NOTES & COMMENTS

MULTIDISTRICT LITIGATION AND PERSONAL JURISDICTION

by
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Under the Fourteenth Amendment's Due Process Clause, a court cannot lawfully adjudicate a party's rights or obligations unless, among other things, that court possesses sufficient personal jurisdiction over the party. The means by which a court may obtain such jurisdiction have grown increasingly narrow in recent years. Parallel to that trend has been the meteoric rise of multidistrict litigation (MDL), in which the Judicial Panel on Multidistrict Litigation transfers and consolidates numerous civil cases in a single federal court that, in many instances, lacks personal jurisdiction over one or more parties. Although MDL is statutorily limited to "pretrial proceedings," 97% of cases transferred into MDL do not make it to trial. By one estimate, 52% of civil cases in federal court are in MDLs. Consequently, nearly half of the federal civil docket is being resolved by courts that lack personal jurisdiction.

With MDL's share of the federal civil docket increasing, and Fourteenth Amendment personal jurisdiction doctrine tightening, it is only a matter of time before litigants begin mounting constitutional challenges to the jurisdictional competency of MDL courts. Those challenges will largely be premised on Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), and* Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Courts facing such claims have several options. This Note discusses the most prominent options and argues that the best path forward for courts is to interpret the MDL statute, 28 U.S.C. § 1407, as authorizing nationwide personal*

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jurisdiction in MDL courts. Many disapprove of that interpretation. But it is supported by the text, function, and purpose of the statute. Moreover, it is the only option that avoids the pitfalls of Fourteenth Amendment personal jurisdiction doctrine, puts current practice on solid legal ground, and preserves the benefits of MDL.

I. MULTIDISTRICT LITIGATION

Multidistrict litigation (MDL) is a form of complex litigation in which civil actions pending in multiple federal district courts are transferred by the United States Judicial Panel on Multidistrict Litigation (the Panel)[1] to a single district court for consolidated pretrial proceedings. It is estimated that between 39% and 52% of the cases in the federal civil docket are part of MDLs.[2] In the 50 years since Congress enacted the MDL statute, 28 U.S.C. § 1407, it has been used in over 1,950 dockets

[1] The Panel is composed of seven federal judges appointed by the Chief Justice of the United States. 28 U.S.C. § 1407(d) (2012).

[2] Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1168 (2018) (MDL cases comprise "nearly 40 percent of the cases on the federal civil docket"); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017) (MDLs comprise 39% of federal docket); Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload (MDLs comprise 52% of federal docket).

"involving more than 250,000 cases and literally millions of claims."[3] Yet current civil procedure textbooks average only two pages on the subject.[4] Indeed, the first comprehensive MDL guide for academics and practitioners was not released until this year.[5]

Multidistrict litigation was created as a means to preserve judicial resources.[6] Under the MDL statute, civil actions may be transferred and consolidated if they share "one or more common questions of fact" and the Panel finds that MDL proceedings will "be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the] actions."[7] By consolidating cases that involve similar facts, MDL streamlines discovery and allows one judge to resolve pretrial issues that would otherwise demand attention from numerous judges. Moreover, because MDL courts approve settlements and grant dispositive motions, a single judge may resolve thousands of cases at once.

Transfer into MDL proceedings may be initiated by a plaintiff, a defendant, or the Panel.[8] Parties receive notice of potential transfer and are provided the opportunity to oppose transfer, including a hearing before the Panel.[9] If the Panel decides that MDL is appropriate, it selects a district court and judge to oversee the MDL.[10] Once those have been selected, the Panel orders each case to be transferred from their original district courts (the transferor courts) to the MDL court (the transferee court) for pretrial proceedings.[11] Once transfer is ordered, each transferor court's jurisdiction ceases and they cannot rule on pending motions.[12] Following MDL proceedings, the cases are remanded to their transferor courts. However, remand is mostly theoretical because "less than 3 percent of the cases ever exit the MDL

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[3] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2229–30 (2008).

[4] Gluck, *supra* note 2, at 1672; Mark A. Hill, Note, *Opening the Door for Bias: The Problem of Applying Transferee Forum Law in Multidistrict Litigation*, 85 NOTRE DAME L. REV. 341, 341 (2009) ("In truth multidistrict litigation . . . is one of the legal world's best kept secrets.").

[5] ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL (2020).

[6] Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 97 (2019) (The "primary goal" of the MDL statute's drafters "was to provide a mechanism to efficiently process the rapidly growing number of mass claims they feared would engulf the federal courts.").

[7] 28 U.S.C. § 1407(a) (2012).

[8] *Id.* § 1407(c).

[9] *Id.*

[10] For information about the Panel's selection criteria, see KLONOFF, *supra* note 5, at 109–44.

[11] 28 U.S.C. § 1407(a).

[12] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 496 (J.P.M.L. 1968).

court."[13] In most MDLs, the transferee court either disposes of the claims or authorizes a settlement.[14]

Multidistrict litigation has been characterized as having "an inherent[ly] split personality."[15] On one hand, litigants have individualized claims. Unlike a class action, each MDL plaintiff files their own claim(s), retains their own counsel, and decides whether to opt-in to proposed settlements. Once MDL proceedings finish, remaining claims are remanded for individualized trials. On the other hand, each MDL plaintiff loses a considerable amount of control over his or her claim(s) for the duration of the MDL: they are transferred across the country, their attorneys are sidelined by the court's appointment of lead attorneys, and, if remand happens, they are generally bound to the rulings of the MDL court.

Surprisingly, MDL has received minimal attention from the Supreme Court. To date, the Court has held that when an individual case within MDL is terminated the parties can appeal as if the case were not part of the MDL.[16] The Court has also stated that MDL transfers are "not limited by general venue statutes."[17] Finally, the Court has overruled itself on the issue of whether transferee courts can grant venue transfer motions, concluding most recently that they cannot.[18]

II. THE PROBLEM: MDL AND FOURTEENTH AMENDMENT PERSONAL JURISDICTION

Multidistrict litigation raises unique concerns.[19] Chief among them is the question of how transferee courts possess sufficient personal jurisdiction[20] to bind parties. Whether a federal district court has personal jurisdiction generally turns on

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[13] Bradt, *supra* note 2, at 1169; *see also* Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 36 (2018).

[14] Bradt, *supra* note 2, at 1169.

[15] Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1296 (2018).

[16] Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 904 (2015).

[17] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 39 n.2 (1998).

[18] *Compare* Illinois Brick Co. v. Illinois, 431 U.S. 720, 763 (1977) ("After pretrial transfers under [§ 1407], cases can be consolidated and transferred to the same district for trial pursuant to the transfer power under § 1404(a)."), *with Lexecon*, 523 U.S. at 28 ("The issue here is whether a district court conducting . . . 'pretrial proceedings' [under § 1407(a)] may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority.").

[19] *See, e.g.*, Bradt & Rave, *supra* note 6, at 76–77 (discussing the controversial practice of transferee courts authorizing settlements); Hill, *supra* note 4, at 342 (arguing that application of transferee forum law to decide federal questions creates room for bias in application of circuit-specific answers to split-circuit questions).

[20] Throughout this Note, "personal jurisdiction" refers to in personam jurisdiction, (i.e., jurisdiction over an individual) and not in rem jurisdiction or quasi-in rem jurisdiction.

state law.[21] Exceptions exist, such as statutes that authorize nationwide personal jurisdiction[22] or the "bulge provision" of the Federal Rules of Civil Procedure (FRCP),[23] but, in most instances, the personal jurisdiction of a federal court is tied to the law of the state in which that court sits. Because state law is, in turn, governed by the Fourteenth Amendment's Due Process Clause, federal courts are generally bound to the limits of personal jurisdiction under that clause. But, as discussed in this Section, MDL allows federal courts to exceed those limits with regard to both defendants and plaintiffs.[24]

A. Defendants

Under the Fourteenth Amendment, a court may exercise personal jurisdiction over a defendant if:

(i) the defendant consents; or
(ii) the defendant is "at home" in the state in which the court sits;[25] or
(iii) the defendant is physically served with process in that state;[26] or
(iv) under *International Shoe*[27] and its progeny:
    (1) there are sufficient "minimum contacts" between the defendant, the claim(s) at issue, and the state in which the court sits;[28] and

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[21] Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 105 (1987); *see also* FED. R. CIV. P. 4(k)(1); Daniel Klerman, Walden v. Fiore *and the Federal Courts: Rethinking FRCP 4(k)(1)(a) and* Stafford v. Briggs, 19 LEWIS & CLARK L. REV. 713, 714–15 (2015).

[22] *Accord* Dodson, *supra* note 13, at 41 n.237 (2018) (collecting statutes); *see, e.g.*, Federal Arbitration Act, 9 U.S.C. § 9 (2012); Sherman Act, 15 U.S.C. § 5 (2012); Trust Indenture Act of 1939, 15 U.S.C. § 77vvv (2012); Clayton Act, 15 U.S.C. § 22 (2012); Securities Act of 1933, 15 U.S.C. § 77v (2012); Securities Act of 1934, 15 U.S.C. § 78aa (2012); Investment Company Act of 1940, 15 U.S.C. § 80a-43 (2012); Investment Advisers Act of 1940, 15 U.S.C. § 80b-14 (2012); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1965 (2012); Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1608 (2012); Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(e)(2) (2012); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921 (2012); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9613 (2012); Railroad Unemployment Insurance Act, 45 U.S.C. § 362 (2012).

[23] FED. R. CIV. P. 4(k)(1)(B).

[24] *See* Bradt, *supra* note 2, at 1226 (stating that MDL appears to be on a "collision course" with Fourteenth Amendment personal jurisdiction).

[25] Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011).

[26] Burnham v. Superior Court of Cal., 495 U.S. 604, 628 (1990).

[27] Int'l Shoe v. State of Washington, 326 U.S. 310 (1945).

[28] Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1781 (2017) ("[F]or a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place

(2) it is reasonable to subject the defendant to litigation in that state.[29]

General personal jurisdiction usually exists in one or two states, and specific jurisdiction usually exists in, at most, a handful of states. Accordingly, for any given claim, a defendant can only be sued in a small number of states. Yet the Panel does not consider personal jurisdiction when selecting transferee courts.[30] Defendants can therefore be forced to litigate in courts that lack jurisdiction over them. For example, one study reveals that of 59 products liability MDLs formed between 2011 and 2015 general personal jurisdiction was lacking for at least one defendant in 47.[31] Because of the limited nature of specific jurisdiction, it is highly unlikely that the courts overseeing those 47 MDLs possessed specific jurisdiction over every defendant.[32]

Bristol-Myers Squibb Co. v. Superior Court of California further illuminates the issue. There, over 650 plaintiffs filed suit in California state court for injuries caused by the defendant's pharmaceutical drug.[33] But only 86 of those plaintiffs acquired the drug and were damaged by it in California.[34] Because the claims of the other plaintiffs had no connection to the state or to the defendant's conduct in the state, the Supreme Court held that California courts lacked specific jurisdiction.[35] Moreover, because California lacked general jurisdiction over the defendant, those plaintiffs had to litigate their claims elsewhere.[36]

Bristol-Myers Squibb is illustrative because the barrier it establishes does not apply in MDL. If the dismissed plaintiffs had filed in federal courts in different federal districts, then moved for transfer into MDL, the Panel could have transferred their claims to a federal district court in California. The transferee court would still lack personal jurisdiction, but it could nonetheless dispose of the claims. By allowing federal courts to bind defendants despite a lack of personal jurisdiction, MDL runs afoul of *Bristol-Myers Squibb* and violates the Fourteenth Amendment.

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in the forum State.'" (alteration in original) (quoting *Goodyear*, 564 U.S. at 919)).

[29] *Id.* at 1780; *see also* Daimler AG v. Bauman, 134 S. Ct. 746, 762 n.20 (2014) (explaining two-step inquiry for determining specific personal jurisdiction).

[30] *See, e.g.*, *In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers . . . are simply not encumbered by considerations of in personam jurisdiction . . . ."); Heyburn, *supra* note 3, at 2227–28 ("Congress gave the Panel broad powers to transfer . . . without consideration for personal jurisdiction over the parties . . . ."); *id.* at 2237 ("The Panel does not consider the legal or factual strength of a given case, nor does it consider the likely outcome of pending jurisdictional motions . . . .").

[31] Bradt, *supra* note 2, at 1220–21.

[32] *Id.* at 1221.

[33] *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.

[34] *Id.* at 1781.

[35] *Id.* at 1782.

[36] *Id.* at 1783; *see also* Bradt & Rave, *supra* note 15, at 1253.

B. Plaintiffs

Courts generally have personal jurisdiction over plaintiffs because plaintiffs consent to jurisdiction when they file their claims.[37] This explains the overwhelming focus on defendants in personal jurisdiction case law. But MDL allows the Panel to force plaintiffs to litigate in courts that they did not select.[38] Although courts may exercise personal jurisdiction over plaintiffs without direct consent, MDL violates the means by which they may do so.

The Supreme Court in *Phillips Petroleum Co. v. Shutts* explained how a court may wield personal jurisdiction over a plaintiff notwithstanding a lack of direct consent. There, a Kansas state court certified a class action involving 33,000 plaintiffs.[39] Before the Supreme Court, the issue was whether the Kansas court could exercise personal jurisdiction over non-representative plaintiffs in the class that had no contacts with Kansas.[40] The Court held that the state court could exercise personal jurisdiction over those absent plaintiffs because (1) each absent plaintiff received notice and "an opportunity to be heard and participate in the litigation, whether in person or through counsel"; (2) each absent plaintiff was provided with "an opportunity" to obtain removal from the class; and (3) representative plaintiffs adequately represented the interests of the absent plaintiffs.[41]

Because of *Shutts*, we know that plaintiffs are protected by Fourteenth Amendment personal jurisdiction doctrine to "*some* degree," though the scope of that protection remains unsettled.[42] The three conditions established in *Shutts* represent the "minimal procedural due process protection" required to safeguard the interest of absent class action plaintiffs.[43] Because MDL plaintiffs are actively involved in litigation, and because they are subject to counterclaims and default judgments,[44] they

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[37] Bradt, *supra* note 2, at 1221; Scott Dodson, *Plaintiff Personal Jurisdiction and Venue Transfer*, 117 MICH. L. REV. 1463, 1466 (2019).

[38] *See, e.g.*, *In re* Zostavax (Zoster Vaccine Live) Prods. Liab. Litig., 330 F. Supp. 3d 1378, 1378–79 (J.P.M.L. 2018) (transferring 57 actions to the U.S. District Court for the Eastern District of Pennsylvania notwithstanding the opposition of plaintiffs in 30 actions to centralization and, alternatively, those plaintiffs' selection of other courts); *see also* Dodson, *supra* note 37, at 1467 (MDL creates a scenario where "the plaintiff is subjected, against their will, to the adjudicatory authority of a new court whose jurisdiction the plaintiff did *not* invoke").

[39] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 801 (1985).

[40] *Id.* at 806.

[41] *Id.* at 812. The Court later reaffirmed those conditions in Ortiz v. Fibreboard Corp., 527 U.S. 815, 848 n.24 (1999).

[42] Dodson, *supra* note 37, at 1468–69 (emphasis altered); *Shutts*, 472 U.S. at 810–12 (stating that "minimal procedural due process protection" extends even to plaintiffs that are "not required to do anything").

[43] *Shutts*, 472 U.S. at 811–12.

[44] Dodson, *supra* note 37, at 1479. *Shutts* tied the lower level of due process protections for absent class action plaintiffs to the fact that those plaintiffs do not risk the "pain of default

should receive greater due process protections than absent class action plaintiffs. Yet MDL does not satisfy *Shutts*. Because transferee courts often appoint lead attorneys and steering committees to manage the MDL, plaintiffs lose significant control over the litigation unless their attorneys are appointed.[45] Furthermore, plaintiffs cannot opt out of MDL.[46] And there is no standard for ensuring that the attorneys appointed by the transferee court adequately represent the interests of all MDL plaintiffs.[47] Altogether, those features compel the conclusion that "MDL plaintiffs are even worse off than absent class members under *Shutts*."[48] By allowing federal courts to bind non-consenting plaintiffs despite failing to provide the safeguards mandated by *Shutts*, MDL violates the Fourteenth Amendment.

III. FIXING THE PROBLEM: A FORK IN THE ROAD

Federal courts conducting MDLs will increasingly face challenges rooted in personal jurisdiction. Multidistrict litigation's share of the federal civil docket appears to be increasing,[49] and federal courts are already split on how to conceptualize

judgment." *Shutts*, 472 U.S. at 809.

[45] Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1263 (2017) ("As a practical matter, in an MDL, only a small number of court-appointed lawyers on the 'plaintiffs' steering committee' will make the key strategic decisions and lead the negotiations with the defendant, with little to no input from the claimants or even from lawyers on the periphery."); Bradt, *supra* note 2, at 1207 ("The ultimate success of plaintiffs' cases . . . is mostly determined by the conduct of [appointed] lawyers, over whom any individual plaintiff has little control."); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 133 (2015) ("In MDL, individual litigants, for all practical purposes, lose a substantial degree of control over the procedural fate of their claims.").

[46] Bradt, *supra* note 2, at 1223; Bradt & Rave, *supra* note 15, at 1299 ("MDL plaintiffs are stuck in the MDL forum until the MDL judge determines that pretrial proceedings are over and lets them go."); Redish & Karaba, *supra* note 45, at 132 ("The Panel's transfer orders are mandatory, one-way tickets to transferee districts—black holes. They are non-transferrable and non-negotiable." (quotation marks and citation omitted)).

[47] Redish & Karaba, *supra* note 45, at 140 (MDL grants discretion to the transferee judge to select lead attorneys "with no formal, open, and adversary participation by th[e] claimants" and "the lawyers on the court-appointed steering committee . . . take over . . . without the protective assurances of their adequacy, good faith, or the extent to which the interests of the absent litigants truly overlap."). Moreover, the level of oversight provided by the transferee court is also subject to unfettered discretion. Bradt, *supra* note 2, at 1223 ("It is true that the court has discretion to exercise oversight over the steering committee, but not all courts do, and when they do, they do not employ the exacting criteria of a class action."). Transferee courts also lack explicit standards for approving global settlements, which raises questions because MDL can involve varying claims involving federal and state laws. Indeed, it is somewhat controversial that transferee courts even approve settlements. Bradt & Rave, *supra* note 45, at 1263.

[48] Bradt & Rave, *supra* note 15, at 1299.

[49] *See supra* note 2.

MDL's compliance with personal jurisdiction requirements.[50] Although MDL could be deemed unconstitutional,[51] that is highly unlikely.[52] Consequently, federal courts and, eventually, the Supreme Court will need to find a satisfactory means of addressing the jurisdictional problems outlined above. This Section discusses the prominent options and argues why the best path forward is for courts to interpret the MDL statute as authorizing nationwide personal jurisdiction.

A. Option 1: Adopt the Panel's Derivative Jurisdiction Approach

The U.S. Judicial Panel on Multidistrict Litigation has long reasoned that the personal jurisdiction of a transferee court derives from the personal jurisdiction of transferor courts. That is, so long as the transferor court had sufficient personal jurisdiction, the transferee court does as well. One option for transferee courts addressing personal jurisdiction challenges, then, is to adopt that derivative jurisdiction approach.

The Panel established the derivative jurisdiction approach in *In re Plumbing Fixture Cases*. There, a plaintiff agreed to be transferred into MDL proceedings but requested that portions of the pretrial proceedings continue in the transferor court.[53] Relevant here, the Panel analogized MDL transfers to transfers under 28 U.S.C. § 1404(a), stating that a transfer into MDL is a "change of venue for pretrial purposes."[54] Because a court that receives a transfer under § 1404(a) possesses jurisdiction "coextensive with that of the transferor court,"[55] the Panel reasoned that a MDL transferee court similarly has jurisdiction equal to that of the transferor court. Therefore, so long as the transferor court has personal jurisdiction, the transferee court

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[50] *Compare In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), *and* Howard v. Sulzer Orthopedics, 382 F. App'x 436 (6th Cir. 2010), *with In re* Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings, 136 F. Supp. 3d 968 (N.D. Ill. 2015).

[51] *See* Bradt & Rave, *supra* note 15, at 1319 (The Supreme Court "could find grounds for doing so by raising the arguments against the scope of MDL's jurisdiction that have been ignored for the last fifty years."); Redish & Karaba, *supra* note 45, at 115 ("MDL is unconstitutional.").

[52] Courts are unlikely to hold that MDL is unconstitutional for two reasons. First, undoing MDL would place incredible burdens on the federal judiciary. By one estimate, MDL constitutes 52% of the civil federal docket. Simpson, *supra* note 2. MDLs can involve thousands of cases, so disaggregating them would mean having those actions be treated for individualized resolution before numerous district judges. Second, voiding MDL would void one of the most successful collaborative efforts of the tripartite branches of the federal government. MDL was created through a joint effort of the federal judiciary and Congress and was signed into law by President Johnson. And the Chief Justices of the United States Supreme Court have appointed the Panel's membership for five decades. Holding MDL unconstitutional would negate 50 years of fruitful cooperation to preserve limited judicial resources.

[53] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 486 (J.P.M.L. 1968).

[54] *Id.* at 495.

[55] *Id.*

does too. Because the transferor court in *Plumbing Fixture Cases* had personal jurisdiction, the Panel denied the request and transferred the case in its entirety into MDL. Following *Plumbing Fixture Cases*, the Panel has routinely rejected personal jurisdiction challenges aimed at transferee courts.[56]

Some federal courts have adopted the Panel's approach.[57] For example, in *In re ClassicStar Mare Lease Litigation*, the U.S. District Court for the Eastern District of Kentucky granted the defendant's motion to dismiss for lack of personal jurisdiction because there were not sufficient contacts between the defendant and Utah, where the litigation commenced.[58] More federal courts could likewise adopt the Panel's approach. But there are two reasons why they should not.

First, adopting the Panel's approach requires courts to blind themselves to practical reality. The Panel's approach is rooted in MDL's status as a temporary mechanism. But only three percent of cases are remanded following MDL.[59] For 97% of transferred cases, MDL is permanent. The Supreme Court,[60] a former Panel chair,[61] and commentators[62] uniformly acknowledge the reality that transferee courts overwhelmingly resolve cases. A court should not close its eyes to a readily apparent truth, nor its ears to a chorus repeating that truth. Moreover, ignoring reality invites further challenges from litigants dissatisfied with the legal fiction of MDL's temporary effect on cases.

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[56] *See, e.g.*, *In re* RAH Color Tech. LLC Patent Litig., 347 F. Supp. 3d 1359, 1360 n.5 (J.P.M.L. 2018) (stating that a party's objection to a certain transferee court "based on a lack of personal jurisdiction is no obstacle to transfer under Section 1407 for pretrial proceedings"); *see also In re* Helicopter Crash Near Wendle Creek, British Columbia, on Aug. 8, 2002, 542 F. Supp. 2d 1362, 1363 (J.P.M.L. 2008); *In re* Sinking of the Motor Vessel Ukola, 462 F. Supp. 385, 387 (J.P.M.L. 1978); *In re* FMC Corp. Patent Litig., 422 F. Supp. 1163, 1165 (J.P.M.L. 1976); *In re* Sugar Indus. Antitrust Litig., 399 F. Supp. 1397, 1400 (J.P.M.L. 1975); *In re* King Res. Co. Sec. Litig., 385 F. Supp. 588, 589–90 (J.P.M.L. 1974); *In re* Gypsum Wallboard, 302 F. Supp. 794, 794 (J.P.M.L. 1969).

[57] *See, e.g.*, Parthasarathy v. RS Inv. Mgmt., LP, No. JFM 04-3798, 2005 WL 4146020 (D. Md. Nov. 5, 2005); *In re* Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 297 (3d Cir. 2004).

[58] *In re* ClassicStar Mare Lease Litig., No. 5:07-cv-353-JMH, 2008 WL 3077732, at *1–4 (E.D. Ky. Aug. 1, 2008).

[59] Bradt, *supra* note 2, at 1169; *see also* Dodson, *supra* note 13, at 36.

[60] Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 905 n.6 (2015) ("In fact, '[f]ew cases [consolidated pursuant to § 1407] are remanded for trial; most multidistrict litigation is settled in the transferee court.'" (quoting MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004) (alteration in original)).

[61] Heyburn, *supra* note 3, at 2231 ("In most instances, cases are resolved (through settlement or otherwise) in the transferee court.").

[62] *See, e.g.*, Gluck, *supra* note 2, at 1673 ("[I]t is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.").

Second, the Panel's approach raises significant Fourteenth Amendment concerns. For one, the approach assumes that a plaintiff's consent to litigate in one court constitutes consent to litigate in any federal court. That is a dramatic and questionable extension of consent. Furthermore, the Panel's approach unnecessarily increases the burdens of litigation for defendants. Because transfer is generally ordered without regard for motions pending in transferor courts,[63] and because the Panel's transfer order renders transferor courts without jurisdiction to rule on pending motions,[64] defendants can be forced to litigate their motions to dismiss for lack of personal jurisdiction in transferee courts. A case that would ordinarily be dismissed fairly quickly thus becomes a cross-country litigation journey.

The defendant's litigation journey also includes an additional stop, unique to MDL, that adds further burdens. When the Panel issues a notice of proposed transfer, the parties may file an opposition to transfer and obtain a hearing.[65] Failure to respond to the notice constitutes acquiescence to transfer,[66] so defendants are highly incentivized to respond. Hearings are held at various locations around the country.[67] Because arguments about personal jurisdiction are irrelevant,[68] defendants contesting transfer must brief and prepare oral argument on entirely new issues: is MDL warranted under the statute and, if so, where should the cases be transferred? If the transferee court thereafter determines that the transferor court lacked personal jurisdiction, the increased costs and burdens incurred by the defendant were wholly unnecessary. The defendant is in the same legal position as if the MDL transfer had not occurred; however, they have a substantially higher bill as a result of litigating new issues before the Panel and the original issue before a new court. A transferor court's lack of jurisdiction is a discernible fact, but the Panel's approach stretches the timeline for ascertaining that fact and passes the bill onto defendants.[69] The

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[63] KLONOFF, *supra* note 5, at 95–96.

[64] *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 496 (J.P.M.L. 1968) ("[A]fter an order changing venue the jurisdiction of the transferor court ceases; and that thereafter the transferor court can issue no further orders, and any steps taken by it are of no effect.").

[65] R. P. J.P.M.L. 11.1(c).

[66] R. P. J.P.M.L. 6.1(c), 7.1(d), 8.1(c).

[67] The Panel is headquartered in Washington D.C., but it travels around the country every two months for hearings. Heyburn, *supra* note 3, at 2235. For the Panel's hearing schedule, see *Hearing Information*, U.S. JUD. PANEL MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/hearing-information (last visited Mar. 21, 2020).

[68] *See* Heyburn, *supra* note 3, at 2227–28 ("Congress gave the Panel broad powers to transfer . . . without consideration for personal jurisdiction over the parties."); *id.* at 2237 ("The Panel does not consider the legal or factual strength of a given case, nor does it consider the likely outcome of pending jurisdictional motions . . . ."); *see also supra* note 56.

[69] For example, if an Idahoan defendant was sued in the Northern District of California, which lacked personal jurisdiction, and the Panel issued a show cause order for transfer, the defendant could be compelled to travel to New Orleans (or another distant metropolis) to argue about transfer and thereafter travel to New York to argue the personal jurisdiction issue. If the

Supreme Court has emphasized that the "primary concern" of Fourteenth Amendment personal jurisdiction is "the burden on the defendant."[70] Under the Panel's approach, MDL still burdens defendants.

In theory, the above burdens could be avoided if, when a motion to dismiss is pending in a transferor court, the Panel postponed its transfer decision until the motion was resolved. The Panel has done so before.[71] But doing so would impede the function and goals of MDL, as individual cases get delayed in district courts across the country instead of forming a streamlined MDL.

B. Option 2: Require Personal Jurisdiction in Transferee Courts

Professor Scott Dodson argues that courts could interpret the MDL statute as requiring personal jurisdiction in transferee courts.[72] Under Dodson's approach, the statute's requirement that transfer into MDL "promote the just and efficient conduct" of the underlying actions[73] can be read to require that transferee courts possess personal jurisdiction because "transfer to a court that lacks personal jurisdiction cannot be just."[74]

Dodson's approach is a cure nearly as lethal as the disease. If the Panel must ensure personal jurisdiction in transferee courts, then the Panel's choice of transferee courts may be curtailed to the point of extinction. The Panel could only transfer to courts that have sufficient jurisdiction over every plaintiff and defendant for every claim. Depending on the situation, that state may not exist or it may not be appropriate for MDL.[75]

Tag-along actions[76] exacerbate the problem. If a tag-along action is suitable for transfer, but the transferee court lacks sufficient personal jurisdiction over it, transfer would have to be denied. Cases that would ordinarily be aggregated would need to

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New York court dismisses the case, the defendant unnecessarily incurred the costs of a cross-country litigation journey.

[70] Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1780 (2017).

[71] *See, e.g.*, *In re* Kaehni Patent, 311 F. Supp. 1342, 1344 (J.P.M.L. 1970) ("A motion to dismiss, filed by . . . the defendant in an action pending in the Northern District of Ohio, is presently pending before that court. Transfer of that action to the District of Maryland will be stayed; if the motion is granted, there of course will be no transfer but if the motion is denied, the stay will be immediately lifted and the action transferred to the District of Maryland.").

[72] Dodson, *supra* note 37, at 1484.

[73] 28 U.S.C. § 1407(a) (2012).

[74] Dodson, *supra* note 37, at 1482.

[75] For example, in a situation involving several corporate defendants located throughout the country, the only state with sufficient personal jurisdiction over all of them may be Delaware, assuming each corporation is incorporated there. But if the relevant evidence and witnesses were located in the Midwest and the West Coast, Delaware would not be an appropriate forum.

[76] A tag-along action is an action that is not originally considered by the Panel for transfer into MDL but is later deemed suitable for transfer into the existing MDL.

be pursued either individually or in an additional MDL.[77] Either way, the purpose of MDL would be undercut as more cases clog the federal courts and discovery efforts, and orders, are duplicated.[78]

Additionally, Dodson's approach would fundamentally alter the Panel's transfer process in an incredibly burdensome way. Whether transfer is appropriate currently turns on the standards set forth in the MDL statute. If the Panel also had to ensure that transferee courts satisfied personal jurisdiction, it would have to conduct a personal jurisdiction analysis for each state that would otherwise be suitable to conduct the MDL. That would heavily burden both the Panel and litigants. Moreover, because the Panel does not have jurisdiction beyond transferring cases, the Panel's determination of personal jurisdiction would not have binding effect—the transferee court could ultimately disagree and dismiss the transferred claims for lack of personal jurisdiction.

C. Option 3: Alter Fourteenth Amendment Personal Jurisdiction Doctrine

Another option, available to the Supreme Court, is to modify Fourteenth Amendment personal jurisdiction doctrine. If MDL constitutes 52% of the federal civil docket[79] and it is truly irreconcilable with Fourteenth Amendment due process, then the practical need for MDL may compel a reassessment.

Professor Abbe Gluck argues that multidistrict litigation represents "unorthodox civil procedure" and that its rise "may be a sign of deeper pressures on the traditional model of procedure."[80] That is, current personal jurisdiction requirements may be poorly suited for the modern world. The growth of nationwide, multinational, and international business has led to an attendant growth in aggregate claims,[81] and MDL may force the Supreme Court to "pay attention" to the tension

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[77] For example, imagine several products liability cases have been transferred to a federal district court in New York. Another batch of cases involves the same defendants as those in the pending MDL, but they also include a retailer that only operates in California. If the New York court lacked personal jurisdiction over the California defendant, the Panel would have to either create an additional MDL for cases involving that defendant or not consolidate those cases.

[78] For judges' perspectives on the problem of duplicative discovery and the significance of MDL in eliminating the problem, see Gluck, *supra* note 2, at 1682–83.

[79] Simpson, *supra* note 2.

[80] Gluck, *supra* note 2, at 1709–10.

[81] *Id.* at 1686; *see also id.* at 1683–84 ("Early MDLs focused on isolated incidents, such as airline crashes and 'common disaster[s].' Prior to 1990, only *six* products liability actions had been consolidated into MDLs. As of December 2016, however, it was those very cases that had taken over the docket. Products liability actions had the largest share of consolidated proceedings on the MDL docket, at 29.1%. Moreover, each product liability MDL tends to have many more individual cases consolidated within it than other types of MDLs, meaning that products liability actions dominate the MDL docket. Antitrust was second, at 22.5% of the docket. This shift is consistent with the understanding that modern MDLs are motivated by the way companies now

between those changes and current doctrinal limitations.[82] That tension will increase over time, giving the Court ample opportunity to modify personal jurisdiction doctrine.

It seems unlikely that the Court will radically reshape personal jurisdiction doctrine. Its recent opinions, such as *Bristol-Myers Squibb*, have affirmed the course taken so far. But MDL nonetheless presents a standing invitation for the Court to reexamine personal jurisdiction under the Fourteenth Amendment.

D. Option 4: Interpret § 1407 as Authorizing Nationwide Personal Jurisdiction

Finally, courts could hold that the MDL statute authorizes nationwide personal jurisdiction in transferee courts and that such jurisdiction is permissible under the Fifth Amendment's Due Process Clause.[83] That is the best option because it effectuates the text, purpose, and operation of the statute. Moreover, that interpretation places current practice on more solid legal ground without necessitating changes in current law.

1. Interpreting the MDL Statute

The plain text of 28 U.S.C. § 1407(a) and (b) establishes that MDL transferee courts possess nationwide personal jurisdiction. Section 1407(a) provides that actions in MDL will not be remanded if they "have been previously terminated."[84] Termination binds parties, precludes future litigation, and gives rise to immediate appealability.[85] Because transferee courts are able to terminate actions, Congress must have intended for those courts to have sufficient jurisdiction to bind parties. Therefore, § 1407(a) evidences an implicit grant of personal jurisdiction to transferee courts. And because any federal district court can be a transferee court, the

do business on a national scale—and so the harm they inflict affects potential plaintiffs across the country." (footnotes omitted)). Increasing economic nationalization has thus led to an increasing use of MDLs as well as an increasing use of MDLs for nationwide claims. With increasing restrictions being imposed on class actions, litigants will continue to turn to multidistrict litigation at a greater pace as a means of securing aggregate relief. Bradt & Rave, *supra* note 15, at 1256–57.

[82] Gluck, *supra* note 2, at 1710.

[83] A related option under the Fifth Amendment's Due Process Clause would be for courts to hold that federal courts implicitly have nationwide personal jurisdiction. *See* Jonathan Remy Nash, *National Personal Jurisdiction*, 68 EMORY L.J. 509 (2019). But that approach is imprudent because it strongly conflicts with current law. The jurisdiction of federal courts is generally tied to the laws of the states in which they sit under FRCP 4. Moreover, Congress has explicitly provided for nationwide personal jurisdiction in federal courts in various statutes, which would be superfluous if federal courts implicitly had such jurisdiction. Another Fifth Amendment option is proposed by Professor Andrew Bradt. *See* Bradt, *supra* note 2, at 1228–37.

[84] 28 U.S.C. § 1407(a) (2012).

[85] Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 905 (2015) (recognizing that the transferee court ruled "on the merits of the case, . . . completed its adjudication of petitioners' complaint and terminated their action," which made the claim appealable).

statute must authorize personal jurisdiction nationwide.

Section 1407(b) provides that transferee judges "may exercise the powers of a district court judge in any district for the purpose of conducting pretrial depositions."[86] That provision authorizes transferee courts to compel discovery from third parties located in other states. For example, a transferee court in Pennsylvania can enforce subpoenas issued by courts in Florida and Georgia against non-parties located there.[87] That function has been recognized by the Supreme Court.[88] Ordinarily, courts must have personal jurisdiction over non-parties to enforce orders against them.[89] Section 1407(b) therefore authorizes transferee courts to exercise nationwide personal jurisdiction over non-parties to a limited extent.

Reading § 1407(a) and (b) together, it is apparent that Congress granted nationwide personal jurisdiction to transferee courts for parties, with similar jurisdiction extending to non-parties for a more limited purpose. In addition to the textual support, that understanding complies with the purpose of multidistrict litigation and the current practice of transferee courts.

Commentators generally oppose the nationwide jurisdiction interpretation.[90] The most prominent criticism is that Supreme Court jurisprudence "demands both a clear statement that Congress intends nationwide jurisdiction and a service-of-

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[86] 28 U.S.C. § 1407(b).

[87] *In re* Sunrise Sec. Litig., 130 F.R.D. 560, 585–86 (E.D. Pa. 1989).

[88] Pillsbury Co. v. Conboy, 459 U.S. 248, 251 n.3 (1983) ("Chief Judge John V. Singleton, Jr., of the District Court for the Southern District of Texas expressly exercised the powers of the District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1407(b).").

[89] Dodson, *supra* note 37, at 1470 ("[C]ourts adhere to personal-jurisdiction principles in contempt proceedings and in enforcing discovery matters, especially against nonparties."); *see, e.g.*, Gucci Am., Inc. v. Bank of China, 768 F.3d 122, 134 (2d Cir. 2014) ("[A] district court can enforce an injunction against a nonparty . . . only if it has personal jurisdiction over that nonparty."); Elec. Workers Pension Tr. Fund of Local Union #58 v. Gary's Elec. Serv. Co., 340 F.3d 373, 378 (6th Cir. 2003) (discussing two views of how to establish personal jurisdiction over non-parties for contempt proceedings); *In re* Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998) (transferring a motion to quash a subpoena could be problematic because the transferee court "would often lack personal jurisdiction over the nonparty"); United States. v. Kirschenbaum, 156 F.3d 784, 794 (7th Cir. 1998) ("A district court may not enjoin non-parties who are neither acting in concert with the enjoined party nor are in the capacity of agents, employees, officers, etc. of the enjoined party."); United States v. Barnette, 129 F.3d 1179, 1185 n.10 (11th Cir. 1997) ("Non-parties, despite a court's initial lack of personal jurisdiction, 'may be subject to that court's jurisdiction if, with actual notice of the court's order, they actively aid and abet a party in violating that order.'" (quoting Waffenschmidt v. MacKay, 763 F.2d 711, 714–17 (5th Cir. 1985))).

[90] *See, e.g.*, Bradt, *supra* note 2, at 1173; Bradt & Rave, *supra* note 15, at 1297–98; Dodson, *supra* note 37, at 1474; Dodson, *supra* note 13, at 35.

process regime to support it"[91] because "Congress knows how to authorize nationwide service of process and when it wants to provide for it."[92] In *BNSF Railway Co. v. Tyrrell*, the Court stated that "Congress' typical mode of providing for the exercise of personal jurisdiction has been to authorize service of process . . . because, absent consent, a basis for service of a summons the defendant is prerequisite to the exercise of personal jurisdiction."[93] Section 1407 contains a notice provision[94] but provides nothing about service. That is why plaintiffs cannot file claims directly into an MDL unless the transferee court has independent jurisdiction or the defendant expressly consents.[95] Other arguments against the nationwide jurisdiction interpretation exist,[96] but the most prominent is that the rules of statutory interpretation prohibit such an interpretation. That argument is on poor footing, however. Multidistrict litigation transfers pending cases, so service of process is typically completed before transfer is ordered. Including a provision for service of process in the MDL statute would therefore be superfluous. And where transfer predates effective service,[97] transferee courts have jurisdiction to oversee service.[98]

The Panel also disagrees with the nationwide jurisdiction interpretation.[99] But the Supreme Court has previously overruled the Panel's understanding of the MDL

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[91] Bradt, *supra* note 2, at 1227; *see also* Dodson, *supra* note 37, at 1474; Dodson, *supra* note 13, at 35.

[92] Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987).

[93] BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1555–56 (2017) (citations omitted).

[94] 28 U.S.C. § 1407(c) (2012).

[95] Bradt & Rave, *supra* note 15, at 1298; Dodson, *supra* note 37, at 1475. For more information about direct filing, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012).

[96] *See, e.g.*, Bradt, *supra* note 2, at 1173–74; Dodson, *supra* note 37, at 1471–75; Dodson, *supra* note 13, at 35.

[97] That practice was blessed by the Panel in *In re* Library Editions of Children's Books, 299 F. Supp. 1139, 1141 (J.P.M.L. 1969).

[98] The MDL statute does not explicitly address the ability of transferee courts to oversee service. But transferee courts have exclusive jurisdiction over cases following transfer, *In re* Plumbing Fixture Cases, 298 F. Supp. 484, 495–96 (J.P.M.L. 1968), and the Panel has held that, where transfer predates effective service, service must still be conducted in accordance with the rules of the transferor court. *In re Library Editions of Children's Books*, 299 F. Supp. at 1142. Accordingly, transferee courts must have jurisdiction to oversee service.

[99] *In re Library Editions of Children's Books*, 299 F. Supp. at 1142 ("Congress, possessing nationwide sovereignty and plenary power over the jurisdiction of the federal courts, has given no indication that, in creating 1407, it intended to expand the territorial limits of effective service."); Bradt, *supra* note 2, at 1211 (arguing that *Library Editions* does not stand "for the proposition that the MDL statute authorizes nationwide service of process. Nor could it.").

statute,[100] and some federal courts have held that MDL authorizes nationwide jurisdiction.[101] Most importantly, the text and operation of the MDL statute evidence Congress's grant of nationwide personal jurisdiction.

2. Fifth Amendment Due Process

Interpreting the MDL statute as authorizing nationwide personal jurisdiction removes MDL from the confines of the Fourteenth Amendment's Due Process Clause and places it within the unsettled scope of the Fifth Amendment's Due Process Clause. Accordingly, MDL no longer risks colliding with the rules established in *Bristol-Myers Squibb* and *Shutts*. Instead, the primary issue becomes whether the statute's grant of nationwide jurisdiction complies with the Fifth Amendment.[102]

The parameters of personal jurisdiction under the Fifth Amendment's Due Process Clause are currently unknown. In *Bristol-Myers Squibb*, the Supreme Court explicitly "le[ft] open the question [of] whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court" that the Fourteenth Amendment imposes on state courts.[103] But the following considerations compel the conclusion that MDL's grant of nationwide personal jurisdiction is likely constitutional under the Fifth Amendment.

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[100] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) ("The issue here is whether a district court conducting . . . 'pretrial proceedings' [under § 1407(a)] may invoke § 1404(a) to assign a transferred case to itself for trial. We hold it has no such authority."); Courtney E. Silver, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the* Lexecon *Result*, 70 OHIO ST. L.J. 455, 461–62 (2009) ("[B]etween 1968 and 1998 . . . [i]t was common . . . for many cases transferred under § 1407 to remain in the transferee district for trial. Transferee judges frequently entered orders for permanent transfer of these cases under 28 U.S.C. § 1404(a) or 1406. . . . The Panel enacted its own procedural rules that provided for self-transfer. . . . [I]t was more common that the action remain[ed] in the transferee district than be remanded to its originating district . . . ." (footnotes omitted)).

[101] *See, e.g.*, Howard v. Sulzer Orthopedics, Inc., 382 F. App'x 436, 442 (6th Cir. 2010); *In re* Auto. Parts Antitrust Litig., No. 12-md-02311, 2015 WL 897857, at *4 (E.D. Mich. Mar. 2, 2015).

[102] Bradt, *supra* note 2, at 1173–74 ("[I]f one concludes that the MDL statute *does* authorize a kind of national jurisdiction, then it is one that truly tests the outer limits of due process . . . ."); Bradt & Rave, *supra* note 15, at 1297 ("[T]he question is whether the unique kind of consolidation in an MDL is an acceptable exercise of federal power under the Due Process Clause of the Fifth Amendment.").

[103] Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1784 (2017); *see also* Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 113 n.* (1987) ("We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits."); Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 102–03 n.5 (1987) (citing *Asahi* and stating the same).

First, Congress has repeatedly enacted statutes granting nationwide jurisdiction,[104] and there is a strong consensus supporting Congress's authority to do so.[105]

Second, MDL furthers myriad federal interests that cumulatively outweigh the interests of individual litigants. Most evidently, MDL preserves limited judicial resources. For example, in one MDL, the Panel transferred 186,723 cases to one court over a 13-year period.[106] It is difficult to overestimate how many judicial resources were saved by that MDL alone. This preservation engenders more than just efficiency; it keeps the courts accessible. Each case transferred into MDL creates space on a federal court docket, which helps prevent the courts from clogging to the point of inaccessibility.[107] Therefore, MDL also furthers the government's strong interest in keeping the courts accessible.

The federal government also has an interest in efficiently resolving large-scale controversies. Cases warranting MDL treatment, particularly products liability cases, often involve damage to individuals or property scattered throughout the country. Such controversies naturally trigger a federal interest in efficient and judicious resolution.[108] If a federal court has subject matter jurisdiction over a case, it follows that the federal interest underlying that jurisdiction is augmented when numerous litigants simultaneously invoke such jurisdiction. Indeed, the MDL statute's standard for transfer could be viewed as the standard for determining if that federal interest is triggered.

Furthermore, the government has an interest in the benefits that individual litigants derive from MDL. For plaintiffs, MDL evens the playing field.[109] Large corporate defendants generally have vast resources, including specialized lawyers, that individual plaintiffs do not have.[110] But because transferee courts appoint lead attorneys to manage the MDL, and those lead attorneys tend to be specialized and

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[104] *See supra* note 22.

[105] Nash, *supra* note 81, at 522; *see also* Bradt, *supra* note 2, at 1172; Bradt & Rave, *supra* note 15, at 1298; Dodson, *supra* note 37, at 1471; Dodson, *supra* note 13, at 40 ("[C]ommentators nearly uniformly agree that the Constitution permits federal courts to exercise nationwide personal jurisdiction based upon a national contacts test."); *see also* Jon Heller, Note, *Pendent Personal Jurisdiction and Nationwide Service of Process*, 64 N.Y.U. L. REV. 113, 126 (1989). *See generally In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987).

[106] *MDL-875, IN RE: Asbestos Products Liability Litigation Cumulative Totals*, U.S. JUD. PANEL MULTIDISTRICT LITIG. https://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.jun30.2019.pdf (last visited May 7, 2020).

[107] Bradt, *supra* note 2, at 1229 (MDL prevents a "litigation explosion" that "would both threaten the legitimacy of the federal courts and make perpetual backlog a weapon for better-resourced defendants").

[108] *Id.* at 1230 (MDL "recognize[s] a national interest in resolving cases of national scope").

[109] Bradt & Rave, *supra* note 6, at 94.

[110] *Id.* at 93.

possess substantial resources,[111] the average quality of representation goes up for plaintiffs. And MDL gives individual plaintiffs strategic leverage unavailable otherwise: the ability to offer defendants the global resolution of claims. Because defendants are "often willing to pay a premium to put the whole litigation behind them," MDL incentivizes defendants to settle, which can increase the value of individual claims.[112] Through better resources, better lawyering, and better leverage, plaintiffs in MDL can achieve better outcomes than they would get in individual litigation. Defendants benefit as well. Instead of facing numerous cases throughout the country, defendants in MDL enjoy a streamlined discovery process and the stronger possibility of efficiently securing global peace.

On balance, the federal government's interests in preserving judicial resources, maintaining court accessibility, and resolving large-scale controversies in a fair and efficient manner outweigh the individual litigant's interest in not undergoing MDL.

Professor Martin Redish and Julie Karaba disagree, arguing that the balance of interests favors individual litigants.[113] Focusing on plaintiffs, they argue many of the problems discussed in Section II: the forced nature of MDL, the loss of control, and the inability to opt out. But those burdens do not outweigh the benefits of MDL. Plaintiffs are better off with access to courts than without. Moreover, plaintiffs can avoid MDL, if they so desire, because they can abstain from filing causes of action that give rise to federal subject matter jurisdiction. It may be argued that, by seeking relief under federal statutes or in a manner that gives rise to federal jurisdiction, plaintiffs consent to adjudication in federal court in accordance with federal procedure. Although there are constitutional limits on the procedures that may be employed—for example, the outcome of cases cannot be decided by coin toss—MDL does not exceed those limits. Plaintiffs still participate throughout MDL proceedings, even if in a diminished fashion. They are not forced into settlements and, if they elect not to settle, they can ask their transferor courts to revisit the decisions of the transferee court on remand. If their case is terminated during MDL proceedings, they can appeal individually. Thus, while plaintiffs are surely burdened by MDL, those burdens do not rise so high as to unconstitutionally deprive plaintiffs of their Fifth Amendment due process rights.

Balancing the interests of individual litigants and the federal government is not a scientific exercise. But the scales tip in favor of MDL's constitutionality. The negative effects of MDL on the interests of individual litigants is mitigated by the benefits that MDL bestows on those litigants. On balance, that mitigated negative must be outweighed by the substantial positives MDL effectuates in terms of federal interests and societal benefits.

Third, the MDL statute requires that the Panel select transferee courts that

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[111] *Id.* at 94–95.

[112] *Id.* at 90–91.

[113] Redish & Karaba, *supra* note 45, at 151.

have some connection to the underlying controversies. Professor Andrew Bradt recently asserted that the Fifth Amendment's personal jurisdiction standards are "more relaxed" than the Fourteenth Amendment's standards.[114] As discussed below, the Supreme Court has hinted that such is true. Accordingly, Bradt reads the Fifth Amendment as requiring "an assessment of reasonableness" and the pursuit of "an appropriate balance . . . between the national interest in efficient resolution of nationwide controversies and the individual's interest in meaningful participation."[115] To preserve that balance, Bradt contends that the Panel should be prohibited from selecting transferee courts that are "unconstitutionally inconvenient" for defendants,[116] too remote from the underlying controversy, or too inaccessible.[117] But that is superfluous. The Panel cannot transfer cases unless doing so would be "for the convenience of the parties and witnesses" and would "promote the just and efficient conduct" of the cases.[118] Satisfying that standard should satisfy Bradt's proposed test. The MDL statute's inherent requirement that the Panel select transferee courts with some connection to the underlying controversy should therefore satisfy the "relaxed standards" of the Fifth Amendment.

Finally, the Supreme Court has hinted that MDL is constitutional under the Fifth Amendment. In *Bristol-Myers Squibb*, the Court ended its near-unanimous opinion by stating that "since our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."[119] The context of those words shed light on how the Court feels about MDL. After holding that several plaintiffs would need to sue in a state that satisfied the Fourteenth Amendment's personal jurisdiction requirements, the Court immediately mentioned that those restrictions might not apply in federal court. That strongly hints that the Court was contemplating the possibility of an MDL.[120] Indeed, the defendant previously argued in its merits brief that while "aggregation of a nationwide set of claims in . . . *state* court was unacceptable, a federal

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[114] Bradt, *supra* note 2, at 1175. Those standards are "more relaxed" because "federal courts are not constrained by state borders, and because federal court action may be justified more easily by a national, federal interest." *Id.*

[115] *Id.* at 1228.

[116] Bradt, *supra* note 2, at 1233.

[117] *Id.* at 1230.

[118] 28 U.S.C. § 1407(a) (2012).

[119] Bristol-Myers Squibb Co. v. Superior Court of Cal., 137 S. Ct. 1773, 1783–84 (2017); *see also* Bradt, *supra* note 2, at 1199 (acknowledging that "federal court jurisdiction remains an open question after *Bristol-Myers*").

[120] Bradt & Rave, *supra* note 15, at 1298 ("[P]erhaps the Court's acknowledgment in *Bristol-Myers* that due process may work differently under the Fifth Amendment than the Fourteenth Amendment signals a receptiveness to MDL."); *id.* at 1257 ("In short, if the plaintiffs want to aggregate after *Bristol-Myers*, they will have to do so on the defendant's terms—either on the

MDL would be just fine."[121] And by the time the case reached the Supreme Court, the defendant had already tried to establish an MDL.[122] By stating that federal courts might not be bound by the holding of *Bristol-Myers Squibb*, the Court showed its inclination to hold MDL as permissible under the Fifth Amendment.

IV. CONCLUSION

Multidistrict litigation is a significant part of the federal civil docket. Yet MDL has only recently started receiving critical attention. This Note places such attention on the disconnect between MDL and the requirements of personal jurisdiction under the Fourteenth Amendment's Due Process Clause. *Bristol-Myers Squibb* and *Shutts* provide fertile ground for litigants to claim that MDL is unconstitutional. If the critical mission of MDL is to continue, federal courts must be prepared to meaningfully address such claims. The best means of doing so is to interpret the MDL statute as authorizing nationwide personal jurisdiction in transferee courts. That interpretation is supported by the text, operation, and purpose of the statute. Moreover, that interpretation avoids the pitfalls of Fourteenth Amendment personal jurisdiction doctrine, puts current practice on solid ground, and preserves the benefits of MDL.

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defendant's home turf or in an MDL.").

[121] *Id.* at 1278 (citing Brief for the Petitioner at 51, *Bristol-Myers*, 137 S. Ct. 1773 (No. 16-466)).

[122] *In re* Plavix Mktg., Sales Practices & Prod. Liab. Litig. (No. II), 923 F. Supp. 2d 1376, 1377 (J.P.M.L. 2013).