PROCEDURAL SELF-INFLICTED WOUNDS?

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A proposal has recently come before the Federal Civil Rules Advisory Committee to expand the ability of parties in multidistrict litigation to seek immediate interlocutory appellate review. This Essay suggests that the proposal is unwise as a matter of policy. It would make MDL litigation more expensive and less efficient. Counterintuitively, it may even harm the very large corporations who are championing the change. This Essay explains why that might occur—why large corporate defendants may pursue legal innovations that harm them—a possibility with implications well beyond interlocutory appellate review.

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I. INTRODUCTION

The large corporations that tend to be defendants in complex legal proceedings, and the attorneys who represent them, routinely take two seemingly inconsistent positions: (1) they complain that the duration and cost of complex litigation forces them to settle even meritless cases; and (2) they pursue changes to civil procedure through legislation, rule amendment, and judicial decisions that protract complex litigation and increase its expense.

This Essay seeks to make sense of this apparent contradiction. It focuses in particular on a recent proposal ("the Proposal") to add a new rule allowing immediate interlocutory appeal of certain non-final orders in multidistrict litigation ("MDL") proceedings. The new rule, if adopted, would hold the potential to make complex litigation slower and more expensive. For example, motions to dismiss, which are infrequently granted, would wend their way more often beyond trial courts to appellate courts where, presumably, they would generally be affirmed. That process would require hundreds of additional hours of work for judges and attorneys and likely extend the time before trial, at least in some cases.

This Essay explores why corporate defendants and their lawyers seek these sorts of procedural changes. Four likely answers arise:

1) Good Policy: the changes could make sound policy sense;
2) Strategic Advantage: the changes could confer a strategic advantage on corporate defendants;
3) Motivated Cognition: corporate agents might expect the changes to be beneficial because of natural distortions in how human beings think, even if the changes would in fact harm corporations; and
4) Agency Costs: the changes could involve agency costs, benefiting the corporations' legal counsel but not necessarily the corporations themselves.

These possibilities are not mutually exclusive. More than one could be true for any proposed procedural change. Which ones are—and are not—will depend on the particular proposal at issue. This Essay uses the proposed expansion of interlocutory appellate review as a case study. It concludes that the Proposal is unlikely to make good policy sense. The arguments in its favor are unpersuasive and unsubstantiated.

Perhaps more surprisingly, the Proposal also may not confer a clear strategic benefit on corporations. True, delay and expense in litigation often redound to the benefit of wealthy defendants. They can beat down plaintiffs and their lawyers, deterring them from filing suit and forcing them to settle on relatively favorable terms for defendants. But that is not always what occurs. Some procedures that increase costs can harm defendants. Imprudent motions to dismiss, for example, can cause courts to frame legal standards in a way that benefits plaintiffs. After all, those motions are difficult to win. And judges in defending the results they reach may have a tendency to emphasize the ways in which the law supports their decisions, to some

extent becoming advocates for the plaintiffs—adopting legal positions that may then govern the remainder of the case. That same pattern may emerge in appellate courts, harming corporate defendants not only in particular cases but also systemically.

But why would corporations pursue procedural changes that actually harm them? Don't they know best what serves their interests? One possible answer is motivated cognition. When people analyze complex matters, their judgments tend to be clouded by various interests they have—including a desire to view themselves in a favorable light—and they are often unaware of this phenomenon. A term for this is motivated cognition. We all suffer from it.

Motivated cognition can cause us to tell stories about the world that flatter us and denigrate our detractors. The possibility is worth contemplating that in descrying the consequences of a rule change in the murky future, the views of corporate actors might be colored by their desire to think of themselves—and the corporations for which they work—as unlikely to violate the law. Corporations may think that they are unlikely to do anything wrong. "Other corporations might," they may think, "but not us." So if they are sued in the future, they believe the claims will likely be unmeritorious. Surely they should win on them on a motion to dismiss in the trial court and if not—perish the thought—that injustice surely would be corrected if only they could get an early review by an appellate court.

There is nothing unusual about this way of thinking. It is all too common, even among sophisticated actors. Motivated cognition can help to explain why corporations might support a procedural change that harms them. They—like virtually everyone else—may not have a fully realistic view of themselves. They may underestimate the likelihood that they will take actions that could cause them to become embroiled in legitimate litigation and they may overestimate their odds of extricating themselves from that litigation. That could cause them to favor rules that would benefit them if reality were the way they like to imagine it but that harms them given how reality really is.

Another reason corporations and their counsel might support the Proposal—even if it harms corporations on the whole—is agency costs. Corporations know the legal system through attorneys—often through outside counsel—and the interests of the corporations and outside counsel do not align perfectly. While corporations may not benefit from an increased rate of interlocutory appeals, their outside lawyers likely would. They would get paid handsomely for the additional hours those appeals require. Indeed, even if the law as a result becomes somewhat more favorable to plaintiffs, that could increase the number of lawsuits in the future—again, benefiting corporate defense counsel, if not their clients. None of this reasoning is meant to imply corporate attorneys act in bad faith. Not at all. Rather the point is that they too may suffer from motivated cognition—believing what is good for them is also good for their clients and, for that matter, good for society.

These last two points—which are not mutually exclusive—suggest an intri-

guing possibility. Highly politically influential corporations—and their highly politically influential counsel—might advocate for procedural reforms that harm society, plaintiffs, and *even corporate defendants*. That possibility is, to say the least, counterintuitive, but it could help to explain why our civil litigation seems to become ever slower, more expensive, and more cumbersome in many ways, even while all the participants in the process cry out for greater speed and efficiency.

II. THE PROPOSAL FOR INTERLOCUTORY APPELLATE REVIEW IN (SOME) MDL CASES

In exploring the above possibility, let us begin with a recent proposal. In 2018, Lawyers for Civil Justice ("LCJ"), a special interest group representing large corporations and defense law firms,[1] proposed amending Federal Rule of Civil Procedure 23.3—the Proposal we address in this Essay. The Proposal has taken various forms in informal discussions, but it originally called for allowing a mandatory appeal of an MDL court's interlocutory orders on motions to dismiss or motions for summary judgment if the outcome of the appeal could be dispositive of 50 or more cases.[2] LCJ proposed amending Rule 23.3 after Congress failed to pass H.R. 985, a bill containing a similar right to appeal interlocutory orders in MDL cases.[3]

The Proposal provides:

Rule 23.3 Multidistrict Litigation Proceedings

(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).

   (1) Appeals. A court of appeals shall permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings

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[1] *See* LAWYERS FOR CIVIL JUSTICE, SHAPING THE FUTURE OF LITIGATION: ANNUAL REPORT 2018, at 17 (2019), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcjreport_2018_4_12_2019.pdf. Members include Bayer, GlaxoSmithKline, Lilly, Johnson & Johnson, Merck, Pfizer, and several large defense law firms. *Id.* at 18.

[2] *See* Lawyers for Civil Justice, *MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules*, at 5–6 (Sept. 14, 2018) https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl__tplf_proposals_for_discussion_9-14-18__004_.pdf [hereinafter LCJ Proposal].

[3] *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105(k)(1) (2017) (requiring courts of appeal to accept appeals "from any order issued in the conduct of coordinated or consolidated pretrial proceedings" if: (1) "the order is applicable to one or more civil actions seeking redress for personal injury," and (2) "an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings"). H.R. 985 passed the House of Representatives a month after its introduction in 2017, but the Senate never voted on the bill.

> conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based.[4]

The proponents ("Proponents") at one later point indicated that the proposed rule should apply to "mass tort MDL proceedings," which they defined to mean "any MDL proceeding in which the MDL Panel's initial transfer order noted that personal injury claims would be a substantial component."[5] The Proponents also suggested expanding the rule to allow appellate review of other interlocutory orders that are "outcome-determinative," including orders related to the admissibility of expert testimony.[6] In subsequent discussions before the MDL Subcommittee of the Civil Rules Advisory Committee, the Proponents suggested their proposal should apply to all MDLs.[7]

III. VARIOUS POLICIES SUPPORT THE FINAL JUDGMENT RULE

To put the Proposal into context, a short discussion may prove helpful of the origins and policy objectives of the general refusal of federal appellate courts to hear interlocutory appeals. Allowing a party to appeal only when the case has concluded has been the foundation of federal appellate jurisprudence since it was included in the first Judiciary Act in 1789.[8] This long-held finality doctrine[9] promotes several important policy goals, including judicial efficiency and allowing district judges to

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[4] LCJ Proposal, *supra* note 2, at 5–6.

[5] *See* Letter from John H. Beisner, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure, U.S. Courts, *Proposed Rules Amendments Regarding MDL Proceedings* 1–2 (Nov. 21, 2018), https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf.

[6] Minutes of Meeting of Comm. on Rules of Practice and Procedure, ADVISORY COMMITTEE ON CIVIL RULES 28 (Apr. 3, 2019), https://www.uscourts.gov/file/25759/download ("Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*.").

[7] *Id.* at 29. The Subcommittee members also expressed skepticism about an automatic right to an interlocutory appeal, indicating that at the least the appellate court would have to have discretion whether to hear one. *Id.*

[8] Judiciary Act of 1789, ch. 20, 1 Stat. 73, 83 (1789).

[9] *See* Catlin v. United States, 324 U.S. 229, 233 (1945) (holding that the final judgment rule "limits review to 'final decisions' in the District Court[]" and explaining that "a 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

conduct their proceedings without undue interference.[10] Over time, certain limited exceptions to the final judgment rule have been created. But each time an exception has been considered, a careful balance was maintained to ensure that the policy goals of the final judgment rule were not frustrated.[11] The appellate courts have applied those exceptions narrowly to preserve the core principles of the final judgment rule.[12]

Both Congress and the Judicial Conference have rejected proposals similar to the rule that the Proponents suggest. For example, the original proposal for the law that would become § 1292(b) permitted interlocutory appeals when "necessary or desirable to avoid substantial injustice."[13] Both the Judicial Conference Committee and Congress rejected that version of the law based on their concern about "opening the door to frivolous, dilatory, or harassing interlocutory appeals."[14] More recently, Congress did not pass a variation on the Proposal that would have created a mandatory right to immediately appeal for certain interlocutory orders in MDL proceedings.[15]

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[10] *See, e.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 380 (1987) ("[T]he finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in allowing trial judges to supervise pretrial and trial procedures without undue interference. . . . The judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review.").

[11] *See, e.g.*, THOMAS BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 57 (2d ed. 2009), https://www.fjc.gov/sites/default/files/2012/PrimJur2.pdf (describing the legislation that created discretionary interlocutory appeals under 28 U.S.C. § 1292(b) as the "greatest legislative compromise . . . on the policy of finality that has marked the history of the courts of appeals").

[12] *See, e.g.*, Hall v. Hall, 138 S. Ct. 1118, 1131 (2018) ("The normal rule is that a 'final decision' confers upon the losing party the immediate right to appeal. . . . Creating exceptions to such a critical step in litigation should not be undertaken lightly."); Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7, 9 (1st Cir. 2005) ("[I]nterlocutory certification under 28 U.S.C. § 1292(b) should be used sparingly and only in exceptional circumstances, and where the proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority." (internal quotation marks omitted)).

[13] JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF A SPECIAL SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 203 (Mar. 20–21, 1952); *see also Appeals from Interlocutory Orders and Confinement in Jail-Type Institutions*: *Hearing on H.R. 6238 and H.R. 7260 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 9 (1958).

[14] Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610 & n.15 (1975) (describing the discussion in the Judicial Conference that emphasized striking a balance between justice and judicial efficiency, and noting that the congressional hearings focused on a similar compromise).

[15] Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. 12 § 105(k)(1) (2017) ("The Court of Appeals having jurisdiction

The existing exceptions to the final judgment rule provide safeguards to all litigants, including MDL defendants. For example, § 1292(b) gives the district court the discretion to certify an interlocutory order for appellate review if it involves a "controlling question of law as to which there is substantial ground for difference of opinion" and where "immediate appeal from the order may materially advance the ultimate termination of the litigation."[16] Rule 54(b) allows for partial judgments, which are immediately appealable.[17] And if a party believes that a judge has exceeded his or her authority in a way that irreparably harms the party, the party may file a writ of mandamus.[18]

A key provision that makes discretionary interlocutory appeals under § 1292(b) work well is that *both* the district court judge and a panel of the circuit court must agree that an interlocutory appeal is justified.[19] The original proposal for

over the transferee district shall permit an appeal to be taken from any order issued in conduct coordinated or consolidated pretrial proceedings . . . provided that the order is applicable to one or more civil actions seeking redress for personal injury, and that an immediate appeal may materially advance the ultimate termination of one or more civil actions in the proceedings.").

[16] 28 U.S.C. § 1292(b) (2012).

[17] FED. R. CIV. P. 54(b) (2018).

[18] FED. R. APP. P. 21 (2018). Even if the Proponents are correct in their claim that the final judgment rule is an unwise policy because it does not allow defendants to appeal the denial of their dispositive motions, the problem they identify is not one that is limited to MDLs that involve personal injury claims. There is, therefore, little justification to limit a new rule to only those cases as the defendants propose. Instead, the Proponents are really arguing to totally abolish the final judgment rule for all dispositive orders. As is discussed below, the Proponents have not shown any evidence that the final judgment rule and the existing exceptions to the rule are not working well. Without such evidence, it is dangerous and unwise to embark on such a seismic and potentially harmful change in federal appellate practice. *See* Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U.L. REV. 213, 217–18 (2010) ("Care must be taken in revising old rules and fashioning new ones, for unintended and adverse consequences abound. As Professor Tidmarsh reminds us, 'All the rules . . . are interwoven. As with a spider's web, a tug on a single rule can collapse the entire structure.'" (quoting Jay Tidmarsh, *Resolving Cases "On the Merits,"* 87 DENV. U.L. REV. 407, 407 (2010)).

[19] In discussions with the Advisory Committee, the Proponents have suggested that they need direct access to the appellate courts because MDL courts never certify interlocutory review under § 1292(b) of MDL courts' orders denying defendants' dispositive motions. *See, e.g.*, Letter from Brian Devine, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure, U.S. Courts, *Proposed Rule Amendment Regarding Interlocutory Appeals in MDL Cases* 1 (Oct. 21, 2019) https://www.uscourts.gov/rules-policies/archives/suggestions/brian-devine-19-cv-cc [hereinafter Devine Letter]; *see also* Letter from 45 Corporations, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure, U.S. Courts, *The Need for FRCP Amendments Concerning Multi-District Litigation (MDL) Cases* 2 (Oct. 3, 2019), https://www.uscourts.gov/sites/default/files/19-cv-aa-suggestion_from_45_companies.pdf (claiming that the opponents of the proposed interlocutory appeal rule "cannot cite a single instance in which § 1292(b) led to appellate review of the type of motion about which the Committee is concerned").

The facts do not seem to support the Proponents' position. In at least 23 recent cases an

MDL court granted a defendant's request for a § 1292(b) certification to seek an appeal of the court's denial of a defendant's dispositive or potentially outcome-determinative motion. *In re* Avandia Mktg., 804 F.3d 633, 637 (3d Cir. 2015) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motion to dismiss); *In re* Endo Pharms. Holdings, Inc., No. 15-0503, 2015 U.S. App. LEXIS 22956, at *2–3 (6th Cir. Nov. 17, 2015) (granting defendant's request to certify a § 1292(b) appeal of the court's order remanding hundreds of plaintiffs from the MDL to state court); Bryant v. United States, 768 F.3d 1378, 1380 (11th Cir. 2014) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motion to dismiss plaintiffs' claims); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 528 (5th Cir. 2014) (granting defendants' request to certify a § 1292(b) appeal of the court's order denying defendants' request to vacate a default judgment); Joffe v. Google, Inc., 729 F.3d 1262, 1264–65 (9th Cir. 2013) (granting defendants' request to certify a § 1292(b) appeal of the court's partial denial of defendants' motion to dismiss); UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 130 (2d Cir. 2010) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motion for summary judgment); Armstrong v. Lasalle Bank Nat'l Ass'n, 552 F.3d 613, 615 (7th Cir. 2009) (granting defendant's request to certify a § 1292(b) appeal of the court's granting of plaintiffs' motion to remand the case to the transferee district); Hepting v. AT&T Corp., 508 F.3d 898, 1011 (9th Cir. 2007) (granting defendant's request to certify a § 1292(b) appeal of the court's denial of the defendants' motion to dismiss); Novell, Inc. v. Microsoft Corp., 505 F. 3d 302, 307 (4th Cir. 2007) (granting defendant's request to certify a § 1292(b) appeal of the court's partial denial of the defendants' motion to dismiss); *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 292 (3d Cir. 2004) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motions to dismiss for lack of personal jurisdiction); La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc., 332 F.3d 896, 896 (6th Cir. 2003) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motion to dismiss plaintiffs' claims and its granting of plaintiffs' motion for summary judgment); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 293 (6th Cir. 2002) (granting the defendant's request to certify a § 1292(b) appeal of the court's order compelling the disclosure of documents that the defendant claimed were protected by attorney-client privilege); *In re* Air Crash Off Long Island, 209 F.3d 200, 201–02 (2d Cir. 2000) (granting defendants' request to certify a § 1292(b) appeal of the court's denial of defendants' motion to dismiss 145 plaintiffs' claims for nonpecuniary damages); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., No. 2047, 2019 WL 1057003, at *4 (E.D. La. Mar. 6, 2019) (granting defendants' request to certify a § 1292(b) appeal of the court's order denying defendants' motion to dismiss); *In re* Blue Cross Blue Shield Antitrust Litig., No. 2:13-CV-20000-RDP, 2018 WL 3326850, at *7 (N.D. Ala. June 12, 2018) (granting defendants' request to certify a § 1292(b) appeal of the court's order deciding the appropriate standard of review applicable to a Sherman Act claim); Ashton Woods Holdings LLC v. USG Corp., MDL No. 13-2437, 2018 U.S. Dist. LEXIS 174981, at * 6 (E.D. Pa. Oct. 11, 2018) (granting defendant's request to certify a § 1292(b) appeal of the denial of defendant's motion for summary judgment); *In re* Aggrenox Antitrust Litig., No. 3:14-md-2516 (SRU), 2015 U.S. Dist. LEXIS 94516, at *9 (D. Conn. July 21, 2015) (granting defendant's request to certify a § 1292(b) appeal of the court's partial denial of the defendants' motion to dismiss); *In re* Mushroom Direct Purchaser Antitrust Litig., 54 F. Supp. 3d 382, 395–96 (E.D. Pa. 2014) (granting defendant's request to certify a § 1292(b) appeal of the court's denial of the defendants' motion for summary judgment); *In re* Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., No. 8:10ML02151 JVS (FMOx), 2011 U.S. Dist. LEXIS 80965, at * 2 (C.D. Cal.

§ 1292(b)—like the Proposal—gave the circuit court the sole discretion to allow interlocutory appeals, removing the district court judge from the decision. Congress rejected this approach, concluding that the district courts are in a superior position to exercise the discretion to allow or disallow interlocutory appeals.[20]

The Supreme Court has repeatedly held that permitting interlocutory appeals without the district court judge's approval "would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."[21] As eight retired federal district judges recently observed, "Such battlefield decisions are best made by the one observing the combatants."[22]

Indeed, because MDL cases are so complex, the circuit courts have provided MDL judges with unusually broad discretion to decide how to manage their cases. For example, the Eighth Circuit has repeatedly held that "MDL courts must be given greater discretion to organize, coordinate and adjudicate its proceedings."[23]

July 19, 2011) (granting defendants' request to certify a § 1292(b) appeal of a cross-cutting standing issue which supported the court's partial denial of defendants' motion to dismiss); *In re* Fosamax Prods. Liab. Litig., No. 06 Civ. 9455, 2011 U.S. Dist. LEXIS 72123, at *26–27 (S.D.N.Y June 29, 2011) (granting defendant's request to certify a § 1292(b) appeal of cross-cutting issue related to the proper risk-benefit analysis that should be used to determine whether a drug is defective); *In re* Adelphia Communs. Corp. Sec. & Derivative Litig., No. 03 MDL 1529 (LMM), 2006 U.S. Dist. LEXIS 11743, at *5 (S.D.N.Y. Mar. 15, 2006) (granting defendant's request to certify a § 1292(b) appeal of the court's denial of the defendants' motion to dismiss); Enron Corp. v. Springfield Assocs., LLC, No. M-47 (SAS), 2006 U.S. Dist. LEXIS 63223, at * 3, *6 (S.D.N.Y. Sept. 5, 2006) (granting defendant's request to certify a § 1292(b) appeal of the court's denial of the defendants' motion to dismiss); *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., No. MDL 1532, 2004 WL 1571617, at *1 (D. Me. Apr. 20, 2004) (granting defendant's request to certify a § 1292(b) appeal of the court's denial of the defendants' motion to dismiss).

[20] H.R. REP. NO. 85-1667, at 5–6 (1958) ("Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the future course of the litigation with any degree of accuracy.").

[21] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981); *see also* Swint v. Chambers Cty. Comm'n, 514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals."); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435–37 (1956) (holding that the district judge serves as a "dispatcher" of appeals, to "meet the demonstrated need for flexibility" in certifying partial judgments and this decision is, "with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay"); Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 12 (1980) ("[T]he task of weighing and balancing the contending factors [associated with certifying an issue for interlocutory appeal] is peculiarly one for the trial judge, who can explore all the facets of a case.").

[22] Brief of Retired United States District Judges as Amici Curiae in Support of Respondents at 8, Hall v. Hall, 138 S. Ct. 1118 (2018) (No. 16-1150), 2007 WL 6729198, at *8 (arguing that a district court is in the best position to determine when partial appeals are appropriate in a consolidated case).

[23] *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 496 F.3d 863, 867

Likewise, the Fifth Circuit held: "The trial court's managerial power is especially strong and flexible in matters of consolidation."[24]

The Proposal should require particularly strong support, given that Congress specifically rejected it in drafting § 1292(b) and that courts have indicated the need for trial court independence and discretion in MDL proceedings. The Proposal risks creating new difficulties without actually solving any problems.[25]

IV. THE POLICY JUSTIFICATIONS FOR THE PROPOSAL ARE UNPERSUASIVE

The Proponents claim that the Proposal would accomplish three general policy goals: (1) eliminating perceived asymmetries in the appellate review of dispositive motions, (2) correcting erroneous trial court orders in high-stakes litigation, and (3) stopping defendants from being forced into distorted settlements.[26] We analyze each of these proposed policy benefits below and conclude that the Proposal does not appear to serve any of them.

A. Eliminating Perceived Appellate Asymmetries

The Proponents claim that the current rules treat defendants unfairly because a plaintiff is permitted an immediate appeal of a grant of an adverse dispositive motion, but a defendant is not ordinarily permitted an immediate appeal of a denial of the same dispositive motion.[27]

The premise of this argument is shaky, at best. It is in a sense partially factually true. A plaintiff is permitted to appeal immediately, for example, from a grant of a

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(8th Cir. 2007)*; see also* Freeman v. Wyeth, 764 F.3d 806, 809 (8th Cir. 2014); *In re* Prempro Prods. Liab. Litig., 423 F. App'x. 659, 660 (8th Cir. 2011).

[24] Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co., 704 F.3d 413, 432 (5th Cir. 2013) (quoting *In re* Air Crash Disaster, 549 F.2d 1006, 1013 (5th Cir. 1977)).

[25] *See also* Howard M. Erichson, *Civil Litigation Reform in the Trump Era: Threats and Opportunities: Searching for Salvageable Ideas in FICALA*, 87 FORDHAM L. REV. 19, 21 (2018) (describing the special rules the Fairness in Class Action Litigation Act of 2017 proposes, including the interlocutory appeal rules, as serving the "goals of corporate defendants" but concluding that "as a matter of litigation policy, the proposals solve nonproblems").

[26] *See, e.g.*, JOHN H. BEISNER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, MDL IMBALANCE: WHY DEFENDANTS NEED TIMELY ACCESS TO INTERLOCUTORY REVIEW 9–14 (2019), https://www.instituteforlegalreform.com/uploads/sites/1/MDL-Defendent-Interlocutory-Review-Timely-Access.pdf; Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1643–44 (2011).

[27] BEISNER & SCHWARTZ, *supra* note 26, at 1 ("This troubling dynamic is not only inefficient, but also highly unfair and one-sided given that it is only the denial of broadly applicable dispositive motions that is not immediately appealable; plaintiffs are free to appeal the grants of such motions posthaste.").

motion to dismiss against it while a defendant is not ordinarily permitted an immediate appeal from its denial. But there is in fact symmetry: if a plaintiff files a dispositive motion against a defendant and loses—say, a motion for summary judgment—the plaintiff has no immediate appeal. But if the motion is granted, and resolves the action, the defendant has an immediate appeal. Symmetry.

The real issue is that plaintiffs rarely have viable pre-trial dispositive motions and defendants often do (although perhaps not nearly so often as defendants would like to think). In other words, there is a realistic possibility in many cases of a plaintiff losing a case before trial but no similar realistic possibility of the defendant losing before trial. That may be the result of sound policy decisions. Or it might not. But it can hardly be said that the asymmetry benefits *plaintiffs*. They would surely prefer a system in which they could win many legal actions early in the proceedings and in which defendants generally cannot. And the Proponents presumably would not like that reversal of positions—even though the "asymmetry" in appellate rights would then benefit defendants. In effect, what the Proponents are really complaining about is a very substantial strategic *advantage* they have in litigation: they may well win without going to the jury but they will rarely lose unless a jury makes findings against them. That is a strange grievance.

Thus, far from being "unfair and one-sided"[28] as the Proponents claim, the final judgment rule provides a carefully balanced foundation of appellate review that has served the judiciary and all litigants well for over 220 years. Every party has the right to appeal a case once it has concluded, so the final judgment rule is symmetrical.

B. *Promoting Correct Rulings*

The Proponents claim that immediate appeals are necessary to correct erroneous pretrial rulings in MDLs.[29] Pursuing the correct application of the law is a legitimate policy goal. But both the Supreme Court and Congress have concluded that some level of error is acceptable to ensure that litigation is not burdened by unreasonable disruption, delay, and expense from interlocutory appeals.[30]

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[28] *Id.*

[29] *Id.* at 13 ("'The fact that pretrial orders are not routinely appealable' before final judgment 'is clearly an enormous factor, with a variety of implications,' the '[m]ost obvious' of which is 'the inability for error correction relating to pretrial rulings that can have enormous significance for many litigants.'" (quoting Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understanding of Procedure*, 165 U. PA. L. REV. 1669, 1706 (2017)).

[30] Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430 (1985) ("Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation

One argument that the Proponents could make is that the balance of interests is sufficiently different in MDLs than other litigation to warrant a different approach. Another is that MDL trial judges are more prone to error—and in greater need of early correction—than trial court judges in other cases. Neither justification for the Proposal survives scrutiny.

That the interests in MDL proceedings tilt in favor of interlocutory appeals is not at all obvious. To be sure, the stakes are higher in many MDLs than in much—but not all—other litigation.[31] That could justify spending more party, attorney, and judicial resources on MDLs than on other cases, including potentially in the process of interlocutory appeals.

But in MDLs the costs of delay to plaintiffs also increase. The number of plaintiffs awaiting recovery is much higher than in most other litigation. Moreover, interlocutory appeals could deprive many plaintiffs of the ability to obtain justice during their lifetime at all. The type of MDLs that a version of the Proposal targets often involves medical devices and pharmaceuticals used by an older population with underlying medical ailments. The members of that population are at an increased risk of dying before their cases get resolved. Adding further delays to the already lengthy litigation process would prejudice these people further.[32]

In addition, the burden on plaintiffs' attorneys—who generally operate on a contingent basis—is far greater in MDL litigation than in most other legal actions. Delay and disruption would pressure plaintiffs to settle at a greater discount than would otherwise be justified by the expected value of the litigation.

In short, there is no obvious reason to think the interests in an MDL proceeding are meaningfully different from the sum of the interests of what would otherwise

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punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'" (quoting United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1982))).

[31] Even if measured solely by the dollar value, many non-MDL cases involve stakes that are as large or larger than MDL cases. For example, in 1985, Pennzoil won an $11 billion verdict against Texaco, which declared bankruptcy and settled for $3 million. *See* Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 735–36 (1990). In 2013, Teva Pharmaceuticals agreed to pay $1.6 billion to settle patent infringement claims made by Pfizer and other companies related to the drug Protonix. Press Release, Teva Pharm. Indus. Ltd., Teva Reaches Settlement Agreement with Pfizer and Nycomed Regarding Generic Protonix (Pantoprazole) Tablets (June 12, 2013), https://ir.tevapharm.com/news-and-events/press-releases/press-release-details/2013/Teva-Reaches-Settlement-Agreement-with-Pfizer-and-Nycomed-Regarding-Generic-Protonix-Pantoprazole-Tablets/default.aspx. In 2003, ExxonMobil Corporation won $416.8 million against Saudi Basic Industries Corporation. *See* Steve Seidenberg, *Exxon Mobil Wins $416.8 Million Jury Verdict*, NAT'L L.J., Mar. 31, 2003, at A15.

[32] *See, e.g.*, Kravitz, *supra* note 18, at 220 ("The Civil Rules Committee is always alert when a proposed rule change may favor one group of litigants over another. A proposed change may appear sensible on its face. But, if in practice the proposed change is likely to advantage one group at the expense of another, that fact may counsel against a change.").

be individual cases—assuming bringing the cases individually would be feasible. And there is some reason to think any differences weigh *against* allowing interlocutory appeals, not in their favor.

Nor do the Proponents show that MDL judges are particularly prone to error. To the contrary, MDL judges' orders are affirmed nearly 90% of the time. Attached as Appendix 1 are the results of a study undertaken to determine if a problem exists in the accuracy of MDL trial court rulings that one version of the Proposal would solve. Our study identified all of the recent MDLs to which the Proposal would have applied, using data provided by the Judicial Panel for Multidistrict Litigation. It identified all of the large MDL actions (more than 500 cases) that are recent (opened in the last 20 years and either still open or terminated in the last 5 years), mature (closed or with more than 70% of the cases resolved), and involve personal injuries. This search identified 37 MDLs that together resolved almost 200,000 individual cases.

All 37 MDL cases were searched to determine how frequently an MDL judge denied a request for interlocutory review of an order using the existing procedures, only to be reversed after final judgment. After searching the appellate history for all 37 of these MDL cases, no cases were identified in which this occurred.

Our study also determined the rate at which MDL judges are reversed by the appellate courts—regardless of whether there was a request for interlocutory appellate review.[33] All appellate decisions that reviewed an order issued by an MDL transferee judge in any of the 37 MDL cases were reviewed. Of the 115 resulting appellate court opinions, the MDL judges' decisions were fully affirmed 87% of the time and partially affirmed another 3% of the time. In total, then, MDL trial judges were affirmed about 90% of the time.[34] This high affirmance rate suggests that MDL judges are not especially prone to mistakes. In fact, the reversal rate in the MDL cases we examined is slightly lower than the 12.18% average reversal rate for all

[33] *Id.* Further details of all appeals reviewed can be found at http://ssrn.com/author=367158.

[34] *Id.* This analysis is limited in some ways. It includes appeals on a variety of matters—some crucial to litigation and some relatively minor—and appeals by plaintiffs and by defendants. It is possible the reversal rate is higher for crucial matters or for appeal by defendants or both. Unfortunately, the data set is too small to draw meaningful inferences based on those narrower categories. Another data point emerges from the sample of 23 cases in which the MDL court granted a defendant's request for a § 1292(b) certification. *See supra* note 20. The circuit court decided 11 of these 23 cases on the merits. Of the 11 cases in which the circuit court decided the appeal on the merits, the circuit court never reversed the MDL court. The circuit courts affirmed the MDL courts in 9 of the 11 cases. Due to an intervening change in the law, the circuit courts remanded the other two cases back to the MDL courts for further proceedings. *See* Devine Letter, *supra* note 19, at 1–2. Although this is a small sample, this data shows that MDL courts have a very high affirmance rate even when the MDL court has determined—as is required by § 1292(b)—that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b) (2012).

private civil cases in the federal courts over the last eight years.[35] Consequently, there is no apparent reason to depart from the careful balance that the final judgment rule strikes between correcting erroneous rulings and the disruption, delay, and expense that come with piecemeal appeals.

C. *Avoiding "Distorted" Settlement Values*

The Proponents argue that defendants are forced to settle cases for "distorted" values because dispositive rulings in MDL cases are not immediately reviewable by an appellate court.[36] The notion of "distortion" requires some baseline—although the Proponents do not make that baseline clear. Much like the Proponents' claim of asymmetry, their implicit notion of distortion is a bit odd. The final judgment rule is the norm. It applies to the great bulk of litigation. It is more natural to consider it as part of the baseline for settlement value than as "distorting" settlement value.

That said, there is a way in which the concept of distortion can be given relevant meaning. An undistorted settlement might be for the expected value of litigation if it were reached in an immediate, final decision.[37] That final decision—we should assume—would not be infallible. No realistic procedural system can be constructed in the hope of achieving infallibility. As Justice Jackson famously wrote of the United States Supreme Court, "We are not final because we are infallible, but

[35] *See Table B-5–U.S. Courts of Appeals Statistical Tables for the Federal Judiciary*, U.S. COURTS (June 30, 2019), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2019/06/30 (reversal rate for all private civil appeals decided between 7/1/2018 and 6/30/2019 was 12.5%); *Table B-5–U.S. Courts of Appeals Statistical Tables for the Federal Judiciary*, U.S. COURTS (June 30, 2018), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2018/06/30 (reversal rate for all private civil appeals decided between 7/1/2017 and 6/30/2018 was 11.7%); *Table B-5–U.S. Courts of Appeals Statistical Tables for the Federal Judiciary*, U.S. COURTS (June 30, 2017), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2017/06/30 (reversal rate for all private civil appeals decided between 7/1/2016–6/30/2017 was 12.1%); *Just the Facts: U.S. Courts of Appeals*, U.S. COURTS (Dec. 20, 2016), https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals (reversal rates for all private civil appeals decided between 2011 and 2015 were: 12.4% (2011), 10.4% (2012), 11.8% (2013), 12.3% (2014), and 14.2% (2015)).

[36] BEISNER & SCHWARTZ, *supra* note 26, at 1 ("Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials. The settlements that ensue are often distorted because the soundness of the MDL court's dispositive motion rulings has not been tested on appeal.").

[37] Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 47–48 (2013); Joshua P. Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 48 (2004).

we are infallible only because we are final."[38] We might imagine a world with imminent finality—if not infallibility—at the expected value of litigation and then treat it as a kind of ideal and any deviation from it as a kind of distortion.

It is hard to generalize about whether the Proposal would cause settlements to more closely approximate the ideal understood in this way. In some cases, it no doubt would. In other cases, it would not. But there is reason to believe on the whole that the final judgment rule is preferable from this vantage.

To see why, it is important to consider how procedural rules can result in deviation from the ideal. One common explanation is that the prospect of the cost, disruption, and delay associated with litigation causes defendants to pay more for settlement than they would otherwise. That appears to have been the reasoning of the Supreme Court in *Bell Atlantic Corp. v. Twombly* in modifying the standard for ruling on motions to dismiss.[39] The Court noted that litigation takes up the time of defendants, creating "an *in terrorem* increment of the settlement value."[40] The Court cautioned against forgetting that litigation is expensive[41]—implying that the expense of litigation can cause defendants to pay more in settlement than they otherwise would.

Interlocutory appeals can add to the cost, disruption, and duration of litigation. That is a significant reason for adopting the final judgment rule. Indeed, the Supreme Court has long recognized that the final judgment rule is good policy because it avoids "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."[42] When Congress debated allowing discretionary interlocutory appeals through what became § 1292(b), senators expressed deep concern that "the indiscriminate use of such authority may result in delay rather than expedition of cases in the district courts."[43]

To quantify the amount of delay that the proposed rule would cause in MDL cases, we studied the amount of time it took the circuit courts to decide interlocutory appeals in 2018. The results of our study are attached as Appendix 2. We found that the average was 23 months, the shortest time was 10 months, and the longest

[38] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[39] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

[40] *Id.* at 558 (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

[41] *Id.*

[42] Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)); *see also* Canter v. Am. Ins. Co., 28 U.S. (3 Pet.) 307, 318 (1830) ("It is of great importance to the due administration of justice, and in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon *final judgments only*, that causes should not come up here in fragments or successive appeals. It would occasion very great delays, and oppressive expenses.").

[43] S. REP. NO. 85-2434, 3 (1958).

was 43 months. Likewise, in the 11 cases in which an MDL court granted a defendant's request for a § 1292(b) certification and the circuit court decided the interlocutory appeal on the merits,[44] it took an average of 23.5 months from the time the MDL court granted the § 1292(b) certification to the time the circuit court decided the appeals on the merits.[45]

The delays caused by interlocutory appeals can impose significant detrimental consequences on the litigants and the judicial system, particularly in large MDL cases. For example, Judge Jack Weinstein (later quoted by Judge Shira Scheindlin) compared discovery in MDL proceedings to moving an oil tanker, noting that "neither is amenable to sudden stops or changes in direction. Suspending discovery for many months while appeals are taken would constitute a significant burden on the timely and efficient disposition of the cases."[46]

So if the reasoning in *Twombly* is compelling—if drawing out litigation and increasing its cost causes defendants to pay *more* in settlement than they would otherwise—then the Proposal would "distort" settlement values by forcing defendants to pay more in settlement than they currently do.

Nonetheless, there are at least a couple of phenomena that would cause the Proposal to *decrease* the amount defendants pay in settlement: early appellate reversals and risk aversion. As to early appellate reversals, the Proponents' point about asymmetry becomes relevant. As discussed above, asymmetry does not—as the Proponents suggest—create intrinsic unfairness. Plaintiffs and defendants both get to appeal once a final judgment is entered against them. It is just that plaintiffs are much more susceptible to early adverse final judgments than defendants. Putting aside the unpersuasive claim about unfairness, that distinction does suggest a way in which interlocutory appeals could benefit defendants.

If interlocutory appeals are available largely in situations where plaintiffs can appeal anyway but defendants cannot—as the Proposal seems to contemplate—interlocutory appeals would systematically benefit defendants. That would, in turn,

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[44] *See supra* note 19.

[45] *In re* Avandia Mktg., 804 F.3d 633 (3d Cir. 2015) (20 months); Bryant v. United States, 768 F.3d 1378 (11th Cir. 2014) (26 months); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521 (5th Cir. 2014) (20 months); Joffe v. Google, Inc., 729 F.3d 1262 (9th Cir. 2013) (26 months); UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121 (2d Cir. 2010) (24 months); Armstrong v. Lasalle Bank Nat'l Ass'n, 552 F.3d 613 (7th Cir. 2009) (22 months); Novell, Inc. v. Microsoft Corp., 505 F. 3d 302 (4th Cir. 2007) (27 months); *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288 (3d Cir. 2004) (18 months); La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc., 332 F.3d 896 (6th Cir. 2003) (34 months); *In re* Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289 (6th Cir. 2002) (26 months); *In re* Air Crash Off Long Island, 209 F.3d 200 (2d Cir. 2000) (16 months).

[46] *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 174 F. Supp. 2d 4, 5, 9 (S.D.N.Y. 2001); Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc., 71 F. Supp. 2d 139, 167 (E.D.N.Y 1999).

cause defendants to settle for less. But, again, it is not obvious that the Proposal would have this effect. True, it would benefit defendants more than plaintiffs. But it could harm both by protracting litigation. From the defendants' perspective, the issue becomes whether defendants would benefit enough from the prospect of an early appellate ruling in their favor to overcome the additional cost associated with their failed appeals, also taking into account the relatively few new interlocutory appeals plaintiffs could pursue and the even fewer occasions when those would be successful. Our finding that trial court rulings in MDL proceedings are affirmed in about 90% of appeals suggests that the mathematics might not support the Proposal—even from the defendants' perspective. Appeals are not cheap. If they succeed only 10% of the time, they are probably a losing proposition, at least when considered purely in terms of defendants' net expenses in litigation.[47] Again, if we think as the Supreme Court did in *Twombly*, we would expect that average increase in net expenses to result in defendants paying more in settlement than without the Proposal.[48]

But *Twombly* may not have offered a complete picture. The prospect of high litigation costs affects the bargaining position not just of defendants, but also of plaintiffs. The Proposal could cause plaintiffs too to face significantly higher litigation expenses. And if they lose in litigation, they never recover those expenses. So we might conclude that the Proposal would benefit defendants, particularly if we take into account the phenomena that shape settlement dynamics, including risk aversion.

Consider the circumstances of the parties and their counsel in large MDLs. The defendants tend to have tremendous resources. Fortune 500 companies are the defendants in many large MDLs and have annual litigation budgets in the hundreds of millions of dollars.[49] The plaintiffs do not have similar resources. As a result, the plaintiffs are apt to be more averse to the risks caused by the expense of litigation—

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[47] Net expenses in litigation is the right metric in this context because the assumption is that defendants are settling for too much based on the expected cost of litigation.

[48] To be sure, the above analysis considers net litigation costs only from the perspective of defendants. But that is not the only relevant perspective. If we look at the system as a whole, increasing the cost of litigation on average through interlocutory appeals would be harmful. Having numerous interlocutory appeals—each of which would have poor prospects of succeeding and thereby expediting the resolution of litigation—could be highly inefficient.

[49] *See, e.g.*, *Form 10-K Filed by Merck & Co., Inc.*, U.S. SEC. & EXCH. COMM'N 63 (Feb. 27, 2019), https://s21.q4cdn.com/488056881/files/doc_financials/2018/Q4/2018-Form-10-K-(without-Exhibits)_FINAL_022719.pdf (Merck had legal defense reserves as of December 31, 2018 in the amount of $245 million); MEDTRONIC, ANNUAL REPORT: FISCAL YEAR 2018, at 93 (2018), http://newsroom.medtronic.com/static-files/262eb1cb-ed16-422c-b33c-d9f031105481 (Medtronic had accrued litigation reserves of $900 million as of April 27, 2018); JOHNSON & JOHNSON, ANNUAL REPORT: 2018, at 132 (2018), http://www.investor.jnj.com/annual-meeting-materials/2018-annual-report (Johnson & Johnson's net litigation expenses for 2018 was $1.99 billion).

and perhaps to litigation risks generally—than defendants.[50] So a first pass at considering these sorts of dynamics suggests that defendants may settle for too little rather than too much. Adopting the Proposal—which would likely shift negotiation leverage in defendants' favor—would exacerbate that dynamic. The shift would occur because even though defendants might suffer from an increase in litigation costs on average, they would gain a chance at an early outright victory. Plaintiffs, on the other hand, would suffer a similar increase in litigation costs on average while also facing the prospects of an early loss, one that could deprive them of a settlement that they might otherwise obtain.

Focusing exclusively on the parties, however, misses a key dynamic. An important layer of incentives involves counsel. Defense attorneys are ordinarily compensated by the hour and do not pay for litigation costs.[51] And they generally do not have any contingent interest in the outcome of a lawsuit.[52] As a result, they benefit from the protraction of proceedings and are not averse to risk. Plaintiffs' attorneys, in contrast, are ordinarily paid on a contingent basis. They generally receive compensation and are reimbursed for litigation costs only if they obtain a recovery. They fare best—obtain the highest hourly rate—if they reach relatively early settlements and they suffer greatly if they lose outright.[53] So they are harmed by delay and tend to be risk averse. This combination of the incentives before the attorneys—what economists call "agency costs"—puts pressure on plaintiffs to settle early, even if for a relatively modest amount, and puts pressure on defendants to be aggressive in settlement negotiations, rejecting even reasonable settlement offers.[54]

The above dynamics can help explain empirical studies showing that when faced with moderate probabilities of losing at trial, plaintiffs are more likely to prefer settlement while defendants are more likely to choose the risk-seeking option of trial.[55] And the same logic would seem to apply to appeals: a plaintiff faced with a

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[50] Davis & Lande, *supra* note 37, at 68.

[51] *Id.* at 69.

[52] *Id.*

[53] *Id.*; *see also* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 980 (2010); Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L.J. 355, 371–72 (2009).

[54] Davis & Lande, *supra* note 37, at 69.

[55] The theory behind these findings goes beyond the dynamics discussed in the text and reflects people's tendencies—at least in some circumstances—to be risk averse when it comes to choosing between different amounts of gains and risk prone when it comes to averting losses. *See, e.g.*, Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 168 (2000) ("When deciding whether to settle a case or go forward to trial, the Framing Theory thus predicts that *plaintiffs* are likely to prefer the risk-averse option—settlement—because they view both settlement and trial as gains, while *defendants* are more likely to prefer the risk-seeking option—trial—because they view both settlement and trial as losses."); Jeffrey J. Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 130 (1996) (conducting

moderate risk of losing on appeal may prefer to settle, whereas a defendant may choose the risk-seeking option of an appeal. Consequently, plaintiffs may be more likely to assign a higher discount value to the risk that they could lose on appeal, and the defendants may be more tolerant of that risk.

To be clear, even if agency costs contribute to these dynamics, we do not mean to suggest that lawyers act in a deliberately unethical manner. They have an obligation to pursue the best interests of their clients and generally no doubt work hard to do so. But incentives matter. As discussed below, our interests tend to color our judgments in ways we have great difficulty in detecting. So the incentives before even ethical lawyers are likely to inform settlement outcomes and not always in ways that serve their clients. To be sure, some clients are able to monitor and mitigate the incentives before counsel—to the extent they diverge from the clients' interests. That is particularly likely to be true for large corporate defendants in MDL proceedings given their sophistication and resources. It is at least somewhat less likely to be true for plaintiffs in MDL proceedings, who tend to be less sophisticated and often lack the resources to second guess the advice of their counsel.[56] As a result, the main point holds true: the incentives before counsel are likely to reinforce the tendency of settlements in MDL proceedings to be too small rather than too large. If so, the Proposal would likely lead to more—rather than less—distortion.[57]

V. MOTIVATIONS AND THEIR IMPLICATIONS

Let us assume, then, that the policy justifications for the Proposal are unpersuasive. Why, then, would the Proponents pursue it? There is an obvious—and uninteresting—answer. Perhaps they are cynical, dressing up a recommended procedural reform as serving the public interest when it is contrary to the public interest and serves only the interests of large corporations, particularly those that violate the law.

But that is an uncharitable view. And there is reason to think it is wrong. That reason is a phenomenon sometimes called "motivated cognition." To oversimplify a bit, motivated cognition is believing what we want to believe,[58] even in the face of

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simulation studies that show that plaintiffs prefer the risk-adverse behavior of settlement while defendants prefer the risk-seeking behavior of trials).

[56] Rachlinski, *supra* note 55, at 129.

[57] Note that this argument does not deny that new information about the merits of a case will almost always change its settlement value. The final resolution of a dispositive issue on appeal, therefore, will usually alter its settlement value. But that does not necessarily mean that a pre-appeal settlement value is distorted. It means only that the value of a pre-settlement appeal is different from the value of a post-settlement appeal because the two values are based on different information.

[58] Dan Kahan usefully defines motivated cognition as "the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the

contrary evidence.[59]

One reason that the above description of motivated cognition is an oversimplification is the use of the term "want." It might suggest a conscious decision made in furtherance of a conscious desire, one that serves our interests in a straightforward way. But motivated cognition is much more subtle than that. The mechanisms by which it operates are often subconscious and difficult to detect. Indeed, one manifestation of motivated cognition is that each of us tends to believe that we are less affected by motivated cognition than are others—making it difficult to correct for our cognitive biases.

Further, motivated cognition can serve our impulses—even self-destructive impulses—rather than any desires we might express or interests we might recognize. Think of addicts. They famously will deny that they are addicts. In doing so, they may well be sincere—at least at a conscious level. Their impulse is to resist an understanding of themselves that would threaten their sense of self. Their denials do not mean that they want to be addicted, that they want to be ignorant of their own addictions and therefore unable to address them, or that their addictions and self-deceptions serve their interests understood in an ordinary sense.

One natural reaction is to think that addicts suffer from distorted thinking in a way that most of us do not. In fact, that reaction itself can be explained by motivated cognition: it causes us to think that we are generally less susceptible to motivated cognition than others.[60] Our minds are quick to distinguish—and pathologize—others as a way to make ourselves feel good.[61] The reality is that motivated cognition is pervasive. Addicts—and some others—may tend to suffer more acutely from self-deception than (some) non-addicts, but the difference is likely to be not one of kind but of degree.

Recognition of motivated cognition suggests three possible explanations of the

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formation of accurate beliefs." Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011). There is extensive literature on motivated cognition and related psychological concepts. The mechanisms that can distort our thinking are numerous and varied. For a seminal article that describes motivated cognition and applies the concept in a legal context, see *id.*

[59] Indeed, there is even evidence of a "backfire effect," which involves people feeling even more committed to beliefs when confronted with contradictory evidence. Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 42 J. LEGAL STUD. 65, 65 (2014); *see also* Dennis Chong & James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101 AM. POL. SCI. REV. 637, 640 (2007); Sarah E. Gollust et al., *The Polarizing Effect of News Media Messages About the Social Determinants of Health*, 99 AM. J. PUB. HEALTH 2160, 2160 (2009); Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010).

[60] Kahan, *supra* note 58, at 22.

[61] *Id.* at 21–22.

motivation behind the Proposal, none of which assumes bad faith. First, the Proposal might *benefit* corporate defendants, causing them to believe it also serves the public interest even though it does not. Second, the Proposal might *harm* corporate defendants and the public interest, but corporations might have reason to think they would benefit from it. Third, the Proposal might *harm* corporate defendants and the public interest but benefit the lawyers who represent corporations—lawyers who play a crucial role in shaping corporations' perceptions of their own interests. Notably, these last two points—about motivated cognition affecting corporations and their counsel—are not mutually exclusive but rather tend to reinforce one another.

A. A Strategic Advantage to Corporate Defendants

Let us not be naïve. There is a real possibility that large corporations and their counsel support the Proposal because they rightly perceive it would give a strategic advantage to corporate defendants in MDLs. By adding a right to an intermediate appeal—potentially even to several sequential intermediate appeals—the Proposal would make MDLs more time-consuming, expensive, and difficult for plaintiffs to litigate.[62]

Defense attorneys are sometimes criticized for—and even publicly boastful of—using delay as a strategy to increase their billings, protract litigation, and force plaintiffs to accept lower settlement values.[63] From this perspective, the Proposal provides an almost endless opportunity for defense lawyers to force delays. If the Proposal were adopted, the ability of defendants to protract the litigation would be limited only by the often extraordinary creativity of their lawyers, some of whom have described the role of defense attorneys as "protractors."[64]

The Proposal would provide a win-win for defendants: their lawyers could file long-shot motions, and even if they are denied, the ensuing appeals would potentially delay the case for two years or more. During those two years, some plaintiffs may die or become so financially desperate that they settle their cases for a relative pittance. Even if the appellate court affirms, the defense lawyers could dream up other motions. Rinse and repeat.

So it is possible that the Proposal would benefit corporate defendants and that

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[62] Defendants' attempts to delay and complicate MDL proceedings could thus frustrate the guiding purpose of MDLs to "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407 (2012).

[63] Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 647 (1998) ("The ability to delay litigation for tactical advantage is widely recognized among litigators as an essential lawyering skill. Bruce Bromley, a highly respected litigator, once boasted at a conference of lawyers and judges: 'I was born, I think, to be a protractor . . . . I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity.'").

[64] *Id.*

is why they and their counsel support it. And it is also possible that corporate defendants believe the Proposal serves the public interest, even though it does not. But there are other possibilities.

B. Harm to Corporate Defendants but a Perception of Benefit

There are various ways in which the Proposal could *harm* corporate defendants. It is at least conceivable that corporate defendants are risk-averse and focus on their own bottom lines in negotiations rather than on the risks plaintiffs face. This is the model that the *Twombly* Court seemed to contemplate.[65] Assuming this model, if the Proposal would increase the average cost and duration of litigation for corporate defendants in MDLs, they might suffer an expected increase in litigation expenses and as a result pay more in settlements. And it is possible—again, assuming this model—that plaintiffs in MDLs would actually benefit from the Proposal.

But the above model seems implausible. For the reasons described above, corporate defendants are likely to achieve at least a relative advantage over plaintiffs in negotiations from the prospect of delay.

Tweaking our analysis to reflect this likely reality, the Proposal might nonetheless harm corporate defendants on the whole, even if it harms plaintiffs more. The reason is that the Proposal might significantly increase the duration and cost of litigation for all parties—and the judiciary—before litigation settles. True, according to this line of analysis, the corporate defendants would ultimately settle on average for less than they would without the Proposal. The price, however, would be an increase in the cost of litigation that results in a net loss for those defendants. That would be true even if plaintiffs suffer an even greater net loss. Note that procedural reform, unlike a settlement for purely monetary relief, is not necessarily a zero-sum game. What harms plaintiffs can also harm defendants.

There are other less obvious ways in which the Proposal could harm corporations. Consider the following possibility. We know that the great majority of appeals fail, including in MDLs (as the appendices show). It is also possible that judges "over-justify" their decisions, interpreting the law and the facts in a way that makes the outcomes they reach seem more certain than they really are. If so, the parties that appeal more often will not only tend to lose those appeals but, in the process, will likely create adverse precedents, skewing the law against their interests in the future. In this way, legal process informs legal substance.

Of course, this phenomenon is speculative. However, if it is accurate, the current "asymmetry" in the system may skew appellate law in favor of defendants. After all, as the Proponents note, plaintiffs get to appeal adverse judgments throughout litigation, but defendants generally get to appeal only an adverse result at trial. And,

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[65] *See also* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1298 (2002).

as we all know, trials are rare. So the majority of appeals—and the great majority of appeals early in litigation—are brought by plaintiffs. They usually lose. And when they lose, judges—in seeking to justify their decisions—may overstate how strongly the law supports defendants.

The Proposal to some extent would reverse this phenomenon—again, if it is a phenomenon. Defendants might be able to appeal large numbers of adverse trial court MDL decisions that they could not appeal in the past, including denials of motions to dismiss, motions for summary judgment, and motions to exclude expert testimony. Appellate courts may view these appeals skeptically, particularly in light of their novelty and the relatively lenient standards that plaintiffs need to satisfy to prevail on them. Defendants might lose regularly, and if they do, appellate judges may support their decisions at times by overstating the strength of the law that favors plaintiffs. A systemic effect of the Proposal, then, could be to shift the law in favor of plaintiffs.[66]

Assuming the Proposal would harm corporate defendants, the question then becomes why they would support it.[67] Aren't corporations consummate sophisticated legal actors? Don't they know what is good for them? Maybe. But maybe not.

The reality is that the people who make significant decisions in litigation on behalf of corporations likely identify strongly with those institutions.[68] And they are likely surrounded by others who feel the same way. In many ways that is good. They should believe in the work they do. So acknowledging that the entities for which

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[66] We mean to take no position here on whether this change would be good, bad, or indifferent. To address that issue, we would need an ideal baseline. In this context, identifying one would be far from straightforward.

[67] Before one rejects this possibility entirely, it is worthwhile considering other procedural decisions that corporate defendants currently make and that may also harm them. There is at least a perception, for example, that defendants—including corporations—started making many more motions to dismiss in the aftermath of *Twombly* and *Iqbal*. Those motions often fail. *See* David Freeman Engstrom, *The* Twiqbal *Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1226 (2013). And it is plausible—based on the kind of judicial over-justification discussed in the text—that as a consequence courts frame the law more favorably for plaintiffs than they would if they were not asked to assess the merits of the litigation until later in the proceedings, perhaps at summary judgment, when the standard is much more favorable to defendants. This dynamic provides another credible possibility of corporate defendants acting contrary to their own interests.

[68] One form that motivated cognition takes is identity-protective cognition. *See, e.g.*, Kahan, *supra* note 58, at 21–22 and sources cited therein. The mechanisms for motivated cognition—and more specifically for identity-protective cognition—are many and varied. As examples, Kahan identifies biased search (we look for information that supports our group identity), biased assimilation (we credit information and argumentation that supports our group identity), and ascription of credibility (we treat as more knowledgeable and trustworthy members within our group). *Id.* at 21. There are many others and they can have similar effects—they skew our views away from truth-seeking and toward some other goal. *Id.* at 21–22.

they work would violate—or have violated—the law could threaten their sense of self-worth. They will likely interpret evidence in a way that minimizes that threat.[69] Being surrounded by others with similar cognitive biases will only reinforce that dynamic. The result may well be a distorted view of reality. Cognitive bias.

Cognitive bias could cause corporate agents to believe that, if the corporation for which they work is sued, the litigation would surely be meritless. And it could cause them to believe that if the corporation has been sued, the litigation *is* meritless—and that, if a trial court judge misjudges the merits of the litigation, surely an appellate court would set matters straight, if only given the opportunity. True, some corporations really do violate the law. "But," they might think, "we don't and won't. Most corporations are probably like us—good actors, much more likely to be falsely accused than to act improperly, much less illegally."

That kind of reasoning is perfectly natural. We are all in our own ways like the residents of Lake Wobegon, who believe all their children are above average. But natural phenomena can be dangerous. In this context, they could cause corporate agents greatly to underestimate the likelihood that they will be sued, that they will pursue an interlocutory appeal, that they will lose the appeal, and that they will regret the resulting costs and disruptions that they have in effect imposed on themselves.

C. Harm to Corporate Defendants but a Benefit to Defense Counsel

Given the pervasive effects of motivated cognition, it should be unsurprising that the lawyers who represent corporate defendants might believe—and might contribute to their corporate clients' belief—that a procedural reform would benefit those clients even if in fact it would not. After all, to the extent that in-house representatives of the clients already have reasons to favor the Proposal, the lawyers are likely to be predisposed to agree with them. Why risk being killed as the messenger?

Further, as noted above, counsel for corporations are the most likely to benefit from the Proposal. If the costs of litigation increase on the whole, that may—or may not—harm corporate defendants, but it would benefit their lawyers. Attorney compensation makes up a significant portion of those costs. Further, if in a subtle, systemic way the Proposal slowly modifies the law to benefit plaintiffs—and perhaps thereby encourage more litigation—that too might increase the litigation fees of corporate defense lawyers. Again, factor in cognitive bias, and the lawyers will likely lead the charge on the Proposal and believe sincerely that they are serving the interests of their clients, even if in fact they are not.

Perhaps the notion that sophisticated corporate representatives and their very

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[69] *See, e.g.*, Daniel M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 467 (2007).

talented attorneys would engage in distorted reasoning seems farfetched. If so, consider two cases—*MTBE* and *Vioxx*—that form a centerpiece of the Proponents' argument that without interlocutory appeals corporate defendants are likely to be forced to settle cases for inflated values.[70] In both of these cases, later events show that if the defendants had waited until after an appeal was decided, they might well have had to pay significantly *more* to settle.

1. MTBE

When water utilities and public agencies sued gasoline refiners alleging that groundwater was contaminated by the gasoline oxygenate methyl tertiary butyl ether ("MTBE"), the cases were transferred to an MDL in the Southern District of New York. The MDL judge denied the MTBE defendants' motion to dismiss, finding that the Clean Air Act did not preempt plaintiffs' claims. Because the MDL judge's preemption decision was not one about which there was "substantial ground for a difference of opinion," she declined to certify her order for an interlocutory appeal under § 1292(b).[71]

Most of the defendants agreed to settle the MTBE litigation that was brought by water utilities and public agencies in 17 states for $423 million. Claiming that these defendants were pressured into settling because they could not immediately appeal the preemption decision, the Proponents claimed: "It stands to reason that the cost of these settlements was higher as a result of the district court's rulings and the inability to obtain immediate appellate review. Indeed, appellate review might have established that the defendants had no liability at all."[72]

However, the subsequent history of the case suggests the opposite conclusion: the MTBE defendants likely *underpaid* for the pre-appeal settlement because the court of appeals would have affirmed the MDL court's preemption decision. We know this because an MTBE case against a non-settling defendant went to trial, resulting in a $105 million verdict for just one city—New York City—and against just one group of defendants—Exxon and its affiliated companies. On appeal, the Second Circuit affirmed the MDL judge's preemption decision and fully affirmed

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[70] *See* BEISNER & SCHWARTZ, *supra* note 26, at 9–11; Pollis, *supra* note 26, at 1675–84.

[71] *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig., 174 F. Supp. 2d 4, 9–10 (S.D.N.Y. 2001). In denying the request for certification, the MDL judge also observed:

> The consolidated cases before this Court involve an essential public right, *i.e.*, the right to water free from contamination, and effect a great number of people. It is important that these actions move forward in a timely and efficient manner. More likely than not, an interlocutory appeal would interfere with discovery, which is progressing well. . . . Moreover, as stated above, it is not clear that an interlocutory appeal would eliminate all of plaintiffs' state law claims—leaving doubt as to whether such an appeal would advance the ultimate termination of these cases.

Id.

[72] BEISNER & SCHWARTZ, *supra* note 26, at 10–11 (quoting Pollis, *supra* note 26, at 1683).

the $105 million verdict.[73]

Rather than vindicating the defendants—as they claimed would happen—an immediate appeal would have eliminated the profound risk to the plaintiffs' case at the time they agreed to settle. If the defendants had waited for the appeal to be decided before settling, the plaintiffs' case might well have become much stronger and the settlement value much higher than it was before the appeal.

2. Vioxx

Patients who took the painkiller Vioxx sued the manufacturer, alleging that it caused serious health risks such as heart attacks and strokes.[74] The cases were transferred to an MDL in the Eastern District of Louisiana. The MDL court denied the defendants' motion for summary judgment, finding that the Food, Drug, and Cosmetics Act did not preempt plaintiffs' claims.[75]

One of the bellwether trials resulted in a verdict for the plaintiffs in the amount of $51 million, which the MDL court later remitted to $1.6 million.[76] The defendant appealed the verdict to the Fifth Circuit in September 2007.[77] Defendants' appeal was never briefed, but clearly if defendants had wanted to raise the issue, the Fifth Circuit could have reviewed the MDL court's preemption ruling, an issue that could have affected all of the cases in the MDL. Rather than appeal preemption, defendants instead chose to enter into a $4.85 billion global settlement in November 2007, two months after filing their appeal.[78] Defendants then dismissed their appeal in April 2008, never giving the Fifth Circuit the chance to address preemption.[79]

After the settlement, the U.S. Supreme Court decided the same implied preemption argument raised by the *Vioxx* defendants in a case involving a different drug.[80] The Court held that the Food, Drug, and Cosmetics Act did *not* preempt plaintiffs' claims.[81] Here, as in *MTBE*, preemption posed a profound risk to the plaintiffs' case. If the *Vioxx* defendants had awaited an appellate court ruling and if

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[73] *In re* Methyl Tertiary Butyl Ether Prods. Liab. Litig. (*MBTE*), 725 F.3d 65, 91, 130 (2d Cir. 2013).

[74] *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1354 (J.P.M.L. 2005).

[75] *Id.* at 788–89.

[76] *In re* Vioxx Prods. Liab. Litig., 523 F. Supp. 2d 471, 472 (E.D. La. 2007).

[77] *See* Notice of Appeal at 1, *In re* Vioxx Prods. Liab. Litig., No. 07-30897 (5th Cir. Sept. 14, 2007).

[78] Alex Berenson, *Merck Agrees to Settle Vioxx Suits for $4.85 Billion*, N.Y. TIMES (Nov. 9, 2007), https://www.nytimes.com/2007/11/09/business/09merck.html.

[79] *See* Entry of Dismissal at 1, *In re* Vioxx Prods. Liab. Litig., No. 07-30897 (5th Cir. Apr. 18, 2008).

[80] Wyeth v. Levine, 555 U.S. 555, 581 (2008) (rejecting drug manufacturer's preemption argument and affirming jury verdict in favor of plaintiffs).

[81] *Id.*

the appellate court had eliminated that risk, the value of the settlement would likely have been much higher.

MTBE and *Vioxx* show that when defendants settle cases before resolution of an appeal, they may obtain better settlement terms than they would afterwards. Of course that is true. What is less obvious is what the Proponents' reliance on *MTBE* and *Vioxx* suggests: that representatives of corporations may misperceive reality. The Proponents—attorneys for corporations—seem to think appellate review would have benefited the *MBTE* and *Vioxx* defendants, but the evidence suggests the opposite. That smacks of cognitive bias. It is the kind of thinking that could cause those same attorneys to pursue unwise interlocutory appellate review on behalf of their clients. It also could cause them to champion a new rule allowing interlocutory appellate review even though it would in fact harm their clients on the whole. Sophisticated clients and lawyers are not immune to cognitive bias. None of us are.

VI. CONCLUSION

The corporations that tend to find themselves defending legal actions and the attorneys who represent them seem at times to take contradictory positions. First, they claim that procedural reforms that increase the expense and duration of litigation would benefit both them and society. The Proposal discussed in this Essay appears to be one such procedural reform. But there are plenty of others. Consider recent efforts at modifying class procedure. Corporate defendants have argued that class actions should involve full-blown *Daubert* inquiries[82] and bifurcation, trifurcation, or other chopping up of discovery and trial.[83] They have also sought at the class certification stage ever deeper exploration of the merits and, correlatively, ever more expensive expert reports[84] and evidentiary hearings that require many hundreds of hours of attorney time and hundreds of thousands of dollars in expert costs.[85] These procedural changes, corporate defendants and their lawyers assert, will

[82] *See, e.g.*, Am. Honda Motor Co. v. Allen, 600 F. 3d 813, 814–15 (7th Cir. 2010) (requiring the district court to conduct a full-blown *Daubert* inquiry as part of class certification if the expert testimony is relevant to establishing any of the Rule 23 requirements); *In re* Capacitors Antitrust Litig., No. 14-cv-03264-JD, 2020 WL 870927, at *1–2 (N.D. Cal. Feb. 21, 2020) (ruling that full-blown *Daubert* analysis applies at class certification).

[83] *See, e.g.*, *In re* Roundup Prods. Liab. Litig., 358 F. Supp. 3d 956, 958 (N.D. Cal. 2019) (bifurcating, at defendants' request, the issue of general and specific causation).

[84] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008) (explaining that before certifying a class, the district court should "resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties"); *Am. Honda Motor Co.*, 600 F.3d at 819 (requiring pre-certification *Daubert* inquiry).

[85] *See, e.g.*, *In re* Capacitors Antitrust Litig., No. 14-cv-03264, 2020 WL 870927, at *2 (N.D. Cal. Feb. 21, 2020) (ruling on *Daubert* after holding "hot tub" proceeding in which plaintiffs and defense experts answered questions from the court with limited attorney

improve the system and serve the interests of corporate defendants. That is true even though they increase the expense of litigating class actions.

Second, those same corporate defendants complain that the ever-increasing cost of class litigation forces them to settle even meritless litigation, an argument that gained traction in *Twombly*. The prospect of expensive, disruptive, protracted litigation, they argue, has an *in terrorem* effect. They complain, in other words, about the consequences of the very procedural reforms for which they advocate.

There is a resulting riddle: why do they lobby for procedural reforms that they claim harm them? It has various possible solutions. One may lie in somehow reconciling these competing claims as both being true. How to do so is not obvious.

Another is to disregard the second claim—that protracting litigation harms corporate defendants. It may be that adding to the expense and duration of litigation actually confers a strategic *benefit* on corporate defendants, even though they have claimed the contrary in requesting other procedural reforms, such as a heightened pleading standard. Corporate defendants might falsely assert the second claim because they are cynical. Or, as we have suggested, they might do so in good faith and in error. Motivated cognition can explain why they would do so.

Motivated cognition supports another possibility as well. It may be that the first claim is wrong—that adding to cost and delay in litigation *harms* corporate defendants—at least in many circumstances. If so, the Proposal we discuss in this Essay provides a possible example of a procedural reform that could damage them—so might various recent and potential modifications to class procedure noted above. And the apparent inconsistency of corporate defendants and their counsel in advocating for these procedural reforms may be explained by cognitive bias. That possibility, we submit, is at least worth entertaining.

participation); *In re* Packaged Seafood Prods. Antitrust Litig., 332 F.R.D. 308, 318 (S.D. Cal. 2019) (holding evidentiary hearing with expert testimony for class certification at defendants' request).

APPENDIX 1: AFFIRMANCE RATE OF MDL TRANSFEREE JUDGES

Our search is based on data available as of May 7, 2019. To identify all multidistrict litigation proceedings, we used two reports published by the Judicial Panel on Multidistrict Litigation ("JPML"):

- "MDL Statistics Report – Distribution of Pending MDL Dockets by Actions Pending"[86] as of April 15, 2019; and
- "Multidistrict Litigation Terminated Through September 30, 2018,"[87] the most recent data available as of April 15, 2019.

We reviewed this data to identify all MDLs that met the following four criteria:

- Large – More than 500 total actions;
- Recent – MDL created in last 20 years and either still open or terminated in the last five years;
- Mature – Either terminated or open with more than 70% of the cases resolved; and
- Personal Injury – MDL primarily involved claims of personal injury caused by a product.

The 37 MDLs (17 terminated and 20 still open) that met all four criteria are listed in Table I.

Table I. Thirty-seven pending or recently-terminated MDLs, identified as of April 15, 2019, that satisfied all four of the selection criteria: large, recent, mature, personal injury.

MDL No.	Name
MDL 1431	Baycol Prods. Liab. Litig.
MDL 1871	Avandia Mktg., Sales Practices & Prods. Liab. Litig.
MDL 1964	Nuvaring Prods. Liab. Litig.
MDL 2158	Zimmer Durom Hip Cup Prods. Liab. Litig.
MDL 2187	C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.
MDL 2197	DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.
MDL 2243	Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)
MDL 2272	Zimmer NexGen Knee Implant Prods. Liab. Litig.

[86] *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (2019), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-April-15-2019.pdf.

[87] *Multidistrict Litigation Terminated Through September 30, 2018*, S. JUD. PANEL MULTIDISTRICT LITIG. (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2018.pdf.

MDL 2325	Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.
MDL 2326	Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.
MDL 2327	Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.
MDL 2329	Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.
MDL 2331	Propecia (Finasteride) Prods. Liab. Litig.
MDL 2387	Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig.
MDL 2391	Biomet M2a Magnum Hip Implant Prods. Liab. Litig.
MDL 2419	New England Compounding Pharmacy, Inc., Prods. Liab. Litig.
MDL 2428	Fresenius GranuFlo/NaturaLyte Dialysate Prods. Liab. Litig.
MDL 2433	E. I. du Pont de Nemours & Co. C-8 Prods. Liab. Litig.
MDL 2440	Cook Medical, Inc., Pelvic Repair Sys. Prods. Liab. Litig.
MDL 1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.
MDL 1507	Prempro Prods. Liab. Litig.
MDL 1657	Vioxx Prods. Liab. Litig.
MDL 1742	Ortho Evra Prods. Liab. Litig.
MDL 1760	Aredia® & Zometa Prods. Liab. Litig.
MDL 1789	Fosamax Prods. Liab. Litig.
MDL 1842	Kugel Mesh Hernia Patch Prods. Liab. Litig.
MDL 1909	Gadolinium-Based Contrast Dyes Prods. Liab. Litig.
MDL 1928	Trasylol Prods. Liab. Litig.
MDL 1943	Levaquin Prods. Liab. Litig.
MDL 1953	Heparin Prods. Liab. Litig.
MDL 2004	Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.
MDL 2092	Chantix (Varenicline) Prods. Liab. Litig.
MDL 2299	Actos (Pioglitazone) Prods. Liab. Litig.
MDL 2342	Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.
MDL 2385	Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.
MDL 2434	Mirena IUD Prods. Liab. Litig.
MDL 2502	Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)

We then conducted searches on Lexis between April 25, 2019 and April 30, 2019 to attempt to identify all cases in which a court of appeals reviewed a decision by the MDL judge in any of these 37 MDLs.[88] This search identified 115 decisions by MDL courts that were reviewed on the merits by a circuit court or the Supreme Court. See Table II.

In these appellate opinions (which are summarized below):

- The circuit court affirmed the MDL court in 100 of the 115 cases (87%).
- The circuit court partially affirmed and partially reversed or vacated the MDL court's decision in 3 of the 115 cases (3%).
- The circuit court reversed the MDL court in 12 of the 115 cases (10%).

Table II. Appellate court review outcomes in the 37 previously identified pending or recently-terminated personal injury MDLs as of April 2019.

MDL No.	Case Name	Appeals	Affirmed	Reversed	Partially Affirmed / Reversed
MDL 1431	Baycol Prods. Liab. Litig.	8	3	3	2
MDL 1871	Avandia Mktg., Sales Practices & Prods. Liab. Litig.	10	9	1	0
MDL 2187	C.R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.	1	1	0	0
MDL 2243	Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)	2	1	1	0
MDL 2272	Zimmer NexGen Knee Implant Prods. Liab. Litig.	1	1	0	0
MDL 2326	Bos. Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.	2	2	0	0
MDL 2327	Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.	2	2	0	0

[88] We attempted to find all opinions by using search terms that included, in the disjunctive, the MDL number (e.g., "MDL-2272"), the case number (e.g., "MD-2272"), and variations of the MDL case name (*e.g.*, "NexGen" or "*In re* Zimmer"). We recognize that we may not have found all opinions if an opinion did not contain the MDL number or the MDL case number or if the name of the MDL was misspelled or otherwise was not accurate in the opinion. For example, if an individual case was appealed and the circuit court opinion did not mention or reference the MDL case name or number, we could have missed that opinion (although our use of broad search terms such as "NexGen" should have found any case that involved this product even if it did not mention the MDL case number). Because of the large number of cases in our study and because any missed cases likely would have the same affirmance rate as those that we found, we do not believe that any missed cases would significantly impact our conclusions.

MDL 2391	Biomet M2a Magnum Hip Implant Prods. Liab. Litig.	1	1	0	0
MDL 1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.	39	38	1	0
MDL 1507	Prempro Prods. Liab. Litig.	5	4	1	0
MDL 1657	Vioxx Prods. Liab. Litig.	14	14	0	0
MDL 1742	Ortho Evra Prods. Liab. Litig.	1	1	0	0
MDL 1760	Aredia® & Zometa Prods. Liab. Litig.	6	6	0	0
MDL 1789	Fosamax Prods. Liab. Litig.	3	3	0	0
MDL 1909	Gadolinium-Based Contrast Dyes Prods. Liab. Litig.	1	1	0	0
MDL 1928	Trasylol Prods. Liab. Litig.	5	5	0	0
MDL 1943	Levaquin Prods. Liab. Litig.	2	1	0	1
MDL 1953	Heparin Prods. Liab. Litig.	1	1	0	0
MDL 2004	Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.	5	1	4	0
MDL 2342	Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.	1	1	0	0
MDL 2385	Pradaxa (Dabigatran Etexilate) Products Liability Litigation	2	1	1	0
MDL 2434	Mirena IUD Prods. Liab. Litig.	2	2	0	0
MDL 2502	Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig. (No. II)	1	1	0	0
	TOTALS	115	100	12	3
			86.9%	10.4%	2.6%

APPENDIX 2: TIME TO APPELLATE COURT DECISION AFTER INTERLOCUTORY REVIEW GRANTED

On April 22, 2019, we searched Lexis for all opinions referencing "1292(b)." We filtered the results to include only those cases decided by a circuit court between January 1, 2018 and December 31, 2018. This search returned 94 results.

We reviewed each of the 94 opinions to identify those that met the following criteria:

- the district court certified an order for interlocutory review pursuant to § 1292(b);
- the circuit court accepted the order for interlocutory review; and
- the circuit court issued an opinion deciding the interlocutory order.

Twenty-five cases met these criteria; 69 cases did not. The 69 cases that did not meet these criteria included a citation to § 1292(b) but it did not provide the jurisdictional basis for the circuit court to issue a decision on the merits.

In the 25 cases that did meet these criteria, the average time that elapsed between the district court entering the order subject to interlocutory review and the circuit court filing a decision on the appeal was 23 months. The shortest time was 10 months and the longest time was 43 months. See Table III.

Table III: Cases with an appellate interlocutory decision in 2018 and the time to decision.

Case Name	Circuit	Court of Appeals Decision	District Court Decision	Months
Crystallex Int'l Corp. v. Petróleos de Venez., S.A. 879 F.3d 79	3d Cir.	1/3/2018	9/30/2016	15.3
Lester v. Exxon Mobil Corp., 879 F.3d 582	5th Cir.	1/9/2018	10/23/2014	39.1
Gov't Emps. Ins. Co v. Tri-Cty. Neurology & Rehabilitation LLC, 721 F. App'x 118	3d Cir.	1/10/2018	12/4/2015	25.6
Galilea, LLC v. AGCS Marine Ins. Co., 879 F.3d 1052	9th Cir.	1/16/2018	4/5/2016	21.7
Batterton v. Dutra Grp., 880 F.3d 1089	9th Cir.	1/23/2018	12/15/2014	37.8
Mineworkers' Pension Scheme v. First Solar Inc., 881 F.3d 750	9th Cir.	1/31/2018	8/11/2015	30.2
Barahona v. Union Pac. R.R., 881 F.3d 1122	9th Cir.	2/6/2018	6/7/2016	20.3
Santomenno v. Transamerica Life Ins. Co., 883 F.3d 833	9th Cir.	2/23/2018	3/14/2016	23.7

Olympic Forest Coal. v. Coast Seafoods Co., 884 F.3d 901	9th Cir.	3/9/2018	6/3/2016	21.5
A.D. v. Credit One Bank, N.A., 885 F.3d 1054	7th Cir.	3/22/2018	8/19/2016	19.3
Drummond Co. v. Conrad & Scherer, LLP, 885 F.3d 1324	11th Cir.	3/23/2018	1/22/2016	26.4
Breuder v. Bd. of Trustees of Cmty. College District No. 502, 888 F.3d 266	7th Cir.	4/17/2018	3/3/2017	13.7
Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 723 F. App'x 224	4th Cir	5/24/2018	11/30/2015	30.2
Petersen Energía Inversora S.A.U. v. Argentine Republic, 895 F.3d 194	2d Cir.	7/10/2018	9/9/2016	22.3
Reading Health Sys. v. Bear Stearns & Co., 900 F.3d 87	3d Cir.	8/7/2018	2/1/2016	30.6
Thompson v. Cope, 900 F.3d 414	7th Cir.	8/14/2018	9/25/2017	10.8
Taksir v. Vanguard Grp., 903 F.3d 95	3d Cir.	9/4/2018	5/26/2017	15.5
Nwanguma v. Trump, 903 F.3d 604	6th Cir.	9/11/2018	8/9/2017	13.3
Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127	3d Cir.	9/27/2018	3/7/2017	19.0
Penn. Dep't of Envtl. Protection v. Trainer Custom Chemical, LLC, 906 F.3d 85	3d Cir.	10/5/2018	8/30/2016	25.5
Hicks v. State Farm Fire & Casualty Co., 751 F. App'x 703	6th Cir.	10/15/2018	3/25/2015	43.3
Hernandez v. Results Staffing, Inc., 907 F.3d 354	5th Cir.	10/24/2018	9/1/2017	13.9
Barron v. Am. Family Mutual Ins. Co., 741 F. App'x 451	9th Cir.	10/29/2018	4/27/2017	18.3
Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Security, 908 F.3d 476	9th Cir.	11/8/2018	1/9/2018	10.1
Nat'l Assoc. of African Am.-Owned Media v. Charter Commc'ns, Inc., 908 F.3d 1190	9th Cir.	11/19/2018	10/24/2016	25.2