Efficiency at the Price of Accuracy: The Case for Assigning MDLs to Multiple Districts and Circuits

28 U.S.C. § 1407 allows for the centralization of unique cases into a single forum for pretrial purposes. The product is multidistrict litigation, known colloquially as the "MDL." While initially conceived as a means of increasing efficiency for only particularly massive, complex litigation, MDLs have become pervasive. Today, over fifteen percent of all civil litigation—and fifty percent of all federal civil litigation—is consolidated into MDLs. Yet, MDLs are commonly overconsolidated, such that only one judge presides over hundreds, thousands, or even hundreds of thousands of individual cases at a time. Fewer than three percent of such cases return to their original forum for trial, meaning that a handful of judges wield considerable influence over a vast portion of this nation's civil litigation.

This Note illustrates how the current MDL scheme suffers from two accuracy problems due to concentrated decisionmaking. First, overburdened MDL judges are regularly tasked with making legally dubious decisions, often lacking concrete authority or procedural guidance. This is especially apparent with regard to choice of law: MDL judges, tasked with applying conflicting state and federal law, face an enormous interpretive burden. Such a burden drains the limited judicial resources of an MDL court and often results in judges neglecting to address nuances in conflicting law. Second, there is the problem of inaccurate outcomes, caused by subjecting hundreds or thousands of unique cases to a single, uniform decision. Statistically, the risk of an extreme decisional distribution is so high that risk-averse parties are induced to settle where they otherwise would not.

By way of a solution, this Note advocates for a "divisional approach." MDLs should be assigned to panels of judges in multiple district courts from different circuits. Such an approach (1) greatly eases the interpretive burden on MDL courts by allowing judges to apply conflicting law more efficiently, (2) reduces the variance among judicial decisions by introducing additional decisionmakers into the fray, and (3) is grounded in the explicit text of § 1407. Ultimately, this approach maintains efficiency without disregarding accuracy.

INTRODUCTION

Imagine a season of American football. The National Football League has thirty-two teams, with each team set to play seventeen games over the course of eighteen weeks—a total of 272 games.[1] Typically, a game is officiated by a team of seven: a referee, umpire, down judge, line judge, field judge, side judge, and back judge.[2] Each official is responsible for refereeing a particular aspect of the game, ranging from out-of-bounds determinations to calling false starts.[3]

Now imagine that in each of these 272 games, there is only *one referee*—the *same* referee, for the entirety of the season. He is responsible for supervising all twenty-two players on the hundred-yard field. He is responsible for determining downs, false starts, out-of-bounds play, and keeping time. He handles every dispute, answers every question, and all that he says is final—there is no avenue for appeal. Beyond doubt, this structure raises concerns. Is it feasible? Is it fair? And most importantly, is it *accurate*? To all three questions, the answer is no.[4]

Yet, this is precisely what happens in nearly half of all federal civil litigation within the United States.[5] Indeed, this is multidistrict litigation ("MDL").[6] Pursuant to 28 U.S.C. § 1407, a panel of judges assigned by the Supreme Court consolidates hundreds, thousands, or

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1. *Creating the NFL Schedule,* NFL FOOTBALL OPERATIONS, https://operations.nfl.com/gameday/nfl-schedule/creating-the-nfl-schedule/ (last visited Feb. 19, 2024) [https://perma.cc/UPU2-KUEQ]. Each team also has a bye week. *Id.*

2. *Officials' Responsibilities & Positions*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/officiating/the-officials/officials-responsibilities-positions/ (last visited Feb. 19, 2024) [https://perma.cc/QFE6-2XSX].

3. *Id.*

4. Beyond the theoretical, there are countless examples in football of referees making bad calls. *See* Nick Dimengo, *The 8 Worst Calls in the History of the Super Bowl*, WORTHLY, https://worthly.com/sports/8-worst-calls-history-super-bowl/ (last visited Feb. 19, 2024) [https://perma.cc/4DNT-GUJL]. Perhaps the most recent example is Super Bowl LVII, where a controversial "defensive holding" call gave the Kansas City Chiefs a first down resulting in a final field goal to defeat the Philadelphia Eagles. Nick Schwartz, *NFL Fans React to the Brutal Holding Call that Decided Super Bowl LVII*, USA TODAY SPORTS: TOUCHDOWN WIRE (Feb. 12, 2023, 10:26 PM), https://touchdownwire.usatoday.com/lists/nfl-fans-react-to-the-brutal-holding-call-that-decided-super-bowl-lvii/ [https://perma.cc/QFE6-2XSX]. In each of these games, seven referees deliberated over the ultimate ruling. If a team of seven so frequently drops the ball, just how accurate can we expect a team of *one* to be?

5. Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019, 10:54 PM), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload [https://perma.cc/7H6B-TVEP]. *But see* Terry Turner, *Multidistrict Litigation (MDL)*, DRUGWATCH, https://www.drugwatch.com/legal/multidistrict-litigation/ (last modified Sept. 5, 2023) [https://perma.cc/8MGM-G6L4] (citing the current share of federal civil litigation consolidated in multidistrict litigation as fifteen percent).

6. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 842–47 (2017).

even hundreds of thousands of cases into a single forum for pretrial litigation.[7] Although this is a temporary transfer, fewer than three percent of cases ever return to their original forum, as pretrial proceedings nearly always end in settlement.[8] A vast portion of our civil litigation—concerning thousands of individuals and billions of dollars—is consolidated in front of *just one judge*.[9]

The largest completed MDL was created in 1991 and involved over 192,000 plaintiffs, with each filing suit independently against the same group of defendants.[10] One judge picked a "leadership team" of attorneys to represent all plaintiffs, despite the plaintiffs already having chosen their own attorneys when filing suit.[11] One judge created a "common benefit tax" to compensate the leadership team, coming out of the pockets of all the plaintiffs' attorneys.[12] One judge set all the parameters for discovery, ruled on dispositive motions, and oversaw settlement.[13] The same judge presided over litigation that lasted over thirty years, only reaching resolution in October 2022.[14] Though this is the largest completed MDL, it is not a total outlier; today, one judge presides over a products liability MDL consisting of 257,892 consolidated cases in the Northern District of Florida.[15]

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7. *Id.*; 28 U.S.C. § 1407.

8. Bradt, *supra* note 6, at 843.

9. *See id.*

10. Turner, *supra* note 5. The 192,000 cases concerned asbestos litigation and were consolidated in the Eastern District of Pennsylvania. *Id.*; *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991).

11. ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 173, 176 (2020).

12. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014). As explained in Subsection II.D.2, a common benefit tax is a percentage of fees taken from individual counsel to further compensate the leadership team. *Id.* at 374–76. Though some critics raise constitutional concerns for the creation of a common benefit tax, it is often justified by the work the leadership team does to propel litigation. *See id.* at 376; *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 616 (E.D. La. 2008); Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1871 (2023).

13. KLONOFF, *supra* note 11, at 197.

14. Turner, *supra* note 5.

15. *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885, 2020 WL 7232079, at *1 (N.D. Fla. Dec. 8, 2020):

> This multidistrict litigation is a collection of products liability actions concerned with whether Defendants were negligent in their design, testing, and labeling of the nonlinear dual-ended Combat Arms Earplug Version 2 (the "CAEv2"). Plaintiffs are servicemembers, veterans, and civilians seeking damages in this action for hearing loss, tinnitus, and related injuries caused by their use of the CAEv2;

Turner, *supra* note 5 ("As of November 2022, the largest active MDL is the 3M Combat Arms Earplug MDL in Florida. At one time it had 320,638 cases and now has 257,892.").

This Note illuminates a serious problem created by the current MDL scheme: the sacrifice of accuracy for the sake of efficiency. A single judge presiding over 192,000 individual plaintiffs obviously hinders the ability to accurately adjudicate and resolve claims on their merits. In the football context, it is akin to having a single referee officiate not only the entirety of a game but the entirety of a *season*.

Part I begins by providing a background to multidistrict litigation, explaining its legal authority, effects, procedures, and controversies. Part II illustrates how the current MDL scheme suffers from two accuracy problems due to concentrated decisionmaking. First, the overburdened MDL judges are regularly tasked with making legally dubious decisions, often lacking concrete authority or procedural guidance.[16] This is especially apparent with regard to choice of law: MDL judges, tasked with applying conflicting state and federal law, face an enormous interpretive burden.[17] Such a burden drains the limited judicial resources of an MDL court and often results in judges neglecting to address nuances in conflicting law.[18]

Second, there is the problem of inaccurate outcomes, caused by subjecting hundreds or thousands of unique cases to a single, uniform decision.[19] Statistically, this creates enormous variance between claimant outcomes.[20] For example, a binary decision needs to be made in one hundred cases—either return a verdict in favor of the plaintiff or the defendant. If the decision is close, with a fifty percent chance of ruling in either direction, one can expect fifty cases to have a plaintiff verdict and fifty cases to have a defense verdict. The likelihood of reaching one hundred plaintiff verdicts or one hundred defense verdicts

16. *See* KLONOFF, *supra* note 11, at 173–292 (describing various roles of MDL judges); *see also infra* Section I.D (discussing the legally dubious authority underlying three "unprecedented" powers of the MDL judge: (1) assigning leadership teams, (2) creating a common benefit tax, and (3) slashing independent attorney's fees).

17. KLONOFF, *supra* note 11, at 285; *see also* Van Dusen v. Barrack, 376 U.S. 612 (1964) (holding that for transfers made pursuant to 28 U.S.C. § 1404(a), the law of the transferor court applies); Robert A. Ragazzo, *Transfer and Choice of Federal Law: The Appellate Model*, 93 MICH. L. REV. 703, 703 (1995). As discussed in Parts II and III, MDL judges overwhelmingly apply the federal precedent of the *transferee* circuit—in which the MDL court resides. Ragazzo, *supra*, at 705–06. As this is legally dubious, MDL judges should instead be applying the federal precedent of the *transferor* circuit—that which the cases originated from. *Id.* at 706. Unfortunately, doing so would only increase the amount of conflicting law the MDL judge must apply. *Id.* at 766.

18. Ragazzo, *supra* note 17, at 703.

19. *See infra* Section III.B. and accompanying footnotes.

20. Variance measures how far each data point is from the mean value. Adam Hayes, *What Is Variance in Statistics? Definition, Formula, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/v/variance.asp (last updated Mar. 14, 2023) [https://perma.cc/F7S2-BVL6].

is effectively zero when each case has its own independent judge.[21] Under the current MDL scheme, however, one of these two extreme outcomes is guaranteed, as one judge issues an identical decision for all one hundred cases.[22] The risk of blanket decisions collapsing potentially determinative variance among cases induces risk-averse parties to oversettle, resulting in distorted and inaccurate outcomes.[23]

Finally, Part III proposes a solution: under a "divisional approach," MDLs should be assigned to panels of judges in multiple district courts from different circuits. Such a solution (1) greatly eases the interpretive burden on MDL courts by allowing judges to apply conflicting law more efficiently, (2) reduces the variance among judicial decisions by introducing additional decisionmakers into the fray, and (3) is grounded in the explicit text of § 1407.[24] Ultimately, this Note calls for football to be played as intended—with multiple referees instead of just one.

I. BACKGROUND ON MULTIDISTRICT LITIGATION

At its core, multidistrict litigation is an attempt to consolidate and coordinate mass litigation in a single forum.[25] Hundreds, thousands, or even hundreds of thousands of plaintiffs may be funneled into a single district court for pretrial proceedings, thereby reducing the need for duplicative discovery or dispositive motions.[26] As such, the

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21. Indeed, the likelihood of one hundred judges returning a verdict for the plaintiff, when a plaintiff verdict only has a fifty percent probability, is 7.889×10^{-31}. This calculation is derived from a simple binomial distribution model. *See infra* Subsection II.B.1.

22. *See* Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 107 (2021); *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995). This strand of reasoning is found in discussions surrounding other forms of aggregate litigation, with an infamous MDL judge donning inconsistency as a core strength of our common-law system. *See* Fitzpatrick, *supra*, at 107; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1302; Edward K. Cheng, *When 10 Trials Are Better than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 956 (2012); Marchan v. John Miller Farms, Inc., 352 F. Supp. 3d 938, 947 (D.N.D. 2018) (Young, J., sitting by designation):

> The great strength of our common law system is reasoned inconsistency, i.e., each court reaching out for the best possible justice in the case before it, where reasoned but varying decisions draw from the body of other such decisions with the idea that the law will grow and adapt based on such reasoning.

23. *See* Turner, *supra* note 5; *infra* Subsection II.B.1 and accompanying footnotes; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1300.

24. *See* 28 U.S.C. § 1407 (emphasis added) (referencing "coordinated *or* consolidated pretrial proceedings," indicating that one can exist without the other); *see also* Part III and accompanying footnotes (proposing a divisional approach where MDLs should be assigned to panels of judges in multiple district courts from different circuits).

25. *See* Bradt, *supra* note 6, at 842; 28 U.S.C. § 1407.

26. *See* Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG. 43, 43–47, 65–66 (1998) ("The multidistrict litigation statute, 28 U.S.C. § 1407, creates a procedure by which

MDL is a grand effort to obtain efficiency in our judicial system where it is lacking. In an attempt to succinctly describe the procedural monstrosity that the MDL has become, this Part begins by addressing its authorizing statute.[27] Afterwards, it addresses the MDL's effect on modern litigation, its general process, and the unprecedented and highly controversial powers bestowed to MDL judges. Finally, this Part briefly discusses general criticisms of the MDL scheme.

A. The MDL Statute

The aggregation of multidistrict litigation is authorized by 28 U.S.C. § 1407. Otherwise known as the "MDL Statute," § 1407 confers the transfer "to any district for coordinated or consolidated pretrial proceedings" those "civil actions involving *one or more common questions of fact* [ ] pending in different districts."[28] In addition, § 1407 states this action is authorized upon determining "that transfers for such proceedings will be for the *convenience of parties and witnesses* and will *promote the just and efficient conduct of such actions*."[29] The MDL Statute therefore requires that centralization: (1) address one or more common questions of fact, (2) ensure convenience of parties and witnesses, and (3) promote justice and efficiency.[30]

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all federal cases containing a common question of fact can be brought before a single judge."); Turner, *supra* note 5.

27. 28 U.S.C. § 1407.

28. *Id.* § 1407(a) (emphasis added); *see also* Bradt, *supra* note 6, at 842–46 (calling the statute the "MDL statute"). Illustrated by Andrew Bradt, Professor of Law at the University of California, Berkeley, the MDL statute was passed in response to an onslaught of antitrust litigation that consumed the nation's judicial resources; through the creation of various judicial committees to improve communication among the federal judiciary, the MDL statute was enacted by Congress in 1964. Bradt, *supra* note 6, at 847–907; *see also* Breck P. McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation*, 38 A.B.A. J. 289, 289–92 (1952) (summarizing the report of the Judicial Conference of the United States "entitled 'Procedure in Anti-Trust and Other Protracted Cases' "); Phil C. Neal & Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621, 622 (1964) ("The avalanche of over 1,800 complex, protracted cases filed in thirty-five districts presented a serious challenge to the capacity of the federal courts."); JUD. CONF. OF THE U.S., PROCEDURE IN ANTITRUST AND OTHER PROTRACTED CASES 3–5 (1951).

29. 28 U.S.C. § 1407(a) (emphasis added).

30. KLONOFF, *supra* note 11, at 57–70. Determining if one or more common questions of fact exist among cases—known as the "commonality test"—is a critical inquiry relative to the determination of efficiency and convenience. *Id.* at 57. While the commonality test is one of fact rather than law, it is often compared to the "predominance" test applied to the certification of 23(b)(3) class actions. *Id.* at 57–58; FED. R. CIV. P. 23(b)(3). Courts are nonetheless divided in whether they apply a "liberal commonality test," staying true to the language of the rule, or a "predominance test" that requires common questions of fact to *predominate* over non-common ones. KLONOFF, *supra* note 11, at 64, 66. An example of the predominance test is in *In re Table Saw Products Liability Litigation*, where the court denied centralization because "common issues [were] overshadowed by the non-common ones." 641 F. Supp. 2d 1384, 1384 (J.P.M.L. 2009).

The Judicial Panel on Multidistrict Litigation ("JPML") consists of seven circuit and district judges designated by the Chief Justice of the United States, none of which can be from the same circuit.[31] Should the JPML decide that there exists one or more common questions of fact—and that transfer would convenience parties while promoting judicial efficiency—it may transfer all of the pending cases to a district judge of its choosing.[32] Furthermore, the JPML must provide notice to any affected party and conduct a hearing to determine whether transfer will occur.[33] Subsequently filed cases involving the same subject matter are also transferred to the MDL judge and are commonly referred to as "tag-along" cases.[34] Crucially, § 1407 makes clear that such transfers to

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As for convenience and justice/efficiency, the JPML rarely discusses them as "freestanding" criteria. KLONOFF, *supra* note 11, at 68. "Indeed, the Panel does not appear to have identified any core definition for either requirement." *Id.* Instead, the JPML uses "boilerplate language" to address them. KLONOFF, *supra* note 11, at 68 ("Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings . . . ; and conserve the resources of the parties, their counsel, and the judiciary." (citing *In re* Uber Techs., Inc., Data Sec. Breach Litig., 304 F. Supp. 3d 1351, 1353 (J.P.M.L. 2018); *In re* Loc. TV Advert. Antitrust Litig., 338 F. Supp. 3d 1341, 1343 (J.P.M.L. 2018))). However, Klonoff identifies "the most important consideration [ ] to be convenience to the federal judicial system, rather than convenience to particular litigants." KLONOFF, *supra* note 11, at 70.

31. 28 U.S.C. § 1407(d).

32. *Id.*; *id.* § 1407(a). A particular district court is oftentimes chosen, however, because of the judge that presides within it. *See* KLONOFF, *supra* note 11, at 136 (describing how prior judicial experience impacts the JPML's selection of a transferee district). JPML selection of the MDL judge is based on a variety of factors including MDL experience, subject matter expertise, and party objection or agreement. KLONOFF, *supra* note 11, at 134–40. The statute, however, implies that multiple judges can be appointed by the JPML. *See* 28 U.S.C. § 1407(b) ("The *judge or judges* to whom such actions are assigned . . . may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." (emphasis added)); *infra* Section III.C (discussing the legitimacy of assigning an MDL to multiple judges). But despite the ability to appoint multiple judges to preside over an MDL, this statutory feature is seldom utilized. *See, e.g.*, *In re* Air Crash Disaster Near Papeete, Tahiti, on July 22, 1973, 397 F. Supp. 886, 888 (J.P.M.L. 1975) (ordering to reassign litigation "to the Honorable Robert Firth for coordinated or consolidated pretrial proceedings"); *In re* Air Crash Disaster Near Chi., Ill., on May 25, 1979, 476 F. Supp. 445, 452 (J.P.M.L. 1979) ("[A]ssigned to the Honorable Edwin A. Robson and the Honorable Hubert L. Will for coordinated or consolidated pretrial proceedings."); *see also infra* Section III.B and accompanying footnotes (discussing variance reduction to foster accurate outcomes).

The JPML still considers a variety of factors in deciding on the transferee district, including the following: party preferences; the location of parties, witnesses, and evidence; the location of pending actions; docket conditions of potential transferee courts; the location of first filed actions; coordination with other federal proceedings or with related state court proceedings; and the location designated in a forum selection clause. KLONOFF, *supra* note 11, at 114–30. However, the JPML is highly responsive to plaintiff and defendant agreement on transferee courts. Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1718 (2019).

33. 28 U.S.C. § 1407(c).

34. Bradt, *supra* note 6, at 842; 15 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3865 (4th ed. 2023).

an MDL judge are limited to *pretrial* proceedings, thereby contemplating a return of cases to their original forums.[35]

While the MDL judge's powers are limited to pretrial proceedings, they are nevertheless expansive. Namely, the MDL judge can coordinate depositions to manage discovery, resolve dispositive motions, grant summary judgment, hold *Daubert* hearings,[36] and more.[37] As with most complex litigation, pretrial occupies the vast majority of a lawsuit's lifespan; MDLs therefore settle before remand approximately ninety-seven percent of the time.[38] As such, the MDL judge retains a high level of control over the entire duration of a large volume of cases—a predicament this Note analyzes further in Part II.[39]

B. Effect of MDLs on Modern Litigation

The prevalence of multidistrict litigation is outstanding. An estimated fifteen percent of all civil lawsuits in the United States are part of MDLs.[40] Notably, the percent of federal cases consolidated into MDLs jumped from sixteen to thirty-six percent in 2014 alone; as of 2019, over fifty percent of all federal civil cases were consolidated into MDLs.[41] The largest completed MDL was created in 1991 and involved over 192,000 cases.[42] Between 2014 and 2021, an additional 220 motions for centralization were granted, thereby centralizing 3,389

35. 28 U.S.C. § 1407(a) ("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 . . . .").

36. *Daubert* hearings are held in response to motions to exclude expert witnesses on reliability grounds under Federal Rule of Evidence 702, as elaborated by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579 (1993).

37. Bradt, *supra* note 6, at 843.

38. *Id.* at 834.

39. *Id.* at 843 ("The result is that the MDL judge has complete authority over the mass of cases, whose numbers can run into the thousands, until pretrial proceedings have concluded and the cases have to be returned to their original courts.").

40. Turner, *supra* note 5.

41. *See* Simpson, *supra* note 5; *see also MDL Standards and Best Practices* x (Duke L. Ctr. Jud. Stud., Working Paper, 2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf [https://perma.cc/6WB4-2VJE] [hereinafter *MDL Standards Statistics*] (as of 2014, over a *third* of all federal civil cases were consolidated into MDLs, a number that increased from sixteen percent in 2002). If we were to remove 70,328 prisoner and social security cases from the 2014 totals, the 120,449 pending actions in MDLs constituted 45.6 percent of all pending civil actions in 2014. *MDL Standards Statistics*, *supra*, at x–xi.

42. Turner, *supra* note 5; *In re* Asbestos Prods. Liab. Litig. (No. VI), 771 F. Supp. 415, 417 (J.P.M.L. 1991).

cases and transferring an additional 37,147 tag-along cases.[43] Currently, the largest active MDL involves over 250,000 cases.[44]

One of the primary justifications for the widespread use of MDLs is, of course, the overall gains in consistency and efficiency.[45] Specifically, MDLs promote consistency in judicial rulings by allowing one judge, whose "knowledge of the facts, science and relevant law reaches expert quality," to decide pretrial issues for all consolidated cases.[46] Considering the varying experiences and legal opinions that different judges may possess, an MDL prevents two similar or identical cases from reaching different conclusions.[47] Additionally, the cost of duplicative discovery is greatly reduced, if not eliminated altogether.[48] Should a defendant corporation's executives be deposed, for example, they need not conduct dozens—let alone hundreds—of depositions. In an MDL, one deposition may suffice. Time and money saved may be channeled towards new areas of discovery, thereby increasing the depth of the plaintiffs' inquiry.[49] While the overall cost of discovery may not necessarily decrease, funds may be efficiently redirected towards the case's merits.[50]

From the plaintiffs' perspective, perhaps the most significant advantage of MDLs (and therefore the most significant *disadvantage* to defendants) is the ability to level the playing field.[51] Pooling together plaintiffs means pooling together resources, allowing a team of plaintiff firms or attorneys to combat the immense strength of the defense bar.[52] In addition, certain prominent lawyers are repeatedly named to plaintiffs' leadership teams.[53] Donned the "repeat" players, these

43. U.S. JUD. PANEL ON MULTIDISTRICT LITIG., UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION: CALENDAR YEAR STATISTICS, JANUARY THROUGH DECEMBER 2021, at 1, https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2021.pdf (last visited Feb. 19, 2024) [https://perma.cc/26QQ-HXZJ].

44. Turner, *supra* note 5; *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-2885, 2020 WL 7232079, at *1 (N.D. Fla. Dec. 8, 2020). At one time, the MDL involved 320,638 cases. Turner, *supra* note 5.

45. Rachel Abrams, *Multidistrict Litigation Consolidation: Pros and Cons*, ADVOC. MAG. (Feb. 2016), https://www.advocatemagazine.com/article/2016-february/multidistrict-litigation-consolidation-pros-and-cons-2 [https://perma.cc/T9JF-T25N].

46. *Id.*

47. *Id.*

48. Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 LA. L. REV. 433, 457 (2014).

49. *See* Herrmann, *supra* note 26, at 43–47, 65–66 (explaining the time and money that the plaintiffs save will likely be channeled into new areas of discovery); Fitzpatrick, *supra* note 22, at 109–10.

50. Herrmann, *supra* note 26, at 45.

51. *Id.*

52. *Id.*

53. *Id.* at 47.

attorneys develop a familiarity with the usual MDL process and the judges who preside over them.[54] MDL consolidation attracts these players and subsequently raises the overall skill level of the plaintiffs' steering committee, much to the defendants' detriment.[55]

From the defendants' perspective, mass consolidation presents a unique opportunity to achieve "global peace."[56] The MDL court is uniquely situated to allow both sides of aggregated, complex litigation to come together and resolve disputes.[57] Rather than forcing defendants to litigate with thousands of plaintiffs—as lawsuits are filed at different times and proceed at different stages—defendants can negotiate with smaller teams of representative attorneys.[58] They can resolve all litigation before them in a single sweep through mass settlements: this is their "global peace." [59] Plaintiffs know of this goal and oftentimes charge defendants a premium through larger settlements.[60] As such, if defendants wish to terminate all litigation and resume ordinary business (assuming financial survivability post-settlement), they must pay a pretty penny.[61] Still, the MDL affords an opportunity to do so.

C. General Process of an MDL

The timeline of an MDL consists of complex procedural processes that oftentimes mirror that of a traditional lawsuit and other times drastically depart.[62] Multidistrict litigation is known to only loosely

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54. *Id.*

55. *Id.*

56. *Id.*

57. *See* Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008) ("[T]he centralized forum created by the MDL Panel truly provides a 'once-in-a-lifetime' opportunity for the resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time.").

58. This is known as the "leadership team" and is further discussed *infra* Subsection I.D.1 and the accompanying footnotes.

59. *See* Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1491, 1511 (2016) ("Increasingly, the prevalent goal of these consolidated proceedings is to buy 'global peace' for the defendants."); *see also* Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives,* 2003 U. CHI. LEGAL F. 177, 240 (arguing that in the similar class action context, defendants primarily seek "closure, or 'global peace' ").

60. *See* Christopher B. Mueller, *Taking A Second Look at MDL Product Liability Settlements: Somebody Needs to Do It,* 65 U. KAN. L. REV. 531, 541 (2017) ("Comparing recoveries under this settlement and the GCCF payouts led to the conclusion that MDL settlements might actually pay claimants more—a kind of global peace premium that some defendants are willing to pay.").

61. *See id.*

62. KLONOFF, *supra* note 11, at 197; *see Request for Rulemaking to the Advisory Committee on Civil Rules*, LAWS. FOR CIV. JUST. 1 (Aug. 10, 2017), https://www.uscourts.gov/sites/default/files/17-cv-rrrrr-suggestion_lcj_0.pdf [https://perma.cc/WAP5-H95L] (a "national coalition

follow the Federal Rules of Civil Procedure, causing many scholars to argue that MDL judges are effectively creating their own procedural rules.[63] This Section summarizes the overall MDL process and procedural tools employed by MDL judges, the availability of appeal, and finally, the choice of law doctrines attached to MDLs.

1. From Complaint to Settlement

After cases are transferred pursuant to a motion for consolidation, the MDL judge has the power to oversee and administer all aspects of the pretrial process.[64] To ensure a smooth process, MDL judges typically issue case-management orders to delineate major issues; for example, judges may establish timelines for ruling on pending motions, create discovery plans, and schedule dispositive motions.[65] Importantly, dates need to be set for filing consolidated amended complaints, responding to motions for remand to state court, filing and briefing motions to dismiss, finalizing fact discovery, resolving class certification motions, developing expert disclosures through *Daubert* hearings, and filing motions for summary judgment.[66]

At early stages, it is especially critical for MDL judges to both focus on common issues of the MDL and determine the strength of individual cases.[67] To focus on common issues, MDL judges heavily rely upon consolidated complaints and answers, which supersede prior pleadings.[68] When determining the strength of individual cases, MDL judges employ plaintiff fact sheets and *Lone Pine* orders—both of which are normally issued before discovery.[69] Plaintiff fact sheets require plaintiffs to submit information to the court in lieu of interrogatories during the discovery process.[70] In the products liability setting, for example, fact sheets typically list the plaintiff's injuries, provide medical history, identify the product that caused the alleged injuries, and name the plaintiff's healthcare provider or diagnosing physician.[71]

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of corporations, law firms, and defense trial lawyer organizations" calling for amendments to the FRCP in response to unchecked procedural improvisation by MDL judges).

63. *Cf.* LAWS. FOR CIV. JUST., *supra* note 62, at 1 ("[T]he FRCP no longer provide practical presumptive procedures in MDL cases, so judges and parties are improvising."); *see also infra* Section I.E.

64. KLONOFF, *supra* note 11, at 197.

65. *Id.* at 198–99.

66. *Id.* at 200.

67. *Id.* at 201.

68. *Id.*

69. *Id.* at 203–06.

70. *Id.* at 203.

71. *Id.*

By contrast, *Lone Pine* orders require plaintiffs to provide detailed information to support their claims, oftentimes requiring proof of causation from a diagnosing physician.[72] The purpose of both screening devices is to prevent an influx of meritless cases into the MDL—which only serve to dilute high-value claims, overburden the court, and waste defendant resources.[73] During later stages of discovery, MDL judges may address any of the following issues: bifurcating discovery, determining deposition guidelines, establishing privilege and confidentiality protocols, and identifying ways to reduce duplicative efforts.[74] Typically, development of expert testimony is a primary focus, as it may "make or break" a large number of cases.[75]

A unique aspect of MDLs is the bellwether trial.[76] A bellwether trial is a trial of a limited number of cases in an MDL that provides useful information for the overall settlement without binding all plaintiffs.[77] The goal of such trials is twofold: first, to facilitate settlement by providing both sides of the litigation with data points pertaining to the likelihood of claim success and the amount of damages awarded; second, to allow counsel an opportunity to prepare for subsequent trials and develop "trial packages" for use by local counsel upon remand.[78] A crucial task for the MDL judge is to create "pools" of plaintiffs that will participate in bellwether trials. Ideally, these pools contain plaintiffs who are accurate representatives of the class—mirroring the typicality requirement for class action certification.[79] To

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72. *Id.* at 204; Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 20 (2019).

73. *See* Engstrom, *supra* note 72, at 31.

74. *See* KLONOFF, *supra* note 11, at 207.

75. *Id.* at 208–10.

76. *Id.* at 223.

77. *Id.* at 224–25.

78. *Id.*; *see also* Fallon et al., *supra* note 57, at 2338 (describing the function of bellwether trials in MDLs). Importantly, Judge Fallon said the following:

> Indeed, the utilization of bellwether jury trials can enhance and accelerate the MDL process in two key respects. First, bellwether trials allow coordinating counsel to hone their presentation for subsequent trials and can lead to the development of 'trial packages' for use by local counsel upon the dissolution of MDLs. Second, and perhaps more importantly, bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.

Fallon et al., *supra* note 57, at 2338.

79. Fallon et al., *supra* note 57, at 2343; KLONOFF, *supra* note 11, at 227–29; *see* Kristin MacDonnell & Scott Dodson, *Is It Time for the End of Typicality?*, 5 J.L.: PERIODICAL LAB'Y OF LEG. SCHOLARSHIP 17, 24 (2015) ("[T]he typicality requirement was rooted in the Committee's assumption that a class had to exhibit internal homogeneity, solidarity, or cohesion, in addition to adequate representation, in order to fairly bind absent class members." (internal quotation marks omitted)); FED. R. CIV. P. 23(a)(3) ("[T]he claims or defenses of the representative parties [must be] typical of the claims or defenses of the class . . . .").

create these pools, judges can either randomly or intentionally select plaintiffs; they can also allow parties to negotiate plaintiff selection among themselves.[80] Nonetheless, MDL judges must also be mindful of the MDL Statute's limitations, as after *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, judges are no longer allowed to transfer cases to themselves for trial.[81] As such, MDL judges must work around *Lexecon* through tactics such as waiver, consent, direct filing, and presiding over the trials in the transferor court.[82]

Facilitating settlement is perhaps the MDL judge's most important role throughout the entirety of the pretrial process, as consolidation creates a unique opportunity for settlement of all similarly situated claims—or "global peace."[83] Through orderly management and a prioritization of the discovery process—during which bellwether trials are held—the MDL judge facilitates settlement by providing both parties with adequate information.[84] Occasionally, however, judges attempt to *control* settlement by requiring judicial approval.[85] Where class actions are part of the MDL, settlement control is warranted by Rule 23(e); without class actions, however, a legal basis for requiring judicial approval of the settlement is often lacking.[86]

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80. KLONOFF, *supra* note 11, at 228; Fallon et al., *supra* note 57, at 2348–51.

81. Fallon et al., *supra* note 57, at 2343–65; 523 U.S. 26, 41 (1998).

82. KLONOFF, *supra* note 11, at 230–32:

> In light of *Lexecon*, five options are potentially available to MDL judges . . . . First, the parties can waive their right to object to a trial on the ground that it violates *Lexecon* . . . . The second option is to allow new plaintiffs to file their claims directly in the MDL transferee court . . . . Third, if a *Lexecon* waiver is not obtained, and the case was not filed directly in the transferee court, the transferee judge can hold the trial in the transferor district . . . . Fourth, after a case is remanded by the Panel, the MDL judge can ask the transferor judge to transfer the case back under 28 U.S.C. § 1404(a), thereby enabling the MDL judge to try it . . . . Finally, after a case is remanded by the Panel, the trial could take place before the transferor judge.

83. *Id.* at 243; Howard M. Erichson, *The Role of the Judge in Non-class Settlements*, 90 WASH. U. L. REV. 1015, 1017–19 (2013).

84. Erichson, *supra* note 83, at 1019:

> The important point is that judges can facilitate settlement in mass disputes by managing the litigation to bring key information to the surface. Discovery and trials, sensibly sequenced, provide information about claimants and claim values. Judges facilitate settlement by scheduling trials so that parties feel pressure to take negotiations seriously. And bellwether trials in mass litigation provide data points that can move the parties toward mass resolution.

(footnote omitted)

85. *Id.* at 1020.

86. KLONOFF, *supra* note 11, at 244; *see* Erichson, *supra* note 83, at 1024–25:

> Claims belong to claimants, not to the judge. If a claimant chooses to dismiss her claim in exchange for compensation offered by the defendant, that is the claimant's prerogative. True, by filing a complaint, a plaintiff subjects herself to the power of the

2. Lack of Appellate Review

Pursuant to 28 U.S.C. § 1291, federal appeals courts have jurisdiction solely over "final decisions" by district courts—that is, decisions that end the litigation on the merits.[87] Because the MDL judge presides only over pretrial matters, no decisions are subject to this "final judgment rule"; in short, they are virtually unappealable.[88] While there are several exceptions to § 1291, each is either narrowly tailored, subject to extremely high standards of review, or both.[89] Most appeals involve a writ of mandamus and courts rarely rule in favor of appellants.[90] As a result, decisions that make up virtually all of the litigation and impact thousands of individual plaintiffs are not subject to interlocutory review. This includes *Daubert* motions, motions to dismiss, and motions for summary judgment.[91]

3. Choice of Law

Typically, the choice of law doctrines for multidistrict litigation present a series of challenges unassociated with normal litigation. Indeed, there are three key processes that MDL judges use to determine which law to apply to the cases before them.[92] The first doctrine exists for diversity cases—where each plaintiff is diverse from the defendant and either meets the $75,000 amount in controversy requirement or has subject matter jurisdiction pursuant to *Allapattah*.[93] This doctrine is triggered by 28 U.S.C. § 1404(a) and the Supreme Court's interpretation of it in *Van Dusen v. Barrack*.[94] In *Van Dusen*, the Court

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court to adjudicate the claim. But adjudication and settlement flow from different power sources.

(footnote omitted)

87. KLONOFF, *supra* note 11, at 310.

88. *Id.*; 28 U.S.C. § 1291.

89. KLONOFF, *supra* note 11, at 311–16 (listing the exceptions to the final judgment rule: (1) Collateral Order Doctrine, (2) Death Knell Doctrine, (3) Certification under 28 U.S.C. § 1292(b), (4) Injunction Orders Under 28 U.S.C. § 1292(a)(1), (5) Mandamus, (6) Appeal Under Rule 23(f), and (7) Appeal Under Rule 54(b)).

90. *Id.* The standard for a writ of mandamus is high, as a Court of Appeals will grant one only in "exceptional circumstances" involving a "judicial usurpation of power" or a "clear abuse of discretion." *See* Cheney v. U.S. Dist. Ct., 542 U.S. 367, 390 (2004). A rare, favorable example is when an MDL allowed plaintiffs to amend their complaints ten months after the close of discovery. *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 843–46 (6th Cir. 2020).

91. KLONOFF, *supra* note 11, at 310–16.

92. *See id.* at 286.

93. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005); *see* 28 U.S.C. §§ 1332, 1367.

94. 376 U.S. 612, 612 (1964).

held that for transfers pursuant to § 1404(a),[95] the law of the transferor court applies whenever personal jurisdiction and venue are proper in the original court.[96] Courts have extended this interpretation to § 1407, thereby treating MDL consolidation as a mere transfer of venue.[97] Ultimately, this means that for diversity cases, MDL judges must apply the state law of the transferor court.[98] Such a doctrine clearly poses an inconvenience; for example, an MDL judge presiding over several thousands of cases may have to apply up to fifty different state laws.[99] As discussed in Section II.A,[100] MDL judges continue to follow *Van Dusen* in cases arising from diversity jurisdiction, despite the efficiency costs.[101]

The second choice of law doctrine is triggered by federal question jurisdiction.[102] Here, there is a circuit split: while most circuits hold that when it comes to federal question jurisdiction, the law of the *transferee* court should apply,[103] some courts hold that the *transferor* court's law should apply.[104] This discrepancy flows from the disagreement over whether federal law is "geographically non-uniform."[105] The majority relies on *In re Korean Air Lines Disaster of September 1, 1983*.[106] In *Korean Air Lines*, a civilian airplane was shot down over the Sea of Japan by the Soviet Union, and the families of deceased passengers sued the airline for wrongful death.[107] At issue was whether the liability could be limited to $75,000 per passenger, as specified on the back of the airline ticket in eight-point font.[108] The applicable law was the Montreal Agreement, which stated that a liability limitation must be written in at least ten-point font to be enforceable.[109] While the Second Circuit previously held that similar violations of the Montreal Agreement made such a contract invalid, the District of Columbia Circuit—where all the cases were transferred pursuant to § 1407—held

95. 28 U.S.C. § 1404(a).
96. *Van Dusen*, 376 U.S. at 621, 639; *see* KLONOFF, *supra* note 11, at 286.
97. KLONOFF, *supra* note 11, at 286.
98. *See id.* at 287.
99. *See id.*
100. *See infra* Section II.A.
101. KLONOFF, *supra* note 11, at 287.
102. *See id.* at 288.
103. *Id.*
104. *Id.*
105. *See id.* at 291.
106. 829 F.2d 1171, 1171 (D.C. Cir. 1987).
107. *Id.* at 1172.
108. *See id.*
109. *See id.*

that inadequate font size did not void the limited liability agreement.[110] The court even applied this ruling to cases originally filed in the Second Circuit, reasoning that it would be "logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law."[111] Doing so, the court said, would be contrary to the obligation of federal courts to "engage independently in reasoned analysis."[112]

Although a significant minority, some courts hold that certain federal laws are nonuniform and are tied to venue; the seminal example is *Eckstein v. Balcor Film Investors*.[113] In *Eckstein*, the Plaintiffs were suing the Defendants for security fraud and their claims depended on which circuit's statute of limitations applied.[114] Recognizing that different circuits adopt different approaches to determining the statute of limitations, Judge Easterbrook ruled that the law was geographically nonuniform.[115] He therefore rejected *Korean Air Lines* and applied the law of the transferor court.[116]

The final choice of law doctrine, known as "direct filing," raises several complications when determining which court's law applies.[117] Here, plaintiffs file directly to the MDL court, despite lacking personal jurisdiction.[118] The purpose of this tactic is to "avoid the cumbersome transfer process, achieve efficiencies, and respond to MDL judges' expressed preference for direct-filed actions when possible."[119] Despite these plaintiffs lacking personal jurisdiction and proper venue—and defendants not waiving such requirements—MDL judges apply the law of the MDL court.[120] To date, there has not been a case holding to the contrary.[121]

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110. *See id.* at 1176.

111. *See id.* at 1175–76.

112. *See id.* at 1176.

113. 8 F.3d 1121, 1126–27 (7th Cir. 1993); *see* KLONOFF, *supra* note 11, at 290 (naming *Eckstein* as the main example of a court following this exception).

114. 8 F.3d at 1123–24.

115. *Id.* at 1127.

116. *See id.* at 1126–27:

> We agree with *Korean Air Lines* that a transferee court normally should use its own best judgment about the meaning of federal law when evaluating a federal claim, but § 27A instructs us to act differently . . . [D]ifferent circuits had taken different approaches to the appropriate statute of limitations . . . .

117. KLONOFF, *supra* note 11, at 292–93.

118. *See id.* at 292.

119. *Id.*

120. *See id.* at 292–93.

121. *See id.* at 293.

D. Unprecedented Powers of an MDL Judge

It is clear that the MDL is a procedural monstrosity that leaves its participants—parties and attorneys alike—scrambling to anticipate the MDL judge's next move. Determining applicable state or circuit law, selecting plaintiffs for bellwether trials, and choosing how to preemptively assess the merits of plaintiff claims are just several areas of uncertainty. What is more, the MDL judge retains significant and often unchecked authority in many other areas.[122] This Section explores several of these powers and their underlying (though admittedly lacking) authority.

1. Assigning Leadership Teams

One of an MDL judge's primary duties is to determine which plaintiff attorneys comprise the "leadership team."[123] As there could be hundreds of individual attorneys representing thousands of plaintiffs, MDL judges must select only a few to avoid having "too many cooks in the kitchen."[124] Indeed, an MDL cannot function efficiently if every attorney is required to contribute to motions pertaining to all claims.[125] Once the leadership team is selected, all other plaintiff attorneys effectively become bystanders with little to no responsibilities.[126]

MDL judges select lead attorneys through a variety of methods. First is the "consensus" method, where the MDL judge informally relies on attorney networks and allows plaintiff attorneys to select their own leaders.[127] Second, the judge may employ a competitive selection method, where individual attorneys must apply independently for judicial selection.[128] Third is the "hybrid" method, where the MDL judge selects attorneys for interim roles while simultaneously conducting an open-application process.[129] Importantly, lead counsel selection is based on several factors, such as the attorneys' ability to fund the litigation and sustain commitment across smaller matters, their record of superb

122. *Id.* at 310–11; Fallon, *supra* note 12, at 374.

123. KLONOFF, *supra* note 11, at 173.

124. *See id.*

125. *See id.*

126. *See id.* at 173–74.

127. *Id.* at 177.

128. *See id.*

129. *See id.* ("[U]nder the 'hybrid' method, the MDL judge may designate temporary or interim lead counsel, who designate others to serve in interim committee roles as well, but at the same time the judge conducts 'an open application process.' ").

performance on key litigation tasks, and their prior MDL experience.[130] Decisions regarding which method to employ for lead attorney selection, as well as which factors to prioritize, are almost entirely within the MDL judge's discretion.[131]

But are MDL judges statutorily authorized to select leadership teams? What source empowers them to relegate remaining plaintiff attorneys to the sidelines, choosing who rides the bench and who plays first string? MDL judges cite their "inherent managerial powers," which allow them to fill in procedural nuances when managing complex cases.[132] Appointing liaison counsel between courts and plaintiffs is perhaps the most legitimate exercise of this power.[133] Still, scholars consider this a weak rationale, as inherent powers are to be used only when "indispensably necessary," and leadership teams function beyond mere liaisons.[134]

2. Setting Common Benefit Taxes

Another example of unfettered MDL judge authority is the creation of common benefit taxes, referred to as "fees."[135] MDL judges create pools of funds to compensate lead counsel for common benefit work, which typically consists of tasks completed solelyby the leadership team.[136] Examples include conducting bellwether trials, working on overarching issues such as *Daubert* hearings and motions for class certification, briefing issues pertaining to MDL-wide discovery, and participating in settlement negotiations on behalf of the MDL.[137]

These fees are almost always taken from a percentage of nonleadership attorneys' fees, and the MDL judge oftentimes orders

130. *See id.* § 7.1, at 179 (discussing factors taken into consideration, including "relevant knowledge" and "experience and resources").

131. *See id.* § 7.1, at 176 ("The MDL judge retains broad discretion on this issue (and many others)."); Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841, 844 (2021) (listing "attorneys' experience, financial resources, and cooperative tendencies" as potential factors and emphasizing that judges retain control over the process).

132. *See* Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1871, 1944–47 (2023); *see also* FED. R. CIV. P. 16(c)(2) ("At any pretrial conference, the court may consider and take appropriate action on the following matters . . . adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems . . . .").

133. Pushaw & Silver, *supra* note 132, at 1926, 1928–29.

134. *Id.* at 1926, 1930–43 (arguing that appointment of liaison counsel, rather than the appointment of leadership teams or steering committees, is the only indispensably necessary function of judges in multidistrict litigation).

135. *See* KLONOFF, *supra* note 11, at 276–77.

136. *See id.*

137. *Id.* at 275.

defendants to "holdback funds" from the global settlement.[138] The legal bases MDL judges rely on to create such funds are "(1) a court's equitable authority to oversee the administration of a global settlement, (2) a court's inherent authority to exercise ethical supervision over the parties, and (3) the court's express authority pursuant to the terms of the MDL settlement agreement."[139]

With the authority to create a common benefit tax, MDL judges balance a variety of methods and factors to determine the "right" fee to award.[140] Most often, judges employ the percentage method, awarding the leadership team a percentage of the plaintiffs' total recovery.[141] Other times, judges employ the "lodestar method," awarding members of the leadership team their hourly rate multiplied by the number of hours worked, along with an additional multiplier to account for the risk undertaken during litigation.[142] Occasionally, a combination of the two methods is used—crosschecking the requested percentage by the lodestar and determining if the multiplier would be reasonable.[143] Regardless of which method is used, MDL judges determine award size using the nondispositive factors from the seminal case *Johnson v. Georgia Highway Express, Inc.*[144] The *Johnson* factors consider the complexity of underlying legal issues, the extent of counsel's time and effort, the market rate for attorney awards, and more.[145]

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138. Pushaw & Silver, *supra* note 132, at 1944; *see* Fallon, *supra* note 12, at 378–79.

139. Fallon, *supra* note 12, at 379. Equitable authority is derived from unjust enrichment law; allowing nonleadership attorneys to benefit from the common benefit work without paying for it will unjustly enrich them at the expense of the leadership team. *See id.* As for inherent authority for ethical supervision, courts rely on their ability to oversee the reasonableness of attorney contracts because nonleadership attorneys have conflicting interests with their clients; these attorneys want to negotiate high fees while knowing they will do little work. *See id.* at 380. Express authority occurs when there is a provision in the settlement agreement that either creates an agreement between the parties as to a certain common benefit tax percentage or provides the MDL judge with authority to create one. *See id.* at 380–81.

140. *See id.* at 381; KLONOFF, *supra* note 11, at 264–68.

141. *See* Fallon, *supra* note 12, at 384.

142. *Id.* at 381–83.

143. *Id.* at 385.

144. 488 F.2d 714, 717–19 (5th Cir. 1974); *see* KLONOFF, *supra* note 11, at 267.

145. 488 F.2d at 717–19. In *Johnson*, the Fifth Circuit enumerated twelve factors for consideration to determine the "right" attorney award, which is ultimately within the sound discretion of the district court:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

3. Slashing Attorney's Fees

Finally, MDL judges oftentimes use their authority to reduce independent attorney's fees they deem unreasonable.[146] A key case is *In re Vioxx Products Liability Litigation*, where the court capped all attorney's fees at thirty-two percent, along with reasonable costs.[147] *Vioxx* provided several bases for an MDL judge's authority to do so, which were remarkably similar to those cited when creating the common benefit fund: "[E]quitable authority to oversee administration of the global settlement[,]" "inherent authority to exercise ethical supervision over the parties[,]" and "express authority pursuant to the terms of the [s]ettlement [a]greement."[148] Indeed, after *Vioxx*, MDL judges have discretion not only to subtract a portion of non-lead-attorneys' fees to compensate the leadership team, but also to cap the portion of non-lead-attorneys' fees that are entirely their own.[149] Notably, settlement agreements rarely grant the MDL judge express authority to reduce attorney's fees. The agreement in *Vioxx*, for instance, merely gave the MDL judge authority to approve the settlement.[150] Interfering with the contract between attorney and client can hardly be seen as "equitable," underscoring that a judge's ethical oversight—especially of vulnerable clients—remains the only authority with much teeth.[151]

E. General Criticisms

Criticism of the MDL—primarily aimed at the expansive authority of MDL judges—has been vast. Professor Bradt boils down the most prominent criticisms to (1) MDLs "insufficiently protect[ing] individual plaintiffs' due process rights"; (2) "there [being] no established rules governing MDL judges' procedures, resulting in inconsistency"; and (3) "MDL cases tak[ing] a very long time to litigate."[152] The criticisms do not end here, however. For example, MDL judges' involvement in choosing the plaintiff leadership teams has allegedly caused a "repeat player" problem.[153] Namely, the practice of

Fallon, *supra* note 12, at 383; 488 F.2d at 717–19.

146. *See* Fallon, *supra* note 12, at 379–80.

147. 574 F. Supp. 2d 606, 617–18 (E.D. La. 2008).

148. *Id.* at 611–14.

149. *See id.* at 618.

150. *See id.* at 609.

151. *See* Fallon, *supra* note 12, at 379–80.

152. Bradt, *supra* note 6, at 846.

153. Burch, *supra* note 131, at 845.

judges appointing the same lead attorneys to every MDL creates a tight-knit bar where dissent is unlikely—fostering concerns of self-dealing between plaintiff and defense counsel that repeatedly work together and resulting in a suboptimal representation of diverse interests.[154] It is also argued that MDL judges lack the constitutional authority to reduce individual attorney's fees, as their "inherent powers" should be used only when "indispensably necessary to the proper exercise of 'judicial power.' "[155] MDL judges also face allegations of blatantly disregarding the Federal Rules of Civil Procedure; for instance, *Lone Pine* Orders arguably raise the pleading standard for plaintiffs.[156] Ultimately, Bradt is precisely on point when he states, "[W]hat makes [the] MDL such an effective means of resolving mass litigation is also what provokes intense criticism: the almost unlimited discretion of the district judge that the [JPML] puts in charge of the litigation."[157]

Several proposed solutions to MDL criticisms include formally amending the Federal Rules of Civil Procedure, creating "Plaintiff Management Committees" to prevent excessive involvement of MDL judges in attorney selection and compensation, and permitting interlocutory appeal for decisions that impact a large number of cases.[158] But in light of how many obstacles MDL judges face, one can argue that these judges are merely smoothing out the process. Indeed, loose procedure and broad judicial discretion may be necessary to achieve the efficiency of the MDL scheme.[159] Without their expansive and unchecked powers, MDL judges may argue that they cannot handle consolidation on their own. This Note agrees and accordingly urges the simplest solution: add more judges.

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154. *Id.* at 845–48.

155. Pushaw & Silver, *supra* note 132, at 1959.

156. *See* Engstrom, *supra* note 72, at 43–46; *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules*, LAWS. FOR CIV. JUST. 3 (Sept. 14, 2018), https://www.uscourts.gov/sites/default/files/suggestion_18-cv-x_0.pdf [https://perma.cc/4PJJ-VNPR] [hereinafter *Proposals*] (characterizing the use of *Lone Pine* Orders for "early vetting" of weak cases as "inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible"); FED. R. CIV. P. 8, 9, 11, 12; *see also* Ronen Avraham & William H.J. Hubbard, *The Spectrum of Procedural Flexibility*, 87 U. CHI. L. REV. 883, 942 (2020) (characterizing *Lone Pine* Orders as exchanging "lower-cost procedure . . . for a higher pleading standard").

157. Bradt, *supra* note 6, at 847.

158. *See Proposals*, *supra* note 156, at 4–7, 9–11 (proposing amendments to the FRCP, including provision for interlocutory appeals); Charles Silver & Geoffrey P. Miller, *The Quasi-class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 160–65 (2010).

159. *See* Bradt, *supra* note 6, at 847.

II. TWO ACCURACY PROBLEMS CREATED BY THE CURRENT MDL SCHEME

As shown, the MDL has become a procedural monstrosity, affording judges practically limitless discretion with very few checks.[160] Still, many MDLs continue to serve their purpose in attaining "global peace" through mass consolidation in a single forum.[161] Rather than analyzing the procedural deficiencies associated with the MDL process, this Part discusses two ways in which the current MDL scheme's concentrated decisionmaking generates inaccuracies. First, there is simply too high a burden on the MDL judge, making accurate decisions less likely. This is especially the case with regard to choice of law: MDL judges face an enormous interpretive burden in having to apply conflicting state and federal law.[162] Second, there is too much variance among the cases consolidated into an MDL, making it less likely for MDL judges to reach accurate outcomes.[163] In other words, having one judge make a blanket decision for thousands of cases heightens the risk of collapsing potentially determinative differences among cases; this, in turn, induces risk-averse parties to oversettle cases.[164]

A. Inaccuracy of Decisions

In short, the MDL scheme demands that one judge decide too much, which results in inaccuracies. As illustrated in Section I.E, MDL judges operate within the Wild West of procedural law—lacking both adequate guidance and legal authority for some of their most crucial decisions.[165] Their decisions as to who to assign to the leadership team, what to set as the common benefit tax, and whether to slash independent attorney's fees are just several examples of this unguided decisionmaking.[166] It follows that these decisions expend enormous judicial resources; MDL judges must take extra care to (1) not exceed the authority granted to them by Congress[167] and (2) ensure that they make the "right" decision—whatever that may be.[168] As many scholars

160. *See* KLONOFF, *supra* note 11, at 309.

161. *See* Bradt, *supra* note 6, at 846.

162. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938); KLONOFF, *supra* note 11, at 286; *infra* Subsection II.A.1.

163. *See infra* Subsection II.B.1 and accompanying footnotes.

164. *Id.*

165. *See supra* Section I.E and accompanying footnotes.

166. *See supra* Section I.E; KLONOFF, *supra* note 11, at 310–11; Fallon, *supra* note 12, at 374.

167. *See* 28 U.S.C. § 1407.

168. KLONOFF, *supra* note 11, at 310–11; Fallon, *supra* note 12, at 374.

already analyzed the accuracy of these decisions,[169] however, this Note chooses to focus on a rather undertheorized burden on MDL judges: choice of law.[170]

Accordingly, this Section is broken into two parts: the first explains the burden created by diversity choice of law, and the second explains the legally dubious nature (and resulting burden) of federal question choice of law. Diversity choice of law—that the substantive state law of the transferor court applies—reveals that MDL judges are at risk of being overburdened by interpreting inconsistent state laws and conducting complicated *Erie* analyses. The present practice in federal question choice of law—in which law of the *transferee* court is applied—may suffer from legal deficiencies, as demonstrated by Professor Ragazzo's study.[171] Yet the remedy this Note endorses—applying the law of the *transferor* court—naturally exacerbates the interpretive burden created by diversity jurisdiction.[172] Notably, direct filing further compounds this problem, although that discussion is beyond the scope of this Note.[173] Ultimately, an analysis of both choice of law doctrines reveals that MDLs regularly sacrifice accuracy for efficiency and that they would greatly benefit from the presence of more judges.

1. Diversity Jurisdiction

Without exception, the basic rule for diversity jurisdiction choice of law in the MDL context is as follows: substantive state law travels.[174] Determining whether state law is substantive, however, can be a cumbersome process—one that tortures many first-year law students in their Civil Procedure courses. Oftentimes, state law is clearly substantive, such as the law pertaining to breach of contract,

169. *See, e.g.*, Fitzpatrick, *supra* note 22, at 107.

170. *See* Ragazzo, *supra* note 17 (discussing choice of law burdens on MDL judges); Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 677–78 (1984).

171. Ragazzo, *supra* note 17, at 703.

172. *See* Jeffrey L. Rensberger, *The Metasplit: The Law Applied After Transfer in Federal Question Cases*, 2018 WIS. L. REV. 847, 901–08.

173. *See* KLONOFF, *supra* note 11, at 169–70 (describing how an MDL court has no contact with the parties and therefore makes personal jurisdiction and venue strong defenses against directly filed cases); *see also* Sanchez v. Bos. Sci. Corp., No. 2:12-cv-05762, 2014 WL 202787, at *4 (S.D.W. Va. Jan. 17, 2014) (acknowledging that "there technically is no prior proper forum whose choice-of-law rules should apply"); Looper v. Cook Inc., 20 F.4th 387, 391 (7th Cir. 2021) (claiming that while "[d]irect filing can bring its own complications and potential pitfalls" by affecting "personal jurisdiction, venue, and choice of law," the affected issues are "waivable").

174. *See* KLONOFF, *supra* note 11, at 286. Indeed, this is the basic tenet of *Erie Railroad Co. v. Tompkins*. 304 U.S. 64, 78–79 (1938).

fraudulent misrepresentation, or negligence. Other times, state law may fall between a procedural and substantive nature, thereby triggering a familiar, albeit complicated, analysis under *Erie Railroad Co. v. Tompkins*.[175] Under *Erie*, a court must first ask whether adopting the federal rule over the state rule will significantly alter the litigation's outcome and, if so, apply state law.[176] Second, a court must ask whether the state law is "bound up with rights and obligations" of the parties and, if so, apply state law in the absence of countervailing federal interests.[177] And third, a court must ask whether the federal rule *clearly* regulates procedure and whether the state law is in conflict with it, applying the federal law if so.[178] MDL courts apply state substantive law in diversity cases as a product of both *Erie* and *Van Dusen*; the latter extended *Erie* to cases transferred pursuant to 28 U.S.C. § 1404(a), preventing federal diversity jurisdiction (and subsequent transfer) from altering the substantive law applied.[179] In particular, *Van Dusen* held that "[a] change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."[180] Courts have employed a similar strand of reasoning to multidistrict litigation, concluding that it is a mere transfer of venue.[181]

Altogether, a single MDL judge may not only have to apply up to fifty different state laws over the course of the MDL, but should the state law teeter between being substantive and procedural, that judge may also have to conduct fifty separate *Erie* analyses.[182] Even where the number of conflicts falls short of fifty, applying the law of several conflicting jurisdictions can be perplexing.[183] In *In re San Juan Dupont*

175. 304 U.S. at 92 (Reed, J., concurring in part) (highlighting the "hazy" line between substance and procedure).

176. *See* Guar. Tr. Co. v. York, 326 U.S. 99, 109–10 (1945); Hanna v. Plumer, 380 U.S. 460, 468 (1965). The twin aims of *Erie* are to prevent forum shopping and inequities in law; courts look at whether a difference between state and federal law would encourage forum shopping at the time of filing. *See Hanna*, 380 U.S. at 468–69.

177. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958).

178. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

179. Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

180. *Id.*

181. *See* Phila. Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 309 F. Supp. 1053, 1055 (E.D. Pa. 1969). The Court cited *Van Dusen* but provided no justification for doing so. *Id.*

182. *See* James A. R. Nafziger, *Choice of Law in Air Disaster Cases: Complex Litigation Rules and the Common Law*, 54 LA. L. REV. 1001, 1009 (1994) (discussing the confusion and difficulty for an MDL court to apply conflicting state laws).

183. *Id.* at 1008 ("Coupled with the principle of dépeçage, by which laws of different jurisdictions may be applied to different issues and parties in a single case, the *Van Dusen* rule can perplex courts and produce odd or discriminatory results." (footnote omitted)). For examples of other MDL courts conducting complicated *Erie* analyses, see *In re* Air Crash Disaster at Bos., Mass. on July 31, 1973, 399 F. Supp. 1106, 1108 (D. Mass. 1975); *In re* Nucorp Energy Sec. Litig.,

Plaza Hotel Fire Litigation, for example, the court grappled with just four conflicting state laws on the applicability of punitive damages.[184] Doing so required analyzing the choice of law, due process limitations, punitive damages allowance, and public policy of each state.[185] There is little question that Judge Acosta was well qualified for the task; despite this, his docket, his time, and his chambers' resources were clogged throughout its duration.[186] As 167 MDLs are pending throughout the country, burdening 142 judicial chambers in 46 districts, the cumulative effect of this colossal burden diminishes the promised efficiency gains of MDLs.[187] More importantly, this choice of law burden severely diminishes the accuracy of judicial decisionmaking.[188] As a result, it is no surprise that MDL judges regularly blur the lines between conflicting state laws, neglecting crucial nuances that simply take too much time and effort to address.[189]

MDL No. 514, 1983 WL 1298, at *1 (S.D. Cal. Mar. 24, 1983); *In re* Cessna 208 Series Aircraft Prods. Liab. Litig., MDL No. 1721, 2007 WL 2172764, at *4 (D. Kan. July 25, 2007).

184. 745 F. Supp. 79, 81 (D.P.R. 1990):

> Cases arising from the San Juan Dupont Plaza Hotel fire were instituted in district courts located in Puerto Rico, California, Connecticut and New York. Pursuant to the aforementioned rules, we must look at the choice of law principles from each one of those jurisdictions to determine whether or not provisions pertaining to punitive damages exist there which are in conflict with each other.

In another MDL action, a single judge applied the choice of law rules of the District of Colombia, Georgia, Illinois, Maryland, Massachusetts, Pennsylvania, Texas, and Virginia. *See In re* Air Crash Disaster at Wash., D.C. on Jan. 13, 1982, 559 F. Supp. 333, 340–41 (D.D.C. 1983); Austin V. Schwing, *Comity Versus Unitary Law: A Clash of Principles in Choice-of-Law Analysis for Class Certification Proceedings in Multidistrict Litigation*, 33 SEATTLE U. L. REV. 361, 367 (2010).

185. *In re* San Juan Dupont Plaza Hotel, 745 F. Supp. at 82, 84–85.

186. Judge Acosta called the task, and his resulting 18-page opinion, a "colossal struggle for the transferee court in attempting to ascertain relevant contacts between the parties and the multiple states and in struggling to understand, evaluate and weigh the particular policies behind the different statutes allowing or disallowing claims and/or remedies." *Id.* at 81.

187. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, MDL STATISTICS REPORT - DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 3 (Jan. 2, 2024), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-January-2-2024.pdf [https://perma.cc/2WLU-HPG3].

188. *See* Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1085–86 (1987) ("In practice, however, as the hypothetical case illustrates, choice of law problems derail the equity and efficiency advantages that collective adjudication otherwise promises."). Another MDL judge, again speaking on diversity jurisdiction choice of law, said the following:

> The law on 'choice of law' in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some other state than the one in which he sits would hold its law to be.

In re Paris Air Crash of Mar. 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975) (emphasis omitted).

189. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 17–18 (2021) ("Previous MDLs have also raised federalism concerns about the propensity to *obfuscate and smooth over* differences across state laws." (emphasis added)); Abbe R. Gluck,

2. Federal Question Jurisdiction

Legally Dubious Foundation. For cases arising out of federal question jurisdiction, most courts apply the transferee court's law, or the law of the MDL court itself.[190] This practice, however, is legally dubious—as illustrated by the foundations of the doctrine. Indeed, MDL courts originally applied the federal precedent of the *transferor* circuit.[191] In *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*,[192] a Pennsylvania district court was the first to do so in an MDL.[193] Citing *Van Dusen*, the court applied transferor federal law—although it did so without a single justification.[194] In its analysis, the court ignored obvious differences between a transfer under 28 U.S.C. § 1404(a) and § 1407. Section 1404(a) is a change of venue, described under *Van Dusen* as a mere change in courtrooms.[195] Section 1407 is a transfer purely for the purposes of pretrial; it therefore lacks the permanence associated with § 1404(a) transfers.[196] Nevertheless, the JPML agreed with the *Philadelphia Housing Authority* decision in *In re Plumbing Fixtures Litigation*, electing to transfer 370 actions for treble damages against eight defendants in a criminal antitrust conspiracy.[197] In a scant five-page opinion, the JPML concluded that the MDL judge would so obviously apply the plaintiff-friendly law of the transferor circuit that concerns to the contrary were "groundless."[198] It cited *Van Dusen* and *Philadelphia Housing Authority* without any analysis.[199]

Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure, 165 U. PA. L. REV. 1669, 1704 (2017) ("When it comes to substantive differences across state law, some of the federal judges acknowledged that state law issues can get 'mushed' together by the MDL's tendency to group similar cases together—cases that may include actions from states with closely related laws."); *e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 701 (E.D.N.Y. 1984) (declaring a tort "law of national consensus" in order to govern a multistate mass tort litigation).

190. *See* KLONOFF, *supra* note 11, at 288.

191. *See* Ragazzo, *supra* note 17, at 703, 705.

192. 309 F. Supp. 1053 (E.D. Pa. 1969).

193. *Id.* at 1055; *see* Ragazzo, *supra* note 17, at 726.

194. *Phila. Hous. Auth.*, 309 F. Supp. at 1055.

195. Van Dusen v. Barrack, 376 U.S. 612, 612 (1964).

196. 28 U.S.C. § 1407.

197. *In re* Plumbing Fixtures Litig., 342 F. Supp. 756, 767–68 (J.P.M.L. 1972).

198. *Id.* at 758:

> The sole basis for opposing transfer is North Carolina's fear that the transferee court will not apply the laws of the circuit in which its action was filed in deciding whether the state can maintain a treble damage action against these defendants under Section 4 of the Clayton Act. In our view these fears are groundless. It is clear that the substantive law of the transferor forum will apply after transfer.

199. *Id.*

Despite courts and the JPML initially favoring the application of transferor law, everything changed following the publication of Professor Richard Marcus's influential article on the matter.[200] Marcus argued that the federal law of the *transferee* court should apply in all transferred cases and that employing *Van Dusen's* rationale to federal claims is inconsistent with both *Erie* and the very principles underlying *Van Dusen*.[201] Citing the principle of competence, Marcus argued that federal courts have a duty to decide cases correctly and when "a federal court simply accepts the interpretation of another circuit without addressing the merits, it is not doing its job."[202] Marcus's view has since gained near-universal judicial acceptance.[203] *Korean Air Lines* solidified this perspective when then-Judge Ruth Bader Ginsburg agreed that *Van Dusen* was irrelevant in the federal question context, therefore holding that an MDL court should apply transferee federal law.[204] Additionally, Ginsburg reasoned that federal law is presumptively uniform—a position contradicted only by a small number of geographically nonuniform statutes.[205] No subsequent judicial decision has taken the contrary view on the applicability of transferee federal law in the MDL context.[206]

Nevertheless, the reasoning underlying both Marcus's article and *Korean Air Lines* is highly suspect.[207] Since the MDL Statute contemplates remand to the transferor court, the transferor circuit is the final appellate forum.[208] Consequently, the law of the transferor court should apply throughout MDL pretrial proceedings.[209] If an MDL

200. Marcus, *supra* note 170, at 677–78; Ragazzo, *supra* note 17, at 727.

201. Marcus, *supra* note 200, at 692–93.

202. *Id.* at 702. Although Marcus's primary and most cited rationale, his argument was originally threefold: first, the policies of "achieving uniformity of result between federal and state courts . . . and preserving the integrity of state law . . . are irrelevant in the federal question context"; second, the theory of venue privilege is not applicable to federal issues because plaintiffs in diversity cases obtain "a choice of law privilege as a corollary to venue privilege as a matter of necessity," and that necessity ceases to exist in federal question cases because courts can fashion choice of law rules for federal claims; and third, competence. Ragazzo, *supra* note 17, at 727–28.

203. Ragazzo, *supra* note 17, at 728.

204. *In re* Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

205. *Id.*; *see* Eckstein v. Balcor Film Invs., 8 F.3d 1121, 1126–27 (7th Cir. 1993).

206. *See* Menowitz v. Brown, 991 F.2d 36, 39–41 (2d Cir. 1993); *In re* TMJ Implants Prods. Liab. Litig., 872 F. Supp. 1019, 1024 (D. Minn. 1995); *In re* Air Disaster, 819 F. Supp. 1352, 1369–71 (E.D. Mich. 1993); *In re* Integrated Res. Real Est. Ltd. P'ships Sec. Litig., 815 F. Supp. 620, 635–37 (S.D.N.Y. 1993); *In re* Taxable Mun. Bond Sec. Litig., 796 F. Supp. 954, 962–63 (E.D. La. 1992); *In re* Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig., No. 1:00-1898, 2005 WL 106936, at *4 (S.D.N.Y. Jan. 18, 2005); *In re* Am. Fam. Mut. Ins. Co. Overtime Pay Litig., No. 06-cv-17430, 2008 WL 4378715, at *2–3 (D. Colo. Sept. 18, 2008).

207. Ragazzo, *supra* note 17, at 746.

208. *Id.*

209. *Id.*

transfer is not permanent, the court's choice of law should not reflect permanence—it should reflect the possibility of remand and a proper forum of appeal.[210] Additionally, there is no reason to believe that Congress intended transferor law to apply for only diversity cases; Congress enacted the MDL Statute in response to an onslaught of *federal* antitrust cases, and § 1407 clearly grants a transfer for *all* pretrial purposes.[211]

Exacerbating the Interpretive Burden. Unfortunately, the correct approach to federal question choice of law—applying the law of the transferor court—only exacerbates the interpretive burden created by the MDL scheme.[212] Indeed, the *Korean Air Lines* rule is yet another attempt to create efficiency in the MDL; it avoids having a single court interpret and apply conflicting federal rules.[213] The contrary would be much like the dilemma created by diversity jurisdiction, potentially forcing the MDL court to apply conflicting state law. While distinguishing between the federal law of several circuits is arguably more straightforward, given the Federal Rules of Civil Procedure and the presumption of judicial expertise in federal law, this burden is not negligible.[214] Professor Ragazzo, for example, acknowledges that having the MDL judge apply conflicting federal law may "eliminate" the benefits of consolidation.[215] Namely, distinguishing between procedural and substantive federal law requires an analysis similar to that of *Erie*—a notoriously difficult task that proponents of *Korean Air Lines* argue should not be introduced into the realm of federal question cases.[216]

Evidently, the choice of law doctrines in MDLs raise two seemingly contrary concerns. On one hand, an MDL court needing to apply contradicting state law is a drain on judicial resources. This drain undermines the MDL's promised gains in efficiency. On the other hand, the current practice of MDL courts applying transferee federal law in

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210. *Id.* at 747.

211. *Id.* at 748.

212. *See id.* at 762 ("Proponents of the *Korean Air Lines* result argue that applying transferor federal law to MDL cases has substantial costs and is contrary to fundamental assumptions of the federal system. The following sections examine these arguments and find them to be without substantial merit.").

213. *Id.* at 763.

214. *Id.* at 763.

215. *Id.* at 766–67. Ragazzo argues, however, that applying the law of several circuits "does not entirely eliminate the benefits of consolidation" as it is still more efficient for one judge to analyze several circuits' precedents than for multiple judges to each analyze the precedent of their own circuit. *Id.* at 766. Additionally, Ragazzo argues that Congress's provision allowing for remand indicates that "achieving uniformity of results was not among its most important goals." *Id.* at 767.

216. *Id.* at 764.

federal question cases is legally dubious;[217] *Erie* and *Van Dusen* make clear that substantive state law must travel in diversity cases.[218] But the alternative of applying transferor federal law only exacerbates the aforementioned burden on judicial resources.[219] If we were to rightly prioritize the pursuit of *accurate* rulings, having MDL courts apply transferor federal law is a necessity. It follows that to achieve accurate decisions without furthering the burden on judicial resources, one thing is clear: MDLs need more judges.

B. Inaccuracy of Outcomes

Overall, the MDL suffers from inaccurate outcomes due to the risk of an extreme distribution of judicial decisions.[220] This occurs because an MDL judge's decisions apply uniformly to all cases within the MDL;[221] what is decided for one case is simultaneously decided for the others.[222] As a result, the distribution of MDL decisions among cases faces enormous variance.[223] A high variance in this context means that the risk of *all* cases being subject to a particular decision is extreme, regardless of how close that decision may be.[224] Considering the lack of appellate recourse under the current MDL scheme, risk-averse parties are consequently forced to settle where they otherwise would not.[225]

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217. *See id.* at 746.

218. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

219. *Id.* at 762–67.

220. From here on out, "decisional distribution" refers to the distribution of judicial decisions to all cases consolidated in the MDL.

221. "Uniform distribution refers to a type of probability distribution in which all outcomes are equally likely." James Chen, *Uniform Distribution*, INVESTOPEDIA, https://www.investopedia.com/terms/u/uniform-distribution.asp (last updated May 19, 2023) [https://perma.cc/FQ8E-QNES].

222. KLONOFF, *supra* note 11, at 200. Examples include selecting the leadership team, setting the common benefit tax, and choosing whether to slash independent attorney's fees. *Id.* at 173–74, 180–82. Of course, certain decisions can be bifurcated, where the MDL judge addresses groups of plaintiffs at a time. *See* Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR. 21 (2011), https://www.jpml.uscourts.gov/sites/jpml/files/FJC-2011-Managing%20MDL%20PL%20Pocket%20Guide.pdf [https://perma.cc/E3B7-STYA]. For simplicity's sake, this Note is concerned with uniformly distributed decisions.

223. *See* Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 84–85 (2015) ("[W]hen judges invoke a variety of legal doctrines, analogies, and their inherent judicial authority . . . their decisions can be unpredictable and difficult to challenge.").

224. *See infra* Subsection II.B.1. and accompanying footnotes.

225. *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) ("Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle."); James Chen, *Risk Averse: What It Means, Investment Choices and Strategies*, INVESTOPEDIA, https://www.investopedia.com/terms/r/riskaverse.asp (last updated Apr. 30, 2023) [https://perma.cc/2VRV-NRK8].

This Section first argues that reducing variance is critical to achieving accurate outcomes in complex litigation, as low variance prevents risk-averse parties from oversettling cases. Second, it notes that the task of reducing variance in MDLs is not entirely foreign; in fact, MDL courts do exactly that through bellwether trials.[226] Still, the variance eliminated through bellwether trials is substantially outweighed by the variance created by having only one MDL judge.[227] Third, it argues that while a preexisting proposal for improving accuracy within MDLs exists,[228] this proposal does little to reduce the variance underlying the distribution of MDL decisions.[229] In short, a reduction of variance in the MDL—much like an alleviation of the choice of law burden—is best remedied by introducing more judges into the fray.

1. The Importance of Variance in Complex Litigation

Variance is the statistical measurement of the spread of a data set—that is, how far each data point is from the average value.[230] As such, variance helps identify how likely an extreme result is to occur.[231] To illustrate variance in the litigation context, consider an earlier example. One hundred cases require a judge to make a binary decision: rule in favor of the plaintiff or rule in favor of the defendant.[232] The decision is a "close one," such that there is a fifty percent likelihood that a judge will return a verdict for either party. If each of the one hundred cases has its own judge, one would expect the average distribution of decisions to consist of fifty plaintiff verdicts and fifty defense verdicts. Indeed, this is both the average and most likely result. There is still a chance, however, that the average distribution is not achieved; for example, it could very well be the case that only forty-nine judges rule in favor of the plaintiff, forty-seven judges rule in favor of the plaintiff,

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226. KLONOFF, *supra* note 11, at 224.

227. *See id.* at 224–25.

228. Fitzpatrick, *supra* note 22, at 118–19.

229. *See infra* Subsection II.B.3. and accompanying footnotes.

230. Hayes, *supra* note 20:

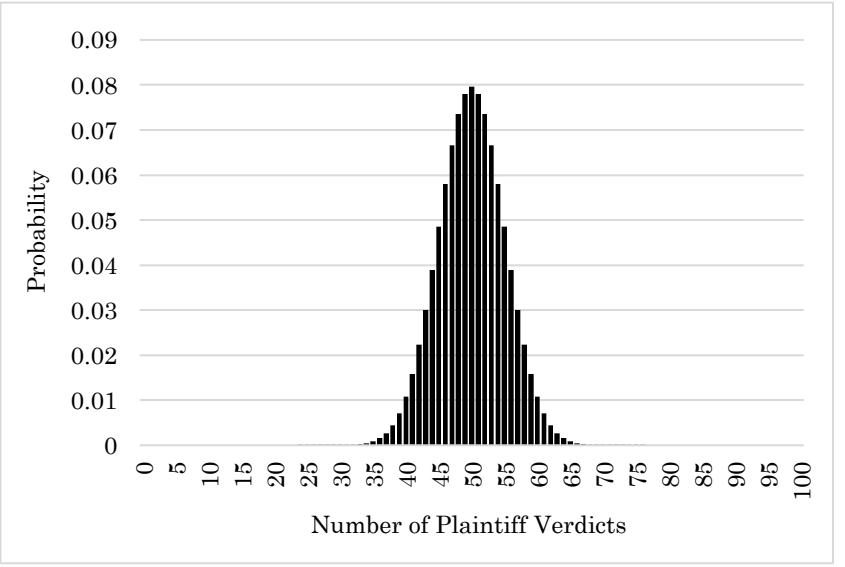
> Variance measures variability from the average or mean. It is calculated by taking the differences between each number in the data set and the mean, then squaring the differences to make them positive, and finally dividing the sum of the squares by the number of values in the data set.

231. *Id.*

232. Of course, many judicial decisions are not binary. For example, motions to dismiss may have three counts; a judge can dismiss zero, one, two, or all counts. In the MDL context, many crucial decisions have a range of possibilities; setting the common benefit tax, for example, requires the MDL judge to choose a percentage from a wide range of possibilities (i.e., any percentage between two and ten percent). *See* KLONOFF, *supra* note 11, at 180.

fifty-five judges rule in favor of the plaintiff, etc. After all, each judge decides a case independently. This scenario is depicted in Graph 1:[233]

GRAPH 1: DISTRIBUTION OF JUDICIAL DECISIONS WITH 100 JUDGES

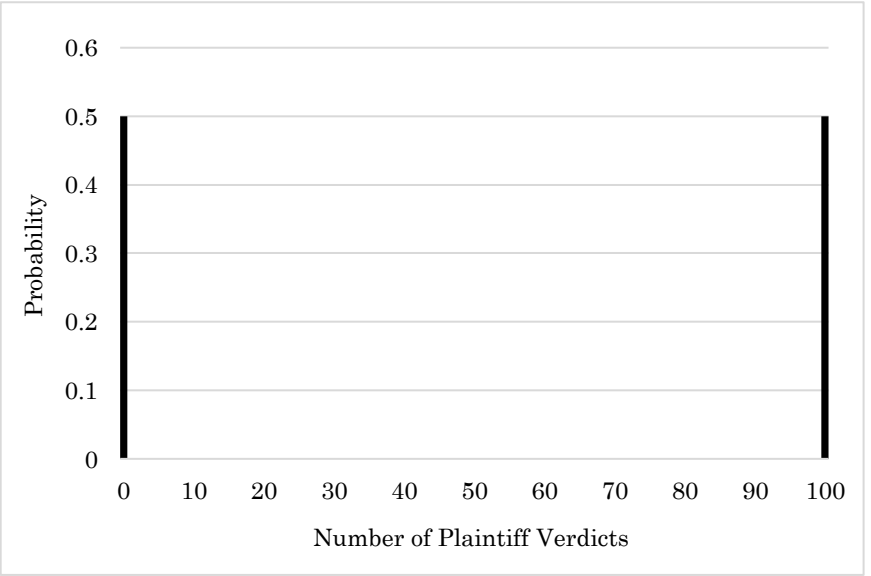


As illustrated, Graph 1 exhibits an average distribution of fifty plaintiff verdicts with a tight variance; in other words, the further the number of plaintiff verdicts strays from fifty, the less likely such an outcome becomes. For example, the likelihood of zero or one hundred plaintiff verdicts is virtually zero.

Consider how drastically things change in the MDL context. Rather than having one hundred judges make independent decisions for one hundred cases, *one* judge now makes *one* decision—subjecting all one hundred cases to that decision. While the odds of rendering a plaintiff verdict remains fifty percent, the likelihood of there being zero or one hundred plaintiff verdicts jumps to fifty percent for either respective outcome: the risk of such an extreme *distribution* is now inevitable. This scenario is depicted in Graph 2:

233. This scenario can be graphed according to a binomial distribution, where the likelihood of a plaintiff verdict (or a "success" of a trial) is 0.50 and each case represents a unique "trial." *See Binomial Distribution*, BYJU'S, https://byjus.com/maths/binomial-distribution/ (last visited Feb. 19, 2024) [https://perma.cc/7KQJ-3QGZ].

GRAPH 2: DISTRIBUTION OF JUDICIAL DECISIONS WITH ONE JUDGE



Why does the distribution of decisions among cases matter? The answer is simple: an extreme distribution creates enormous pressure for risk-averse parties to settle.[234] To elaborate, the expected number of plaintiff verdicts in either of the two hypothetical scenarios is fifty.[235] The risk of an extreme number of plaintiff verdicts, however, drastically changes. Risk-neutral parties that care only for the average number of plaintiff verdicts would be indifferent between the two scenarios. Risk-averse parties—those that have a low tolerance for risk and therefore avoid volatile outcomes—would greatly prefer for one hundred judges to decide one hundred cases.[236] Should they be dragged into an MDL, these risk-averse parties would be induced to settle to avoid the risk of one hundred plaintiff verdicts. Hence, it comes as no surprise that fewer

234. *See In re* "Agent Orange" Prod. Liab. Litig., MDL No. 381, 818 F.2d 145, 166 (2d Cir. 1987) ("Indeed, a settlement in a case such as the instant litigation, dramatically arrived at just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise."); Redish & Karaba, *supra* note 225, at 128 ("Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle.").

235. The expected value is derived by multiplying the probability of successes by the number of trials, and adding the probability of failures multiplied by the number of trials. Where there are 100 judges making 100 decisions, the expected number of plaintiff verdicts is therefore 100[0.5(1) + 0.5(0)] = 50, as each judge has an identical 50% chance of ruling for the plaintiff. Where there is one judge making one decision, the expected number of plaintiff verdicts is 0.5(100) + 0.5(0) = 50. Here, one judge has a 50% chance of ruling in favor of the plaintiff, though he will subject all cases to the same decision.

236. *Cf.* Chen, *supra* note 225.

than three percent of consolidated cases are ever remanded to their original forum.[237] As settlements occur where they otherwise would not, the decisional distribution created by the MDL creates inaccurate outcomes.

The extreme distribution of judicial decisions in the MDL context has a close analogue: the extreme distribution of liability in the class action context.[238] The class action is a similar form of aggregate litigation in which one plaintiff represents a class of absent members and the class must obtain certification by satisfying the requirements under Federal Rule of Civil Procedure 23.[239] In contrast, MDLs consist of individually filed lawsuits, where all plaintiffs are armed with their own attorneys and participate actively in the litigation.[240] While class actions are subject to a more stringent set of procedural rules, they suffer from the same key drawback as MDLs—risk.[241] In particular, the result of a single trial (that of the class representative) carries binding consequences for the entire class, thereby exposing defendants to "enterprise-ending liability."[242] Accordingly, judges and scholars alike

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237. Bradt, *supra* note 6, at 834; Mueller, *supra* note 60, at 541 (discussing a "kind of global peace premium that some defendants are willing to pay").

238. *See* Zachary B. Savage, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439, 442 (2013):

> As Judge Richard Posner explained in *In re Rhone-Poulenc Rorer Inc.*, if an individual trial's outcome can determine a defendant's liability with respect to not only the parties before the court, but also to thousands of other individuals, a risk-averse defendant may opt to settle the entire litigation to avoid the chance of enterprise-ending liability, regardless of the suit's actual merits;

Lawrence T. Hoyle, Jr. & Edward W. Madeira, Jr., *"The Philadelphia Story": Mass Torts in the City of Brotherly Love*, 2 SEDONA CONF. J. 119, 122 (2001):

> While aggregation gives the defendant the opportunity to buy, as one plaintiffs' counsel puts it, "world peace," aggregation is viewed by other defendants as exerting unreasonable pressure to settle relatively weak, and arguably spurious, claims because the alternatives to settlement—including a single jury verdict determining the defendant's total liability—are risky. That risk puts the defendants under enormous pressure to agree, in Judge Friendly's words, to "blackmail settlements."

239. FED. R. CIV. P. 23.

240. *See id.* A class must first meet a class definition under 23(b); it must either be a limited fund class, a class seeking injunctive relief available for all members, or a class seeking money damages. *Id.* Additionally, the class must meet the four criteria under 23(a): numerosity, commonality, typicality, and adequacy of representation. *Id.*; Bradt, *supra* note 6, at 842.

241. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995); *see also* FED. R. CIV. P. 23 (listing requirements for class definition and class certification, including, but not limited to, numerosity, commonality, typicality, and adequacy of representation).

242. Savage*, supra* note 238**Error! Bookmark not defined.**, at 442; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1300 (Judge Posner describes the risk of class certification—that one jury holds billions of dollars of liability and the subsequent fate of an industry in the palm of its hands).

have deemed the class action as enabling "legalized blackmail" against risk-averse defendants.[243]

This problem has not gone unaddressed in the class action context, however. Indeed, the seminal case is *In re Rhone-Poulenc Rorer, Inc*., where Judge Richard Posner discussed the overcentralized nature of class actions.[244] There, a group of hemophiliacs sought class certification in a negligence action against manufacturers of antihemophilic factor concentrate ("AHF"), alleging they became infected with Human Immunodeficiency Virus ("HIV") as a result of the manufacturers' products.[245] The plaintiffs presented evidence of two thousand hemophiliacs succumbing to AIDS, along with the assertion that over half of the remaining U.S. hemophiliac population could be HIV positive.[246] Over three hundred lawsuits involving nearly four hundred plaintiffs had already been filed, and thirteen were already tried.[247] Importantly, twelve of the thirteen trials resulted in verdicts for the Defendants.[248] Still, the class was certified to determine whether the Defendants were liable.[249]

Judge Posner ultimately held that certification was precluded for several reasons, one of which was an undue and unnecessary risk of entrusting the determination of potential multi-billion-dollar liabilities to a single jury.[250] First, considering the thirteen completed jury trials as a representative sample, Posner reasoned that without class certification, the Defendants would prevail in twelve out of every

243. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1298; Hoyle & Madeira, *supra* note 238, at 122; Savage, *supra* note 238, at 442; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation As Network*, 2005 UTAH L. REV. 863, 890 n.116, 891 ("Moreover, even a non-risk-averse risk analysis may lead defendants to settle for significant sums in situations not only where the defendant believes it will lose, but also where the defendant thinks the overwhelming likelihood is that it will prevail."); *see, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[Besides] skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail." (citations omitted)); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784–85 (3d Cir. 1995) ("Another problem is that class actions create the opportunity for a kind of legalized blackmail: a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth.").

244. 51 F.3d at 1299–1300.

245. *Id*. at 1293.

246. *Id*. at 1295–96.

247. *Id*.

248. *Id*.

249. *Id*. at 1297. The district judge reasoned that the class was impossible to certify as a traditional 23(b)(3) class, as differences in time of infection alone would defeat predominance and commonality. *Id*. As such, he wanted to prevent the relitigation of the issue of negligence and allow individual suits for damages. *Id*.

250. *Id*. at 1293.

thirteen of the remaining three hundred lawsuits.[251] This would result in an expected liability of $125 million.[252] With class certification, however, the class size would dramatically increase to encompass thousands of members—the majority of whom had not yet filed suit (and may never file suit).[253] The Defendants would then face a one in thirteen chance of $25 billion in potential liability—not to mention bankruptcy.[254] Posner reasoned that such a scheme—where a six-person jury "hold[s] the fate of an industry in the palm of its hand"—creates such intense pressure to settle that it defies fairness.[255] He held that this risk made certification of the class a clear usurpation of judicial power, particularly when it was entirely feasible to use a "decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions."[256]

This criticism of class actions undoubtedly extends to MDLs.[257] Just as a single jury's enormous verdict arguably constitutes legalized

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251. *Id.* at 1298.

252. *Id.*

253. *Id.*

254. *Id.* at 1298, 1300.

255. *Id.* at 1300.

256. *Id.* at 1299. Regarding concern over using judicial resources to remedy risks imposed by excessively centralized litigation, Judge Posner concluded:

> With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11.

Id. at 1300. That being said, it is obviously impractical to individually adjudicate every single claim in a class action—*that* would be a waste of judicial resources. Yet Judge Posner's argument is a convincing one. *See infra* Section III.D and accompanying footnotes.

As a result of Judge Posner's argument, recent scholarship proposes an alternative method for introducing varied outcomes in final liability determinations—statistical sampling. Cheng, *supra* note 22, at 956. According to Professor Cheng, courts that adopt sampling will "litigate a small subset [of cases] and award the remaining plaintiffs statistically determined amounts based on the results." *Id.* At first glance, sampling seems like the "second best" solution—as individual adjudication, although impractical, inherently appears more accurate. *Id.* at 957. But Professor Cheng rebuts this "second best" argument, arguing that sampling can actually produce more accurate outcomes than individual adjudication because it does not "confine[] itself to a single case and factfinder." *Id.* Statistical sampling produces more stable averages by reducing the effect of outlier juries—those that are especially unreliable and award unusually low or high awards with little justification. *See id.* at 959 ("If the sampled cases are very similar . . . or juries are very flaky . . . then sampling and averaging will produce more stable and accurate damage assessments than case-by-case adjudication."). In *Cimino v. Raymark Industries, Inc.*, "Judge Parker sampled 160 asbestos cases from the 2298 on his docket," divided sample verdicts into five categories of diseases, and held that all non-sampled class members would receive the average award of those sampled in their category. *Id.* at 960; 751 F. Supp. 649, 653 (E.D. Tex. 1990).

Though beyond the scope of this Note, sampling jury verdicts shares many parallels with dividing an MDL among multiple judges. Just as sample jury verdicts are deployed on subparts of a class action, each MDL judge would only make decisions for his part of the MDL.

257. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1300.

blackmail, so too does the imposition of a single MDL judge's decision on all the cases before him.[258] Since the current MDL scheme affords little appellate recourse, many of the MDL judge's decisions are final.[259] As such, extreme decisional distribution distorts the outcome of MDL cases much like the risk of enormous jury verdicts in class actions.[260]

2. Attempts to Reduce Variance Through Bellwether Trials

Attempts to reduce variance are not foreign to the MDL context, however. Indeed, bellwether trial selection is an attempt to do exactly that, albeit in the context of liability rather than judicial decisionmaking.[261] By creating "pools" of plaintiffs to participate in bellwether trials, MDL judges create a statistically accurate representation of all plaintiffs, with some suffering different injuries than others, warranting greater or lesser degrees of compensation.[262] Choosing a single plaintiff would lump all injuries together.[263] Additionally, while the verdict of a bellwether trial binds only the bellwether plaintiff, damage awards serve as data points in settlement determinations.[264] Having only one bellwether trial would create exactly the type of distortion observed in *Rhone-Poulenc*: a single jury trial would serve as the sole data point for a settlement designed to compensate potentially hundreds of thousands of individual claims.[265] Having multiple bellwether trials of plaintiffs with varying degrees of damage awards informs both parties of a more accurate average and, crucially, greatly reduces the risk of an extreme award representing

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258. *See* Savage, *supra* note 238, at 442.

259. *But see* KLONOFF, *supra* note 11, at 311–16 (listing the exceptions to the final judgment rule: (1) Collateral Order Doctrine, (2) Death Knell Doctrine, (3) Certification Under 28 U.S.C. § 1292(b), (4) Injunctive Orders Under 28 U.S.C. § 1292(a)(1), (5) Mandamus, (6) Appeal Under Rule 23(f), and (7) Appeal Under Rule 54(b)).

260. *See* Stier, *supra* note 243, at 892–93; Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not.").

261. KLONOFF, *supra* note 11, at 224.

262. Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 609 (2008); *see* Fallon et al., *supra* note 57, at 2343, 2346 ("Ideally, the trial-selection process should accurately reflect the individual categories of cases that comprise the MDL in toto, illustrate the likelihood of success and measure of damages within each respective category, and illuminate the forensic and practical challenges of presenting certain types of cases to a jury.").

263. *See* Cimino v. Raymark Indust., Inc., 751 F. Supp. 649, 653 (Judge Parker evaluating class members with distinctive injuries by separating them into five disease categories: mesothelioma, lung cancer, other cancer, asbestosis, and pleural disease).

264. KLONOFF, *supra* note 11, at 224; *see* Fallon et al., *supra* note 57, at 2338 ("[P]erhaps more importantly, bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.").

265. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

every plaintiff in the MDL.[266] This approach recognizes that if one jury for a bellwether trial acts unpredictably and awards damages far exceeding the defendant's expectations, the second may award damages far below the defendant's expectations, and the third may meet them.

Still, bellwether trials reduce variance in only one aspect of litigation: jury awards. All remaining decisions are made by the MDL judge alone. The MDL judge still creates deposition guidelines, establishes privilege and confidentiality protocols, determines whether to impose plaintiff fact sheets or *Lone Pine* orders, and rules on potentially dispositive motions pertaining to expert qualification, class certification, dismissal, and summary judgment.[267] And as illustrated by the choice of law burden, the MDL judge must also apply conflicting state law, and should apply potentially conflicting interpretations of federal law—both of which require substantial judicial resources.[268] While both parties benefit from a variety of awards during the bellwether trial process, that is but a small piece of the puzzle. The risk of extreme decisional distribution in the remaining pretrial process still subjects the MDL to inaccurate outcomes.[269]

3. Our Current Solution Falls Short

Professor Brian Fitzpatrick posed a solution to some of the inaccuracies resulting from MDL centralization.[270] He considers "accurate adjudication" to be the most significant cost of mass consolidation generated under the MDL scheme.[271] This consolidation can "undermine the quality of decisionmaking by cutting off second, third, fourth, and fifth opinions before judges render final verdicts on matters that can impact large numbers of people."[272] Borrowing from

266. For example, if only one bellwether trial was conducted for an MDL with one hundred plaintiffs, and the jury awarded the bellwether plaintiff above-average damages, any settlement based on the bellwether verdict would be greater than it should be—for fear of every jury awarding above-average damages. *See* Fallon et al., *supra* note 57, at 2359 ("[F]or a plaintiff, a favorable verdict at trial may result in a greater recovery than would be received through settlement."). Additionally, the variance reduced by bellwether trials protects the defendants' property interest in MDLs "relatively well," as multiple data points yield an accurate damages average. Lahav, *supra* note 262, at 609. The same logic should apply to plaintiffs, as data from bellwether trial awards prevent premature, subaverage settlements. *See* Fallon et al., *supra* note 57, at 2341–42 ("By bringing fact-finding to the forefront of multidistrict litigation, bellwether trials can make a significant contribution to the maturation of disputes and, thus, can naturally precipitate settlement discussions.").

267. KLONOFF, *supra* note 11, at 201–07.

268. Ragazzo, *supra* note 17, at 705.

269. Fitzpatrick, *supra* note 22, at 111–12.

270. *Id.* at 108.

271. *Id.* at 107–08.

272. *Id.* at 111.

Condorcet's Jury Theorem—that if everything is held constant, the more people that are asked a question, the greater the chance the majority of them will select the correct answer—Professor Fitzpatrick concluded that more judges are required to alleviate inaccurate adjudication.[273] As such, he proposed his "Many Minds" theory—for the JPML to appoint a *panel* of judges rather than a single judge.[274]

This solution is both feasible and grounded in the text of the MDL statute. After all, the MDL statute allows for the transfer of cases for pretrial litigation to "a judge *or judges*."[275] It has also been implemented before, as the JPML has transferred cases to multiple judges on two occasions.[276] A panel of judges would mirror the number of minds applied to appellate decisions on higher courts as well—considering that both circuit courts and the U.S. Supreme Court have more than two justices deciding cases.[277]

Nevertheless, this solution does little to address the variance among decisional distribution. If a panel of judges were to make decisions for an MDL containing thousands of plaintiffs, it would still culminate in a single decision for all consolidated cases. A single decision made with three minds as opposed to one. While accuracy of the decisions themselves may improve,[278] extreme decisional distribution would still distort litigation outcomes—especially as risk-averse parties are induced to oversettle.[279] Arguably, even more judges are needed so that the fate of thousands does not rest in one, two, or three pairs of hands.

III. SOLUTION: A DIVISIONAL APPROACH

This Note proposes a solution to the aforementioned accuracy problems: the "divisional approach" to MDL assignment. In short, the

273. *Id.* at 114, 118.

274. *Id.*

275. *Id.* at 118; 28 U.S.C. § 1407(a).

276. *See* Order Reassigning Litigation to Judges Pierson M. Hall and Manuel Real, *In re* Air Crash Disaster Near Papeete, Tahiti, on July 22, 1973, 397 F. Supp. 886, 887 (J.P.M.L. 1975); *see also In re* Air Crash Disaster Near Chi., Ill., on May 25, 1979, 476 F. Supp. 445, 452 (J.P.M.L. 1979).

277. *Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Feb. 9, 2024) [https://perma.cc/BCC5-445Z].

278. Accuracy of MDL decisions are but one side of the coin, whereas accuracy of the litigation outcomes is another; this is illustrated by the existence of bellwether trials and the purpose they serve. Lahav, *supra* note 262, at 609.

279. *See* Savage, *supra* note 238, at 442; Bradt, *supra* note 6, at 846–47; Mueller, *supra* note 60, at 541 ("MDL settlements might actually pay claimants more—a kind of global peace premium that some defendants are willing to pay."); Cheng, *supra* note 22, at 957–58 (arguing that a sampling model for MDLs could lead to less distorted litigation outcomes).

JPML should divide MDLs into more manageable portions and allocate those portions to panels of judges across multiple districts and circuits. Admittedly, this solution is size dependent; a small MDL with fifty plaintiffs originating from a single circuit should not be assigned to more than one judge. But an MDL with 192,000 plaintiffs from each of the twelve circuits should be assigned to a judge in *every* circuit—much like creating twelve smaller MDLs where cases are transferred to the MDL judge in their circuit of origin.[280] This solution combats both the interpretive burden created by MDL choice of law, and, principally, the high variance among MDL decisional distribution. Moreover, this solution is fully grounded within the text and purpose of the MDL Statute.[281]

A. Fostering Accurate Decisions: Addressing the Choice of Law Burden

First and foremost, assigning an MDL to multiple judges in multiple circuits provides a remedy for the legally dubious application of the law in federal question cases. MDL judges should apply transferor court precedent, given that (1) the transferor circuit is the ultimate appellate forum, and (2) MDL transfer is a temporary measure that allows for remand.[282] Doing so, however, exacerbates the interpretive burden by requiring MDL judges to apply even more conflicting law.[283]

A divisional approach to MDL assignment remedies this aggravated burden by splitting a daunting task among many. Ultimately, there is little reason to require that a single judge apply vastly different state laws, just as there is little reason to require that a single jury determine the liability (and, therefore, the fate) of an entire industry.[284] In the case of massive MDLs, having judges exclusively apply the state laws within their respective circuits effectively splits up the task.

Of course, the divisional approach fails to remedy *all* of the choice of law burden. Even under the current regime, there are instances where state law may be essentially uniform.[285] Additionally, federal judges are reasonably expected to hold the legal expertise

280. *See* Turner, *supra* note 5 (discussing the largest ever MDL).

281. 28 U.S.C. § 1407 (text of statute contemplates assignment of MDLs to a judge *or judges* for the purposes of *coordination or consolidation*).

282. Ragazzo, *supra* note 17, at 703; 28 U.S.C. § 1407.

283. *See supra* Section II.A and accompanying footnotes; Gluck, *supra* note 189, at 1704.

284. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

285. KLONOFF, *supra* note 11, at 291.

necessary to conduct proficient *Erie* analyses.[286] And even under the divisional approach, MDL judges would still have to apply conflicting state law should they preside over cases from multiple states in the same circuit.[287]

Yet these criticisms, while entirely valid, overlook how any remedy to the choice of law burden will inevitably have negative consequences. Indeed, the divisional approach cannot possibly alleviate all state choice of law burdens on MDL courts; even if it could, the benefit of introducing enough judges to entirely ameliorate these burdens would be outweighed by the costs imposed by adding too many judges. For example, adding a judge for every district in which cases are filed would render the MDL scheme useless, as it would eliminate efficiency gains altogether.

Crucially, the benefits of this solution are not limited to alleviating—as much as it can—the choice of law burden in MDLs. It also introduces more judges into the fray.[288] Different judges possess different perspectives, and a multi-billion-dollar matter affecting hundreds of thousands of plaintiffs deserves to be heard by multiple minds.[289]

B. Fostering Accurate Outcomes: Addressing Variance Reduction

Multiple judges means multiple minds—this is not a new idea.[290] Indeed, having multiple MDL judges choose the leadership team, set the common benefit tax, rule on crucial motions, and set the parameters of discovery is essential to improving the accuracy of MDL proceedings.[291] This is especially important considering MDL judges

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286. Marcus, *supra* note 200, at 692–93.

287. *See supra* Subsection II.A.1 and accompanying footnotes; *e.g.*, *In re* Air Crash Disaster at Wash., D.C. on Jan. 13, 1983, 559 F. Supp. 333, 340–41 (D.D.C. 1983) (applying the choice of law rules of the District of Colombia, Georgia, Illinois, Maryland, Massachusetts, Pennsylvania, Texas, and Virginia).

288. *See also infra* Section III.B and accompanying footnotes (discussing how adding more judges to the MDL scheme can reduce the variance of MDL decisional distribution).

289. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1299:

> The first is a concern with forcing these 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, when it is entirely feasible to allow a final, authoritative determination of their liability for the colossal misfortune that has befallen the hemophiliac population to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions; and when, in addition, the preliminary indications are that the defendants are not liable for the grievous harm that has befallen the members of the class.

290. *See* Fitzpatrick, *supra* note 22, at 110–13.

291. Engstrom, *supra* note 72, at 2.

often toe the line of violating procedure in the name of efficiency[292] and enjoy nearly unchecked authority due to limited appellate review.[293] More minds on the matter would enhance the likelihood that the majority reaches the correct conclusion.[294]

"More minds" can be added in varying ways.[295] Appellate review could be expanded beyond the typical writ of mandamus; however, this solution is implausible, as it would require Congress's revision of the MDL Statute.[296] As Professor Fitzpatrick suggested, MDLs could be assigned to panels of judges—an approach that the JPML has previously employed.[297] While the JPML should adopt this approach, it is not a panacea, as it fails to address the high variance among MDL decisional distribution. Whether a single judge or a panel oversees an MDL, the outcome would still boil down to a single decision applying to every included case. As such, Professor Fitzpatrick's panel proposal should be expanded to contemplate assigning the MDL to multiple districts, each situated within a different circuit. This solution would enjoy multiple panels of judges, with each making its own decisions—a *variety* of decisions.

Returning to the hypothetical scenario depicted in Subsection II.B.1, Graph 3 illustrates a hypothetical divisional approach: one hundred cases are divided among ten judges, with each judge receiving an equal number of cases. Each judge subsequently makes simultaneous, uniform decisions for the cases before him—as if he was presiding over an MDL with ten rather than one hundred cases. While the variance is not reduced to the same degree as having one hundred judges make one hundred independent decisions—as illustrated by the tightness of the curve in Graph 1[298]—it certainly beats the enormous variance depicted in Graph 2.[299] As such, the divisional approach would

292. *See* Gluck, *supra* note 189, at 1696; Bradt, *supra* note 6, at 846.

293. *See* KLONOFF, *supra* note 11, at 310; *see also* Catlin v. United States, 324 U.S. 229, 233 (1945).

294. Fitzpatrick, *supra* note 22, at 112–13.

295. *See id.* at 116–19.

296. *See Proposals*, *supra* note 156, at 5–6 (suggesting proposed language to increase appellate review of MDL cases); Fitzpatrick, *supra* note 22, at 117 (expanding appellate review would require "lawmaking").

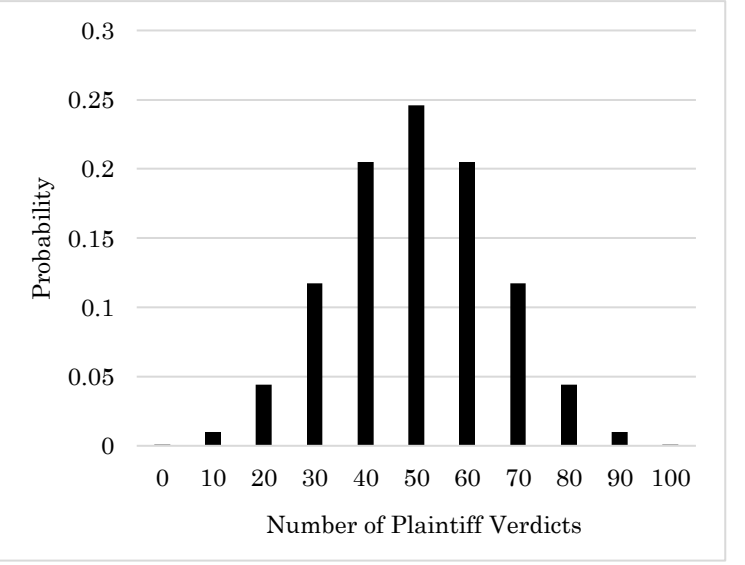
297. Fitzpatrick, *supra* note 22, at 118; *see also In re* Air Crash Disaster Near Chi., Ill., on May 25, 1979, 476 F. Supp. 445, 452 (J.P.M.L. 1979) (assigning the MDL to Judges Edwin A. Robson and Hubert L. Will).

298. The tighter the distribution around the mean, the lower the variance, as variance is the square of the standard deviation, which is the difference between data values and the mean. Hayes, *supra* note 20; *see supra* Subsection II.B.1.

299. Recall that in Graph 2, the variance was extremely high due to there being a 50% chance of either 100 plaintiff or 100 defense verdicts; there would be no data points surrounding the mean of 50 plaintiff and 50 defense verdicts. *See supra* Subsection II.B.1.

foster more accurate outcomes by sacrificing some level of judicial efficiency (having ten judges rather than just one) for a sharp reduction in the variance of decisional distribution.

GRAPH 3. DISTRIBUTION OF JUDICIAL DECISIONS WITH TEN JUDGES



C. Legitimacy of Having Multiple MDL Judges

A critical feature of this solution is its legitimacy. First and foremost, the MDL Statute makes clear that an MDL may be assigned to a "*judge or judges*."[300] This reference occurs several times within subsection (b) of the statute:

> Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation . . . such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.[301]

Subsection (b) alone references the phrase "judge or judges" four times, demonstrating explicit congressional contemplation of assigning a single MDL to multiple judges—indeed, Professor Fitzpatrick also cited

300. 28 U.S.C. § 1407(b) (emphasis added).

301. *Id.* (emphasis added).

this statutory justification when advocating for the feasibility of his solution.[302]

Notably, the phrase "coordinated *or* consolidated pretrial proceedings" is also repeated several times in § 1407.[303] Deliberate use of the contrasting conjunction suggests the statute authorizes MDL proceedings that coordinate without consolidating or consolidate without necessarily coordinating.[304] The former is vital to this Note's solution, as assigning an MDL to multiple judges in different circuits surely demands a more comprehensive coordination effort than what is traditionally required.[305] While the number of district court judges involved with the matter may decrease from hundreds (pre-consolidation) to a mere dozen (post-consolidation), this approach would require communication among the remaining districts to ensure ongoing efficiency in the litigation. Although the JPML has yet to consolidate litigation in more than one court, statutory text suggests that it is entirely within its power and discretion to do so.

D. Preserving the Purpose of Consolidation

The most anticipated criticism is that the divisional approach makes the MDL framework ineffectual. After all, what purpose does consolidation serve if it risks resulting in disparate outcomes across the MDL—if it makes the MDL *inefficient*? What is the purpose of consolidation if discovery is neither uniform nor coordinated?

In short, such criticism has two key limitations. First, the divisional approach does not eviscerate *all* efficiency gains but rather maintains those gains at a level that does not introduce inaccuracy. Furthermore, MDL judges can coordinate across circuits to compensate for some of the reductions in efficiency; in fact, MDL judges already regularly coordinate with state judges to establish uniform guidelines for discovery and to avoid duplicative efforts.[306] For example, in *In re*

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302. *Id.*; Fitzpatrick, *supra* note 22, at 118.

303. 28 U.S.C. § 1407 (emphasis added).

304. *Id.*

305. Such a coordination effort would be similar to coordination among state and federal judges under the MDL scheme. William W. Schwarzer, Nancy E. Weiss & Alan Hirsch, *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700–33 (1992).

306. *See* Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1851–52 (1997):

> It is now commonplace for one judge to ask another judge to assist in settling a case. Federal and state judges sit together in handling cases that arise out of the same set of facts. One court may defer resolving a case until similar issues are decided by another court;

Beverly Hills Fire Litigation, the MDL judge and Kentucky state judge coordinated all discovery and pretrial activity together, ultimately dividing cases into two groups to try in state and federal court, respectively.[307] In *In re Ohio Asbestos Litigation*, the state and MDL judge coordinated all pretrial activity to an even greater degree, creating identical tracking systems and eventually holding joint hearings and settlement discussions.[308] Meanwhile, the state and MDL judges in *In re L'Ambiance Plaza Collapse Litigation* relied on outsourcing to coordinate pretrial; recruiting an alternative dispute resolution specialist, the four judges formulated a settlement plan, a mediation procedure, and a joint-hearing schedule.[309]

While the aforementioned cases are just three examples, MDL judges routinely achieve intersystem coordination of discovery in a variety of ways[310]—the simplest of which includes straightforward agreements to accept discovery material developed in the other court.[311] If such coordination can be achieved between state and federal courts, it is surely attainable among federal courts alone.[312]

Second, and perhaps more importantly, the divisional approach recognizes that efficiency, consistency, and uniformity are not the sole concerns of this nation's justice system.[313] Accuracy is just as crucial. While dividing MDLs among multiple courts creates inconsistency and a lack of uniformity, this is precisely the rationale for reducing variance: it reflects a statistically accurate picture of what the right decisional distribution should be, thereby reducing the risks associated with placing an entire industry's fate in a single jurist's hands.[314] This is why

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Abrams, *supra* note 45; Grabill, *supra* note 48; Herrmann, *supra* note 26, at 43–47, 65–66.

307. 639 F. Supp. 915, 916 (E.D. Ky. 1986); Schwarzer et al., *supra* note 305, at 1700–33.

308. Ohio Asbestos Litigation: Case Management Plan and Case Evaluation and Apportionment Process, *In re* Ohio Asbestos Litig., No. 83-OAL (N.D. Ohio Dec. 16, 1983) (Order No. 6); Schwarzer et al., *supra* note 305, at 1702.

309. *See In re* L'Ambiance Plaza Litig., No. B-87-290 (D. Conn. & Conn. Super. Ct. Dec. 1, 1988) (Special Settlement Proceedings); Schwarzer et al., *supra* note 305, at 1702.

310. *See* Schwarzer et al., *supra* note 305, at 1707–14 (listing, among other tactics, the following examples of intersystem discovery coordination methods: joint discovery hearings, joint use of discovery materials, common discovery master, joint discovery plan, and joint scheduling).

311. *Id.* at 1710–11; *see, e.g.*, Airline Disaster Litigation Report—Uniform Damage Rules Needed, 127 F.R.D. 405 (1988).

312. *See* William W. Schwarzer, Alan Hirsch & Edward Sussmann, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts,* 73 TEX. L. REV. 1529, 1531–32 (1995) (discussing cooperation among federal and state courts); *see also, e.g.*, Schwarzer et al., *supra* note 305, at 1700–03 (listing examples of federal and state court coordination).

313. Marchan v. John Miller Farms, Inc., 352 F. Supp. 3d 938, 947 (D.N.D. 2018) (Young, J., sitting by designation); *see* Fitzpatrick, *supra* note 22, at 111–12.

314. *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995).

prominent MDL judge, Judge William Young, in describing the value of decisional distribution, said the following:

> The great strength of our common law system is reasoned inconsistency, i.e., each court reaching out for the best possible justice in the case before it, where reasoned but varying decisions draw from the body of other such decisions with the idea that the law will grow and adapt based on such reasoning.[315]

Discussed at length in Subsection II.B.1, a divisional approach to MDLs prevents risk-averse parties from settling where they otherwise would not.[316] As for efficiency concerns, Judge Young continued: "Efficiency *is* one component of justice, but it is not the sole goal of the justice system. Were that not the case, why have trials at all?"[317] Perhaps an even better example is the due process protections that exist in other forms of aggregate litigation; for instance, class action certification under Rule 23[318] requires an adequate class representative (among other things).[319] The failure of a class to have an adequate representative is a due process violation, making class certification wholly improper.[320] Were efficiency the primary goal of the federal judiciary, why go through the trouble of assigning so many protections for absent class members? The answer is clear: efficiency is but one piece of the puzzle—accuracy is another.

CONCLUSION

Overall, this Note addresses a significant and ongoing problem with the MDL scheme—the sacrifice of accuracy for efficiency by way of excessive pre-trial consolidations before a single judge. Returning to the football analogy, it would be patently obvious to an outside observer that requiring a single referee to oversee an entire season's worth of games would be impractical and produce inaccurate, unfair results. In the MDL context, assigning a single judge to preside over thousands of plaintiffs creates two accuracy problems: first, inaccurate *decisions*, as illustrated by the interpretive burden created by MDL choice of law

315. *Marchan*, 352 F. Supp. 3d at 947.

316. *See supra* Subsection II.B.1 and accompanying footnotes.

317. *Marchan*, 352 F. Supp. 3d at 947 (advocating for more jury trials).

318. FED. R. CIV. P. 23.

319. *Id.* at 23(a)(4) ("[T]he representative parties will fairly and adequately protect the interests of the class."); *see also id.* at 23(a)(1)-(3), (b)(1)-(3) (creating numerosity, commonality, typicality, class definition, and class type requirements, including predominance and superiority requirements for money damages class actions).

320. Hansberry v. Lee, 311 U.S. 32, 45 (1940) ("Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.").

doctrines; second, inaccurate *outcomes*, as illustrated by the high variance of decisional distribution that pressures risk-averse parties to oversettle. This Note advocates for the JPML to draw upon the logic that already exists to criticize class actions and support bellwether trials. Under a "divisional approach," as explicitly authorized by 28 U.S.C. § 1407(b), the JPML should assign particularly expansive MDLs to panels of judges in multiple districts and circuits. This modified approach will necessarily enhance the accuracy of decisions that wield considerable influence over our nation's civil litigation landscape. In short, the solution is simple. For so many cases—and for so much at stake—we need more than just one referee.

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* J.D. Candidate 2024, Vanderbilt University Law School. Bachelor of Science in Economics, University of Maryland, College Park, 2021. I would like to thank the *Vanderbilt Law Review* staff—particularly Christian Dunn and Ari Goldfine—for all their help throughout the editing process. I would also like to give a special thanks to Professor Brian T. Fitzpatrick; his guidance and honest critique were crucial from start to finish. Most importantly, however, I would like to dedicate this Note to my classmate and fiancée, Morgan Elizabeth Scott. She provided constant support via her offering of counterarguments, her encouragement through difficult times, and her presence by my side. Morgan served—and continues to serve—as both my biggest fan and greatest inspiration.