

# MDL Myths

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*As Multidistrict Litigation (MDL) has become an increasingly important part of the legal landscape, it has become increasingly controversial. To some degree this is both predictable and appropriate; MDL is not perfect, and scholars and policymakers should always be on the lookout for ways to improve it. Unfortunately, some of the criticism of MDL is based on “myths” that are either incorrect or not based on reliable evidence, and these misconceptions are dangerously close to becoming conventional wisdom or, worse, the basis for policy changes. These myths are especially troublesome when they are seized upon by advocates who deploy them in support of “reforms” that run the risk of restricting the access to court and compensation that MDL uniquely provides. In this Article, we hope to bring some balance to the narrative by both debunking some of these misconceptions and placing them in context. While MDL may not be flawless or achieve ideal results in every case, it is also not the threat to plaintiffs’ due process rights or general welfare that some claim it to be. To the contrary, MDL has achieved a remarkable degree of success to the benefit of both plaintiffs and defendants. And those who intend to tinker with it should take great care not to rely on a negative narrative that is overwrought, and in some cases, simply wrong.*

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### Introduction

Multidistrict litigation (MDL) is ascendant. As its creators predicted in the 1960s, MDL has become the centerpiece of the federal civil litigation system, handling pretrial proceedings in mass disputes of nearly all kinds. Whenever a national controversy finds its way into the federal courts, MDL stands ready to ensure that the complex and massive litigation moves as efficiently as possible to an orderly resolution. One might think this would be grounds for at least muted celebration.

But lately it has not been. Perhaps criticism is the price of prominence, but MDL is increasingly taking punches from all directions. Defense-side interest groups claim that MDL increases the number of non-meritorious claims, then essentially requires defendants to pay off those claims. Some plaintiffs' lawyers argue that the MDL courts' appointments of leadership attorneys divest other attorneys of control over their signed clients' cases and force them to pay the court-appointed leadership for the privilege.<sup>1</sup> Several federal judges have expressed concerns that MDL is something of a lawless land where the regular rules of procedure don't seem to apply.<sup>2</sup> Some academics seem to agree with all of the above complaints.<sup>3</sup> And several go on to assert that the biggest losers are those whom MDL should, ideally, benefit the most—plaintiffs with meritorious claims.<sup>4</sup> To make things worse, according to these commentators, the plaintiffs' interests are sacrificed at the altar of the worst villains of them all: their own lawyers.<sup>5</sup> As one might expect, even within each of these groups of critics there is little agreement on the proper solutions for the problems they've identified. But one thing all the critics seem to agree upon is that the MDL system is broken, and perhaps corrupt, and we need to fix it.<sup>6</sup> Now!

In this paper, our goal is to lower the temperature or at least the volume. We believe the mass panic about MDL is at least exaggerated and in many cases just wrong. Neither of us is Pollyanna; like all procedural devices, particularly ones that attempt efficiency, MDL is imperfect, requires difficult

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1. See *infra* subpart II(B).

2. See *infra* subpart II(A).

3. See *infra* subparts II(A) and II(B).

4. See *infra* subpart II(C).

5. See, *infra* subpart II(D).

6. See, e.g., *infra* notes 50–51, 88–89, 91 and accompanying text.

tradeoffs, and likely could be improved. But the notion that MDL is some sort of lawless Leviathan, with the primary effect of making the (presumed) rich richer while enabling supposedly lazy district court judges to quickly tie up complex national messes with a pretty bow, regardless of the consequences, is simply wrong. That MDL would become so prominent, while being so horribly ineffective at providing justice, almost suggests a vast conspiracy among the central players in the system—the dreaded “repeat players”—to benefit themselves at the expense of everyone else. One might think, especially after reading much of the academic commentary, that the entire MDL system, from the JPML on down, is a racketeering enterprise. It would be one thing if these critiques were the sorts of harmless and hopefully productive criticisms that academics often advance. But the problem here is that many of these critiques actually make things worse by elevating myths to perceived realities. These myths hinder our understanding of the way MDL—now an inescapable feature of private enforcement of the law—actually works. These myths also can lead to policy errors that will both make the system worse and harm those whom the critics often purport to be trying to help. Perhaps of greatest concern is that these myths, when elevated to the status of conventional wisdom, sow seeds of MDL’s illegitimacy among the general public, the bar, and the bench.

Here, we hope to correct at least some of these myths and reorient the narrative. In short, we believe that MDL works reasonably well, that judges are appropriately constrained by the existing formal rules and dominant norms, and that plaintiffs—even when they are part of large-scale settlements—are not deprived of their due process rights nor otherwise disserved. As is often the case when confronted with a difficult and complicated set of problems, panicking makes things worse. Better to move forward calmly and clear-eyed.

Our Article proceeds in three parts. We begin, in Part I, with a short summary of how and why MDL came to exist. We trace MDL’s origins to the mid-twentieth-century movement to increase and formalize certain aspects of judicial case management in large-scale cases. We note that an MDL-type framework was used by some judges before the MDL statute was formally enacted in 1968.<sup>7</sup> And the statute itself was designed to preserve significant flexibility for MDL judges and the JPML.<sup>8</sup> Thus, current critiques of MDL as insufficiently constraining—even fomenting—judicial “creativity” and “lawlessness” misunderstand the history of the MDL statute.<sup>9</sup> Other current concerns expressed about MDL were also articulated prior to the statute’s adoption: the fear within some sectors of the (then very

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7. *See infra* note 63 and accompanying text.

8. *See infra* note 65 and accompanying text.

9. *Id.*

small) plaintiffs' bar that less powerful lawyers would lose control of their cases to more powerful lawyers,<sup>10</sup> and analogous worries within the federal judiciary that district court judges across the country might lose "their cases" through transfer to the MDL court.<sup>11</sup> We believe that it is useful and important to understand that these sorts of concerns about MDL predate the statute and, critically, that the statute reflects the real choices Congress made—minimally considered though they were—about the tradeoffs inherent to the statute.

We go on in Part I to describe and discuss the "discovery" of MDL by lawyers and academic commentators beginning in the 1980s. The rise in prominence of MDL corresponded with two related developments: the receding of the class action as the go-to procedural device for prosecuting mass tort claims and the increasing attention to "managerial judging." The Agent Orange litigation involving personal injury and other claims of hundreds of thousands of Vietnam War veterans against Dow Chemical and the United States had been (creatively) managed by federal district court Judge Jack Weinstein as a class action until its controversial resolution in 1984.<sup>12</sup> But that case highlighted and underscored—including to future MDL judge Jack Weinstein<sup>13</sup>—the many ways in which the class action device is not well suited to the prosecution of many types of mass tort personal injury claims. (In 1997, in *Amchem Products, Inc. v. Windsor*,<sup>14</sup> the U.S. Supreme Court would agree.) In 1991, *In re: Asbestos Products Liability Litigation MDL, No. 875*<sup>15</sup> was created by the Judicial Panel on Multidistrict Litigation (JPML) in the Eastern District of Pennsylvania. This would go on to become the longest-running and largest MDL at that point, with more than 100,000 claims passing through it to resolution.<sup>16</sup> Serious academic attention to MDL also began in 1991, with the publication of Professor Judith Resnik's careful, scholarly, and deeply prescient article *From "Cases" to "Litigation."*<sup>17</sup> In

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10. See *infra* notes 81–82.

11. See *infra* subpart II(A).

12. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 3–5 (Enlarged ed. 1986) (calling Agent Orange "A New Kind of Case" and describing the Agent Orange class action, Judge Weinstein's creative techniques, and the case's eventual settlement).

13. See, e.g., JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 86, 88 (1995) (noting how the Agent Orange litigation is illustrative of the respects in which the class action device is inadequate for the resolution of mass torts).

14. 521 U.S. 591 (1997).

15. 771 F. Supp. 415 (J.P.M.L. 1991).

16. *MDL-875—In re: Asbestos Prods. Liab. Litig. (No. VI): Cumulative Totals*, U.S. DIST. CT. E. DIST. PA. (July 3, 2019), <https://www.paed.uscourts.gov/documents/MDL/MDL875/MDL-875.jun30.2019.pdf> [<https://perma.cc/8WLR-CV3H>].

17. Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., no. 3, Summer 1991, at 1.

1995, Judge Jack Weinstein published *Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices*, a book that sets out, in part, his views of the costs and benefits of MDL consolidations to all parties, including society at large.<sup>18</sup> But it was not until the 2000s—perhaps motivated by a massive increase in the number of individual actions transferred to mass-tort MDLs, which came to make up a sizable portion of the federal civil docket—that a critical mass of academics focused on MDL, resulting in the burst of commentary and proposals that have become the MDL panic.

In Part II, we take up the continuing MDL panic. We focus our discussion on five prominent myths about MDLs that we believe underlie the view, especially widespread among academic commentators, that the MDL system is broken and needs fixing. Many of these myths are based on a misunderstanding and misrepresentation of important facts on the ground. All of these myths reflect a failure of critics to appreciate that the real world—including the real world of mass tort MDLs—is messy and inevitably requires tradeoffs.

- Myth 1: MDL was intended only to coordinate discovery, and other innovations are lawless.
- Myth 2: MDL denies individual plaintiffs due process and their day in court.
- Myth 3: The negotiated resolution of claims—settlement—is an inappropriate goal for an MDL.
- Myth 4: Individual plaintiffs in mass tort MDLs cannot trust their attorneys, neither their individually retained counsel nor the court-appointed plaintiffs’ leadership attorneys.
- Myth 5: For the plaintiffs, money is no object and time has no value.

In Part III, we briefly explain why the MDL myths matter. Each of the claims by commentators that we examine in the previous Part misunderstands and misrepresents MDL. The urgent repetition of these myths quickly elevates them to a reality that hinders our collective understanding of the MDL system, how it actually works, and why. These myths become commonplace in academic articles. They seep into (or are aggressively promoted to) the mainstream and social media where they are positioned to do great harm. These myths predictably and adversely impact the views that claimants and the general public have of our civil justice system and of plaintiffs’ attorneys. These myths can lead to calls for change, some sincere and some self-interested, and for new policies that—because they rest on untruths—inevitably make things worse. By identifying and correcting these

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18. WEINSTEIN, *supra* note 13.

five core myths about MDL, we hope to reorient the MDL narrative so that any proposals for change can be based on facts rather than fiction.

### I. MDL's Origins and Rediscovery

Passed in 1968 on the consent calendar of both houses of Congress, the MDL statute has now been with us for over half a century.<sup>19</sup> For much of that period, MDL was not closely scrutinized, especially when compared to the modern class action, which was ushered into existence by the 1966 amendments to Federal Rule of Civil Procedure 23. While Rule 23 sparked almost immediate controversy, which still shows no sign of abating, MDL attracted relatively little notice in the years immediately following its creation.<sup>20</sup>

But this was not because MDL was intended to be unimportant or to play second fiddle to the class action. As one of us (Bradt) has written, the creators of the MDL statute—primarily federal judges who believed active case management was the only way to process the coming “litigation explosion” that they accurately predicted—intended their “radical proposal” to be the central mechanism for handling what would come to be known as “mass torts” in the federal courts.<sup>21</sup> Indeed, the Advisory Committee on Civil Rules confirmed as much in the original committee note to the 1966 amendments to Rule 23, which admonished readers that use of the new (b)(3) provision should not be used for “mass accidents.”<sup>22</sup> Moreover, unlike the amendments to Rule 23, which attracted almost no notice during their development, the MDL statute was enormously controversial *prior* to its passage. It was vigorously opposed by the corporate defense bar and the ABA, which understood well the dangers of leveling the playing field by allowing plaintiffs to litigate essentially as a group.<sup>23</sup> Indeed, the defense bar, led by prominent antitrust lawyers, effectively blocked the statute’s passage for several years before relenting in 1968. For their part, the judges supporting the statute believed that these lawyers were standing in the way

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19. Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375, 1377 (2019) (noting that MDL’s “fiftieth anniversary comes at a moment when, despite its meteoric growth, MDL seems to be taking it on the chin, from several angles”).

20. See Resnik, *supra* note 17, at 47 (“Unlike class actions, MDL did not become identified as enabling plaintiffs (such as consumers, school children, or prisoners) to file lawsuits otherwise beyond their resources and information. . . . As such, it has been a ‘sleeper’—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments.”).

21. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 834 (2017) (“[Judges who developed the statute] predicted in the early 1960s a ‘litigation explosion’ arising from the increased prevalence of mass torts and recognized the need for a device to efficiently process that litigation by centralizing it in the federal courts.”).

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

23. See BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* 9–10 (2019) (explaining the lack of pushback against the creation of the class action); Bradt, *supra* note 21, at 888 (describing ABA opposition to the MDL statute).

of progress in order to increase costs and delays (and perhaps to demonstrate the inadequacy of the federal courts).<sup>24</sup> That the mass tort class action exploded almost immediately upon the adoption of the 1966 amendments was a surprise to nearly everyone involved with Rule 23, particularly in light of the admonishment against using the (b)(3) class action for that purpose in the committee note.<sup>25</sup> In contrast, the drafters of the MDL statute were focused on mass torts from the beginning and vehemently resisted any limitations on the statute's applicability. Rather, they intended that MDL be available without any subject-matter limitations or a requirement that common issues predominate, as was eventually included in Rule 23(b)(3).<sup>26</sup>

While debate about the class action raged within the courts, Congress, and the academy throughout the 1970s, the MDL statute was little noticed.<sup>27</sup> Why was MDL, in Judith Resnik's memorable term, a "sleeper"?<sup>28</sup> Perhaps it was because the kind of "managerial judging" (another Resnik turn of phrase) that MDL sought to amplify was rapidly becoming part of the judicial mainstream, as demonstrated by the expansive amendments to Rule 16 in 1983.<sup>29</sup> Or perhaps the relative lack of controversy regarding MDL was because Congress had passed the MDL statute, thereby imbuing MDL with enhanced legitimacy. Or, as one of us (Bradt, along with Professor Teddy Rave) has argued, perhaps it was because MDL conformed to traditional norms of individual litigation while still facilitating tightly knit aggregation.<sup>30</sup> The class action, in contrast, overtly made very small claims viable to litigate *en masse* and inevitably sparked much greater backlash.

In any event, the class action sucked up most of the oxygen in the aggregate litigation room, while MDL continued to face little criticism,

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24. See Bradt, *supra* note 21, at 899 ("[T]he bill had languished for two years due to the ABA's opposition.").

25. Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 670 (1979) ("The class action onslaught caught everyone, including the draftsmen, by surprise.").

26. Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1735–37 (2017) (describing the pushback of the primary advocate for the bill, Judge William Becker, against limitations on the scope of the statute).

27. Cf. David Freeman Engstrom, *Jacobins at Justice: The (Failed) Class Action Revolution of 1978 and the Puzzle of American Procedural Political Economy*, 165 U. PA. L. REV. 1531, 1535–36 (2017) (noting the decades-long "class action wars" and the ongoing debate over Rule 23).

28. Resnik, *supra* note 17, at 47.

29. David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1984–85 (1989) (explaining that a "major purpose" of the 1983 amendments to Rule 16 "was to recognize, and indeed to embrace, the strong trend toward increased judicial management of litigation from an early stage of the lawsuit").

30. Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1257–58 (2018) (arguing that MDL's "split personality permits MDL to accommodate the norms of traditional American one-on-one litigation far better than a class action, even while functioning, at times, like representative litigation").

especially from academics. Although there were a few academic articles about MDL in the 1970s, they tended to be mostly descriptive or from the perspective of the antitrust bar, which in the early years was the sector of the bar whose cases were most likely to get MDL treatment.<sup>31</sup> It is not that MDL was not used during the 1970s—it was, although not at the rate it is used today. But the cases within MDL tended to be federal-question cases (such as antitrust, patent, and securities cases) and single-event mass torts, such as airplane crashes.<sup>32</sup> The tide began to turn, perhaps a bit unexpectedly, when the JPML established the Dalkon Shield MDL in 1975.<sup>33</sup> That litigation was a true, large, dispersed, mass tort product liability case of the kind that dominates MDL today. But MDL's initial lack of prominence was surely aided by the restraint on the part of the Judicial Panel on Multidistrict Litigation (JPML), which repeatedly declined to create an asbestos MDL when the asbestos crisis peaked in the 1980s.<sup>34</sup>

So, while class actions continued to be controversial in all sorts of areas, MDL seemed to chug along, handling major cases with little controversy and making good use of the developments in case management that were quickly becoming *de rigeur*, and were promoted by some, like Francis McGovern, who would later be among the most important players in the MDL system.<sup>35</sup> Those developments, of course, were not without critics. And by the end of the 1990s, some prominent academics, Judith Resnik and Stephen Burbank among them, had begun to link the growth of MDL and the expansive use of case management. Resnik's 1991 article *From "Cases" to "Litigation"* was the first to explore deeply the origins of the MDL statute and what it had

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31. See, e.g., Wilson W. Herndon, *Section 1407 and Antitrust Multidistrict Litigation—The First Decade*, 47 ANTITRUST L.J. 1161, 1161–62 (1979) (stating the article's purpose as "review[ing] and evaluat[ing] the standards for dealing with antitrust actions" in MDLs); Martin I. Kaminsky, *The Judicial Panel on Multidistrict Litigation: Emerging Problems and Current Trends of Decision*, 23 SYRACUSE L. REV. 817, 817 (1972) ("[T]his article will seek to analyze the apparent trends of decision [of the Judicial Panel on Multidistrict Litigation] . . .").

32. See generally *Legacy Statistics 1968-1979*, U.S. JUD. PANEL ON MULTIDIST. LITIG., <https://www.jpml.uscourts.gov/statistics-info?page=2> [<https://perma.cc/RM3V-TTRW>] (documenting cases transferred by the panel during each year from 1968 to 1977).

33. Georgene M. Vairo, Georgine, *The Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L. REV. 79, 89–90 (1997).

34. See Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 CARDOZ L. REV. 1967, 1974–75 (1992) (explaining that trial judges' and attorneys' calls for using techniques such as MDL in asbestos litigation were forestalled in part by the Judicial Panel on Multidistrict Litigation itself).

35. See Elizabeth Cabraser & Robert Klonoff, *Francis McGovern: The Consummate Facilitator, Teacher, and Scholar*, 84 LAW & CONTEMP. PROBS., no. 2, 2021, at 1, 2 (describing McGovern's "unparalleled" role in MDL litigation); cf. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 456 (1986) (explaining when alternative procedures such as MDL should be considered and how they should be monitored to ensure success).



wrought.<sup>36</sup> Burbank, in a piece called *The Costs of Complexity*, critiqued MDL as a “dubious packaging strateg[y] that [is] supposedly provisional but that in substantive terms may be irremediable.”<sup>37</sup> And Deborah Hensler, at RAND and then Stanford, has always kept a close empirical eye on MDL.<sup>38</sup> Moreover, “complex litigation” as a field was beginning to emerge, launched largely by the innovative casebook on the subject written by Edward Sherman and Richard Marcus.<sup>39</sup> Other trenchant critiques of MDL came largely from the conflict-of-laws field and criticized MDL judges’ seemingly magical ability in plane-crash cases to apply a single state’s law to all of the plaintiffs’ claims.<sup>40</sup>

So, although academic interest in MDL began to pick up some steam in the 1980s and 1990s, it really wasn’t until the debate over class actions subsided a bit that criticism of MDL began to take over.<sup>41</sup> Following the circuit-court opinions of the 1990s that clamped down on the mass tort class action, the Supreme Court’s opinions in *Amchem* and *Ortiz*,<sup>42</sup> and the enactment of the Class Action Fairness Act of 2005, it appeared that opponents of the mass tort class action had won the day.<sup>43</sup> (Rumors of the class action’s ultimate demise have always been, and likely always will be, exaggerated.)<sup>44</sup> By that point, attention turned to MDL, where it seemed that all of these mass tort cases had wound up.<sup>45</sup> Although tort reform and

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36. Resnik, *supra* note 17, at 30–33.

37. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (reviewing RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* (1985)).

38. See, e.g., Deborah R. Hensler, *Has the Fat Lady Sung?: The Future of Mass Toxic Torts*, 26 REV. LITIG. 883, 888–89 (2007) (describing the extensive research process she undertook to better understand mass tort litigation and MDL).

39. See Burbank, *supra* note 37, at 1463 (describing the first edition of the casebook as “break[ing] new ground” and “provid[ing] a sound basis for development”).

40. See, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 554–58 (1996) (describing the “kind of manipulation that takes place” in MDL).

41. See Bradt, *supra* note 21, at 847 (observing that MDL only shifted into the spotlight following the perceived “demise” of the mass tort class action).

42. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

43. Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1346–47 (2014) (“As reliance on Rule 23 has diminished, MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts.”).

44. See Robert H. Klonoff, *Class Actions Part II: A Respite from the Decline*, 92 N.Y.U. L. REV. 971, 972 (2017) (acknowledging that the class action plaintiffs’ bar has reason for optimism despite the author’s previous claims that class actions had been “severely weakened”); Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 503–04 (2016) (explaining that while class actions may have been waning in the 1980s, they were becoming more frequent again in the 1990s and 2000s).

45. JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 116 (2015) (describing MDL as “group litigation that is the functional equivalent to a class action [that] has come to supplant the class action in the mass tort field”); William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISCOURSE 136, 144 n.40 (2013) (“In

restrictions on class actions had significantly reduced the volume of asbestos litigation, the massive settlements in the tobacco cases gave the plaintiffs' bar the resources to innovate,<sup>46</sup> including in so-called mega MDLs that might have once been 23(b)(3) class actions.

Academics took notice. Tulane, the academic home of Edward Sherman, hosted a symposium exclusively on MDL in 2007 and published the articles in its law review.<sup>47</sup> Tom Willging and Emery Lee of the Federal Judicial Center pointed out the massive increase in MDL cases since *Amchem* and *Ortiz*.<sup>48</sup> Other scholars began to cite what seemed like alarming statistics that MDL had come to dominate a quarter or a third of the federal civil docket.<sup>49</sup> Suddenly, it seemed, MDL which had always been a second banana, had become the focus of intense analysis and criticism by a new wave of scholars.<sup>50</sup> Professor Martin Redish and his co-author, Julie Karaba, for their part, concluded rather surprisingly (for a nearly half-century old statute) that MDL was an unconstitutional violation of due process.<sup>51</sup>

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the wake of *Amchem* and *Ortiz*, however [sic] MDLs have become *the* form for resolution of mass tort matters.”).

46. See Barry Meier, *Lawyers in Early Tobacco Suits to Get \$8 Billion*, N.Y. TIMES (Dec. 12, 1998), <https://www.nytimes.com/1998/12/12/us/lawyers-in-early-tobacco-suits-to-get-8-billion.html> [<https://perma.cc/4T67-DYN3>] (“The lawyers who represented [Florida, Mississippi, and Texas,] the first states to settle with the tobacco industry over health care costs[,] were awarded \$8.2 billion in fees yesterday, the richest legal payday in the nation’s history.”). Five Texas plaintiffs’ firms shared \$2.3 billion in total contingent fees from the historic \$15.3 billion Texas tobacco settlement. Scott Baldauf, *Texas-Size Lawyers’ Fees Rankle in State Tobacco Suit*, CHRISTIAN SCI. MONITOR (Apr. 13, 1998), <https://www.csmonitor.com/1998/0413/041398.us.us.4.html> [<https://perma.cc/4LGJ-VVFA>].

47. Sarah S. Vance, *Introduction to the Symposium*, 82 TUL. L. REV. 2199, 2199 (2008) (“[T]he Tulane Law Review sponsored a national Symposium on multidistrict litigation (MDL) that offered a provocative reassessment of MDL practice.”); see, e.g., Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008) (explaining this as the lead article in aforementioned symposium).

48. 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, 798 (2010) (discussing the “massive increase in MDL aggregate litigation” in federal courts that occurred from 2004 to 2008).

49. See, e.g., Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE, no. 2, 2015, at 36, 41 (“The results are stunning: mass-tort MDL dockets consolidated over 125,000 civil actions constituting over 96 percent of all pending actions included in all of the MDL dockets.”).

50. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73–74 (2015) (summarizing her main critiques of existing MDL management practices); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011) (same); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 111 (2010) (same).

51. Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110, 115 (2015) (observing that “the current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison” and contending that “MDL is unconstitutional”).

The last decade has seen a massive influx of scholarship on MDLs—including by many who participated in this symposium.<sup>52</sup> Much of that scholarship is critical, as it should be, and much of it has focused attention on problematic incentives in mass litigation and ways of addressing them. Our job as academics is not typically to pop the corks for a toast to the status quo. Nor are the incentives of academia aligned with scholars (particularly younger scholars) concluding that things are mostly hunky dory.<sup>53</sup> On the other hand, some of this scholarship has been rather extreme—extreme to the point of suggesting that MDL is not simply a flawed-but-necessary accommodation to a system with more litigation than it can handle case by case, but a conspiracy among “repeat-player” judges and lawyers on both sides of the “v” to profit at the expense of those allegedly harmed by the defendants’ misconduct.<sup>54</sup> In the view of these scholars, MDL is less a means of leveling the playing field than an opportunity for the institutional cartel to sell out the plaintiffs—in the name of efficiency and finality. Consider, they might say: plaintiffs’ lawyers (especially those in leadership) get paid handsome fees for relatively little work, defense lawyers profit by the hour through lengthy pretrial proceedings and then deliver a sweetheart deal to their clients, while transferee judges get approbation from their colleagues for solving a massive legal problem and relieving their peers of a potential burden. And the JPML gets to celebrate all of this every year with their hand-

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52. The *Texas Law Review* symposium on “Judicial Management of MDLs and Other Consolidations” was held at the University of Texas School of Law in Austin, Texas, on January 27–28, 2023. For additional scholarship on MDLs by symposium contributors and attendees, see generally Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577 (2011); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019); Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DEPAUL L. REV. 393 (2015); Myriam Gilles, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173 (2012); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014); David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403 (2019); Silver & Miller, *supra* note 50; and Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

53. See Stephen B. Burbank, *Thinking, Big and Small*, 46 MICH. J. L. REFORM 527, 528 (2013) (describing how legal scholarship “privileges the big idea” and develops an incentive structure that pushes junior faculty members to search for new theories).

54. See, e.g., Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1852, 1914 (2022) (asserting that repeat-player plaintiffs’ attorneys use “their plaintiffs-side leadership positions to bargain with defendants to increase their own common-benefit fees,” while repeat-player defense counsel “negotiat[e] for widespread closure and litigation releases on ethically dubious terms” and contending that “MDLs fail on nearly every fairness metric posed by existing research”); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552–53 (2013) (explaining how plaintiffs, defendants, and judges have all “embraced” MDL because it serves as a “de facto collusive model of aggregate claims resolution” which is useful for mass litigation participants “to accomplish self-interested goals”).

selected problem solvers at the Breakers in West Palm Beach. One might think it's the perfect crime! But do these allegations withstand scrutiny?

## II. Five MDL Myths

In this Part, we take up the continuing MDL panic. We focus our discussion on five prominent myths about MDLs that we believe underlie the view that the MDL system is broken and needs fixing. This view is especially widespread among defense-side interest groups as well as among academic commentators. Many of these myths are based on a misunderstanding and misrepresentation of important facts on the ground. All of these myths reflect a failure of critics to appreciate that the real world—including the real world of mass tort MDLs—is messy and inevitably requires tradeoffs.

- Myth 1: MDL was intended only to coordinate discovery, and other innovations are lawless.
- Myth 2: MDL denies individual plaintiffs due process and their day in court.
- Myth 3: The negotiated resolution of claims—settlement—is an inappropriate goal for an MDL.
- Myth 4: Individual plaintiffs in mass tort MDLs should not trust their attorneys, neither their individually retained counsel nor the court-appointed plaintiffs' leadership attorneys.
- Myth 5: For the plaintiffs, money is no object and time has no value.

### A. *Myth 1: MDL was intended only to coordinate discovery, and other innovations are lawless*

One pervasive myth about MDL is that the ambitions of its drafters were limited to coordinating only discovery and that because MDLs were only for “pretrial” proceedings, judges were intended to not be involved in the substantive aspects of the case.<sup>55</sup> This idea that the MDL judge should act exclusively as a sort of party planner—getting everyone on the same dance floor, but staying out of the actual festivities—is wrong. It ignores the history of the MDL statute and the context out of which it emerged. The drafters, all of whom were proponents of the then-novel tools of active case management, had grand ambitions for their creation. Not only did they intend MDL to be

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55. See, e.g., Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOU. L. REV. 295, 304 (2000) (“[S]ection 1407(a) authorized MDL transfers only for purposes of consolidated discovery, not for purposes of trial.”); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 916–17 (1996) (describing the JPML’s “authority to consolidate pending federal lawsuits in a single judicial district for purposes of discovery”); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 823 n.249 (1985) (“Congress in fact intended that the MDL Panel consolidate such cases only for discovery purposes and not for trial.”); Greg Zipes, *Fostering Ethics in Complex Litigation*, 34 SUFFOLK U. L. REV. 53, 72 (2000) (describing MDL’s “legislative purpose, which is to dispose of preliminary discovery issues”).

a centerpiece of federal litigation amid a coming “explosion,”<sup>56</sup> as noted above, but they also intended that the judge would play a central role in moving the litigation forward substantively.<sup>57</sup> Discovery was of course important. The drafters understood well from their experience in the massive electrical-equipment antitrust litigation that was the immediate progenitor of the MDL idea that centralized document depositories and one-time, extended depositions of key players in the litigation were crucial to reducing costs and delays.<sup>58</sup> But the drafters did not see the transferee judge’s role as limited to discovery.<sup>59</sup>

To the contrary, it was important to the judges in electrical equipment—both then and later as part of the procedural machinery that they created—that transferee judges be able to track the litigation into “front” and “back burner[s],” narrow the issues in the case, decide cross-cutting legal issues, and even try cases.<sup>60</sup> The judges in electrical equipment were also centrally involved in settlement discussions because they believed that settlements would beget more settlements and help resolve the massive controversy.<sup>61</sup> Indeed, the drafters of the MDL statute believed that the transferee judge should have complete power over the cases transferred to her until the cases were ready for trial.<sup>62</sup> This included the kind of active case-management techniques that judges had been developing for the “big case” since the 1940s, including regular pretrial conferences, narrowing the issues in the litigation, choreographing pretrial activity, and ruling on common legal issues, such as admissibility of evidence and the viability of legal defenses such as the statute of limitations.<sup>63</sup> Although it was an option, the drafters of the MDL statute did not limit the ability of a transferee judge to resolve dispositive motions; that the transferee judge could do so was reaffirmed during the Senate hearings on the bill.<sup>64</sup>

In addition, what current critics of MDL as “lawless” ignore is that the statute was designed to give transferee judges maximal discretion to adapt

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56. Bradt, *supra* note 21, at 890 (quoting *Judicial Administration: Hearings Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 26–27 (1966) (statement of William H. Becker, C.J., U.S. Dist. Ct. for the W. Dist. of Mo.)).

57. *Id.* at 839.

58. *Id.* at 838–39, 862.

59. *Id.* at 839.

60. *See id.* at 858–62 (quoting in part CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGES ACTIONS* 125 (1973)) (discussing the judges’ management of the electrical-equipment cases).

61. *Id.* at 858–59.

62. *Id.* at 870, 881.

63. *Id.* at 852–53 (quoting Breck P. McAllister, *The Judicial Conference Report on the “Big Case”*: *Procedural Problems of Protracted Litigation*, 38 A.B.A. J. 289, 289 (1952)).

64. *A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation: Hearings on S. 3815 Before the Subcomm. on Improvements in Jud. Mach. of the S. Comm. on the Judiciary*, 89th Cong. 14–15 (1966) (statement of Phil C. Neal, Dean, Univ. of Chi. L. Sch.).

procedure to the cases before them. There is ample evidence to support this, which one of us (Bradt) has written about elsewhere.<sup>65</sup> But among that evidence is, importantly, that the drafters of the statute, in conjunction with key players in the Judicial Conference, rejected specific Federal Rules of Civil Procedure to govern MDLs, largely because they understood that the cases would arrive in all shapes and sizes and that judges would need to innovate in case management.<sup>66</sup> Many of the standard case-management tools we take for granted today—including leadership committees, case-management orders, and even bellwether trials—come from the massive electrical-equipment antitrust cases that spawned the creation of the MDL statute.<sup>67</sup> It is also not a coincidence that the primary drafters of the MDL statute were the primary drafters of the first *Manual for Complex and Multidistrict Litigation*, which included many of the innovative practices that had been developed in the prior decade.<sup>68</sup> Moreover, the statute’s insulation of the JPML from appellate review was a further indication that the MDL process was to develop without substantial interference.<sup>69</sup> In short, this was a statute written by federal judges, for federal judges, to enable them to handle massive controversies in creative ways.<sup>70</sup>

It is true that it is difficult to ascribe any strong intentions on the part of Congress when it comes to the MDL statute. The drafters of the statute were judges (and one law professor, Phil C. Neal, of the University of Chicago) who had been longtime advocates for vigorous judicial case management and (for that reason) were appointed by Chief Justice Earl Warren to an ad hoc committee known as the Coordinating Committee on Multiple Litigation to handle the wave of electrical-equipment cases engulfing the federal courts.<sup>71</sup> It was during the successful management of that unprecedented massive litigation that the Coordinating Committee came to the conclusion that mass litigation would become more typical and that a permanent addition to federal procedural law was necessary to ensure the availability and legitimacy of their recent innovations in future cases. Indeed, before the MDL statute

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65. See Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 *FORDHAM L. REV.* 87, 91 (2018) (explaining that “the drafters of the statute . . . believed that flexibility for individual judges was necessary to adapt to the endless variety of complicated cases that face the federal courts”).

66. *Id.* at 90, 96, 100.

67. Bradt, *supra* note 26, at 1723–25.

68. Bradt, *supra* note 21, at 838, 903–04.

69. See 28 U.S.C. § 1407(e) (“No proceedings for review of any order of the [JPML] may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.”).

70. See Andrew D. Bradt, *The Stickiness of the MDL Statute*, 37 *REV. LITIG.* 203, 204 (2018) (explaining that the drafters “intended that the newly created Judicial Panel on Multidistrict Litigation (JPML) operate with maximum discretion”).

71. Colvin A. Peterson, Jr. & John T. McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 *A.B.A. J.* 737, 737 (1970).

passed, the Coordinating Committee had begun handling (with no authority) other large multidistrict litigations brought to them by other judges.<sup>72</sup> The MDL statute, therefore, was a product of judicial creativity brought to Congress by the Judicial Conference, which was at perhaps a high-water mark of influence.<sup>73</sup>

Although the two Senate hearings on the proposed bill were substantive and contentious, they were attended by only one Senator, Joseph Tydings of Maryland, who bore primary responsibility for many innovations in his role as Chairman of the Subcommittee on Improvements in Judicial Machinery, including the Federal Magistrates Act and the creation of the Federal Judicial Center.<sup>74</sup> There was virtually no debate about the statute on the floor of either house of Congress, and it was passed on the consent calendar of both houses before being signed with little fanfare by President Johnson.<sup>75</sup> Ascribing congressional intent through the formal legislative history therefore requires some imagination. But there was much wrangling behind the scenes, and we understand well why the drafters of the statute (and Senator Tydings) made the choices they did.<sup>76</sup> If nothing else, though, the fact that the statute says so little and granted so much power to the new JPML suggests that there was no intent on the part of Congress to limit the scope of the MDL statute or federal judges' innovations under its auspices. In other words, there is no evidence that Congress intended to limit the broad scope or effect of the MDL statute, or to constrain its operation to discovery. To the contrary, the reformers who proposed the statute believed that it was urgently needed and that the best way to deal with a litigation explosion was to effectively handle it, not somehow quickly dispose of it.<sup>77</sup>

*B. Myth 2: MDL denies individual plaintiffs due process and their day in court*

By design, the MDL process for the resolution of mass tort claims differs in many respects from the process for resolving ordinary, bipartite civil disputes. After the JPML determines that an MDL is appropriate, all claims that have been (or thereafter would be) filed in federal court are transferred to the designated MDL court for coordinated pre-trial proceedings, including discovery.<sup>78</sup> The coordinated, collective nature of the

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72. Bradt, *supra* note 21, at 862–63.

73. *Id.* at 910–11.

74. See Joseph F. Spaniol, Jr., *The Federal Magistrates Act: History and Development*, 1974 ARIZ. ST. L.J. 565, 567 (noting Senator Tydings's interest in judicial administration).

75. Bradt, *supra* note 21, at 898.

76. See *id.* at 895 (explaining that Tydings considered the statute's opponents' stance as being opposed to the fair administration of justice).

77. *Id.* at 889–91.

78. 28 U.S.C. § 1407(a).

proceedings in the MDL court means that individual claimants (and their chosen legal counsel) are limited in their ability both to control many aspects of those pre-trial proceedings, and to opt out of the proceedings and return to the transferor court for individual litigation.<sup>79</sup> And some critics thus contend that the MDL process denies individual claimants due process.<sup>80</sup>

But a lack of individual control in certain aspects of pre-trial proceedings does not mean an absence of due process. To begin, these limitations on individual control were expressly contemplated and authorized by Congress in the MDL statute.<sup>81</sup> Indeed, the MDL process simply cannot meaningfully exist if individual claimants are permitted to opt out of the proceedings, or if the MDL court cannot appoint leadership attorneys who will simultaneously speak on behalf of all the claimants in the MDL and not just on behalf of the claimants who have originally retained them.<sup>82</sup> Relatedly, there is little reason to believe that the claimants who did not

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79. It was the firm intent of the drafters of the MDL statute to not allow any opt outs. See Bradt, *supra* note 26, at 1713 (“The creators of the MDL statute expressed to the Advisory Committee’s Reporters their strong opposition to any opportunity to opt out of a consolidated mass tort proceeding, because such a right could threaten the efficiencies of aggregate treatment.”).

80. See, e.g., Redish & Karaba, *supra* note 51, at 113–14 (describing “MDL’s serious undermining of the individual plaintiffs’ right to procedural due process”); Mullenix, *supra* note 54, at 539 (contending that MDL “resonates in back-room deal making, blanketed with an aura of judicial legitimacy and largely liberated from the due process concerns and protections associated with the class action”); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1985, 1986 (2011) (asserting that Plaintiffs in MDLs “have little control of lead lawyers” and “[a]lthough a lawyer must normally follow a client’s lawful marching orders as given, there is no evidence that lead attorneys look to their clients for instructions when deciding how to handle MDLs.”); *id.* (explaining that he is using “the label ‘disabled lawyers’ to describe lawyers denied lead counsel positions because their ability to act for their clients in the MDL is limited,” and observing that “[a]lthough [lead lawyers] report to and receive input from disabled attorneys, they are independent actors who operate subject to no one’s control”); Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 *WAKE FOREST L. REV.* 1, 54 (2009) (asserting that “[t]hrough forced collectivization” mass tort claimants in MDLs “frequently lose meaningful participation opportunities and process control over their own cases” and that “[a]fter collectivization, the new bureaucracy of compensation grids, statistical sampling, and claims resolution facilities envelops them”).

81. 28 U.S.C. § 1407(a) (stating that the transfer of cases to an MDL court shall be made by the JPML “upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions,” and specifying that the only exit from the MDL court is through remand “by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated . . . .”); see also, e.g., 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, 473–74 (2020) (explaining how the MDL process works at the outset of consolidation); *In re Bard IVC Filters Prods. Liab. Litig.*, 122 F. Supp. 3d 1375, 1377 (J.P.M.L. 2015) (ordering consolidation and transfer of cases involving the Bard IVC Filters to Judge David G. Campbell in the District of Arizona).

82. See Baker & Herman, *supra* note 81, at 474 (stating that after hundreds of cases are consolidated before her, the MDL judge will appoint “leadership counsel” in order to communicate effectively with the many plaintiffs’ counsel and ensure that discovery proceeds efficiently).



individually retain the court-appointed MDL leadership attorneys will be poorly served by those attorneys. A claimant's individually retained counsel may well be a top-notch attorney, but the leadership attorneys chosen and appointed by the MDL court are also likely to be high-quality attorneys. In addition, virtually every decision made, and action taken, by the leadership attorneys will bind their own clients as well as all the clients who did not individually retain them.<sup>83</sup> Thus, the leadership attorneys have neither the option nor any incentive to act other than in the best interests of all the claimants in the MDL. It should also be noted that the non-leadership attorneys know who the leadership attorneys are and, at least in theory, have the ability to provide those attorneys input on how various aspects of the litigation should be handled. On certain issues, the non-leadership attorneys may also have an ability to provide their input to the MDL court.<sup>84</sup>

In addition, substantial benefits to the claimants result from the limitations the MDL process imposes on the claimants' individual control of their cases. The coordinated proceedings in the MDL provide substantial economies of scale to each of the claimants in the MDL.<sup>85</sup> The enormous costs of discovery and of scientific and medical experts on issues of general causation are shared across thousands of claimants (and their counsel) rather than being borne, repeatedly and redundantly, by each claimant. Indeed, without the ability to share litigation costs in this way, very few claimants would have claims with an expected positive value.<sup>86</sup> And many plaintiffs'

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83. An important exception here is when a court-appointed leadership attorney receives an offer from the defendant to settle only the cases of the clients who individually retained that attorney. The MDL court may want or need to take action to ensure that the relevant leadership attorney continues to play a role in the MDL only if the attorney can be counted on to act in the best interests of the claimants remaining in the MDL. *Id.* at 492–93.

84. *See, e.g.*, Order #2: Order Appointing Plaintiff's Steering Committee at 4, *In re Yasmin and YAZ (Drospirenone) Mktg., Sales Pracs. and Prods. Liab. Litig.*, MDL 2100 (S.D. Ill. Nov. 10, 2009) (No. 3:09-md-02100-DRH-CJP), ECF No. 43 [<https://perma.cc/H38U-BK29>] (stating that the court-appointed Plaintiffs' Steering Committee (PSC) is to "[a]ct as spokesperson for all plaintiffs at pretrial proceedings and in response to any inquiries by the Court, *subject of course to the right of any plaintiff's counsel to present non-repetitive individual or different positions*") (emphasis added); *id.* at 5 (charging the PSC to "[n]egotiate and enter into stipulations with defendants regarding this litigation," but noting that all such stipulations "except for strictly administrative details such as scheduling, must be submitted for Court approval and will not be binding until ratified by the Court" and providing that "[a]ny attorney not in agreement with a non-administrative stipulation shall file with the Court a written objection within 5 days after he/she knows or should have reasonably become aware of the stipulation"); *see also* Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 462 n.45 (2012) (describing techniques used by Judge Weinstein when serving as an MDL judge to "permit more participation from individual attorneys").

85. *See* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–45 (1997) (discussing economies of scale resulting from aggregated proceedings).

86. In addition to the costs of pre-trial discovery, the cost of trial for a single personal injury case against a major corporation involving substantial science or medicine can be expected to

firms might not be able to afford to prosecute these claims. The coordinated proceedings also can be expected to expedite the resolution of all the covered claimants' claims by eliminating multiple parallel proceedings across various federal district courts. The absence of parallel proceedings further reduces the total costs of the litigation for both the defendant and the plaintiffs, thereby conserving assets that will be available for direct compensation from the defendant to the claimants who obtain a successful resolution of their claims.<sup>87</sup>

Finally, the overall quality of the MDL proceedings may well be higher—and is unlikely to be lower—than the quality of individual proceedings across a multitude of federal district courts. The JPML is likely to choose a respected and experienced judge to serve as the MDL judge, and that judge will acquire substantial and deep knowledge of all aspects of the litigation over time. Similarly, the MDL judge is likely to appoint leadership attorneys who, individually, are experienced and well respected. Those attorneys are therefore likely to provide representation for all the claimants that is at least as good as—and in some instances and in some respects likely better than—the representation the claimants' individually retained counsel alone would have provided. Indeed, having multiple such attorneys engage in, and share the various burdens of, each claimant's representation might be expected to ensure an overall higher quality of representation for each claimant, including for claimants whose individually retained counsel are among the court-appointed MDL leadership. Consider, for example, the likely quality of the briefing on cross-cutting legal issues, or the deposition of an important witness, or the review of a huge cache of documents—all of these tasks are likely to be done better by a team of sophisticated and experienced litigators.

The criticisms discussed above regarding the MDL claimant's lack of individual control segue into a related myth: The small number of trials in MDLs means that the MDL process is failing claimants by denying them their day in court.<sup>88</sup> The usual starting point for this critique is the fact that

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exceed \$250,000. Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 *FORDHAM L. REV.* 1943, 1952 (2017).

87. Silver & Baker, *supra* note 85, at 749.

88. See, e.g., Redish & Karaba, *supra* note 51, at 113–14 (contending that the MDL process “miserably fails the dictates of the due process right to one’s day in court”); *id.* at 133 (“MDL fails to provide a constitutionally adequate opportunity to litigate.”); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 *LA. L. REV.* 399, 399 (2014) [hereinafter Burch, *Remanding*] (asserting that aggregation through multidistrict litigation “contributes steadily to disappearing trials and fuels the new paradigm of making and enforcing a settlement grid”); Elizabeth Chamblee Burch, *Disaggregating*, 90 *WASH. U. L. REV.* 667, 681 (2013) [hereinafter Burch, *Disaggregating*] (contending that “[i]n the name of efficiency, multidistrict litigation subverts autonomy goals that individual justice theorists hold dear” and “also undermines procedural justice aims”).

very few claims within an MDL ever reach trial.<sup>89</sup> Taken alone, however, this fact is neither unique to claims within an MDL nor inherently problematic. It has long been the case that only a very small percentage of civil claims in U.S. courts proceed to trial.<sup>90</sup> And insofar as a settlement reflects the decision of the parties that the terms of the resolution are in each of their best interests, the failure to proceed to trial is not obviously or inherently problematic.

Some critics, however, have argued that MDL claimants have “no real choice” to proceed to trial.<sup>91</sup> When a settlement agreement involving MDL claims is entered into,<sup>92</sup> a claimant who is considering declining the offer to settle their claims pursuant to that agreement likely will have few attractive alternatives. To proceed to trial, the claimant may need to first have their case remanded to the court in which the claim was originally filed. The claimant may then face a substantial wait to obtain a trial date in the original transferor court. Further, the claimant may be concerned that the original transferor

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89. The small number of MDL cases that are tried is often attributed in part to the small percentage of cases that are ultimately remanded from MDLs to their original districts. MDL “has frequently been described as a ‘black hole’ because transfer is typically a one-way ticket.” Burch, *Remanding*, *supra* note 88, at 400 (footnote omitted). The percentage of cases that have been remanded by the JPML has steadily declined from 3.425% in 2010, to 3.1% in 2012, and to 2.9% in 2013. *Id.* at 400–01. In 2019, the JPML remanded only 2.34% of cases to their original court. Thomas H.L. Forster, Note, *Out of the “Black Hole”: Toward a New Approach to MDL Procedure*, 100 TEXAS L. REV. 1227, 1228 (2022).

90. Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020) (“Although civil case filings in federal courts, where the data are most reliable, have increased fourfold since the early 1960s, the percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% by 2013.”); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2135–39 (2018) (noting that the federal trial rate is even lower than the federal data suggest insofar as those data overcount “trials” to include any proceeding where evidence is presented (i.e., Rule 23 hearings or *Daubert* hearings), resulting in the majority of “trials” lasting less than a day).

91. *See, e.g.*, Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 1019 (2010) [hereinafter Erichson, *Trouble*] (contending that a lawyer withdrawing if the client declines a settlement offer means that the client’s informed consent to a settlement offer is meaningless: “they essentially had no real choice”); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301 (2011) [hereinafter Erichson & Zipursky, *Consent Versus Closure*] (same); Burch, *Disaggregating*, *supra* note 88, at 682 (“Although plaintiffs can, in theory, withhold their consent [from an aggregate settlement], this choice is often a Morton’s Fork: one must either continue litigating in front of and incur the displeasure of a judge who has played an active role in encouraging settlement or accept the settlement offer.”); Redish & Karaba, *supra* note 51, at 114 (explaining that, even if a litigant does decline to participate in an aggregate settlement, their “right to control adjudication of [their] own claim will have been substantially compromised by the collective, lowest common denominator control of the pretrial process, including all important discovery and pretrial motions”).

92. This settlement agreement will typically involve a particular firm’s “inventory” of claims within the MDL and will not be a true global settlement. Baker, *supra* note 86, at 1945–46, 1945 n.7. In addition, the settlement agreement will not itself resolve any claimant’s claim; it is merely an agreement to establish a settlement program. Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEXAS L. REV. 1165, 1166–67 (2020) [hereinafter Baker, *Disappearing Defendant*].

judge will be hostile to scheduling a trial (or will simply be hostile to the claimant for seeking a trial) when the vast bulk of similar claims have been resolved via settlement without remand. In addition, the claimant may find that their existing counsel is not interested to continue representing the claimant.<sup>93</sup> And, if necessary, their attorney may seek—and may well receive—permission from the relevant court to withdraw from the representation.<sup>94</sup> Further, the claimant may not be able to find new counsel willing to continue prosecuting their case, given (among other things) the substantial expense of a trial and the likelihood that any given claimant’s case is, ultimately, a negative-expected-value case.<sup>95</sup> Given all of this, a claimant may have no real option to proceed to trial or, indeed, to continue prosecuting their claim. And accepting their settlement offer may ultimately be the only practical option for the claimant in order to obtain compensation for their claim. But the claimant’s lack of options here is not due to “defects” of the MDL process. Rather, it is the natural result of the high cost of litigation, the limited potential value of any individual claim, and the very real resource constraints faced by courts and contingent-fee attorneys.

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93. See Baker, *supra* note 86, at 1962–64 (explaining that a client’s refusal to settle may justify a lawyer’s withdrawal under Rule 1.16(b) of the ABA Model Rules of Professional Conduct). The claimant’s attorney may be of the view that the attorney cannot obtain a better result for the claimant than the current settlement offer that the claimant wants to decline. The attorney may further believe that the claimant’s case is unlikely to be a positive expected value case if litigated. The attorney may consider the case to be relatively weak. And the cost of trying the case, in any event, may well exceed \$250,000. *Id.* at 1952. The claimant’s attorney has no ethical obligation to lose money on behalf of a claimant. *Id.* at 1963–64.

94. If the claimant’s case has been filed, the attorney will need to seek the permission of the relevant court in order to withdraw from the case. *Id.* at 1962–63, 1962 n.76; see also MODEL RULES OF PRO. CONDUCT r. 1.16(c) (AM. BAR ASS’N 2020) (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.”). Some MDL courts have been reluctant to grant plaintiffs’ counsel permission to withdraw in cases in which substitute counsel is not being named. See, e.g., *McDaniel v. Daiichi Sankyo, Inc.*, 343 F. Supp. 3d 427, 434 (D.N.J. 2018) (“At bottom, counsel seeks to withdraw because the client has chosen to litigate rather than settle. This is not a sufficient reason to withdraw.”); Case Management Order No. 48 at 2, *In re Bard IVC Filters Prods. Liab. Litig.*, No. 2:15-md-02641 (D. Ariz. Dec. 9, 2020), ECF No. 21740 (“The Court will not consider or grant any such motions.”); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2011 WL 4368719, at \*2, \*5 (E.D. La. Sept. 16, 2011) (denying the motion because withdrawal “would significantly disrupt th[e] MDL proceeding and harm the administration of justice”); Order in response to Case Management Order No. 12 at 1–2 *In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-md-02244 (N.D. Tex. Dec. 17, 2019), ECF No. 1067 (implementing procedural requirements for attorneys who seek to withdraw). It is far from clear that such denials of the attorney’s request for permission to withdraw from the representation would be upheld on appeal.

95. Also, a claimant who has already declined one attorney’s advice (to accept a settlement offer) may not be an attractive client to other attorneys. Similarly, an attorney who has settled the bulk of their own cases of this type and has “moved on” to other projects will likely not be interested in representing a “straggler” case in the litigation. The exception here might be an attorney who has not yet settled their cases of that type and who can simply include the new client’s case in their own “inventory.” But that, too, is likely only to yield a settlement offer for the claimant and not a future day in court.

It is important to appreciate that the vast bulk of criticisms of MDL levied in the preceding paragraph are not unique to claims within an MDL. Moreover, trials *do* systematically occur through the MDL process.<sup>96</sup> To be sure, unlike an MDL claimant, an individual civil claimant outside an MDL will not be delayed in obtaining a trial date by the need to seek a remand of their claim by the JPML from the court supervising pre-trial proceedings back to the court in which the case was originally filed and may be tried.<sup>97</sup> But that non-MDL claimant may instead encounter delays because the claimant's individually retained counsel alone will be undertaking the massive discovery that is conducted by teams of coordinated attorneys in an MDL. Indeed, the cost of such discovery may well be so great that no individual case that involves the complex science and medicine common in many MDL mass torts will be viewed by a contingent-fee attorney as one with a positive expected value, even when the likelihood of prevailing at trial appears to be high. Relatedly, few contingent-fee attorneys may be able (or willing) to bear that multimillion-dollar expense on their own. In sum, it is possible that no comparable free-standing case would ever be accepted by a law firm in the first instance, let alone upon the withdrawal of the initially retained counsel. Stated differently, it is MDL with its aggregation, coordination, economies of scale, and cooperative funding of discovery on the plaintiff side that makes such litigation—including trials—economically feasible for an individual claimant and their counsel. *MDL mitigates, rather than exacerbates, concerns about the vanishing trial.*

One further criticism of MDL that is sometimes portrayed as involving issues of due process is the determination of a claimant's individual settlement offer amount. When mass tort claims settle, some of them—but far from all of them—will be “in” the MDL court. (Many claims will not have been filed anywhere, and some of those may be on a tolling agreement that a plaintiffs' firm has with the defendant; other claims may be filed in state courts.) Any such settlement will almost certainly be a confidential “inventory” settlement of a group of claims, negotiated by defense counsel

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96. In *Vioxx*, for example, there were nineteen trials, six of which were “in” the MDL court. *In re Vioxx Prods. Liab. Litig.*, No. 05-4578, 2010 WL 724084, at \*1 (E.D. La. Feb. 18, 2010), *aff'd*, 412 F. App'x 653 (5th Cir. 2010). And in the ongoing Roundup litigation, there have been eight trials as of April 1, 2023, two of which have been “in” the MDL court. See Managing Editor, *Roundup Lawsuit Settlement Update 2023 and the Most Needed FAQs*, MEDLEGAL360 (March 23, 2023), <https://www.medlegal360.com/roundup-lawsuit-settlement-update/> [<https://perma.cc/BQ9T-3UYB>] (providing an update on the Roundup litigation and trial results). Although many of these trials were in state court and were thus not “in” the MDL court, the MDL process—with its coordination, aggregation, economies of scale, and cooperative plaintiff-side funding of discovery and trials—helps make these trials possible.

97. Nor will a claimant in a stand-alone civil case fear the real or imagined displeasure of a (transferor) judge who knows that virtually all other similar cases throughout the country have settled; in a stand-alone case, there is no “transferor” judge and there will be no group of recently resolved similar cases.

with a particular law firm or consortium. That is, a true global settlement of all of the claims pending in the MDL is extraordinarily rare, notwithstanding commentators' frequent (mis-)statements to the contrary.<sup>98</sup> And neither the MDL judge nor the fact that some of the cases to be settled are in the MDL ultimately impacts the settlement offer process.

Whatever its precise form, the confidential group settlement agreement will typically involve a lump-sum dollar amount for a specified number of claims. And the defendant almost always will expressly play no role in determining any individual claimant's settlement offer amount.<sup>99</sup> How then, and by whom, is each claimant's settlement offer value determined? As one of us (Baker) has previously explained, claimants' counsel, sometimes working with a neutral third party, will allocate the settlement funds among all the claimants eligible to receive a settlement offer.<sup>100</sup> And, before a claimant can agree to resolve their claims, they must receive comprehensive disclosures setting out the entire framework or matrix used for the allocation and the settlement offer values that claimants with various injuries have been assigned.<sup>101</sup>

The fact that a claimant's settlement offer amount is not determined after a jury trial,<sup>102</sup> nor otherwise decided directly by the defendant, does not mean that the claimant has been denied "due process" in the making of the offer or that the offer is in some way improper. Indeed, a powerful case can

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98. *Vioxx* is the rare example of such a true global settlement. See Settlement Agreement Between Merck & Co. Inc. and the Counsel Listed on the Signature Pages Hereto at 1, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) [hereinafter *Vioxx Settlement Agreement*], <https://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement%20-%20With%20Exhibits.pdf> [<https://perma.cc/68VE-DD34>] (containing the entire Settlement Agreement). And a true global settlement will include not only the cases in the MDL but all the similar, meritorious claims against the defendant, whether filed in a state court or unfilled. *Vioxx*, of course, was a fully public settlement; most of the handful of other global settlements have been confidential and involved far fewer than the 50,000 potential claims covered by the *Vioxx* settlement.

99. Baker, *Disappearing Defendant*, *supra* note 92, at 1165, 1167–68.

100. *Id.* at 1169. For a discussion of the costs and benefits to claimants and their counsel of a lump-sum settlement fund being allocated by plaintiffs' counsel rather than by a third-party neutral, see *id.* at 1169–83.

101. *Id.* at 1171; see also Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 310–14, 316–19 (2015) [hereinafter Baker, *Attorney Liability*] (detailing the requirements and explaining the normative underpinnings of the disclosures that plaintiffs' counsel is required to make to obtain their clients' informed consent to an aggregate settlement pursuant to ABA Model Rule of Professional Conduct 1.8(g)); ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-438 (2006) (discussing the lawyer's duties to disclose relevant information and obtain informed consent from clients when an "aggregate settlement" is involved).

102. Of course, a trial does not itself determine the amount that the claimant will be paid by the defendant—at least, not until that verdict has survived all appeals. A trial verdict, however, does provide an important point of reference for any ensuing negotiations to resolve that claim prior to the exhaustion of all available appeals.

be made that the aggregate-settlement allocation process affords the claimant multiple clear benefits relative to a jury verdict or an individually determined offer from the defendant. Unlike the black box of a jury verdict or an individual offer from the defendant, the allocation process for an aggregate settlement provides the claimant transparency regarding the basis for that settlement offer amount.<sup>103</sup> The required disclosures will provide the claimant information about the settlement values being offered to each of the categories of claims included in the group settlement, as well as information about the characteristics of the claimant's own claim that were relevant in the categorization and valuation process.<sup>104</sup> Thus, in stark contrast to a jury verdict or individual offer, the settlement offer process for aggregate settlements assures the claimant substantial and visible horizontal equity within the group of covered claims: claims with similar characteristics will receive similar gross settlement-offer values.<sup>105</sup>

Some critics have contended that the claim-valuation process for an aggregate settlement is problematic because it involves some measure of “damage averaging.”<sup>106</sup> That is, strong (high value) claims are offered too

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103. Lynn A. Baker & Charles Silver, *In Defense of Private Claims Resolution Facilities*, 84 LAW. & CONTEMP. PROBS., no. 2, 2021, at 45, 58 (2021); see also *id.* at 49–50, 52, 58 (comparing three models of claim resolution that provide claimants various levels of transparency, with group settlements providing the most).

104. The required disclosures are specified in every state's equivalent to ABA Model Rule 1.8(g), which states in relevant part:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of . . . the clients, . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS'N 2020); see also ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-438 (2006) (detailing disclosure and consent obligations for attorneys involved in aggregate settlements). One of us (Baker) has published extensively on this disclosure obligation. See, e.g., Baker, *Disappearing Defendant*, *supra* note 92, at 1170–72 (analyzing the disclosure requirements of Rule 1.8(g)); Baker, *Attorney Liability*, *supra* note 101 (describing requirements and judicial interpretations of Rule 1.8(g) and offering a normative theory of the Rule); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1470 (1998) [hereinafter Baker & Silver, *I Cut, You Choose*] (explaining that Rule 1.8(g) permits lawyers to allocate settlement funds in consensual group proceedings); Silver & Baker, *supra* note 85, at 736 (analyzing the operation of Rule 1.8(g) in mass litigation).

105. Each “inventory” settlement that a defendant enters into will be expressly confidential. Thus, the claimant will not have information about the values accorded a similar claim in a *different* inventory settlement of similar claims. Nonetheless, the information the claimant receives about the settlement values of all the claims in the claimant's group settlement is information that is not available to a claimant who receives a jury verdict or an individual offer from the defendant.

106. E.g., Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 552; Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 408 (2008); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*,

little of the total settlement fund while the weak (low value) claims are offered too much, each relative to what a jury might award or what the defendant might offer in an individual, confidential settlement. First, it is difficult to know as an empirical matter whether this discrepancy in settlement values exists. Certainly, one would expect any such gap to be mitigated by the “finality premium” that the defendant is likely to pay to obtain closure on a group of cases.<sup>107</sup> The resolution of a single case, in contrast, is less attractive to the defendant because it means both that all the other claims remain outstanding against the defendant and, critically, that the defendant will in part be funding the war against itself when it pays the relevant claimant’s counsel to resolve that one case.<sup>108</sup> Second, any such gap in gross settlement amounts, at least for the high-value cases, is likely to be mitigated by the opportunity to share expenses when claims are resolved as a group. The potentially great reduction in expenses attributable to a single case will substantially increase the *net* amount received by the claimant who instead settles as part of a group of claims. Relatedly, the gap in gross settlement amounts for the low value cases that are resolved via an aggregate

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41 S. TEX. L. REV. 149, 168–69 (1999); Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It’s Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 220 (1999); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 214 (1996). As one of us (Baker) has previously written, damage averaging is inevitable in any group settlement. See Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 241 (1999) (“All settlement allocation plans necessarily ignore many aspects of individual claims that might affect their value if litigated individually. Group-level deals reflect practical judgments that, at some point, the benefit of a more perfectly individualized settlement allocation plan would not justify the added cost.”). In addition, it is an open empirical question whether group members fare better or worse than claimants with similar injuries who sue alone. See *id.* at 243 (“[B]ecause under-compensation of persons with large claims is a serious problem throughout the tort system, there is no reason to suppose that group lawsuits are uniquely bad in this regard.”); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1218 (1992) (“Th[e] pattern of overcompensation at the lower end of the range and undercompensation at the higher end is so well replicated that it qualifies as one of the major empirical phenomena of [individual] tort litigation ready for theoretical attention.”). “Indeed, there are reasons for thinking that, in consensual group lawsuits, plaintiffs with the highest-valued claims will be overpaid or paid amounts that more closely reflect the merits of their claims.” Baker & Silver, *supra*, at 243. Finally, it should be noted that group settlements—with or without damage averaging—provide claimants horizontal equity while jury trials do not. See, e.g., Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEXAS L. REV. 571, 584 (2012) (discussing how jurors often “consider damages holistically”); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 162 (1986) (stating that “[e]ven when the seriousness of the injury was similar, someone hurt in an automobile accident was likely to receive only one-third of the money that someone hurt in a workplace accident received” from a jury).

107. See Silver & Baker, *supra* note 85, at 760–62 (detailing reasons why defendants who settle group lawsuits “want finality and are willing to pay for it”); Issacharoff & Rave, *supra* note 52, at 413 (same); Erichson & Zipursky, *Consent Versus Closure*, *supra* note 91, at 319 (discussing further reasons why mass tort defendants desire closure).

108. The latter point assumes, of course, that the relevant claimant’s counsel represents additional claimants with claims against the defendant.



settlement rather than individually is likely to be very small or nonexistent.<sup>109</sup> This is because even the possibly inflated values typically offered these claimants in an aggregate settlement will be very small and, indeed, are likely to be the smallest amount necessary to induce such claimants to provide the defendant an executed release. Ultimately, aggregation itself mitigates discrepancies between a claim's "true" value and the claimant's net settlement amount—those with high-value claims will bear lower litigation costs relative to an individual resolution, and those with low-value claims will not receive significant windfalls.

C. *Myth 3: The negotiated resolution of claims—settlement—is an inappropriate goal for an MDL*

Some critics contend that MDL is problematic because claims tend to be resolved while they are "in" the MDL. These critics argue that the MDL statute limits the role of the MDL court to pre-trial proceedings, but that JPML statistics reveal that only a very small number of cases in each MDL are ever remanded back to their transferor court.<sup>110</sup> Sometimes the argument is, erroneously, justified by the misperception that MDL is (or ever was) only about coordinated discovery. More substantively, though, the argument appears to be that something improper is taking place, presumably with the involvement (or, at least, the blessing) of the MDL judge. The implication is that in the ideal world, in which the MDL judge was fully abiding by the limitations of his or her authority under the MDL statute, all cases would be remanded back to their respective transferor courts after common discovery is closed and none would be resolved while in the MDL court. In addition,

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109. Because these low-value claims are exceedingly unlikely to proceed to trial, any individual resolution would likely occur only through a direct offer from the defendant.

110. See, e.g., Silver & Miller, *supra* note 50, at 123 (contending that while an MDL judge is "supposed" to remand cases back to the transferor court for trial, it remains "exceedingly unlikely" in practice); Burch, *Remanding*, *supra* note 88, at 400 (observing that MDL "has frequently been described as a 'black hole' because transfer [under § 1407] is typically a one-way ticket"); *id.* at 400–01 (noting that the percentage of cases that have been remanded by the JPML has steadily declined from 3.425% in 2010, to 3.1% in 2012, and to 2.9% in 2013); Redish & Karaba, *supra* note 51, at 132 (asserting that consolidation into MDL proceedings "all but guarantees that transferred cases will never return to their original jurisdictions for trial"); L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 161 (2004) (contending that "collective representation, without the judicial supervision incorporated into the class action and bankruptcy schemes, permits collusion and inequitable settlement allocations that lead to second-class justice for mass tort claimants"); *id.* at 162 (expressing a "concern that aggregation 'blackmails' defendants into settlement" and questioning "whether success is appropriately measured by settlement"); *id.* at 222 (observing that "the Manual for Complex Litigation (Fourth) speaks of facilitating mass tort settlements" but questioning whether "settlement that comes at the price of blackmail [is] a legitimate goal"); *id.* at 227 (contending that the "pressure to settle in the context of aggregation most often comes at the price of fairness when conducted outside the class action mechanism," as in mass tort MDLs).

these critics would seem to prefer that the transferor courts then try many of these cases.<sup>111</sup>

In fact, it should not be surprising that large numbers of claims are resolved by the parties during the many years of pre-trial proceedings in an MDL. As discovery proceeds, the plaintiffs and defendant all gain important information about the strength and weaknesses of their case. Some cases may proceed to trial, either in state courts or in the MDL court.<sup>112</sup> Those trials provide the parties further, valuable information about the claims at issue. In addition, those trials provide both sides an incentive to consider settlement, not only of the claim(s) set for trial, but of additional claims represented by the trial claimant's counsel. And so begins the series of confidential "inventory" settlements that will resolve not only the claims in the MDL but also the claims—unfiled, filed in state court, or on tolling agreements—represented by the particular plaintiffs' counsel entering into each inventory settlement agreement.

The fact that the claims in MDLs are typically resolved through a series of confidential "inventory" settlements and only rarely through a single, truly global settlement is seldom noted (and, perhaps, not understood) by many MDL critics concerned about supposed overreaching by MDL judges.<sup>113</sup> This is significant because the MDL judge has virtually no role to play in an inventory settlement beyond ultimately ruling on plaintiff counsel's motion to dismiss with prejudice the claims that are "in" the MDL and that have been resolved pursuant to that settlement agreement.<sup>114</sup> Even in the event of the

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111. See, e.g., Burch, *Disaggregating*, *supra* note 88, at 694 (discussing how "plaintiffs' ability to exit the multidistrict litigation and return to their home states for trial will likely amplify their ability to credibly threaten the defendant" and how MDL removes trial "as a bargaining chip for all but a few plaintiffs"); Burch, *Remanding*, *supra* note 88, at 404, 409 (noting the benefits of "remanding [MDL] cases once the transferee judge resolves common pretrial issues" and contending that without remand MDL "can undermine democratic values of communal participation and fact-finding by citizens nationwide"); Redish & Karaba, *supra* note 51, at 150 (arguing that the MDL process is a "mass-produced form of rough justice," while an "individual lawsuit in federal district court . . . is the most accurate procedure available" and allows each claimant to exercise "control over how his rights [are] asserted"); *id.* at 146 (contending that MDL does not "satisfy the right to a constitutionally dictated day in court" insofar as it "disrespects [the claimant's] individual autonomy" and "does not provide claimants with the choices and control that are necessary to satisfy the individual's right to a day in court").

112. See *supra* note 96 and accompanying text.

113. The fact that the *Vioxx* settlement was both a very rare, entirely public mass tort settlement, and also a rare, truly global settlement may be the root of some of this misunderstanding about the form that resolution of mass tort MDLs typically takes. See Baker, *supra* note 86, at 1945–46, 1945 n.7 (noting that the *Vioxx* settlement was the "second earliest of the relatively few public, nonclass, personal injury aggregate settlements to date"); Baker & Silver, *supra* note 103, at 68 (explaining that the *Vioxx* settlement was "a rare truly global (and public) settlement").

114. The MDL judge may also receive a request from the relevant plaintiffs' firm and the defendant to stay any further proceedings in the MDL regarding that particular firm's cases. In addition, the MDL judge may ultimately need to rule on plaintiff counsel's motion requesting permission to withdraw from representing any claimants covered by the inventory settlement whose

very rare, truly “global” settlement, the MDL judge will typically play a similar, very modest role.<sup>115</sup> A settlement, after all, is a private agreement, and there is no obvious or legally authorized role for the MDL judge to play in the context of a non-class settlement.

At some point, after years of discovery, pre-trial proceedings, and perhaps conducting one or more bellwether trials, the MDL judge may indicate that her next step will be to recommend that the JPML remand any cases that remain in the MDL.<sup>116</sup> And scholars focused on the limited statutory role of the MDL judge might be expected to applaud. Ironically, however, these commentators instead sometimes contend that this seemingly logical next step by the MDL judge underscores the supposedly excessive pressures that MDL judges put on the parties to settle.<sup>117</sup> It seems clear, however, that an announcement by an MDL judge that she will soon be recommending that unsettled cases be remanded by the JPML back to their transferor courts might naturally cause the parties both to resist the court’s

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claims are filed or otherwise “in” the MDL and who decline their settlement offer, or who cannot be located, or who have ceased communicating with plaintiffs’ counsel. Also, as noted above, many of the claims covered by a confidential inventory settlement will not be ones that are “in” the MDL. Rather they may be filed in a state court, on a tolling agreement, or simply unfiled.

115. The public *Vioxx* settlement is the very rare exception with regard to the role of the MDL judge and may be the root of some of the misunderstanding on this issue. The *Vioxx* Settlement Agreement stated that Judge Eldon Fallon, the MDL judge, would serve as “chief administrator” of the settlement and explicitly authorized him to oversee it. *Vioxx* Settlement Agreement, *supra* note 96, §§ 6.1.1, 8.1, 16.4.2. The Settlement Agreement further expressly referenced the cooperation of three state court judges in whose courts many *Vioxx* cases had also been filed. *Id.* § 9.2.4 (referencing the Honorable Victoria G. Chaney, the Honorable Carol E. Higbee, and the Honorable Randy Wilson); *id.* § Recital D (listing the three state court proceedings that were “coordinated” with the Federal MDL).

116. See 28 U.S.C. § 1407(a) (“Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”).

117. See Burch, *Remanding*, *supra* note 88, at 415–17 (“[T]ransferee judges have an interest in pushing parties to settle.”); *id.* at 411 (“[S]ettlement—not remand—further the existing power structure’s interests, which explains why transferee judges have used remand as a threat to bring stakeholders to the negotiating table.”); *id.* at 421 (“As long as the [JPML] continues to ‘reward’ transferee judges who quickly settle cases with new multidistrict litigation assignments and quietly bemoan the rest, transferee judges will prefer to keep assignments as long as it takes to browbeat the parties into settling.”); Redish & Karaba, *supra* note 51, at 145 (arguing that the view that claimants “can always hold out for remand to their preferred jurisdictions” demonstrates “an incomplete understanding of the power of transferee courts” because all MDL participants “face enormous pressures to achieve a global resolution in the transferee district”); Silver & Miller, *supra* note 50, at 123–24 (arguing that plaintiffs lack leverage to credibly threaten the defendant with a trial in the original forum because MDL courts “want[] a global settlement at all costs”); Mullenix, *supra* note 54, at 553 (contending that “in the early twenty-first century, private actors have evolved the nearly perfect model for accomplishing self-dealing [settlement] agreements by manipulating MDL procedure to accomplish ends the mechanism was never intended to perform” and describing MDL as a way for “mass litigation actors [to] settle complex cases largely unconstrained by law”).

proposed remands and to focus with new urgency on settlement.<sup>118</sup> After all, for both the plaintiffs and the defendant it will be more costly in every way to continue prosecuting, and eventually to reach a resolution of, the outstanding claims if they are no longer “in” a single court with all the benefits such coordination provides. Thus, the new eagerness with which the parties might discuss settlement does not logically mean that the MDL judge is exerting any particular pressure on the parties to settle, let alone excessive or improper pressure.<sup>119</sup>

In sum, it is not clear what concern underlies these various criticisms of the resolution of claims in the MDL court. After all, the primary purpose of our civil justice system is to resolve disputes, and MDL courts are a part of that system.<sup>120</sup> A privately negotiated settlement that includes cases that are “in” the MDL is entirely proper and does not mean that the settling parties have been denied due process. Moreover, settlement provides efficiencies of cost and time that benefit both parties and arguably make it a superior form of resolution. It also merits note that some cases “in” virtually all MDLs are tried.<sup>121</sup> And when less than 1% of all federal civil cases proceed to trial, the likelihood that an MDL case will be tried is not obviously lower than for a non-MDL case.<sup>122</sup> Critical and inescapable, however, is the fact that when a mass tort involves thousands of cases it is simply not feasible—nor

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118. A recent comment by the judge in the *Roundup* MDL, Judge Vince Chhabria in California, offers a different perspective on this issue. See Amanda Bronstad, *Judges Feel a Lot of Pressure’: Jurists Debate Path for Unsettled MDL Cases*, LAW.COM (Sept. 14, 2022, 5:08 PM), <https://www.law.com/2022/09/14/judges-feel-a-lot-of-pressure-jurists-debate-path-for-unsettled-mdl-cases/> [<https://perma.cc/VU6L-6M3Q>] (“I strongly believe it’s not the job of the MDL judge to make sure these cases settle, and to do anything possible to force everybody to settle. And I do not believe a lack of settlement means a failure.”).

119. At least one MDL judge has publicly stated that he “strongly believe[s] it’s not the job of the MDL judge to make sure these cases settle, and to do anything possible to force everybody to settle.” Bronstad, *supra* note 118. It should also be noted that the claims remaining in the MDL at the time the judge is contemplating remand are unlikely to be a random cross section of cases. They will typically be one of the following: (1) cases of claimants represented by an attorney who has not yet entered into an inventory settlement with the defendant, perhaps because the attorney represents only a small number of claimants and was therefore not a high priority of the defendant; (2) cases of claimants whom a plaintiffs’ attorney who has entered into a settlement with the defendant has not been able to locate and whom the attorney still represents; or (3) cases of claimants represented by an attorney who has entered into a settlement with the defendant but who have declined their settlement offer.

120. Some critics seem to suggest that the goal of our civil justice system is to provide each claimant maximal due process at any cost. See, e.g., Redish & Karaba, *supra* note 51, at 134 (characterizing the “day-in-court ideal” that procedural due process guarantees as “central to the American conception of the adversarial model of litigation”); Burch & Williams, *supra* note 54, at 1889–97 (acknowledging that “the clash between what people want and expect from courts and what MDL can offer them is inevitable,” but going on to provide six pages of anecdotes from claimants unhappy with various aspects of the MDL process including the absence of “a chance to tell their story” to the MDL court or to participate personally in the MDL proceedings).

121. See *supra* note 96 and accompanying text.

122. See *supra* note 90.

necessary—for each such case to be tried in order for each claimant to receive fair compensation for their claim.<sup>123</sup>

*D. Myth 4: Plaintiffs in MDLs cannot trust their attorneys*

Another focus of MDL critics is the attorneys who represent plaintiffs in the MDL, both the plaintiffs' individually retained counsel and the leadership attorneys appointed by the MDL court. Each of these groups of attorneys is accused of systematically failing their clients in a variety of ways. Some critics contend that a substantial portion of the plaintiffs' attorneys betray their clients while others argue that structural aspects of the mass tort settlement process induce certain misbehavior by these attorneys.<sup>124</sup> Below, we examine several of the most prominent of these criticisms. We explain why we believe that each criticism is, at best, overstated and, at worst, unsubstantiated and cannot in any event justify any particular reform to mass tort MDLs.

One pair of critics, Elizabeth Burch and Margaret Williams, asserts that a substantial portion of the court-appointed lead lawyers and individually retained counsel for MDL plaintiffs nationwide regularly violate various fiduciary and ethical duties they owe their clients.<sup>125</sup> These include the duty

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123. Indeed, if the concern is horizontal equity in claimants' compensation, an aggregate settlement is vastly superior to trial or individual settlements. *See, e.g.,* Lahav, *supra* note 107, at 591–93, 608–12 (discussing how aggregate, mass tort settlements allow for greater outcome equality); Baker & Silver, *supra* note 103, at 58 (describing the transparency and horizontal equity that aggregate settlements offer claimants).

124. Prominent critics who argue that plaintiffs' attorneys betray their clients include Elizabeth Chamblee Burch, Margaret S. Williams, and Linda S. Mullenix. *See generally, e.g.,* Burch & Williams, *supra* note 54 (suggesting that MDL undermines, among other things, fundamental tenets of attorney ethics); Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129 (2020) [hereinafter Burch & Williams, *Judicial Adjuncts*] (raising similar concerns); Chamblee, *supra* note 110, at 170–71 (describing mass torts as “[f]odder for [c]ollusion in [s]ettlements” and contending that “all mass torts share three key features that contribute to the potential for collusion in settlements: ‘repeat player’ attorneys who routinely represent mass tort plaintiffs or defendants; aggregation before a single court; and a judge who wants to dispose of burdensome mass tort litigation”); Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L. REV. 1455, 1472 (2015) (contending that “with the advent of the MDL non-class aggregate settlements, there are virtually no means to control, review, or constrain the misconduct of attorneys participating in these suprajudicial proceedings”); Mullenix, *supra* note 54, at 554 (referring to MDL non-class settlements as the “ultimate cynical expression of an aggregate claims resolution model that enables self-interested actors to resolve claims in the actors’ best interests rather than the interests of injured claimants”). Scholars who contend that structural aspects of MDLs provide incentives for attorney wrongdoing include Howie Erichson and Charles Silver. *See, e.g.,* Erichson, *Trouble*, *supra* note 91, at 982 (highlighting problems that arise in aggregate settlements); Decl. of Charles Silver at 10, *In re* Gen. Motors LLC Ignition Switch Litig., No. 1:14-md-02543 (S.D.N.Y. Feb. 5, 2016), ECF No. 2243-2 [hereinafter Silver Declaration] [<https://perma.cc/59KY-T77K>] (describing such incentives).

125. *See* Burch & Williams, *supra* note 54, at 1870–88 (describing survey respondents' reports of various aspects of their experience with their counsel in MDL proceedings).

to communicate with clients and keep them reasonably informed,<sup>126</sup> and the obligation to provide clients certain disclosures in order to obtain their informed consent to any aggregate settlement.<sup>127</sup> These alleged failures among others lead Burch and Williams to a dire conclusion: “In sum, MDLs fail on nearly every fairness metric posed by existing research.”<sup>128</sup> What is the authors’ basis for this troubling conclusion and for their very serious claims against thousands of plaintiffs’ attorneys across the country? Astonishingly, it is the responses given by a tiny number of claimants who chose to complete an online survey regarding their experience in MDL proceedings involving a product “targeted” toward women.<sup>129</sup>

The survey participants were 193 individuals with a claim against one of the five major pelvic-mesh defendants, along with twenty-four individuals with claims in other MDLs.<sup>130</sup> Those 193 individuals are less than two-tenths of one percent—0.00186—of the more than 104,000 claimants in the pelvic-mesh MDLs.<sup>131</sup> And the pelvic-mesh MDLs were only six of sixty-one product liability MDLs pending around the time of the Burch and Williams study.<sup>132</sup> Moreover, only 168 of the survey respondents reported that they actually employed an attorney, and only sixty-three of the respondents reported that they settled their claims.<sup>133</sup>

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126. *Id.* at 1876–79; MODEL RULES OF PRO. CONDUCT r. 1.4 (AM. BAR ASS’N 2022) (mandating attorney communication with clients).

127. Burch & Williams, *supra* note 54, at 1903–04; MODEL RULES OF PRO. CONDUCT r. 1.8(g) (AM. BAR ASS’N 2022) (requiring informed consent to aggregate settlements); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-438 (Feb. 10, 2006) (providing details on lawyers’ disclosure obligations when seeking client consent to an aggregate settlement).

128. Burch & Williams, *supra* note 54, at 1914.

129. *Id.* at 1839, 1841, 1857 (describing how the authors obtained responses to their online survey from plaintiffs who were involved in certain MDL proceedings).

130. *Id.* at 1860 tbl.1.

131. *See* Michelle Llamas, *Transvaginal Mesh Lawsuits*, DRUGWATCH, <https://www.drugwatch.com/transvaginal-mesh/lawsuits/> [<https://perma.cc/JY6G-QBQN>] (Nov. 11, 2022) (providing statistics from the Nov. 19, 2019, report of the U.S. Judicial Panel on Multidistrict Litigation). In addition, the claims of many thousands of other individuals were filed in state courts, on tolling agreements, or otherwise not filed. It should be noted that the JPML appointed the same judge, Joseph R. Goodwin of U.S. District Court for the Southern District of West Virginia, to all of the vaginal-mesh MDLs. The vaginal-mesh MDLs included MDL 2440, *In re Cook Medical, Inc.*, from which Burch and Williams did not report having any survey participants. *See MDL Statistics Report - Distribution of Pending MDL Dockets by District*, U.S. JUD. PANEL ON MULTIDIST. LITIG. (June 19, 2019), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-June-19-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-June-19-2019.pdf) [<https://perma.cc/395M-9KCP>] (listing six “pelvic repair system” MDLs assigned to Judge Goodwin).

132. *Distribution of Pending MDLs by Type, Calendar Year Statistics: January Through December 2020*, U.S. JUD. PANEL ON MULTIDIST. LITIG., [https://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics%202020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics%202020.pdf) [<https://perma.cc/456X-3L3U>].

133. Burch & Williams, *supra* note 54, at 1871 tbl.6 (showing 168 responses indicating that the participant had a lawyer); *id.* at 1861 tbl.4 (showing sixty-three responses indicating that the participant settled). Some eighty-four of the respondents reported that their claim was dismissed.

Even more troubling than the tiny size of the sample is the bias in Burch and Williams's selection of those individuals. The survey respondents were neither selected randomly nor vetted in any way that might ensure that they were representative even of the larger population of vaginal-mesh claimants, let alone representative of all claimants in product liability MDLs.<sup>134</sup> Rather, as we detail at length elsewhere, Burch and Williams's method for recruiting survey participants explicitly targeted a subset of claimants who were more likely to be dissatisfied with their experience.<sup>135</sup> To further appreciate the lack of representativeness in Burch and Williams's small sample, consider one important example. One of their survey questions was: "Before you agreed to settle or agreed to enter into a settlement program did you . . . [h]ave an estimate of your approximate monetary award based on the settlement program's tiers, allocation formula, or points[?]"<sup>136</sup> Burch and Williams state that "[l]ess than half" of their respondents whose cases settled "appear[] to have received the information required by ethics rules, which raises troubling questions about informed consent."<sup>137</sup> In short, Burch and Williams would have us think that the lawyers for more than one-half of all vaginal-mesh plaintiffs who settled their claims did not ensure that their clients received all of the disclosures mandated by applicable state ethics rules.

Of course, every claimant should receive the proper disclosures at the time they are deciding whether to settle their claim.<sup>138</sup> And indeed, if the attorneys for fully one-half or more of all claimants are not ensuring that their clients receive this information, a *systemic* problem might well exist. In fact, however, there is good reason to think that Burch and Williams's thirty-two of ninety-nine survey respondents who reported not receiving the proper

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*Id.* Unfortunately, Burch and Williams do not report how many of the 168 claimants with an attorney were in each of the outcome categories of settled, dismissed, ongoing, or unknown. *Id.*

134. Since virtually all—88.9%—of the survey respondents were from five pelvic mesh MDLs that all took place in the Southern District of West Virginia and involved a product used only by women, the respondents were obviously not representative of the larger population of claimants in product liability MDLs. *See id.* at 1860 tbl.1 (showing how 193 of the 217 survey respondents were from MDL proceedings involving Ethicon, Boston Scientific, American Medical Systems, C.R. Bard, or Coloplast); *supra* note 131 and accompanying text (noting that Cook Medical was a sixth pelvic mesh defendant with MDL proceedings assigned to Judge Goodwin).

135. Lynn A. Baker & Andrew Bradt, *Anecdotes Versus Data in the Search for Truth About Multidistrict Litigation*, 107 CORNELL L. REV. ONLINE 249, 252–54 (2022), <https://live-cornell-law-review.pantheonsite.io/wp-content/uploads/2023/01/Baker-Bradt-comment-final.pdf> [<https://perma.cc/NC3T-RJB5>].

136. Burch & Williams, *supra* note 54, at 1904 tbl.17.

137. *Id.* at 1904. As we also detail at length elsewhere, Burch and Williams's statement that "less than half" of their respondents did not receive the required settlement disclosures misrepresents the relevant survey responses they reported receiving. Baker & Bradt, *supra* note 135, at 256 n.30.

138. The required disclosures are specified in every state's equivalent to ABA Model Rule 1.8(g). *See supra* note 104.

disclosures are outliers and are not in any way representative of the tens of thousands of clients who settled their vaginal-mesh claims. Consider that one of us (Baker) served as the ethics advisor to the plaintiffs' lawyers in numerous confidential vaginal-mesh settlements nationwide involving more than 51,000 total claimants. We therefore have firsthand knowledge that the disclosures provided to each of those 51,000+ claimants who received settlement offers were appropriate, comprehensive, and fully in accordance with the attorneys' obligations under the applicable state(s)' Rules of Professional Responsibility governing aggregate settlements.

Although our own empirical "sample" of claimants' experience on this important issue of settlement disclosures is one in which more than 51,000 claimants received proper, comprehensive information and zero claimants did not, we do not mean to suggest that all other vaginal-mesh claimants received similarly proper disclosures from their attorneys. We simply don't know. We also do not mean to suggest that our sample of more than 51,000 claimants and their attorneys is representative of the more than 104,000 vaginal-mesh claimants and their attorneys. Again, we simply don't know. We would submit, however, that generalizations based on more than 51,000 data points are more likely to be accurate than generalizations based on thirty-two or ninety-nine data points.

In sum, Burch and Williams's 193 survey respondents with vaginal-mesh claims cannot plausibly be considered "representative" in any meaningful sense of the more than 104,000 individuals with filed claims against the major defendants in the vaginal-mesh MDL, let alone of the nearly 400,000 cases currently pending in product liability MDLs.<sup>139</sup> Thus, one cannot draw any conclusions about attorneys who represent plaintiffs in MDLs based on this small, skewed sample of survey responses. And to urge any reform proposals based on those responses is perilous in the extreme.

Consider, further, that even if one could ignore the problems discussed above and somehow conclude that Burch and Williams's data are sufficiently representative to demonstrate widespread plaintiff dissatisfaction in MDLs, we don't know how dissatisfied plaintiffs typically are—with the legal process or with the attorney-client relationship—in *non-MDL cases*.<sup>140</sup> That

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139. See *MDL Statistics Report—Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDIST. LITIG. (Mar. 16, 2023), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_By\\_Actions\\_Pending-March-16-2023.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-March-16-2023.pdf) [https://perma.cc/PH6X-HLNG] (listing products liability MDLs as having nearly 400,000 currently pending cases, including twenty-four out of twenty-five of the largest current MDLs by total pending actions).

140. Arguably, one might look at how Burch and Williams's survey participants were recruited and be pleasantly surprised that, for instance, 25.5% of respondents were *not* dissatisfied with their lawyers. Burch & Williams, *supra* note 54, at 1872 tbl.7. It should be noted that Table 7 states that the number of respondents was 168, but only 152 responses were received. *Id.* Some 109 respondents of the 168 who were asked the question (65%) indicated that they were "somewhat" or



is, one needs to address the “Compared to What?” question. This is particularly significant for policy discussions involving aggregate litigation, which is always going to exact costs in individual participation in exchange for the substantial economic and other benefits of proceeding as a group. Perhaps the median contingent-fee client with a one-off personal injury claim outside of an MDL is as unhappy—or even more unhappy—with various aspects of their experience as is the median respondent to Burch and Williams’s survey.<sup>141</sup> It seems likely that few personal injury claimants, inside or outside an MDL, have previously employed an attorney or sought redress through our civil courts.<sup>142</sup> Most plaintiffs therefore are likely to have little *ex ante* understanding of basic facts about the litigation process or the attorney–client relationship, which in turn may cause them to have unrealistic expectations about both. In what ways, and to what extent, is the median MDL claimant more or less dissatisfied with their attorney or the American system of civil justice than the median one-off tort claimant? We don’t know. And Burch and Williams don’t know. Simply put, Burch and Williams’s handful of survey responses do not and cannot offer any insights into whether or how MDL has made things worse or better.

In another article, Burch and Williams claim that plaintiffs’ attorneys violate their fiduciary obligations to their MDL clients by regularly mishandling various expenses related to the clients’ cases.<sup>143</sup> In particular, MDL plaintiffs’ attorneys are accused of employing, at the plaintiffs’ expense, a large number of arguably unnecessary (and potentially biased) “judicial adjuncts” in connection with aggregate settlements.<sup>144</sup> Such “adjuncts” include mediators, special masters, lien-resolution administrators, and qualified-settlement-fund (QSF) administrators.<sup>145</sup> These accusations by Burch and Williams reflect a larger error by many critics, who attribute to the MDL plaintiffs’ lawyers virtually every aspect of the MDL process they

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“extremely dissatisfied” with their attorneys. *Id.* For further, useful discussion of the “as compared to what” question in the context of MDLs, see Todd Venook & Nora Freeman Engstrom, *Toward the Participatory MDL: A Low-Tech Step to Promote Litigant Autonomy*, in *LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE* 173, 178 n.21, 180 nn.28–29 (David Freeman Engstrom ed., 2023).

141. See, e.g., Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO J. LEGAL ETHICS* 1485, 1500 (2009) (documenting that “settlement mill” lawyers who represent individuals pursuing certain types of one-off tort claims very rarely meet, or communicate, with clients); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 *U. ILL. L. REV.* 89, 92 (1989) (reporting that, even in simple, one-off tort litigation, the lawyer–client relationship is frequently “perfunctory” and “superficial”).

142. See HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS* 46 (2004) (noting that, as compared to corporate clients, “the contingency fee client is the archetypical one-shot player”).

143. See Burch & Williams, *Judicial Adjuncts*, *supra* note 124, at 2197–99, 2216–17 (discussing the various ways in which the authors contend that plaintiffs are disserved by the appointment of various “judicial adjuncts” in product-liability and mass tort MDLs).

144. *Id.* at 2205–17 (discussing “Capture and Cronyism,” “Self-Dealing and Bias,” and the associated financial and other costs to plaintiffs of various “judicial adjuncts”).

145. *Id.* at 2153.

find problematic. In fact, the MDL plaintiffs' lawyers are responsible for very few of these retained individuals and, indeed, are rarely in a position to prevent, or object to, their hiring. In many cases, the third party has been retained upon the order or strong recommendation of the MDL judge. For example, in the massive and highly complex *Opiate* MDL, Judge Polster early on appointed three special masters to assist the court with a wide range of tasks including mediating disputes among the parties and coordinating with other courts.<sup>146</sup> Similarly, in the *Vioxx* MDL, Judge Fallon ordered the appointment of a discovery special master to assist the court with privilege issues.<sup>147</sup> Typically, the cost of each of these judicially mandated third parties is shared equally by the plaintiffs and the defendant.<sup>148</sup>

Three other categories of third-party service providers are virtually always required by the defendant as a condition of settlement, and the defendant typically requires that they be retained and paid by the plaintiffs. Usually, the defendant will want the settlement funds deposited into a QSF that is under the jurisdiction of the MDL court or another specified court.<sup>149</sup> And a QSF requires the retention and appointment of a QSF Administrator.<sup>150</sup> The QSF has various tax benefits for the defendant, as well as providing some assurance that the eventual distribution of settlement funds, including to any holders of medical liens, is handled properly.<sup>151</sup> The MDL plaintiffs' lawyers, on the other hand, likely would be happy to have the settlement funds instead deposited directly into their own law firm's client trust account and forgo the appointment of a paid QSF administrator.

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146. Appointment Order at 1–3, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (N.D. Ohio Jan. 11, 2018), ECF No. 69 [<https://perma.cc/J6VJ-5C5P>] [hereinafter *Opiate Appointment Order*].

147. *E.g.*, *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 791–92 (E.D. La. 2007) (noting that the MDL court appointed a special master to handle privilege-related issues that arose early in the discovery process).

148. *See, e.g.*, *Opiate Appointment Order*, *supra* note 145, at 5–6 (discussing compensation for the special masters).

149. The defendant will typically want a QSF rather than simply depositing the funds into an escrow account, in part because of the tax advantages for the defendant. A QSF enables the defendant to accelerate its tax deduction to the date that the settlement amount is paid into the QSF, rather than when each individual plaintiff signs their release and is paid. *What You Need to Know: Qualified Settlement Funds (QSF)*, 4STRUCTURES, <https://www.4structures.com/qualified-settlement-fund> [<https://perma.cc/9J34-M6PA>] (Jan. 12, 2023) (also discussing benefits for plaintiffs); *see also* BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 111–12 (2d ed. 2018) (explaining how a QSF “provides significant administrative convenience for the court and parties and offers favorable tax advantages to the parties”).

150. *E.g.*, Agreed Motion to Establish Qualified Settlement Fund and Appoint Fund Administrator at 3–4, *In re Biomet M2A Magnum Hip Implant Prod. Liab. Litig.*, No. 3:12-md-2391 (N.D. Ind. Sept. 18, 2014), ECF No. 2756 [<https://perma.cc/G3CX-8LWT>].

151. *See supra* note 149.

The defendant will also typically require as a provision of the settlement agreement that they be provided documentation from a lien-resolution professional that any governmental medical liens related to a settling claimant's alleged injuries have been resolved, or that an agreed holdback percentage be determined, prior to the distribution of a claimant's settlement funds.<sup>152</sup> Thus, the plaintiffs' lawyers will be obligated to retain a lien-resolution administrator, typically at the expense of the plaintiffs, to provide this service required by the defendant.<sup>153</sup>

Finally, the defendant will often also require that the settlement fund be allocated by a third-party neutral "special master." Of course, the defendant could itself determine, or play a significant role in determining, each claimant's settlement offer amount.<sup>154</sup> But there are various real and perceived benefits to a defendant of not playing that role.<sup>155</sup> Or the defendant could express no view on the matter, thereby permitting the plaintiffs' lawyers to perform this function. But the defendant might mistakenly believe that the plaintiffs' lawyers cannot ethically allocate the settlement fund or might not trust the plaintiffs' lawyers to do so properly.<sup>156</sup> Or the defendant

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152. *E.g.*, Vioxx Settlement Agreement, *supra* note 98, §§ 12.1.1–12.1.5. The defendant risks paying various penalties if healthcare liens related to the settling claimants' injuries are not resolved. Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 *FORDHAM L. REV.* 1833, 1860 (2011).

153. *See* Baker & Silver, *supra* note 152, at 1861–62, 1864–66 (specifying contractual and other conditions under which the fees of the lien-resolution administrator are properly chargeable by the plaintiffs' attorneys to their clients). The Florida State Bar is an outlier on this issue, severely restricting the circumstances under which the plaintiffs' attorney may charge the claimants for lien-resolution services. *See In re Amendments to the Rules Regulating the Florida Bar* (Biannual Report), 101 *So. 3d* 807, 808 (2012) (declining to adopt amendment to Rule 4-1.5 regarding lien-resolution services in contingent-fee cases and "tak[ing] this opportunity to clarify that lawyers representing a client in a . . . case charging a contingent fee should, as part of the representation, also represent the client in resolving medical liens and subrogation claims related to the underlying case").

154. For example, the *Vioxx Settlement Agreement* included Exhibit 3.2.1 (Points Award Criteria), which was agreed to by both counsel for Merck and the Negotiating Plaintiffs' Counsel, and which specified in precise detail the claim characteristics and their value—both of which would be used by the Claims Administrator to determine the settlement value of each qualifying Claimant's claim. *Vioxx Settlement Agreement*, *supra* note 98, § 3.2. exhibit 3.2.1.

155. *See* Baker, *Disappearing Defendant*, *supra* note 92, at 1167–68 (discussing reasons why mass tort defendants do not seek to play a role in determining each claimant's settlement offer value).

156. It is a common misconception, by both attorneys and academics, that the plaintiffs' attorneys cannot ethically allocate the settlement fund. *See, e.g., id.* at 1171 (discussing how Rule 1.8(g) of the Model Rules provides plaintiffs' attorneys assurance that they are permitted to participate in allocating a limited settlement fund); Baker, *Attorney Liability*, *supra* note 101, at 317 (same); *see also* Baker & Silver, *I Cut, You Choose*, *supra* note 104, at 1535 (explaining that plaintiffs' attorneys "have little incentive to apportion an aggregate settlement in order to benefit some group members by providing others less than the expected net values of their claims in individual litigation"). A defendant's specific concerns about whether or how a settlement fund is allocated by plaintiffs' counsel will often depend in part on certain terms of the Master Settlement

might believe (perhaps correctly) that the claimants will consider more “fair” an allocation by a third party and will therefore be more willing to accept their allocated settlement offer amount.

In sum, contrary to Burch and Williams’s claims, MDL plaintiffs’ counsel typically neither is responsible for, nor has any control over, the retention of the various third-party service providers discussed above. (In some instances, plaintiffs’ counsel may have input into which service provider will be retained or may be responsible for negotiating, on behalf of the plaintiffs, a fair price for the service provided.)<sup>157</sup> Thus, any criticisms or concerns regarding these expenses should be levied against the court or the defendant. And there is no “solution” to the “problem” of many of these expenses. Obviously, the court has the authority to require the parties to retain third parties it thinks useful to moving the litigation toward resolution.<sup>158</sup> And a defendant can simply refuse to settle rather than agree to terms the plaintiffs might prefer that make it more difficult for the defendant to ensure that certain legal obligations to third-parties are met or that the defendant considers otherwise problematic.<sup>159</sup>

It also merits noting that the expense of any such third parties will inevitably be borne by the plaintiffs, even if the defendant is ostensibly paying some or all of these expenses directly. The defendant presumably has a specified amount it is prepared to pay to resolve the relevant claims and is indifferent regarding whether some of those funds are paid to one or more

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Agreement, such as those specifying how the rebate, if any, to the defendant will be determined for any eligible claimant who may decline her settlement offer.

157. Pricing for each service should be competitive, given that there are multiple available providers of each service. And where the court mandates the hiring of a particular special master, for example, the court will presumably be attentive to the fees charged by the individual.

158. See FED. R. CIV. P. 16(c)(2)(I) (“[T]he court may consider and take appropriate action on . . . settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule . . . .”); FED. R. CIV. P. 53(a)(1)(C), (g)(1) (authorizing a court to appoint a master to “address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district” and to “fix the master’s compensation”).

159. For example, lien resolution is required by federal and state law for governmental health liens such as Medicare and Medicaid. See ERIC HELLAND, RAND CORP., THE ROLE OF HEALTH CARE LIENS IN LITIGATION AND RECOVERY 3–5, 5 n.8 (2018) (noting how Medicare and Medicaid have been given “far more extensive [statutory] lien rights” over the last 15 years that have made “resolving these liens a requirement of settlement”), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR2300/RR2393/RAND\\_RR2393.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2393/RAND_RR2393.pdf) [<https://perma.cc/X3BM-VL2R>]; Jason D. Lazarus, *Resolution of Medicare Conditional Payments*, LEGAL EXAM’R: LEGAL NEWS BY JASON D. LAZARUS, ESQ. (Aug. 29, 2022), <https://jasondlazarusesq.legalexaminer.com/art-of-settlement/resolution-of-medicare-conditional-payments/> [<https://perma.cc/2FMM-JBSC>] (describing the legal consequences for personal injury practitioners who fail to resolve Medicare Conditional Payments). In addition, the establishment of a QSF, the retaining by plaintiffs’ counsel of an allocation “neutral,” or both may also be of material concern to the defendant in negotiating a settlement.

third-party service providers directly rather than indirectly via the plaintiffs.<sup>160</sup>

While Burch and Williams contend that a substantial portion of the plaintiffs' attorneys betray their clients in various ways, two other critics have argued that structural aspects of the mass tort settlement process may induce certain misbehavior by plaintiffs' attorneys.

Howard Erichson has written about a handful of plaintiffs' attorneys who have been found to have engaged in wrongdoing of various sorts during the representation of plaintiffs in large group settlements.<sup>161</sup> He asserts that the financial pressures on the attorneys to obtain client consent to aggregate settlements of mass tort cases are in part to blame for much of this attorney misbehavior.<sup>162</sup> In particular, he contends that “[a]ll-or-nothing settlements systematically and predictably create opportunities for abuse.”<sup>163</sup> And he recommends that “[plaintiffs’] lawyers generally should resist demands for all-or-nothing settlement terms” in favor of “*most-or-nothing* settlements.”<sup>164</sup>

To his credit, Erichson doesn't contend that his six examples of “lawyers in trouble” are representative of plaintiffs' lawyers in mass tort MDLs.<sup>165</sup> Nor does he assert that defense attorneys are inherently more virtuous or less likely to engage in misbehavior than plaintiffs' attorneys.<sup>166</sup> At the same time, however, he implicitly (and perhaps unintentionally) portrays mass tort plaintiffs' attorneys as presumptively untrustworthy due to a combination of the alleged temptations posed by the structure of some mass tort settlements, individual greed, and attorneys' inattentiveness to ethical constraints.

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160. See Baker, *Disappearing Defendant*, *supra* note 92, at 1182–83 (explaining why the defendant ultimately will pay the same amount irrespective of which party formally pays a special master).

161. Erichson, *Trouble*, *supra* note 91, at 982–1006.

162. *Id.* at 982–83.

163. *Id.* at 983.

164. *Id.* at 1023.

165. See *id.* at 982 (framing the article as merely seeking “to understand the ethical pressures created by various settlement structures” and recognizing that not all aggregate settlements are problematic). Erichson includes the 2007 nationwide *Vioxx* settlement as his sixth example. But his focus is on provisions of that settlement agreement that he believes were problematic and not on wrongdoing by any particular attorneys. For a rebuttal to Erichson's claims that the *Vioxx* settlement was ethically problematic, see generally Baker, *supra* note 86.

166. ABA Model Rule 8.4(a) states that it “is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .” MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4(a) (AM. BAR ASS'N 2016). Thus, to the extent that plaintiffs' counsel is determined to have violated any ethical or other rules in the handling of the lump-sum settlement, defense counsel may be found under some circumstances also to have engaged in professional misconduct.

In fact, the all-or-nothing settlement structure that Erichson considers problematic plays a role in only one of his six examples of attorney misbehavior.<sup>167</sup> And even in that instance, the wrongdoing by the plaintiffs' attorneys was unrelated to the settlement structure and could have occurred with any settlement structure: it involved collusion with defense counsel at the expense of the plaintiffs.<sup>168</sup> All of this in turn suggests that Erichson's

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167. Only Erichson's fourth example, the Leeds Morelli settlements involving employment claims, involved a settlement structure that was arguably an all-or-nothing settlement. Erichson, *Trouble*, *supra* note 91, at 998 (noting that a handful of clients declined to participate in the settlement but "[t]he language of the agreement, however, leaves no doubt that the parties' intent was to include every one of the clients in the deal"). Erichson's first and most egregious example, a single Kentucky fen-phen settlement in which the three plaintiffs' attorneys were found liable to their former clients for \$42 million and that resulted in prison sentences and disbarment for two of the attorneys, did not involve an all-or-nothing settlement. *Id.* at 983–84. Rather, that settlement had the sort of most-or-nothing walkaway provision that Erichson recommends. *Id.* at 985 (noting that "[t]he agreement contained a walkaway clause that permitted AHP to terminate the agreement if fewer than 95% of the claimants provided releases"). The attorneys simply appropriated a substantial portion of their clients' proper share of that \$200,450,000 settlement, a theft made easier by the attorneys' failure to provide the clients the comprehensive disclosures required by the aggregate settlement rule. *Id.* at 986–87. The two other fen-phen settlements that Erichson discusses also were not all-or-nothing settlements. In both of those settlements, the attorneys improperly allocated the total settlement fund to maximize their own fees and failed to provide the clients the ethically required comprehensive disclosures regarding the settlements. *Id.* at 990–91, 994–95. In each settlement, the attorneys also either misrepresented or failed to disclose certain aspects of the settlement to their clients. *Id.* at 992 ("Napoli deceived its clients about whether the individual settlement amounts had been negotiated with the defendant . . ."); *id.* at 994 ("[T]he [Locks] firm withheld funds from the individual settlement amounts to adjust offers as necessary to secure clients' acceptance . . ."). Erichson's fifth example is the *Vioxx* settlement, which was expressly not an all-or-nothing settlement. *Id.* at 1000–01. And Erichson acknowledges that "[o]n the surface, the *Vioxx* deal was not all-or-nothing. It was structured as an 85% walkaway deal." *Id.* at 1000. In addition, unlike with his other examples, Erichson's concern is with provisions of the *Vioxx* settlement agreement that he construes to be ethically problematic and not with wrongdoing by particular attorneys. *Id.* at 1000–04. As one of us (Baker) has previously explained, Erichson's concerns that the *Vioxx* settlement was ethically problematic are unfounded. See Baker, *supra* note 86, at 1954, 1956, 1964–65 (explaining why the controversial provisions of the *Vioxx* settlement are "ethically unproblematic"). Erichson's sixth and final example is an aggregate settlement related to the 1989 explosion at a chemical plant in Texas. Erichson, *Trouble*, *supra* note 91, at 1004–06. This settlement, too, was not an all-or-nothing settlement because some of the plaintiffs did not settle. Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6 ("In the end, all but a handful [of the plaintiffs] agreed to settle for a sum totaling \$190 million, of which [the law firm] received \$65 million."). And the alleged wrongdoing by the plaintiffs' attorneys in that settlement concerned the misallocation of the settlement fund and the failure of the attorneys to provide the plaintiffs the proper disclosures regarding the settlement and the allocation. Erichson, *Trouble*, *supra* note 91, at 1004–06.

168. Erichson, *Trouble*, *supra* note 91, at 999–1000. As Erichson notes:

At their core, the former clients' claims against Leeds Morelli were about collusion. . . . [T]he employees who had been represented by Leeds Morelli complained that their law firm's loyalty was compromised by a deal the firm struck with the opposition. Instead of representing the employees with undivided loyalty, the former clients claimed, the firm forged a mutually advantageous relationship with its clients' adversaries.

examples of attorney wrongdoing are simply individual instances of attorney greed or inattentiveness to ethical obligations and cannot be attributed to the structure of many mass tort settlements. As Erichson acknowledges, “[a]ny large pot of money can create temptation, just as any aggregate settlement can trip up unwary lawyers.”<sup>169</sup>

In sum, notwithstanding Erichson’s concerns, there is no systematic reason to consider mass tort plaintiffs’ attorneys to be especially likely to fail their clients. Indeed, for at least two decades, the vast majority of confidential mass tort settlements have taken the most-or-nothing form that Erichson, entirely reasonably, prefers as providing fewer temptations for attorney wrongdoing.<sup>170</sup> In addition, Erichson’s examples of attorney misbehavior, rather like the rare commercial airline flight that crashes, garner headlines precisely because the vast bulk of mass tort aggregate settlements apparently proceed without any such headline-grabbing attorney misbehavior. Finally, it merits mention that Erichson’s concerns with the impact of an all-or-nothing settlement on the contingent-fee of the plaintiffs’ attorneys overlook the fact that the financial pressure on the attorney—even in an all-or-nothing aggregate settlement—is in practice less than in a single-client contingent-fee representation. This is because in the aggregate settlement context, the decision of any one client to decline their settlement offer will not in practice derail the entire settlement, even if the text of the settlement agreement gives the defendant the unilateral right to terminate the settlement if 100% of the eligible clients do not participate.<sup>171</sup> Stated differently, a contingent-fee lawyer who represents a single client risks making nothing if that lone client is not willing to accept their settlement offer. Meanwhile, the plaintiffs’ lawyer even in an all-or-nothing aggregate settlement “will typically simply make a bit less in fees if 999 claimants, rather than [all] 1,000, accept their settlement offers.”<sup>172</sup>

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*Id.* (citations omitted). Simply stated, “Nextel bribed the attorneys to compromise Plaintiffs’ claims against Nextel on terms favorable to Nextel.” *Id.* at 1000 (quoting *Johnson v. Nextel Commc’ns, Inc.*, No. 06-cv-5547, 2007 WL 2814649, at \*1 (D.N.J. Sept. 21, 2007)).

169. *Id.* at 983.

170. One of us (Baker) has been the ethics advisor on more than 100 confidential, large-dollar, mass tort, inventory settlements since 1998 and has firsthand knowledge of the structure of those settlements.

171. This is explained at greater length in Baker, *supra* note 86, at 1950–52. A particularly significant fact is Baker’s observation that “[i]n my nearly two decades of experience as a consultant on dozens of actual large-group, large-dollar, mass tort settlements, I have never seen a defendant terminate a settlement in which the specified participation threshold, whether 100 percent or less, was not met.” *Id.* at 1951.

172. *Id.* at 1951. For further discussion of this hypothetical, see *id.* (explaining that even in a settlement with a 100% participation requirement, the defendant’s best course of action if that threshold is not reached is almost certainly still to “have prompt, final resolution of the claims of the 999 claimants willing to settle”).

Another scholar, Charles Silver, has raised concerns about potential misbehavior by the court-appointed leadership counsel (CAC) in an MDL because of a different “structural” issue that he argues will arise under certain settlement circumstances.<sup>173</sup> Silver’s concern is with the “structural conflict” that he contends can develop when a CAC negotiates with the defendant a confidential “inventory” settlement of only the claimants who originally individually retained that CAC.<sup>174</sup> Silver argues that this CAC may be incentivized to enrich her individually signed clients at the expense of the other claimants who remain in the MDL.<sup>175</sup> But it is not clear how this incentivization will occur. One possibility, mentioned by Silver, is that the CAC will seek a premium for the inventory of her own clients’ claims relative to the settlement(s) she later negotiates for other claimants in the MDL.<sup>176</sup> Another possibility is that the CAC might agree as a condition of the settlement of her own inventory that she will undertake to withdraw from her leadership position, thereby depriving the remaining MDL plaintiffs of her future labor, knowledge, and resources. Neither of these possibilities is likely to occur, however, or to disadvantage the remaining claimants in the MDL if it does.

With regard to the first possibility, the suggestion seems to be that the leadership attorney who negotiates an especially good settlement value for her own inventory will receive that premium from the defendant in exchange for collusively “selling out” the other claimants in the MDL.<sup>177</sup> Such collusion, however, is unlikely to be possible. That leadership attorney is unlikely to play any role in determining the settlement value of the other claims in the MDL, whether they are resolved via other inventory settlements (which will each be negotiated by the individually retained counsel for the relevant group of claimants) or a more global settlement (which will not be unilaterally negotiated by any one leadership attorney).<sup>178</sup> The simple explanation for any premium paid by the defendant for the claims of the clients who individually retained the leadership attorney is that the defendant places a heightened value on resolving that attorney’s inventory based on factors such as that attorney’s experience, trial verdicts to date, financial

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173. Silver Declaration, *supra* note 124, at 6–7.

174. *Id.* The issue of this possible “structural conflict” is discussed at length in Baker & Herman, *supra* note 81, at 486–93.

175. Silver Declaration, *supra* note 124, at 6.

176. *Id.*

177. *See id.* (“[A] lead attorney may encounter countless opportunities to gain additional relief for the signed clients by reducing the defendant’s exposure in the unsettled cases that remain in the MDL.”).

178. The fact that the defendant settled the leadership attorney’s cases via an inventory settlement likely means that the defendant will be undertaking only inventory settlements.



wherewithal, or the size and quality of the attorney's inventory.<sup>179</sup> Thus, the leadership attorney's negotiation of the settlement of her own inventory is not itself a reason to question the leadership attorney's loyalty to the clients who individually retained her or to the other claimants in the MDL.<sup>180</sup>

The second "structural conflict" possibility—that the defendant might want the leadership attorney to agree as a condition of the settlement of her own inventory that she will undertake to withdraw from her leadership position—is also not a reason to question the attorney's loyalty to her own clients or to the other claimants in the MDL.<sup>181</sup> To begin, such a condition on an inventory settlement would seem to be a prohibited restriction on the attorney's practice of law in violation of every state's equivalent to ABA Model Rule 5.6(b).<sup>182</sup> Independently of the Rule's requirements, an MDL leadership attorney cannot simply agree with the defendant not to carry out the role that she has been appointed by the court to perform. The attorney must seek permission from the MDL court to give up her leadership role, which means that the MDL judge has complete authority to protect the interests of the claimants remaining in the MDL and to determine whether their interests will be better served by permitting the attorney to leave the leadership or by requiring her to continue to serve.<sup>183</sup> And if the MDL court concludes that the leadership attorney should continue in that role, the financial incentives of the attorney to maximize the recoveries of the claimants remaining in the MDL will be similar to those at the time of her initial appointment since she will ultimately share in the contingent common

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179. Indeed, a court-appointed leadership attorney who is able to negotiate a premium for her own inventory will often be a lawyer who, even without the leadership appointment, would be able to demand a premium recovery for her clients in light of these characteristics.

180. A limited fund or similar extenuating circumstances could affect this analysis. See Baker & Herman, *supra* note 81, at 489 n.70 (collecting cases where courts have suggested that limited fund settlements could raise more conflict of interest problems for attorneys' representing multiple clients).

181. Ironically, Silver posits that one cure for the claimed structural conflict is for the leadership attorney to withdraw anticipatorily from that court-appointed position:

Nothing prevents an attorney who holds a lead position in an aggregate proceeding from negotiating a side-settlement of an inventory of signed cases. The attorney need only recognize the conflict and resign the lead position. By resigning, the lawyer preserves good incentives by eliminating the possibility that the unrepresented claimants will be treated like sacrificial lambs.

Silver Declaration, *supra* note 124, at 9–10.

182. ABA Model Rule 5.6(b) states in relevant part that "[a] lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." MODEL RULES OF PRO. CONDUCT r. 5.6 (AM. BAR ASS'N, 2020).

183. Baker & Herman, *supra* note 81, at 491–92; see also Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 6–7 (2018) (describing how the responsibilities and goals of court-appointed leadership counsel in MDL proceedings differ from the typical attorney–client relationship).

benefit fees generated by the resolution of the remaining claimants' claims.<sup>184</sup> In brief, we are not persuaded that the potential structural conflict described by Silver is likely to exist nor, in any event, that it is cause for MDL plaintiffs to fear that the court-appointed leadership attorneys have systematic incentives not to act in the best interests of all the plaintiffs.<sup>185</sup>

To summarize this subpart: critics have expressed various concerns about the individually retained attorneys, as well as the court-appointed attorneys, who represent claimants in mass tort MDLs. But we are not persuaded by those critics that any systematic problems exist that should cause claimants generally to distrust their attorneys. The fact that isolated plaintiffs' attorneys through the years have violated certain ethical and fiduciary obligations to their MDL clients means only that. It does not mean that plaintiffs' attorneys who represent claimants in product liability MDLs are more likely than any other attorneys who represent plaintiffs or defendants, in one-off or aggregate litigation, to violate their ethical and fiduciary obligations to their clients. Nor, therefore, can the misbehavior of isolated attorneys justify any particular systemic reforms to (mass tort) MDLs.

*E. Myth 5: For MDL plaintiffs, money is no object, and time has no value*

A fifth myth—or broad misconception—underlies many of the criticisms of MDLs discussed in connection with the previous myths, but it merits separate examination. This myth, which is often implicit, is that time has no value and money is no object for plaintiffs in mass tort MDLs. Thus, for example, critics concerned that few MDL plaintiffs have the opportunity for a full-dress trial of their claims, to truly tell their story to the court, often fail to acknowledge—or perhaps even to appreciate—that a trial involves

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184. See Baker & Herman, *supra* note 81, at 493 n.78 (detailing the factors that could lead to a minor reduction in the attorney's financial incentives after her own clients settle).

185. We also fear that Silver's proposed remedy for this alleged structural conflict, which is for the leadership attorney to be obligated to resign her position prior to negotiating her inventory settlement, harms rather than helps the other claimants in the MDL. See *id.* at 493 (arguing that if a CAC had to resign upon (or prior to) negotiating a settlement for her inventory, "defendants would be incentivized to serially 'buy off' the MDL leadership via such settlements in order to deprive the rest of the MDL claimants of the attorneys who are especially well-suited to lead the litigation"). Judge Jesse Furman, the judge in the General Motors MDL in which Silver filed his Declaration, shared both our skepticism regarding the existence of a "structural conflict" and our concerns with Silver's proposed remedy:

[T]here is no law or logic for the proposition that Lead Counsel cannot settle their own cases—or alternatively, as Professor Silver suggests, to require them to step down as Lead Counsel if they desire to settle some of their own cases. Indeed, if anything, such a rule would be a serious disincentive for any lawyer to seek a lead counsel position in the first instance and would do a disservice to the interest of plaintiffs as a whole.

*In re* Gen. Motors LLC Ignition Switch Litig., No. 14-md-2543, 2016 WL 1441804, at \*11 (S.D.N.Y. Apr. 12, 2016) (citation omitted).

significant delay and extraordinary expense, in addition to substantial risk.<sup>186</sup> Even putting to one side the fact that the contingent-fee plaintiff is not risking their own money on the trial, it seems plausible that many plaintiffs would prefer to receive a reasonable and certain settlement relatively quickly rather than bear the delay, eventual expense, and risk of ultimately receiving nothing. Stated differently, it is likely not an oversight that plaintiff lawyers' TV advertisements for mass tort claimants typically announce that "You may be entitled to compensation!" and not that "You may be entitled to a day in court!"

In an ideal world for (many) plaintiffs, the cost of civil litigation against corporations alleged of wrongdoing would be low; contingent-fee plaintiffs' attorneys would have limitless capital and other resources, and be happy to spend them to litigate through trial and appeal every client's claim, no matter how low its value; courts would have infinite capacity expeditiously to conduct individual trials, affording each plaintiff the opportunity to tell their story; and plaintiffs who are successful at trial would promptly receive compensation from the liable defendant. But the real world in which mass tort plaintiffs find themselves is very different. Civil litigation against a major corporation involving complex science and medicine is very expensive. Contingent-fee plaintiffs' attorneys do not have limitless capital and, in order to stay in business, must exercise discretion when investing in litigation. Civil courts are limited in number and overburdened, with long waits for each individual trial date. And a defendant corporation that loses at trial is also entitled to due process and is not obligated to pay a single dollar to the successful plaintiff unless and until the plaintiff prevails in some measure through all appeals.

Stated simply, all litigation—and especially aggregate litigation—is an exercise in the art of the possible. The system does not have the resources to provide each plaintiff a "day in court" ever, let alone expeditiously. The MDLs involving product liability claims are massive proceedings, complex substantively and procedurally, and expensive. And even in the absence of any other constraints, the scarcity of judicial resources demands tradeoffs in the name of efficiency. Although efficiency risks undervaluing the unique

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186. See, e.g., Redish & Karaba, *supra* note 51, at 115 ("The sweeping deprivations of an individual's ability to protect his legal rights [through a day in court] brought about by MDL cannot be justified by naked concerns of pragmatism if the concept of due process is to mean anything"); Burch & Williams, *supra* note 54, at 1914 (detailing how "MDL's efficiency-centered world places it on a collision course with the procedure-heavy, litigant-centered model advanced by procedural justice scholars" and concluding that "MDLs fail on nearly every fairness metric posed by existing research"); Burch, *Disaggregating*, *supra* note 88, at 681 (contending that "[i]n the name of efficiency, multidistrict litigation subverts autonomy goals that individual justice theorists hold dear" and that MDL "also undermines procedural justice aims").

experiences of individuals in the litigation, efficiency through the MDL process also redounds to plaintiffs' systematic benefit in myriad ways.<sup>187</sup>

Most obviously, through the MDL process, plaintiffs with meritorious claims are able to receive compensation relatively expeditiously.<sup>188</sup> To take just one, non-confidential example: the \$4.85 billion *Vioxx* settlement program was announced on November 9, 2007,<sup>189</sup> some two years and nine months after the JPML conferred MDL status on *Vioxx* lawsuits filed in various federal courts throughout the country and transferred all such cases to Judge Eldon Fallon's court in New Orleans.<sup>190</sup> On July 17, 2008, some eight months after the announcement of the settlement program, Merck formally announced that the settlement's participation thresholds had been met and that it would begin funding the *Vioxx* Settlement Program.<sup>191</sup> Merck promptly deposited an initial \$500 million into the settlement fund so that claimants confirmed to have valid claims and who signed a release to accept their settlement offer could begin to receive a significant portion of their settlement money through an "interim payment" process.<sup>192</sup> The final payments to heart-attack claimants were completed by October 14, 2009, (fifteen months later), and final payments to stroke claimants were completed by June 14, 2010 (twenty-three months later).<sup>193</sup> To quote from Judge Fallon's August 8, 2011, Order & Reasons:

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187. In addition to expediting the payment of compensation, other systematic ways in which aggregation through the MDL process benefits plaintiffs include: economies of scale in litigation costs, increased leverage in settlement negotiations, equalization of plaintiffs' and defendants' risks, and the conservation of defendants' assets. Silver & Baker, *supra* note 85, at 744–49 (discussing these benefits in detail).

188. As the late Judge Jack Weinstein observed regarding the aggregate resolution of mass torts: "Efficiency and economies of scale are desirable not because they are inherently good, but because they result in recovery sooner and in more appropriate amounts for those who have been harmed. If justice delayed is justice denied, justice hastened is justice served." WEINSTEIN, *supra* note 13, at 85.

189. *Vioxx* Settlement Agreement, *supra* note 98, at 1–2.

190. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 642 (E.D. La. 2010) (noting that the JPML order creating the *Vioxx* MDL issued on February 16, 2005).

191. *Merck to Settle Vioxx Settlement in August*, ALA. PUB. RADIO (July 17, 2008), <https://www.apr.org/2008-07-17/merck-to-settle-vioxx-settlement-in-august> [<https://perma.cc/GNK5-8JK9>].

192. *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 762 (E.D. La. 2011). The "interim payment" process is set out in the *Vioxx* Settlement Agreement, *supra* note 98, § 4.1. The Settlement Agreement also provided an option for "fixed payments" of \$5,000, which would be paid promptly upon the funding of the Settlement. *Id.* §§ 3.3, 5.1.6; *see also Merck Progress Report on Enrollment in Program to Resolve U.S. VIOXX Product Liability Lawsuits*, FIERCE BIOTECH (Mar. 4, 2008, 10:48 AM), <https://www.fiercebiotech.com/biotech/merck-progress-report-on-enrollment-program-to-resolve-u-s-vioxx-product-liability-lawsuits> [<https://perma.cc/ZFF8-K4P3>] ("Merck and Co., Inc. today said that more than 44,000 of the approximately 47,000 individuals who registered eligible injuries have submitted some or all of the materials required for enrollment that could qualify them for an interim payment in the program . . .").

193. *In re Vioxx*, 802 F. Supp. 2d at 762.

[I]n only 31 months, the parties to this MDL case were able to reach a global settlement and distribute Four Billion, Three Hundred and Fifty-three Million, One Hundred Fifty-two Thousand and Sixty-four Dollars (\$4,353,152,064) to 32,886 claimants, out of a pool of 49,893 [potentially] eligible and enrolled claimants. This efficiency is unprecedented in mass tort settlements of this size. It was due in large part to the ability, industry, and professionalism of the attorneys for both sides, the plan administrators, the lien administrators, the pro se curator, and the special masters.<sup>194</sup>

In contrast, the first *Vioxx* trial resulted in an August 2005 verdict of \$253.4 million for the plaintiff, the widow of a *Vioxx* user.<sup>195</sup> The trial judge, Ben Hardin, promptly reduced the award to \$26.1 million because of Texas state-law limits on punitive damages.<sup>196</sup> Merck appealed, and on May 28, 2008, the Texas appeals court reversed the entire award, finding that *Vioxx* did not cause the fatal heart attack suffered by the plaintiff's husband.<sup>197</sup> In sum, by August 2008, the first *Vioxx* claimant who had gone to trial and had won a historic verdict three years earlier had not received a single dollar of compensation. Meanwhile, by that same August 2008 date, the MDL proceedings that had begun a bit more than three years earlier resulted in a global settlement for \$4.85 billion and some 32,000 claimants had begun to receive substantial "interim payments" of their settlement amounts.

### III. Why the Myths Matter

Although much of the debate over MDL procedure has played out and will continue to play out in the pages of law reviews, as is often the case in civil procedure, the debate can hardly be dismissed as purely "academic." Lawyers, lobbyists, and legislators are well attuned to the power of procedure, and reform is perpetually on their collective agenda.<sup>198</sup> That is not inherently improper, of course—Congress "holds the cards" when it comes to procedure, and interested parties will inevitably seek changes that benefit

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194. *Id.*

195. Richard Stewart, *Lawyer Who Won First Vioxx Lawsuit Praises Latest Deal*, HOUS. CHRON. (Nov. 10, 2007), <https://www.chron.com/news/houston-texas/article/Lawyer-who-won-first-Vioxx-lawsuit-praises-latest-1825437.php> [<https://perma.cc/6A7R-24FU>].

196. *Vioxx Litigation*, LANIER LAW FIRM, <https://www.lanierlawfirm.com/practice-areas/pharmaceutical-liability/vioxx/> [<https://perma.cc/H92X-6VGT>]; *Merck Vows to Appeal Vioxx Damage Award*, NBC NEWS (Aug. 22, 2005, 12:12 PM), <https://www.nbcnews.com/health/health-news/merck-vows-appeal-vioxx-damage-award-flna1c9441235> [<https://perma.cc/D68X-E5SK>].

197. Bill Berkrot, *Merck Wins Appeal on First Vioxx Case*, REUTERS (May 29, 2008, 8:36 AM), <https://www.reuters.com/article/us-merck-vioxx/merck-wins-appeal-on-first-vioxx-case-idUSN2945701220080529> [<https://perma.cc/R58S-GUZ4>].

198. See Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1927–28 (2006) (noting that "interest groups [push] Congress either to restrain the judiciary or itself to exercise the power of procedure").

their constituencies.<sup>199</sup> Beyond Congress, there are other venues in which interested parties seek procedure that will inure to their benefit: the rules committees, district and circuit courts, and groups designated to provide written “guidance” or “best practices,” such as the Federal Judicial Center, which has recently begun the process of revising the *Manual for Complex Litigation*.

Reasonable people acting in good faith can disagree about the relative benefits of any procedural policy change, but the fact of the matter is that “reform” is perpetually on the agenda. And mistakes can harm real people, even if seemingly technical changes rarely make the front page. The under-the-radar nature of complicated reforms raises the stakes on what myths become conventional wisdom. Once the conventional wisdom becomes that the system is broken and is hurting those it purports to serve, then the need for change feels more broadly acute and the risks of experimentation seem less severe.

Our purpose in this paper, therefore, is not to convince readers that MDL operates perfectly in every case, or that no changes would be salutary. In our view, such a claim would be as irresponsible as the claims of those who might argue that MDL is unfair on every available metric. Nevertheless, the myths demand a counter-narrative before they become too calcified in the conventional wisdom to dispute. Otherwise, when these myths are inevitably presented to policymakers as “true,” then there will be little pushback, especially when those deploying the myths in support of their agenda cannot be expected to act magnanimously.

In addition to policymakers, potential claimants are affected by the myths. Perpetuating myths that MDL is corrupt or rife with untrustworthy actors may cause some individuals with potentially meritorious claims to forgo pursuing them.<sup>200</sup> After all, if you can’t trust your lawyer, or the judge, or the “system,” why bother asserting your rights? Why be “victimized” again, by the very system that is intended to remedy the original wrong? If the conventional wisdom is that the game is rigged, few will play. Thus, acceptance of many critics’ critiques of MDL is unlikely to lead to better results for claimants.

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199. Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1678 (2004) (“A clear-eyed view that is informed by precedent and history leaves little doubt that Congress holds the cards and that the questions of the moment are, therefore, whether, when, and after what process of consultation, it should play them.”).

200. See Baker & Bradt, *supra* note 135, at 265 & n.59 (quoting Richard Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987)) (observing that “under-claiming by individuals who deserve payment but do not sue has long caused some scholars to opine that ‘the real tort crisis’ is ‘a crisis of underclaiming rather than overclaiming’” and listing relevant scholarship).

Beyond the politics, however, those engaged in the project of good-faith improvement of the system should have a clear picture of what the real problems are in aggregate litigation. Potential solutions should solve real problems—and we must know what those real problems are so that other perceived shortcomings of MDL cannot be used as smokescreens for reforms that are little more than rent-seeking. So, even when MDL’s critics have good intentions, which we do not doubt, the myths matter.