.”).
72 See Fed. R. Civ. P. 23(c)(5)(A) (“Any class member may object to the proposal if it requires court approval. . . .”).
73 See Fed. R. Civ. P. 23(e)(2) (“[T]he court may approve [a settlement proposal] only after a hearing and only on finding that it is fair, reasonable, and adequate . . . .”).
74 See Fed. R. Civ. P. 23(h) (“In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.”). Class members also enjoy the right to object to a motion to award fees. See Fed. R. Civ. P. 23(h)(2) (“A class member, or a party from whom payment is sought, may object to the motion.”).
75 See Fed. R. Civ. P. 23(c)(1)(A) (“At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”).
76 For the text of former Rule 23(a)(3), the spurious class-action rule, see supra note 63. For MDL proceedings, in addition to requiring “one or more common questions of [law or fact] among cases pending in different districts,” 28 U.S.C. § 1407(a) requires that transfer “will be for the convenience of parties and witnesses and will promote the just and efficient conduct” of the cases.
77 See Jean Wegman Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 Hastings L.J. 165, 165 (1990) (contending that named class plaintiffs have no legal authority and serve no useful purpose).
78 See Fallon et al., supra note 30, at 2338 (emphasizing the use of MDL proceedings in global settlements).
lawsuits,\textsuperscript{79} rather than opt into a class action, many lawyers who file their clients' cases in federal court are aware of, and may even be angling for, multidistrict treatment. Indeed, the vast majority of cases consolidated into an MDL are filed in the district in which the MDL proceeding is pending with the expectation that the cases will be swept into the MDL proceeding.\textsuperscript{80} The Panel routinely transfers cases filed in other federal districts (known as tag-along actions) to the transferee forum.\textsuperscript{81} By filing in federal court, these plaintiffs are, for all intents and purposes, opting into the MDL proceeding.

Finally, the formal authority of the class-action judge to appoint class counsel on behalf of the class is not a major feature distinguishing class actions from MDL proceedings.\textsuperscript{82} Transferee judges also appoint lead counsel in MDL proceedings.\textsuperscript{83} Although their choice is not formally constrained by concerns for adequate representation, a transferee judge is unlikely to appoint counsel with such competence or conflict issues that the lawyer would fail to clear the adequacy hurdle for class counsel.\textsuperscript{84} Put differently, the same adequacy considerations are likely to guide a transferee judge and a class-action judge. Granted, the transferee judge’s power does not extend so far as to choose or replace an MDL plaintiff’s original lawyer, but cases that arrive at an MDL proceeding rarely return to the original lawyer for trial.\textsuperscript{85}

Similarly, the trend is to provide MDL litigants with other structural and procedural protections comparable to those enjoyed by class members. In particular, judges have begun to claim the authority to approve global settlements in mass aggregations\textsuperscript{86} and to regulate the fees paid both to MDL

\textsuperscript{79} See id. at 2325 (“A typical bellwether case often begins as no more than an individual lawsuit . . .”).

\textsuperscript{80} See \textit{Statistical Analysis} (2018), supra note 4, at 5 (providing data showing that, over the past two years, approximately ninety percent of cases consolidated in an MDL proceeding are initially filed in the district in which the MDL proceeding is pending).

\textsuperscript{81} See \textit{Multidist. Litig. R. 7.1} (2016) (discussing the procedures for tag-along actions).

\textsuperscript{82} See supra text accompanying notes 33–37 (describing the appointment power in both MDL and class-action cases).

\textsuperscript{83} See Burch, \textit{supra} note 48, at 88 (“[T]he [MDL] committee appointment process [is] more akin to choosing class counsel—where putative class members have no say in who represents them—than to forming ad hoc attorney groups.”).

\textsuperscript{84} \textit{Cf. Principles of the Law: Aggregate Litigation} § 1.05(c) (Am. Law Inst. 2010) [hereinafter \textit{Aggregate Litigation}] (recommending that in all aggregate proceedings, “[j]udges should ensure that parties and represented persons are adequately represented.”). \textit{But see} Burch, \textit{supra} note 48, at 88 (“Unlike selecting class counsel, judges seem to pay little attention to . . . adequate-representation concerns in multidistrict litigation.”).

\textsuperscript{85} The original lawyer may perform valuable litigation-related services for the client, such as handling client questions or concerns. \textit{See} Burch, \textit{supra} note 48, at 114–15 (explaining the preparation done by attorneys in this setting). But the power of the original lawyer to shape the conduct of the MDL proceeding that will likely determine the fate of the client’s case is minimal. \textit{See id.} at 88 (“The individually retained attorney has no power to appoint or discharge the leaders who assume control of her clients’ cases.”).

\textsuperscript{86} See Mireya Navarro, \textit{Judge Rejects Deal on Health Claims of Workers at Ground Zero, N.Y.}
counsel and to the plaintiffs’ original lawyers. Although MDL plaintiffs have neither a formal right to opt out of multidistrict litigation at its outset or at the time of settlement, nor a formal right to object to a settlement, opt-out rights are not a feature of an opt-in class, and in any event MDL plaintiffs can refuse to consent to a settlement, in effect voicing their objection and opting out. Finally, the scope of the preclusive effect of an opt-in class action and an MDL proceeding are comparable. In both instances, only those who are formally made parties are bound by a judgment.

Of course, the analogy between class actions and MDL proceedings is not perfect. Opt-in class actions are constituted for all purposes, while multidistrict litigation is for pretrial purposes only. Given the rarity of

The authority to regulate the fees of MDL counsel arises from the common-fund (or common-benefit) doctrine, which dictates that lawyers for a group should be compensated when their work generates a benefit for the group. See Boeing Co. v. Van Gemert, 444 U.S. 472, 477–79 (1980) (applying the common-fund concept to class litigation); Burch, supra note 48, at 102 (“To justify awarding fees to lead [MDL] lawyers, judges have borrowed ad hoc from class-action law’s common-fund doctrine, contract principles, ethics, and equity.” (footnote omitted)). Transferee judges can be instrumental in establishing the common fund. An early case-management order often requires the plaintiffs’ original lawyers to enter into fee-transfer agreements, in which the original lawyers agree to pay to lead MDL counsel a set percentage (usually two to six percent) of the gross proceeds ultimately obtained by the client. See id. at 106 (explaining the application of fee-transfer arrangements).

Of course, MDL counsel can employ tactics to keep plaintiffs from exercising these rights. See supra text accompanying notes 67–75 (describing the differing attributes of multidistrict litigation and true class actions).

Of course, MDL counsel can employ tactics to keep plaintiffs from exercising these rights. See supra note 61 and accompanying text. But many of the same tactics can also be used in opt-out class actions. Cf. THOMAS E. WILLING et al., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (1996) (reporting a low rate of opting out). One proposal to limit the right of MDL plaintiffs to refuse to participate in a settlement is the aggregate-settlement rule, in which plaintiffs agree at the outset of litigation to be bound by the majority vote of plaintiffs who are represented by the same lawyer. See AGGREGATE LITIGATION, supra note 84, § 3.17(b) (recommending an aggregate-settlement rule as long as a “substantial majority vote” of all claimants approves the settlement). But see Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 514–15, 522 (N.J. 2006) (rejecting, prospectively, an aggregate-settlement rule as inconsistent with a lawyer’s professional obligations to obtain consent from each client).

See supra text accompanying notes 67–75 (describing the differing attributes of multidistrict litigation and true class actions).

See supra note 61 and accompanying text. But many of the same tactics can also be used in opt-out class actions. Cf. THOMAS E. WILLING et al., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (1996) (reporting a low rate of opting out). One proposal to limit the right of MDL plaintiffs to refuse to participate in a settlement is the aggregate-settlement rule, in which plaintiffs agree at the outset of litigation to be bound by the majority vote of plaintiffs who are represented by the same lawyer. See AGGREGATE LITIGATION, supra note 84, § 3.17(b) (recommending an aggregate-settlement rule as long as a “substantial majority vote” of all claimants approves the settlement). But see Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 514–15, 522 (N.J. 2006) (rejecting, prospectively, an aggregate-settlement rule as inconsistent with a lawyer’s professional obligations to obtain consent from each client).

See supra text accompanying notes 67–75 (describing the differing attributes of multidistrict litigation and true class actions).

See supra note 61 and accompanying text. But many of the same tactics can also be used in opt-out class actions. Cf. THOMAS E. WILLING et al., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (1996) (reporting a low rate of opting out). One proposal to limit the right of MDL plaintiffs to refuse to participate in a settlement is the aggregate-settlement rule, in which plaintiffs agree at the outset of litigation to be bound by the majority vote of plaintiffs who are represented by the same lawyer. See AGGREGATE LITIGATION, supra note 84, § 3.17(b) (recommending an aggregate-settlement rule as long as a “substantial majority vote” of all claimants approves the settlement). But see Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 514–15, 522 (N.J. 2006) (rejecting, prospectively, an aggregate-settlement rule as inconsistent with a lawyer’s professional obligations to obtain consent from each client).

See supra note 61 and accompanying text. But many of the same tactics can also be used in opt-out class actions. Cf. THOMAS E. WILLING et al., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 52–53 (1996) (reporting a low rate of opting out). One proposal to limit the right of MDL plaintiffs to refuse to participate in a settlement is the aggregate-settlement rule, in which plaintiffs agree at the outset of litigation to be bound by the majority vote of plaintiffs who are represented by the same lawyer. See AGGREGATE LITIGATION, supra note 84, § 3.17(b) (recommending an aggregate-settlement rule as long as a “substantial majority vote” of all claimants approves the settlement). But see Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 514–15, 522 (N.J. 2006) (rejecting, prospectively, an aggregate-settlement rule as inconsistent with a lawyer’s professional obligations to obtain consent from each client).
remand in MDL litigation, however, the all-purpose nature of a spurious class action is not as significant a difference from an MDL proceeding as it might initially appear. Next, the trend toward transferee-judge review of settlements and attorney’s fees is controversial and far from pervasive. Moreover, while a class must satisfy numerous elements (numerosity, commonality, typicality, adequacy, and more) that collectively assure adequate representation and efficient resolution, an MDL proceeding may commence with only two cases raising common issues.

We are not the first to notice close connections between multidistrict litigation and class actions or to compare MDL proceedings to opt-in class actions. But we press hard on the analogy to opt-in class actions for two reasons. First, as the rest of this Part explains, the movement of the MDL process toward a quasi-class action explains its present instability. Second, as the following Part describes, the class-action analogy adumbrates one of two potential futures for multidistrict litigation.

Class actions promise great benefits, but they also impose certain costs. Two sets of costs are primary: loss of individual autonomy and agency costs. These costs have proven sufficiently concerning that federal
judges have been unwilling to engage in more adventuresome uses of the class-action form.\footnote{100}

As multidistrict litigation has moved into the space that restrictive interpretations of Rule 23 have left void, precisely the same concerns now haunt § 1407.\footnote{101} Although some defenders of the MDL status quo exist,\footnote{102} the drumbeat of critical commentary becomes louder and more difficult to ignore with each passing year. That commentary has particularly focused on two matters: (1) the loss of plaintiff autonomy in MDL proceedings, as individuals get swept into mass proceedings which are controlled by lawyers not of their choosing and from which escape is nearly impossible;\footnote{103} and (2) the costs of faithless agents, as repeat-player MDL lawyers can carve out settlements that benefit themselves more than their plaintiffs.\footnote{104}

Many of the proposed remedies for these problems come straight out of the class-action playbook. One set of reforms seeks to create structures that monitor the adequacy of the work of lead MDL counsel. For example, Professors Silver and Miller have proposed establishing a committee of lawyers who represent the largest number of MDL claimants (and thus have the largest stake in the case) to select and monitor lead MDL counsel.\footnote{105} In a similar vein, Professor Burch argues that third-party funding to finance multidistrict litigation would result in a large stakeholder (the third-party funder) with an incentive to monitor MDL counsel.\footnote{106} Professor Burch has also assayed a different idea, arguing that imposing greater controls over the

class action device could substantially undermine basic notions of democratic accountability by indirectly (and, often, furtively) transforming the essential nature of the substantive rights being enforced.”). The same critique can be leveled against modern multidistrict litigation. \textit{See} Mullenix, \textit{supra} note 13, at 564 (“[T]he argument may be made that the new models of nonclass aggregate dispute resolution represent an even more compelling illustration of the death of democratic dispute resolution.”).\footnote{100}

We do not necessarily credit this view, but we note that the prevailing concern about class actions’ costs have created the conservative approach to class actions reflected in the opinions rejecting class certification cited \textit{supra} notes 40–43.\footnote{101}

\textit{See} Bradt, \textit{supra} note 92, at 1742 (“[T]he arguments that provoked the limitations originally installed in Rule 23(b)(3) are now forcefully made against actual practice in MDL.”).\footnote{102}

\textit{See supra} note 14 and accompanying text (discussing the benefits of MDL).\footnote{103}

\textit{See}, e.g., Redish & Karaba, \textit{supra} note 13, at 151 (“Measured in terms of autonomy, paternalism, utilitarianism, or dignitary theories, procedural due process demands considerably more protection of the individual litigants’ interests than MDL provides.”).\footnote{104}

\textit{See}, e.g., Burch, \textit{supra} note 37, at 1298 (“Settlement agreements requiring nearly unanimous consent pressure plaintiffs’ attorneys to push their clients to acquiesce so they can collect their fees.”); Silver & Miller, \textit{supra} note 16, at 146 (“[F]orced aggregation may saddle claimants with agency costs by putting them at the mercy of lawyers they cannot control or discharge.”).\footnote{105}

Silver & Miller, \textit{supra} note 16, at 176 (recommending “implementation of a default mechanism . . . that would place MDLs under the control of management committees composed of attorneys with valuable client inventories”).\footnote{106}

Burch, \textit{supra} note 37, at 1315 (“[I]t is . . . possible to overlay the financier’s incentives with the plaintiffs’ incentives such that the financier, who has litigation expertise, sophistication, and substantial capital involved, will monitor the attorney and counterbalance the attorney’s incentives in ways that thwart at least some of the agency problems.”).
fees of lead MDL counsel might help to control agency costs. She has also suggested a structural protection akin to Rule 23(e)(4)’s discretionary time-of-settlement opt-out opportunity: automatic remand of non-settling plaintiffs’ cases to their transferor forums. Approaching the same problem from the viewpoint of substantive fairness rather than procedural safeguards, Professors Bradt and Rave suggest that MDL judges be allowed to weigh in on the fairness of an MDL settlement—not exactly Rule 23’s full right of approval or rejection—but at least an information-forcing mechanism that “would send a signal directly to litigants about whether they ought to opt into the agreement.”

Legislative and rulemaking proposals to regulate MDL proceedings do not borrow as directly from class-action safeguards. A bill that has passed the House of Representatives would institute three checks on the power of MDL judges: requiring the use of “fact sheets” as a case-management tool to weed out factually unsupported claims; limiting the ability of a transferee judge to conduct a trial in any case transferred into or filed directly in the MDL proceeding unless all parties consent; and authorizing appellate review of any pretrial order of a transferee judge when “an immediate appeal from the order may materially advance the ultimate termination of” the MDL proceeding. On the rulemaking front, the Advisory Committee on Civil Rules has recently formed a subcommittee to explore the creation of rules to govern the work of transferee judges.

107 See Burch, supra note 13, at 147 (arguing for compensating lead MDL counsel on a quantum meruit basis where awards depend on a variety of factors, including the lead lawyers’ opportunity costs, financial risks, billing practice; case status, and time spent).
108 See id. at 153 (“[T]ransferee judges should issue a standing order indicating that they will automatically request that the Panel remand non-settling plaintiffs to their court of origin after leaders negotiate a master settlement.”).
109 Bradt & Rave, supra note 60, at 1306–07.
111 Fact sheets were used to great effect in the asbestos MDL, clearing away a backlog of thousands of cases. See Robreno, supra note 55, at 136–38 (discussing the use of a case-management order requiring MDL asbestos plaintiffs to submit the medical opinions they relied on for their claimed injuries and noting that “[s]imilar orders have been entered by courts presiding over mass tort litigation in a growing number of cases”).
113 Amanda Bronstad, Federal Rules Advisory Panel to Eye Litigation Financing—Sort of, NAT’L L.J. (Nov. 8, 2017, 7:23 PM) https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/08/federal-judicial-panel-to-consider-litigation-financing-sort-of/ (reporting that U.S. District Judge John Bates, chair of the Advisory Committee, suggested creating a subcommittee to take up a package of proposals to amend multidistrict litigation procedures). Most of the subcommittee’s work will travel over the same terrain as the House bill, exploring whether to require a means to test the validity of MDL claims at the outset, limit bellwether
This ferment for reform reflects the difficulties of meeting multidistrict litigation’s dual promise: achieving efficiency through aggregation while retaining litigant control.\footnote{114} This “split personality . . . becomes more untenable” as multidistrict litigation grows in size and importance.\footnote{115} Despite these pressures, multidistrict litigation is far from indefensible. Multidistrict litigation resolves transferred cases at a fraction of the cost of individual litigation.\footnote{116} Without these efficiencies, many cases that fall into an MDL proceeding might never be filed at all—only the prospect of MDL treatment makes them viable. Defendants and courts also need a mechanism to bring repetitive litigation to an end, and in the absence of class actions, multidistrict litigation is the best available alternative.

The issue, therefore, is how multidistrict litigation should evolve to address emerging concerns while preserving its core benefits.

III. WHERE WE SHOULD GO

The present posture of multidistrict litigation suggests two diametrically opposed directions for its future. One direction continues multidistrict litigation down its present path, bringing the process into closer alignment with class actions. The logical endpoint of this path is the conversion of the MDL process into an opt-in class action. The other direction is to roll back multidistrict litigation to a mechanism for conducting consolidated discovery—and no more. We then consider whether a blend of the two models is feasible.

A. Toward an Opt-In Class Action

The most likely evolutionary path for multidistrict litigation is “forward” toward a regulatory model that extends the power of the transferee judge. Start with the low-hanging fruit: appointment of lead MDL counsel and approval of global MDL settlements. Despite murky authority to do so, transferee judges have long claimed the power to appoint lead counsel to represent MDL plaintiffs.\footnote{117} A regulatory model would create a rule, akin to...
Rule 23(g)(1), that explicitly confirms the appointment power. The logical standard for appointment, also borrowed from Rule 23(g)(1), is fair and adequate representation. This representation both requires legal competence and prohibits collusive behavior or counsel’s simultaneous representation of MDL plaintiffs with conflicting interests.

An adequate-representation requirement is dictated by an MDL model designed to resolve litigation in the transferee forum. As long as the MDL process addressed only matters of common interest, such as efficiently conducting discovery, conflicts among MDL plaintiffs on non-common matters could be tolerated. As multidistrict litigation has evolved to become the final stop in resolving mass disputes, however, the concern that counsel has an incentive to sell out the interests of some plaintiffs has spread like an oil slick across the MDL process, and the myth of client consent, often coerced or ill informed, can no longer hide the stain. The proper remedy is to demand that lead MDL counsel adequately represent the group. The scope of the representation that is deemed adequate will hinge on the scope of the MDL proceeding. As an MDL proceeding expands from matters of common discovery to discussions about global settlement or bellwether trials, the inquiry into competence and conflicts must also expand. And the inquiry may defeat some MDL consolidations (just as the adequate-representation requirement of Rule 23 can scuttle some class actions).

The regulatory model for multidistrict litigation also recognizes the

---

118 See FED. R. CIV. P. 23(g)(1)(A) (listing specific factors that a judge appointing class counsel must consider); FED R. CIV. P. 23(g)(1)(B) (permitting the judge to “consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class”); Silver & Miller, supra note 16, at 160–66, 169 (discussing the mechanisms to ensure adequate representation, which involves appointing a Plaintiffs’ Management Committee to propose lead MDL counsel, and relying on litigation funders to monitor counsel behavior); Burch, supra note 37, at 1276–77 (discussing the potential for private monitoring through third-party financiers and the American Bar Association’s Commission on the ethics of alternative litigation financing). Employing other means is a matter likely to be left to the transferee judge’s discretion.

119 See Hansberry v. Lee, 311 U.S. 32, 44 (1940) (holding that the Due Process Clause denies preclusive effect to a class judgment when class members have conflicts of interest or class counsel acts collusively with opposing counsel); De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP, 269 F.R.D. 445, 462 (E.D. Pa. 2010) (rejecting as class counsel a lawyer who was “qualified and experienced” but who had no class-action experience and who would have been required to represent plaintiffs with conflicting interests).

120 See Burch & Williams, supra note 38, at 1530–31 (“Multidistrict litigation is designed to promote pretrial efficiency and consistency without altering core due process rights such as adequate representation . . . .”).

121 See Rave, supra note 61, at 2177 (“The risk that MDL settlements can include terms that benefit the negotiating parties more than claimants is well recognized.”).

122 See De Lage Landen, 269 F.R.D. at 461 (describing the requirement of adequate representation under Rule 23(a)(4) and discussing whether the attorney is capable of representing the class and if there are conflicts).

123 See id. at 462 (denying class certification in part due to inadequacy of class counsel).
transferee judge’s power to approve or reject global settlements.\footnote{124 See Jeremy T. Grabill, Judicial Review of Private Mass Tort Settlements, 42 SETON HALL L. REV. 123, 182 (2012) (“[T]here is] an emerging opt-in paradigm for mass tort settlements in the post-class action era and [it] clarifies the role for the judiciary to play as mass tort litigation is increasingly settled in this new, unfamiliar, and private way.”).} Given the tactics that lead MDL counsel or individual counsel can employ to obtain client consent to an MDL settlement, consent has proven to be an insufficient and largely fictional check on inadequate representation.\footnote{125 See supra note 61 and accompanying text (discussing the encouragement to settle and the changing role the lead attorney has in settlement).} Like the power to appoint counsel, the power to review MDL settlements is a slight but logical step beyond existing law. Judges’ capacious case-management powers already influence the shape of MDL settlements.\footnote{126 See \textit{Fed. R. Civ. P.} 16(c)(2)(A)–(P) (describing a range of case-management powers, including the power to take appropriate action with respect to “settling the case,” “adopting special procedures for managing potentially difficult or protracted actions,” and “facilitating in other ways the just, speedy, and inexpensive disposition of the action”); \textit{Erichson, supra} note 86, at 1017–19 (discussing mechanisms by which judges can facilitate settlement).} In addition, parties sometimes negotiate judicial review into the terms of the settlement agreement,\footnote{127 For circumstances in which the law requires or the parties negotiate for judicial review of a settlement, see Grabill, \textit{supra} note 124 at 129–38.} and, as we have seen, transferee judges are starting to assert the authority to review global MDL settlements.\footnote{128 See \textit{supra} notes 86, 93 and accompanying text (discussing instances when judges rejected settlement agreements and whether judges have the authority to do so).} As the class-action experience shows, judicial review of MDL settlements will not filter out all inadequate settlements or self-dealing by lead MDL counsel.\footnote{129 See \textit{e.g.}, \textit{In re Hyundai & Kia Fuel Econ. Litig.}, 881 F.3d 679, 707 (9th Cir. 2018) (rejecting approval of class-action settlement in part because the district court failed to consider the value that the settlement added to the defendant’s voluntary reimbursement program and set attorney’s fees accordingly); \textit{Eubank v. Pella Corp.}, 753 F.3d 718, 725–26, 729 (7th Cir. 2014) (reversing the district court’s approval of a settlement when, among other reasons, the court did not estimate the likely value of the claims at trial and the $90 million estimate of the class’s expert accountant appeared to be inflated in relation to the actual claims that class members filed against the settlement fund).} But review is also far from toothless, especially when coupled with auxiliary doctrines borrowed from the law of class actions—in particular, a requirement that MDL plaintiffs receive notice of the settlement and an opportunity to file objections with the transferee judge.\footnote{130 Cf. \textit{Fed. R. Civ. P.} 23(c)(2)(B) (requiring “the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort” for opt-out class actions). Because each MDL plaintiff is known, providing notice will be neither more difficult nor more costly than the present process for notifying MDL plaintiffs. Other protections for class members in mandatory or opt-out class actions are unwarranted. For instance, substituted notice for unknown class members is unnecessary because each MDL plaintiff is known. Nor, because each plaintiff enjoys the right to reject the settlement, is an opt-out opportunity at the time of settlement needed.}

Judicial review of MDL settlements entails establishing a standard of review. It seems unlikely that the standard presently applicable to class
actions—that the settlement must be “fair, reasonable, and adequate”—can be improved. This standard will lead judges to reject indefensibly weak MDL settlements. Prolonging some MDL proceedings is the necessary price of greater judicial control.

Powers to appoint lead counsel and review settlements will go a long way to curb the perceptions of lawlessness and self-dealing that infect present debates about multidistrict litigation. In view of emerging precedent and a sense of best practices, these changes seem destined to happen—and likely sooner than later. These changes signal an end to the fiction that client consent is a sufficient bulwark against MDL counsel who overreach.

Providing two more powers to transferee judges would complete multidistrict litigation’s transformation into an opt-in process: (1) explicit authority to approve fees paid both to lead MDL counsel and to the plaintiffs’ original lawyers; and (2) authority to transfer MDL cases for all purposes, including trial, to the transferee forum. Regarding fees, the power of the transferee judge to set the fee of lead MDL counsel for undertaking work of benefit to all MDL plaintiffs is already beyond doubt. Although the power to control the fees of the MDL plaintiffs’ original lawyers is more controversial, exercising judicial control over all fees is inevitable once the notion of judicial control supplants the fiction of individual consent. Indeed, a transferee judge’s power to regulate fees is part and parcel of the power to review settlements; it is impossible to evaluate a settlement’s fairness without examining the share of the total proceeds that lead and original counsel both receive. Admittedly, the argument for fee regulation has less salience when MDL cases proceed to trial. But as we describe in the next paragraph, the regulatory model also posits that MDL trials will occur in the transferee forum, thus undercutting any argument that original counsel deserves a large percentage of an MDL plaintiff’s recovery.

Providing transferee judges the power of self-transfer closes the loop and ensures that they enjoy plenary power over an MDL proceeding. MDL

---

131 Fed. R. Civ. P. 23(e)(2). Opacity is perhaps the only critique of this standard. But courts have developed a series of factors to put meat on these open-ended words. See, e.g., City of Detroit v. Grinnell Corp., 495 F.2d 448, 462–63 (2d Cir. 1974) (listing nine factors to evaluate the merits of a class settlement), abrogated on other grounds by Goldberger v. Integrated Res., Inc., 209 F.3d 43 (2d Cir. 2000). An amendment to the Federal Rules of Civil Procedure, slated to become effective on December 1, 2018 breaks the standard into four factors, one of which involves four subfactors. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 23–27, app. C–12 to C–14 (Sept. 2017), http://www.uscourts.gov/sites/default/files/2017-09-jcus-report_0.pdf (proposing an amendment to Fed. R. Civ. P. 23(e)(2)).

132 Supra note 87 and accompanying text.

133 Supra note 93 and accompanying text.

134 It is important to note that judicial approval of fees does not mean that an MDL plaintiff’s original lawyer will receive no fee. The original lawyer can still obtain a fee for any work that was performed and was reasonably necessary to advance the client’s interests.
courts exercised this power until Lexecon ended the practice in 1998.\textsuperscript{135} In the ensuing years, Congress repeatedly attempted to overturn Lexecon. In 1999, 2001, 2003, and 2005, the House voted in favor of bills “to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial.”\textsuperscript{136} In 1999, the Senate amended the House bill, keeping the language to overrule Lexecon but deleting other jurisdictional provisions that the House proposed; the two chambers were unable to reconcile their differences and the Lexecon fix, to which both chambers agreed, never became law.\textsuperscript{137}

Therefore, it is not difficult to imagine Congress giving transferee judges the power to conduct MDL trials. In an increasing number of MDL proceedings, transferee judges already conduct bellwether trials that set the table for global settlements.\textsuperscript{138} Some MDL courts have also effectively worked around Lexecon by using a “Lexecon waiver.”\textsuperscript{139} Although present legislative and rulemaking proposals suggest that the pendulum has swung away from self-transfer for the time being,\textsuperscript{140} self-transfer completes the consolidation of power in the transferee court—a consolidation that reflects the clear direction of present multidistrict litigation.

The powers that this regulatory model posits—appointing counsel, reviewing settlements, approving counsel fees, and consolidating cases for all purposes—strike the balance between efficiency and autonomy decidedly in favor of efficient single-forum resolution. Only remnants of litigant


\textsuperscript{137} 145 CONG. REC. 27,055–56 (1999); The Multidistrict Litigation Restoration Act: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 109th Cong. 2 (2006) (statement of Sen. Jeff Sessions, Chairman, S. Subcomm. on Admin. Oversight and the Courts) (“The House of Representatives has passed legislation to address the Lexecon decision—the so-called ‘Lexecon fix’—in the 106th, 107th, and 108th Congresses. The Senate passed its own Lexecon fix in the 106th Congress as well . . . . None of these bills has become law to date, however.”). The Senate also continued to consider its own bills to overturn Lexecon. See, e.g., 152 CONG. REC. 15,936–37 (2006) (stating that the purpose of the bill is “[t]o amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and for other purposes.”).


\textsuperscript{139} Under a “Lexecon waiver,” the parties in a case that is transferred into an MDL proceeding (or a defendant in a case that is directly filed in the transferee court) agree to waive objections to trial of the case in the transferee forum. These waivers must be done on a case-by-case basis; they are therefore costly, and the relevant parties may refuse to give consent. See Fallon et al., supra note 30, at 2356–60 (describing the process for and logistical difficulties of Lexecon waivers).

\textsuperscript{140} See supra notes 110–113 and accompanying text.
autonomy remain. Save for an appointed class representative, this regulatory model converts multidistrict litigation, for all intents and purposes, into an opt-in class action.

The regulatory model is complete, save for a final structural concern. At present, class actions can be, and often are, a part of multidistrict proceedings. Converting the MDL process into an opt-in class action requires an allocation mechanism to determine whether a particular proceeding should be a mandatory, an opt-out, or an opt-in class action.

Creation of this mechanism in turn raises questions about the roles of the Judicial Panel and the transferee judge. At present, the Panel makes the decision to transfer; the transferee judge makes the decision to certify (or not certify) a class. Carrying this arrangement forward into an opt-in world, the Panel would make the decision whether to treat related cases on an opt-in basis, while the transferee judge would make the decision whether to convert the cases into an opt-out or mandatory class action.

This split in decision-making authority strikes us as undesirable. One person or entity should make the determination about the proper form of class action for a case. The logical entity is the Judicial Panel. The Panel must make the first decision: whether to consolidate related cases into an opt-in class. It would not be difficult for the Panel to decide at that time whether a form of class treatment other than an opt-in class makes more sense. If it does, the Panel can certify the proceeding as a mandatory or opt-out class action and transfer it to an appropriate district judge for handling. The same is true if the Panel determines that an opt-in class is the proper approach.

Establishing a single institution to make allocative decisions between an opt-in or opt-out process is hardly fanciful. In the United Kingdom, the Competition Appeal Tribunal, which has jurisdiction over a range of matters akin to American antitrust law, has recently received the power to decide whether a collective action should proceed on an opt-in or opt-out basis. The Tribunal serves as a model for the allocative power that our regulatory model assigns to the Judicial Panel.

Placing class-certification decisions in the hands of the Panel will generate clear benefits. The Panel is comprised of seven federal judges versed in complex matters, so the decisions regarding class certification will be well-considered. Greater uniformity in the law of class actions will

---

141 See supra notes 45–47 and accompanying text.
142 See Competition Appeal Tribunal Rules 2015, SI 2015/1648, R. 79(3) (Eng.) (listing factors to be considered by the Tribunal in “determining whether collective proceedings should be opt-in or opt-out”).
develop. States are increasingly developing a single, specialized court to handle complex litigation or large commercial disputes. Investing the Panel with the authority to organize a geographically dispersed dispute helps the federal system keep pace. Increasing the role of the Judicial Panel also checks the largely ungoverned power of the transferee judge.

The regulatory model will also produce side effects with more debatable merit (or demerit). There will be fewer multidistrict proceedings, as some consolidations will stumble on the adequacy hurdle. In addition, fewer consolidated cases will be settled, as transferee judges reject weak settlements. And more cases involving mass injuries may remain unfiled or flee to state court, as lawyers seeking to avoid regulatory control over their fees either decline to represent plaintiffs in mass-injury disputes or file their cases in state court.

An empowered Judicial Panel also raises practical questions—including the right to appeal Panel determinations, the right of the Panel to supervise other case-management decisions of the transferee judge, and the circumstances in which (and by whom) a case might be converted from one class-action form into another—that need not detain us. Our goal is to sketch a model of what MDL proceedings are likely to become if we follow present trends to their logical conclusion. And the conclusion is difficult to resist. Legal institutions and judges do not give up power readily, and they often seek to add to the power that they already possess, especially when justifications such as greater efficiency and lower agency costs lie behind the maneuver. Nothing to date suggests a different denouement for multidistrict litigation.

B. Back to Discovery Coordination

Although the momentum in multidistrict litigation points toward greater judicial control, an alternative is possible. Under a second discovery-coordination model, the MDL process would return to its roots as a mechanism to complete common discovery. When that discovery is finished, cases must be remanded to their transferor forums for further proceedings—whether trial, settlement, termination on pretrial motion, or voluntary dismissal.

This model avoids many of the problems infecting the modern MDL process—problems that arise largely because multidistrict litigation has become a center to resolve mass disputes. Concerns for adequate representation do not go away when lawyers represent a group of MDL

\[144\] Perfect uniformity will not occur because individual district judges will make class-certification determinations when no related actions are filed in other federal districts.

\[145\] See Benjamin F. Tennille et al., Getting to Yes in Specialized Courts: The Unique Role of ADR in Business Court Cases, 11 PEPP. DISP. RESOL. L.J. 35, 39–40 (2010) (noting that, as of 2010, at least nineteen states had created complex-litigation or commercial courts “based upon procedural complexity”).
plaintiffs only during discovery, but they are significantly lessened when the lawyers focus only on common discovery and the prospect of earning large fees for global settlements dissipates. A focus limited to common discovery will also streamline the MDL process. And the autonomy of MDL plaintiffs is enhanced because, after common discovery, their cases will return to the forum and lawyer of their choosing. Indeed, remanding cases to their transferor forums has begun to emerge as a judicially subversive technique to challenge the conventional wisdom of multidistrict litigation as a mass-resolution mechanism.146

Given the evolution of multidistrict litigation toward mass resolution, however, one objection to the discovery-coordinating model is the impracticality of turning the battleship around to its distant port of departure. As a legal matter, however, a simple doctrinal change can accomplish the switch. One of the first and most transformative powers that transferee judges claimed was the authority to make dispositive pretrial rulings.147 If that procedure were reversed—if the phrase “coordinated or consolidated pretrial proceedings” in §§ 1407(a)–(b)148 were interpreted in light of the Panel’s remand authority in § 1407(b) to exclude the transferee judge’s power to render globally dispositive pretrial rulings149—the focus of multidistrict litigation would return to discovery of common issues.

If cases are routinely remanded to their transferor forums for additional discovery on individual issues, the prospects for global settlements diminish but are not entirely doomed. In appropriate cases, the transferee judge can certify a class action, and the parties can seek to settle the case on that basis. Moreover, after conducting appropriate discovery, lead MDL counsel can still seek to negotiate a global settlement before—or even after—remand. With a credible threat of remand at the completion of common discovery, however, the deal would need to be sufficiently attractive to induce MDL plaintiffs and their original counsel to sign on the dotted line, which is not necessarily a bad thing.150

146 See Robreno, supra note 55, at 144 (noting that, after 2009, the asbestos MDL “departed from this regimen” of seeking to attain a single mass resolution and that “[r]emand was no longer viewed as a failure, but rather very much as a part of the MDL process”).
147 See supra notes 18–24 and accompanying text.
149 These rulings include motions to dismiss, motions for summary judgment, and evidentiary rulings that would lead to the dismissal of claims on a global basis. Excluded are dispositive motions unique to particular cases, such as motions to dismiss a specific defendant due to a lack of personal jurisdiction or sanctions motions to enforce discovery obligations.
150 Because many cases that end up in an MDL proceeding are filed originally in the transferee forum, see supra notes 3–4, the transferee judge will retain control of cases filed in the transferee district. The transferee judge could employ techniques such as bellwether trials to craft a settlement open to remanded cases. Without a case-dispositive authority, however, the transferee judge is likely to see fewer of these transferee-forum filings.
Another objection to the discovery-coordinating model is the arguable sacrifice of too much efficiency in return for limited gains in autonomy. In the short term, a return of multidistrict litigation to a discovery-coordinating device will undoubtedly jolt the federal civil-justice system, which has come to rely heavily on § 1407 to siphon off a large percentage of its docket. In the medium term, this approach may suppress the filing of some cases involving mass harm, especially those that are economically viable principally because of the prospect of global MDL resolution. In the long term, the downward trajectory of class actions may reverse to fill the vacuum that the shrinking of the MDL process creates.

This model also disrupts the referral industry that has sprung up around multidistrict litigation. At present, feeder firms aggregate claims and funnel their clients to the lawyers that handle the cases, often grabbing a large chunk of the potential recovery along the way.\footnote{See Morris A. Ratner, Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements, 26 GEO. J. LEGAL ETHICS 59, 91 (2013) (describing the dichotomy between, on the one hand, lead MDL counsel who “do not necessarily collect and resolve large numbers of individual claims” but rely on common-benefit set asides in aggregated proceedings for their fees and, on the other hand, firms “structured to primarily obtain and warehouse claims for processing and settlement”).} Disrupting this industry may be beneficial if it brings an end to the repeat-player phenomenon, whose competition-stifling effect on legal services has been one of the most trenchant criticisms of multidistrict litigation.\footnote{See Burch & Williams, supra note 38, at 1531 (arguing that multidistrict litigation must be adjusted to stimulate competition between repeat-player counsel and others law firms “such that faithfully representing plaintiffs’ interests becomes more lucrative than playing the long game”); Burch, supra note 13, at 152–54 (suggesting that automatic remand of MDL cases that do not settle can destabilize the repeat-player power structure in multidistrict litigation).}

The real difficulty for the discovery-coordination model is practical: will the Panel be willing to wrestle existing power away from transferee judges? Whether or not it is realistic, however, the discovery-coordinating model is a Rorschach test. If the idea of dispersing one-third of the federal docket back to their transferor forums seems naive or unappealing, then the only alternative to control the undesirable side effects of the present MDL process is the regulatory, or opt-in, model.

Unless, that is, the two models can be blended.

C. Both Forward and Back: A Middle Ground

Both the regulatory model and the discovery-coordinating model leave gaps that the present MDL process, with its amoeba-like flexibility, papers over. The regulatory model will prevent the mass resolution of cases that fail to meet the requirements for an opt-in class action, but it may be overkill for cases that need no more than discovery coordination. The discovery-coordination model will make mass resolution more difficult, at least unless
class actions reverse course to compensate for the retreat of multidistrict resolution.

Fortunately, a middle ground is possible. Recall our suggestion that, under the regulatory model, the Judicial Panel be empowered to allocate cases to an opt-in, opt-out, or mandatory class-action track. It takes only a small tweak to add a non-class track into which the Judicial Panel can slot a consolidated proceeding: a discovery-only track in which the Panel has authority to choose the counsel to handle the discovery process. In choosing among the various tracks, the Panel can explicitly weigh concerns like litigant autonomy, agency costs, and efficient resolution.

A fair question is whether the Panel would ever opt to put cases on a discovery-coordination track. Although experience with such a reform can provide the only certain answer, a quiet counter-revolution in favor of remand at the completion of common discovery may already be underway. At a minimum, forcing the Panel’s hand on the point will make it confront the costs of using multidistrict litigation as a dispute-resolving tool and will clarify its expectations for a transferee judge’s mission in an MDL proceeding.

But we expect the discovery-coordination track will see use. In some MDL proceedings, the variance in interests among the consolidated parties may make a class action—whether opt-out or opt-in—impossible to certify. The Panel may also regard class treatment as an inappropriate response for other reasons, especially when individual cases have positive value, so that concerns for litigation autonomy and bet-the-company liability make a class action undesirable. In these cases, a discovery-coordination track may achieve the best balance among efficiency, autonomy, and the curtailment of agency costs.

**CONCLUSION**

Viewed from 30,000 feet, one fascinating aspect of the present MDL process is how little traction concerns for individual autonomy have, when those same concerns have so constrained the scope of class actions. The reason is the fig leaf of consent and control that multidistrict litigation provides: in theory, each MDL plaintiff, rather than a class representative, remains in charge of making critical litigation decisions. As multidistrict litigation has become a holding tank for claims awaiting global resolution in

---

153 See supra notes 143–145 and accompanying text.
154 See supra note 146 and accompanying text.
155 See In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (stating that some class actions force “defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability”).
156 See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 616 (1997) (“The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action.” (quoting FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment)).
the transferee forum, that fig leaf has become vanishingly small, and the problems of an MDL process with few clear limits on the conduct of repeat-player lawyers and judges have been exposed.

These problems generate the turbulent energy that will drive multidistrict litigation’s continued evolution over the next segment of its lifespan. Many of the extant proposals for reform have tried to leave multidistrict litigation in its present no-man’s land, importing controls associated with class actions while avoiding the conversion of multidistrict litigation into a class action. But the momentum that such controls create will likely propel multidistrict litigation toward some form of opt-in class action.

That momentum will then leave a void—a lack of any judicial form to handle cases that might benefit from common discovery but that fail to meet the demanding protective requirements of a class action. Preserving a role for multidistrict litigation in such cases is valuable. A structure that allocates cases to their best track—opt-in class action, opt-out class action, mandatory class action, or discovery-only proceeding—is logical.

It is also necessary. Judicial pragmatism and the desire to be efficacious have crafted multidistrict litigation into a vital part of the American litigation landscape. Those same qualities have led judges and lawyers to turn a blind eye to some of the more ethereal values of American justice, such as litigant autonomy and adequate representation. The blended model that we have proposed is no panacea, but it creates a blueprint for a multidistrict process that is sustainable for the next fifty years.