Out of the "Black Hole": Toward a New Approach to MDL Procedure

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Multidistrict litigation (MDL) allows the consolidation of claims in a single forum. Usually, these suits share common facts but involve individual liability questions that prevent class-action certification. Under 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation (JPML) may transfer and consolidate all pending actions before its chosen judge. In turn, the MDL judge coordinates "pretrial proceedings" and is instructed to remand the consolidated claims at their conclusion. MDL is a fundamental part of the federal docket. When prisoner and social-security cases are removed, MDL constitutes more than 50% of actions pending in U.S. District Courts. But little procedural law constrains MDL.

Many scholars critique MDL. Most often, skeptics argue that MDL reduces a plaintiff's control over her claim. Some suggest that MDL undermines procedural-justice protections and prioritizes compensation over individual dignity. However, practitioners generally approve of MDL. Defendants complete discovery and motion practice in a single forum, plaintiffs enjoy economies of scale that balance the scales against well-financed defendants, and courts avoid repeatedly resolving the same issue in suits across the country. Academic criticism, then, often fails to take seriously the practical merits of nonclass aggregate litigation. While scholars critique MDL for denying plaintiff autonomy and shortchanging procedural justice, less attention has been devoted to MDL procedural reform.

A principled approach, attentive to MDL as practiced, is needed. This Note provides a starting point. It proposes an analytical framework that is party-neutral and responsive to MDL's purpose in practice. It uses this new approach to consider an important threshold question: whether MDL practice would tend to benefit more from procedure in the form of rules or in the form of standards. It then evaluates two proposals for reform—plaintiff fact sheets and interlocutory review—to demonstrate a more appropriate approach to MDL procedure. At base, I call for a more robust and substance-sensitive dialogue on procedural reform in MDL.

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Introduction

Multidistrict litigation (MDL) has been described as a "black hole" because, as one scholar laments, "transfer is typically a one-way ticket."[1] MDL has faced equal, if less expressive, criticism from many corners of the academy. It is said to be a vehicle for "[c]lient disempowerment" and "lawyer empowerment."[2] In more dire terms, "the new models of nonclass aggregate dispute resolution represent an even more compelling illustration of the death of democratic dispute resolution."[3] We are asked whether new procedures of nonclass aggregate litigation are "fair, satisfying, and just."[4] By this account, "we cannot afford to ignore procedural justice in mass torts."[5]

A concern for procedural protections is not misplaced. In 2019, MDL constituted 37.6% of actions pending in U.S. District Courts.[6] When prisoner and social-security cases are removed, MDL's share of the federal docket climbs to over 50%.[7] As of the same year, the Judicial Panel on Multidistrict Litigation (JPML) had remanded only 2.34% of cases to their original court.[8] Over 79% of actions were terminated in the transferee MDL court.[9] The

1. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400 (2014).

2. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 317 (2011).

3. Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 564 (2013).

4. Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 7 (2009).

5. *Id.* at 11.

6. *Compare* ADMIN. OFF. OF THE U.S. CTS., U.S. DISTRICT COURTS — JUDICIAL BUSINESS 2019, https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2019 [https://perma.cc/X7W6-QKAT] (stating that 357,566 cases were pending before U.S. District Courts in 2019), *with* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407, FISCAL YEAR 2019 [hereinafter MDL ANALYSIS 2019], https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2019_0.pdf [https://perma.cc/R579-DT9M] (stating that in MDL, 134,462 actions were pending in 51 transferee district courts).

7. *See* Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW 360 (Mar. 14, 2019, 10:54 PM), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload [https://perma.cc/9PMJ-9BNN] ("[A]ccording to a study from Lawyers for Civil Justice . . . . MDLs accounted for 52 percent of all pending federal civil cases at the end of the last fiscal year . . . up from 47 percent in the previous fiscal year."); BOLCH JUD. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, at vii (2d ed. 2018), https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf [https://perma.cc/MJL5-MQZ7] (calculating the total at 52% as of June 2018).

8. *See* MDL ANALYSIS 2019, *supra* note 6 (noting that since the JPML's creation in 1968, 722,146 civil actions have been centralized, with a total of 16,918 actions remanded for trial as of September 30, 2019).

9. *See id.* (noting that since the JPML's creation in 1968, 722,146 civil actions have been centralized, with a total of 570,766 actions terminated in the transferee court as of September 30, 2019).

volume of actions covered by MDL and the dispositive nature of MDL itself surely strengthen calls for more procedure.

Yet MDL is not constrained by robust procedure. Substantive differences across state law and the variety of claims—both in kind and degree—brought within a single MDL prevent application of Federal Rule of Civil Procedure (FRCP) 23.[10] And little MDL procedural law has emerged to fill the gap.[11] Instead, an "unorthodox, modern, non-textbook, civil procedure," characterized by "workarounds to the currently accepted baselines of civil procedure," regulates MDL.[12] By Abbe Gluck's account, based on interviews with MDL judges, "the very hallmark of the MDL is the ability to deviate from traditional procedures."[13] Judges select and work directly "with the best lawyers" through a procedure "designed to avoid trial itself."[14] They enjoy flexibility in pretrial procedure because "every MDL is different."[15] Appellate review is rare.[16] In one judge's words, "[W]hen you have mass litigation, the notion of the individual plaintiff is totally anachronistic."[17] Unsurprisingly, Gluck notes that "[m]any scholars worry about the lack of MDL transparency, the loss of the individual claim, and the dearth of uniform MDL procedural law."[18]

Despite academic criticism of MDL, the institutional players who operate within it claim to benefit from its unique character. MDL economizes scarce judicial resources. Judge James Holderman explains: "Without the centralized control of an MDL transferee judge, the cost of duplicative discovery and e-discovery in each case consolidated as an MDL action for pretrial purposes would be a significant detriment to each case's litigants and justice in America as a whole."[19] In another judge's snappier summary: "It

10. Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1681–82 (2017).

11. *See id.* at 1679 (commenting on the scarcity of MDL procedural law in general).

12. *Id.* at 1671–72.

13. *Id.* at 1689.

14. *Id.* at 1673, 1699–1700.

15. *Id.* at 1689.

16. *See id.* at 1679 ("[T]he meat of the MDL takes place in the pretrial context. But under current doctrine—28 U.S.C. § 1291—pretrial rulings are typically not 'final decisions' and therefore are not eligible for routine appellate review and the accompanying written decisions that would ultimately create MDL common law."); Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1648 (2011) ("The existing rules of appellate jurisdiction rarely permit immediate appellate review of most significant MDL decisions; the decisions in question do not fit the traditional mold of orders reviewable as of right, and discretionary review in this context is unreliable.").

17. Gluck, *supra* note 10, at 1696–97.

18. *Id.* at 1674.

19. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, LITIGATION, Summer/Fall 2012, at 26, 27.

would be chaos if you didn't have [MDLs]."[20] Importantly, many judges oppose additional rules, in order "to remain flexible and creative in every case."[21]

Although jockeying to turn any new procedure to party advantage, the plaintiffs' bar and corporate defense attorneys seem to approve of MDL.[22] Before bemoaning that MDL is turning into "lawsuit magnets," a U.S. Chamber of Commerce broadside acknowledges that MDL "courts can help the parties obtain the information they need about the strength of the claims pool and thereby facilitate a more efficient resolution of all claims."[23] Defendants accrue other benefits through aggregation. Rather than litigate the same issue in courts across the country, they can complete more efficient discovery and motion practice in a single forum.[24] A corporate defendant may also face a "potential 'cloud'" on its share price; consolidation of claims can facilitate a comprehensive and relatively expeditious settlement that removes the "cloud."[25]

Likewise, plaintiffs enjoy benefits from MDL aggregation. Instead of each plaintiff facing the burden of the *same* pretrial costs alone (which might create negative-value claims), all injured plaintiffs can benefit from economies of scale to share substantial legal costs.[26] Aggregated resources also allow plaintiffs to balance the scales against an otherwise well-financed cadre of defense attorneys.[27] In addition to financial advantage, plaintiffs spread the risk that any individual might lose her suit, allowing more competitive negotiation with a comparatively risk-neutral defendant.[28] This

20. Gluck, *supra* note 10, at 1683.

21. *Id.* at 1689.

22. *See* Heyburn & McGovern, *supra* note 19, at 26 ("Overall, counsel believe that the panel is accomplishing its basic objective of easing the burdens of multiparty, multijurisdictional litigation on parties, counsel, and courts.").

23. U.S. CHAMBER INST. FOR LEGAL REFORM, MDL PROCEEDINGS: ELIMINATING THE CHAFF 1 (2015), https://instituteforlegalreform.com/research/mdl-proceedings-eliminating-the-chaff/ [https://perma.cc/BR8R-FZ52].

24. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 836 (2017).

25. Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944 (2017); *see also* Burch, *supra* note 1, at 414 ("Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.").

26. Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–45 (1997); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192 (2013). For support for the idea of potential negative-value claims in MDL, see Baker, *supra* note 25, at 1952 which notes that the cost of technical experts at trial "may exceed $250,000" and suggests that a claimant may have difficulty finding a contingent-fee lawyer.

27. Silver & Baker, *supra* note 26, at 745–48; Rave, *supra* note 26, at 1192; *see also* Bradt, *supra* note 24, at 835 ("Plaintiff-side firms have come to appreciate the ability to join forces to achieve parity with well-resourced defendants.").

28. Silver & Baker, *supra* note 26, at 748–49; Rave, *supra* note 26, at 1193.

is not to suggest that the plaintiffs' bar is uniform in its support of MDL: some attorneys dislike centralization, particularly if they are not part of attorney leadership through steering committees.[29] Despite understandable—but ultimately self-serving—complaints on both sides of the "v.," MDL's practitioners recognize the benefits of aggregation.

A problem emerges. Scholars critique MDL for denying plaintiff autonomy, shortchanging procedural justice, and prioritizing compensation over individual dignity, but practitioners (and their clients) benefit from MDL's unorthodoxy. Academic criticism, then, often fails to take seriously the practical merits of nonclass aggregate litigation. For some scholars, "the preservation of a uniform, transsubstantive, FRCP-minted procedure" trumps MDL's efficiencies.[30] But what good is procedure for procedure's sake? At the same time, self-interested actors petition the Advisory Committee on Civil Rules to institute procedure that favors their camp.[31] Likewise, what good is procedure that systematically advantages one party over another? A principled approach, attentive to MDL as practiced, is needed.

This Note provides a starting point to fill the gap. It proposes an analytical framework that is party-neutral and responsive to MDL's purpose in practice. It uses this new approach to consider an important threshold question: whether MDL practice would tend to benefit more from procedure in the form of rules or in the form of standards. It then evaluates two proposals for reform—plaintiff fact sheets and interlocutory appellate review—as exemplars of a more appropriate approach to MDL procedure. Some, particularly judges, may object to *any* rulemaking in the MDL context.[32] But such objections, even if in good faith, do not undermine this Note's mission. If *no* rule is appropriate to govern the variety of suits consolidated in MDL, then an analytical framework sensitive to MDL's

29. *See* Heyburn & McGovern, *supra* note 19, at 26 ("Naturally, some counsel were unhappy that their cases were centralized and with the procedures that led to it."). For a description of the process of selecting MDL management, see Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 122–26 (2015), which notes that "the group of powerful MDL plaintiffs' attorneys remains relatively small, and newcomers face formidable barriers to entry that they cannot overcome on their own accord" and expresses concern that most plaintiffs will not be aware that their selected attorney is unlikely to direct their case.

30. Gluck, *supra* note 10, at 1696.

31. *See, e.g.*, Multidistrict Litigation Subcommittee, Subcommittee Report, *in* ADVISORY COMM. ON CIV. RULES, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 151, 154–55 (2020) [hereinafter MDL Subcommittee Report], https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf [https://perma.cc/49EE-ZUQP] (observing that "[t]he proponents of expanded interlocutory review came mainly from the defense side" but that "[t]here was strong opposition from plaintiff-side lawyers" due to perceived advantages from each side).

32. *See* Gluck, *supra* note 10, at 1689 (discussing judges' uniform opposition to "a new FRCP for MDLs or even a uniform common law approach").

purpose should yield *no* new rules. And even if this might be true, it is still useful to have common ground from which to argue.

Part I briefly reviews the history and operation of the MDL statute. Part II begins by identifying the principal academic criticisms of MDL. It then considers several scholars' work, in order to propose an analytical framework to evaluate MDL procedure. It concludes by responding to potential criticisms of the approach. Part III uses this analytical framework to assess specific areas of suggested procedural reform. First, it will consider the rules–standards distinction and whether procedure of either type is more suited to MDL. Although the boundary between a rule and a standard is not always clear, a theoretical inquiry into whether procedures that are more rule-*like* or more standard-*like* better promote MDL's substantive purposes is critical background to consideration of more specific practical proposals. It will then evaluate two areas of proposed rulemaking recently examined by the Advisory Committee—plaintiff fact sheets and interlocutory appellate review. The Note will conclude by establishing the importance of a substance-sensitive approach to MDL procedure, both to clarify the academic literature and to appraise proposed reforms prudently.

I. MDL: Origins & Practice

Congress has authorized the consolidation of federal claims into a single forum under 28 U.S.C. § 1407. The statute provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings."[33] It requires "four members" of the "judicial panel on multidistrict litigation," consisting of "seven circuit and district judges designated from time to time by the Chief Justice of the United States," for "any action by the panel."[34] Specifically, the JPML may initiate transfer proceedings sua sponte or upon the motion of a party in any action that might be transferred.[35] If it believes that transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions,"[36] it may consolidate all pending actions before its chosen judge.[37] Extraordinary writ is available for review of the JPML's decision to consolidate claims, but the JPML's denial of a transfer motion is unreviewable.[38] Finally, the statute commands that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such

33. 28 U.S.C. § 1407(a).
34. *Id.* § 1407(d).
35. *Id.* § 1407(c).
36. *Id.* § 1407(a).
37. *Id.* § 1407(b).
38. *Id.* § 1407(e).

pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[39]

Today, MDL constitutes a fundamental part of the federal docket. As explained, it occupies a significant percentage of pending suits in U.S. District Courts, with only a few percent of actions historically remanded to their original court.[40] Findings of the Bolch Judicial Institute at Duke Law School contextualize general caseload statistics: "Removing an estimated 73,749 prisoner and social security cases from the total, cases that typically (though not always) require relatively little time of Article III judges, the 168,372 pending actions in MDLs represented 52% of the pending civil cases as of June 2018."[41] As of 2019, more than 95% of these pending actions involved mass-tort claims.[42] And what happens to the majority of cases while they are in the MDL court? They settle.[43]

Although the MDL statute was "little noticed" when passed in 1968 and has grown to cover "staggering" numbers of cases today,[44] Andrew Bradt, who has researched the legislative history in great detail, argues that "[t]he MDL statute was an intentional power grab, accomplished at an especially opportune moment."[45] He contends that "a small group of judges engineered a transfer of power in large litigations from the parties and district judges in individual cases around the country to themselves and the other members of the newly formed Judicial Panel on Multidistrict Litigation."[46] For Bradt, "[w]hether MDL is preferable to other available alternatives is an open question, . . . [b]ut what the history should lay to rest is any perception that the ambitions of the statute and its creators were modest."[47]

And MDL judges continue to wield great power today. The "best" and "most experienced" members of the federal bench are selected and enjoy considerable discretion.[48] A judge with JPML experience summarized: "When we grant an MDL, we look to whether a judge has particular

39. *Id.* § 1407(a).

40. *See supra* notes 6–9 and accompanying text.

41. BOLCH JUD. INST., *supra* note 7, at vii.

42. Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 470–71 (2020); *see also* Thomas Metzloff, *The MDL Vortex Revisited*, JUDICATURE, Autumn 2015, at 36, 41 (noting that 96% of pending actions involve mass-tort claims as of 2015).

43. *See* BOLCH JUD. INST., *supra* note 7, at viii ("Anecdotal evidence suggests that a large majority are settled."); Gluck, *supra* note 10, at 1673 ("Although styled as a mechanism for only pretrial resolution of cases unamenable to class action but with sufficient similarities to justify some consolidation, it is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.").

44. Bradt, *supra* note 24, at 843.

45. *Id.* at 907.

46. *Id.*

47. *Id.* at 908.

48. Gluck, *supra* note 10, at 1693.

experience; we are telling the judge this is a different kind of case because we are giving it to *you*."[49] Of course, a central duty of discretion in this context is to facilitate the efficient resolution of claims. Judge Eldon Fallon, who has overseen several large MDLs, concluded that MDL offers "a 'once-in-a-lifetime' opportunity for the resolution of mass disputes by bringing similarly situated litigants from around the country, and their lawyers, before one judge in one place at one time."[50] For many MDL judges, settlement is success and remand failure.[51]

In brief summary, the MDL statute has served as a powerful tool since its creation. But as MDL cases have increased in volume, MDL has also attracted academic criticism.

II. Fashioning a New Framework

This Part proposes a new analytical framework to evaluate MDL procedures. It begins by responding to common academic criticisms of MDL. It then briefly summarizes scholarship that provides a useful foundation for procedural analysis. It concludes by describing an analytical framework responsive both to MDL's substantive purpose and actual practice.

A. Academic Criticism

MDL faces two broad critiques: that it reduces plaintiff autonomy and that it dilutes procedural justice. Scholars have criticized other specific aspects of MDL (and aggregate litigation, generally), but these two broader—and closely related—concerns often underlie academic dissatisfaction with MDL.

Start with the loss of plaintiff autonomy. This argument often distinguishes MDL from its procedural cousin, the class action.[52] While plaintiffs in a class action typically have negative-value claims, an MDL plaintiff has a positive-value claim that, by this argument, she could bring on

49. *Id.*

50. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2340 (2008).

51. *See* DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 152 (D. Mass. 2006) ("[I]t is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home courts for trial."); Gluck, *supra* note 10, at 1673 ("As one judge put it, '[i]t's the culture of transferee courts. You have failed if you transfer it back.'"); Burch, *supra* note 1, at 417–18 ("As Judge Eduardo Robreno, who handled the asbestos multidistrict litigation, observed, 'As a matter of judicial culture, remanding cases is viewed as an acknowledgement that the MDL judge has failed to resolve the case, by adjudication or settlement, during the MDL process.'").

52. *See* Redish & Karaba, *supra* note 29, at 110 ("But in important ways, the current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison."); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2012) ("The deployment of MDL jurisdiction . . . has stripped away protections afforded by class action requirements.").

her own.[53] Despite having more at stake, the MDL plaintiff is forced into aggregation. More directly, "[t]he plaintiff whose claim is grouped together with countless others is given no choice in the matter."[54] Compounding the situation, the MDL judge will select attorney leadership, often rewarding repeat players.[55] A group of "powerful MDL plaintiffs' attorneys" then displaces in significant part a plaintiff's chosen counsel.[56] Here, then, "[c]lient disempowerment is also lawyer empowerment."[57] Finally, most cases settle.[58] And, by this account, an unhappy plaintiff is left between the proverbial rock and hard place: accept the settlement or lose representation.[59] In making this decision, a plaintiff also loses her "day in court."[60]

The procedural-justice criticism builds on a similar foundation. More directly focused on the adequacy of extant procedure, we must ask whether "these procedures [are] fair, satisfying, and just."[61] This question can be expanded into more detailed factors: "(1) whether procedures allow people an opportunity to state their case; (2) whether authorities are viewed as neutral, unbiased, honest, and principled in their decisionmaking; (3) whether the authorities are seen as benevolent, caring, and trustworthy; and (4) whether the people involved are treated with dignity and respect."[62] For many scholars, MDL—and other nonclass aggregate litigation—displaces

53. *See* Redish & Karaba, *supra* note 29, at 111 (distinguishing between claim values for class-action and MDL plaintiffs). A quick illustration: if Utility Company systematically adds $20 onto each user's bill, it would be economically infeasible for any one plaintiff to challenge Utility Company's behavior. Class action allows aggregation so that suit may be brought against Utility Company. But if Pharmaceutical Company's medication is alleged to cause heart failure in some patients, a given plaintiff likely has a sufficiently valuable claim (as measured in potential damages) to bring individual suit. Or, this is how the argument usually goes.

54. *Id.*

55. *Id.* at 123–25.

56. *Id.* at 125. For a more comprehensive review of the different roles of lawyers in mass-tort MDLs, see generally Baker & Herman, *supra* note 42.

57. Erichson & Zipursky, *supra* note 2, at 317.

58. *See supra* note 43 and accompanying text.

59. *See* Erichson & Zipursky, *supra* note 2, at 317 ("It is another thing for the individual to learn one day in the newspaper that his lawyer has signed an agreement requiring the client to accept an unknown amount or else lose the lawyer.").

60. *See, e.g.*, Burch, *supra* note 4, at 50 ("Thus, some claimants with consolidated or coordinated claims feel entitled to their own day in court."); Redish & Karaba, *supra* note 29, at 139 ("But for a variety of reasons, transfer effectively amounts to the end of the road for the overwhelming majority of cases. This is troublesome from a constitutional perspective, because not even the most minimal protection of the day-in-court ideal . . . is satisfied."). For an image of the day-in-court ideal in contexts where compensation may be inadequate, see Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 368 (2003).

61. Burch, *supra* note 4, at 7.

62. Mullenix, *supra* note 3, at 564 & n.262 (citing Tyler & Thorisdottir, *supra* note 60, at 384). Note that factor (3)—whether authorities are viewed as "benevolent, caring, and trustworthy"—may not be a standard requirement of procedural-justice frameworks.

democratic ideals of individual dignity and participation in favor of efficiency and compensation. Here, "these fundamental concepts have been stretched and shoehorned into a makeshift process."[63] Novel forms of nonclass aggregation, then, "represent an even more compelling illustration of the death of democratic dispute resolution."[64]

Additional objections to MDL expand on these critiques. Some debate the appropriate role of the MDL judge.[65] Others question if client consent can be meaningful in the MDL context.[66] Importantly, these two objections—and their offspring—raise serious questions; some scholars even suggest that MDL may be unconstitutional.[67] But few of these accounts are responsive to MDL in practice. Instead, MDL is abstracted, with a narrow focus on cracks in the theoretical foundations of aggregate litigation. Again, such an exercise in pure theory is valuable, but it has muddled the procedural literature on MDL.

A few practical observations will clarify. In practice, MDL does favor compensation, often through settlement, over an individual plaintiff's expressive rights. But over what alternative? Some plaintiffs may feel undercompensated by a settlement. First, although unlikely to mollify the MDL skeptic, a plaintiff retains the option to opt out by simply not accepting the settlement offer. More fundamentally, a disgruntled plaintiff is left with unappealing alternatives due to economic realities, not procedural injustice. One of many other claimants, the vast majority of whom may enter the settlement agreement, she enjoys little individual bargaining power with the defendant.[68] If she chooses to go to trial, she faces litigation costs in excess of $250,000 and the uncertainty of final judgment years away.[69] She may also struggle to find an attorney willing—or financially able—to take on her case.[70] Likewise, a potential plaintiff exploring the possibility of suit faces an uphill battle when considering the prospect of individual litigation. While MDL certainly benefits institutional actors, it also allows plaintiffs to challenge a corporate defendant with deep pockets. An MDL judge has

63. Burch, *supra* note 4, at 7.

64. Mullenix, *supra* note 3, at 564.

65. *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017) (considering the proper role of the judge in MDL settlement).

66. *See, e.g.*, Erichson & Zipursky, *supra* note 2, at 321 ("The advance-consent idea for nonclass aggregate settlements purports to harmonize the need for client consent with the need for closure. We have argued above that the circle cannot be squared: consent and closure cannot, in the end, be accommodated in the manner envisioned . . . .").

67. *See, e.g.*, Redish & Karaba, *supra* note 29, at 115 (arguing that "MDL is unconstitutional" because it violates the Fifth Amendment's Due Process Clause).

68. Baker, *supra* note 25, at 1952.

69. *Id.*

70. *Id.*

recognized as much: "The question is whether a case goes forward at all. Is the choice essentially an MDL consolidation as opposed to not being able to litigate at all?"[71]

So what's the problem? Much of the academic literature critiques the MDL in theory, often couched in the language of procedure. However, objections are rarely aimed directly at MDL procedure. In truth, scholars critique MDL for the characteristic that makes it attractive in practice: aggregation. Put differently, MDL—aggregate by nature—is criticized for not being individual in form. Thoughtful criticism of aggregation is not inherently problematic; it may spark wide-ranging reform. But it has had an unintended and unfortunate side effect. Little attention has been devoted to evaluating MDL procedure in practice. Important questions must be answered. If the MDL is entrenched as a part of modern litigation, what rules can be developed that begin to standardize the process without removing the characteristics that make the MDL effective in the first place? How can an MDL "procedure" be developed that is party-neutral and helpful to judges?

B. Academic Groundwork

A few scholars have distinguished concerns about aggregate litigation from practical questions about MDL procedure. Judith Resnik has studied the history of the movement "from 'cases' to 'litigation.'"[72] She argues that "aggregation poses a challenge to the civil justice system," but she identifies clear questions for "today's procedural innovators."[73] Her work reflects plaintiff-autonomy concerns but at least recognizes the possibility that "the criticisms leveled in this context should be directed more broadly to bemoan a host of contemporary developments."[74] While a gesture toward the functional justifications for MDL, it fails to provide a clear framework to assess MDL procedure.

In *Making Effective Rules: The Need for Procedure Theory*, Robert Bone provides possible groundwork to assess MDL procedure.[75] He begins by encouraging the Advisory Committee to "adopt a more systematic approach, one that derives broad normative principles from core features of litigation practice and explicitly evaluates all the costs and benefits of a rule in light of those principles."[76] As noted above, he recognizes that

71. Gluck, *supra* note 10, at 1697. Another judge framed the problem differently: "Access is all well and good but for these cases it is pie in the sky." *Id.*

72. Judith Resnik, *From "Cases" to "Litigation"*, LAW & CONTEMP. PROBS., Summer 1991, at 5, 6.

73. *Id.* at 6, 67.

74. Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 940 (1995).

75. Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319 (2008).

76. *Id.* at 320.

"stakeholders all too often push aggressively for rules that serve their own private interest at the expense of the public interest."[77] While the FRCP were designed to be "general in nature and 'trans-substantive,'" Bone notes that modern reform efforts have recognized that procedural design involves "policy decision[s] with substantive implications."[78] Bone challenges the notion that legal rights can be vindicated while ignoring substantive policies and argues that "we must bury, once and for all, the thoroughly misguided idea that trans-substantivity is an independent value or ideal for the Federal Rules."[79] Instead, he contends that "the main goal of a procedural system is to distribute the risk of error across different case-types and different parties, and any system must be judged by the kind of distribution it creates."[80]

Bone also addresses settlement and the day-in-court right. He notes that the "position of ignoring settlement is untenable as a normative matter."[81] Settlement quality and judgment quality may require different procedural rules, and "rulemakers must balance settlement effects against judgment effects."[82] For Bone, "settlement *quality*" must be considered with "settlement *quantity*"; party consent cannot cure procedural infirmity.[83] Importantly, he situates settlement appropriately, stating that "evaluation of a procedural rule is always a comparative analysis, and the baseline for comparison must include settlement effects *outside as well as inside* litigation."[84] Finally, Bone questions the day-in-court participation right. He argues that critics "must explain why dignity or legitimacy is not fully respected by an adjudication system that does its best to produce as accurate an outcome as practicable for each litigant."[85] He concedes that MDL may undermine consent, particularly where "judicial pressure" compels the result.[86] But he also suggests that "in very large aggregations, a court appoints a litigation committee, which in effect converts an individual into a collective

77. *Id.*

78. *Id.* at 324–25.

79. *Id.* at 333.

80. *Id.*

81. *Id.* at 334.

82. *Id.* at 335.

83. *Id.* at 336.

84. *Id.* at 337 (emphasis added). When describing effects "outside as well as inside [the] litigation," Bone seems to suggest that any procedural rule must be evaluated with realistic alternatives in mind. Put differently, no litigation exists in a vacuum. He indicates as much: "This means, for example, that the mass tort class action, with all its flaws, should be compared to lump-sum inventory settlements rather than to some idealized picture of individual litigation and individual trials." *Id.*

85. *Id.* at 338. Bone does not provide a precise definition of "accuracy" here, but he seems concerned with outcome quality. For a fuller discussion of this point, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 279–85 (1992).

86. Bone, *supra* note 75, at 339.

day in court."[87] In closing, Bone posits that "any effort to reconceive that right must start with a general theory of individual participation in civil adjudication, a theory which should be developed by fitting principles in a coherent way to the core elements of litigation practice."[88]

Bone's piece provides a few key takeaways that will be useful for developing a framework to evaluate MDL procedure. First, analysis of procedure, within and without MDL, must be responsive to its substantive purpose and to litigation practice. For Bone, procedural rules may—and perhaps should—consider settlement, but any proposed rule must optimize settlement quality *and* judgment quality (recognizing the tradeoff), in addition to centering settlement *quality* in conversations often focused on settlement *quantity*. Practical alternatives must also be considered. Finally, the day-in-court, plaintiff-autonomy right may be significant, but only insofar as required by practice. Outcome quality may alleviate concerns of individual participation.

C. Analytical Framework

Most fundamentally, an analytical framework for evaluating procedural rules must be sensitive to MDL's *substantive purpose*. What is MDL's purpose? The MDL statute facilitates transfer when it "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[89] In other words, efficiency is a central value in MDL. But what does efficiency actually mean in *litigation practice*? Most often, settlement.[90] That most MDL involves mass-tort claims strengthens this conclusion. A primary function of the tort system is to compensate the injured; a compensatory scheme is consistent with the substantive goal of encouraging settlement.

The costs and benefits of any procedural rule in MDL must be assessed in light of the fact that cases most often settle. Importantly, this analytical framework must not strive only for *more* settlements but for *more fair* settlements. Any procedural rule cannot systematically favor one party over another. Put differently, a procedural rule must foster an accurate outcome; that is, it must not consistently over- or under-compensate plaintiffs. For example, a rule that imposes tighter discovery deadlines on plaintiffs than defendants would tend to favor defendants in settlement. It may encourage settlement, insofar as plaintiffs might look to settle quickly to avoid

87. *Id.*

88. *Id.* at 340.

89. 28 U.S.C. § 1407(a). For a thorough treatment of MDL rulemaking in light of these values, see Jenifer J. Norwalk, Comment, *The Case Against MDL Rulemaking*, 169 U. PA. L. REV. 275, 288–94 (2020). While Norwalk does not center settlement in her analysis, her argument is more responsive to MDL practice than most academic literature.

90. *See supra* note 43 and accompanying text.

burdensome costs or, in an extreme case, dismissal, but it would provide defendants greater leverage in settlement negotiations.

What do I mean by "fair settlement"? At one extreme, the idea of a "fair" settlement might import the unbounded ideas of procedural justice rejected above. After all, "fair" in a colloquial sense might encompass notions of autonomy and individual dignity. More generally, some might argue that "fair" is not really an appropriate word to describe settlement. Aren't all settlements "fair," at least when parties have reached a voluntary agreement? By this argument, the vast majority of settlements are "fair," and my proposed procedural framework would have little room to operate. But "fair settlement" in this Note neither means "fairness" in its everyday use nor "fairness" as a manifestation of party consent. Instead, the following analysis uses "fairness" to address "optimal" settlement outcomes in the aggregate.

When I suggest that procedural rules must promote "fair settlement," I mean that settlements over time must meet a threshold of optimality, neither overcharging defendants nor undercompensating plaintiffs *as a group*. Specifically, "optimality" here does not measure an actual settlement against any objective measure of the "ideal settlement" (this type of analysis would be problematic for a number of practical and theoretical reasons), but rather is a reflection of how different procedural rules affect relative bargaining power in the long run of cases.[91] This Note does not use "fair settlement," then, to invoke "fairness" in its full universe of meaning or to provide an objective metric to evaluate any individual settlement; instead, it recognizes that settlement is likely and asks if new procedural rules push settlement outcomes in a more optimal direction. In this way, "fair settlement" acts as a proxy for a sufficient level of outcome optimality.

What about *judgment quality*? Is the possibility of fair adjudication at trial sacrificed by attention to *settlement quality*? Here, we must consider alternatives. As of 2019, the JPML has remanded only 2.34% of cases back to their transferor court.[92] Most suits in MDL will be resolved without remand; trial in the transferor court is a remote possibility. In this way, MDL practice validates an approach that weighs settlement quality over judgment quality. Even if a plaintiff should opt out of a fair settlement, her trial right is not necessarily compromised by MDL itself but is foreclosed by the practical cost of litigating her individual claim. In other words, she may not fare well at trial, but that result is likely due to factors beyond MDL.[93]

91. In addition to "fair" or "optimal" settlement, the idea of "equitable settlement" might also capture the proposed relationship here. In this formulation, any rule (when considered in the context of the current procedural system) that systematically and unjustifiably gives one party greater bargaining power over another leads to a less optimal—or "fair"—settlement.

92. *See supra* note 8 and accompanying text.

93. *See supra* notes 68–71.

In summary, I propose that procedural rules for MDL must be evaluated in light of their ability to produce a fair settlement. Before elaborating on this general principle by considering specific procedural proposals, I will respond to a few potential objections.

Some might counter that it is not a judge's proper role to facilitate settlement. They might fear a Judge Jack Weinstein, who, in his own words, "carried" plaintiffs with weak claims into settlement by his own "legal[] creativ[ity]."[94] However, attention to settlement when designing procedural rules does not necessarily demand a greater or potentially inappropriate role for a judge. Adjusting filing fees or shifting discovery deadlines may encourage fair settlement in certain circumstances without expanding a judge's involvement in settlement. The adoption of an analytical framework should not lead to uniformity of opinion, only to consistency of analysis. Additionally, and perhaps more persuasively, if judges already do undertake a role in promoting settlement, the rules should reflect that reality. An explicit recognition of this judicial function might actually promote better settlements.[95] Finally, if settlement negotiations do fail, a judge may remand the claims to their original courts. Recognition of settlement as a central MDL feature does not mandate settlement and would not foreclose remand.[96]

Scholars concerned with plaintiff autonomy might worry that procedural rules constructed with settlement in mind will only compound the injustices that they believe MDL already produces.[97] As discussed above, many already fear the consequences of a lawyer-centric MDL that favors institutional actors. But, again, these concerns stem from theoretical misgivings about aggregate litigation writ large; they have little to contribute to clarifying MDL procedure. If the *individual* plaintiff-autonomy, day-in-court right is sacrificed, plaintiffs may enjoy a "*collective* day in court."[98] Practically, there is also no viable alternative to MDL.[99] The question becomes: if not settlement, what? In Professor Bone's words, "evaluation of

94. Ralph Blumenthal, *How Judge Helped Shape Agent Orange Pact*, N.Y. TIMES, May 11, 1984, at A1, https://www.nytimes.com/1984/05/11/nyregion/how-judge-helped-shape-agent-orange-pact.html [https://perma.cc/9QFL-JDYV].

95. For example, transparency here might encourage more open discussion about the most effective ways for a judge to assist in the settlement process.

96. The MDL statute contemplates remand "at or before the conclusion of such pretrial proceedings." 28 U.S.C. § 1407(a). Conversely, a judge's willingness to remand—and the prospect of dispersed litigation—might actually invigorate the parties' settlement negotiations.

97. For a more general discussion and critique of these arguments, see *supra* subpart II(A).

98. *See* Bone, *supra* note 75, at 339 (emphasis added) (noting that in very large aggregations, an individual day in court is effectively converted into a collective day in court because of the inverse relationship between a party's aggregation size and the amount of control a party can exercise).

99. Although not precisely about MDL, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), foreclosed the ability of certain groups of claims to proceed under Rule 23.

a procedural rule is always a comparative analysis."[100] Here, centering individual plaintiff autonomy may have perverse effects. Rules that vindicate individual autonomy may well undermine settlement quality.[101] Importantly, a plaintiff's lawyer should meet her ethical obligation to involve her client and communicate regularly[102]—both to obtain meaningful consent and to respect her client—but grafting traditional norms of individual litigation serves little purpose unless in service of MDL's mission.

Finally, a corporate champion, like the U.S. Chamber of Commerce, might fear that a procedural system designed with settlement in mind will force a defendant's hand. By this account, MDL becomes legalized extortion. This criticism is exaggerated and more often is a loosely veiled attempt to promote procedures *more* favorable to defendants. On a general level, this argument reflects a feature of aggregation: as more plaintiffs aggregate (with claims of indeterminate strength), a corporate defendant's liability grows, which may increase the pressure to settle. But an approach that considers settlement *quality* and settlement *quantity* should naturally integrate potential prejudice to a defendant into analysis of a procedural rule. If defendants are systematically disadvantaged (say, by a proposed rule that shields information about plaintiffs' claims from a defendant), then it should be rejected.

This Part has stressed that the academic discussion of MDL often ignores its practical benefits to the parties involved. We should not adhere to the procedural values of individual litigation to the parties' detriment. Scholars are right that the MDL can improve, but we must evaluate proposed procedure in light of what I have argued is MDL's practical purpose: fair settlement.

III. Application of the New Framework

This Part will first consider whether rules or standards, in the abstract, are more appropriate in the MDL context. Although theoretical, this threshold inquiry provides an important foundation for evaluating specific procedural proposals. It will then use the analytical framework developed above to evaluate two areas of proposed procedural reform: plaintiff fact sheets and interlocutory appellate review. Each proposal has detail beyond the scope of this Note. I do not seek to provide final answers on either topic but to

100. Bone, *supra* note 75, at 337.

101. Procedure designed to encourage individual autonomy may slow settlement and reduce plaintiffs' bargaining power, as plaintiffs are generally less well situated than defendants to bear the costs of delay. Procedural rules favoring autonomy might also dilute some of MDL's benefits (e.g., if aggregation is undermined, so, too, is the plaintiffs' bargaining power against a corporate defendant).

102. *See* Gluck, *supra* note 10, at 1689–90 (describing the increased access of a plaintiff to information in MDL as compared to "regular cases").

illustrate the considerations that a purpose-sensitive approach to MDL procedure would raise.

A. "Crystals" or "Mud"? Rules vs. Standards in MDL

The rules–standards debate is not new.[103] And all procedural reform must consider, at some point, the distinction. A proceduralist must answer a question: should a new procedure be a rule or a standard? Before using the framework to evaluate *specific* proposals in the MDL context, this Note must address this *general* question. The analysis will inform the content of any specific procedural proposal in MDL and, in a more general way, exemplify how this Note's proposed framework operates. In other words, even if a proposed procedure seems "good" under the framework, that analysis is somewhat superficial—or hollow—without consideration of the proposal's form, whether as a rule or as a standard. At the outset, then, this subpart centers on a question: is a rule or a standard more likely to promote the MDL's practical purpose of fair settlement?

At the simplest level, a rule provides certainty and a standard flexibility. For example, a rule might direct a driver not to exceed 35 miles per hour while a similar standard would caution the same driver that he must "drive carefully." In this way, a rule provides a bright line—the driver either exceeds 35 miles per hour or does not. By contrast, a warning to "drive carefully" is context-dependent: in some situations, 35 miles per hour may be an appropriate speed, in others not. And who determines whether an individual driver, in fact, drove "carefully"? Different police officers may have different understandings of what is "careful," and traffic courts could face protracted debate over the meaning of "careful" in a specific context. A clear rule allows drivers to adjust their behavior in advance *and* removes discretion in identifying violations.

What about a more complicated situation? A maker of tort rules may not be able to imagine each specific way that a company could behave irresponsibly. Tort rules would swell to account for a variety of fact patterns, proving burdensome yet incomplete. A standard, such as negligence, allows a judge or jury the flexibility to identify unacceptable behavior without resort to a byzantine codebook. Absent bright-line rules, a company faces some uncertainty but understands that it must act carefully and be responsive to courts' evolving understanding of what "negligence" means.

But this account oversimplifies the rules–standards divide. In an influential article, Carol Rose examines the distinction between rules and

103. *See* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 580–90, 605 (1988) (describing the cyclical nature of the rules–standards debate and the emergence of the rhetoric of "crystal" rules in the Enlightenment).

standards, or what she calls "crystals" and "mud."[104] Focusing on the property law context, Rose challenges whether the rules–standards distinction is as neat in practice as it is in theory. By her account, there exists a "blurring of clear and distinct property rules with the muddy doctrines of 'maybe or maybe not,' and . . . [a] reverse tendency to try to clear up the blur with new crystalline rules."[105] For Rose, the choice of rule or standard serves as "metaphor or rhetoric" to structure community relationships.[106] In a broader economic study to determine when to select a rule or standard, Louis Kaplow summarizes the difference a bit differently: "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act."[107] But, like Rose, he acknowledges the artificiality of a clear divide.[108] Instead, per Kaplow, "[o]ne can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider."[109] Rose's and Kaplow's accounts complicate the basic sketch above.

In light of MDL's purpose to facilitate fair settlements, should the Advisory Committee prefer rules or standards? Or, to incorporate Rose's and Kaplow's observations, should it prefer procedure that is more rule-*like* or more standard-*like*? Importantly, non-binding standards, in the form of "best practices," exist for MDL.[110] However, intuitively, rules would more naturally seem to facilitate settlement. While a standard generates uncertainty (*Am I driving carefully?*), a rule offers clarity (*I am driving under 35 miles per hour*). Greater uncertainty for both plaintiffs and a defendant will make settlement more difficult. For example, if a procedure allowed appellate review of an MDL judge's pretrial ruling based on a vague standard, a defendant may be more likely to protract litigation—optimistic that it may achieve a favorable outcome—and less likely to continue settlement negotiations. By contrast, a clear rule decreases uncertainty. If a defendant knows that it is unable to appeal (due to not meeting a requirement of the procedural rule), it enters settlement with a clearer picture of future litigation, which, in turn, allows it to value pending claims more accurately. Whether

104. *Id.* at 577–78.

105. *Id.* at 580.

106. *Id.* at 604–10.

107. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (emphasis removed).

108. *See id.* at 561 ("The language of this Article will follow the common practice of referring to rules and standards as if one were comparing pure types, even though legal commands mix the two in varying degrees.").

109. *Id.* at 561–62.

110. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.36 (2004) (describing the "tasks of the MDL transferee judge"); *see generally* BOLCH JUD. INST., *supra* note 7 (providing best practices for MDL).

or not interlocutory appeal *should* be available in MDL is addressed below; here, I intend only to describe the relationship between clarity of procedural outcome and likelihood of settlement. Put differently, the more a procedural rule can "resolve[] in advance" a legal issue[111] (and inform each party where it stands), the more it should encourage settlement.

Some might object that this point merits the same criticism earlier levied against points made by other scholars: it considers MDL in the abstract and does not account for its messy practice. Certainly, judges seem to agree that the diversity of MDL suits makes rules impractical.[112] Other judges have expressed that MDL is still "evolving," so it would be premature to impose uniform rulemaking.[113] To the latter objection, the creation of *some* rules does not mandate the creation of a *universe* of rules. In this way, rulemaking in the MDL context need not produce a comprehensive, codified set of rules, such as the FRCP, at one fell swoop. This idea is implicit in one judge's quote: "MDLs are still evolving. . . . Practices are always evolving. Fact sheets are a great example. It's a big innovation, everyone now uses them . . . . Necessity is the reason for innovation."[114] If "everyone now uses" fact sheets, perhaps it should become formalized in a rule. As long as rules are not *imposed on* MDL but rather *emerge from* MDL practice, this concern should not undermine a call for MDL rulemaking. The first objection is more compelling; perhaps rulemaking is not appropriate for MDL and bright lines are possible only in the abstract. This argument proves too much. It supposes not just that rules are impractical in MDL but often that *any* form of procedural constraint is inappropriate. The very existence of "best practices" belies the notion that procedural innovation is impossible. My point is not to contend that all MDL procedure must take the form of a rule but only to suggest that along the rule–standard continuum, the closer a procedure is to a rule, the more likely the procedure will advance settlement. To summarize, we should hope for crystals over mud.

Of course, this subpart has dwelled in the abstract. At a general level, though, it adds another layer of scaffolding to our analytical framework. Now, on to the practical.

111. *See* Kaplow, *supra* note 107, at 561–62.

112. *See* Gluck, *supra* note 10, at 1689 ("[S]everal judges emphasized that any rule that allowed judges the required degree of flexibility would add nothing.").

113. *See id.* ("Another reason that the judges resisted any kind of uniform procedure is their consensus view that MDL procedure is still a work in progress, but one that may never be complete."). For a thorough discussion of this argument, see Norwalk, *supra* note 89, at 279, 295–306, which argues that "balancing the costs and benefits of [the] four proposals [of the MDL Subcommittee] reveals that MDL-specific rules will not promote efficiency and fairness and should not be adopted."

114. Gluck, *supra* note 10, at 1689.

B. Plaintiff Fact Sheets

This subpart will evaluate the proposal to require plaintiff fact sheets (and other, similar procedures to test plaintiffs' claims).[115] Fact sheets are standardized questionnaires that seek more information about a party's claim or defense.[116] While defendant fact sheets are sometimes used, this subpart will focus on the more common use of plaintiff fact sheets. Usually, a plaintiff either knows or has access to the information needed to complete a fact sheet, such as the circumstances of exposure, the severity of injury, or medical records.[117] Often, parties are able to enter the information directly into a central database.[118] Some courts have also required plaintiffs to complete an "initial census form," which is completed before a fact sheet and requires less information.[119] A recent report, focused on product-liability claims, found that plaintiff fact sheets were ordered in 57% of MDL proceedings in the study and 87% of proceedings with more than 1,000 actions.[120] One judge confirmed as much: "Practices are always evolving. Fact sheets are a great example. It's a big innovation, everyone now uses them."[121]

According to the *Manual for Complex Litigation*, fact sheets can help "facilitate settlement negotiations or improve claim administration following settlement."[122] The MDL Subcommittee has agreed that "fact sheets are useful for early screening and jumpstarting discovery."[123] Unsurprisingly, the defense bar is on board. A U.S. Chamber of Commerce publication complained: "The filing of bogus claims inflates the size of multidistrict

115. *See* Draft Minutes: Civil Rules Advisory Committee April 1, 2020 (June 17, 2020), *in* ADVISORY COMM. ON CIV. RULES, AGENDA: MEETING OF THE ADVISORY COMM. ON CIV. RULES 93, 104–06 (2020) [hereinafter April 2020 Meeting Minutes], https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf [https://perma.cc/49EE-ZUQP] (describing different proposals for "early vetting").

116. MARGARET S. WILLIAMS, JASON A. CANTONE & EMERY G. LEE III, PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 1 (2019).

117. *Id.* at 1, 7; MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 110, § 22.91. For an important example of a similar discovery technique in a non-MDL mass tort, see Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 143–44 (2012), which details the information required from plaintiffs in the 9/11 first-responder litigation.

118. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 110, § 22.91.

119. Draft Minutes: Committee on Rules of Practice and Procedure June 23, 2020 [hereinafter June 2020 Meeting Minutes], *in* ADVISORY COMM. ON CIV. RULES, AGENDA: MEETING MINUTES OF THE ADVISORY COMM. ON CIV. RULES 19, 40 (2020), https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf [https://perma.cc/49EE-ZUQP].

120. MARGARET S. WILLIAMS, EMERY G. LEE III & JASON A. CANTONE, PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008–2018, at 1 (2019).

121. Gluck, *supra* note 10, at 1689.

122. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 110, § 22.91.

123. June 2020 Meeting Minutes, *supra* note 119, at 40.

proceedings, which in turn lends baseless credence to allegations that, in reality, might pertain to only a small minority of all the claims filed."[124] Their solution: "expanded use of plaintiff fact sheets and *Lone Pine* orders."[125] Although fact sheets—and census forms—typically ask for available information, they can impose a burden on plaintiffs. Medical records can be expensive, and, more practically, it can be difficult for a plaintiffs' firm with many clients to complete fact sheets in a short period of time.[126] The Advisory Committee seems to be weighing most seriously the possibility of requiring less detailed census sheets.[127]

Do plaintiff fact sheets facilitate fair settlements? At base, plaintiff facts sheets can encourage settlement. They expand the information available to both parties, allowing each to assess the value of claims more accurately. For the defendant, fact sheets ensure that any negotiated settlement will tend not to compensate plaintiffs with meritless claims. Defendants, after all, want finality, but the uncertain merit of claims—coupled with the prospect of a significant payout—may impede settlement. But do fact sheets encourage *fair* settlements for plaintiffs? Any answer depends on two variables: information required and submission deadline for the fact sheet. As the type of information needed becomes more detailed and more costly, and the submission deadline becomes tighter, any plaintiff-fact-sheet procedure becomes less likely to produce a fair settlement. Incomplete or deficient fact sheets can result in dismissal of cases.[128] Moreover, if too costly, a plaintiffs' firm with many clients may struggle to cover these frontloaded costs. Together, these effects may undermine plaintiffs' bargaining power in negotiations with a defendant. And if fact sheets require *too little* information, then the procedure's benefit to a defendant decreases, and the cost to plaintiffs becomes more difficult to justify.

Plaintiff fact sheets seem promising for MDL procedure. Current practice supports this conclusion.[129] A rule requiring plaintiff fact sheets in MDL might be appropriate. But, in order to facilitate a fair settlement, the "how" of plaintiff fact sheets—that is, the precise details—may be more "mud" than "crystal." Specifically, plaintiff fact sheets that are more rule-*like*

124. U.S. Chamber Institute for Legal Reform, *supra* note 23, at 2.

125. *Id.* A *Lone Pine* order requires plaintiffs to submit more detailed evidence to support the elements of their claims. *See* WILLIAMS, *supra* note 116, at 3 n.6 (tracing the origin of these orders to the *Lone Pine* case in which the judge entered an order "requiring plaintiffs to submit evidence of exposure to toxic substances" after defendants submitted evidence countering plaintiffs' claims).

126. WILLIAMS, *supra* note 116, at 2–3.

127. *See* April 2020 Meeting Minutes, *supra* note 115, at 105 ("If desirable, it will remain a question whether to attempt to capture the practice [initial census orders] in a Civil Rule, or whether to leave it instead to the categories of best practices . . . .").

128. WILLIAMS, *supra* note 116, at 3.

129. *See supra* text accompanying note 120.

likely better promote fair settlement than loose standards.[130] Clear requirements for fact sheets, provided with advance notice, allow plaintiffs to prepare relevant materials and minimize the litigation costs that would result from disputes over a more general standard. Defendants could also plan in advance by anticipating the precise information that they would receive. But practice may be messier than theory; different cases likely require different disclosures, and the cost–benefit analysis outlined above necessarily depends on factual context. So, again, the "how" of plaintiff fact sheets, by necessity, may be more "mud" than "crystal." Likewise, specific language is beyond the scope of this Note, but the brief analysis above indicates that the content of any fact sheet must balance the benefits accrued to a defendant from increased information access and the costs to plaintiffs of collecting needed information on a particular timeline. A perfect proposal may not exist, but the preceding analysis is the kind that rule makers should adopt when evaluating MDL procedure.

C. Interlocutory Appellate Review

This subpart will consider proposals for interlocutory appellate review in MDL. Attention will be brief, partially because the MDL Subcommittee recently recommended that the Advisory Committee not pursue appellate-review reform.[131] Currently, there is little appellate review of most MDL decisions.[132] MDL itself has no built-in appellate procedure until final judgment.[133] Specifically, 28 U.S.C. § 1291 provides the courts of appeals with jurisdiction "of appeals from all final decisions of the district courts of the United States."[134] Interlocutory appeal is limited by 28 U.S.C. § 1292(b), which allows a district judge to verify for the court of appeals that an otherwise unappealable action involves a "question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[135] The court of appeals may then exercise jurisdiction "in its discretion."[136] A deferential standard of appellate review compounds these statutory hurdles to successful appeal of an MDL pretrial decision. The Third Circuit noted that appellate courts review orders "with deference, particularly in the MDL context. . . . [because] '[d]istrict judges must have authority to manage their dockets, especially during a massive litigation such as this, and

130. *See supra* text accompanying note 111.
131. MDL Subcommittee Report, *supra* note 31, at 154–58.
132. Pollis, *supra* note 16, at 1645.
133. *Id.* at 1674–75.
134. 28 U.S.C. § 1291.
135. *Id.* § 1292(b).
136. *Id.*

we owe deference to their decisions whether and how to enforce the deadlines they impose.'"[137]

A brief—and oversimplified—example should clarify the relationship between final-judgment and interlocutory appeal. If a defendant moves to dismiss a plaintiff's suit for failure to state a claim under Rule 12(b)(6), a judge has two basic options: grant or deny.[138] If the judge grants the defendant's motion to dismiss, final judgment is entered and the plaintiff, the losing party, can appeal this "final decision[] of the district court[]."[139] By contrast, if the judge denies the defendant's motion to dismiss, the case moves forward, and the defendant has no "final decision" to appeal.[140] The defendant might try to seek interlocutory appeal, but it would rely on the district judge (who just denied its motion) to certify that the otherwise unappealable action should be taken up by the court of appeals.[141] In short, interlocutory appeal offers no guarantee of appellate review.[142] Appellate procedure is more complicated than this simple example, but it should illustrate the general difficulty of challenging pretrial decisions that do not result in a final judgment.

Critics worry that MDL exacerbates the effects of legal error in pretrial rulings.[143] As explained above, MDL is designed to encourage the "just and efficient conduct" of consolidated actions until "the conclusion of such *pretrial* proceedings."[144] MDL's pretrial setting means that many of the transferee court's decisions are not final judgments subject to appeal as of right.[145] If a trial judge misstates the law when denying a motion to dismiss or a motion for summary judgment, the parties must either proceed to trial and rely on appeal after final judgment or reach a settlement, with defendants, in the aggregate, potentially overcharged due to the legal error.[146] The

137. *In re* Asbestos Prods. Liab. Litig. (No. VI), 718 F.3d 236, 243 (3d Cir. 2013) ("[d]istrict" in original) (quoting *In re* Fannie Mae Sec. Litig., 552 F.3d 814, 822 (D.C. Cir. 2009)).

138. *See* FED. R. CIV. P. 12(b)(6) (providing for a motion to dismiss for "failure to state a claim upon which relief can be granted").

139. *See* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

140. *See id.* (providing for appellate jurisdiction over final decisions, but not others).

141. *See* 28 U.S.C. § 1292(b) (describing the district-judge certification process for interlocutory appeals).

142. Another quick example to emphasize the importance of many pretrial decisions: if a district judge determines that a causation expert does not meet *Daubert*, the plaintiffs may, for practical purposes, have no case but not yet have an appealable final judgment. For details about the *Daubert* standard, see generally *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993).

143. *See, e.g.*, Pollis, *supra* note 16, at 1667 ("But MDL consolidation comes at significant cost. Legal error in pretrial rulings has 'effects that go far beyond the mere conduct of litigation.'").

144. 28 U.S.C. § 1407(a) (emphasis added).

145. *See* Pollis, *supra* note 16, at 1645 ("But there is no appellate jurisdiction over most interlocutory MDL orders. And that should make us nervous.").

146. *Id.* at 1667–68.

original proposal to the Advisory Committee would have required courts of appeals to accept MDL interlocutory appeals, instituting mandatory review.[147] Later proposals sought to give the courts of appeals sole discretion and remove the transferee judge's input on whether appeal would be useful.[148] The defense bar has served as the primary advocate of expanded appellate review.[149] For example, the U.S. Chamber Institute for Legal Reform has criticized a perceived double standard: "If defendants win such motions and claims are dismissed as a result, the rulings are immediately appealable as final orders. On the other hand, if defendants lose such motions, the decisions are not immediately appealable."[150] Plaintiffs' lawyers are quick to respond that this perceived imbalance is a traditional feature, not a bug, of the civil system.[151] For the plaintiffs' bar, current procedure provides sufficient opportunity for appellate review; expanded access to interlocutory appeal would only "produce major delays without any significant benefit."[152]

Was the Advisory Committee right to hold off on MDL appellate reform? Would expanded interlocutory review encourage fair settlement? Generally, increased appellate review is unlikely to produce more efficient settlement. A defendant, with an unfavorable trial-court decision and significant resources, can use appeal as a dilatory tactic, increasing the plaintiffs' cost of litigation and strengthening its own bargaining power in later settlement negotiations. But where appellate review might not advance settlement *speed*, it could improve settlement *quality*. Both the defendant and plaintiffs would enjoy an additional layer of protection from an erroneous trial-court decision that could distort a final settlement agreement.

A few factors suggest that any benefit from an increase in settlement quality is unlikely to outweigh the costs of a corresponding decrease in settlement speed. First, aside from defendant lobbying materials, few suggest that MDL judges regularly get it wrong. In fact, "only the 'best' and 'most experienced' judges are assigned MDLs in the first place."[153] And it should be emphasized that extant procedure does allow for appellate review.[154] One

147. MDL Subcommittee Report, *supra* note 31, at 154; *see also* Pollis, *supra* note 16 (arguing for non-discretionary interlocutory appellate review in MDL).

148. MDL Subcommittee Report, *supra* note 31, at 154.

149. *See id.* ("The proponents of expanded interlocutory review came mainly from the defense side, and principally from those involved in defense of pharmaceutical or medical device litigation.").

150. U.S. CHAMBER INST. FOR LEGAL REFORM, MDL IMBALANCE: WHY DEFENDANTS NEED TIMELY ACCESS TO INTERLOCUTORY REVIEW 1 (2019), https://instituteforlegalreform.com/research/mdl-imbalance-why-defendants-need-timely-access-to-interlocutory-review/ [https://perma.cc/TZE3-AM62].

151. MDL Subcommittee Report, *supra* note 31, at 155.

152. *Id.*

153. Gluck, *supra* note 10, at 1693.

154. *See supra* text accompanying notes 133–36.

judge has also observed that much of MDL's work is accomplished by "consensus," which "means there is not much to appeal."[155] An argument for increased access to interlocutory appeal, then, requires some showing that a fear of erroneous pretrial decisions is well-founded and that current protections are insufficient. Second, if courts of appeals employ a highly deferential standard of review, appellate review may not often overturn an MDL judge's decision, which means interlocutory appeal would likely not encourage more accurate settlements at the margin. In fact, if appellate courts rarely overturn MDL rulings, review would likely distort settlements in favor of the defendant, with plaintiffs facing increased delay.

The Advisory Committee likely made the correct decision. Expanding interlocutory review would likely decrease the efficiency of settlement, with any corresponding increase in quality relatively small in comparison (and, depending on the rate of trial-court error and appellate reversal, increased interlocutory review may actually advantage defendants in settlement negotiations). And here, the clarity of a rule—say, a defendant can appeal as of right an MDL judge's denial of a motion to dismiss—does not alter this cost–benefit balance, which points to negative settlement effects regardless of the procedure's formulation. Again, though, this Part does not seek to provide conclusive answers; a full account of the complexities of each procedure is beyond this Note's scope. But it should illustrate the kind of analysis that scholars and rule makers should apply: a substance-sensitive and practice-responsive approach to evaluating procedure.

Conclusion

Why more rules? Importantly, my argument is not that we need more rules but that we need more—and better—discussion and debate about rulemaking in the MDL context. Currently, commentators argue on different levels. Many scholars criticize MDL for its aggregate foundations, but practitioners debate practical procedural proposals, often with their own advantage in mind. Academic debate, then, could be clarified in two ways. First, we must ask whether the MDL should continue to exist as a method of dispute resolution. As explained above, this question has been thoroughly debated in the academic literature. Second, if we conclude that the MDL meets a need in modern litigation, we must consider the procedures best suited for its unique character. This Note has sought to foreground this question by proposing a substance-sensitive analytical approach to evaluating procedure and by illustrating different factors to consider in its application. At base, any analytical framework should respect the primary purpose of current MDL practice: efficient and fair settlement.

155. Gluck, *supra* note 10, at 1706.

And with MDL constituting more than half of the federal docket, the second question seems more pressing than the first. Personally, I think there is room for the development of some rules in some areas of MDL procedure, but this Note does not aim to provide final answers. Rather, it calls for a more transparent and robust dialogue on procedural reform in MDL. Otherwise, meaningful discussion is confused when critiques of MDL theory camouflage as critiques of MDL procedure. Only by framing arguments more carefully and addressing MDL procedure in context can an "unorthodox" procedural law become mainstream and an academic literature find its way out of the "black hole."