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## Plaintiff Control and Domination in Multidistrict Mass Torts

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# PLAINTIFF CONTROL AND DOMINATION IN MULTIDISTRICT MASS TORTS

S. TODD BROWN\*

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#### I. INTRODUCTION

The Supreme Court's recent decisions concerning preclusion doctrine stress the "deep-rooted historic tradition that everyone should have his own day in court."<sup>1</sup> Nonetheless, "properly conducted class actions"<sup>2</sup> are a recognized exception to this general rule because such actions ensure that nonparties are "adequately represented by someone with the same interests who was a party to the suit."<sup>3</sup> Mass torts, however, frequently involve numerous plaintiffs with diverse legal and factual issues that are not "sufficiently cohesive to warrant adjudication by representation."<sup>4</sup> Thus, it may be reasonably feared that the Court's firm insistence on preserving individual

<sup>1</sup> *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (vacating certification of a Title VII gender discrimination class action for lack of "the existence of any common question" across the class); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (certification of a limited fund asbestos class action inappropriate given the numerous individual issues and intra-class conflicts); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (rejecting certification of asbestos class action).

<sup>2</sup> *Taylor*, 553 U.S. at 894 (recognizing six exceptions to the day in court ideal).

<sup>3</sup> *Id.*

<sup>4</sup> *Amchem Prods., Inc.*, 521 U.S. at 623.

autonomy will deny plaintiffs the economies of scale and other benefits of class actions that make it economically viable to advance their claims.<sup>5</sup>

Although repeat players<sup>6</sup> have largely abandoned the mass tort class action, they have effectively modified other aggregative devices to operate in largely the same manner as class actions—so much so that some have characterized them as “quasi-class actions.”<sup>7</sup> Asbestos bankruptcies, for example, are often controlled by one or more of the lawyers who advanced the *Amchem* and *Ortiz* settlement class actions, follow the same basic settlement design, and are otherwise functionally equivalent to the settlements rejected by the Court in those cases.<sup>8</sup> And plaintiffs’ lawyers in these quasi-class actions tend to enjoy substantially all of the leverage and economies of scale as they should expect to find in a class action.

This trend toward converting other forms of aggregation into quasi-class actions is perhaps most evident in federal multidistrict consolidation under 28 U.S.C. § 1407, which has become the most common mechanism for the collective management and settlement of mass tort matters in the last decade.<sup>9</sup> Unlike a class

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<sup>5</sup> See, e.g., Sergio Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059 (2012) (criticizing the Court’s focus on individual autonomy and advancing a deterrence-centered model for evaluating due process in the mass tort setting).

<sup>6</sup> As used herein, the term “repeat players” refers to plaintiffs’ lawyers and other professionals who specialize in aggregate litigation.

<sup>7</sup> Judges and commentators have used the term “quasi-class actions” to liken non-class aggregation to class actions. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006) (“While the settlement in the instant action is in the nature of a private agreement between individual plaintiffs and the defendant, it has many of the characteristics of a class action; it may be characterized properly as a quasi-class action subject to the general equitable power of the court.”); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611-12 (E.D.L.A. 2008) (“[T]he Vioxx global settlement may properly be analyzed as occurring in a quasi-class action, giving the Court equitable authority . . . .”); Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 95, n.22 (2011); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480-81 (1994) (“What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions. . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.”).

<sup>8</sup> Accord Samuel Isacharoff, *Private Claims, Aggregate Rights*, 2009 SUP. CT. REV. 183, 210 (“To the untutored eye, the 524(g) workout looks strikingly similar to the efforts to obtain a judicial imprimatur for work-outs of present and future claims, as were struck down in *Amchem* and *Ortiz*. For good reason, as it appears that way to the tutored eye as well. The practical effect is that an agreement broadly supported by present claimants can be used to cram down the claims not only of dissenting plaintiffs, but of future claimants as well. The bankruptcy work-out includes a Future Claimants Representative who assumes a fiduciary responsibility. But the major difference is that the statutory scheme substitutes an Article I judge for an Article III judge, hardly a stirring form of enhanced protection for the due process interests that are at stake.”).

<sup>9</sup> See, e.g., Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2057 (2011) (“[M]ass tort actions that cannot be litigated as class actions because individual issues of causation and injury predominate over common issues are often aggregated using the MDL device.”); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing*

action, where the wide range of individual issues among prospective class members will often preclude certification,<sup>10</sup> even substantial legal and factual differences among plaintiffs' claims do not preclude consolidation in multidistrict litigation.<sup>11</sup> Rather, the focus is whether transferring and consolidating the cases will serve "the convenience of the parties and witnesses and promote the just and efficient conduct of such actions."<sup>12</sup> The great weakness of section 1407, however, is that it lacks any direct structural mechanism for compelling plaintiffs to act in their collective—as opposed to individual—self-interest, which may either allow defendants to "divide and conquer"<sup>13</sup> the claim pool or preclude favorable settlements from obtaining sufficient support to become final.<sup>14</sup> That said, the absence of such a structural mechanism is more an inconvenience than an insurmountable barrier; repeat players exercise—and continue to build upon—the tools available to them to maintain cohesion and obtain sufficient consent to settle even the most diverse and complex mass tort cases today.

Yet in capturing much of what makes the class action viable, the quasi-class multidistrict tort model also strips plaintiffs of the means of protecting their own interests from overreaching repeat players. Viewed from the perspective of relative power relations, the Court's class action cases that have emphasized the value of preserving the "day in court" involved matters in which repeat players—class counsel, for example—so fully dominated the process that disempowered plaintiffs' interests could not be adequately represented. In the asbestos class actions of the late 1990s, for example, the intrinsic conflicts among current and future class members

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*Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 108 (2010) (marking the growth of the quasi-class action); John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2232 (2008) (Chair of the Judicial Panel of Multidistrict Litigation (JPML) noting transition of some litigants to the MDL process given the limitations on class actions and the growth of open Multidistrict Litigation (MDL) dockets from 161 in 1997 to 297 in 2007).

<sup>10</sup> See, e.g., Benjamin Sachs-Michaels, *The Demise of Class Actions Will Not be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665 (2011); Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure*, 104 NW. U. L. REV. 787, 794 (2010) ("[I]t has become exceedingly difficult to certify a class in the context of a mass tort."); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

<sup>11</sup> See, e.g., *In re Ford Motor Co. Defective Spark Plug & 3-Valve Engine Prods. Liab. Litig.*, 844 F. Supp. 2d 1375 (J.P.M.L. 2012) ("Section 1407 does not require a complete identity or even a majority of common factual issues as a prerequisite to centralization.") (citing *In re Denture Cream Prods. Liab. Litig.*, 624 F. Supp. 2d 1379 (J.P.M.L. 2009)); *In re Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.*, 844 F. Supp. 2d 1371 (J.P.M.L. 2012) (noting that "almost all injury litigation involve questions of causation that are case- and plaintiff-specific" and concluding "[s]uch differences have not been an impediment to centralization in the past"); *In re Zimmer Durom Hip Cup Prods. Liab. Litig.*, 717 F. Supp. 2d 1376, 1378 (J.P.M.L. 2010) (noting that product liability cases usually involve "multiple individualized fact issues," but that does not preclude consolidation).

<sup>12</sup> 28 U.S.C. § 1407(a) (2006).

<sup>13</sup> See, e.g., Sergio Campos, *The Future of Mass Torts . . . and How to Stop it*, 159 U. PA. L. REV. PENNUMBRA 231, 233 (2011).

<sup>14</sup> See *infra* Part III.B.

raised serious doubts that all of the various subclasses' interests would be protected.<sup>15</sup> The quasi-class Multidistrict Litigation (MDL) may ostensibly preserve plaintiffs' rights to exclude themselves from any settlement, but the private mechanisms employed by repeat players to compel consent do no less violence to disempowered plaintiffs' rights than the structural mechanisms found in mandatory class actions.

My objective in this Article is to examine the manner in which repeat player domination is achieved in non-binding global mass tort settlements in multidistrict litigation. Thus, Part II begins with an overview of the rise of the modern mass tort, how these matters are swept into and progress in federal multidistrict litigation, and the structural limits of section 1407 once settlement is reached. Part III addresses the role of repeat players and the tools that lead counsel can employ to effectively foreclose plaintiffs' efforts to obtain resolutions on the merits when they are dissatisfied with the global settlement. Part IV examines the combined effect of the structure of section 1407 and these tools on plaintiffs' rights and the perceived legitimacy of the process. Finally, Part V proposes a distinct model for aggregate governance in multidistrict mass tort litigation that balances the need for cohesion and finality against the need to preserve and enhance plaintiffs' voice and exit options.

## II. MULTIDISTRICT CONSOLIDATION AND THE MODERN MASS TORT

### A. Pretrial Consolidation Under Section 1407

A popular account of the life cycle of a mass tort breaks it into an immature stage, where uncertainty about how courts and juries are likely to resolve the basic legal or medical issues common to all claims remains, and the mature stage, at which a consensus concerning these issues is more or less established. It is fair to characterize a mass tort as mature when "there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions."<sup>16</sup> At this point, "little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted."<sup>17</sup> After a tort matures, parties tend to focus on settlement according to established precedent and practice rather than continued litigation.

At the immature stage, firms will have little guidance for evaluating the risk of success or failure, making the risk of developing a large number of claims substantial.<sup>18</sup> Accordingly, we should expect to see relatively limited investment in client recruiting efforts prior to maturity. Conversely, investment in a given mass tort will accelerate as it approaches and enters into the mature stage because the prospects for success concerning these core items will become less uncertain. The

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<sup>15</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856-58 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-27 (1997).

<sup>16</sup> Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

<sup>17</sup> *Id.*

<sup>18</sup> Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 528, n.12 (2007).

demand for streamlined settlement increases as the volume of claims increases. This, in turn, may lead to an influx of dubious claims.<sup>19</sup>

Although caution may have been the mantra in the 1970s and 1980s, the large-scale client solicitation efforts that once began in earnest only after signs of litigation success begin today within hours of a catastrophic event, announcement of a potential product defect, or other sign that a new mass tort will emerge in the near future.<sup>20</sup> Depending on the specific circumstances of the emerging mass tort, the defendant may first experience anywhere from a few individual lawsuits to a sudden deluge of individual and class actions across the country in the months that follow. Increasingly, however, attorney efforts to build sizeable claim portfolios<sup>21</sup> precede any significant litigation activity once one of these catalysts occurs.<sup>22</sup>

The trend in recent years has been for one or more parties to petition the Judicial Panel on Multidistrict Litigation (JPML) to consolidate facially distinct and geographically diverse cases within a centralized court very early in the tort's life cycle.<sup>23</sup> Absent the constraints of Rule 23,<sup>24</sup> repeat players in the plaintiffs' bar increasingly move for multidistrict consolidation early in the belief that they can obtain consolidation in a friendly transferee court,<sup>25</sup> where they may stand a better

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<sup>19</sup> See, e.g., S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559 (2012) (outlining the manner in which predictability encourages practices that generate specious claims); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 188 (2001) ("In mature mass torts, where there may be a widely-shared understanding of the value of certain types of claims, thousands of lesser-value claims may be resolved en masse according to negotiated schedules of damages that pay little attention to individual claim differences and involve little adversarial litigation."); McGovern, *supra* note 16, at 688.

<sup>20</sup> See LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 253-54 (2011).

<sup>21</sup> The term "claim portfolio" refers to the collective pool of claims controlled by the lawyer. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 533 (2003) ("Regardless of whether plaintiffs' claims are formally aggregated, the lawyer representing many similarly situated clients necessarily handles the litigation on a group basis. In preparing pleadings, conducting discovery, retaining experts, preparing for trial, and negotiating settlement, the lawyer addresses the plaintiffs' claims primarily as a group.").

<sup>22</sup> See Howard M. Erichson, *Aggregation and Settlement of Mass Torts in the Real World: A Rebuttal to the Mandatory Class Actions Idea*, 159 U. PA. L. REV. PENNUMBRA 237, 237-38 (2011).

<sup>23</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006) ("As use of the class action device to aggregate claims has become more difficult, MDL consolidation has increased in importance as a means of achieving final, global resolution of mass national disputes."); see also Interview with Hon. John G. Heyburn, Panel Promotes Just and Efficient Conduct of Litigation (Feb. 2010), available at [http://www.jpml.uscourts.gov/General\\_Info/Third\\_Branch\\_Interviews/The\\_Third\\_Branch\\_-\\_February-2010-Heyburn\\_Interview.pdf](http://www.jpml.uscourts.gov/General_Info/Third_Branch_Interviews/The_Third_Branch_-_February-2010-Heyburn_Interview.pdf) (noting the trend toward centralization under section 1407 and the panel's efforts to shorten the time between the filing of a motion for consolidation and a decision).

<sup>24</sup> FED. R. CIV. P. 23.

chance of obtaining leadership appointments and avoiding unfavorable rulings.<sup>26</sup> Defendants may also favor early consolidation instead of suffering the business disruption and expense of coordinating the defense of multiple cases spread across potentially dozens of jurisdictions.<sup>27</sup>

### B. Selecting Lead Counsel and Managing Dissent

Once the underlying cases are consolidated within a federal MDL, the transferee court will typically focus first on the selection of lead counsel. As the JPML guide for MDL judges notes, “Early organization of the counsel who have filed the various cases is a critical case-management task.”<sup>28</sup> The transferee courts tend to issue pretrial case management orders early in the case and, once appointed, press lead counsel to advance discovery plans promptly. At this point, the court may rule on a broad range of pretrial matters, including discovery disputes, early dispositive motions, and *Daubert*<sup>29</sup> and other evidentiary issues.

The competition for leadership roles in the MDL usually begins before the JPML authorizes consolidation.<sup>30</sup> Repeat players must recruit aggressively<sup>31</sup> and “can spend as much time jockeying for position among their rivals as they do attacking corporate wrongdoers.”<sup>32</sup> Within the relatively small community of repeat players who dominate multidistrict mass tort cases,<sup>33</sup> relationships and understandings are

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<sup>25</sup> The court that is selected to oversee the MDL proceedings is referred to as the “transferee court” to reflect the fact that the cases are transferred to the court for pretrial proceedings consistent with section 1407. Conversely, the courts in which the cases were filed and may be returned upon the conclusion of the MDL proceedings are referred to as the “transferor courts.”

<sup>26</sup> See generally Mark Herrmann, *To MDL or Not to MDL: A Defense Perspective*, 24 LITIG. 43 (1998).

<sup>27</sup> See generally *id.*

<sup>28</sup> FED. JUDICIAL CTR., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR JUDGES* 10 (2011); see also JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., *TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES* 2 (2009), [hereinafter MDL GUIDE], available at [http://www.jpml.uscourts.gov/TenSteps-MDLGuide-2009-Transferee\\_Judges.pdf](http://www.jpml.uscourts.gov/TenSteps-MDLGuide-2009-Transferee_Judges.pdf) (noting that appointment of lead counsel is one of the first and “most important decisions” the MDL judge must make).

<sup>29</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

<sup>30</sup> Gary Wilson et al., *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 108 (2000) (describing contests for steering committee roles as “Washington-styled lobbying”).

<sup>31</sup> See Erichson, *supra* note 22, at 238; Douglas McCollam, *Slick on Slick*, N.Y. TIMES, Nov. 7, 2010, at 44 (“As the term implies, a key to influence in a mass tort is achieving mass. From the moment a cataclysm like BP’s Deepwater Horizon blowout occurs, a trial lawyer is on the clock. How much power he can wield in the expanding litigation is often determined, or at least influenced, by how many clients he has and how quickly he gets to court.”).

<sup>32</sup> McCollam, *supra* note 31, at 44.

<sup>33</sup> See, e.g., L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 172 (2004) (discussing concentration of control by lead firms across different mass torts); Samuel Issacharoff,

formed across cases, altering the manner in which these repeat players manage the case, assign potentially lucrative common benefit work and negotiate settlement terms. Although these appointments are technically within the discretion of the judge overseeing the MDL,<sup>34</sup> the participating firms and lawyers frequently enjoy considerable influence in the selection.<sup>35</sup> In some cases, participants will agree to the entire composition of the steering committee and iron out any objections before presenting a list to the judge.<sup>36</sup> Alternatively, the judge may make the initial steering committee and other leadership appointments without deferring to the lawyers involved but leave the final decisions concerning specific work assignments in the MDL to be worked out among counsel.<sup>37</sup>

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“Shocked”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1928 (2002) (“The plaintiffs’ market operates through an elaborate referral system that concentrates cases in the hands of a small number of repeat-player firms.”); Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When it’s Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 216-17 (1999) (“Finally, mass tort victims benefit from joint representation because, through the referral process, their claims tend eventually to be handled by the most-qualified lawyers, those who have specialized in their specific type of litigation. As an illustration, we need look only to the familiar example of the asbestos cases, which have now been consolidated in the hands of no more than approximately twenty law firms around the country that devote most of their resources to asbestos litigation and are highly proficient at handling asbestos-related injury claims.”); Herrman, *supra* note 26, at 47 (“Particularly in mass tort MDLs, there are certain prominent lawyers who are named repeatedly to the plaintiffs’ steering committees.”).

<sup>34</sup> Over time, the *Manual For Complex Litigation* has shifted from suggesting control over selection for lead counsel by “parties having a common interest” to encouraging judges to take “an active part in making decisions on the appointment of counsel.” See MANUAL FOR COMPLEX LITIGATION (FIRST) §§ 1.92, 4.53 (1982) (stating that “Lead counsel are chosen by the groups of parties having a common interest”; in “exceptional circumstances” or when the parties fail to choose, courts may do so); MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.224 (1985) (advising judges to oversee appointment of steering committees); MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 20.222, 20.224 (1995) (recommending that judges take “an active part in making the decisions on the appointment of counsel”); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.244 (2004) (same).

<sup>35</sup> For example, as the *Wall Street Journal* explained in the Toyota MDL:

Judge Selna will have the final say on which lawyers will take the lead in the case. Judges usually allow lawyers to first duke it out among themselves, then rely on a slate presented to them. Judge Selna has appointed three interim lead attorneys who have put together a slate of lawyers to take the lead after a series of attorney meetings in a Newport Beach, Calif., restaurant, a Chicago hotel and a Las Vegas casino to fight for positions.

Dionne Searcey, *Lawyers Wrestle Over Driver's Seat in Litigation Against Toyota*, WALL ST. J., May 5, 2010, at A1.

<sup>36</sup> *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 787 F. Supp. 2d 1358 (J.P.M.L. 2011).

<sup>37</sup> See Order No. 5, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145 (C.D. Cal. 2010).

A critical objective at this stage is to ensure that the lawyers work together and advance the collective interests of the claim pool in a cohesive fashion.<sup>38</sup> This goal is advanced, in part, by assigning key leadership roles to influential repeat players and providing them with largely unfettered control over the proceedings.<sup>39</sup> It is reinforced by judicial control over the purse strings—judges overseeing multidistrict litigation routinely order a percentage of the fees lawyers earn from the case set aside to pay for the costs incurred by lead and other counsel in connection with the MDL.<sup>40</sup> After the fund is established, the court typically asks lead counsel (or a special committee comprised of attorneys who have served in the MDL) to recommend allocations to the lawyers who have worked on the case. The transferee court, of course, has final say over any allocations from the fund. Thus, as others have noted previously, the lawyers and firms involved have strong incentives to avoid appearing disruptive or uncooperative.<sup>41</sup>

### C. Discovery, Bellwether Trials, and Settlement Framing

Efficient discovery and consistency of pretrial rulings are central to purpose of section 1407, and the transferee judge has broad discretion in designing the discovery plan.<sup>42</sup> In complex matters involving both common and distinct issues, transferee judges frequently adopt staggered discovery plans that appear to both prioritize discovery into core matters first and allow for adaptation in future stages to account for discoveries in earlier stages.<sup>43</sup> Pursuing multiple lines of discovery at once is, of course, permissible, but doing so may not be viewed as efficient at the outset, particularly in cases that are consolidated shortly after the triggering event gave rise to the action.

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<sup>38</sup> Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 2000 (2011) (discussing this focus is geared toward advancing global settlement and works against advancing cases for actual trial).

<sup>39</sup> See, e.g., *id.* at 1986.

<sup>40</sup> Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 *VAND. L. REV.* 107, 109 (2010).

<sup>41</sup> See, e.g., *id.* at 109-10 (“In practical effect, MDL judges are lead lawyers’ clients. Fee-related concerns also cause non-lead lawyers to fear MDL judges, who take from them the money lead lawyers receive. By challenging an MDL judge, a non-lead lawyer must be willing to risk retribution in the form of a heavy fee tax. Because judges leave the size of forced fee transfers open until litigation ends, obedience is the prudent course for non-lead lawyers until an MDL formally concludes—or even longer when non-lead lawyers have cases in other MDLs being handled by the same judge.”). Likewise, those who attempt to undermine lead counsel outside of court may suffer because judges increasingly request input on fee allocation decisions from the lead lawyers in the case. See *In re Diet Drugs Prods. Liab. Litig.*, No. 99-20593, 2002 WL 32154197, at \*23 (E.D. Pa. Oct. 23, 2002) (MDL 1203) (collecting cases).

<sup>42</sup> See, e.g., *In re Celotex Corp. “Technifoam” Prods. Liab. Litig.*, 424 F. Supp. 1077 (J.P.M.L. 1977).

<sup>43</sup> See, e.g., Order No. 5, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145 (C.D. Cal. 2010) (MDL 2151) (“It is expected that discovery on foundational issues during Phase I will enable the parties to develop a more narrowly tailored discovery plan for subsequent phases of this litigation and to be more focused, economical and efficient in subsequent phases of discovery.”).

Following discovery, MDL courts frequently schedule a series of bellwether trials rather than remand the cases to the forums from whence they came.<sup>44</sup> The purpose is not to achieve global finality through trial; indeed, such an approach exceeds the limits of the ostensibly pretrial work of the MDL court.<sup>45</sup> Rather, these trials are intended “to provide meaningful information and experience to everyone involved in the litigations.”<sup>46</sup> And Judges Fallon, Grabill and Wynne recently explained:

Bellwether trials thus assist in the maturation of any given dispute by providing an opportunity for coordinating counsel to organize the products of pretrial common discovery, evaluate the strengths and weaknesses of their arguments and evidence, and understand the risks and costs associated with the litigation. Indeed, the utilization of bellwether jury trials can enhance and accelerate the MDL process in two key respects. First, bellwether trials allow coordinating counsel to hone their presentation for subsequent trials and can lead to the development of “trial packages” for use by local counsel upon the dissolution of MDLs. Second, and perhaps more importantly, bellwether trials can precipitate and inform settlement negotiations by indicating future trends, that is, by providing guidance on how similar claims may fare before subsequent juries.<sup>47</sup>

Ideally, then, bellwether trials will not merely accelerate global resolution; rather, global settlement will occur because they effectively accelerate the perceived maturity of the litigation.<sup>48</sup>

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<sup>44</sup> Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571, 609 (2012).

<sup>45</sup> See, e.g., *In re Hanford Nuclear Reservation Litig.*, 497 F.3d 1005, 1025 (9th Cir. 2007) (“We recognize that the results of the Hanford bellwether trial are not binding on the remaining plaintiffs.”); *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1199 (10th Cir. 2000) (“There is no indication in the record before us that the parties understood the first trial would decide specific issues to bind subsequent trials.”); *In re TMI Litig.*, 193 F.3d 613, 725 (3d Cir. 1999) (“Absent a positive manifestation of agreement by Non-Trial Plaintiffs, we cannot conclude that their Seventh Amendment right is not compromised by extending a summary judgment against the Trial Plaintiffs to the non-participating, non-trial plaintiff.”); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 318 (5th Cir. 1998); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (“The transferee court could conduct a bellwether trial of a centralized action or actions originally filed in the transferee district, the results of which (1) may, upon the consent of parties to constituent actions not filed in the transferee district, be binding on those parties and actions, or (2) may otherwise promote settlement in the remaining actions.” (footnote omitted)).

<sup>46</sup> Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008); see also Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006).

<sup>47</sup> Fallon et al., *supra* note 46, at 2338.

<sup>48</sup> See Jeremy T. Grabill, *Judicial Review of Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 124 (2012) (“A private mass tort settlement begins as a contractual agreement between plaintiffs’ liaison counsel and the defendant(s) involved in a particular mass tort litigation that sets forth a negotiated settlement offer for each individual plaintiff to consider. The substance of the settlement offer consists of a commitment by the defendant(s) to pay a

Regardless of whether this idealized vision of the process reflects settlement premised upon the true maturation of the tort or merely provides a baseline for structuring a global settlement in lieu of true maturation, the result is frequently the same: bellwether trials are highly effective at promoting global settlement.<sup>49</sup> Indeed, the very threat of bellwether trials appears to have a comparable effect on promoting settlement even where the process has not yielded anything that could be reasonably characterized as transforming the tort into “mature” status.<sup>50</sup>

#### D. Global Settlement in Multidistrict Litigation

At settlement, the intrinsic systemic limitations of section 1407 are perhaps most problematic for defendants and lead plaintiffs’ counsel. Although section 1407 contemplates that settlement may occur before remand to transferee courts,<sup>51</sup> it does not provide a mechanism for binding non-consenting plaintiffs to the settlement’s terms. If the facts of the case permit, the MDL judge may oversee one or more limited settlement class actions filed in the transferee court, but the judge cannot self-assign cases for trial.<sup>52</sup> In short, section 1407 lacks any direct structural framework for ensuring that the matter can be resolved once and for all through litigation or global settlement in the transferee court.

The absence of a clear procedural framework for settlement is not surprising given the stated purpose of section 1407: *pretrial* consolidation. Although such sweeping consolidations may provide a forum that encourages private resolution as a practical matter, any resolution on the substantive merits remains the function of individual or properly certified class action trials. As noted previously, it is this potential—the plaintiffs’ power to control the ultimate decision to proceed to trial or

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fixed amount to the current aggregate plaintiff population, with individual awards varying based on the strength of each plaintiff’s claim as determined by the allocation of “points” among the plaintiffs by a neutral administrator pursuant to negotiated—and often very complex—formulas and grids. Those settlement formulas and grids tend to be based on real-world information and experience gained through discovery, pretrial rulings, and bellwether jury trials, all of which increasingly occur in the context of a multidistrict litigation proceeding created pursuant to 28 U.S.C. § 1407. In other words, private mass tort settlements often await and account for the maturation of the litigation.”).

<sup>49</sup> See, e.g., Effron, *supra* note 9, at 2057 (“Although the transferee judge must send cases back to the original district for trial, the MDL is a powerful aggregation device because most cases settle before trial.”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2206 n.4 (2008) (“Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court.”).

<sup>50</sup> Two recent cases, the World Trade Center Disaster Site Litigation and the Deepwater Horizon litigation, were settled shortly before the first bellwether trials in those cases were scheduled to begin. John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 3, 2012, at A1 (settlement announced three days before the first phase of the Deepwater Horizon bellwether trials were scheduled to begin); Mireya Navarro, *Deal is Reached on Health Costs of 9/11 Workers*, N.Y. TIMES, Mar. 12, 2010, at A1 (WTC settlement reached roughly two months before bellwether trials were scheduled to begin).

<sup>51</sup> 28 U.S.C.A. § 1407 (West 2012) (requiring remand of a transferred case once pretrial work is completed “unless it shall have been previously terminated”).

<sup>52</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (noting that MDL judge may not self-assign a case for trial under 28 U.S.C. § 1404(a)).

settle once pretrial work is done—that allows section 1407 consolidations to avoid the restraints that preclude similarly sweeping mass tort class actions. Although this potential recommends multidistrict consolidation early in the proceedings, it suggests that the post-consolidation stage will break down into dozens, hundreds or thousands of individual actions and settlements that may involve additional discovery, repetitive litigation concerning similar issues across forums, and inconsistent rulings concerning these issues. In sum, section 1407 can bring the claim pool to the settlement finish line, but it does not provide the court with the power to make the plaintiffs cross it.

### III. PRIVATE POWER RELATIONS IN THE MASS TORT MDL

No discussion of aggregative procedures is complete without a practical assessment of the manner in which these procedures alter power relations among the parties. Yet the literature concerning the shifting power relations in aggregate litigation is incomplete. The focus is most often on the relative economies of scale and power imbalance between defendants and plaintiffs in the absence of aggregation. But another important shift in power relations—among plaintiffs, their personal counsel and the lawyers who control the MDL proceedings—is an essential element in the transformation of these pretrial proceedings into a mechanism for achieving global private settlements.<sup>53</sup>

The focus here is not to revisit lead lawyers' unfettered control over the plaintiffs' side of the litigation within the MDL. Rather, it is how this control, combined with the dynamics of mass tort litigation recruiting and networks generally, allows lead counsel to bridge the gap between the structural limits of section 1407 and the need for finality in structuring any global settlement.

#### A. Plaintiffs, Counsel, and Lead Counsel

The quasi-class MDL may bear several similarities to the class action, but its very existence is the product of the limits of traditional class actions. In a properly certified class action, the representative plaintiffs' interests are largely the same as—or at least not in conflict with—the other members of the class.<sup>54</sup> As recognized in *Amchem* and *Ortiz*, however, mass torts frequently involve numerous plaintiffs with diverse legal and factual issues that are not “sufficiently cohesive to warrant adjudication by representation.”<sup>55</sup> Thus, the quasi-class MDL begins not only with the recognition that individual plaintiffs may have different interests in the

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<sup>53</sup> RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* ix (2007) (“One significant facet of the mass tort phenomenon consists of the emergence and operation of an elite segment of the personal injury plaintiffs’ bar. These lawyers specialize in the identification, development, and comprehensive resolution of whole categories of mass tort disputes. The story of this mass tort plaintiffs’ bar—indeed, the intense, competitive relationship among such law firms—is as much a part of the mass tort world as legal doctrine.”).

<sup>54</sup> See, e.g., Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 588-89 (discussing certification standards as a means of avoiding conflicts between the representative plaintiff or class counsel and the interests of other class members).

<sup>55</sup> *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

proceedings<sup>56</sup> but also that these diverse interests are entitled to independent representation.

Consolidations under section 1407 do not strip individual plaintiffs of their chosen counsel with respect to their individual claims, but such consolidations alter plaintiffs' potential to monitor developments that affect their interests. The client solicitation and referral practices<sup>57</sup> that are common in mass tort litigation frequently place one attorney in control of multiple claims against the same defendants even without formal consolidation. Some of these lawyers, in turn, assume leadership positions on the steering committees established to represent the claim pool collectively. Thus, lawyers with whom an individual plaintiff does not have a relationship may make many of the most significant decisions concerning her case.

The net result is that MDLs involve lawyers who enjoy influence over the direction of the case and the terms of the settlement, on the one hand, and disempowered lawyers who lack such influence on the other. Some disempowered lawyers may be conciliatory—hoping to leverage their compliance with the dictates of lead counsel into common benefit work assignments in the instant case or future cases. Others, however, may assume a more aggressive posture—using the claims they control to undermine any settlement or, at least, exact preferential treatment—in order to discourage other repeat players from excluding them from the negotiating table. Effective MDL management on the plaintiffs' side demands not only cooperation among lead counsel but also careful attention to the demands of disempowered lawyers who may control sufficient claim volumes to undermine any proposed settlement.

#### *B. The Autonomy Problem in Multidistrict Settlement*

The inability to bind all plaintiffs to a global settlement under section 1407 presents an obvious problem: defendants will not enter into a global settlement if they cannot be reasonably certain that it will bring peace.<sup>58</sup> Plaintiffs with the strongest claims will simply allow their claims to return to the transferor court and proceed with litigation, while those with weaker claims accept the settlement's terms.<sup>59</sup> This tendency toward adverse selection in a non-binding global settlement is compounded where the very fact of settlement generates more claims, leading to rampant oversubscription against the settlement without making a significant dent in the defendant's potential liability to those advancing strong claims.<sup>60</sup> In sum, no matter how bad reverting to scattered litigation across multiple jurisdictions may be for the defendant, a wide-open global settlement that preserves opt-out rights is likely to be worse.

Another problem is the risk that "holdout plaintiffs" will threaten to reject the settlement unless they receive preferential treatment. This threat only has force to the extent that the plaintiffs exercising it have the power to undermine the

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<sup>56</sup> See *supra* note 11.

<sup>57</sup> Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863 (2005).

<sup>58</sup> See NAGAREDA, *supra* note 53, at 12.

<sup>59</sup> Brown, *supra* note 19, at 587-91.

<sup>60</sup> *Id.* at 602-05.

settlement, and few global settlements demand 100% acceptance.<sup>61</sup> The real threat is that one or more disempowered attorneys representing several plaintiffs will, individually or collectively, reject the settlement in their clients' names or persuade their clients to reject the settlement due to misinformation or promises of greater potential recoveries down the road.

The fen-phen national settlement is a stark example of these problems in action.<sup>62</sup> Although plaintiffs had the ability to opt out of the settlement, it was well funded (initially, at \$3.75 billion) and included multiple provisions designed to preclude oversubscription.<sup>63</sup> Nonetheless, the settlement received more qualifying claims than was statistically believed to be possible,<sup>64</sup> and several plaintiffs opted out. In short, it was a disastrous settlement for the defendant, who, to date, has incurred litigation and settlement costs well in excess of \$20 billion.<sup>65</sup>

Merck's initial strategy with respect to the Vioxx personal injury mass tort—litigate every case,<sup>66</sup> may thus be seen as a rational response to the fen-phen settlement debacle, even if some observers were appalled by the approach.<sup>67</sup> The Vioxx case bore substantial similarities to the fen-phen case—millions of regular users of the drugs, statistically higher rates of certain conditions associated with use of the drugs, the difficulty in establishing that exposure to the drugs (as opposed to other causal factors) was or was not a substantial factor in any individual patient's injury, and the difficulties in screening out specious claims in any global settlement—and suggested that even a well-structured global settlement might likewise be overrun. Instead of pursuing early settlement, Merck litigated eighteen cases to judgment, winning eleven at trial and enjoying additional success on appeal.<sup>68</sup> In the process, Merck effectively signaled that it would rather pay its lawyers than settle weak cases; if a global settlement could not be structured to avoid the defendant's fate in the fen-phen matter, there would be no settlement at all.

After Merck's initial success, albeit at great cost to the company,<sup>69</sup> the plaintiffs' steering committee and Merck structured a global settlement that facially preserved the right to pursue individual litigation but included terms that made it “practically

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<sup>61</sup> Erichson, *supra* note 21, at 574.

<sup>62</sup> Although fen-phen was technically a Rule 23(b)(3) settlement class action, its example is relevant to modern multidistrict litigation given that both afford plaintiffs with the option to reject global settlement. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274-75 (2011) (contrasting the Rule 23(b)(3) settlement in fen-phen against the private settlement in Vioxx).

<sup>63</sup> See Brown, *supra* note 19, at 583-86.

<sup>64</sup> See NAGAREDA, *supra* note 53, at 145-46.

<sup>65</sup> See Brown, *supra* note 19, at 586.

<sup>66</sup> See Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 514-17 (2008) (discussing Merck's initial strategy in the Vioxx litigation).

<sup>67</sup> See *id.* at 522-534 (discussing the ethical and moral dimensions of the Merck strategy).

<sup>68</sup> Erichson & Zipursky, *supra* note 62, at 278-79.

<sup>69</sup> McClellan, *supra* note 66, at 510 (discussing the “millions of dollars in legal fees and other trial expenses” spent by Merck in litigating Vioxx cases).

impossible for a claimant to decline the offer.”<sup>70</sup> The settlement included a clause that allowed the defendant to walk away if less than 85% of eligible claimants in multiple categories did not participate.<sup>71</sup> Lawyers who signed the agreement or enrolled a client in the program were required to recommend the deal to every client<sup>72</sup> and refuse to represent those who rejected the deal going forward.<sup>73</sup> In short, plaintiffs could choose to walk away, but doing so meant starting over from scratch without the benefit of their existing counsel or any other attorney with significant experience in the litigation.

Whatever one thinks of the fen-phen and Vioxx settlements, it is sufficient at this point to note that they reveal a clear tension between the systemic preference for global settlement and the private self-interests that, left unchecked, work against it. If a global settlement is to occur, the defendant must have some assurance of peace. But peace is one thing that multidistrict litigation is ill equipped to ensure; it lacks the binding force of bankruptcy or mandatory class actions, and even the best laid private settlement plans that freely preserve individual autonomy can go horribly awry.

The Vioxx settlement also provides a stark and frequently criticized example of how private power relations between plaintiffs and their attorneys can be employed to bridge the gap between pretrial consolidation and global settlement. Given Merck’s relative success at trial, however, its “litigate every case” strategy and apparent commitment to continue along this course in the absence of sufficient assurances of peace generated considerable uncertainty for plaintiffs’ lawyers and demanded the use of aggressive private restraints on individual litigants. And though it is easy to take issue with the overtly coercive terms of the settlement, it is also easy to see why settling counsel and defendants felt resort to such terms was necessary under the circumstances.

### C. *The Structural and Systemic Dominance of Repeat Players*

Although section 1407 does not provide any direct structural power to force plaintiffs to abide by the terms of any global settlement, repeat players enjoy considerable power to dominate settlement decisions with or without the coercive terms found in the Vioxx settlement. As Ian Shapiro observed in the political context:

[D]omination can result from a person’s, or a group’s, shaping agendas, constraining options, and, in the limiting case, influencing people’s preferences and desires. Domination can also occur without the need for explicit commands when one person or group secures the compliance of another as a by-product of their control of resources that are essential for

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<sup>70</sup> Erichson & Zipursky, *supra* note 62 (discussing the Vioxx global settlement).

<sup>71</sup> *See id.*

<sup>72</sup> *See* Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, No. 2:0MD01657, 2008 WL 7084949, at § 1.2.8.1. (E.D. La. July 9, 2008) (MD 1657).

<sup>73</sup> *Id.* § 1.2.8.2.

the second person or group, or, in the terminology I will deploy, is in a position to threaten their basic interests.<sup>74</sup>

Although multidistrict consolidation governance is obviously distinct from political governance in many respects, repeat players enjoy comparable avenues for domination over plaintiffs in multidistrict litigation. They shape agendas for the litigation, can manipulate the claim pool's preferences through information control and modifying the composition of the pool, have the power to constrain litigation options during the proceedings, control the options available under any settlement, and may directly or indirectly limit the resources available for plaintiffs to advance their interests outside of any settlement.

### 1. Shaping the Agenda

As noted previously, lead counsel enjoy largely unfettered control over the plaintiffs' agenda during multidistrict proceedings. This control is reinforced by judicial reluctance to interfere with their choices and limited options for disempowered lawyers and plaintiffs to challenge them.<sup>75</sup> Given the extreme deference the JPML affords transferee courts to retain or return individual cases to transferor courts, these disempowered participants cannot express their dissatisfaction through exit as long as lead counsel and the transferee court believe restraining their exit options advances the claim pool's objectives. Disempowered plaintiffs are left with no practical voice and, at best, must wait for months or years before exit is possible.<sup>76</sup>

If we assume that the claim pool is comprised of claims that center on the same basic legal and factual issues, the fact that a small group of sophisticated counsel controls the pretrial agenda may not be problematic. But this assumption does not reflect the reality across mass harm multidistrict proceedings. Plaintiffs within a claim pool will have conflicting interests in valuing their respective injuries, defining the criteria for qualifying for settlement, and, ultimately, in choosing to accept or reject any settlement that is proposed. An attorney may support settlement criteria that reduce compensation and exit options for some plaintiffs but has the collective impact of increasing the total returns of the claim portfolio.<sup>77</sup>

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<sup>74</sup> IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 4 (2003).

<sup>75</sup> See, e.g., Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 1986 (2011) ("Lead attorneys enjoy plenary and, in many respects, exclusive control of the litigation. Although they report to and receive input from disabled attorneys, they are independent actors who operate subject to no one's control. Disabled lawyers cannot tell lead attorneys what to do; nor can they fire them for disobedience. If disabled lawyers dislike the way lead lawyers are performing, their only recourse is to complain to the trial judge, who, for a variety of reasons, is unlikely to be sympathetic.").

<sup>76</sup> Accord Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 *FORDHAM L. REV.* 311, 317 (2009) (discussing statistical improbability that cases will be remanded to transferor courts and concluding, "when the JPML selects a transferee district and judge for an MDL, there is an overwhelming chance that it is assigning the constituent actions to their final resting place").

<sup>77</sup> Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 *PEPP. L. REV.* 175, 192 (2003) ("The mass tort lawyer cannot deal with his or her clients on a one-to-one basis that permits full client participation in the litigation. This diffuse relationship

For example, in the World Trade Center Disaster Site Litigation, Judge Hellerstein noted severe conflicts of interests among plaintiffs who were collectively represented by one of the firms in that case:

Approximately a third of the Plaintiffs had little or no objective injury traceable to their work at the WTC site, and were in the lowest settlement tiers. They may have had little or no option except to settle. Other Plaintiffs, despite contracting serious cancers, were facing the possibility of small settlement recoveries because of difficulties in proving causal relation with the toxins at the WTC site, and thus might nevertheless have wished to proceed to take their chances with *Daubert* motions and trial. The Tier IV Plaintiffs, those with serious and lasting ailments strongly related to their work at the WTC site, although well compensated under the SPA relative to others, also reasonably could have opted in favor of trial rather than settlement.<sup>78</sup>

In light of these concerns, the court readily concluded that their lawyers were not in position to provide them with the independent advice and counsel they were entitled to receive.<sup>79</sup> Although Judge Hellerstein concluded that these conflicts demanded judicial intervention in this case,<sup>80</sup> courts rarely consider whether similar diverse interests within an attorney's claim portfolio warrant comparable protections in other MDL cases.

Similarly, in the Deepwater Horizon MDL, the claim pool included not only those advancing the economic and property damages claims that comprised the majority of the pool but also much smaller groups of plaintiffs whose interests in discovery and the litigation generally were only partially aligned with this majority. For example, the claims advanced on behalf of workers who were injured or killed in the initial explosion were swept into the MDL, delayed as lead counsel investigated numerous questions that were largely irrelevant to their cases, and further delayed pending the transferee court's consideration of the settlement of the economic and property damage settlements. Many of these victims were struggling financially as a result of the disaster and ultimately settled their cases individually—without the additional leverage afforded by trial or even a foreseeable trial date—in order to

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inevitably will yield some level of client dissatisfaction and, because of compromises the attorney must make to formulate strategy for the group as a whole, may result in less-than-zealous advocacy for positions of particular clients.”); Erichson, *supra* note 21, at 558-59 (“Conflicts of interest in here in collective representation. Unless the plaintiffs' interests are perfectly aligned, which is rare, a lawyer representing multiple plaintiffs with related claims inevitably faces decisions about whose interests to advance. As Judge Jack Weinstein has explained with regard to mass tort litigation, ‘while the attorney representing a large number of clients might, in theory, be able to reach some approximation of the objectives of the group as a whole, that attorney cannot possibly account for the varying desires of individual members of the group.’ In mass litigation, any conflict between individual and group interests likely presents not only a concurrent client-client conflict, but also a concurrent client-lawyer conflict. Plaintiffs' lawyers' fees, ordinarily tied to the size of the overall recovery for the group, give lawyers an economic stake in favoring group interests.”).

<sup>78</sup> *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 197 (S.D.N.Y. 2011).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

address their immediate financial concerns. In these cases, it is easy to see how lead counsel's ability to set the agenda and quash dissenting voices may have impacted the rights and recoveries of a small but severely injured minority.

At this point, my focus is not whether the agenda shaping in the World Trade Center Disaster Site Litigation or the Deepwater Horizon MDL worked to the disadvantage of certain minority plaintiffs or whether this is, on balance, undesirable or illegitimate;<sup>81</sup> it is to demonstrate that the power to shape agendas can be decisive in shaping litigants' perceptions of their ability to advance their legitimate interests that are not part of that agenda. Once that agenda is fixed, plaintiffs are most often powerless to voice their disapproval or exit. Discovery costs and delays may mount while lead counsel advance issues that concern the majority but are irrelevant to disempowered plaintiffs, for whom the practical realities of their circumstances may not allow them to simply wait for a return to the transferor court. And if these agendas lead to shaping settlements that simultaneously exclude and limit disempowered plaintiffs' options to pursue their claims individually, they may not only lose the potential scale economies of aggregation but also find that proceeding individually is no longer economically viable.

## 2. Influencing Preferences Through Information Control

Perhaps the greatest irony of mass tort multidistrict litigation is the degree to which plaintiffs lack ready access to the pretrial work performed for their benefit. Although global settlements do not generally contain the same sort of nondisclosure terms found in many individual settlements, few plaintiffs have both direct access to the discovery obtained and the time and resources to evaluate it before making the decision to settle or pursue trial litigation. This information may be filtered through layers of lawyers, each with interests that may conflict with the plaintiff. And in cases where global settlements occur before bellwether or other trials, plaintiffs may have little or no qualitative basis for assessing their prospects at trial.

Qualitative information is, of course, a critical component of any settlement decision. In traditional litigation, this decision is framed by an assessment of several factors; including the plaintiff's objectives in the litigation, the amount she will receive to forego trial and the specific risks of losing at trial if she proceeds. A plaintiff's objectives and expectations are continually reshaped during the course of the litigation and associated settlement talks, with the plaintiff's lawyer counseling the plaintiff concerning developments as they arise in the case and encouraging or discouraging settlement according to the ever-changing understanding of the case. The settlement offer tends to be a fixed dollar amount, and its fairness and adequacy can be assessed by the plaintiff and her counsel based on their respective understandings of the case when the offer is made.

By contrast, an individual plaintiff's decision to accept or reject a global settlement is often burdened by uncertainty about how the settlement will treat her claim. At the time they must make this decision, plaintiffs usually do not know whether their respective claims will be approved and, if so, how their injuries will be classified. Claim processors may interpret settlement language to exclude plaintiffs who may reasonably believe their claims will be accepted under the same terms. Moreover, even plaintiffs who are comfortable with their prospects for acceptance under the settlement's terms and conditions may not be able to predict whether the

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<sup>81</sup> See *infra* Part IV.

fund will be sufficient to pay all claims promptly or in full. Claims that are selected for audit may be delayed, and settlements that are oversubscribed may have provisions allowing the administrator to reduce payments. In short, plaintiffs must often make the settlement decision before they can know all of the information relevant to assessing the settlement's treatment of their claims.

Likewise, notwithstanding the extraordinary amount of resources devoted to advancing pre-trial matters in the MDL, the plaintiff's settlement decision is further complicated by uncertainty about her prospects at trial. Specific information about a defendant's conduct and culpability will tend to promote litigation by those advancing the strongest claims.<sup>82</sup> Individual plaintiffs, however, may have only limited knowledge of the information uncovered during discovery. In settlements that occur prior to any trials, their ability to calculate the risks of trial in their own cases will be further limited. The lawyers who are most familiar with all of this information—those in leadership and other roles in the MDL—may be unreliable sources of independent advice given their own interests in prompt settlement. In sum, many plaintiffs must make the settlement decision notwithstanding substantial uncertainty concerning both the settlement's treatment of their individual claims and their prospects for success at trial.

### 3. Claim Pool Flooding and Plaintiff Preferences

Although frequently overlooked, repeat players' methods for identifying and sweeping potential claimants into the proceedings can also have a profound impact on shaping the collective attitudes and preferences of the claim pool. By shaping the composition of the claim pool, repeat players can alter the collective voice of the pool when seeking settlement approval. This potential is most obvious where individual claims are objectively distinct—the preferences of a large group with one type of claim overwhelming the preferences of a much smaller group with a distinct type of claim—but it may also be present where differences of perception among plaintiffs with comparable objective profiles can be exaggerated and manipulated.

To illustrate, assume three types of plaintiffs who were exposed to a known carcinogen produced by the same defendant. Victim A has not been diagnosed with lung cancer but has been told that her chance of developing the disease increased from 9% to 12% due to her exposure. Victim B has lung cancer but also smoked two packs of cigarettes a day for more than thirty years. Victim C has a rare form of lung cancer, which experts have attributed primarily to exposure to the defendant's product. We may expect each plaintiff to have different perceptions of, and objectives within, the litigation and settlement of the case. We may also expect these perceptions and objectives to guide their level of activity and decisions to approve or reject settlement.

What we may not expect in this scenario is that Victim A, Victim B, and Victim C may refer to the same person. This individual's perception of her interest in the case is premised upon her realization of the depth of her injury and the

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<sup>82</sup> Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 460 (2005) ("Culpability information is far more useful to a meritorious plaintiff because it has evidentiary value in proving her case. On the other hand, culpability information is considerably less useful to plaintiffs with frivolous claims, since they are more likely to try to extract a quick initial settlement (as opposed to proceeding with litigation).").

accountability of the defendant; and it may be based on incomplete information, the decision to emphasize one fact over another or the refusal to internalize information due to cognitive biases. Thus, even if the plaintiff has a unique form of cancer that is attributable primarily to exposure to the defendant's product, she may not appreciate the distinction or believe that the defendant caused it. She may not sue, and, if she does, she may not have the same level of commitment to see the litigation to conclusion as she would if she had access to perfect information.

This example highlights the vital role that a plaintiff's perceptions play in guiding her litigation and settlement decisions. Within the classic naming, blaming and claiming framework, we ask how injurious experiences become or do not become perceived (naming), are or are not transformed into grievances (blaming), and ultimately develop or do not develop into disputes (claiming).<sup>83</sup> Each stage plays a critical role in the transformation of a dispute in traditional personal injury matters; the case will not arise, we are told, unless the victim perceives an experience as injurious, attributes fault to another, and decides to advance a claim.<sup>84</sup>

Plaintiffs who do not perceive actual injuries and attribute them to the defendant's conduct, however, may advance claims where they believe they will be paid under applicable law or settlement criteria. This includes not only those who submit frivolous claims but also those who advance compensable claims. Although the law may allow a lung cancer victim to sue Harold's Auto Parts<sup>85</sup> for selling asbestos-lined brakes, for example, she may have some difficulty accepting that Harold or his store were to blame for her injury. Applicable law may allow consumers or workers to assert claims for unrealized economic or physical injuries, but any resulting payment may be viewed more as a windfall than compensation for an internalized wrong. Such a disconnect between plaintiff perception and legal compensability may be particularly strong where, as in the United States, so much of the public views the civil litigation system as prone to accepting frivolous claims.<sup>86</sup>

The divide between individual perception and compensability may be most significant where the damages are small or the purported injury-causing event is remote, speculative or just one of many possible causes.<sup>87</sup> Although some authors

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<sup>83</sup> William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 631 (1980-1981).

<sup>84</sup> *Id.*; see also Markus Groth et al., *Commitment to Legal Claiming: Influences of Attributions, Social Guidance, and Organizational Tenure*, 87 J. APPLIED PSYCHOL. 781, 782 (2002) (noting the progression from one stage to the next).

<sup>85</sup> This example is taken from the parties in *Harold's Auto Parts, Inc., v. Mangialardi*, 889 So. 2d 493 (Miss. 2004).

<sup>86</sup> See, e.g., Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 449-50 (2004) (discussing studies showing that more than four-fifths of the public believe that many meritless cases are filed in civil litigation).

<sup>87</sup> For example, at the height of asbestos litigation screenings, it was not uncommon to hear reports of newly minted plaintiffs celebrating findings that they had compensable asbestos-related disease. In one frequently cited article, a reporter at a screening in Missouri interviewed several prospective plaintiffs who appeared wholly unconcerned with their positive "diagnoses." See Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 8, 2003, at A1 (noting that eighteen of the twenty merely saw the screening as "a way to add a little cash to their retirement funds"). Similar attitudes were

have framed plaintiffs' reluctance to sue in these matters as a product of rational claiming decisions,<sup>88</sup> as their individual costs of litigation will exceed the expected gains, many of these potential plaintiffs should not reach the claiming stage in the first place. Even if small or as yet unrealized injuries are acknowledged, they may not evoke a sufficient reaction to warrant more attention than the numerous annoyances and slights people confront every day.

This disconnect is significant because the transformation of the plaintiff's perspective not only plays a significant role in determining whether she will sue but also how committed she will be to doing so. The degree to which a victim perceives the defendant's conduct as wrongful influences her commitment to holding the defendant accountable throughout the litigation and settlement process, even where legal liability is not dependent upon fault.<sup>89</sup> Likewise, a plaintiff's perception of the breadth and depth of the harm caused by the defendant plays a significant role in shaping her commitment to demanding accountability through litigation rather than settlement.<sup>90</sup> In sum, plaintiffs within a claim pool may be distinguishable not only on the basis of objective criteria but also by the degree to which they have internalized their injuries and attributed them to the wrongdoing of another.

In some cases, the stark difference between claiming rates in traditional and aggregate litigation<sup>91</sup> is not merely a product of increased publicity; it reflects the obvious distinction between those who have sufficient commitment to sue notwithstanding the obstacles and those who agree to sell litigation rights they may not value or perceive to be worth the trouble of litigation. Indeed, there is little reason to believe that the practices used in these cases generate large volumes of traditional, high-commitment plaintiffs. Thirty-second commercials and internet advertising do little more than advise that lawyers are looking for clients, and studies show that mass tort plaintiffs only rarely have direct contact with their lawyers,<sup>92</sup>

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observed among some plaintiffs in the fen-phen case. Andrew Wolfson, *Woman Claims Lawyers Exaggerated Diet-Drug Injuries*, COURIER-J., June 22, 2009, at A1 (discussing former paralegal's testimony that clients were happy with echocardiogram readings that allegedly exaggerated their injuries "because it meant they were going to get more money").

<sup>88</sup> See, e.g., Campos, *supra* note 5; David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 397-400 (2000); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529 (1997).

<sup>89</sup> See, e.g., Frank A. Sloan et al., *The Road from Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, 60 LAW & CONTEMP. PROBS. 35 (1997) (discussing the significance of assigning fault to the claiming decision and finding that no-fault claimants' primary motivation was to obtain compensation, while those who pursued tort litigation were motivated by the desire to hold the wrongdoer accountable or to obtain information about the circumstances of the injury).

<sup>90</sup> See generally Gillian Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences With the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008).

<sup>91</sup> McGovern, *supra* note 16, at 688 ("Unlike most torts where not every individual harmed seeks legal redress, mature mass torts generate an overabundance of plaintiffs through widespread publicity, including a substantial number of false positive claims.").

<sup>92</sup> Cramton, *supra* note 77, at 1919-93 (discussing client communication in mass tort); see also Weinstein, *supra* note 7, at 496-98 (discussing shortcomings of client communication where lawyers represent "hundreds or thousands of clients").

much less receive sufficient counsel to overcome the numerous barriers to naming and blaming that have been identified.<sup>93</sup> To the contrary, even if these advertisements may be viewed as reflecting potential compensability in litigation or settlement, poor public opinion of the ethics of lawyers who engage in dragnet recruiting and the manipulability of the legal system<sup>94</sup> suggests that even those who sign up may not accept that they are injured or have been wronged by the defendant. And the fact that so many mass tort claimants appear to have low claiming commitment levels once they are signed suggests that the surge in new claims is not the product of increased naming and blaming.<sup>95</sup>

On the other hand, aggregation and the methods used to build claim portfolios appear extremely effective at amassing passive claims. Representing a large group of plaintiffs may provide the firm some advantage in obtaining a leadership role, but individual lawyers can still benefit from submitting the claims they control to any resulting global settlement regardless of their role in the case.<sup>96</sup> Assuming they are at least prepared to do what is necessary to satisfy the pre-trial and settlement criteria established in the case,<sup>97</sup> obligations that will be less demanding than preparing each claim for trial,<sup>98</sup> there may be little practical downside to building a sizeable claim portfolio, particularly for those with reasonable prospects of obtaining an appointment to the steering committee or some other lucrative role in the case. To the extent medical diagnoses are required, law firms tend to select the doctors, arrange the appointments and pay the doctors directly.<sup>99</sup> And a plaintiff does not need a sufficient commitment to be actively involved in the case because only a few, if any, will be called on to litigate their claims fully.

In so dramatically reducing the barriers to claiming, even those who have not named and blamed may find joining a claim pool worth the time and effort. At the extreme, mass tort practice can transform some plaintiffs' perceptions to the point that the process no longer resembles litigation at all. As one asbestos plaintiff noted, "It's better than the lottery. If they find something, I get a few thousand dollars I didn't have. If they don't find anything, I've just lost an afternoon."<sup>100</sup>

When the claim pool is flooded with passive claimants, any vote or collective settlement acceptance of the claim pool is far more likely to reflect passive plaintiffs' loss aversion than a rational assessment of the settlement by those who might be likely to sue otherwise. "[L]itigants, like decision-makers generally, evaluate

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<sup>93</sup> See, e.g., Frederick C. Dunbar & Faten Sabry, *The Propensity to Sue: Why do People Seek Legal Actions?*, 42 BUS. ECON. 31, 31 (2007) (discussing numerous personal and social barriers to naming, blaming and claiming).

<sup>94</sup> See Rhode, *supra* note 86, at 448.

<sup>95</sup> See Brown, *supra* note 19, at 582-83 (2012) (discussing tendency of asbestos and silica claimants to withdraw claims when asked to submit modest additional documentation).

<sup>96</sup> See, e.g., NAGAREDA, *supra* note 53, at 16-18.

<sup>97</sup> See Brown, *supra* note 19, at 612-17.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 585.

<sup>100</sup> Andrew Schneider, *Asbestos Lawsuits Anger Critics*, ST. LOUIS POST-DISPATCH, Feb. 8, 2003, at A1.

decision options relative to the current state of affairs and make risk-averse decisions when choosing between gains and risk-seeking decisions when choosing between losses.”<sup>101</sup> Those who internalize the reality of their injuries and the defendant’s fault begin litigation with this reality framing their expectations.<sup>102</sup> For these plaintiffs, any settlement proposal that is below expectations represents a loss to be avoided rather than a gain, while passive claimants who initially perceive any settlement as a windfall may see its potential rejection of the same settlement as a loss.<sup>103</sup> The manner in which aggregate litigation sweeps in plaintiffs lends itself to creating claim pools that are not only more passive but also more risk-averse than traditional plaintiffs, so a facially democratic vote of the pool provides little assurance that the settlement reflects fair compensation for those who believe they have suffered a loss at the hands of the defendant.<sup>104</sup>

In bankruptcy or other mandatory aggregation, dissatisfied plaintiffs’ only practical opportunity for voice—voting on any proposed plan—will be overwhelmed by the sheer volume of votes controlled by the lead firms.<sup>105</sup> When global settlements are not mandatory, the effect can nonetheless be comparable. The appearance of support from an overwhelming number of other plaintiffs may reinforce the prevailing vision of those who wish to pursue individual litigation as extortionists or self-indulgent holdouts. Plaintiffs who might be inclined to pursue individual litigation standing alone will face considerable judicial and social pressure to conform to the preferences of the majority,<sup>106</sup> and this pressure will be compounded by the presence of take it or leave it settlement terms, limited information concerning the settlement and their risks at trial, and aggressive efforts by lead counsel to sell the settlement to the claim pool.

#### 4. Constraining Opt-Out Options

As demonstrated in the *Vioxx* matter, the power to shape settlement terms—including the power to delay or limit the power to opt-out or exit—is perhaps the

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<sup>101</sup> See Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 167-68 (2000).

<sup>102</sup> See John M.A. DiPippa, *How Prospect Theory Can Improve Legal Counseling*, 24 U. ARK. LITTLE ROCK L. REV. 81, 99 (2001) (“[M]any plaintiffs may initially be risk-seeking because they may have framed the case as a loss and therefore be more willing to go through the difficult process of finding and consulting a lawyer.”).

<sup>103</sup> See *id.* at 98 (“Thus, many plaintiffs might be initially risk-seeking because plaintiffs will frame their situation as a loss. They have already suffered some ‘damage.’ Unless they file a lawsuit, they face the certainty of never recovering anything for that loss.”). Although some have suggested that frivolous plaintiffs are also risk seeking. See Guthrie, *supra* note 101 (assuming a traditional litigation framework where these actors have decided to claim notwithstanding the low probability of success). As noted previously, however, mass aggregation promotes passive claiming regardless of the individual claimants’ litigation risk preference.

<sup>104</sup> See DiPippa, *supra* note 102, at 98-99 (discussing how the barriers to claiming in traditional litigation weeds out risk-averse plaintiffs).

<sup>105</sup> See S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841, 858-60 (2008).

<sup>106</sup> See, e.g., Hadfield, *supra* note 90, at 667; Burch, *supra* note 7, at 90-91.

most obvious and direct manner in which lead counsel can coerce plaintiffs. As the late Richard Nagareda noted in the class action context, the “settlement might try to make an offer that class members cannot refuse in the more sinister sense used in *The Godfather*: an offer that is no offer at all in practical terms but, rather, simply an illegitimate threat to leave class members with nothing in the event that they refuse the offer.”<sup>107</sup> In the Vioxx settlement, such an “offer they can’t refuse” involved stripping plaintiffs who opted out of their counsel of choice. In the Sulzer hip implant settlement, the designers used “a wily combination of a security interest and a trust fund to leave practically nothing from which opt-out claimants might recover.”<sup>108</sup>

Moreover, even without express settlement terms that directly limit opt-out options, the inability to advance individual cases during the several months or longer that it may take to approve proposed settlements may also leave plaintiffs with little choice but to accept the global settlement or individual settlement of excluded claims. Indeed, the Deepwater Horizon MDL settlements were conditioned on the stay of phase I bellwether trials and contemplated that related matters would not proceed pending consideration of the settlement.<sup>109</sup> Such an exercise of power may have largely the same effect as a defendant’s scorched-earth litigation strategy; if justice delayed is justice denied, it makes little difference if the delay is caused by a recalcitrant tortfeasor or lead counsel whose MDL agenda forces the disempowered plaintiff to the backburner.

#### 5. Political Considerations

The attenuated relationships between attorneys and clients create significant obstacles to effective plaintiff monitoring, both of their individual lawyers and lead counsel. Section 1407 does not address lead attorneys’ duties to MDL plaintiffs who are not their own clients, and the case law provides little guidance.<sup>110</sup> Although they are clearly fiduciaries with respect to clients within their claim portfolios, “there is no evidence that lead attorneys look to their clients for instructions when deciding how to handle MDLs.”<sup>111</sup> They do not consult with clients concerning which cases to advance as bellwethers or seek authority to negotiate settlement terms with the defendant. Nor is there any evidence that they gauge the claim pool’s or their own client portfolio’s support for foregoing bellwether trials before agreeing to the terms of early global settlements, even in matters where the litigation may advance plaintiffs’ and the affected community’s other non-pecuniary interests.

Most accounts of attorney-client conflict in aggregate litigation focus on the attorney’s financial interests in the immediate case, but the lawyers who ultimately

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<sup>107</sup> Richard A. Nagareda, *Closure in Damages Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141, 144 (2003).

<sup>108</sup> *Id.*

<sup>109</sup> See Plaintiffs’ & BP’s Memorandum in Support of Joint Motion for Preliminary Approval of Proposed Med. Benefits Class Action Settlement, Approval of Class Notice, & Related Matters at 39-40, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, No. MDL 2179, ECF No. 6267, at 39-40 (E.D. La. Apr. 18, 2012).

<sup>110</sup> Silver, *supra* note 38, at 1988.

<sup>111</sup> *Id.* at 1986.

make the critical decisions in these cases are most often part of a relatively small group of repeat players in mass tort litigation. This generates a conflict between the lawyer's need to maintain or advance her position within the repeat player community and the duty to represent the best interests of at least some of her own clients. If those interests are not shared, a lawyer who is faithful to her clients' interests may be sanctioned by her peers not only in the instant case but also with respect to future appointments and common benefit fund distributions.<sup>112</sup> Conversely, disempowered lawyers with sufficient claim portfolios to block settlement may have strong incentives to challenge the settlement to discourage similar disempowerment in future cases. Either scenario raises the prospect that the lawyer's decisions will conflict with the interests of at least some of her clients.

Ultimately, however, repeat player politics can be addressed without undermining cohesion. Those lawyers who have both sufficient client pools to interfere with any global settlement and a history of doing so are easily identified and may be brought into the fold through common benefit work assignments and modifications to distributions from the common benefit fund.<sup>113</sup> Conversely, lead counsel may propose or otherwise go along with defendant proposals that impose additional burdens on disempowered holdout lawyers.<sup>114</sup>

#### D. The Limited Checks on Domination

##### 1. Plaintiff Oversight and Referrals

Lead attorneys in multidistrict litigation are, in a very real sense, beyond the control of any plaintiffs, even those within their own claim portfolios. Mass tort clients frequently do not have direct relationships and regular personal communication with the counsel they hired,<sup>115</sup> much less the attorneys to whom their cases are referred for litigation. It is simply not possible for lawyers to counsel and take direct and personal instruction from clients when one lawyer represents several thousand individuals in one matter.<sup>116</sup> Much of the work of litigation occurs out of

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<sup>112</sup> See, e.g., *Lachance v. Harrington*, 965 F. Supp. 630, 650 (E.D. Pa. 1997) (“[T]he incentives among plaintiff lawyers in the class action bar to maintain ties with their fellows in order to have a role in the next ‘big case’ cannot be overlooked.”); see also Transcript of Initial Pretrial Conference, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 07-md-01871-CMR, ECF No. 111, at 43-44 (E.D. Pa. Apr. 8, 2008) (leading MDL plaintiffs’ lawyer Daniel Becnel discussing lead counsel patronage appointments for common interest work in other multi-district litigation).

<sup>113</sup> See *infra* Part IV.A.2.

<sup>114</sup> This may include, for example, requiring lawyers who oppose a proposed settlement to submit additional claim information or otherwise incur substantial additional costs. See Brown, *supra* note 19, at 616 (discussing law firms’ contentions along these lines in the *Bextra* and *Celebrex* MDL proceedings); see also Silver & Miller, *supra* note 40.

<sup>115</sup> Weinstein, *supra* note 7, at 494 (“Many of these lawyers do not maintain meaningful one-to-one contact with their clients, nor can they represent these people as individuals, each with his or her own needs and desires. The client becomes no more than an unembodied cause of action.”).

<sup>116</sup> In the World Trade Center Disaster Site litigation, for example, the judge concluded that the Napoli law firm was too conflicted to advise its clients on the details of the settlement. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp.2d 184, 190 (S.D.N.Y. 2011) (“The [settlement agreement] was a long and complicated document of 104 pages and 20 exhibits

court and out of public view, meaning that the only party with both a duty to the client and sufficient knowledge of an attorney's disloyalty will be the attorney. On top of these difficulties in monitoring their own counsel, individual plaintiffs do not even have the power to oversee and demand loyalty from most, if any, of the numerous lawyers who staff leadership committees or perform common interest work within an MDL.<sup>117</sup>

In addition, the repeat player effect may shift a critical check on disloyalty to clients—the belief that those who act against the interests of their clients will not obtain client referrals in the future—to a need to establish or reinforce the lawyer's reputation within the repeat player community. And the risk of such a is heightened where clients may be readily available without former client referrals, clients are unlikely to become aware of any disloyalty, and the perception of being a strong player in mass tort litigation may be a valuable tool in mass media and internet client advertising.

## 2. Judicial Oversight

To protect the interests of litigants, MDL judges increasingly hold hearings to consider the fairness and adequacy of any global settlement, but it is severely limited in this context. The hearing, of course, comes only after the deal is fully negotiated and difficult to rework and suffers from the same limitations found in class action fairness hearings.<sup>118</sup> Even if there were reasonably objective criteria for accurately assessing the fairness of a given settlement,<sup>119</sup> settlement proponents shape the judge's knowledge of the relevant issues and, at this stage, have a shared interest in ensuring that the information advanced is uniformly favorable.<sup>120</sup> Indeed, it is not at all clear that ostensible fairness hearings involve “any independent review of the fairness, reasonableness, or adequacy of the terms of the settlement or the process

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containing approximately an additional 130 pages. Normally, lawyers advise clients as to the meaning and consequences of a complicated document and are in turn authorized and instructed by their clients how to act on their behalves. However, this model did not fit the mass tort litigation before me, with 9,000 Plaintiffs represented by a single law firm and numerous potential conflicts among them and between them and their law firm.”)

<sup>117</sup> *Accord* Pope v. Rice, No. 04 Civ. 4171(DLC) 2005 WL 613085 (S.D.N.Y. Mar. 14, 2005).

<sup>118</sup> See, e.g., Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 7-9 (1993) (discussing the limits of judicial oversight in class actions).

<sup>119</sup> See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1444-45 (2006) (noting scholarship supporting the view that “there are simply no objective criteria by which the judges can accurately assess either the value or the process of settlements.”); G. Donald Puckett, Note, *Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1279 (1999); Geoffrey C. Hazard, Jr., Lecture, *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1270 (1995).

<sup>120</sup> See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46 (1991) (“Settlement hearings are typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel.”).

that led to the agreement.”<sup>121</sup> Finally, given the structural limitations of section 1407, the court’s authority to reject non-class settlements that are unfavorable to plaintiffs is limited.<sup>122</sup>

Even where lawyers engage in dubious recruiting and settlement practices, judicial oversight is further limited by the dynamics of aggregate litigation. MDL judges are not dependent on lawyers to bring high-profile cases to them as in other forms of aggregation,<sup>123</sup> but they do depend on the extensive work that lawyers perform to make the cases run smoothly.<sup>124</sup> Lawyers not only fund the plaintiffs’ side of the litigation but also control the networks that draw potential plaintiffs into the process, perform the work necessary to advance the case, and bring the claim pool together in settlement. While judges have an interest in clearing these complex matters from their dockets—an interest reinforced by the emphasis on maximizing efficiency and prompt resolution in multidistrict litigation generally<sup>125</sup>—they also have an interest in protecting the integrity of the process. Judges may take action where the misconduct is overt and their conduct is an obvious and direct violation of ethical rules or applicable law, but few of the distortions of the process identified fall neatly into these categories.

Under the circumstances, the reluctance to take firm action against repeat players where the line between unethical conduct and aggressive representation is uncertain may be more a sign of appropriate judicial temperament than indifference. We expect judges to act on established facts, not inferences and suspicions about the parties before them. In aggregate litigation, where lawyers play such a central role, aggressive responses to perceived but uncertain misconduct can have a severe impact on the proceedings and the innocent plaintiffs whose interests are at stake. This dynamic suggests an answer to the question of why so few lawyers involved in the client recruiting and other mass tort scandals of the last decade have been

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<sup>121</sup> Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 802 (2010) (discussing the Vioxx settlement hearing and contrasting the limited review in that case and the Zyprexa case with a far more searching inquiring into these matters in Agent Orange).

<sup>122</sup> See, e.g., Alexandra N. Rothman, Note, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011) (questioning judicial authority to approve or reject private settlements in multidistrict litigation); Willging & Lee, *supra* note 121, at 801 (“Neither the MDL statute nor the Federal Rules of Civil Procedure include any requirement that the court review a consolidated settlement, even an opt-in settlement negotiated by attorneys in the proceeding. The presumption is that the attorneys for the individual plaintiffs will represent the plaintiffs’ interests adequately.”).

<sup>123</sup> See generally LYNN LoPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING BANKRUPTCY COURTS* (2005) (discussing the dependency corruption that arises as a result of bankruptcy forum shopping).

<sup>124</sup> The JPML guide for MDL judges advises judges, “You cannot manage an MDL entirely yourself. To a large extent, you must rely upon lead counsel to assist you.” MDL GUIDE, *supra* note 28, at 3.

<sup>125</sup> See, e.g., Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 BYU L. REV. 821, 832 (1997) (noting the extreme emphasis on judicial efficiency in multidistrict litigation).

sanctioned.<sup>126</sup> And when judges have taken a more aggressive line, they have met with resistance and outrage from litigants, experts and the public.<sup>127</sup>

#### IV. THE PROBLEM OF REPEAT PLAYER DOMINATION

Any first-year law student will be familiar with some of the basic functions and goals of tort law: compensation; deterrence; fairness; and administrative efficiency. And across these considerations, aggregative proceedings promise distinct advantages over individual litigation in mass harm matters. Aggregation levels the playing field with defendants, who have intrinsic economic and other advantages in mass harm cases over any individual plaintiff, which, in turn, should promote compensation and deterrence. A level playing field should better promote fairness—allowing plaintiffs and defendants to obtain judgments or settlements based on merit rather than forcing outgunned and underfinanced plaintiffs to accept lowball settlement offers.

As often becomes clear in first-year Torts and in practice, these goals “may actually often be in conflict with one another in application to real world events.”<sup>128</sup> One or more of the dimensions of deterring wrongful behavior—through subjecting the misconduct to public scrutiny, increasing the aggregate risk of liability, or otherwise—may conflict with plaintiffs’ individual or collective interests in compensation. Efforts to make the process procedurally fair and transparent may be manipulated by a party to increase the costs of the process beyond the point that her adversary can rationally afford to continue with the litigation. Conversely, procedures that are incredibly efficient may obtain this efficiency by cutting corners and relying on unjustified presumptions. Trial by ordeal, for example, was far more efficient than modern civil litigation, yet nobody seriously suggests that a return to such a model of dispute resolution is desirable.

At settlement, these questions may be viewed in the narrow terms of whether the proposed settlement effectively balances the objectives of substantive law. In other words, what ends are advanced by the settlement, and who decides? Structurally, section 1407 does not contemplate, much less expressly authorize, placing this decision in the hands of anyone other than the holders of the substantive rights at issue.<sup>129</sup> As demonstrated in the preceding part, however, these questions are

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<sup>126</sup> Brown, *supra* note 19, at 610.

<sup>127</sup> For example, in the World Trade Center Disaster Site litigation, Judge Hellerstein’s efforts to ensure the fairness of the proposed settlement drew considerable condemnation from editorial boards, litigants and several scholars. *See, e.g.*, Editorial, *Remember the Blindfold, Judge*, N.Y. POST, Apr. 14, 2010, at 30 (criticizing Judge Hellerstein’s efforts to be more involved in shaping the settlement and characterizing his complaints (“I don’t know what’s going on [with the settlement]”) as “a temper tantrum of sorts”); John Riley, *Judge Challenged on Ruling*, NEWSDAY (N.Y.), Apr. 15, 2010, at A6 (noting various attacks on Judge Hellerstein’s initial stance on the World Trade Center settlement); *see also* Grabill, *supra* note 48, at 146-53 (criticizing judicial review of MDL settlements generally and Judge Hellerstein’s approach in the World Trade Center Disaster Site litigation specifically).

<sup>128</sup> DOMINICK VETRI ET AL., TORT LAW AND PRACTICE 15 (3d ed. 2006).

<sup>129</sup> As Martin Redish noted in his critique of the class action device, “the class action was never designed as a freestanding legal device for the purpose of ‘doing justice,’ nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds or as a mechanism by which to redistribute wealth.” MARTIN H. REDISH, WHOLESALE JUSTICE 22 (2009).

ultimately left to the repeat players who control multidistrict proceedings. Thus, this section focuses on the degree to which repeat players reflect plaintiffs' interests in the proceedings, whether those repeat players who assume lead counsel roles are likely to be the best suited for striking this balance, and the impact of modern mass tort practice on the perceived legitimacy of the process.

#### A. Domination, Conflicts, and Competition

If we assume that lead attorneys' interests are aligned with plaintiffs' interests, the fact that lead counsel set the agenda for the MDL—and, accordingly, define the common good to be pursued—should be of little concern. Empowering these repeat players should level the playing field with defendants prior to settlement and provide sufficient cohesion across the claim pool to preclude plaintiff self-interest from undermining any settlement that is achieved. In sum, empowering repeat players may be viewed as best ensuring that the purpose of applicable substantive law is achieved in settlement.

Collectively, however, the layers of representation, referral and control are so complex that conflicts of interest may be inevitable. As demonstrated, the modern framework sweeps a plaintiff into one firm's portfolio, in which her interests may conflict with both the lawyer's personal interests and the interests of others within that portfolio. If this lawyer refers the cases to another attorney with more influence, similar conflicts with the second lawyer's personal and portfolio majority's interests may also be present. When that lawyer is not among those controlling the direction of the case, there are yet more opportunities for personal and client majority/minority conflicts. And, by this point, the plaintiff is so far removed from those making the critical decisions that will drive the case toward conclusion that her individual preferences will be of little concern to those making the decisions that drive the inexorable march toward global settlement.

#### 1. The Failure of the Common Good Emphasis

The disconnect between the interests of lead counsel and plaintiffs places a thumb on the scale in favor of prompt global settlement ahead of plaintiffs' other interests in discovery and trial. Of course, as others have noted previously, the lawyers who have invested considerable resources in the litigation may prefer to accept an early settlement that provides sufficient returns for her investment even if it fails to capture the full value of her clients' claims.<sup>130</sup> This risk can be particularly high where attorneys invest enormous sums in the litigation over a period of years.<sup>131</sup> Moreover, even where the plaintiffs' non-pecuniary objectives—getting answers,

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Similarly, nothing in section 1407 alters the fact that it, like the class action, "is nothing more than an elaborate procedural device designed to facilitate the enforcement of pre-existing substantive law" that is vested in plaintiffs rather than repeat players. *Id.*

<sup>130</sup> Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 977-78 (1995).

<sup>131</sup> See *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 196-98 (S.D.N.Y. 2011) (discussing financial stress on one of the law firms in the case and concluding, "[t]he prospect of settlement and a fee of \$250 million gave the firm an interest that may not have been in line with many of its clients' interests"); *In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d 650, 652 (S.D.N.Y. 2011) (discussing similar incentives generating a conflict for the only other law firm representing a large group of plaintiffs in the case).

holding those responsible accountable publicly for their actions, and shaping public and political discussion to avoid similar problems in the future—may be achieved through litigation, the power to shape the agenda toward prompt settlement may foreclose these options as a condition of settlement.

With respect to compensation, even if the lawyer or lawyers who control the process share the interests of the claim pool with respect to increasing the size of the settlement, their own recoveries will also be dependent on how the fund is divided. Higher evidentiary barriers will increase the firms' overhead and reduce the number of the claims they control that are ultimately compensable, even if these barriers more effectively distinguish good and bad claims. Lead firms may also have an interest in maximizing claimant approval or acceptance through coercion<sup>132</sup> rather than accommodating minority claimants' needs and interests that may reduce their own claim portfolio's recovery. Collectively, these considerations demonstrate that lead counsels' interests advancing the settlement are likely to be at odds with at least some of the plaintiffs within the claim pool.<sup>133</sup>

Likewise, the belief that deterrence is improved by prompt global settlement is largely premised upon untested assumptions about the manner and degree to which different aspects of tort litigation may alter corporate behavior. From a social welfare standpoint, even if we assume that the quasi-class action increases aggregate liability, it is far from clear that this effect improves deterrence.<sup>134</sup> The murky parameters of this broader debate on the relationship between raw liability and deterrence are beyond the scope of this paper, but the dearth of empirical support for tort liability-centered deterrence should, at a minimum, suggest caution in framing aggregate litigation policy solely on accelerating and increasing aggregate settlement liability.

This need for caution is further warranted by the potential for the settlement-focused framework to cap defendants' other perceived risks of civil litigation. When plaintiffs express concern that defendants are merely writing checks to sweep their problems under the rug,<sup>135</sup> they capture the range of risks to the defendant more accurately than a model focused solely on the raw financial costs that litigation and settlement entail. The risks to decision makers and the enterprise alike may be more complex than the diversion of resources decision makers do not own.<sup>136</sup> In criminal

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<sup>132</sup> See *infra* Part III.B.

<sup>133</sup> Accord Brown, *supra* note 105, at 907-09 (discussing the frequency of this form of conflict of interest in asbestos bankruptcies).

<sup>134</sup> See generally Steven Shavell & A. Mitchell Polinsky, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437 (2010).

<sup>135</sup> See Rebecca Mowbray, *BP Oil Spill Health Settlement Details are Still a Mystery*, NEW ORLEANS TIMES-PICAYUNE, Mar. 11, 2012 (noting plaintiff's concerns that settlement might mean their stories would be "swept under the rug"); Harry R. Weber & Michael Kunzelman, *BP, Plaintiffs Focus on Gulf Oil Spill Settlement*, ASSOC. PRESS, Feb. 27, 2012 (quoting plaintiff's concerns that the Deepwater Horizon MDL settlements would allow BP to simply "write a check to solve their problems").

<sup>136</sup> Kara Scharwath, *BP Cuts a Deal on the Deepwater Horizon Spill*, TRIPLEPUNDIT (Mar. 6, 2012), <http://www.triplepundit.com/2012/03/bp-cuts-deal-deepwater-horizon-spill/> ("For a company that is trying to move on from a disaster of such grand proportions, the decision to settle was a smart one. It puts the money in the hands of the plaintiffs much more quickly than if the company were to have gone to trial, which certainly helps their perception of the

law, for example, it is recognized that fear of the reputational costs of a conviction may far exceed the threat of substantial monetary penalties in civil litigation,<sup>137</sup> yet the reputational effects that may arise from harmful disclosures in civil litigation tend to be discounted in the direct economic liability analysis.

For much the same reason companies fear criminal actions, defendants are frequently willing to pay more to settle a case where harmful discovery can be shielded from public scrutiny.<sup>138</sup> When a company is buying peace in global settlement, they are buying not only a cap on litigation costs and liability but also on public attention to potentially ruinous revelations about the company's wrongdoing. This may allow counsel to increase the aggregate settlement amount by some portion of the monetary value of secrecy to the defendant,<sup>139</sup> but it also allows defendants to avoid potentially catastrophic public relations fallout and constant public reminders of the harm they have caused.<sup>140</sup> In the process, an early settlement may unduly limit policy discussions concerning the specific events and processes that gave rise to the injurious event. In this respect, the degree to which early mass settlement transforms civil litigation into a complex business transaction can have a perverse effect on deterrence.

The precise effect of negative publicity on deterrence is difficult to quantify, and the degree to which early settlement may undermine this effect will vary from case to case. Discussions of this form of deterrence are grounded more in speculation and anecdotes than empirical evidence. Moreover, it is difficult to say how much, if any,

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company. And by avoiding a lengthy, dramatic trial, BP can protect its image and keep damaging headlines off the front page.”).

<sup>137</sup> See, e.g., Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 280 (2008) (“The perception that the reputational consequences of a conviction could exceed even the substantial monetary penalties in any parallel civil litigation can explain why firms under investigation for criminal violations are willing to do almost whatever it takes—including waiving attorney-client privilege, assisting the government's prosecution of their senior officers, and paying millions of dollars in civil fines—to avoid an indictment.”).

<sup>138</sup> William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 REV. LITIG. 565, 571 and n.17 (2008) (“[T]he possibility of keeping documents secret—both ‘bad documents’ and marginally confidential but valuable documents—no doubt can affect the ability of plaintiffs to settle cases and the amount for which cases will settle. Put more bluntly, defendants will pay more to keep bad documents secret.”).

<sup>139</sup> Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 981-82 (2010).

<sup>140</sup> As Shavell and Polinsky acknowledge, manufacturers are clearly motivated to avoid declines in product sales that would result from the perception that their products cause injury. Shavell & Polinsky, *supra* note 134, at 1439; see also Deborah A. Lilienthal, *Litigation Public Relations: The Provisional Remedy of the Communications World*, 43 N.Y.L. SCH. L. REV. 895, 897-98 (1999-2000) (“Many defendants recognize that they must be concerned with opinion outside the courtroom as well as inside. In fact, negative public opinion may impact a company more than an adverse legal decision. After all, if a company cannot pay its judgment, it can seek bankruptcy protection. If, on the other hand, the public believes your product is unsafe, that you are dishonest, that your business practices are unjust, no code, case law or judge can protect your client's market share, brand name, reputation, or credibility in the court of public opinion.”).

tort litigation adds to this form of deterrence when the injurious events at issue are already in the public eye due to extensive public and media interest. And given that so many traditional civil litigation cases settle as well, it may be that aggregation does no more than preserve a defendant's expectation of controlling the public relations fallout in tort litigation. This is not to say the effect plays a marginal role in deterring undesirable conduct *ex ante*; it merely reflects the difficulty in identifying what truly drives decision makers to modify their behavior and the extent to which aggregation merely suffers from the same shortcomings of traditional civil litigation.

## 2. Repeat Player Expertise and Plaintiffs' Interests

The "political convention mentality that currently prevails in MDLs"<sup>141</sup> can generate conflicts with the interests of the claim pool. Even if we assume that politically-motivated appointments and assignments are valuable inasmuch as they may promote cooperation among counsel and discourage strategic dissent by firms controlling large claim portfolios, the use of such assignments as a means of fostering loyalty to the collective interests of the leadership may come at the expense of zealous representation of the attorney's clients' interests.<sup>142</sup> At the same time, the danger in political appointments is that lawyers who may be better suited to specific roles due to experience, quality of work, ability to contain costs or otherwise are passed over to accommodate lawyers who are simply better politicians or have more effective networks for amassing large claim portfolios.<sup>143</sup>

In the Vioxx case, for example, the Motley Rice firm argued that the bellwether cases it prepared for trial were "pushed aside" by influential counsel in favor of their own cases.<sup>144</sup> In response, the Fee Allocation Committee argued that it was "familiar with the Motley Rice firm, the quality of their work and the efficiency of their lawyers" and accused the firm of overbilling.<sup>145</sup> Following the special master's

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<sup>141</sup> Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1985, 2002 (2011).

<sup>142</sup> *See supra* Part III.A.1.

<sup>143</sup> Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 *U. PA. L. REV.* 1593, 1623-25 (2008) (discussing the risk that the post-Class Action Fairness Act (CAFA) class actions and non-class aggregation will favor "dominant players on the plaintiff's side" and the role of networks and "connections" in obtaining appointments).

<sup>144</sup> Motley Rice's Objection to the Vioxx Fee Allocation Comm.'s Common Benefit Fee Recommendation, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, at 7 (E.D. La. Feb. 7, 2011). As Charles Silver noted:

In other words, Motley Rice contends that, when selecting Vioxx cases for bellwether trials, the lead attorneys were more concerned about fattening their lodestars than maximizing the value of plaintiffs' claims. I do not know whether this is true, but I can say that the allegation is plausible because the lodestar method, which rewards time expended, creates perverse incentives. . . . Motley Rice's complaint is plausible because judges base common benefit fee awards in MDLs on time expended and hourly rates.

Silver, *supra* note 141, at 2002.

<sup>145</sup> Indeed, in response, the committee criticized Motley Rice's work on the matter. Fee Allocation Comm.'s Response to Objections to Recommended Common Benefit Fee Allocation, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, at 13 (Mar. 4, 2011) ("The Fee

hearing on the matter, the Fee Allocation Committee increased the size of Motley Rice's proposed allocation from \$195,000 to \$1,250,000, which was approved by the special master and the court.<sup>146</sup>

Although Motley Rice's perception of the reasons for the strategic decision to litigate other cases ahead of its own may not be entitled to deference, it is easy to see how these decisions can be tainted by the lead firms' own self-interest. At the same time, if the lead lawyers are indeed familiar with Motley Rice and have such a negative view of their work and efficiency, the decision to have them do any work at all—much less increase their compensation by more than one million dollars—is perplexing. Regardless of how one evaluates the arguments advanced by the lawyers in the heat of a bitter fee dispute, it reinforces that the manner in which lead firms assign, manage and oversee the compensation for other lawyers involved in common benefit work can be tainted by political considerations that are not consistent with the best interests of the claim pool or the lawyers whose fees will be taxed to compensate others for that work.

To be clear, although *quid pro quo* understandings and agreements among repeat players may arise from time to time, the same effect can be observed even in the absence of such an express understanding. Where lawyers play an active role in selecting other lawyers to serve on the steering committee or perform other common interest work, these decisions may be framed by the participants' desires to build loyalty and relationships across cases. Although courts have acknowledged some of these concerns and taken a more active role in selecting counsel for leadership roles,<sup>147</sup> they nonetheless look to the firms' respective influence within the mass tort bar when making key appointments.<sup>148</sup> To that end, a firm's skillful leveraging of its position in a case may be seen as essential to build the support and influence necessary to obtain desirable positions in future cases.<sup>149</sup>

In sum, the perceived need to ensure cohesion among the members of the mass tort bar within a case tends to reward political savvy over legal skill, diligent

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Allocation Committee is familiar with the Motley Rice firm, the quality of their work and the efficiency of their lawyers. Therefore, the Committee concluded that these time records were likely reconstructed and reflected an overestimate of the time actually worked.”).

<sup>146</sup> See Order & Reasons, *In re Vioxx Prods. Liab. Litig.* MDL No. 1657, at 108 (E.D. La. Aug. 9, 2011).

<sup>147</sup> Order & Reasons, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, at 3, n.4 (E.D. La. Oct. 19, 2010) (“[T]he selection of lead counsel by their fellow attorneys would involve intrigue and side agreements which would make Macbeth appear to be a juvenile manipulator. Frequently, recommendations by attorneys for positions on leadership committees are governed more on friendship, past commitments and future hopes than on current issues.”).

<sup>148</sup> *Id.* (noting that “the efficient and successful resolution of an MDL is dependent on coordination and cooperation of lead counsel for all sides” and requires lawyers who have demonstrated sufficient “diplomatic skills to coordinate the efforts of a diverse group”).

<sup>149</sup> Accord Charles W. Wolfram, *Mass Torts—Messy Ethics*, 80 CORNELL L. REV. 1228, 1232 (1995) (discussing the need to “parlay the small favors and back scratching of a series of class-action cases into a position of influence and sizable fees in a future class action of one's own”). Although Wolfram discussed this back scratching in the class action context, this gamesmanship is equally critical in modern MDL practice given the current approach to selecting firms for leadership and other roles.

assessment of plaintiffs' preferences and objectives in litigation and settlement, and restraint in amassing and awarding common benefit funds. This does not mean that those who obtain leadership positions or common benefit work necessarily lack sufficient competence to perform their work effectively, but it does caution against blind confidence that the choices made by lead counsel will reflect plaintiffs' individual or collective best interests.

### 3. Competition and Distortion of the Mass Tort

As noted in Part II.A., the competition that underlies modern mass tort recruiting fuels the rapid growth of the modern mass tort following a triggering event. Within five months of the Deepwater Horizon explosion in the Gulf of Mexico, BP had been named in an estimated three hundred civil lawsuits across the country involving tens of thousands of plaintiffs, with many consolidated in a federal MDL.<sup>150</sup> Likewise, within a few months after a widely publicized "unintended acceleration" accident killed four people and caused Toyota to recall 3.8 million vehicles, more than one hundred lawsuits against the company were filed and consolidated in another federal MDL.<sup>151</sup> In a far less publicized matter, competing firms had already recruited several hundred clients and moved for the creation of an MDL less than one month after DePuy's recall of two hip replacement products and public commitment to cover all of the costs associated with the recall in August 2010.<sup>152</sup> In sum, whatever role maturity may still play in some cases, other events are more likely to trigger mass client solicitation today.

How do we account for such a shift? Representing a large group of plaintiffs may provide the firm some advantage in obtaining a leadership role,<sup>153</sup> and those who do not obtain such appointments may nonetheless leverage their portfolios to demand additional concessions for themselves or their clients. At this stage, it is sufficient to identify those who fit the basic profile and add their potential claims to the portfolio,<sup>154</sup> which not only provides the lawyer with practical control over the claim but also prevents competitors from obtaining them and precludes defendants

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<sup>150</sup> See John Schwarz, *U.S. Judge in New Orleans Will Hear Gulf Spill Cases*, N.Y. TIMES, Aug. 10, 2010, at A11.

<sup>151</sup> See Transfer & Order, *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prods. Liab. Litig.*, MDL No. 2151 (C.D. Cal. Apr. 9, 2010) (ordering consolidation of eleven class actions and more than one hundred other personal injury and economic loss lawsuits pending against Toyota arising out of alleged "unintended acceleration").

<sup>152</sup> DePuy issued a recall of its ASR hip replacement devices on August 24, 2010. *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, 787 F. Supp. 2d 1358, MDL No. 2244 (J.P.M.L. May 24, 2011). Plaintiffs' lawyers filed a motion to consolidate litigation concerning the devices on September 3, 2010, and the JPML ordered consolidation in the Northern District of Ohio on December 7, 2010. See Transfer Order, *In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig.*, MDL No. 2197 (J.P.M.L. Dec. 3, 2010).

<sup>153</sup> See, e.g., NAGAREDA, *supra* note 53, at 16-18; see also McCollam, *supra* note 31.

<sup>154</sup> Brown, *supra* note 19, at 593-95.

from settling with them prematurely.<sup>155</sup> Assuming they are at least prepared to do what is necessary to satisfy the pre-trial and settlement criteria established in the case,<sup>156</sup> obligations that will be less demanding than preparing each claim for trial,<sup>157</sup> there may be little practical downside to building a sizeable claim portfolio.

Under the accelerated aggregation and settlement model, the aggressive recruiting practices that have plagued some mature mass torts come at the beginning of the case. In the Deepwater Horizon MDL, for example, several victims who attempted to submit claims to the Gulf Coast Claims Facility were surprised to discover that they had ostensibly agreed to representation by counsel.<sup>158</sup> Likewise, after the threatened demise of asbestos litigation triggered a rush to file silicosis claims, thousands of asbestos plaintiffs were “recycled” as silicosis plaintiffs.<sup>159</sup> Similarly dubious recruiting and development practices have been identified in the other cases.<sup>160</sup>

Defense lawyers, who also tend to be frequent repeat players in these cases, are well aware of the degree to which plaintiffs’ lawyers may recruit and litigate claims in ways that conflict with broader norms. The transformation from civil litigation from a battle between the weak and powerful to aggregate litigation among largely equal—and equally imperfect—institutional repeat players provides opportunities for defendants even as it may level the playing field in court. To that end, defense firms’ client development materials tend to highlight not only their legal skill but also their experience in identifying and exploiting these conflicts<sup>161</sup> for good reason: emphasizing the corruption of the plaintiffs’ bar may shift prospective juror and broader public attention away from the defendant’s own actions in ways that advance their clients’ interests.

Combined with the defense narratives concerning the impact of frivolous litigation on job creation, retirement security and global competition; it is easy to see how defendants have been successful in altering public opinion in some mass tort

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<sup>155</sup> Once a party is represented by counsel, the Model Rules of Professional Conduct precludes opposing counsel from communicating about the matter with the client without consent. MODEL RULES OF PROF’L CONDUCT R. 4.2 (2012) (Opposing counsel “shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”). Judge Weinstein noted this limitation as an issue in the Dalkon Shield case and other evidence of this rule undermining client access to information. *See* Weinstein, *supra* note 7, at 496-97.

<sup>156</sup> Brown, *supra* note 19, at 612-17.

<sup>157</sup> *Id.*

<sup>158</sup> McCollam, *supra* note 31 (interviewing numerous victims who were misled into signing retention agreements or claimed they never retained anyone as counsel).

<sup>159</sup> Brown, *supra* note 19, at 581.

<sup>160</sup> *Id.* at 583-86.

<sup>161</sup> *See* Kirk Hartley, *Big Law Now Marketing Defense of Global Tort Litigation, and Adopting the Insurance Industry Tactic of Marketing a Theme of Fraud*, GLOBALTORT (Dec. 17, 2010), <http://www.globaltort.com/2010/12/big-law-now-marketing-defense-of-global-tort-litigation-and-adopting-theinsurance-industry-tactic-of-marketing-a-theme-of-fraud/> (discussing mass tort defense firms’ marketing tactics).

cases. Even in Libby, Montana—a community that has been plagued by more asbestos personal injuries per capita than any other—the specious claiming practices that historically dominated asbestos litigation have contributed to community sentiment against not only the litigation but also those victims who advance legitimate claims in litigation.<sup>162</sup> Documented evidence of claim manufacturing in the South American banana plantation proceedings have likewise been largely effective at shifting the focus from the defendant's widespread use of dangerous pesticides to the perceived greed of the lawyers and plaintiffs involved.<sup>163</sup>

Moreover, where defendants actually discover strong evidence of misconduct or manipulation, they may enjoy additional leverage in efforts to reduce their aggregate liability. In the aforementioned Silica MDL, for example, defendants successfully identified numerous obvious abuses with respect to the medical and other evidence supporting large blocks of silicosis claims.<sup>164</sup> Even though individual silicosis claims have been advanced for decades, the conclusion that such a substantial majority of the claims were “manufactured for money”<sup>165</sup> tainted the entire claim pool and continues to haunt true victims' efforts to pursue their rights today.

In transforming the popular perception of civil litigation from a means of advancing justice into a mechanism devoted primarily, if not exclusively, on transferring resources, the perception of tort law has also been transformed from a means of empowering the weak and injured to a mechanism for one group of powerful elites (the controlling lawyers) to transfer wealth to no one so much as themselves.<sup>166</sup> The success of this transformation is as much a product of aggregation's focus on wealth redistribution, empowering lawyers at the expense of individual plaintiffs' voice and exit options, and the systemic reluctance to reign in entrepreneurial litigation practices as any orchestrated campaign by defendants. The problem is not so much that defendants are exploiting their rights to highlight any distortions they uncover; it is that the practices that define entrepreneurial mass tort plaintiffs' practice and weaknesses in modern mass tort governance encourage these distortions and make the defendants' task too easy.

### *B. Plaintiff Rights, Attorney Dominance, and Legitimacy*

As suggested previously, the acceleration of claim recruiting and filing, discovery and settlement under the quasi-class action model may generate a

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<sup>162</sup> Heather Orom et al., *A Typology of Communication Dynamics in Families Living a Slow-Motion Technological Disaster*, 33 J. FAM. ISSUES 1299, 1310-16 (Oct. 2012) (noting community and family criticism that tracks broader criticism concerning the merits of asbestos litigation and generates doubts about the truthfulness and integrity of individual claimants).

<sup>163</sup> See, e.g., Amanda Bronstad, *Litigation Fraud Allegations Hotly Disputed in Dole Banana Case*, NAT'L L.J., Feb. 1, 2010.

<sup>164</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005).

<sup>165</sup> *Id.*

<sup>166</sup> Accord John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 603 (2005) (“[T]he relentless monetization of redress has arguably introduced pathologies, including the commodification of injuries, and the transformation of some plaintiffs' lawyers from victim-representatives to injury entrepreneurs.”).

“distorted”<sup>167</sup> life cycle for a mass tort. Plaintiffs who may have had the will and support necessary to advance their cases to conclusion in the absence of multidistrict consolidation—the same type of plaintiffs whose litigation uncovered the far-reaching misconduct of the asbestos industry—will find them delayed and more difficult to advance successfully. The maturity promised by the aggressive litigation of their rights may be replaced with pre-mature settlements based on repeat player preferences.

The practical effect is a transformation from appropriately adversarial civil litigation to a process structured to value the litigation rights that will inevitably be sold.<sup>168</sup> The pretrial work of multidistrict litigation is frequently characterized as establishing or aiding lead counsel and defendants in establishing rough values for the claims to be settled.<sup>169</sup> In any matrix-based settlement, these efforts will allow defendants and lead counsel to distinguish those rights—the goods—to be sold from those that will be treated as non-conforming and rejected. The global settlement agreement captures these terms, subject only to the approval of the true owners of the rights, which may be achieved through coercion, controlling the information available to plaintiffs and drowning out dissent through flooding the claim pool. To the extent that “aggregate settlements derive their legitimacy from client autonomy,”<sup>170</sup> the coercive force of aggregate practice and quasi-class action settlement<sup>171</sup> render them substantively suspect even if they preserve some technical conception of autonomy.

Even where the rough presumption that aggregation improves total recovery holds true in practice, “tort law is not simply a device for transferring wealth, and good lawyers are not simply maximizers of average payout.”<sup>172</sup> Compensation and deterrence are valuable social ends of tort law, but “the claim tort law provides against the tortfeasor is not precisely a means to that end.”<sup>173</sup> The power to control the litigation, including the initial decision to pursue litigation at all, belongs and remains with the client. And to “lose the right to decide whether to settle one’s

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<sup>167</sup> Frances E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1988) (noting that such premature consolidations may “perpetuate a distorted version of a mass tort”).

<sup>168</sup> Others have drawn similar observations concerning global mass tort settlements. See generally William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 413 (2001); accord, L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 163 (2004) (discussing the potential for collusive settlements in the mass tort settlement context).

<sup>169</sup> See, e.g., *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (noting that bellwether trials “can be beneficial for litigants who desire to settle such claims by providing information on the value of the cases as reflected by the jury verdicts”); Fallon, *supra* note 46, at 2342 (“[B]ellwether trials essentially supply counsel with ‘raw’ data around which a more fair and equitable grid-based compensation system can ultimately be constructed.”).

<sup>170</sup> Erichson, *supra* note 21, at 530 n.40.

<sup>171</sup> Peter Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 977-78 (1995).

<sup>172</sup> Erichson & Zipursky, *supra* note 62, at 312.

<sup>173</sup> *Id.*

claim, and on what terms, is to lose control of that claim in a very real sense.”<sup>174</sup> Placing these decisions in the hands of predictable repeat players may accelerate resolution, but this efficiency comes at the cost of denying plaintiffs access to digestible and unbiased information, independent and loyal representation and meaningful opportunities for voice and exit.

If we assume that all plaintiffs really want in litigation is compensation, then aggregation holds far more promise than leaving individual plaintiffs to their own devices. This assumption, however, presumes more than the available information can establish.<sup>175</sup> As one commentator noted recently, compensation alone fails “to heal the deep wounds of many clients.”<sup>176</sup> Dr. Tamara Relis likewise recently observed that “the bulk of lawyers for both plaintiffs and defendants have similar conceptions of why plaintiffs have sued in a particular case—the reason being solely or predominantly for money” while “claimants desires for acknowledgments of harm, retribution for defendant conduct, admissions of fault, prevention of reoccurrences, answers and apologies remain invisible to most lawyers throughout the litigation and mediation of these cases.”<sup>177</sup> Indeed, although a majority of the traditional tort plaintiffs in the Relis study identified compensation as at least a secondary goal of litigation, less than one quarter of the plaintiffs identified compensation as their primary (18%) or sole (6%) objective in the case.<sup>178</sup>

As in class action litigation, passive plaintiff majorities “appear to be behaving out of apathy or rational ignorance rather than making a considered choice not to opt out or object.”<sup>179</sup> There may be an “overwhelming market demand for en masse representation”<sup>180</sup> among these plaintiffs, but this passive majority is so readily manufactured in modern practice that it tells us little about how those with internalized injuries and a firm commitment to vindicating their rights assess the litigation and settlement. Moreover, this simple majority preference neither justifies the wholesale coercive surrender of individual rights nor the characterization of

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<sup>174</sup> *Id.* at 313.

<sup>175</sup> See Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11<sup>th</sup> Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 378 (2003) (“For example, in cases concerning widespread worker exposure to asbestos, liability for a particular person’s injuries is sometimes determined without a hearing, using answers to a questionnaire regarding exposure to asbestos. The courts use this approach to distribute settlements to large groups of victims quickly. However, instead of gratefully receiving their rapid settlements, injured parties have been angered by the denial of their ‘day in court.’ In other words, an effort by the judicial system to reform in order to better meet the needs of the public has not been successful due to an inaccurate understanding of what people really want in this situation.”); Tom R. Tyler, *A Psychological Perspective on the Settlement of Mass Tort Claim*, 53 LAW & CONTEMP. PROBS. 199, 199-205 (1990).

<sup>176</sup> Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1136 (2000).

<sup>177</sup> Tamara Relis, *“It’s Not About the Money!”: A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701, 706-07 (2007).

<sup>178</sup> *Id.* at 723.

<sup>179</sup> Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1563 (2004).

<sup>180</sup> David Rosenberg, *supra* note 88, at 428.

those who choose to advance individual cases as “self-indulgent”<sup>181</sup> or extortionists.<sup>182</sup> Even if we accept that some of those who insist upon taking a different course have nefarious motives or are falling prey to lawyers advancing their own agendas, it is a stunning logical leap to presume that all that reject the majority’s preference are so morally bankrupt or easily manipulated.

The reaction of the relatives of those killed in the World Trade Center to the 9/11 Victims Compensation Fund (VCF) provides a vivid reminder of the value of these rights in the mass tort context. Viewed purely from a compensation standpoint, the VCF was exceptional—promising “a fast, guaranteed payment . . . comparable to what they might recover if they won in court”<sup>183</sup>—so much so that “most expected them to accept the offer in droves.”<sup>184</sup> In spite of these benefits, many of those eligible for compensation were reluctant to participate and delayed claim filing until shortly before the deadline.<sup>185</sup>

Although others suggested a variety of explanations for the reluctance to file, a study conducted by Gillian Hadfield showed that “the choice between accepting a payment from the Fund and going to court was not exclusively, or even primarily, framed as a financial calculation.”<sup>186</sup> For many of these claimants, the decision:

involved not an easy trade-off between a guaranteed dollar payment and a gamble on a “pot of gold,” but a deeply troubling trade-off between money and a host of nonmonetary values that respondents thought they might obtain from litigation. These values included information from otherwise inaccessible sources (the decision makers who determined airline and World Trade Center fire safety procedures, for example), accountability in the sense of public judgment about whether those on

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<sup>181</sup> *Id.*

<sup>182</sup> As Erichson and Zipursky noted in discussing the Vioxx settlement:

[A]nother suggestion here requires careful examination: the charge of extortion—the suggestion that those refusing to settle their claims are obviously merely manipulative hold-outs, that these claimants must recognize proposed settlements as perfectly acceptable and desirable and, by holding out, are simply trying to squeeze more out of the defendant at the cost of everyone around them. . . . It would be naive to deny that some allegedly reluctant claimants are like this, but we find no reason to suppose that only a manipulative claimant would reject the settlement agreement. Claimants have different risk tolerances, different litigation objectives, different satisficing levels, and different evaluations of the strength of their own claims. Moreover, settlements treat claimants differently, leaving some better compensated than others. Claimants may place different values on certainty and may differ in their evaluation of the certainty that settlement provides. On the facts of Vioxx, the claimants had very little sense of how much money they would obtain from a settlement. There is good reason to think that some of them genuinely wanted to take Merck to trial rather than accept an utterly indefinite settlement.

Erichson & Zipursky, *supra* note 62, at 318.

<sup>183</sup> Hadfield, *supra* note 90, at 645-46.

<sup>184</sup> *Id.* at 646.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

whom victims depended for their safety did their jobs, and responsive policy change—making sure that lessons were learned and heeded in the future.<sup>187</sup>

Hadfield's study provides a stark example of the popular perception of civil litigation rights. That victims prized their rights to litigate is evident not only in their reluctance to sacrifice the rights but also in the way that they framed this reluctance. These rights represented the potential for compensation in tort, but they also represented the ability to serve their communities in a unique way.<sup>188</sup> When faced with the choice of ensuring compensation that was comparable to what they would receive in tort or retaining the right, even those with compelling personal needs for compensation struggled with the decision and were "heartbroken and ashamed"<sup>189</sup> when they capitulated to the certainty of the VCF.<sup>190</sup> Hadfield concluded that civil litigation rights represented more to these victims "than a means to satisfying private material ends; it represents principled participation in a process that is constitutive of a community."<sup>191</sup>

Although it may be tempting to characterize the ultimately high participation rates with the fund as "a widespread endorsement of money over litigation or an ultimate acceding to the financial frame offered by Congress, VCF personnel, and the legal profession," the study directly undermines these characterizations.<sup>192</sup> As Hadfield noted, "Many felt that they had been bought off, induced to forego litigation in order to protect the government, the airlines, or other corporate entities."<sup>193</sup> And a "significant majority of respondents felt that it was wrong that the VCF design required them to waive their right to pursue civil litigation as a condition of receiving money through the VCF."<sup>194</sup>

The reality that awaits victims in quasi-class multidistrict litigation is, as noted, more likely to resemble the compelled acceptance of such a "payoff" than the 9/11 victims' idealized vision of civil litigation. And though the vast majority of respondents "felt that the limitation of liability, the effort to prevent lawsuits, and the requirement that victims and their families choose between money and lawsuits were

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<sup>187</sup> *Id.* at 647-48.

<sup>188</sup> *Id.* at 661 (concluding that many saw their litigation rights as a uniquely powerful tool for gaining an understanding of what went wrong and why, so that we might "change things to prevent this from happening again"). As Hadfield noted, "the choice as they saw it was it was about relinquishing gold in favor of something they saw as more important," even though they knew they faced an uphill battle in court. *Id.* at 662.

<sup>189</sup> *Id.* at 663.

<sup>190</sup> *Id.* at 665 (finding that a majority of respondents who ultimately submitted claims to the VCF found it "somewhat" or "very" hard to do so, with these decisions frequently "driven by a capitulation to reality and brute facts").

<sup>191</sup> *Id.* at 648-49.

<sup>192</sup> *Id.* at 667.

<sup>193</sup> *Id.* at 668.

<sup>194</sup> *Id.*

steps no future Congress should take,”<sup>195</sup> these are steps that quasi-class actions demand in the largest mass tort cases.

Collectively, the exclusion of plaintiffs’ voices, dominance of lead counsel, and negative perceptions of the practices employed by some of these entrepreneurial lawyers undermines the long-term legitimacy of the quasi-class action model. The irony in the efforts to transform multidistrict litigation into a quasi-class action is that it exaggerates the features of class action practice that served as the core talking points in building support for the Class Action Fairness Act (CAFA).<sup>196</sup> And though multidistrict consolidation may never draw the same attention of the special interests that successfully lobbied for CAFA, the political effort to limit class actions was viable only because these talking points rung true with the public. While CAFA may have marked an important legislative shift in class action practice, the battle over the public’s perception of the legitimacy of the class action device appears to have been lost long before CAFA.<sup>197</sup>

#### V. RECOMMENDATIONS, PROPOSALS, AND LIMITATIONS

The problem with mass tort aggregation is not so much that it wholly supplants traditional civil litigation; it is that it captures many of traditional litigation’s weaknesses and introduces new ones. Although individual plaintiffs in traditional civil litigation frequently defer to the expertise and advice of counsel, they retain the power to control and guide their own cases. In empowering a select group of lawyers to control multidistrict proceedings, the preceding demonstrates that plaintiffs are neither individually nor collectively empowered to exert control over critical collective decisions in a similar fashion. They have no meaningful voice in matters that are relevant to the disposition of their claims, and their exit options are effectively limited.

The question, then, is how to empower plaintiffs without undermining the efficiencies of aggregation. Empowering every plaintiff to opine on every step, evaluate every confidential document and deposition, or effectively veto any global settlement would mark a descent into chaos. Class actions ostensibly address this concern by designating one or more representative plaintiffs, but the characteristic that defines the need for multidistrict rather than class treatment—substantial variations within the claim pool—also suggests that purely representative governance will fail to capture the objective claim distinctions and subjective

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<sup>195</sup> *Id.* at 669.

<sup>196</sup> Erichson, *supra* note 143, at 1596-1602.

<sup>197</sup> As Professor Lahav noted in 2003,

The pervasive criticisms against class actions—which fall mostly in the lap of plaintiffs’ side class action attorneys—are damaging to the legal profession and to the regulatory purpose of the class action mechanisms. Commentators who oppose class action litigation often point to lawyer control as the reason for eliminating class actions. Studies and opinion polls have found that the public believes that lawyers are greedier and more dishonest than other professionals. The bad press concerning class action litigation has not helped this image.

Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 *IND. L. REV.* 65, 74 n.31 (2003).

preferences of the plaintiffs. In sum, plaintiff empowerment may sound nice in theory, but it promises to be exceptionally difficult in practice.

To address this question, this Part proposes a framework for collective voice and oversight that mirrors the approach used in complex corporate bankruptcy proceedings. As in multidistrict litigation, these proceedings tend to involve creditors with diverse and conflicting individual interests, limited incentives for individual creditors to monitor and police the proceedings on their own, and a high potential for repeat players to assume control over the case in a manner that undermines the interests of the claim pool. Although this proposal is complicated by the obvious distinctions between complex bankruptcy and mass tort proceedings, it nonetheless provides a useful starting point for resolving the problems that arise in a system that marginalizes plaintiffs.

*A. A Model for Collective Voice in Quasi-Class Action*

1. Creditors' Committees in Chapter 11

At its core, bankruptcy is a straightforward common pool problem: the bankrupt's creditors have both a shared interest in maximizing the size of the debtor's assets available for distribution and antagonistic interests in maximizing their individual distributions from those assets. If these creditors remain free to pursue whatever recourse is available to them outside of bankruptcy, history demonstrates that creditors will "race to the courthouse" to advance their individual interests even if the collective impact of this race is to reduce their aggregate returns. Thus, if bankruptcy law is to achieve whatever vision of equitable distribution it is designed to advance, it must curtail creditors' self-help options.

The bankruptcy structure provides a vehicle for creditors to express their collective voice—by way of one or more official committees comprised of creditors selected by the Office of the United States Trustee—throughout the bankruptcy case. These committees may exercise a level of influence over the proceedings that few individual creditors can match, even if the individual creditors have the resources and resolve to do so. At the same time, individual creditors are expressly authorized to object to any matter that affects their interests, may be authorized to proceed with their individual collection efforts upon satisfaction of certain conditions, and have the right to vote on any Chapter 11 plan that alters their interests in any way. To that end, although bankruptcy preempts traditional litigant discretion and control, it does so in a way that respects and strengthens creditor voice rather than stifles it.

Specifically, under section 1102 of the Bankruptcy Code, the U.S. Trustee is charged with appointing one or more official creditors' committees "as soon as practicable" after the commencement of a Chapter 11 bankruptcy case. This typically involves sending solicitation letters and questionnaires to the unsecured creditors identified by the debtor in its Chapter 11 petition.<sup>198</sup> The U.S. Trustee subsequently reviews completed questionnaires and selects committee members that best reflect the creditor body, both in terms of type and amount of claims held.

Once formed, the committee has the power to retain counsel and other necessary professionals of the committee's choice, which will be approved by the court barring

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<sup>198</sup> For a more detailed account of this process, see Greg M. Zipes & Lisa L. Lambert, *Creditors' Committee Formation Dynamics: Issues in the Real World*, 77 AM. BANKR. L.J. 229 (2003).

any disqualifying conflicts of interest. This selection process—the so-called “beauty contest”—typically involves the committee hearing brief presentations from potential representatives, which tend to emphasize the lawyer’s qualifications and strategies for protecting creditor interests. Once selected, the lawyer owes fiduciary duties to the committee rather than any individual creditor or committee member.

The bankruptcy estate pays the reasonable fees and expenses of professionals selected to represent the committee, as well as the reasonable expenses incurred by committee members in connection with their service on the committee. By contrast, any fees or expenses associated with any committee member’s efforts to collect on its claims or litigate other matters in its individual capacity are the responsibility of the committee member alone. Thus, committee members do not pay any of the costs incurred in connection with the committee’s performance of its duties, but they remain responsible for the costs of advancing their individual interests in the case. To that end, committee members typically hire their own separate counsel to advance their own interests in the case and maintain separation between their work as a member of the committee and these individual interests.

Creditors’ committees can play a critical role in the cases in which they are appointed. They serve as a “statutory watchdog,”<sup>199</sup> charged with investigating and monitoring the debtor in possession’s conduct.<sup>200</sup> Bankruptcy judges tend to place tremendous weight on the committees’ opinions concerning significant proposals and contested matters; so much so that sensible debtor’s counsel will at least try to resolve any conflicts with the committees before seeking court approval. Ideally, the debtor and the committee will work closely throughout the case to frame any ultimate plan of reorganization and, in some cases, may be able to resolve issues to the point that they propose a joint plan for court approval.

Notwithstanding its potential, the available data concerning the degree to which the bankruptcy committee structure helps to improve outcomes in Chapter 11 cases is mixed. In one study, Stephen Lubben suggests that the appointment of a creditor’s committee tends to suggest strong creditor interest and, accordingly, a lower probability of failure.<sup>201</sup> In another study, Michelle Harner and Jamie Marincic analyzed 296 Chapter 11 cases across six jurisdictions and supplemental survey data from committee members and professionals.<sup>202</sup> The authors found that cases with only one official committee fared worse in terms of restructuring success and distribution to creditors than cases with no committees and cases with multiple committees.<sup>203</sup> Accordingly, their proposals included greater use of “multiple

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<sup>199</sup> See, e.g., Michelle M. Harner & Jamie Marincic, *Committee Capture? An Empirical Analysis of the Role of Creditors’ Committees in Business Reorganization*, 64 VAND. L. REV. 749, n.68 (2011) (noting the common reference to official committees as “statutory watchdogs”).

<sup>200</sup> 11 U.S.C. § 1103 (2006) (setting forth powers of committee, including the ability to “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor”; “participate in the formulation of a plan”; and “request the appointment of a trustee or examiner”).

<sup>201</sup> Stephen J. Lubben, Chapter 11 “Failure” (2009) (Seton Hall Public Law Research Paper No. 1375163), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1375163](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375163).

<sup>202</sup> Harner & Marincic, *supra* note 199.

<sup>203</sup> *Id.* at 794-95.

committees, categorical single committees and more robust disclosures that target that goal.”<sup>204</sup> The authors concluded, “By striving to give more creditors a stronger, more informed voice on committees, the committee structure could help protect the process from the often subtle and questionable influence of just a few.”<sup>205</sup>

The beauty of the bankruptcy committee structure is its potential as a framework for empowering those who have strong incentives to monitor, spreading the costs of monitoring across the claim pool, and providing clear parameters for designated peers to speak for the group. Individual claimants may still monitor and participate in the case on their own, but they may also choose to rely upon the committee to protect their interests with respect to the big picture matters that tend to dominate these cases. At the same time, the committee, as the collective voice of the claim pool, should enjoy far more influence in critical negotiations and contested matters than any individual creditor.

## 2. Constitution and Functions of Plaintiffs’ Oversight Committees

Conceptually, a formal plaintiffs’ oversight committee (POC) can serve a similarly valuable role in quasi-class action, though, as demonstrated in bankruptcy, demands careful attention to several key questions. First, it is necessary to clearly define the POC’s purpose. In bankruptcy, official committees are charged with representing the collective interests of their constituencies by challenging actions that might dissipate the estate’s assets or unduly elevate some creditors above others. In the quasi-class action context, the POC should serve a similarly broad purpose—advancing the shared interests of the claim pool, challenging decisions and settlement terms that unduly elevate or undermine the interests of sub-groups, taking steps to improve cohesion within the pool where possible, and improving plaintiffs’ access to the information necessary to allow them to make informed decisions about their respective claims. In contrast to the nominal representative plaintiff in class action litigation, however, this role is focused on improving collective voice and facilitating access to information that will promote informed individual decisions rather than identifying a figurehead<sup>206</sup> whose presence may be used to rationalize coercion.

This conception of what the POC’s objectives will be should provide some guidance with respect to the next question: Who will make up the POC? As the Harner and Marincic study suggests, any proposal must pay close attention to the need to improve voice across the diverse claim pool and limit potential capture by those seeking to manipulate the committee process to advance their individual or sub-group interests at the expense of the group. This need to incorporate the views of a potentially diverse group of plaintiffs, however, must be balanced against the

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<sup>204</sup> *Id.* at 803.

<sup>205</sup> *Id.*

<sup>206</sup> See, e.g., Debra Lyn Bassett, *When Reform is Not Enough: Assuring More than Merely “Adequate” Representation in Class Actions*, 38 GA. L. REV. 927, 951 (2004) (“[B]oth courts and commentators have observed that in practice, class representatives often serve as little more than mere figureheads.”); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 27-28 (2002) (“Named representative plaintiffs have proven to be merely figureheads: ineffective, passive, unsophisticated, and completely disregarded by both courts and class attorneys.”).

need to keep the size of the committee manageable. In short, a committee that is too small may not be representative of the claim pool at large, but a committee with too many members may find it difficult to hold regular conferences and have the discussions necessary to shape and advance its objectives.

Moreover, committee turnover is always a possibility in any aggregate proceeding. Given the potential that some POC members may settle their claims during the course of the MDL, the framework must account for replacing committee members who no longer have an interest in the case. This potential to settle with individual plaintiffs as the case advances also raises the specter of POC members (or their counsel) using their appointments to obtain unduly favorable settlements of their own claims at the expense of the claim pool. In sum, the POC must be structured carefully to avoid capture, depletion of critical voices within the committee, and disloyalty by one or more members.

Perhaps the most complex question is how this framework can be structured to empower the POC to fulfill its objectives. Mass tort litigation is in many ways more complex and uncertain than corporate bankruptcy and involves creditors who tend to be less sophisticated in legal matters than the typical unsecured business creditor. This suggests that the POC will require, at a minimum, representation or other guidance by experienced, independent counsel or a “special officer”<sup>207</sup> in the course of its work. To effectively fulfill its obligations and reach its potential, the framework must also be designed to provide the POC with timely access to information concerning the progress of the case, including any settlement negotiations, and a forum for communicating its views with – and obtaining input from – other plaintiffs.

Although conceptually promising, the preceding discussion demonstrates significant obstacles to applying a plaintiff-centered governance model to mass tort aggregation.

### 3. Selection of Committee Representatives

Perhaps the most obvious difficulty in such a proposal is identifying and appointing potential committee members in a manner that adds value without introducing new avenues for abuse. Those with potential claims can be identified and solicited for committee membership early in virtually any aggregative proceeding. Nonetheless, the U.S. Trustee controls this decision in bankruptcy, and there is no comparable organization in other forms of aggregation. This task must thus fall to courts, the lawyers the courts will oversee, or the decision of the claim pool. At this stage, counsel have a strong interest in selecting passive plaintiffs for committee appointments and, given their capacity to flood the pool,<sup>208</sup> may also be in position to manipulate any vote. To that end, notwithstanding the potential conflict with democratic principles, it may be necessary at this point to place this responsibility in either the supervising court or some other judicial body.

A committee is, of course, only as representative and independent as its members, so the criteria for selection of committee members must be framed carefully. In this respect, judges should attempt to identify willing plaintiffs who have demonstrated both a commitment to active involvement in the case and ensure

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<sup>207</sup> Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 48-49 (2009).

<sup>208</sup> See *supra* Part III.C.3.

that the plaintiffs selected provide a fair representation of the diverse interests present in the case. To control for the potential for capture, courts should limit the number of plaintiffs with direct or indirect relationships with lead counsel or other parties in the case or on the committee. Likewise, to avoid the infusion of claimants who are interested more in any fee they can obtain from serving in this capacity, committee member compensation, if any, should be tied to work actually performed in connection with the case.

#### 4. Responsibilities

The primary function of committee members would be to direct and oversee the work of hired professionals, provide a forum for committed plaintiffs to voice their concerns, and generate truly plaintiff-centered assessments of common benefit fund assessments and allocation and other key developments in the case. They would have access to all discovery and receive periodic reports from lead and committee counsel concerning the progress of the case. Lead counsel would be required to submit any proposed settlement to the committee prior to submission to the claim pool. After a global settlement is reached, the plaintiffs' oversight committee would be asked to analyze and produce a report to plaintiffs concerning their individual and collective views of the risks and benefits of litigation and settlement.

Another function of the plaintiffs' oversight committee would be to actively encourage ongoing communication and cooperation within the claim pool. As Elizabeth Burch recently observed, this coming together at an early stage where their respective objectives in the litigation can be focused on shared goals "can strengthen group cohesion" and, ultimately, may improve their willingness to come together on other matters.<sup>209</sup> And, as discussed below, building this community cohesion at this early stage may not only improve collective oversight of the process but also encourage greater participation in and satisfaction with global settlement.

#### 5. Committee Counsel

Given the scientific, procedural and legal complexities associated with these cases, counsel will often be necessary to assist the committee in monitoring, framing its objections, and communicating its views with the court and the claim pool. As with retained counsel in bankruptcy cases, committee counsel in this context may enjoy considerable influence and, accordingly, should not have or represent any party that has an interest in the case. Although this condition might unduly limit the pool of viable counsel in cases that have evolved and matured over an extended period of time, in which case experience in the field may be both necessary and disqualifying, this should not be a concern in the vast majority of mass tort cases that are consolidated shortly after a triggering event today.

Ideally, committee counsel's compensation should not be tied to any settlement due to the risk that any advice may be tainted by the lawyer's interest in being paid. Such a conflict is unlikely in bankruptcy because the Code expressly provides for compensation of professionals on an interim basis during the course of the case.<sup>210</sup> As noted previously, compensation in other forms of non-class aggregation tends to

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<sup>209</sup> Burch, *supra* note 207, at 28.

<sup>210</sup> See 11 U.S.C. § 331 (2006).

be decided by the judge only after settlement,<sup>211</sup> and the legal basis for compensating counsel in multidistrict litigation is far from certain. Notwithstanding this uncertainty, the current trend toward recognizing the propriety of common benefit funds even outside the class action context and the extraordinary competition for these roles suggests that the risk of nonpayment should not be a significant barrier to obtaining qualified counsel for committee counsel and other professionals.

### *B. Advantages in Litigation and Settlement*

#### 1. Plaintiff Monitoring and Conflicts of Interest

As noted previously, the multiple layers of lawyers between many plaintiffs and lead counsel in multidistrict mass tort litigation and the range of conflicts of interest at each level limits individual plaintiffs' options for monitoring and having their voice heard in the proceedings. It is well settled that individual plaintiffs lack sufficient power and resources to challenge large corporate wrongdoers effectively in civil litigation, yet we tend to rely on ethical regimes and the virtually non-existent threat of ethical enforcement or malpractice litigation to somehow protect plaintiffs from similarly powerful and well-funded entrepreneurial plaintiffs' lawyers. Although modern aggregation has given rise to a plaintiffs' bar that can match the most powerful defendants in terms of resources and expertise, it has not, to date, provided plaintiffs with a sufficient mechanism for protecting their own interests when they conflict with the bar.

The oversight committee approach fills this void by empowering plaintiffs to have voice as a group, both within the proceedings and as a matter of coordinating and reconciling their conflicting perspectives. Instead of the scattering of random voices expressed through diverse avenues that may never reach decision makers today, such a unified framework for plaintiffs to come together and affirm or reject decisions that directly influence their interests. In so doing, it matches the same basic design of civil litigation generally—collective oversight for litigation of their collective interests instead of individual oversight of an individual case—and provides the assistance necessary to make this collective oversight viable.

#### 2. Improved Decision Making in Settlement

As noted previously, the practical limits on direct plaintiff education concerning their prospective recoveries under a global settlement and risks at trial reduce the prospects that individual plaintiffs will make informed settlement or opt out decisions. Although steering committee and individual counsel employ town hall sessions and similar efforts to advance their visions of the case collectively, these sessions are frequently one-sided affairs that either praise or vilify the settlement according to the preferences of counsel.

In fostering group cohesion and direct dialogue amongst victims, the committee proposal addresses these shortcomings. By virtue of their shared status as victims, plaintiffs may enjoy a level of credibility and potential for group cohesion that outsiders—including their own counsel—do not.<sup>212</sup> They can speak to their concerns

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<sup>211</sup> See *supra* Part III.

<sup>212</sup> Burch, *supra* note 207, at 48.

at a level of understanding that even experienced counsel fail to appreciate.<sup>213</sup> The proposed framework promotes and provides a clear forum for group deliberation, which can improve their willingness and ability to cooperate.<sup>214</sup> Rather than relying upon the potential for informal groups to form, develop an action plan, and advance the group's interests on an ad hoc basis,<sup>215</sup> the committee structure provides a clear framework for the group to develop information, share it with the claim pool, and ensure that any global settlement truly reflects their interests. And in supporting this group with independent counsel who effectively fills the role of "special officer," this structure can better ensure that the group evolves in a manner focused on advancing plaintiffs' interests and avoids capture by individual parties or repeat players.<sup>216</sup>

Individual plaintiffs remain free to accept or reject the oversight committee's opinions under this proposal, but even those who reject the committee's views stand to benefit from the additional information and input. These insights, tailored toward emphasizing matters critical to similarly situated and dissimilar plaintiffs alike, can encourage plaintiffs to internalize critical aspects of their claims—to see them as more than a mere ticket to recovery but as a means of vindicating their rights—and suggest, overtly or otherwise, questions they should ask of themselves and their counsel before committing to a course of action. At the same time, it allows plaintiffs to tell their own stories in a forum that will, by its nature, be widely distributed and publicized; which can serve to improve a plaintiff's understanding of her own claims as well as the claims of others within the group.

### C. Potential Objections and Limitations

Any framework that fundamentally alters existing practices necessarily involves integration issues that must be addressed before implementation. In bankruptcy, for example, the precise design of the modern committee structure was premised upon creditor oversight provisions that existed under the Bankruptcy Act of 1898<sup>217</sup> and was refined to account for decades of experience and several detailed inquiries into the shortcomings of those provisions.<sup>218</sup> Multidistrict litigation, however, has no comparable plaintiff oversight mechanism and involves administrative issues that

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<sup>213</sup> See generally Taft, *supra* note 176 (discussing disconnect between attorneys and clients); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105 (2010) (outlining how plaintiffs in global settlements may play on cognitive biases to produce settlements that disadvantage plaintiffs).

<sup>214</sup> Burch, *supra* note 207, at 48.

<sup>215</sup> *Id.* at 22.

<sup>216</sup> *Id.* at 52-53 (outlining potential use of a "special officer" to encourage group formation and focus on issues that improve cohesion and avoid capture).

<sup>217</sup> Bankruptcy Act of 1898, ch. 541, 541 Stat. 544, 544-66, *repealed by* An Act to Establish a Uniform Law on the Subject of Bankruptcies, § 401(a), 92 Stat. 2549, 2682 (1970).

<sup>218</sup> See *Furthering Asbestos Claims Transparency Act of 2012: Hearing on H.R. 4369 Before the Subcomm. on Courts, Commercial, and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 2-3 (2012) (written statement of Professor S. Todd Brown) (discussing the manner in which modern bankruptcy governance provisions evolved as a result of repeat player fraud and abuse under the Bankruptcy Act of 1898).

may be more complex. Given the focus of this proposal as a first-stage proof of concept, however, this section focuses less on objections to specific aspects of the proposal than on conceptual objections.

### 1. Plaintiff Sophistication and Participation

One fear is that mass tort plaintiffs may lack sufficient sophistication to oversee the process effectively, though this fear may say more about those who express it than the shortcomings of the victims themselves. Few issues in even the most complex litigation, however, are beyond the comprehension of most men and women, assuming, of course, that their counselors provide competent guidance and counsel. Our civil litigation system, of course, relies upon lay juries to decide similarly complex cases, and the professional's job in advising clients is arguably far less complex and provides greater flexibility in clarifying any ambiguities and confusion.

The systemic and pervasive skepticism of plaintiffs' capacity to make decisions concerning matters that may have profound and lasting effects on their daily lives says more about the elite-centered culture of litigation and academia than it does about the plaintiffs themselves. In the *Deepwater Horizon* case, for example, we should expect that at least some of the affected plaintiffs have an extensive understanding of oil drilling, environmental science, and other technical issues that likely far exceed that of the lawyers controlling the case. Similarly, given the reach of the *Toyota Sudden Acceleration MDL*, at least some of the affected plaintiffs are likely to have far superior expertise in the relevant engineering, economics and other disciplines than the lawyers advancing their interests.

This skepticism reflects less a fear that plaintiffs will make decisions that run contrary to their own objectives than the prospect that they will have perspectives that differ from lead counsel and transferee courts. Improving access to information strips away some of the lawyer's information advantage in the relationship, but it does not do so in a way that undermines the ostensible role of lawyer as agent. To that end, empowering plaintiffs through improving access to information is consistent with substantive law. In sum, the objection here is less one with its consistency with applicable law than it is with the manner in which that law places control in the hands of those who are harmed.

Another difficulty with this proposal is that it depends upon the presence of plaintiffs who are not only committed to advancing the litigation but also stepping forward as independent representatives of the community of plaintiffs. This framework will presumably be limited where few, if any, plaintiffs would name and blame and thus never claim in the absence of aggregation. Just as there is no one-size-fits-all mass tort case, the approach to governance in mass tort litigation must conform to the needs and preferences of the plaintiffs. Indeed, official committees are not appointed in many small Chapter 11 cases because creditors simply do not have sufficient stakes to justify participation. And if no plaintiffs can be bothered to oversee a case, this fact alone has value in telling us about the claiming commitment of the claim pool and may support an approach that looks far more like modern governance by counsel than this proposal.

Even in cases where plaintiffs are unable or unwilling to take a direct role, their absence may be offset to a degree by reserving most or all steering committee and other leadership roles for those attorneys who represent distinct plaintiff subgroups exclusively and preferring traditional plaintiffs' lawyers over mass tort repeat players. Although a lawyer's clients may consent to representation by counsel who

represent others with conflicting interests, this consent is not always readily apparent and, in any case, cannot be assumed beyond the lawyer's own clients. In shaping leadership committees to reflect these distinct interests and reducing the prospects of control by repeat players, the leadership should not only advance their shared interests but also promote arms-length balancing of their antagonistic interests in any settlement.

## 2. Committee Counsel Domination

Given the relative complexity of mass tort litigation, and the need for competent counsel to guide the committee, the risk that repeat player committee counsel will come to dominate the proceedings to their own benefit cannot be overlooked. This risk, however, is tempered by the fact that committee counsel will be appointed by and subject to the direct control of committee members who are not, of course, repeat players. As in bankruptcy, this risk can be further limited by excluding lawyers who represent individual plaintiffs in the matter or have extensive overlapping interests with other repeat players involved in the case.

## 3. Waste and Delay

The use of formal committees is not, of course, without cost. Bankruptcy committee professional fees frequently run into the millions in the largest cases, and their work appears, at times, to be duplicative of debtors' counsel.<sup>219</sup> The need for independent counsel necessarily involves costs. Likewise, regular report preparation, information sharing, development of communication strategies across the claim pool, preparation of the POC's assessment of any proposed settlement, and other functions will entail costs and, at times, may draw lead counsel's attention away from the important work of investigating and litigating the case. And adding another layer of bureaucracy into aggregate governance may introduce a variety of other costs and delays that are difficult to predict at the outset.

For some, these risks alone are sufficient to reject any sort of plaintiff-centered governance proposal. Indeed, instead of addressing the power disparity between plaintiffs and the lawyers who dominate aggregate litigation, recent proposals attempt to expand it by eradicating the last remaining vestige of plaintiff autonomy by placing the final settlement decision in the hands of counsel. The American Law Institute's (ALI) Principles of Aggregate Litigation, for example, seeks to bind plaintiffs to the collective decision of the claim pool through advance consent.<sup>220</sup> As demonstrated, the raw majority vote proposal is so readily manipulated by accelerated recruiting practices as to effectively provide lead counsel unfettered control under the modern framework. Combined with the ex ante consent provision, this approach would render the effort to strip plaintiffs' power over the decisions that will forever alter their rights complete.

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<sup>219</sup> Much of this duplication, however, stems from the fact that creditors' committees are often adverse to the debtor in possession. Where matters are contested, for example, they will hire competing experts to evaluate critical questions. The POC model, on the other hand, does not envision a similarly adverse relationship. Rather, the POC's role should be far more cooperative than seen in complex bankruptcy matters, with conflicts limited to areas that directly involve protecting the claim pool's interests.

<sup>220</sup> AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.17 (2010).

Rather than continue the “ongoing search for novel ways to bind individual mass tort plaintiffs to outcomes by which they do not affirmatively agree to be bound . . . or do not affirmatively support,”<sup>221</sup> the collective objectives of substantive tort law are better served by expanding plaintiff monitoring, group building, and providing victims with an additional forum for obtaining the information they need to make informed decisions. Indeed, many of the problems that have been identified in mass tort litigation have their origins in the historical emphasis on efficiency without adequate attention to the other objectives of substantive and procedural law. The claim manufacturing practices that ultimately defined the silica mass tort and fueled asbestos litigation for more than a decade were, in most respects, a model of efficiency even as they reinforced the worst public perceptions of mass tort practice and lawyers.

## VI. CONCLUSION

Quasi-class aggregation yields complex and interrelated concerns. It generates several layers of conflicts of interest and may accelerate recruiting practices that introduce dubious and passive claims. Moreover, in delaying plaintiffs’ practical opportunities for voice and exit until after a global settlement is reached, long-term multidistrict consolidations may coerce acceptance of unfavorable settlement terms at the expense of individual plaintiffs’ legitimate private interests. Even if we accept that quasi-class aggregation is necessary, overseen by men and women of high personal integrity and capable of superior economic recoveries to other forms of aggregation, these costs are too often ignored. Theories of legal practice tend to collapse under the day-to-day realities and demands of the moment; even those who have strong personal and professional ethics are susceptible to ethical blind spots and rationalizations. And the mere preference of the majority may be of little comfort to plaintiffs who find their cases delayed, rights altered, and voices muted in the inexorable march toward settlement.

It is easy to characterize a plaintiff-centered approach as placing too much faith in the capacity of ordinary citizens to carry the weight necessary to realize its full potential. The same could be said of civil litigation generally or, given the collective barriers to exit and voice, even the marginal opportunities for meaningful involvement in the current quasi-class action model. But where vindication of their injuries matters most to plaintiffs, either as a matter of individual right or community responsibility, procedural empowerment reinforces rather than rejects or dampens the expectation and promise of civil litigation and restores the victims’ place within it. It transforms the dynamics of the choice to oversee the litigation, regardless of what that choice may be for any given plaintiff. And if that choice is to simply forego the option of speaking with a collective voice, it is surely more voluntary and consistent with the principles of democratic governance than a model premised upon paternalism, usurpation of control and systemic distrust of victims.

Moreover, even if these concerns ultimately foreclose the use of plaintiff committees in all but a few cases, the foregoing suggests a need for greater recognition of the potential intra and inter-case conflicts of interest that inhere in multidistrict consolidation when shaping the steering committees and other leadership roles within these cases. Each plaintiff is entitled to voice in the proceeding, if not directly then by counsel who has both the power to advance the

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<sup>221</sup> Grabill, *supra* note 48, at 164.

plaintiff's antagonistic interests and the incentive to do so zealously. This is true even if doing so may complicate global settlement negotiations or requires disaggregation of some portion of the claim pool early in the process or in a manner that reduces the aggregate settlement premium.