

GLOBAL SETTLEMENTS IN NON-CLASS MDL MASS TORTS

by
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The increased resolution of mass tort cases through multidistrict litigation (MDL) compels examination of the comparative treatment of those mass tort MDLs that obtain class certification and those that, for various reasons, cannot be certified as a class. Despite the efficiency of the MDL mechanism, it often lacks uniformity and raises fairness concerns for mass tort MDLs that cannot be certified and yet reach a global settlement on behalf of dissimilarly situated plaintiffs. The MDL statute should be updated by Congress to address the “quasi-class action” problem that may be widespread in non-class mass tort MDLs. This Article examines the differences between class certified mass tort MDLs and so called quasi-class action MDLs to illustrate current problems in the MDL landscape. It also identifies a new generation of quasi-class action MDLs that assume some of the powers and characteristics of class litigation without specifically invoking a quasi-class action theory.

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Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation may, “[w]hen civil actions involving one or more common questions of fact are pending in different districts,” transfer such actions to a single federal district court for coordinated or consolidated pretrial proceedings, to be remanded at the conclusion of those proceedings.¹ An order consolidating actions may only be reviewed by extraordinary writ under 28 U.S.C. § 1651,² and rarely will a case escape the “black hole” of multidistrict litigation (MDL) to be remanded to the district from which it was transferred.³

The MDL docket “comprised roughly 15% of all federal civil cases” in 2012,⁴ and 96% of the individual claims consolidated in MDL, including those claims aggregated through the class action mechanism, are mass torts.⁵ A class settlement reached in an MDL will retain all the protections of Federal Rule of Civil Procedure 23 (Rule 23), because the judge is required to ascertain that all of the elements of Rule 23(a) and 23(b) have been met, and that the settlement is fair under 23(e).⁶ However, outside of the class action mechanism, there is no procedural requirement in MDL for assessing the adequacy of counsel or the fairness of a mass settlement.

In multidistrict litigation, committees assume control of the litigation by initiating and conducting discovery; they also “act as spokespersons for all plaintiffs, call counsel meetings, examine and depose witnesses, coordinate trial teams, select cases for bellwether trials, submit and argue motions, and negotiate proposed settlements.”⁷ Although plaintiffs retain individual counsel, an attorney with whom they have no relationship may make important decisions in their case.⁸ Because of this, in MDL, “non-class mass litigation often resembles class actions in the sense that numerous plaintiffs depend on counsel with whom they have no meaningful individual relationship and whose loyalty is directed primari-

¹ 28 U.S.C. § 1407(a) (2012).

² 28 U.S.C. § 1407(e).

³ See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014) [hereinafter Burch, *Remanding*].

⁴ *Id.* at 401.

⁵ See Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 41 (2015).

⁶ See Burch, *Remanding*, *supra* note 3, at 409 n.53 (indicating transferee courts will remand cases to transferor courts to certify parties as a class under Rule 23).

⁷ Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 87–88 (2015) [hereinafter Burch, *Judging*].

⁸ See S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 403 (2013) (noting that “[c]onsolidations under section 1407 do not strip plaintiffs of their chosen counsel with respect to their individual claims, but such consolidations alter plaintiffs’ potential to monitor developments that affect their interests”).

ly to collective interests.”⁹

This implicates the aggregate settlement rule, Rule 1.8(g) of the Model Rules of Professional Conduct, which “limits the ability of attorneys to settle claims of numerous clients at once.”¹⁰ The rule requires “(1) disclosure of all settlement terms to all clients, including disclosure to each of what the other plaintiffs are to receive or other defendants are to pay; (2) unanimous consent by all clients to all settlement terms; and (3) a prohibition on agreements to waive [the] requirements . . . even with the clients’ unanimous consent.”¹¹

Since substantial legal and factual differences in plaintiffs’ claims characteristic of mass torts limit the possibility of certifying a class but do not preclude pretrial consolidation in multidistrict litigation, lead counsel appointed to represent all plaintiffs in non-class mass tort MDLs are presented with an inherent conflict of interest when there are differently situated claimants with diverse interests—exactly the type of situation the Supreme Court ruled against in the class action context in *Amchem Products, Inc. v. Windsor*, where the Court could not approve a global settlement that failed to provide representation for subgroups with diverse interests.¹²

The *Manual for Complex Litigation* notes that in appointing class counsel, “[d]ue process concerns also attend possible conflicts of interest within the class of future claimants”; lead attorneys in non-class MDLs, however, are often appointed for their experience and resources.¹³ Furthermore, judges in different districts appoint non-class lead counsel based on different criteria. This is because there is no statutory language in § 1407 that grants or limits the power of judges to establish a structure to manage the large number of plaintiffs and consolidated actions that can characterize mass tort MDLs. When the court gives control of the litigation to a single or a few attorneys based on their experience and cooperative abilities rather than ability to represent diverse interests within the MDL, there should be a mechanism to ensure settlements negotiated on behalf of all claimants are fair. The MDL statute created in 1966, as explained below, should be revised to include structural assurance of adequate representation and fairness in settlements when the court desig-

⁹ Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1774 (2005).

¹⁰ ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 1132 (3d ed. 2012).

¹¹ *Id.* at 1133 (excerpt from Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 734 (1997)).

¹² See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997); see also Brown, *supra* note 8, at 406–07; Burch, *Judging, supra* note 7, at 89–90.

¹³ MANUAL FOR COMPLEX LITIGATION, FOURTH, §§ 22.58, 22.62 (2004) (recommending courts consider the potential lead attorneys’ “experience in managing complex litigation” and “the resources that they can contribute to the litigation”); see Burch, *Judging, supra* note 7, at 91.

nates attorneys to act on behalf of all claimants in the litigation.

I. BACKGROUND

Professor Richard Nagareda said, “[T]he endgame for a mass tort dispute is not trial but settlement.”¹⁴ A mass tort “usually denotes litigation involving a large number of tort claims arising out of the use of or exposure to a single product, or resulting from injuries due to a single catastrophic event.”¹⁵ These include injuries due to mass accidents, pharmaceutical products, medical devices, food and diet supplements, chemicals, and toxic substances.¹⁶ As Professor Vairo states, these injuries may be “real and imagined, current and future, serious to minor,” and involve thousands, or even millions, of people.¹⁷ The large number of claims, the commonality of the issues and actors among claims within litigation, and the interdependence of claim values make mass torts different from ordinary personal injury litigation.¹⁸ Furthermore, claimants may be dispersed both geographically and temporally.¹⁹ Geographic dispersion of claimants can cause the filing of thousands of individual suits in varying jurisdictions.²⁰ For an example of temporal dispersion one need only look to the asbestos litigation context, where injury develops long after exposure and many claimants seeking compensation may lack a current, cognizable injury.²¹

A defendant facing mass tort liability seeks to make an “all-encompassing peace in the subject area of the litigation as a whole.”²² A plaintiff suffering personal injury seeks compensation, the right to be made whole by the one whose action or inaction caused the harm. In between lies the judiciary, faced with resolving potentially thousands of cases stemming from a few causes but resulting in a myriad of injuries. Despite the advantage of efficiency in class actions, these cases may be subject to different constraints in time, geography, unique defenses and fact-specific inquiries that make collective representation through class

¹⁴ RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT IX* (2007).

¹⁵ Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887 (2001).

¹⁶ See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965–1013 (1993) (profiling mass torts litigation, e.g., the Beverly Hills Supper Club Fire, the Dalkon Shield, salmonella, and asbestos, among others).

¹⁷ Georgene M. Vairo, Georgine, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 81 (1997).

¹⁸ Hensler & Peterson, *supra* note 16, at 965.

¹⁹ See NAGAREDA, *supra* note 14, at xv.

²⁰ See *id.* at xiii–xiv; Charles E. Reuther, *Class Actions and the Quest for a Fair Resolution in Mass Tort Litigation*, N.J. LAW. MAG., Aug. 2011, at 25.

²¹ See Hensler & Peterson, *supra* note 16, at 1045–46.

²² NAGAREDA, *supra* note 14, at ix.

action unattractive to a system that relies on every person having his or her day in court.²³ Courts often seek to achieve efficient and equitable resolution of these cases through other types of aggregation, one of which is consolidation under the MDL statute.²⁴

A defendant in a mass tort action may seek peace with a global settlement through class certification, bankruptcy, or legislation.²⁵ Additionally, parties may contract privately to reach a settlement.²⁶ Of course, if a defendant desires to limit exposure to future liability, a single individual settlement in the context of mass litigation will not accomplish that goal. To that effect, aggregate litigation offers defendants a chance at a global settlement.²⁷ For example, a class action offers defendants the possibility of an approved class settlement that would preclude members from “relitigating claims that were, or might have been, raised in the underlying litigation.”²⁸ That being said, defendants may feel unfairly pressured to settle, particularly in the context of class certification under Rule 23(b)(3).

A coordinated approach can also be cost effective and strategically advantageous to plaintiffs.²⁹ Furthermore, in the context of a defendant with limited funds, it can help to ensure equitable treatment between claimants presently injured and those suffering from exposure only.³⁰ Working together in an aggregate context, plaintiffs may be able to achieve a resolution sooner, thereby receiving relief for their injuries when they need it most.

Settlement provides closure, compensation, and clear dockets, but the way parties are reaching mass tort settlements is changing.³¹ The decline of mass torts in class actions did not signal the end of aggregate litigation in this field because claimants suffering grave personal injury retained incentive to file individual suits. Under 28 U.S.C. § 1407, the United States Judicial Panel on Multidistrict Litigation (JPML) may aggregate individually filed claims that share a common question of fact for pretrial proceedings in a single district court (an MDL), in order to promote the efficient resolution of the claims.³² Judges encourage settlement between the parties, and cases are rarely remanded to the court from

²³ See Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 123 (2012).

²⁴ See Hensler & Peterson, *supra* note 16, at 1050.

²⁵ See Erichson, *supra* note 9, at 1778–80.

²⁶ See Grabill, *supra* note 23, at 124.

²⁷ See Hensler & Peterson, *supra* note 16, at 1050.

²⁸ See NAGAREDA, *supra* note 14, at 9.

²⁹ See Hensler, *supra* note 15, at 889.

³⁰ See NAGAREDA, *supra* note 14, at xv.

³¹ See Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 269 (2011) (critiquing a new legal device allowing plaintiffs’ lawyers to bind clients to a group settlement).

³² 28 U.S.C. § 1407(a) (2012).

which they were transferred.³³

II. MASS TORTS IN MDL

The decline of mass torts class actions was not the end of aggregate mass tort settlements.³⁴ Consolidation under the MDL statute and certification as a class action under Rule 23 are not mutually exclusive. A class may be consolidated under MDL and seek certification, or an MDL may contain multiple classes while simultaneously maintaining non-class individual suits. Class certification is not necessary to the creation of a settlement after consolidation.³⁵ Parties often reach private, sometimes confidential, settlements that can be overseen through the administration of the transferee court.³⁶ These private settlements do not require court approval and are not subject to appeal.³⁷ In MDL it is said that “defendants get global peace, plaintiffs obtain compensation for the harm they suffered, lawyers are rewarded for their work bringing the case to closure, and it all happens rather quickly in a public forum.”³⁸ However, concerns over coercive terms in settlement agreements, the due process rights of claimants within the MDL, and the necessary judicial improvisation of doctrine to resolve issues on which the MDL statute remains silent, continue to raise discussion.³⁹ While mass torts are not the only type of law-

³³ See MANUAL FOR COMPLEX LITIGATION, FOURTH, § 20.132 (2004) (“As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.”); BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL CTR., MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES 4 (2011) (“One of the values of MDL proceedings is that they bring before a single judge all of the federal cases, parties, and counsel making up the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement [Y]ou may facilitate the settlement of the federal and any related state cases through prompt ruling on dispositive motions.”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 158 (2010) (stating that “[u]nless the judge is inclined to dismiss all claims, the judge will want to achieve a global settlement”).

³⁴ See Burch, *Judging*, *supra* note 7, at 80.

³⁵ See Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 782 (2010).

³⁶ See MANUAL FOR COMPLEX LITIGATION, FOURTH, § 22.91.

³⁷ See Grabill, *supra* note 23, at 127.

³⁸ Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1369 (2014).

³⁹ See Erichson & Zipursky, *supra* note 31, at 266 (describing a term requiring the lawyer to recommend the settlement to all eligible clients); 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, 110–11 (2015) (describing the reasons due process protections are necessary in MDL similar to the class action context); Morris A. Ratner, *Achieving Procedural Goals through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 61

suit that can be consolidated under the MDL statute, they have come to “dominate” the MDL docket.⁴⁰

Section 1407 states that “transfers for such proceedings will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”⁴¹ The statute provides for “coordinated or consolidated pretrial proceedings,” subject to remand “to the district from which it was transferred.”⁴² Congress adopted § 1407 in 1968 to promote the policies of avoiding duplicative litigation and promoting the efficient administration of justice.⁴³ The need for consolidation arose out of a federal antitrust case involving electrical equipment in the 1960s, resulting in 2,000 cases involving 25,000 separate claims for relief in 35 federal judicial districts.⁴⁴ A special committee of nine judges oversaw the coordination and consolidation of pretrial discovery proceedings, thereby alleviating the “heavy burden” of “continually conflicting pretrial discovery demands for the same witnesses and documents” on federal courts. The committee then recommended a formal mechanism to deal with “instances of mass litigation,” which lead to the current consolidation statute in § 1407.⁴⁵ In sum, the MDL statute’s primary purpose is efficiency.

The JPML holds the power to grant MDL status and selects the transferee judge.⁴⁶ It consists of seven federal circuit and district court judges appointed by the Chief Justice of the United States, “no two of whom shall be from the same circuit.”⁴⁷ The JPML can transfer “groups of cases to a single district court for the purpose of conducting pretrial proceedings without consideration for personal jurisdiction over the parties and without having to meet the venue requirements of 28 U.S.C. § 1404.”⁴⁸ It may do this on its own or in response to a motion filed by a party to an action in which transfer may be appropriate.⁴⁹ The JPML considers only two issues: whether common questions of fact exist so that consolidation

(2013) (describing how “[c]ourts overseeing non-class aggregate settlements have thus improvised to define a doctrinal foundation for exercising authority over fees”).

⁴⁰ See Metzloff, *supra* note 5, at 37.

⁴¹ 28 U.S.C. § 1407(a) (2012).

⁴² *Id.*

⁴³ Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2248 (2008).

⁴⁴ Robert A. Cahn, *A Look at the Judicial Panel on Multidistrict Litigation*, 72 F.R.D. 211, 211 (1976).

⁴⁵ *See id.*

⁴⁶ Hensler, *supra* note 15, at 893.

⁴⁷ 28 U.S.C. § 1407(d) (2012); see Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2327 (2008).

⁴⁸ John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2228 (2008).

⁴⁹ See Fallon et al., *supra* note 47, at 2327–28.

will be efficient, and “which federal district and judge are best situated to handle the transferred matters.”⁵⁰ The goal is to “pair an experienced, knowledgeable, motivated, and available judge in a convenient location with a particular group of cases.”⁵¹ The JPML issues a transfer order, assigns a title and number to the MDL, and identifies related actions that will be transferred.⁵² Centralized cases become a part of an MDL proceeding in the transferee court.⁵³ The transferee judge then oversees these “factually related individual cases” for pretrial proceedings.⁵⁴ The transferee court possesses the same power to resolve pretrial issues and to facilitate settlement as it would in any other case,⁵⁵ although the Supreme Court decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* makes clear that the transferee court may not assign a case to itself for trial.⁵⁶

Once cases have been consolidated and transferred, regardless of status as a class action, judges often appoint lead counsel for the plaintiffs and sometimes for defendants to help manage and coordinate the litigation.⁵⁷ These attorneys may become lead counsel, part of a Plaintiffs’ Steering Committee, Plaintiffs’ Executive Committee, or Plaintiffs’ Liaison Committee; compensation for each occurs by the court through a common benefit fund.⁵⁸ This concept, prominent in the class action context, is cited by the *Manual for Complex Litigation* as appropriate for all MDLs, stating that “attorneys who provide a common benefit to a group of litigants may also receive compensation from a common fund—even if the attorneys who provide the benefit are not part of an official committee.”⁵⁹ Judges may order “a percentage of the fees lawyers earn from the case set aside to pay for the costs incurred by lead and other counsel in connection with the MDL,” and ask lead counsel or a special committee to “recommend allocations to the lawyers who have worked on the

⁵⁰ Heyburn, *supra* note 48, at 2228.

⁵¹ *Id.* at 2241.

⁵² Fallon et al., *supra* note 47, at 2327–28.

⁵³ See Catherine R. Borden et al., *Centripetal Forces: Multidistrict Litigation and Its Parts*, 75 LA. L. REV. 425, 427 (2014).

⁵⁴ Thomas, *supra* note 38, at 1350 (emphasis omitted).

⁵⁵ See Borden et al., *supra* note 53, at 428–29; Fallon et al., *supra* note 47, at 2328.

⁵⁶ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

⁵⁷ See Jaime L. Dodge, *Wrangling the Beast: Creating New Standards and Best Practices for Large and Mass-Tort MDLS*, 99 JUDICATURE 32, 34 (2015).

⁵⁸ See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 U.S. Dist. LEXIS 17535, at *20 (D. Minn. Mar. 7, 2008).

⁵⁹ MANUAL FOR COMPLEX LITIGATION, FOURTH, § 22.62 (2004). Judges may also fine attorneys that worked for the “common detriment.” See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2009 U.S. Dist. LEXIS 130985, at *23 (D. Minn. Dec. 14, 2009).

case.”⁶⁰ Attorneys competitively seek positions as lead counsel.⁶¹ The judge appoints lead counsel based on expertise, cooperative abilities, and financial means.⁶²

Transferee courts may use bellwether trials of selected individual cases to create “settlement valuations for a mass settlement of remaining claims.”⁶³ These individual bellwether cases undergo case-specific discovery, and the jury receives the case at trial much like any other case would be.⁶⁴ While the verdicts of bellwether trials are not binding, they provide litigants with information about how future cases will likely proceed and a basis for a settlement that is grounded in reality.⁶⁵ For this reason, bellwether trials are perceived to increase the rate at which a tort “matures,” leading to settlement.⁶⁶ For example, in *In re Vioxx Products Liability Litigation*, an MDL where plaintiffs alleged a failure to warn of increased risk of heart attack and stroke associated with the pain reliever Vioxx, “[t]he transferee court conducted six bellwether trials . . . only one of which resulted in a verdict for the plaintiffs,” ultimately leading to serious settlement negotiations and a \$4.85 billion settlement.⁶⁷

Although the scope of MDL proceedings was narrowly construed at its inception, the role of an MDL court has increasingly moved towards that of a “global settlement administrator,” who oversees the resolution of state and federal claims as well as private claims not yet filed.⁶⁸ State claims are not subject to the jurisdiction of the transferee court in a federal MDL because “[n]onremovable cases filed in any state court and claims brought privately do not fall within § 1407’s language.”⁶⁹ However, private agreements structured as opt-in settlements allow state claimants to consent to settlements that the federal MDL court will oversee.⁷⁰

In the first year of the JPML’s existence, it heard only 17 motions for consolidation under § 1407.⁷¹ By 2007, there were 297 open MDL dockets representing 76,000 pending actions.⁷² Today, “15% of all civil litigation

⁶⁰ Brown, *supra* note 8, at 399.

⁶¹ *See id.* at 397.

⁶² *See* Burch, *Judging, supra* note 7, at 86.

⁶³ Thomas, *supra* note 38, at 1350–51.

⁶⁴ Fallon et al., *supra* note 47, at 2360, 2365.

⁶⁵ *See id.* at 2337 (“bellwether trials can precipitate and inform settlement negotiations by indicating future trends”).

⁶⁶ *See* Brown, *supra* note 8, at 401; Fallon et al., *supra* note 47, at 2341–42 (“By bringing fact-finding to the forefront of [MDL], bellwether trials can make a significant contribution to the maturation of disputes and, thus, can naturally precipitate settlement discussions.”).

⁶⁷ *See* Fallon et al., *supra* note 47, at 2334–37.

⁶⁸ *See* Thomas, *supra* note 38, at 1362.

⁶⁹ *Id.* at 1375–76.

⁷⁰ *See id.*

⁷¹ Heyburn, *supra* note 48, at 2231.

⁷² *Id.* at 2232.

in the federal courts is MDL,” and the MDL courts have only remanded 2.9% of consolidated cases to their original district.⁷³ Not all MDLs are “mega-cases.”⁷⁴ In fact, in 2007, half of open MDL dockets consolidated only ten or fewer individual actions.⁷⁵ However, while mass tort dockets comprise only 23% of all MDLs, those dockets represent the consolidation of over 125,000 civil actions, “constituting over 96% of all pending actions included in all of the MDL dockets.”⁷⁶ These actions may be individual or class actions.

Non-class multidistrict litigation can involve multi-billion dollar lawsuits, but lacks the appellate scrutiny or legislative oversight granted to class actions.⁷⁷ While Rule 23 class settlements bind all class members that do not opt out, non-class MDL mass settlements operate by soliciting plaintiffs to opt in to a voluntary settlement agreement negotiated by counsel appointed by the court to manage the proceeding.⁷⁸ While MDLs in general permit the “coordinated treatment of similar claims of wrongdoing brought by a large number of individual plaintiffs,” nothing in the statute itself contemplates representation of all claimants by a few attorneys.⁷⁹ Unless the court certifies the class under Rule 23, there is no structural assurance of fairness for claimants in non-class mass tort MDLs.

The transferee judge holds the same power granted to judges under the Federal Rules of Civil Procedure, but will not apply Rule 23 unless a class is certified.⁸⁰ Federal Rule of Civil Procedure 16 (Rule 16) authorizes judges to facilitate settlement discussions before trial, and the JPML itself views a settlement as a successful conclusion to litigation.⁸¹ However, “[n]either the MDL statute nor the Federal Rules of Civil Procedure include any requirement that the court review a consolidated settlement.”⁸² In a non-class MDL proceeding, “the federal court takes a measure of control over the settlement of the mass tort itself” and “[i]ndividual claimants opt in to the resulting settlement, accepting its structure and oversight by the MDL court.”⁸³ Although a federal court would not have jurisdiction over state claims and claims not filed before the court, a plaintiff can contractually agree to the power of the district court by opt-

⁷³ Thomas, *supra* note 38, at 1347; Burch, *Judging*, *supra* note 7, at 73.

⁷⁴ See Heyburn, *supra* note 48, at 2230 (internal quotations omitted).

⁷⁵ See *id.* at 2230.

⁷⁶ See Metzloff, *supra* note 5, at 41.

⁷⁷ See Burch, *Judging*, *supra* note 7, at 72–73.

⁷⁸ See Thomas, *supra* note 38, at 1377.

⁷⁹ See Dodge, *supra* note 57, at 33.

⁸⁰ See Burch, *Judging*, *supra* note 7, at 78–79 (explaining that “experienced transferee judges struggle to police the same self-interested behavior they witnessed in class-action practice, [but] they find themselves without the tools that Rule 23 provided”).

⁸¹ See Burch, *Judging*, *supra* note 7, at 83–84.

⁸² See Willging & Lee, *supra* note 35, at 801.

⁸³ See Thomas, *supra* note 38, at 1362.

ing into the global settlement.⁸⁴ In effect, “[t]heir decision to participate in the mass settlement overseen by the MDL court becomes a substitute for class certification.”⁸⁵ If an individual plaintiff declines to opt in, they will have to proceed alone, possibly without original counsel.⁸⁶

Most non-class MDLs end in private settlements that are not subject to judicial review, unless the parties voluntarily give the court authority or authority is “conferred by law for specific types of settlements.”⁸⁷ There may be little documentation of the terms of these settlements because they need no court approval.⁸⁸ In theory, claimants in a non-class MDL do not present the same policy concerns driving *Amchem* because these types of claimants receive representation by counsel of their choosing. However, in practice, the attorneys appointed by the court to a committee control discovery and negotiations for settlement, leaving little power in the hands of the attorneys representing claimants who originally filed an individual suit.⁸⁹ Furthermore, these private settlements may affect individuals outside of any court proceeding when the settlement requires a certain percentage of individuals with tolling agreements (suspending the statute of limitations) to opt in, and who have not yet filed a case.⁹⁰

Judge Grabill characterizes a private mass tort settlement as a public and transparent contractual settlement offer made to eligible plaintiffs that awards settlements based on a matrix and contingent on a requisite number of opt ins.⁹¹ However, it is not unusual for Master Settlement Agreements in non-class MDLs to be confidential.⁹²

Mass torts that are consolidated under § 1407 but lack class certification are sometimes treated as “quasi-class actions.”⁹³ They are similar to

⁸⁴ See *id.* at 1370 (explaining that “parties themselves invoke the power of the district court to preside over the settlement agreement when they opted into it”).

⁸⁵ *Id.* at 1377.

⁸⁶ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 609 (E.D. La. 2008) (where settlement agreement contained a term requiring attorneys to withdraw from clients who decided not to opt in to the agreement).

⁸⁷ See Burch, *Judging*, *supra* note 7, at 85; Grabill, *supra* note 23, at 129.

⁸⁸ See Erichson, *supra* note 9, at 1770 (stating that “[b]ecause settlements in non-class actions need no court approval, they rarely generate reported decisions”).

⁸⁹ See Burch, *Judging*, *supra* note 7, at 73.

⁹⁰ See Thomas, *supra* note 38, at 1341; Enrollment Form at 34, *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (E.D. La. Dec. 19, 2005) (“This Program will come into existence when an agreed upon number of plaintiffs and an agreed upon number of persons who have signed tolling agreements consent to enroll in the Second MDL Program and be bound by its terms.”).

⁹¹ See Grabill, *supra* note 23, at 154.

⁹² See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 U.S. Dist. LEXIS 17535, at *15 (D. Minn. Mar. 7, 2008); *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 2 (D. Minn. Nov. 10, 2011) (order granting plaintiffs’ amended motion to remand).

⁹³ See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006).

class actions in that “many plaintiffs claim to have suffered harm from a common action or course of conduct,” but differences in “exposure, background health, conditions, knowledge, and other factors preclude class certification” under *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard*.⁹⁴ The term gained notoriety in *In re Zyprexa* when the judge approved a private settlement and limited attorneys’ fees in an MDL by characterizing the consolidated actions as a “quasi-class action subject to the general equitable powers of the court.”⁹⁵ There is no official definition of a quasi-class action.⁹⁶

In summary, mass torts in MDL may proceed as individual actions, class actions, contain a class and individual claimants outside of that class, or can be treated as a quasi-class action. There are also consolidated actions that borrow concepts from the class action context but do not self-identify as quasi-class actions.

III. MASS TORTS IN CLASS ACTIONS

Aggregation of mass tort claims is considered the logical, or even inevitable, method for managing mass tort litigation, and certification as a class under Rule 23 is “the most readily available tool.”⁹⁷ However, the possibility for conflicting interests due to individualized injuries are frequently present in mass torts; this creates a tension between efficiency and fairness.⁹⁸ The Federal Rules seek to maintain the efficiency of aggregate litigation while providing structural fairness for litigants in Rule 23. Accordingly, “[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”⁹⁹

In 1966, the modern Rule 23 emerged, adding a new type of class in (b)(3).¹⁰⁰ If a class seeking certification meets the threshold requirements of numerosity, commonality, typicality, and adequacy of representation under Rule 23(a), a court may facilitate collective litigation under (b)(3) if it finds “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and

⁹⁴ Silver & Miller, *supra* note 33, at 113.

⁹⁵ *In re Zyprexa*, 424 F. Supp. 2d 488, 491; *see also* Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 398 (2011).

⁹⁶ *See* Mullenix, *supra* note 95, at 391 (stating that the quasi-class action is a “phantasm”).

⁹⁷ *See* William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 839 (1995); Grabill, *supra* note 23, at 123.

⁹⁸ *See* Erichson & Zipursky, *supra* note 31, at 267; *see also* Grabill, *supra* note 23, at 123.

⁹⁹ FED. R. CIV. P. 23(e); *see also In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 386 (E.D. Pa. 2015).

¹⁰⁰ *See* JAY TIDMARSH, *FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES* 21 (1998).

that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”¹⁰¹ This calls for courts to balance individual interest in autonomy and the need for efficiency.¹⁰² The “predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”¹⁰³ The rule also requires that “an absent plaintiff be provided with an opportunity to remove himself from the class” and “that the named plaintiff at all times adequately represent the interests of the absent class members.”¹⁰⁴ This is to protect the interests of absent class members who “played no role in selecting either the class representative or class counsel.”¹⁰⁵ The Advisory Committee envisioned Rule 23(b)(3) would allow individuals who alone lacked the incentive to bring their opponents into court to aggregate their claims and potential recovery into “something worth someone’s (usually an attorney’s) labor.”¹⁰⁶

Certification as a class action provides the parties with judicial oversight of any settlements reached in the course of litigation under Rule 23(e).¹⁰⁷ In the class action context, a private settlement for a certified class “for which no approval is sought or notice given is not effective and may be ignored by the court.”¹⁰⁸ The purpose of Rule 23(e) is to protect absentee members from potentially unfair settlements to which they would be bound.¹⁰⁹ The text of the rule requires that members receive notice of the proposed settlement, allows those members who would be bound to object to the proposal, and gives the court the authority to refuse to approve the settlement.¹¹⁰ A court may approve a settlement only after conducting an inquiry into whether the settlement is fair, adequate, and negotiated in the absence of collusion.¹¹¹ During a fairness hearing, class members may object to a settlement on the bases of fairness, reasonableness, and adequacy of the settlement.¹¹² In addition to fairness,

¹⁰¹ Fed. R. Civ. P. 23(a) & (b); see Hensler, *supra* note 15, at 892 (noting that resolving a (b)(3) class action binds all members, absent and present, unless the right to opt out was exercised); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

¹⁰² See *Amchem*, 521 U.S. at 615.

¹⁰³ *Id.* at 623.

¹⁰⁴ *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43, 45 (1940)).

¹⁰⁵ Grabill, *supra* note 23, at 132.

¹⁰⁶ *Amchem*, 521 U.S. at 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

¹⁰⁷ Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 803 (2013).

¹⁰⁸ CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1797 (3d ed. 2005).

¹⁰⁹ See *id.*

¹¹⁰ See Fed. R. Civ. P. 23(e)(1)–(5).

¹¹¹ See Fed. R. Civ. P. 23(e).

¹¹² See Fed. R. Civ. P. 23(e)(2).

the court will examine whether the settlement class meets the requirements of Rule 23(a), (b), and (e) before approving the settlement. In a settlement class, class members receive the opportunity to opt out before the court approves the settlement, and class members have the right to appeal if the court approves the settlement.¹¹³

The Advisory Committee noted that mass torts are ordinarily not appropriate for class treatment because of “the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.”¹¹⁴ Despite this, the courts approved many mass tort cases as class actions in the 1980s when the courts were overwhelmed with a flood of mass tort cases.¹¹⁵ Class actions allowed courts to streamline claims and provide closure to defendants while allowing plaintiffs’ attorneys to negotiate from the stronger position of aggregate harm.¹¹⁶

In the 1980s, mass torts soared when “mass marketing of products increased the population’s exposure to potentially injurious products and substances.”¹¹⁷ Courts sought to achieve efficient and equitable resolution of these cases through aggregation.¹¹⁸ One way courts dealt with mass tort cases was to certify them for settlement purposes only, thereby relaxing some of the requirements of Rule 23.¹¹⁹

In *Amchem*, the Supreme Court reviewed the certification of a class that “sought to achieve global settlement of current and future asbestos-related claims.”¹²⁰ This case arose from the consolidation of 26,639 claimants in 1991, which led to a negotiated settlement that would bind inventory plaintiffs as well as potential plaintiffs that lacked an attorney-client relationship with the lawyers.¹²¹ The Court stated that the settling parties achieved “a global compromise with no structural assurance of fair and adequate representation” by failing to create subclasses between currently injured and exposure-only plaintiffs with adequate representatives for

¹¹³ See John E. Kennedy, *Class Actions: The Right to Opt Out*, 25 ARIZ. L. REV. 3, 59–60 (1983) (explaining the implication that there is a mandatory right to opt out if the action would only be certified as a Rule (b)(3) certified class action).

¹¹⁴ FED. R. CIV. P. 23(b)(3) advisory committee’s note to 1966 amendment.

¹¹⁵ See TIDMARSH, *supra* note 100, at 21; see also Hensler, *supra* note 15, at 892–93; Schwarzer, *supra* note 97, at 838 (explaining that some view the mass tort class action as “running amok”); Klonoff, *supra* note 107, at 736 (“Responding to dockets [in the 1980s] clogged with mass tort cases, courts became far more receptive to approving major class actions.”).

¹¹⁶ Dodge, *supra* note 57, at 33.

¹¹⁷ Hensler & Peterson, *supra* note 16, at 1013.

¹¹⁸ See *id.* at 1050 (“In the face of appellate courts’ resistance to the use of formal aggregative techniques, courts informally aggregated cases for settlement and trial.”).

¹¹⁹ See KLONOFF ET AL., *supra* note 10, at 568.

¹²⁰ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

¹²¹ L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 209 (2004).

each subclass.¹²² The majority concluded that the case did not satisfy the requirements of predominance and adequate representation.¹²³ The Supreme Court held that the presence of a settlement class only affected the manageability analysis of Rule 23 because a settlement-only class eliminated the possibility of trial.¹²⁴ However, it noted that the specifications of the rule designed to protect absentees may in fact demand heightened attention in the settlement context.¹²⁵ While *Amchem* did not signal the end of settlement classes, it did begin a shift away from mass tort settlement classes.¹²⁶

Two years after the Court's decision in *Amchem*, it rejected another asbestos settlement class action in *Ortiz v. Fibreboard Corporation*, certified as a limited-fund under Rule 23(b) (1) (B), for failing to demonstrate that the limited fund "was limited except by the agreement of the parties," and because there were deficiencies in "the fairness of the distribution of the fund among class members."¹²⁷ The Court again emphasized the need for structural assurance of fairness.¹²⁸ These decisions signified a change in the tide for certification in mass tort settlement class actions.¹²⁹ Furthermore, settlements straining to conform to the requirements of *Amchem* and *Ortiz* in providing sufficient structural fairness could expose defendants to "the risk of being overwhelmed by class claims as well as by opt-outs pursuing individual claims," undermining the purpose of final peace for the defendant.¹³⁰

Other recent changes also influenced the likelihood of certification for class actions.¹³¹ For example, Rule 23(f), adopted in 1998, allows an interlocutory appeal to review a grant or denial of class certification, and "courts of appeals more often grant Rule 23(f) appeals when defendants seek review of an order granting class certification than when plaintiffs seek review of an order denying class certification."¹³²

¹²² See *Amchem*, 521 U.S. at 627.

¹²³ *Id.* at 628.

¹²⁴ *Id.* at 620.

¹²⁵ *Id.*

¹²⁶ See Noah Smith-Drelich, *Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 1 (2014) (illustrating how "the Court has repeatedly . . . denied mass tort class certification").

¹²⁷ 527 U.S. 815, 848, 855 (1999).

¹²⁸ See *Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 856.

¹²⁹ See Erichson & Zipursky, *supra* note 31, at 271–75 (explaining that a settlement class action must meet the requirements of Rule 23(a) and (b)); see also KLONOFF ET AL., *supra* note 10, at 747 (describing how, as a result of Supreme Court decisions, district courts refused to certify or decertified mass tort class actions proposed for settlement).

¹³⁰ Erichson & Zipursky, *supra* note 31, at 274.

¹³¹ See Willging & Lee, *supra* note 35, at 783.

¹³² See *id.* at 784 ("[R]esearch suggests that Rule 23(f) interlocutory appeals more often result in the denial of class certification than in either affirming class certification or in the reversal of a denial of class certification.").

Other authors point to Congress and appellate courts “requiring plaintiffs to prove Rule 23’s prerequisites by a preponderance of the evidence, instructing judges to delve into a case’s merits when the merits overlap with class certification requirements, and complicating choice-of-law questions and manageability by providing federal courts with jurisdiction.”¹³³

The Supreme Court decisions in *Amchem* and *Ortiz* legitimately sought procedural fairness for absent plaintiffs with the potential to suffer from serious injury related to asbestos, but those decisions resulted in a decrease of certification for settlement purposes in mass tort cases.¹³⁴ In seeking to protect absentee members under Rule 23, these decisions shifted the resolution of mass torts to MDL where the settlements have much less procedural assurance of fairness.¹³⁵ With MDL now being considered “the primary means for resolving aggregate litigation,”¹³⁶ it is important to look at how the absence of the procedural safeguards of Rule 23 affects non-class mass tort MDL settlements.

IV. CLASS ACTIONS IN MDL

Mass tort actions consolidated in MDL may still reach a class settlement. A national settlement class reached in an MDL provides claimants with all the protections of Rule 23. Two mass tort consolidations in MDL that received class settlement approval in 2015 are *In re Oil Spill by Oil Rig Deepwater Horizon* and *In re National Football League Players’ Concussion Litigation*. These cases provide recent examples of how mass tort settlement classes operate in MDL.

a. *In re Oil Spill by Oil Rig Deepwater Horizon*

The *Deepwater Horizon* MDL and class action stemmed from the “loss of well control and one or more fires and explosions” that occurred on the *Deepwater Horizon* oil drill on April 20, 2010, resulting in a flow of oil into the Gulf of Mexico for three months and giving rise to thousands

¹³³ See Burch, *Judging*, *supra* note 7, at 78.

¹³⁴ See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 334 (2011) (Scirica, J., concurring) (noting that some practitioners avoid the class action device and instead turn to aggregate non-class settlements due to the view that Rule 23 poses “formidable obstacles”); Klonoff, *supra* note 107, at 802–03.

¹³⁵ See Redish & Karaba, *supra* note 39, at 111 (explaining that in MDL cases “[t]he substantive rights of litigants are adjudicated collectively without any possibility of a transparent, adversary adjudication of whether the claims grouped together actually have a substantial number of issues in common, whether the interests of the individual claimants will be fully protected by those parties and attorneys representing their interests, or whether the individual claimants would have a better chance to protect their interests by being allowed to pursue their claims on their own.”).

¹³⁶ See Burch, *Judging*, *supra* note 7, at 79.

of individual claims for personal injury, economic loss, and property damages.¹³⁷ In *Deepwater Horizon*, the court appointed a Plaintiffs' Steering Committee (PSC), chosen for their availability, cooperative ability, and experience, to represent the medical class.¹³⁸ However, at the settlement stage the court also examined adequacy under Rule 23(a). The court found no conflicts of interest among the class because "the Class Representatives and the absent Class Members are united by the fact that their injuries emanate contemporaneously and directly from a common occurrence."¹³⁹ The settlement fund was uncapped, distinguishing it from *Ortiz*, where class members were "in competition with each other for a limited amount of money."¹⁴⁰ It did not present the problems of *Amchem* because it had a "Back-End Litigation Option" that allowed class members to retain the ability to sue for later manifested injury.¹⁴¹ For these reasons the court found that "subclasses are neither necessary, useful, nor appropriate."¹⁴²

The court also determined that the settlement was fair, reasonable, and adequate under the factors established by the Fifth Circuit in *Reed v. General Motors, Inc.*¹⁴³ These factors include consideration of collusion, the complexity of the litigation, the stage of the proceedings, the probability of plaintiffs' success on the merits, the range of possible recovery, and the opinions of class counsel, class representatives, and absent class members.¹⁴⁴

b. In re National Football League Players' Concussion Litigation.

The first retired NFL players filed lawsuits against the NFL in July 2011, alleging that the NFL Parties "breached their duties to the players by failing to take reasonable actions to protect players from the chronic risks created by concussive and sub-concussive head injuries and that the NFL Parties concealed those risks from the players."¹⁴⁵ Due to the high number of subsequent filings, consolidation of the lawsuits as an MDL occurred on January 31, 2012.¹⁴⁶ On January 6, 2014, after undergoing mediation with a retired district court judge and deciding on basic settlement terms, the plaintiffs filed a class action complaint, but the court

¹³⁷ *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 295 F.R.D. 112, 117–18 (E.D. La. 2013).

¹³⁸ *Id.* at 137–38.

¹³⁹ *Id.* at 139 (internal quotations omitted).

¹⁴⁰ *Id.* at 140.

¹⁴¹ *Id.*

¹⁴² *Id.* at 140.

¹⁴³ *See id.* at 145–46.

¹⁴⁴ *See id.* at 146.

¹⁴⁵ *In re NFL Players' Concussion Injury Litig.*, 301 F.R.D. 191, 195 (E.D. Pa. 2014).

¹⁴⁶ *Id.*

denied preliminary approval.¹⁴⁷ The judge was concerned as to the adequacy of the award. In particular, the judge was mainly concerned that “the capped fund would exhaust before the 65-year life of the Settlement.”¹⁴⁸ After further negotiation, the parties reached a revised settlement that uncapped the fund for retired players with qualifying diagnoses, regardless of the total cost.¹⁴⁹ The parties estimated that \$900 to \$950 million would be paid out to compensate injured players.¹⁵⁰ The court granted preliminary approval in July 2014 and ordered that notice be sent to class members.¹⁵¹

The court certified the class and approved the settlement on April 22, 2015. The court determined that “Class Counsel vigorously pursued Class Members’ rights at arm’s length from the NFL Parties.”¹⁵² The court found there was no collusion and that no fundamental conflicts of interest existed that would undermine counsel’s ability to adequately represent the class members.¹⁵³ The court also looked at “conflicts of interest between named parties and the class they seek to represent.”¹⁵⁴ Recognizing that adequacy requires “the alignment of interests and incentives between the representative plaintiffs and the rest of the class,” the court found that the parties had a common interest in establishing a “scheme” to prevail on their claims and that the two subclasses, each with its own individual counsel, prevented conflicts of interest between those presently injured and those not yet manifesting injury.¹⁵⁵

At the time the court approved the settlement, class counsel had not yet moved the court for a fee award; however, the NFL agreed not to contest an award equal to or below \$112.5 million and members of the class could still object to the award once proposed by counsel.¹⁵⁶ Ninety-five objectors appealed the settlement to the Third Circuit, which ultimately affirmed its fairness.¹⁵⁷

Looking at these cases, it is clear that a class action in an MDL retains the protections of Rule 23. The judge acts as a fiduciary to the class and plays an active role. In *NFL*, the judge denied the initial settlement with a capped fund to protect class members, and in *Deepwater Horizon* the judge closely examined the case for potential conflicts of interest be-

¹⁴⁷ *Id.*

¹⁴⁸ *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 364 (E.D. Pa. 2015).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 418.

¹⁵¹ *Id.* at 365.

¹⁵² *Id.* at 387.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 375.

¹⁵⁵ *Id.* at 375–76.

¹⁵⁶ *See id.* at 396, 423.

¹⁵⁷ *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410 (3d. Cir. 2016).

tween class members.¹⁵⁸ The judge grants approval in stages, parties receive notice and a chance to object, and the court holds a fairness hearing based on certain factors to ensure that the interests of absentee members are protected.¹⁵⁹ In both *NFL* and *Deepwater Horizon*, the court held a fairness hearing to ensure that the settlement was fair, reasonable, and adequate.¹⁶⁰ Even if a class member is unhappy with the settlement, they have the ability to appeal the decision, which is exactly what happened in the *NFL* litigation.¹⁶¹ In addition to all of this, the hearings provide transparency and create a detailed record of the case, the court's decisions, and the court's reasoning.

The class action mechanism has developed over time to balance the efficiency of aggregate litigation with fairness to the parties subjected to that litigation. In this way, it creates a baseline for procedural fairness in the aggregate settlement context.

V. QUASI-CLASS ACTIONS IN MDL

Some authors identify *In re Zyprexa*, *In re Vioxx*, and *In re Guidant* as the sources of the quasi-class action doctrine.¹⁶² In this sense, they not only represent the quasi-class action, they have come to define it. These cases are characterized by the actions of the transferee court in appointing lawyers to committees to manage the litigation, the creation of a global settlement, the court's administration of the settlement, and the establishment of a common benefit fund to compensate lead attorneys.¹⁶³ While the controversial quasi-class action has received a lot of attention, only 55 cases used the term between 2006 and 2011, 32 of which originated from the *Zyprexa* MDL.¹⁶⁴ However, a court may refrain from labeling an MDL a quasi-class while still treating the proceedings as such. These seminal MDLs are widely discussed in publications and may influence managerial techniques in other MDLs. Accordingly, any discussion of quasi-class MDLs would be incomplete without an examination of these early cases.

¹⁵⁸ See *NFL*, 307 F.R.D. at 364; see also *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 295 F.R.D. 112, 139 (E.D. La. 2013).

¹⁵⁹ See *In re NCAA Student-Athlete Concussion Injury Litig.*, No. 13 C 9116, at 6–7 (N.D. Ill. July 15, 2016) (memorandum opinion and order granting preliminary approval of the Second Amended Class Settlement).

¹⁶⁰ See *NFL*, 307 F.R.D. at 370; *Deepwater Horizon*, 295 F.R.D. at 119.

¹⁶¹ See *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 426 (3d Cir. 2016) (ninety-five objectors appeal the certification of the class of retired NFL players and the determination that the settlement was fair).

¹⁶² See, e.g., Silver & Miller, *supra* note 33, at 116; Mullenix, *supra* note 95, at 392; Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys' Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589, 607, 613–15 (2012).

¹⁶³ See Silver & Miller, *supra* note 33, at 116.

¹⁶⁴ Mullenix, *supra* note 95, at 392.

a. In re Vioxx Products Liability Litigation

In the *Vioxx* MDL, the JPML transferred all *Vioxx* lawsuits to the Eastern District of Louisiana.¹⁶⁵ *Vioxx* was a prescription drug designed to relieve pain and inflammation; it was removed from the market after a clinical trial indicated that it increased the risk of heart attack and stroke.¹⁶⁶ The MDL included claims from nearly every state and included personal injury and wrongful death claims, medical monitoring claims, and purchase claims.¹⁶⁷ The Negotiating Plaintiffs' Counsel, comprised of six members appointed by the court, negotiated the settlement on behalf of all claimants.¹⁶⁸

The Master Settlement Agreement stated that by "submitting an Enrollment Form, the Enrolling Counsel affirms that he has recommended . . . or will recommend . . . to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program."¹⁶⁹ If a claimant failed or refused to enroll in the settlement, the agreement required, to the extent permitted by the Model Rules of Professional Conduct, that counsel take all necessary steps to disengage and withdraw from representation.¹⁷⁰ The settlement was structured as an "opt in" agreement, contingent on 85% of claimants opting in.¹⁷¹ These two terms combined "made it practically impossible for a claimant to decline the offer," by forcing claimants to choose between opting in to the settlement or losing representation.¹⁷² Within a year, 99.79% of eligible claimants enrolled in the settlement.¹⁷³

b. In re Guidant Corp. Implantable Defibrillators Products Liability Litigation

In *Guidant*, the JPML consolidated cases alleging injuries caused by defective implantable defibrillator devices and pacemakers manufactured by Guidant in November 2005, and transferred them to the District of Minnesota for pre-trial proceedings.¹⁷⁴ The parties engaged in extensive discovery, entering into a proposed settlement of \$195 million in July 2007, subsequently renegotiated to \$240 million in a confidential Master

¹⁶⁵ *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 608 (E.D. La. 2008).

¹⁶⁶ *Id.*

¹⁶⁷ *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 453 (E.D. La. 2006).

¹⁶⁸ See Grabill, *supra* note 23, at 143.

¹⁶⁹ Master Settlement Agreement § 1.2.8.1 (2007), <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> (master settlement agreement resulting from *Vioxx*, MDL No. 1567).

¹⁷⁰ *Id.* § 1.2.8.2.

¹⁷¹ *Id.* § 11.1.

¹⁷² Erichson & Zipursky, *supra* note 31, at 266.

¹⁷³ *Id.*

¹⁷⁴ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2009 U.S. Dist. LEXIS 130985, at *4-5 (D. Minn. Dec. 14, 2009).

Settlement Agreement in December 2007.¹⁷⁵ The settlement identified 8,550 eligible claimants.¹⁷⁶ During renegotiation, the parties “contemplated a global settlement covering Plaintiffs from both the MDL and state cases, and included Plaintiffs whose cases had been filed or transferred to the MDL, Plaintiffs whose cases were filed outside the MDL in state court proceedings, and potential Plaintiffs who had not yet filed their cases.”¹⁷⁷ A provision in the settlement called for the reduction of individual awards in the event fewer than 8,400 participating claimants did not register in the settlement.¹⁷⁸

Although the settlement was confidential, later court documents indicate that it contained provisions requiring attorneys to withdraw if their clients declined to opt in to the settlement.¹⁷⁹ Possibly due to this requirement, many attorneys moved to withdraw in 2008, coinciding with the closing period for opting in to the settlement.¹⁸⁰ This resulted in a large number of *pro se* claimants—enough that the court ordered a withholding of ten percent of their awards to pay for the PSC’s time in answering their questions.¹⁸¹ In order to qualify for participation in the settlement, claimants submitted a declaration, a release, and a stipulation of dismissal with prejudice.¹⁸² Any allocations under the settlement were final and not subject to appeal or review by the Special Master or the MDL court.¹⁸³

¹⁷⁵ *Id.* at *5–6.

¹⁷⁶ *See id.* at *8.

¹⁷⁷ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 U.S. Dist. LEXIS 17535, at *14–15 (D. Minn. Mar. 7, 2008).

¹⁷⁸ *Guidant*, 2009 U.S. Dist. LEXIS 130985, at *34.

¹⁷⁹ *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, at 2 (D. Minn. July 1, 2008) (order granting motions for withdrawal) (finding that “given the requirements necessary to proceed under the Master Settlement Agreement,” and the fact that clients have refused to sign releases, there was good cause to allow attorneys to withdraw).

¹⁸⁰ *See Pretrial Orders and Minute Entries*, U.S. DIST. CT.: DIST. MINN., <http://www.mnd.uscourts.gov/MDL-Guidant/orders-minutes.shtml> (last updated Mar. 29, 2013) (publishing letters from counsel to court stating reasons for withdrawal in 2008, many of which cite irreconcilable differences due to client refusing to sign the release; but also because the settlement required all clients to respond and some could not be reached).

¹⁸¹ *See Guidant*, MDL No. 05-1708, at 1–2 (D. Minn. Dec. 15, 2008) (pretrial order no. 38) (“[A] certain provision of the Master Settlement Agreement is the reason for the increasingly large number of *pro se* Claimants. The provision essentially requires attorneys to withdraw from representing non-participating Claimants in order to continue to represent participating Claimants.”).

¹⁸² *See Guidant*, MDL No. 05-1708, at 1–2 (D. Minn. Dec. 14, 2009) (order denying plaintiffs’ lead counsel committee’s motion to enforce settlement agreement terms for claims that Guidant deems deficient).

¹⁸³ *See Guidant*, MDL No. 05-1708, at 1–2 (D. Minn. Feb. 18, 2009) (memorandum opinion and order denying 34 objections, appeals, and requests for *de novo* review of the Special Masters’ orders on review of the Claims Review

Although the controversial terms in *Vioxx* were subject to criticism, the public nature and transparency of the settlement at least allowed meaningful subsequent discussions to take place. The confidential nature of the *Guidant* settlement precludes both discussion of the terms of the settlement and guidance to future courts and claimants. Later *Guidant* documents indicated that the settlement also included a controversial term requiring attorney withdrawal,¹⁸⁴ but without transparency, the exact nature of that term is unknown. These cases raise the concern that mass settlement agreements may contain terms that prevent claimants from making a truly voluntary choice. These cases represent quasi-class actions in MDL between 2005 and 2008.

VI. A NEW GENERATION OF QUASI-CLASS ACTIONS

Forty-nine products liability and air disaster MDLs terminated between January 2012 and November 2015.¹⁸⁵ Eleven of those MDLs received class certification.¹⁸⁶ Seven of the non-class MDLs terminated in that period reached a global settlement without class certification.¹⁸⁷ These do not represent all global settlements reached in this time period because an MDL may remain open to administer the settlement or deal with cases that did not opt in to the settlement even after a large settlement was reached. For example, *Vioxx* reached a global settlement in 2008 but is still an active MDL—in 2015, it approved a consumer class

Committee's allocations).

¹⁸⁴ *Guidant*, *supra* note 182, at 1 (“The provision [in the Master Settlement Agreement] essentially requires attorneys to withdraw from representing non-participating Claimants in order to continue to represent participating Claimants.”).

¹⁸⁵ See U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2012, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2012.pdf [hereinafter MULTIDISTRICT LITIG. TERMINATED 2012]; U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2013, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2013.pdf [hereinafter MULTIDISTRICT LITIG. TERMINATED 2013]; U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., MULTIDISTRICT LITIGATION TERMINATED THROUGH SEPTEMBER 30, 2014, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Terminated_Litigations-2014.pdf [hereinafter MULTIDISTRICT LITIG. TERMINATED 2014]; U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION, FISCAL YEAR 2015, http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015_0.pdf [hereinafter MULTIDISTRICT LITIG. TERMINATED 2015].

¹⁸⁶ See MULTIDISTRICT LITIG. TERMINATED 2012, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2013, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2014, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185.

¹⁸⁷ See MULTIDISTRICT LITIG. TERMINATED 2012, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2013, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2014, *supra* note 185; MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185.

settlement.¹⁸⁸ However, a terminated MDL is sure to have either reached some kind of settlement, dismissed the cases, or remanded the remaining cases, making them appropriate for the examination of global settlements.

Two of the MDLs terminated in this time period were *Zyprexa* and *Guidant*, which have been recognized as quasi-class actions. The presence of a global settlement may indicate treatment as a quasi-class action because a large number of plaintiffs alleging injury from one or more defendants are presented with a master settlement negotiated by counsel appointed to act on behalf of all claimants. For purposes of this Article, I define a global settlement as when the parties present a single “master agreement” offered to all eligible plaintiffs, contingent on a certain percentage opting in. These MDLs consolidated between 194 and 12,679 federal actions and in all of them the court appointed a form of lead counsel for plaintiffs, empowered to negotiate settlement on behalf of all claimants.¹⁸⁹ However, the method and reasons for appointment differ.

In cases where details seem scarce, this may be because most of the record of MDL must be pieced together by looking at orders issued by the transferee court. Some orders, such as those including details of confidential settlement agreements, are sealed. Out of the five mass tort MDLs reaching global settlement, the following three reached global resolution agreements between 2010 and 2012.

a. In re Welding Fume Products Liability Litigation

The *Welding Fume* MDL consolidated the claims of plaintiffs who alleged suffering injury “due to exposure to manganese in welding fumes attributable to products” of more than a dozen defendants into MDL No. 1535 in June 2003.¹⁹⁰ The MDL encompassed 12,679 federal actions over the ten years it was active.¹⁹¹

At the beginning of the case, the court appointed two attorneys to be Plaintiffs’ Lead Co-Counsel and gave them the authority (a) to be lead spokesperson before the court; (b) to coordinate, determine, and present the positions of the plaintiffs to the court in pretrial proceedings;

¹⁸⁸ See generally Eldon E. Fallon, *MDL-1657 Vioxx Products Liability Litigation: Current Developments*, U.S. DIST. COURT, E. DIST. L.A. (Jan. 5, 2015), <http://www.laed.uscourts.gov/vioxx/> (providing updates regarding the *Vioxx* MDL).

¹⁸⁹ See MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185, at 25 (closing 194 claims in the *Oral Sodium Phosphate* MDL and 12,679 claims in the *Welding Fume* MDL as of September 30, 2015); Ratner, *supra* note 39, at 65–66 (explaining the trial court appointed counsel to leadership positions in the *Vioxx*, *Guidant*, and *Zyprexa* matters).

¹⁹⁰ *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, at 1 (N.D. Ohio Apr. 27, 2012) (memorandum and order); see *In re Welding Rods Prods. Liab. Litig.*, 269 F. Supp. 2d 1365, 1366–67 (J.P.M.L. 2003) (order consolidating and transferring cases to the Northern District of Ohio).

¹⁹¹ MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185, at 25.

(c) to coordinate discovery; (d) to coordinate the work of all plaintiffs' counsel and assign work; (e) to monitor activities of plaintiffs' counsel; (f) to enter into stipulations with opposing counsel necessary for the conduct of the litigation; (g) to communicate with plaintiffs' counsel; (h) to call meetings for plaintiffs' counsel, among several other provisions.¹⁹² Agreements made by Plaintiffs' Lead Co-Counsel were "binding on all plaintiffs whose cases are subject to the jurisdiction of this Court."¹⁹³ The court did not invoke the quasi-class action theory; rather, these appointments were made as a matter of course. The court also appointed a Plaintiffs' Liaison Counsel to coordinate administrative activities, and a Plaintiffs' Executive Committee to create a plan for conducting the litigation and receive instruction from the Plaintiffs' Lead Co-Counsel; they would be subject to compensation for their hours upon the creation of a Common Benefit Fund.¹⁹⁴ The court denied certification of a medical monitoring class in 2007.¹⁹⁵

The Plaintiffs' Lead Counsel and Plaintiffs' Executive Committee reached a global "Resolution Agreement" with the defendants in January 2012 that plaintiffs could opt into.¹⁹⁶ The Agreement established "a full and final resolution of all Claims arising from, related to, or in any way connected with allegations of potential injury, actual injury, or death due to exposure to manganese in welding fumes attributable to products of one or more Defendants," including "unasserted claims" by Plaintiffs' Counsels' clients that had not yet been filed as of December 31, 2011.¹⁹⁷ The Agreement gave Defendants the right to terminate the agreement if less than 100% of plaintiffs listed on Exhibit B delivered binding releases.¹⁹⁸ Exhibit B listed both federal MDL cases and state court cases against the MDL defendants.¹⁹⁹

The Agreement awarded plaintiffs delivering a valid release a minimum of one hundred dollars and the opportunity to submit a claim under the Claims Processing and Program Fund Allocation Protocol.²⁰⁰ The

¹⁹² *In re* Welding Rod Prods. Liab. Litig., No. 1:03-CV-17000, at 4–5 (N.D. Ohio) (case management order).

¹⁹³ *Id.* at 6.

¹⁹⁴ *Id.* at 6–7, 33.

¹⁹⁵ *In re* Welding Fume Prods. Liab. Litig., 245 F.R.D. 279, 302–03 (N.D. Ohio 2007) (denying the *Steele* plaintiffs' motion for certification of eight separate state medical monitoring classes each with two subclasses because the classes lacked typicality).

¹⁹⁶ See Resolution Agreement § 2.1 (2012), <https://www.sec.gov/Archives/edgar/data/850660/000119312512168429/d336734dex991.htm> (resolving all claims related to *Welding Fume*, MDL No. 1535).

¹⁹⁷ See *id.* at 2 (Preamble).

¹⁹⁸ See *id.* § 5.1.1.

¹⁹⁹ See *id.* Exhibit B (MDL Cases).

²⁰⁰ See *id.* Exhibit A (Plaintiffs' Counsels' Claims Processing and Program Fund Allocation Protocol).

Protocol provided for a Claims Administrator to assess claims based on the reasonable and objective criteria, methodologies, medical science, formulae, guidelines, categories, and other terms and conditions relevant in evaluating the Program Claims, which may include the type and extent of injury, age, age of onset, medical history, exposure history (including dates, length, and duration of such exposure to welding fumes), the type of welding consumables and fumes to which exposure occurred, other work history, the period from last exposure to welding fumes to the onset of the alleged injury, causation evidence, other risk factors present for the injuries alleged, and other criteria deemed relevant by the Claims Administrator in order to evaluate the Program Claims in a reasonably consistent manner.²⁰¹

However, there is no indication the plaintiffs reviewed a settlement grid or range of possible settlement values. The determinations of the Claims Administrator were not subject to appeal under the Agreement and any award under the Program was confidential.²⁰²

Under Article 1 of the Agreement, Plaintiffs' Counsel warranted that they would recommend that their clients opt into the Agreement.²⁰³ Counsel was also required to withdraw under the Agreement if their clients failed to submit the "documentation required" in a timely manner,²⁰⁴ and warrant that they had no present intent to represent any future welding fume clients.²⁰⁵

The court found that the qualified settlement fund was in the best interest of all parties and named an administrator of the Welding Fume Resolution Fund with the authority to determine how the funds should

²⁰¹ *Id.* Exhibit A at 4.

²⁰² *See id.* §§ 2.1.2, 8.2.

²⁰³ *Id.* § 1.2.1 ("Plaintiffs' Counsel represent and warrant that they shall (subject to the exercise of their independent professional judgment as to the circumstances of individual clients) recommend that each of their respective Plaintiffs covered by this Agreement accept the terms set forth herein. The Parties recognize, however, that the decision whether to participate in the resolution set out in this Agreement rests with each individual Plaintiff.").

²⁰⁴ *Id.* § 1.2.2 ("If a Plaintiff fails to submit the documentation required by this Agreement in a timely manner or fails to timely cure any deficiencies in such required documentation, such Plaintiff's Counsel shall file a motion to withdraw as counsel for that Plaintiff, provided that the conditions permitting counsel to withdraw under the applicable Rules of Professional Conduct in each jurisdiction in which such Plaintiff's Counsel practices law and in each jurisdiction whose Rules of Professional Conduct are or may be applicable . . . are satisfied.").

²⁰⁵ *Id.* § 1.2.3 ("Further, while nothing in this Agreement is intended to operate as a 'restriction' on the right of Plaintiffs' Counsel to practice law within the meaning of the Rules of Professional Conduct, Plaintiffs' Counsel have no present intent to (i) solicit or represent new clients for the purpose of bringing Welding Fume Claims against any of the Defendants, (ii) share in any fee in connection with a future Welding Fume Claim, or (iii) except as required by a court, provide support or assistance to any other attorney, plaintiff, claimant, fact witness, or expert witness in connection with a Welding Fume Claim.").

be dispersed.²⁰⁶ The order establishing the fund did not indicate that the judge reviewed the Resolution Agreement for fairness. The \$21.5 million settlement went into effect in April 2012.²⁰⁷ By May 30, 2012, only three cases remained in the MDL.²⁰⁸ The JPML terminated the MDL in 2013, remanding only two actions to their transferor courts.²⁰⁹

In this case, the court appointed lead counsel and empowered them with the ability to negotiate settlement on behalf of all claimants in the MDL.²¹⁰ The global resolution agreement describing how to opt in to the private resolution program is available through the SEC website, but the program itself was confidential.²¹¹ The Agreement also required attorneys to recommend that their clients opt in.²¹² The provision on withdrawal if a client does not submit proper documentation seems aimed at the problem of being unable to reach claimants, whose participation may affect the total amount for the group and in turn the amount of other individual awards. This highlights the interdependency of claims, another possible conflict of interest.

The Claims Administrator distributed awards based on a variety of factors, but there is no indication that the claimants were presented with a range of awards or a settlement grid. On the contrary, the release explicitly states there is no guarantee of monetary payment beyond \$100.²¹³ Because it was not a class action, there was no determination of fairness by the judge. However, the coexistence of exposure-only claimants (evident from the request for certification of a medical monitoring class) with currently-injured claimants is a classic conflict of interest and there is no indication that the court chose different counsel to represent these diverse interests.

b. In re Oral Sodium Phosphate Solution-Based Products Liability Litigation

The JPML consolidated 38 civil actions alleging kidney injury from oral sodium phosphate solution-based products manufactured by a single

²⁰⁶ See *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, at 1 (N.D. Ohio Apr. 27, 2012) (memorandum and order) (naming David R. Cohen as the Claims Administrator); Sean McLernon, *Judge Sets Up \$21M Fund for Welding Fumes MDL Plaintiffs*, LAW360 (May 1, 2012), <https://www.law360.com/articles/336033/judge-sets-up-21m-fund-for-welding-fumes-mdl-plaintiffs>.

²⁰⁷ See Resolution Agreement, *supra* note 196, at 3 (Recitals); McLernon, *supra* note 206.

²⁰⁸ See *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, at 1 (N.D. Ohio July 20, 2012).

²⁰⁹ MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185, at 25.

²¹⁰ See *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, at 4–5 (N.D. Ohio) (listing Plaintiffs' Lead Co-Counsel's duties).

²¹¹ See Resolution Agreement, *supra* note 196, § 8.2.

²¹² See *id.* § 1.2.

²¹³ See *id.* Exhibit C (Release of All Claims).

defendant, Fleet, in June 2009.²¹⁴ The MDL eventually encompassed 194 federal actions.²¹⁵

The court requested defendants and plaintiffs submit a proposed organizational structure, which means that the court accepted nominations to lead counsel positions, in July of 2009.²¹⁶ The court did not list criteria it would consult in approving any proposed leadership nominations.²¹⁷ The court appointed two attorneys to be Plaintiffs' Co-Lead Counsel and one attorney as Plaintiffs' Liaison Counsel.²¹⁸ The Court cited the *Manual for Complex Litigation* in giving Lead Counsel power to formulate (in consultation with other counsel) and present positions on substantive and procedural issues during the litigation.²¹⁹ It also appointed a Plaintiffs' Executive Committee (PEC) and a Plaintiffs' Steering Committee (PSC).²²⁰ The PEC received authority to assist in coordinating pretrial proceedings and the PSC received authority to brief and argue motions, in addition to conducting pre-trial proceedings with Lead Counsel.²²¹

In June 2010, the court thoroughly reviewed the terms of the Common Agreement (a precursor to the Master Settlement Agreement outlining the basic terms of the parties' agreement) and Settlement Construct (providing a range of settlement values based on certain factors), and was "convinced that the settlement terms it contain[ed] [were] fair and reasonable."²²² Under the terms of the Common Agreement, each claimant would know at the time of his or her application for settlement benefits "the likely range of compensation amounts for which he is eligible."²²³ All of this information came from an order regarding contingency fee agreements, and some from the footnotes of that order. There was not a formal hearing for court approval of the settlement as fair and reasonable. The court, recognizing a federal district court's broad equity power to supervise contingency fees, ordered that any contingent fee reached with a claimant agreeing to participate in the settlement entered

²¹⁴ *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, 629 F. Supp. 2d 1352, 1353–54 (J.P.M.L. 2009).

²¹⁵ MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185, at 25.

²¹⁶ *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 2–3 (N.D. Ohio Jul. 16, 2009) (pretrial order no. 1).

²¹⁷ *See id.*

²¹⁸ *See In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 1 (N.D. Ohio Sept. 10, 2009) (order appointing Plaintiffs' Executive Committee & Plaintiffs' Steering Committee).

²¹⁹ *Oral Sodium*, MDL No. 2066, at 1 (pretrial order no. 1).

²²⁰ *Oral Sodium*, MDL No. 2066, at 2–3 (order appointing Plaintiffs' Executive Committee & Plaintiffs' Steering Committee).

²²¹ *See id.*

²²² *See In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 3 n.2 (N.D. Ohio June 15, 2010) (order regarding contingent fee arrangements).

²²³ *Id.* at 4 n.3.

into after June 14, 2010, would be impermissible and unenforceable.²²⁴

The court stated on the record that the PEC and Fleet reached a Master Settlement Agreement (MSA) on July 9, 2010.²²⁵ The court ordered claimants' lawyers to file with the court an MSA participation agreement identifying "Participating Claimant[s]" and "Opt Out Claimant[s]," although the MSA was structured as a voluntary opt-in agreement.²²⁶ There were "roughly 560 participating claimants."²²⁷ The Settlement Construct and Protocol were confidential, as well as the monetary terms of the MSA.²²⁸

The MSA reserved settlement funds for common benefit fees and expenses, partly paid by the defendant, claimants receiving benefits, and attorneys representing claimants receiving benefits.²²⁹ The court also established rules and standards for use in determining common benefit awards.²³⁰

In this case, the court accepted nominations for lead counsel positions but did not specify the criteria that would qualify candidates for appointment. The PEC reached a master settlement agreement with the defendants, and the judge overseeing the MDL reviewed these terms and found them to be fair and reasonable, but appears to only announce this in the footnotes of a document concerning attorneys' fees.²³¹ Nor did the comment contain analysis of any factors in determining if the settlement was fair, reasonable, and adequate.

c. In re Medtronic Inc. Sprint Fidelis Leads Products Liability Litigation

The JPML consolidated actions related to the implantation of Sprint Fidelis leads in implantable cardiac devices in February 2008.²³² Individu-

²²⁴ See *id.* at 3.

²²⁵ *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066 (N.D. Ohio July 9, 2010) (settlement order no. 7).

²²⁶ See *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 2 (N.D. Ohio July 19, 2010) (order regarding claim processing schedule).

²²⁷ *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Action*, MDL No. 2066, 2010 WL 5058454, at *1 (N.D. Ohio Dec. 6, 2010) (memorandum and order entering certain Common Benefit Fee and Expense Awards).

²²⁸ See *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 1–2 (N.D. Ohio Dec. 2, 2010) (memorandum and order regarding appeals of claim valuation decisions).

²²⁹ *Oral Sodium*, 2010 WL 5058454, at *2.

²³⁰ See *id.* (stating "the Court set out in great detail the procedures and guidelines it would use if it became appropriate to enter common benefit fee and expense awards").

²³¹ See *In re Oral Sodium Phosphate Solution-Based Prods. Liab. Litig.*, MDL No. 2066, at 3 n.2 (N.D. Ohio June 15, 2010) (order regarding contingent fee arrangements).

²³² See *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 536 F. Supp. 2d 1375, 1376 (J.P.M.L. 2008).

als implanted with cardioverter defibrillators brought claims of defective design, emotional distress, breach of express and implied warranties, physical injuries, and requests for medical monitoring.²³³ The MDL eventually encompassed 1,264 federal actions.²³⁴

The court stated the intent to appoint plaintiffs' lead counsel and PSC in its first order. It listed the main criteria as "(1) willingness and ability to commit to a time-consuming process; (2) ability to work cooperatively with others; (3) professional experience in this type of litigation; and (4) access to sufficient resources to advance the litigation in a timely manner," and asked applications to state fee proposals, rates, and percentages expected "if the litigation succeeds in creating a common fund."²³⁵ The court appointed a single attorney as plaintiffs' lead counsel, and plaintiffs' lead counsel received the authority to coordinate discovery, conduct settlement negotiations on behalf of plaintiffs, and enter into stipulations with opposing counsel, but could "not enter non-binding agreements except to the extent expressly authorized."²³⁶

In July 2008, the court ordered the PSC to file a single master consolidated complaint, "suitable for adoption by reference in individual cases."²³⁷ This same order also stated that "a motion, brief, or response that has a potential effect on multiple parties . . . shall be deemed made in all similar cases on behalf of, and against, all parties similarly situated except to the extent such other parties timely disavow such a position."²³⁸ In January 2009, the court dismissed the Master Complaint (MCC) and all the plaintiffs' claims therein as preempted.²³⁹ The court dismissed 229 pending cases that adopted the MCC without alleging any additional claims in May 2009; the court stayed the remaining cases, anticipating that the plaintiffs would appeal dismissed cases to the Eighth Circuit.²⁴⁰

The Eighth Circuit affirmed the District Court's dismissal, but on October 8, 2010, while the issue was on appeal, the parties reached a

²³³ See *Summary Description of In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, MDL No. 08-1905, U.S. DIST. COURT, DIST. MINN., <http://www.mnd.uscourts.gov/MDL-Fidelis/introduction.shtml> (last visited May 19, 2017).

²³⁴ See MULTIDISTRICT LITIG. TERMINATED 2015, *supra* note 185 at 32.

²³⁵ *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 5–6 (D. Minn. Apr. 23, 2008) (order no. 1 setting initial conference).

²³⁶ *In re Medtronic, Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 2 (D. Minn. May 30, 2008) (order no. 3) This is not an exhaustive list of plaintiffs' lead counsel's responsibilities.

²³⁷ *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 16 (D. Minn. Jul. 7, 2008) (order no. 7, first amended omnibus management order).

²³⁸ *Id.* at 17.

²³⁹ See *In re Medtronic Inc. Sprint Fidelis Leads Prods. Liab. Litig.*, 592 F. Supp. 2d 1147, 1165–66 (D. Minn. 2009) (concluding that all claims are preempted and dismissing those claims with prejudice).

²⁴⁰ See *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 7 (D. Minn. May 12, 2009) (order staying remaining cases).

Master Settlement Agreement.²⁴¹ The settlement was confidential.²⁴² Medtronic's announcement stated that Medtronic could cancel the agreement if certain conditions were not met, and that either party could terminate the agreement if the MDL proceedings were not terminated.²⁴³ The court established a qualified settlement fund of \$268 million pursuant to the MSA.²⁴⁴ Later court proceedings indicate that over 8,100 claimants participated in the agreement, resulting in a reduction of awards in some cases, but the proceedings do not specify if those plaintiffs opting in were only from cases pending in the federal MDL or if they included state claimants as well.²⁴⁵

The MDL court dismissed those cases entering into the MSA on June 30, 2011.²⁴⁶ By November 2011, only six cases against Medtronic and nine cases against non-Medtronic defendants remained in the MDL.²⁴⁷

The court in *Medtronic* appointed counsel to represent the transferee claimants based on their willingness, cooperation, experience, and resources, but not to represent diverse interests (like medical monitoring claimants and presently injured claimants) in the MDL.²⁴⁸ On the other hand, counsel given the authority to conduct settlement negotiations on behalf of all claimants reached a global settlement that provided a claims resolution process even though the claims in the MCC were preempted. There was no affirmative indication that the judge reviewed and approved the terms of the settlement, which is consistent with private settlements.

²⁴¹ See *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 1 (D. Minn. Dec. 16, 2010); see also Dylan McGuire, *Medtronic to Pay \$268M to Settle 3,700 Claims Involving Sprint Fidelis Leads*, LEXISNEXIS.COM (Oct. 14, 2010), <http://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2010/10/14/medtronic-to-pay-268m-to-settle-3-700-claims-involving-sprint-fidelis-leads.aspx#sthash.Wyz7om20.dpuf>; Tom Lamb, *Sprint Fidelis Lead Wire Defect Litigation Comes to an Apparent Disappointing End (Medtronic Wins)*, DRUG INJURY WATCH (Nov. 10, 2010), <http://www.drug-injury.com/druginjurycom/2010/11/medtronic-sprint-fidelis-litigation-settlement-followed-by-federal-preemption-ruling-affirmed.html>.

²⁴² See *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 2 (D. Minn. Nov. 10, 2011) (order granting plaintiffs' amended motion to remand).

²⁴³ See Press Release, Medtronic, *Medtronic Settles US Lawsuits on Sprint Fidelis Family of Defibrillation Leads* (Oct. 14, 2010), <http://newsroom.medtronic.com/phoenix.zhtml?c=251324&p=irol-newsArticle&ID=1771430>.

²⁴⁴ See McGuire, *supra* note 241.

²⁴⁵ See *e.g.*, *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, 2012 U.S. Dist. LEXIS 42054, at *4 (D. Minn. Mar. 26, 2012).

²⁴⁶ *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905 (D. Minn. June 30, 2011) (order dismissing cases).

²⁴⁷ See *Medtronic*, MDL No. 08-1905, at 2 (order granting plaintiffs' amended motion to remand).

²⁴⁸ See *In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig.*, MDL No. 08-1905, at 5-6 (D. Minn. Apr. 23, 2008) (order no. 1, setting initial conference).

VII. ANALYSIS

In a class action, claimants are ensured that their interests are represented because “[t]he representative parties’ claims must share significant common issues with the claims of the absent parties,” and “[t]heir claims must also be typical of those of the absent parties, and they must adequately represent those absent parties.”²⁴⁹ In non-class MDLs, courts establish plaintiffs’ organizational structures to represent thousands of claimants without determining if those representatives will be adequate or if the settlements they reach on behalf of claimants are fair. Individually retained counsel not appointed to a leadership role lack any control over the litigation. This is not to say that members of the MDL leadership are shirking their responsibilities to the claimants or are inadequate in their desire to represent claimants. The problem is that attorneys are most often appointed to leadership in MDL for their cooperative abilities and experience, without any examination of conflicts of interest within the class that preclude adequate representation by a single attorney or group of attorneys.

In an MDL that reaches a class settlement, the court at some point must make a determination of adequacy under Rule 23(a). In both *Deepwater Horizon* and *NFL*, the court appointed a PSC on the basis of the attorneys’ availability, cooperative ability, and experience.²⁵⁰ In certifying a settlement class, each court examined the class counsel, the class representation, and whether or not a conflict of interest existed within the class under Rule 23(a)’s adequacy requirement. In *Deepwater Horizon*, the ability to litigate in case of future injury despite being bound by the settlement made subclasses for future injury claimants unnecessary. In the *NFL* settlement, two distinct subclasses with separate representation protected the class from conflicts of interest.

In any non-class MDL, regardless of quasi-class action status, there is no statutory requirement that the court must appoint adequate representation or find that the settlement negotiated on behalf of all claimants is fair. While there may be a reoccurring theme, there are no firm criteria for lead plaintiffs’ counsel or committees that direct the litigation. For example, *Vioxx* and *Medtronic* appointed counsel based on willingness, cooperative ability, and experience. On the other hand, the judge may not announce any criteria for appointed leadership counsel, like in the *Welding Fume* and *Oral Sodium* MDLs.

Additionally, in non-class MDLs there is no assurance of compliance with the aggregate settlement rule. In *Welding Fume*, plaintiffs traded their claims for \$100 and the opportunity to make a claim in the settlement

²⁴⁹ Redish & Karaba, *supra* note 39, at 110–11.

²⁵⁰ See *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 295 F.R.D. 112, 137–38 (E.D. La. 2013); see also *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 373 (E.D. Pa. 2015).

program.²⁵¹ The record does not show they were given an idea of what their claims might be worth under the program, which, if accurate, violates the requirement under the aggregate settlement rule that clients should receive disclosure of what the other plaintiffs are to receive.

Furthermore, if the public master settlement agreement in *Vioxx* contained controversial terms requiring a recommendation that clients opt in and withdrawal if clients did not, the confidentiality of a master settlement agreement that lacks the protections of Rule 23 could cover all manner of sins. Former Supreme Court Justice Louis Brandeis said “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Giving MDL judges in mass tort non-class consolidations the authority to determine the fairness of the settlement in a public hearing would shed light on the processes currently shrouded in confidentiality. MDL courts have already adopted mechanisms from class actions that provide efficiency; the MDL statute should provide claimants with the requisite assurances of fairness. The purpose of consolidation is the “just and efficient” resolution of claims, but without adequate protections for claimants who lack control over the litigation, the process might be “just efficient.”

VIII. CONCLUSION

This is not a recommendation calling for the end of mass tort actions in MDL. The efficiency of the process leading to settlement is in the best interest of the courts, which must effectively deal with thousands of claims, filed simultaneously against a single or small group of defendants, often without the availability or use of class action to streamline resolution. It is arguably in the best interest of plaintiffs who are likely to receive awards sooner; furthermore, it is not the job of courts to restrict the freedom of plaintiffs to opt in to a private settlement. Defendants achieve final resolution sooner as well, and dispose of a large number of serious claims from both the federal and state level in a single settlement that provides finality and known exposure to liability.

However, there appears to be a lack of consistency and little assurance of fairness to claimants’ non-class MDLs, unless a judge intervenes—in which case he or she receives criticism for judicial overreaching. The MDL statute simply does not provide enough guidance or confer sufficient authority for judges dealing with the problems of mass torts. The evolution of MDL in practice has outpaced the structure provided by the statute, contemplating only coordinated pretrial activities and then remand. In the absence of statutory direction, courts and parties are treating the *Manual for Complex Litigation* like a statute.²⁵² However, the manu-

²⁵¹ See Resolution Agreement § 4.1 (2012).

²⁵² See *In re Seroquel Prods. Liab. Litig.* MDL No. 1769, at 83 (M.D. Fla. Aug. 22,

al's 798 pages make it unlikely to yield consistent results.

Confidentiality of global settlement agreements in non-class mass tort MDLs is a barrier to accountability and transparency. MDLs need transparency so that the legal community can understand how to appropriately develop the law. Few decisions in non-class MDLs, that in a class action would warrant a hearing, are widely publicized. District courts sometimes create websites dedicated to pending MDLs in that district, but it can still be difficult to piece together the progression of the litigation.

From the available records it is clear that courts are not prioritizing conflicts of interest when appointing counsel to represent plaintiffs in non-class mass tort MDLs. It is also clear that these consolidations would be impossible to manage without some kind of structure to organize hundreds or thousands of actions containing even more claimants. The best solution would be to find resolution of these claims under Rule 23, which guarantees a finding of adequacy of representation before settlement approval, but most mass torts are inappropriate for certification under Rule 23. In absence of the availability of class certification, the MDL statute should be updated to require courts to consider the adequacy (conflicts of interest) of court appointed attorneys, and the fairness of any global settlements reached.

In the absence of an updated MDL statute, courts should utilize the analogy of subclasses within the MDL context to provide claimants with little control or say in the litigation with adequate representation by aligning the interests of the committee making decisions with the interests of claimants they represent. This is often a resolution to conflicts of interest in class actions that would otherwise inhibit adequacy. Because MDL steering or negotiating committees act on behalf of all claimants in the MDL in the same way class members' representatives would speak for absentee plaintiffs in a class action, there should be similar procedural assurances that these committees are adequately representing the interests of all claimants.

This could limit the presence of terms in private agreements requiring attorneys to withdraw from representing claimants who do not agree to the settlement. While the court cannot approve or disapprove a private settlement, it can appoint lead counsel to represent different groups of plaintiffs.²⁵³ Currently, the court compensates lead counsel who works for

2007) (counsel stating, "We took the confidentiality order from the manual in multidistrict complex litigation. We think that should apply . . . We took it directly from that manual . . . We followed the manual."); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH § 22.61 (recommending that the court "urge counsel to familiarize themselves with the *Manual for Complex Litigation*").

²⁵³ *See, e.g.*, Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3048 (2013) (stating "the court rationalized that it could designate subclasses later if need be" in the class action context).

the common interest of the MDL, but non-class mass tort claimants with varying injuries may not share a common interest.

This provides lead counsel with incentive to settle, but it is impossible for them to advocate for diverse interests in a settlement where, as in *Guidant*, the private settlement includes a term requiring counsel to withdraw from all their clients if some claimants refuse to opt in to the settlement.²⁵⁴ Whether or not attorneys are frequently failing to advocate for their client's best interests, these terms incentivize attorneys to advocate for the most injured clients, which will yield the greatest fees, while coercing others to enroll in the settlement.

The legislature did not structure § 1407 or Rule 23 with mass tort litigation in mind. Nevertheless, courts must use the tools given to efficiently and justly resolve large numbers of suits that threaten to overwhelm the system. MDL would be just as efficient and more in line with the requirements of due process if it protected claimants by identifying their interests and then ensuring those interests receive separate representation and are given a voice in settlement negotiations. If a judge overseeing the MDL identified no fundamental conflict of interest, they would be under no requirement to slow down negotiations by creating a subcommittee. At the time a master settlement or global resolution is reached, judges should have the authority under the statute to review the terms and rule on the fairness of the settlement in a public forum. Empowerment to appoint adequate representation and determine settlement fairness under the statute ensures the legitimacy of the proceeding and uniformity among MDLs. This preserves the efficiency of the MDL process and provides structural assurance of adequate representation to claimants.

²⁵⁴ See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, at 1 (D. Minn. Dec. 15, 2008) (pretrial order no. 38).