Diversity and Complexity in MDL Leadership: A Status Report from Case Management Orders

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In multidistrict litigation, as elsewhere, personnel is policy. As MDL has become a major site for aggregate litigation, commentators have raised concerns that large-scale products liability cases are unduly influenced by a small cadre of elite lawyers whom courts repeatedly appointed to serve in the most powerful MDL leadership roles. Repeated appointments of these "repeat players," commentators worry, facilitate self-dealing, suppress dissent, and aggravate conflicts of interest seen in other areas of aggregate litigation. These concerns about MDL overlap with broader concerns across the bench and bar about the degree to which white people and men dominate important leadership posts, to the exclusion of younger attorneys, women, LGBTQ+ people, and attorneys of color.

In response to these concerns, prominent authorities urged MDL courts to adopt a number of reforms. They recommended that judges appoint leaders through open, competitive processes; create additional leadership posts and committees; and appoint leaders for limited terms in order to create more opportunities for new attorneys to participate in leadership. But, outside of a handful of highly publicized cases, we have little empirical evidence of whether MDL leadership appointments changed in the ways that reformers proposed. This Article—part of a larger, ongoing study of the nature and functions of MDL leaders and the MDL model of aggregate litigation—begins to fill that gap. Drawing on a dataset of thousands of filings and orders that were entered in sixty-eight products liability MDLs pending in June 2019, we report data on the size, composition, and appointment process for MDL leadership slates, and changes in the makeup of leadership slates in the eighteen-year period our dataset covers.

Our data tentatively suggest that reformers' calls for larger, complex leadership slates and frequent competitive leadership appointment processes went unheeded. Examining trends in the size and structure of MDL leadership slates in products liability MDLs, we find little evidence that courts implemented the structural changes that the reformers suggested. Yet, while leadership appointment practices and the complexity of MDL leadership slates do not appear to have changed during the period we studied, we find intriguing changes in who is being appointed to leadership posts. Slightly less than a quarter of leadership appointments in our data went to female attorneys, suggestive of only a trivial increase in women's representation on leadership slates compared to earlier studies. But the majority of leadership appointments also did not go to super-elite repeat player attorneys. And, comparing our findings with earlier work that examined MDLs pending in 2013, we find substantial movement in the attorneys and firms whom MDL courts appointed most frequently to leadership posts.

These findings complicate received wisdom about MDL leadership posts. While we document considerable continuity in who is being appointed to MDL leadership posts and how, our data are suggestive of a deep bench of potential future MDL leaders for judges to choose from, as well as the opportunity for even further change in the future.

Introduction

In October 2022, the Judicial Panel on Multidistrict Litigation (JPML) consolidated all the federal cases against Exactech—an orthopedics company that had just recalled hundreds of thousands of faulty knee, hip, and ankle replacements.[1] At first, the *Exactech* litigation looked like many other sprawling cases pending on the federal docket. The plaintiffs' lawyers were old hands at medical device litigation.[2] The panel appointed a veteran district court judge, the Honorable Nicholas Garaufis, observing he was "well-versed in the nuances of complex and multidistrict litigation."[3] And the short, three-page opinion consolidating all of the cases against Exactech found, as had countless other orders, that centralizing the litigation before Judge Garaufis would "streamline pretrial proceedings, reduce duplicative discovery," and "prevent inconsistent rulings" on common evidentiary and other pre-trial motions.[4]

But what happened next made headlines.[5] Shortly after the cases arrived on his desk, Judge Garaufis invited counsel to nominate "younger or newer lawyers who are learning the trade," as well as those of more diverse "racial and ethnic backgrounds."[6] Within a week's time, plaintiffs' counsel obliged,

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1. *In re* Exactech Polyethylene Orthopedic Prods. Liab. Litig., 2022 WL 5408779, at *1 (J.P.M.L. Oct. 7, 2022); Barbara Grzincic, *Exactech Orthopedic Implant Lawsuits Sent to Federal Judge in Brooklyn*, Reuters (Oct. 10, 2022, 9:41 AM), https://www.reuters.com/legal /litigation/exactech-orthopedic-implant-lawsuits-sent-federal-judge-brooklyn-2022-10-10/ [https://perma.cc/H4NF-HE2B].

2. The proposed co-leaders, Kirk Pope and Ellen Relkin, served as leaders in four similar MDLs. *See* Order Appointing Plaintiffs' Co-Lead and Co-Liaison Counsel at 1, *In re* Wright Med. Tech. Inc., Conserve Hip Implant Prods. Liab. Litig.*,* No. 1:12-md-02329-TWT (N.D. Ga. May 3, 2012), ECF No. 79 (appointing Kirk Pope); Order at 2–3, *In re* Profemur Hip Implant Prods. Liab. Litig., No. 4:20-md-02949-KGB (E.D. Ark. Dec. 7, 2020), ECF No. 25 (appointing Kirk Pope); Case Management Order No. 3 at 1, *In re* DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., No. 1:10-md-02197-JJH (N.D. Ohio Jan. 26, 2011), ECF No. 71 (appointing Ellen Relkin); MDL Order No. 11 at 1, *In re* Stryker LFit V40 Femoral Head Prods. Liab. Litig., No. 1:17-md-02768-IT (D. Mass. June 30, 2017), ECF No. 183 (appointing Ellen Relkin as State Liaison Counsel).

3. *In re* Exactech, 2022 WL 5408779, at *2.

4. *Id.*

5. *See, e.g.*, Amanda Bronstad, *Nearly Half Proposed Exactech Legal Team Would Lead an MDL for First Time*, Law.com (Nov. 30, 2022, 5:22 PM), https://www.law.com /2022/11/30/nearly-half-proposed-exactech-legal-team-would-lead-an-mdl-for-first-time [https://perma.cc/4FC3-XZJB] (reporting that nearly half of the plaintiffs' attorneys appointed have never led multidistrict litigation).

6. *Id.*; *see also* Minute Entry, *In re* Exactech, No. 1:22-md-03044-NGG-MMH (E.D.N.Y. Nov. 16, 2022) (noting the "importance of a proposed slate of attorneys including diverse representation, including in racial and ethnic background and experience").

proposing a slate of twenty-seven attorneys to lead the litigation.[7] Six of the applicants had never served on a plaintiffs' steering committee.[8] Five other lawyers had never served in *any* leadership capacity in a multidistrict litigation.[9] The MDL leaders in *Exactech* also emphasized their commitment to broadening the ranks of those charged with spearheading some of the largest litigations on the federal docket.[10] They promised to assign work to a diverse group of attorneys within their firms to "enable them to gain the requisite experience to apply for leadership roles in the future."[11]

Since the early 2000s, or what some have called the "post-class action era,"[12] the federal courts have turned to MDL to manage the nation's largest mass torts. In MDL, thousands of cases may be consolidated before a single federal judge for the purpose of pre-trial litigation.[13] The federal courts have handled over 1,800 MDLs since the device was first established by statute in 1968[14]—including some of the most significant products liability cases of

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7. Letter from Ellen Relkin and Kirk Pope to Judge Nicholas Garaufis at 1–17, *In re* Exactech, No. 1:22-md-03044-NGG-MMH (E.D.N.Y. Nov. 29, 2022), ECF No. 46.

8. *Id.* at 2.

9. *Id.*

10. *See id.* ("Plaintiffs' proposal consists of both senior and more junior attorneys. This combination will allow the younger attorneys or those newer to Multidistrict Litigation to gain experience as well as the necessary guidance to serve in leadership roles as their legal careers progress.").

11. *Id.* The proposal observed that the size and number of committees—which included positions for discovery, bellwether trials, federal-state coordination, and liaising among attorneys— was also warranted by the sheer size of the litigation and the number of products likely to become involved. *Id.* at 2, 4, 6–8.

12. *See, e.g.*, J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 4, 7 (2012) (describing how the Supreme Court's recent class action jurisprudence has weakened the "class action device" and brought about the "post-class action era").

13. *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2209 (2008) (describing the federal MDL model, which allows "the United States Judicial Panel on Multidistrict Litigation . . . to transfer all cases relating to similar litigation to a single judge for pretrial proceedings"); 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, 776–77, 804 (2010) (describing the shift from class actions to MDL in the first decade of the 2000s as a shift to a process "in which a judge selected by the Judicial Panel on Multidistrict Litigation presides over cases consolidated in a multidistrict litigation in which all (or most) parties are represented by counsel" and noting that counsel sometimes have "thousands of cases" in a given MDL).

14. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 837–38 (2017) (describing the 1968 enactment of the MDL statute); *About the Panel*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/about-panel [https://perma.cc/V75J-NAGN] ("Since its inception, the Panel has received more than 3,000 motions for centralization, resulting in the creation of more than 1,800 litigation dockets (MDLs) involving over 1.1 million cases.").

our time, like *Opiates*,[15] *Volkswagen*,[16] and *Roundup*.[17] And depending on how you count,[18] one out of every two cases on the federal docket now sits in an MDL.[19]

In MDL, as elsewhere, "personnel is policy."[20] As MDLs moved into the spotlight, the judges and attorneys who manage them have come under intense scrutiny. Early on, critics maintained that the small cadre of judges who repeatedly oversaw MDLs discouraged vigorous advocacy by appointing attorneys to manage litigation and determining their compensation—particularly when the same lawyers knew they likely would appear before those same judges in other large MDLs.[21] More recently,

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15. *In re* Nat'l Prescription Opiate Litig., 290 F. Supp. 3d 1375 (J.P.M.L. 2017).

16. *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig., 148 F. Supp. 3d 1367 (J.P.M.L. 2015).

17. *In re* Roundup Prods. Liab. Litig., 214 F. Supp. 3d 1346 (J.P.M.L. 2016).

18. A count of newly "filed" cases places the number of new MDL cases closer to 30%. *See Statistical Analysis of Multidistrict Litigation under 28 U.S.C. § 1407: Fiscal Year 2021*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/sites/jpml /files/JPML%20FY%202021%20Report.pdf [https://perma.cc/L9B6-H9KP] (noting that 103,065 civil actions were subjected to MDL in Fiscal Year 2021); *U.S. District Courts—Judicial Business 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021 [https://perma.cc/N5SH-HEBG] (listing 344,567 civil filings in 2021); *see also* Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1246, 1271 (2019) (examining the type and size of MDLs and criticizing the use of "pending" number of claims as an accurate measure of MDL's share of the federal docket). There are other reasons to question the usefulness of statistics tracking the growing share of MDL as a percentage of the federal docket. Class actions and MDLs, while both species of aggregate litigation, are counted very differently on the federal docket. A class action that benefits the same number of people as a 300,000-member MDL is only counted as one case on the federal docket, even though both may involve the same commitment of judicial management and resources. *See* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1314–16 (2020) (noting that "MDL percentages might overstate the share of judicial business that reportedly reflects 'MDL problems,'" given that individual, consolidated cases include "class actions, mass actions, or other representative suits"). MDLs nevertheless still constitute an important feature of mass litigation in our federal courts.

19. *See MDL Statistics Report—Distribution of Pending MDL Dockets by District*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Mar. 16, 2023), https://www.jpml.uscourts.gov/sites /jpml/files/Pending_MDL_Dockets_By_District-March-16-2023.pdf   [https://perma.cc/K4GM-M3ZQ] (reporting that as of March 16, 2023, there were 397,808 pending MDL actions in federal courts); *Federal Judicial Caseload Statistics 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/8FN7-G8EN] (reporting that as of March 31, 2022, there were 638,264 total civil cases pending in federal courts).

20. According to one source, this phrase was coined by Ronald Reagan's director of personnel, Scott Faulkner. Jeff Hauser & David Segal, *Personnel Is Policy*, DEMOCRACY (Feb. 6, 2020, 3:43 PM), https://democracyjournal.org/magazine/personnel-is-policy/ [https://perma.cc/7FT6-P5NH].

21. *See, e.g.*, David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545, 576 (2017) (noting that critics of judicial management over MDLs take issue with judicially appointed lead lawyers); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 86, 88–89, 102 (2015) (suggesting that judicial appointment and compensation of lead attorneys may compromise vigorous representation and innovation while discussing conflicts that may arise between the lead attorney appointed by the court and the claimants); Jaime

commentators have focused on the highly-specialized group of lawyers who manage MDLs.[22] We refer to these court-appointed lawyers as "MDL leaders," even though they actually play many different roles in complex litigation.[23]

Critics have alternatively described the well-connected MDL leaders as "repeat players," "cartel-like," and "superb schmoozers."[24] Those concerns were seemingly validated by empirical surveys that appeared to show that a small number of elite lawyers repeatedly served in the most powerful leadership roles.[25] Those studies prompted a broader debate about the costs and benefits of "repeat play" in large-scale litigation.[26] Critics worried that

Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 355 (2014) (stating that "[s]mall cadres of repeat players dominate most of the key leadership positions in MDL" and voicing concerns about how this trend may hurt individual plaintiffs); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131 (2010) (asserting that judges are aware that lead attorneys use their control over settlement negotiations to increase their own compensation); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2129 (2000) ("Judges now have the power of payment, serving more like clients and consumers . . . .").

22. *See, e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 145 (2019) [hereinafter BURCH, MASS TORT DEALS] (quoting Professor Bryant Garth as stating that a "special elite group" of lawyers is routinely selected to lead MDLs and to "provide tailor-made justice geared specifically to large business disputes"); Brooke D. Coleman, *A Legal Fempire?: Women in Complex Civil Litigation*, 93 IND. L.J. 617, 648–49 (2018) (noting that most lawyers who are repeatedly slated for leadership in MDLs are white men); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 74, 81 (2017) [hereinafter Burch, *Monopolies*] (arguing that non-class settlements often benefit repeat attorneys and explaining that MDL judges' leadership selection process allows repeat actors to use their influence to their advantage).

23. These functions include coordinating pleadings, motion practice, discovery, trial and settlement strategy, and arguably most important, financing the litigation and allocating fee awards for attorneys who perform "common benefit" work on behalf of MDL plaintiffs. *See generally* David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433 (2020) (presenting preliminary empirical findings about the role and functions of court-appointed MDL leaders).

24. *See* Burch, *Monopolies*, *supra* note 22, at 70, 73, 122 (referring to repeatedly appointed MDL plaintiffs' attorneys as "repeat players" and describing their "cartel-like" characteristics**);** Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 539–41 (2013) (explaining how the convergence of interests between plaintiffs' and defense counsel helped lead to modern settlement mechanisms with limited judicial oversight); Myriam Gilles, *Tribal Rituals of the MDL: A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation*, 5 J. TORT L. 173, 178 (2012) (discussing how "repeat players" appear recurrently in MDL cases because they are "superb schmoozers" who develop mutually beneficial arrangements with one another).

25. *E.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459, 1471 (2017); Dodge, *supra* note 21, at 363–68; Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 149–52 (2012).

26. *See* Elizabeth Chamblee Burch, *Diversity in MDL Leadership: A Field Guide*, 89 UMKC L. REV. 841, 841, 846–48 (2021) (analyzing repeat play in MDLs and asserting that questions over

repeat play could prompt self-dealing, suppress dissent, and aggravate conflicts of interest seen in other areas of aggregate litigation.[27] Others warned that blowback *against* repeat players could undercut plaintiffs' chief advantage in MDL: leveraging the money, experience, and organizing power needed to retain experienced guns to fight wealthy corporate tortfeasors.[28] These debates coincided with broader concerns across the bench and bar that white people and men dominated the leadership of court proceedings, to the exclusion of young attorneys, women, LGBTQ+ people, and attorneys of color.[29]

Almost immediately, reports of efforts to expand participation in MDL leadership began to appear in the press.[30] In 2014, the editor in chief for the

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repeat play costs and benefits have "been the subject of much debate"); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–103, 136 (1974) (explaining advantages that repeat-player litigants enjoy over "one-shotter" litigants in litigation generally).

27. *See, e.g.*, Burch, *Monopolies*, *supra* note 22, at 73–74 (arguing that lead lawyers' power over proceedings in MDLs can lead to self-dealing and harm plaintiffs); Howard M. Erichson, *What MDL and Class Actions Have in Common*, 70 VAND. L. REV. EN BANC 29, 33 (2017) (discussing the similarities between MDL and class actions including attorney self-interest in negotiating settlement and the discouragement of objections); Dodge, *supra* note 21, at 367–68 (collecting criticisms of MDL repeat play, including that repeat players may be overcommitted and overly cooperative).

28. *See, e.g.*, Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 75, 94–97 (2019) (discussing the ways repeat-player plaintiffs' lawyers benefit plaintiffs in MDLs including experience, capital, and participation in rulemaking).

29. *See* Shira A. Sheindlin, *Female Lawyers Can Talk, Too*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/opinion/female-lawyers-women-judges.html [https://perma.cc/V3YA-6JR7] (reporting study results that found that women were lead attorneys in only 25% of commercial and criminal cases in New York); *see also* Alan Feuer, *A Judge Wants a Bigger Role for Female Lawyers. So He Made a Rule.*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/nyregion/a-judge-wants-a-bigger-role-for-female-lawyers-so-he-made-a-rule.html [https://perma.cc/8Y6Z-UD2Q] (describing efforts by Judge Jack B. Weinstein and twenty other federal district court judges to write local rules inviting more young female attorneys to argue motions and conduct trials); Amanda Bronstad, *Despite Diversity Focus, Fraction of MDL Leadership Posts Go to Non-Anglo Attorneys*, LAW.COM: DAILY BUS. REV. (Aug. 17, 2020, 1:18 PM), https://www.law.com/dailybusinessreview/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white-392-100192/ [https://perma.cc/23W7-7NE4] (reporting results of Law.com survey of MDLs that found an average of only 5% of appointments to plaintiffs' leadership teams went to lawyers who identified as nonwhite from 2016 to 2019).

30. *See, e.g.*, Alison Frankel, *'The Needle Is Moving': Another MDL Judge Cites Diversity in Lead Counsel Appointments*, REUTERS (Jan. 25, 2021, 8:24 PM), https://www.reuters.com /article/us-otc-diversity/the-needle-is-moving-another-mdl-judge-cites-diversity-in-lead-counsel-appointments-idUSKBN29U2CV [https://perma.cc/CT8R-A7RH] [hereinafter Frankel, *'The Needle Is Moving'*] (reporting that nearly three-quarters of the plaintiffs' lawyers running one MDL are women because of the judge's call for diversity); Alison Frankel, *As Judges Push for Diverse Lead Counsel in MDLs and Class Actions, PSLRA Is Obstacle*, REUTERS (May 20, 2021, 3:26 PM), https://www.reuters.com/business/legal/judges-push-diverse-lead-counsel-mdls-class-actions-pslra-is-obstacle-2021-05-20/ [https://perma.cc/3REM-7KN8] ("There's recently been notable progress toward diversity at the top of the plaintiffs bar, thanks to federal judges using the lead

Duke Law *Standards and Best Practices for Large and Mass Tort MDLs* declared that "[a] new phase of diversity is now taking hold, in which diversity is recognized as a value for all cases."[31] Reformers called for MDL judges to provide more opportunities for individual attorneys to apply for and contest leadership.[32] The George Washington University guidelines recommended that courts make more appointments to steering committees and subcommittees to accommodate a greater range of voices, and that they appoint leaders for limited terms, requiring them to reapply, along with any new applicants, annually.[33]

But despite these efforts to improve MDL diversity, we know little about how MDL leadership is changing outside the context of a handful of highly publicized cases.[34] This Article—part of a larger, ongoing study of the nature and functions of MDL leaders and the MDL model of aggregate

counsel appointment process in class actions and multidistrict litigation to promote women and minority lawyers."); Alison Frankel, *Women Litigators Star in Briefs to Lead Blockbuster Ad Sales Antitrust Case*, REUTERS (Nov. 19, 2018, 12:40 PM), https://www.reuters.com/article/legal-us-otc-tvadsales-idINKCN1NO2A3 [https://perma.cc/FU2D-P6MP] (noting that many firms bidding to be lead counsel in one MDL emphasized that "women would be heading the case if they were appointed" and almost every firm specified that a woman would be part of its leadership structure); Julie A. Steinberg, *More Women Plaintiffs' Lawyers Becoming Complex Litigation Leaders*, BLOOMBERG   L.   (Jan.   11,   2017,   11:00   PM), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X26LF9JK000000 ?bna_news_filter=business-and-practice#jcite   [https://perma.cc/NS5Y-DH38]   [hereinafter Steinberg, *More Women Plaintiffs' Lawyers*] (explaining that there has been an increase in women in leadership roles for plaintiffs in MDLs partly because of judges pushing for diversity). *But see* Julie A. Steinberg, *Women See No Gains as Plaintiffs-Side Complex Case Leaders*, BLOOMBERG L. (May 21, 2018, 6:07 AM), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/XCLJ4DB0000000?bna_news_filter=business-and-practice#jcite [https://perma.cc/NX27-TP3X] (stating that the percentage of leadership roles going to women decreased in 2016 and 2017, perhaps due to less trial experience and fewer mentors than male peers).

    31. Dodge, *supra* note 21, at 367.

    32. *See, e.g.*, JAMES F. HUMPHREYS COMPLEX LITIG. CTR., GEORGE WASH. L. SCH., INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION 1, 15–16, 20–21 (2021), https://law9.drupal.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/Inclusivity_and _Excellence_Master_Draft.pdf [https://perma.cc/YL4G-3ZXX] [hereinafter INCLUSIVITY AND EXCELLENCE GUIDELINES] (calling for judges to promote diversity in leadership appointment in MDLs in various ways, including using "individual applications and evidentiary hearings to allow applicants to make their case for appointment"); Coleman, *supra* note 22, at 648–49 (encouraging judges to use an individualized-appointment process that focuses on diversity as an important factor); BOLCH JUD. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 38, 45–46 (2d ed. 2018) [hereinafter DUKE BEST PRACTICES] (urging judges to control the application process to ensure that the plaintiffs' leadership team is diverse).

    33. INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 16, 20–21, 24 & 37 n.96.

    34. One exception is DANA J. ALVARÉ, VYING FOR LEAD IN THE BOYS CLUB: 2018 UPDATE 4, 8 (2018), https://law.temple.edu/csj/wp-content/uploads/sites/3/2018/12/Vying-for-the-Lead-2018-Revised-Update.pdf [https://perma.cc/J4PA-GA5F], which documents a study observing improvements in female representation in MDL leadership between 2012 and 2017, compared to when women occupied roughly seventeen percent of leadership positions between 2011 and 2016.

litigation[35]—begins to fill that gap. The proposals noted above urged courts to create larger leadership slates and form additional committees to improve the diversity of leadership slates while ensuring adequate representation for parties in MDL. They also urged courts to oversee open, competitive, and iterative application processes for leadership appointments to counteract the effects of appointments negotiated behind closed doors. Drawing on a dataset of filings and orders that were entered in MDLs pending in June 2019, we looked for evidence that courts were implementing these recommendations. We also investigated the extent to which leadership appointments are monopolized by elite repeat players by comparing our findings about who was appointed to leadership positions with the findings from an earlier study of lead attorneys, which reported data from MDLs pending in May 2013.

As described further below, our findings are preliminary and could well change after we collect more evidence and perform additional analyses. With that important caveat, our data are suggestive of considerable continuity in the structure and size of MDL leadership slates throughout the period captured by our dataset. If courts and attorneys took calls for greater diversity to heart, one would expect to see a trend toward more complex, and larger, leadership slates across our study period. We find little empirical evidence of such trends. And while our dataset includes MDLs where courts regularly reappointed leaders, this practice did not produce substantial *changes* in leadership slates as MDLs progressed. Instead, courts tended to reappoint the same leaders while expanding leadership slates over the course of an MDL. Periodic reappointments, in other words, were a vehicle for expanding leadership, not for changing control of the litigation.

Our data suggest that the *structure and size* of MDL leadership slates have not changed, but they also provide reason for modest optimism that MDL *leadership itself* can. Consistent with earlier studies, we document a relatively small group of lawyers who succeed at obtaining leadership positions in multiple MDLs. We find notable changes, however, in the composition of this super-elite. Thirty-seven of the sixty-five most frequently appointed attorneys in our dataset were not among the sixty-five most frequently appointed attorneys in the 2013 data, suggesting a substantial degree of movement in the ranks of the uber-elite. Perhaps more importantly, most of the leadership appointments we documented did not go to super-elite repeat-player attorneys. More than half of the leadership appointments that we recorded went to attorneys that were appointed a single time in our dataset. The vast majority went to single-shotters or "minor repeat players" who received between one and five appointments, either within a single MDL or across our dataset. Although these attorneys took on a variety of leadership roles, this finding suggests a deep bench of potential future MDL leaders for

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35. For an earlier work in this project, see generally Noll, *supra* note 23.

judges to choose from, as well as the opportunity for even more change in the future.

This Article proceeds in three parts. Part I lays the groundwork for our analysis. After reviewing the basics of the MDL leadership appointment process, we survey concerns that repeat appointments of the same experienced attorneys in MDL threaten diversity, inclusion, innovation, and outcomes in mass litigation, and we survey reformers' calls for judges to change the way that leaders are appointed in a variety of ways. Part II describes the data we examined and presents our preliminary findings. Part III reflects briefly on some broader implications of our findings.

One note deserves mention at the outset. Scholarly, judicial, and popular writing on diversity in MDL often defines it broadly to include differences in gender, race, age, sexual orientation, experience, geography, and repeat-player vs. newcomer status, among other aspects of identity. Due to the ongoing nature of our project and the lack of standard data sources for attorney demographics, we report only basic information about the gender and repeat-player status of the MDL leaders below. Our focus on these two dimensions of diversity is in no way meant to imply that other dimensions lack scholarly or normative importance. We hope to see more work analyzing other aspects of MDL diversity in the future.

I.   MDL's Diversity Problem

A.   *MDL's Rise as a Forum for Mass Tort Litigation and the Role of Court-Appointed Leaders*

Over the past two decades, multidistrict litigation has become a major forum for resolving mass litigation in the United States. In an MDL, a seven-member panel, the JPML, transfers all federal cases raising a "common question[] of fact" to a single court.[36] That court, known as the transferee court, coordinates all proceedings leading up to trial. A judge in a transferee court wields substantial power—identifying all litigants with claims, designing special procedures for pleading, streamlining discovery, managing motion practice, scheduling bellwether trials, and, in most cases, encouraging large aggregate settlements.[37] Consistent with civil litigation in general, most MDLs are not resolved through trial, but instead through settlement, voluntary dismissal, or some other dispositive action.[38]

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36. 28 U.S.C. § 1407(a), (d).

37. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. 2023); *see also* David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 405, 418, 444 (2019) (highlighting how transferee court judges exercise powers analogous in some ways to those of administrative agencies).

38. *See Statistical Analysis of Multidistrict Litigation under 28 U.S.C. § 1407: Fiscal Year 2020*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., https://www.jpml.uscourts.gov/sites/jpml

The overwhelming majority of cases proceeding in MDL are products liability cases[39]—which have become more difficult to certify as class actions since the late 1990s[40]—and are the focus of this study. Since the JPML was created in 1968, it has centralized hundreds of thousands of civil actions for pretrial proceedings. Just one unusually large MDL, with over 257,000 cases, accounts for about 40% of all the cases currently on the federal docket.[41]

One of the most consequential decisions an MDL judge will make is to appoint lawyers to manage the litigation. Unlike class actions, no formal rules govern courts' appointments of MDL leaders.[42] In the absence of hard law, a cottage industry of practice guides has developed to guide MDL attorneys and judges. For example, the *Manual for Complex Litigation*, published by the Federal Judicial Center, encourages MDL judges to put in place a process for appointing leaders soon after an MDL is created.[43] The Duke *Best Practices*, a set of recommendations produced by a privately funded institute with input from selected judges and attorneys, recommends creating a leadership structure in the first three to four months of an MDL.[44] Today, the literature on complex litigation takes for granted that courts will organize the attorneys in large MDLs and appoint attorneys to manage litigation of transferred plaintiffs' cases. And, in an earlier study, one of us found that

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/files/Fiscal_Year_Statistics-2020_1.pdf [https://perma.cc/5LMJ-9NNT] (listing 414,479 total terminated cases since October 1, 2019, 4,188 of which were remanded).

39. *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY ACTIONS PENDING 1–4 (2020), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Actions_Pending-December-15-2020.pdf [https://perma.cc/XK99-52ZF] (showing that products liability cases equal 322,443 cases out of a total of 330,816 cases pending on the MDL docket). This number, again, depends on whether one considers class actions, which dominate other non-products liability MDLs, to be multiple cases or a single case (which is how they are currently counted). *See supra* note 18; *see also* Clopton, *supra* note 18 at 1305, 1314–16 (noting that MDLs often consist of thousands of individual cases but cautioning against counting each of those as an individual case to avoid distortion of case counts compared to other consolidated actions).

40. *See* Willging & Lee, *supra* note 13, at 801 (observing that "the MDL process has supplemented and perhaps displaced the class action device as a procedural mechanism for large settlements").

41. *See* U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT 2 (2022), https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-14-2022.pdf [https://perma.cc/8TRD-SE9D] (showing that *In re 3M Combat Arms Earplug Products Liability Litigation* accounted for 257,892 pending cases as of October 14, 2022); *Federal Judicial Caseload Statistics 2022*, *supra* note 19 (reporting that there were 638,264 total civil cases pending in federal courts as of March 31, 2022).

42. *Cf.* FED. R. CIV. P. 23(c)(1)(B), 23(g) (outlining procedures and criteria for the appointment of class counsel).

43. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004).

44. DUKE BEST PRACTICES, *supra* note 32, at 34, 38.

assumption is largely justified.[45] In virtually every case examined there, lawyers were appointed through a case management order that created a "charter" memorializing how leadership should operate.[46]

In the prototypical MDL, the transferee court appoints one or more attorneys as lead plaintiffs' counsel and a plaintiffs' steering committee or plaintiffs' executive committee that serves as the litigation's board of directors. Typical criteria judges consider for attorneys serving on MDL leadership include: (1) knowledge and experience in MDL, (2) an ability to work cooperatively, and (3) financial resources to prosecute very expensive litigation. This final factor is important because lead attorneys routinely advance very large sums of money to finance the litigation.[47]

Beyond that, MDL leadership structures can vary significantly. For example, it is often assumed that more straightforward cases—particularly those outside the bounds of this study, like securities and some consumer class actions—will not require a complex leadership structure. More complex and differentiated claims that characterize products liability cases, by contrast, are thought to require more organization among plaintiffs' counsel (and even defense counsel). The Duke *Best Practices* advises that the overriding drivers of leadership structure are "the needs of the litigation," which include the nature of the claims, the number of plaintiffs, and the need for financing.[48] Tailoring leadership structures to the needs of particular cases is consistent with the view that MDLs are too varied to be resolved using a single set of procedures. In interviews, transferee judges explain that "every MDL is different," and no "one-size-fits-all" solution to the selection of attorneys could capture the varying demands of any given multidistrict litigation.[49]

It is also widely assumed that plaintiffs' counsel informally organize themselves very early in the lifecycle of a mass tort, sometimes before even filing their cases and moving to consolidate them at the JPML, so as to form

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45. *See* Noll, *supra* note 23, at 441–42 ("[L]eadership appointments are common, to the point that appointment orders should be considered a standard feature of contemporary MDL.").

46. *See id.* at 445, 465 (noting that roughly 84% of MDLs involved a court-appointed leadership structure or "charter").

47. *See, e.g.*, Report and Recommendation of Special Master Ellen Reisman Regarding Award of Common Benefit Fees and Expenses at 21–22, *In re* Abilify (Aripiprazole) Prods. Liab. Litig., No. 3:16-md-2734 (N.D. Fla. Dec. 6, 2019), ECF No. 1219 (reporting that firms in MDL's leadership positions contributed a total of $3,610,000 in capital to fund the litigation).

48. Duke Best Practices, *supra* note 32, at 29–30.

49. *See, e.g.*, Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1689, 1693 (2017) (reporting the frequent comment from interviewed judges that "every MDL is different"); BOLCH JUD. INST., DUKE L. SCH., STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS, at iv (1st ed. 2014) ("[A] host of other differentiating factors makes the promulgation of any one-size-fits-all set of detailed rules impossible. Instead, the only clear rule in MDL may be that every MDL is different and requires individualized solutions to be effective.").

an ad hoc law firm, based on their own needs, resources, and professional networks.[50] But this kind of "private ordering" has been criticized by commentators, who contend that it facilitates conflicts of interest, inadequate representation of MDL plaintiffs, the appointment of lawyers who are not fully committed to the litigation, improper side bargains to secure leadership positions, and the boxing out of lawyers who bring useful skills and perspectives to the litigation.[51] To that end, recent guidance has encouraged judges to take a more active role in structuring leadership—soliciting views on the number of committees needed to finance and conduct the litigation, articulating a clear process for lawyers to apply for leadership, soliciting written applications from lawyers interested in serving in leadership, and clearly defining the role and responsibilities of each appointed individual within the leadership structure.[52]

B.   Concerns About Repeat Play in MDL

As MDL became an increasingly prominent forum for aggregate litigation, commentators grew concerned about the perceived tendency of courts to appoint the same well-connected and experienced attorneys to finance and manage cases. In starkest terms, the fear was that MDL leadership had literally and figuratively become an "old boys' club" that did not reflect the diversity of either the bar or American society at large. The clubby nature of MDL leadership appointments, critics continued, contributed to inadequate representation of MDL plaintiffs, proceedings that were neither accessible nor transparent, and poor case outcomes.[53]

Although our primary interest in this Article is in documenting courts' leadership appointment practices, we are sympathetic to the view that MDL leadership appointments should reflect the diversity of the bar and American society. Leadership positions are prestigious and lucrative posts. Normatively, we believe that descriptive representation in these posts is important, and that the prevalence of largely white, largely male slates raises concerns about various forms of bias that may be at work in the leadership selection process. Nor do we perceive a tradeoff between attention to the diversity of leadership slates, on the one hand, and the quality of

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50. *See* Gilles, *supra* note 24, at 177–78 (exploring the informal efforts of attorneys to organize MDL leadership early in the litigation).

51. *See, e.g.*, Burch, *Monopolies*, *supra* note 22, at 82–84, 125–26, 132–33 (describing problems with private ordering, such as incentivizing "behind-the-scenes political wrangling," hindering other lawyers' ability to enter into the leadership market, and lacking "checks and balances" to ensure adequate, conflict-free representation).

52. DUKE BEST PRACTICES, *supra* note 32, at 36–38, 42.

53. *See, e.g.*, Dodge, *supra* note 21, at 367–68, 371 (suggesting the need for increased transparency about financial arrangements and explaining how the current system of selecting leadership may result in counsel being "overcommitted . . . and in turn yielding settlements that are not consistent with the needs of clients").

representation that MDL parties receive, on the other.[54] Across a range of contexts, scholars have found that groups' performance is improved when their members are diverse in terms of demographics, life experience, education, and other dimensions.[55] Given that body of research, our prior is that the historical homogeneity of leadership slates is something of a red flag when it comes to quality of representation, and that increasing the diversity of leadership slates on dimensions including race, gender, and professional background will improve the quality of representation MDL parties receive.[56]

Concerns about the diversity of MDL leadership slates reflected two larger trends in federal litigation. The first was (renewed)[57] recognition that federal litigation in general has a diversity problem. Roughly the same number of women and men have attended law school for over twenty years, and the number of minorities graduating from law schools and entering private practice has been at an all-time high.[58] Those trends, however, have not translated into leadership in civil and criminal litigation.[59] A 2015 American Bar Association study showed that only 24% of lead counsel in civil cases were women.[60] When researchers broke down the data by subject matter, they found that the vast majority of lead counsel were men,

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54. *But cf.* Martin v. Blessing, 571 U.S. 1040, 1042 (2013) (Alito, J., respecting the denial of certiorari) (assuming that a district court's attention to the diversity of court-appointed leaders was the equivalent of "[r]acial discrimination . . . in the courtroom" (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991))).

55. *See, e.g.*, Sujin K. Horwitz & Irwin B. Horwitz, *The Effects of Team Diversity on Team Outcomes: A Meta-Analytic Review of Team Demography*, 33 J. MGMT. 987, 990, 1005–06 (2007) (reporting that increases in "task-related diversity," including functional expertise, education, and organizational tenure, improved team performance); David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter [https://perma.cc/328G-8XBN] (reporting that a company's financial performance and ability to innovate are linked to diversity in race and gender).

56. *See* Burch, *supra* note 26, at 852 (advocating for "cognitive diversity" in MDL leadership appointments by seeking "members whose knowledge, skills, information, and tools differ").

57. *See* Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001, 1001–02 (2002) (disagreeing with the "widespread assumption" that women's "increasing representation and visibility" mean that gender disparities in the legal profession have been resolved); Coleman, *supra* note 22, at 620, 625–26, 636–37 (describing how state and federal courts created "gender bias task forces" in the 1980s to look at gender discrimination in the courtroom and how the goal of remedying gender discrimination still has not been realized today).

58. AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2022, at 27, 42, 44 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [https://perma.cc/XMW3-SC6B].

59. *See* Coleman, *supra* note 22, at 645–46 (citing statistics that demonstrate the "lack of women at the top" of elite law firms); STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG, AM. BAR FOUND. & AM. BAR ASS'N, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 12–13 (2015), https://www.americanbar.org/content/dam/aba/administrative/women/first_chairs_final.pdf [https://perma.cc/5VZT-9KAL] (reporting that in criminal cases, only 33% of lead counsel are women, and only 21% of lawyers appearing as trial attorneys are women).

60. SCHARF & LIEBENBERG, *supra* note 59, at 9–10.

"regardless of whether the case concerned civil rights, intellectual property rights, labor, torts, or other areas of civil practice."[61]

MDL leadership appointments followed this pattern. A study of MDLs pending in April 2014 found that men were appointed as lead counsel almost twelve times more often than women from 2000 to 2004, seven times more often from 2005 to 2009, and three times more often from 2010 to 2014.[62] A study using data from 2016 to 2017 found marginal improvement in MDL leadership but that the overall rate of women appointments to the highest levels of leadership remained only 22%.[63] We have not located many academic studies that attempted to measure the representation of attorneys of color or LGBTQ+ people on MDL leadership slates but expect they would follow the same general patterns.[64]

Altogether, commentators argued that the absence of women and minority voices from key positions in aggregate litigation undermined faith and confidence in the litigation system and was in tension with the Judicial Code of Conduct's instruction that judges "exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism."[65] Among other things, they blamed case management orders that tended to select attorneys based on "consensus slates" and "private ordering," which required professional connections, prior experience, and access to financing.[66]

The second concern was more specific to the dynamics of large-scale complex litigation. For decades, complex litigation scholars have maintained

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61. INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 2. The irony of this study being written by two white men is not lost on us.

62. Dodge, *supra* note 21, at 364.

63. ALVARÉ, *supra* note 34, at 7; *see also* Burch & Williams, *supra* note 25, at 1471, 1536 (finding 63% of leadership positions went to the same attorneys and determining that forty of the top fifty repeat attorneys were male).

64. Some surveys have been conducted outside the academic literature. In a recent survey, for example, Law.com found very little progress in the ethnic diversity of MDL plaintiff leadership teams. Amanda Bronstad, *Despite Diversity Efforts, Fewer than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White*, LAW.COM (Aug. 17, 2020, 1:18 PM), https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/ [https://perma.cc/2TBY-AG8W] (finding an average of 5% of appointments going to attorneys who identified as "nonwhite" on plaintiffs' teams created from 2016 to 2019).

65. *See, e.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 3–5 (contending that the "favoritism" of white men in MDL leadership "is objectionable under Canon 3(B)(3)"). For this canon of judicial conduct, see CODE OF CONDUCT FOR U. S. JUDGES CANON 3(B)(3) (JUD. CONF. OF THE U.S. 2019).

66. *See, e.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 11, 15–16 (noting judges' obligation to avoid bias and favoritism and listing the negative consequences of the "consensus-selection" method); DUKE BEST PRACTICES, *supra* note 32, at 29, 37, 46 (discussing criticisms of "private ordering" in MDL leadership selection and noting that access to financing is a factor that leads to repeat players being appointed).

that parties in aggregate litigation have, at most, a limited ability to effectively monitor and control the attorneys who work on their behalf.[67] In the specific context of MDL, these concerns have been fueled by fears that lawyers will be more responsive to the judges and professional networks who control leadership positions—and who are a source of appointments and recommendations in future litigations—than the clients they serve.[68]

Commentators also worried that repeat play suppressed innovation and dissent among non-lead lawyers looking to break into MDL litigation by rewarding cooperators (with plumb positions or common benefit fees) and punishing defectors (by shutting the doors to future committee appointments). In products liability litigation that is likely to involve many conflicting interests, substantial damage awards, and the application of multiple states' laws, courts and commenters also grew concerned about other downsides of repeat play: groupthink, inadequate representation, lack of geographic diversity, and the need to help younger lawyers with less finances break into the system.[69]

The few empirical studies of repeat play in MDL provided some evidence for these concerns. In an empirical study of all products liability and sales practices MDLs pending in May 2013, Professor Elizabeth Chamblee Burch and a senior researcher at the Federal Judicial Center, Margaret S. Williams, examined repeat-player lawyers across MDLs.[70] Burch and Williams's sample consisted of seventy-three MDLs

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67. *See, e.g.*, Jaros & Zimmerman, *supra* note 21, at 560, 570–71 (observing that clients in aggregate settlements often "lack input and control" over the settlement's outcome); Silver & Miller, *supra* note 21, at 122 (considering the tradeoff for plaintiffs of limited control of their attorneys in exchange for "administrative convenience" in MDLs); Burch, *supra* note 21, at 122–23 (discussing adequate representation concerns arising out of the divergent interests of plaintiffs in MDLs).

68. *See, e.g.*, Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 388–89, 441, 464 (2000) (describing coordination among plaintiffs' attorneys and discussing the power of judges and controlling lawyers to determine the fates of all litigants in MDLs); Resnik, *supra* note 21, at 2148–50, 2152 (exploring the limitations on litigant autonomy when judges select lead lawyers in MDLs).

69. *See, e.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 1, 15–16 (acknowledging the financial challenges entailed in MDL leadership and advocating for individual applications for leadership positions to avoid "perpetuat[ing] the entrenched role of the homogenous-repeat player in leadership roles"); DUKE BEST PRACTICES, *supra* note 32, at 41, 46 (noting the importance of adequate representation in deciding leadership appointments and counseling that geographic diversity among attorneys is vital when multiple states' laws are at issue in an MDL); Frankel, *'The Needle Is Moving'*, *supra* note 30 (stating that a group of plaintiffs' lawyers in a particular MDL responded to the judge's call for geographic and experiential diversity in their proposed leadership slate); Steinberg, *More Women Plaintiffs' Lawyers*, *supra* note 30 (quoting plaintiffs' lawyer Elizabeth Cabraser as having seen "a definite trend away from slates and toward public application procedures" which "promote[] diversity naturally" by "eliminat[ing] the barriers to entry that a slate system can subconsciously impose").

70. Burch & Williams, *supra* note 25, at 1470, app.

encompassing over 312,500 cases.[71] Burch and Williams's study treated an appointment to a leadership post as an MDL-level characteristic; they did not track whether leadership varied over the life cycle of a case or whether leadership instead evolved as the litigation progressed. They found that "[f]ifty attorneys were named as lead lawyers in five or more multidistrict litigations and those 50 attorneys occupied 30% of all plaintiff-side leadership positions."[72] They also found the top five repeat-player plaintiffs' lawyers consistently occupied powerful leadership positions inside plaintiffs' steering committees.[73]

C.   *Efforts to Diversify Leadership*

As awareness of the MDL's "diversity problem" grew, various players in the world of mass torts and complex litigation took steps to increase the diversity of MDL leadership slates. First, the JPML has made a concerted effort to diversify the ranks of transferee courts and judges that handle MDLs.[74] In 2016, the JPML transferred cases to fifteen first-time MDL judges, including Judge Vince Chhabria (who would oversee thousands of cases involving Monsanto's Roundup) and future Associate Supreme Court Justice Ketanji Brown Jackson.[75] The assignments—which marked the first time in five years that the majority of judges chosen to oversee an MDL had never done so before[76]—aimed to bring new perspectives and innovation into MDL practice. As more judges take on MDLs in more courts around the nation, the feeling was that they would open opportunities for more attorneys to take on divergent roles in leadership.

Second, commentators and practice guides recommended judges take more active roles in inviting attorneys to apply for leadership in "competitive selection" processes. Some called for case management orders that clearly articulated appointment requirements and that invited counsel to file applications for leadership with the court, which could then hold a public

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71. *Id.* at 1470.

72. *Id.* at 1471.

73. *Id.* at 1451.

74. *See* Amanda Bronstad, *Meet the Next Generation of MDL Judges*, LAW.COM: NAT'L L.J. (Apr. 20, 2017), https://www.law.com/nationallawjournal/2017/04/20/meet-the-next-generation-of-mdl-judges/ [https://perma.cc/93P4-8LQ9] ("It's a job that requires skillful case management, and the panel that doles out the massive cases has tended to return to repeat players on the bench. . . . With that in mind, the U.S. Judicial Panel on Multidistrict Litigation has looked to broaden its pool of judges.").

75. Amanda Bronstad, *Rookie Judges Start to Wrangle MDL Dockets*, LAW.COM (Apr. 20, 2017, 4:48 PM), https://www.law.com/2017/04/20/rookie-judges-start-to-wrangle-mdl-dockets/ [https://perma.cc/Y7ST-7UN3].

76. *Id.*

hearing and determine who will be on the leadership structure.[77] "The application and hearing method allows judges—not peer attorneys—to evaluate applicants on criteria other than one's status as a repeat player."[78] Some have suggested that an increase in gender diversity on MDL panels—and a decrease in repeat play—may result from competitive application processes for leadership.[79]

Third, judges and commentators recommended that courts appoint larger, complex leadership slates to foster diversity, build resumes, and enhance connections, while ensuring adequate resources and managerial experience exist to manage large litigations. For example, the *Inclusivity and Excellence: Guidelines and Best Practices* recommends that MDL judges enlarge the size and structure of leadership in order to create new pathways into MDL leadership while preserving the advantages of a system that relies on repeat players.[80] Its *Best Practice 1A* recommends considering the appointment of a new attorney who lacks financial resources if that attorney "will be part of a larger group that is able to provide financial assistance or who can be assigned a limited-leadership role."[81] Others observed that adding more committees, with different assignments, skill sets, and access to financing, would also provide "new entrants with an opportunity to enter the field."[82]

Finally, reformers recommended that MDL judges remain open to shaking up leadership by placing time limits on their service.[83] Guidance has long suggested that as MDLs progress, MDL judges should allow non-lead attorneys to compete for leadership positions to hold leaders' feet to the fire and provide opportunities for new entrants to vie for leadership positions.[84]

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77. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224 (2004) ("Deferring to proposals by counsel without independent [investigation or] examination, even those that seem to have the concurrence of a majority of those affected, invites problems down the road . . . .").

78. INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 15.

79. *E.g.*, ALVARÉ, *supra* note 34, at 4.

80. *See* INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 14–15, 18, 24 (describing and suggesting remedies to financial barriers to diverse representation in MDL leadership and also recommending that judges issue "orders or guidelines that direct leadership counsel to take into account diversity among the factors considered when assigning duties"). Other recommendations that may increase the size of leadership include efforts to avoid marginalizing non-repeat players. For example, "the 'power of three' supports having at least three members of the nondominant group for deliberations" in litigation steering committees. *Id.* at 21.

81. *Id.* at 1.

82. *E.g.*, Dodge, *supra* note 21, at 360, 362.

83. *E.g.*, DUKE BEST PRACTICES, *supra* note 32, at 50; *see also, e.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 24 ("[R]evisiting appointments periodically may increase the chances that new lawyers, including women and diverse lawyers, can obtain positions on the leadership team . . . .").

84. *See* DUKE BEST PRACTICES, *supra* note 32, at 50 ("This [term-limited] approach helps to ensure that [leadership attorneys] continue to fulfill their duties and offers an established procedure for replacing those who do not.").

To that end, judges may appoint members of the leadership team for a limited term, requiring them to reapply and providing an opportunity for competitors to seek leadership positions. As we describe below, other judges have invited non-lead attorneys to apply for leadership positions as the original leaders settled their cases or dropped out for other reasons.

All told, we would expect these various efforts to result in larger, more complex leadership slates, more efforts to solicit leadership applications, and more change in leadership slates once a court appoints an initial slate of attorneys. While the case studies we have discussed suggest that these recommendations are being heeded in *some* MDLs, we lack systematic evidence about the extent to which concerns about repeat players and the lack of diversity in the ranks of MDL leaders translated into changes in the size, structure, or composition of leadership slates, or changes to the ranks of elite attorneys whom Burch and Williams describe in products liability MDLs. We delve further into those questions in the following Part.

II.   The Picture from Appointment Orders

To explore the extent to which concerns about MDL's diversity problem are translating into changes in the size and structure of leadership appointments, we conducted an empirical analysis of leadership appointments using a dataset of filings and orders from MDLs that were pending in June 2019. We also compared our findings about the attorneys and firms that courts appointed to leadership positions to Burch and Williams's data to see whether the attorneys and firms that were most frequently appointed in our 2019 sample corresponded to the attorneys and firms that were appointed in their 2013 sample.

This Part describes the data we examined for this analysis and presents our findings. We examined various metrics that would suggest that leadership slates have changed in response to concerns about MDL's diversity problem. But we found little evidence of changes in the size or complexity of leadership slates over the time our sample covers. It is possible that additional data or analysis will reveal the type of changes that we set out to locate, but based on the data we describe here, we cannot say that efforts to diversify MDL leadership translated into material changes in the size or complexity of MDL leadership slates.

We did find new evidence, however, about the extent to which leadership slates change over the lifespan of an MDL and the stability of the elite MDL bar. Even in simple MDLs, courts enter multiple orders affecting leadership, resulting in leadership slates that evolve over time. Furthermore, our findings about the attorneys and firms who are appointed most frequently only partially overlap with Burch and Williams's. A not insignificant number of attorneys and firms moved into the ranks of the super-elite between their study and ours, displacing attorneys at the top of their repeat-player leaderboard.

The overall picture we describe complicates received wisdom about who MDL leaders are and how they are organized. While we did not see dramatic changes in *how* leadership is structured across our data, we see modest changes in *who* is being appointed to leadership positions.

A. Our Dataset

As part of a larger, ongoing study of MDL, we have compiled a dataset of court orders and filings from MDLs that appeared on the JPML's June 2019 list of pending MDLs.[85] The dataset was compiled by examining the docket sheet of every MDL pending in June 2019 and downloading orders and filings that matched pre-specified criteria relevant to leadership appointments and the award of attorney's fees. Orders and filings were downloaded between June and August 2020.[86] This dataset consists of approximately 8,200 PDF files and takes up 3.39 gigabytes of disk space. It covers every MDL on the JPML's June 2019 list of pending MDLs except for *In re Asbestos Products Liability Litigation (No. VI)* [87] and *In re Methyl*

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85. This list is archived at https://web.archive.org/web/20190928201540 /https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-June-18-2019.pdf [https://perma.cc/4PJC-J8B4].

86. Search Instructions for Noll-Zimmerman MDL Leadership Project (June 1, 2020), https://drive.google.com/file/d/1-2YZfQCgZzHz5SVROkThGxVj9o6fu8nT/view [https://perma.cc/M7VF-4TL5] (on file with authors).

87. 771 F. Supp. 415 (J.P.M.L. 1991).

Tertiary Butyl Ether (MTBE) Products Liability Litigation,[88] which were excluded because filings for them are not available electronically.

Given this symposium's focus, we here analyze orders and filings from MDLs categorized as "Products Liability" cases by the JPML. Excluding *Asbestos* and *MTBE*, there were sixty-eight such MDLs. The earliest, *In re Baycol Products Liability Litigation,*[89] was created on December 18, 2001. The most recently filed, *In re Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation,*[90] was created June 4, 2019.

The time frame in which we downloaded orders has important implications for the interpretation of our results. MDLs such as *Hill's Pet Nutrition* had only been pending for a year before we downloaded orders and filings. Thus, we have a more complete picture of leadership proceedings in the older MDLs in our dataset.[91]

We focused on case management orders or "CMOs." CMOs are the primary vehicle through which judges appoint and organize plaintiffs' counsel into litigation-specific law firms and identify the functions they perform.[92] Although they do not provide a complete picture—and, as we find, they take wide-ranging approaches—CMOs invite attorneys to apply for and contest leadership, rotate slates of attorneys, and create committees and subcommittees of lawyers, which, in turn, provide opportunities for more attorneys to get involved in MDL leadership. They thus may help identify not just who leads MDL litigation but how they can promote new leaders—whether there are shifts in the way judges select and organize MDL leaders as well as the extent to which these shifts entrench or expand their ranks.

Within the subset of Products Liability MDLs that we examined, one of us coded every CMO that affected the leadership of the MDL for eighteen separate attributes.[93] This resulted in a dataset of 274 orders affecting

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88. 379 F.Supp.2d 348 (S.D.N.Y. 2005).

89. 180 F. Supp. 2d 1378 (J.P.M.L. 2001).

90. 382 F. Supp. 3d 1350 (J.P.M.L. 2019).

91. In a future iteration of this project, we will update orders and filings for the dataset and re-analyze them to address the problem of incomplete coverage.

92. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 22.61–62 (2004) (defining and compiling initial case management orders that organize counsel in MDL).

93. We captured: the order's docket number; the MDL in which it was entered; the date it was entered; the judge who entered it; the type of judge (district judge or magistrate judge) who entered the order; whether the order or docket sheet indicated that applications were solicited in connection with the order; whether the order resolved a motion under Rule 23; whether the order was contested; the number of "organizational units" created; the number of organizational units that were terminated; whether the order specified functions that leaders were to perform; whether it limited non-lead attorneys' ability to practice in the transferee court; whether it imposed legal duties on leaders to non-client plaintiffs; whether it imposed or recognized legal duties from individually retained attorneys to their clients; whether the order affected a plaintiff-side organizational unit; whether it affected a defense-side organizational unit; whether the order cited or quoted Rule 23;

leadership appointments for an average of 4 orders per MDL. Every time that an order appointed or removed an attorney or law firm from a leadership position, we separately recorded that action. (As a shorthand, we sometimes call these actions "appointments.")[94]

Our data schema improves on earlier studies of MDL leadership that treat a leadership position as a fixed characteristic of an MDL. In contrast to those studies, we capture three distinct types of information: information pertaining to MDLs, information about orders within MDLs, and information about appointments (and removals) of specific attorneys and law firms effected by orders. Because we separately track MDLs, orders, and appointments, our data captures leadership changes through an MDL, giving us a more complete picture of how MDL leadership evolves and insight into courts' use of short-term appointments to improve opportunities for new leadership. In total, we captured 2,540 court actions appointing or removing MDL leaders for an average of 37.3 actions per MDL in the litigations we studied.

Although our schema is an improvement on earlier studies, the findings we report here are subject to important limitations. First, our findings reflect a "snapshot" of MDL practice at a specific moment in time, namely the summer of 2020. Although we analyze eighteen years of court actions, allowing us to perform quasi-longitudinal analyses described below, we have not conducted a true longitudinal study of leadership appointments.[95]

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and whether it cited or quoted the Manual for Complex Litigation. We also recorded the types of organizational units affected by the order.

94. We recorded the attorney's first and last name, their law firm (where reported), the nature of the court's action (i.e., whether the court was appointing or removing an attorney or firm), whether the appointment was on an interim basis, whether the appointment was to an individual attorney or a firm, and the type of position that the appointment involved where it was noted on the court's order.

95. This is true of many other studies of MDL leadership. *See, e.g.*, Burch & Williams, *supra* note 25, at 1450 (studying MDL proceedings pending as of May 2013); Dodge, *supra* note 21, at 364 (reviewing MDL filings as of April 15, 2014); Williams et al., *supra* note 25, at 148–49 (studying MDL proceedings centralized between 2001 and 2012). The only longitudinal study we have found is by Dana Alvaré. See ALVARÉ, *supra* note 34, at 8, which canvassed leadership appointments of women over time but did not capture the impact of leadership structure on the persistence of other forms of repeat play.

Second, as already noted, our data on recent MDLs in the dataset are incomplete. Third, our findings reflect the "four corners" of orders we coded; we did not, for example, fill in attorneys' firm names when they were not listed on orders.[96]

Finally, when reporting statistics on attorney and law firm appointments, we corrected typographical errors in orders, standardized firm names (e.g., Weitz and Luxemburg was standardized to Weitz & Luxemburg), and removed entity type designations (e.g., LLP and PC). However, we did not make any effort to account for changes in firm names or named partners. Thus, for example, "Anapol Schwartz," "Anapol Weiss," and "Anapol, Schwartz, Weiss, Cohan, Feldman, & Smalley" appear as separate firms in our results.

B.   *Summary Statistics*

We begin with an overview of the data we captured. Tables 1 and 2 present selected summary statistics on the orders and appointments that we analyzed.

Table 1: Summary Statistics on Orders

Total MDLs examined	68
Total orders examined	274
Orders that affected plaintiff-side organizational units	185
Orders that affected defense-side organizational units	60
Orders that solicited applications	87
Contested orders	44
Orders that resolved Rule 23 motion	24
Orders that recognized legal duties from court-appointed leaders to non-client parties	9
Orders that recognized legal duties from individually retained counsel to clients	12
Orders that cited or quoted Rule 23	33
Orders that cited or quoted Manual for Complex Litigation	31

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96. In future work, we hope to backfill this information and re-report our results.

Table 2: Summary Statistics on Appointments

Total appointments and removals	2,540[*]
Plaintiff-side appointments and removals	2,324
Defense-side appointments and removals	198
Interim appointments	93
Appointments and removals of individuals	2,475
Appointments and removals of law firms	63
Unique attorneys	946
Unique law firms	563

*Some appointments in our dataset were coded as neither plaintiff or defense side, so the total number of appointments is larger than the sum of plaintiff-side appointments and defense-side appointments.

Figures 1 and 2 chart the number of orders affecting leadership and the number of appointments by MDL number.

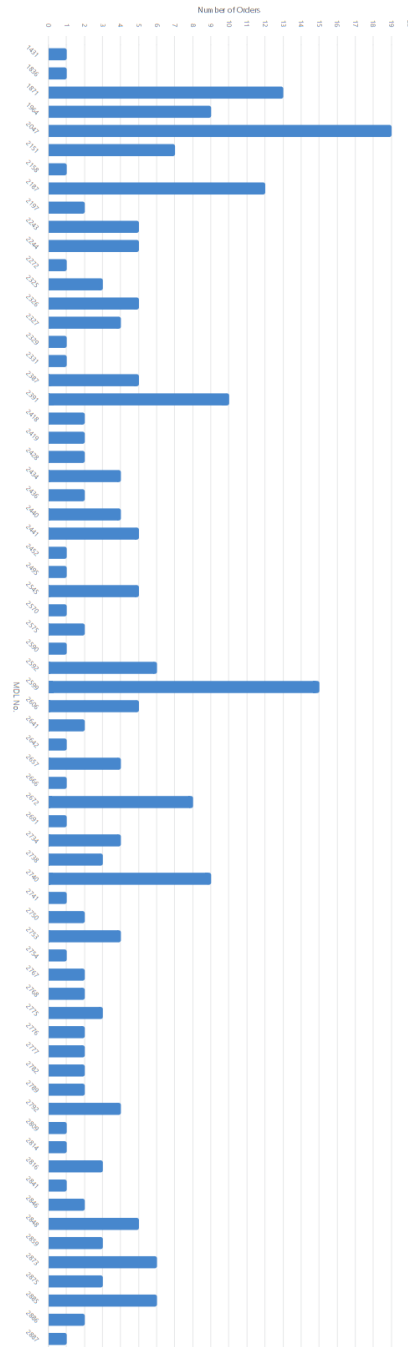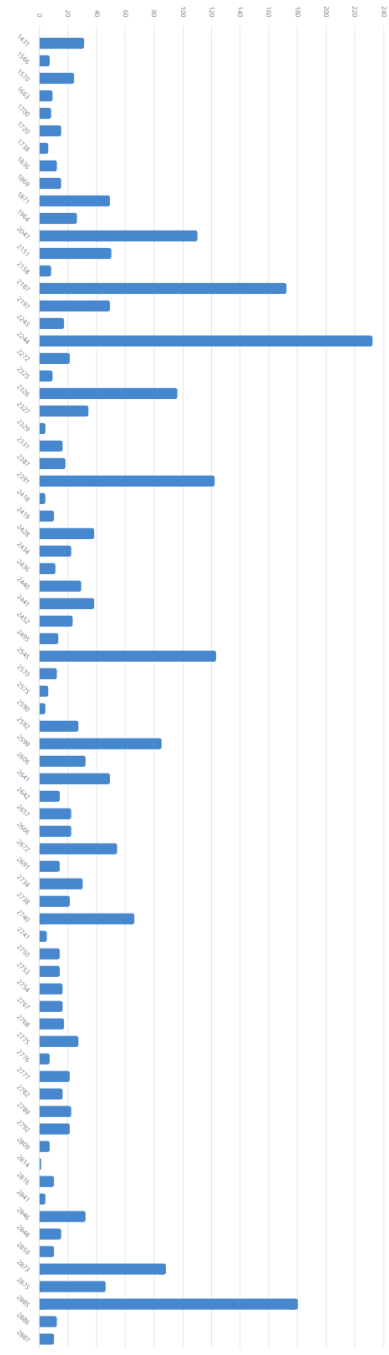Figure 1: Orders by MDL (by MDL No.)

Figure 2: Appointments by MDL

These summary statistics and figures confirm the conventional wisdom that the appointment of leadership attorneys is routine.[97] Our dataset does not contain a single MDL that lacked an order affecting the MDL's leadership.

C. Gender

Many dimensions of diversity are of interest as we seek to better understand MDL and the way that large-scale products liability cases are organized. At this stage of our project, the only demographic dimension that we were able to measure quantitatively is gender. As Part I explained, earlier studies found that leadership positions in federal litigation were dominated by men. To what extent was this true of the appointments captured in our dataset?

Our dataset contains appointments of 946 unique individual attorneys through 2019. We examined attorneys' publicly available web pages and identified an attorney as female if the web page used "she/her" pronouns to describe the attorney. Of the 946 attorneys reflected in our data, 222 (23.4%) identified as female. Our data included 2,475 court actions appointing or removing individual attorneys. Of these, 586 (23.6%) affected female attorneys.

Appointments to lead counsel positions—the attorneys who manage litigation day-to-day—are perhaps the most important appointments courts make. Our data contain 186 unique attorneys who were appointed to lead counsel positions. Forty-five (24.2%) of the attorneys were women. Of 128 attorneys who received plaintiff-side lead counsel appointments, twenty-nine (22.6%) identified as female. Sixteen of fifty-seven defense-side lead counsel appointees (28%) were female. Judged by court actions, forty-one of 216 (18.9%) court actions affecting plaintiff-side lead counsel positions went to women. On the defense side, women received nineteen of sixty-six (24.2%) of lead counsel appointments.

The percentage of lead counsel appointments that went to women— slightly less than a quarter—represents an increase of approximately 6% over appointment rates that others identified for the years between 2011 and 2016 (16.55%).[98] But it is essentially unchanged from more recent appointment rates in 2016 and 2017 (24%).[99]

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97. *See* Noll, *supra* note 23, at 436 ("Appointing leaders is extremely common in contemporary MDL, to the point that it should be considered a standard feature of the 'MDL model' of aggregate litigation and settlement.").

98. *See, e.g.*, ALVARÉ, *supra* note 34, at 4 (finding an average rate of female appointment to MDL leadership of 16.55% from 2011 to 2016).

99. *See id.* at 5 (stating research results showing 24% of plaintiff leadership appointments for cases initiated in 2016 and 2017 went to women). Alvaré's data notably include appointments for all kinds of MDLs, not just products liability MDLs.

Finally, there were modest changes in appointments to the most prominent leadership positions. We broke down the proportion of male and female appointments to lead counsel and management positions on "large" leadership slates, which we defined as slates with ten or more appointments. In the first thirty-four MDLs captured in our study—which were formed between January 2001 and December 2014—the proportion of male to female appointments dramatically exceeded the averages we described above for *fifteen* different MDLs. For example, of the 104 separate appointments we counted in *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation* (No. 2244), only ten went to women. Of the twenty appointments we counted in *In re Incretin-Based Therapies Products Liability Litigation* (No. 2452)*,* only one went to a woman. One true "manel" existed in *In re Atlas Roofing Corp. Chalet Shingle Products Liability Litigation* (No. 2495). There, *all twelve* of the top leadership appointments went to men.

By contrast, in the remaining thirty-four MDLs centralized between 2015 and 2019, we only identified seven leadership teams where the proportion of male to female appointments exceeded these averages.[100] By other measures, however, gender disparities proved stubbornly persistent. For example, the very first large leadership team in our dataset where the number of female appointments equaled or exceeded those of male appointments was *In re Zimmer M/L Taper Hip Prosthesis or M/L Taper Hip Prosthesis with Kinectiv Technology and Versys Femoral Head Products Liability Litigation* (No. 2859), which was centralized in October 2018. For all the other large leadership teams in our study, male appointments outnumbered female appointments.

D.   *Number and Type of Leadership Appointments*

We turn next to the number and types of leadership appointments in our dataset. How many attorneys or firms did courts appoint to leadership positions? And what kind of jobs were lead attorneys assigned?

As noted above, we gathered data for these questions by coding every court action appointing or removing a leader within the dataset. The average number of leadership appointments per MDL was 37.3. It bears emphasizing that this is a count of *court actions affecting leadership positions*, not the number of attorneys or law firms who were appointed to leadership positions. As our unit of analysis was the appointment or removal of an attorney or firm

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100. These were *In re Takata Airbag Products Liability Litigation* (No. 2599), *In re Bard IVC Filters Products Liability Litigation* (No. 2641), *In re Abilify (Aripiprazole) Products Liability Litigation* (No. 2734), *In re Stryker LFIT V40 Femoral Head Products Liability Litigation* (No. 2768), *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation* (No. 2846), *In re Aqueous Film-Forming Foams Products Liability Litigation* (No. 2873), and *In re Allura Fiber Cement Siding Products Liability Litigation* (No. 2886).

from a leadership position, a single attorney could be (and often was) appointed multiple times in a single MDL (such as when an attorney was appointed lead counsel and a member of a plaintiffs' steering committee).

There was considerable variation from MDL to MDL in the number of leadership appointments we recorded. The median number of leadership appointments was 21 with a standard deviation of 44. Figure 2, above, illustrates this variation graphically. Ten MDLs had more than fifty appointments: *In re Chinese-Manufactured Drywall Products Liability Litigation* (No. 2047); *In re Testosterone Replacement Therapy Products Liability Litigation* (No. 2545); *In re Takata Airbag Products Liability Litigation* (No. 2599); *In re Aqueous Film-Forming Foams Products Liability Litigation* (No. 2873); *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation* (No. 2672); *In re 3M Combat Arms Earplug Products Liability Litigation* (No. 2885); two pelvic mesh MDLs (Nos. 2187 and 2326); and two hip-implant MDLs (Nos. 2244 and 2391). Figure 3 presents the same data with MDLs sorted by the net number of appointments within them. The case at the extreme right end of the distribution is *In re DePuy Orthopaedics Inc., Pinnacle Hip Implant Products Liability Litigation* (No. 2244). There, Judge Ed Kinkeade appointed and then reappointed a leadership slate of between forty-one and fifty-one attorneys a total of five times, resulting in a staggering 232 total appointments.

Figure 3: Appointments by MDL (by Number of Appointments)

What were leaders appointed to do? We defined an "organizational unit" as any unit of attorneys or firms within an MDL that was created by court order to coordinate or manage litigation. Thus, we treated "Lead Counsel," "Plaintiffs' Steering Committee," "Plaintiffs' Executive Committee," "Settlement Counsel," and similar committees and roles as distinct organizational units. We based our coding on the primary purpose reflected in an organizational unit's name and coded for fifteen separate types of units, adding new categories as we encountered them in appointment orders.[101]

As Table 3 illustrates, most court-appointed leaders fell into our "Management" category and were charged with general management of litigation on behalf of plaintiffs. This category includes appointments to Plaintiffs' Steering Committees, Plaintiffs' Executive Committees, and similar types of units. It accounts for 1,521 of 2,324 (65.4%) of plaintiff-side appointments in our dataset. The next most common types of plaintiff-side appointments were lead counsel (258), communications (144), class counsel (141), and settlement administration (138). Other types of specialized appointments—such as committees to coordinate bellwether trials and expert testimony—appeared in fewer than 100 appointments each. Courts in two MDLs appointed counsel to serve as a liaison to pro se litigants who were attempting to assert claims in the MDL or participate in an aggregate settlement. At the very tail end of our dataset, the court in *In re 3M Combat Arms Earplug Products Liability Litigation* created a "vetting" subcommittee to "oversee the process of collecting and producing certain basic information about each plaintiff's claims."[102]

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101. We coded units that were charged with overall management of litigation, such as Plaintiffs' Steering Committees and Plaintiffs' Executive Committees, as "Management." Lead counsel appointments were coded as "Lead counsel." Leaders charged with coordinating communications among counsel and parties are typically referred to as "liaison" counsel in appointment orders and were coded as "Communications." The remaining types of appointments we found in the dataset are: Attorney's fees, Bellwether, Class counsel, Coordination, Discovery, Experts, Local counsel, Motions and filings, Pro se, Settlement, Settlement administration, Trial and Vetting.

102. Pretrial Order No. 4 at 9, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-02885-MCR-GRJ (N.D. Fla. Apr. 19, 2019), ECF No. 76.

Table 3: Types of Plaintiff-Side Appointments

Type	Number of court actions
Bellwether	4
Class counsel	141
Communications (liaison counsel)	144
Coordination	64
Discovery	81
Experts	62
Attorney's fees	117
Lead counsel	258
Management (all types)	1,521
Motions/briefing	36
Pro Se	2
Settlement	28
Settlement administration	138
Trial	13
Vetting	18

E.   Leadership Complexity and Variability

Central to the controversies we surveyed in Part I is the complexity of court-appointed leadership slates. As noted, best-practice guides urge courts to create additional leadership posts and committees to improve the diversity in leadership while ensuring funding and adequacy of representation for MDL plaintiffs. To the extent that courts followed this advice, we would expect to see larger and more complex slates of leaders. Our hypothesis that increases in leadership diversity will be associated with larger leadership slates reflects the complex relationship among legal skill, ambition, and financial resources. As we discuss above, a key part of a leader's role is to finance litigation on behalf of MDL plaintiffs until judgments or settlements cover attorney's fees and litigation costs. Given that a leadership role requires money and experience, judges have been encouraged to appoint attorneys

who will be "part of a larger group" that is able to provide "financial assistance" or who can be assigned "a limited-leadership role."[103]

Still, a desire for diversity is far from the only factor influencing the complexity of MDL leadership slates. As anyone who has served on a law school committee can attest, a committee's ability to act decisively is inversely correlated with its size. In addition, larger committees mean more attorneys who will expect to receive common benefit fees. To the extent that courts are concerned with litigation proceeding efficiently and with common benefit fees being kept to a minimum, we might expect to see small committees.[104] We might also expect to see changes in committee complexity based on whether a leadership structure was designed by the court or attorneys; court-designed structures will be simpler than attorney-designed ones, we hypothesize, because courts face less pressure to accommodate conflicting interests by bringing attorneys into the fold. Leadership complexity is also linked to adequate representation. Drawing on debates in class action jurisprudence, commentators sometimes maintain that each identifiable group of plaintiffs within an MDL should be represented in its leadership by an attorney or group of attorneys who will advance the group's interests.[105] To the extent that courts are attuned to these concerns, we might expect to see more complex leadership structures, with attorneys or firms appointed to advance the interests of distinct groups of parties.

In short, we hypothesize that the complexity or simplicity of court-appointed leadership slates is the product of numerous factors that pull in many directions: courts' and attorneys' perceptions about the optimal size of a leadership slate; concerns for adequate representation; the actor or actors who design a leadership slate; and our variable of interest, calls to improve the diversity of leadership appointments along multiple dimensions.

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103. *E.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 1; *see also, e.g.*, DUKE BEST PRACTICES, *supra* note 32, at 46 ("The court should ensure that slates or, later in the litigation, formation of committees or allocation of work assignments, do not lead to the exclusion of attorneys who bring valuable skills, resources, or perspectives to the litigation.").

104. Indeed, some anecdotal evidence suggests judges prefer "lean leadership committees" in order to "bring down legal costs." Amanda Bronstad, *'Boys' Network Slowly Making Room for Gender Diversity in MDL Leadership*, LAW.COM (May 29, 2018, 6:56 PM), https://www.law.com/nationallawjournal/2018/05/29/boys-network-slowly-making-room-for-gender-diversity-in-mdl-leadership/ [https://perma.cc/ZFY9-DVFQ].

105. *See, e.g.*, Burch, *supra* note 21, at 78–79 (comparing non-class MDLs to Rule 23 class actions, in which "certification offered transferee judges a dizzying array of judicial powers to appoint class counsel, ensure a fair settlement, and award fees, all of which helped prevent counsel from exploiting absent class members" (footnotes omitted)); Erichson, *supra* note 27, at 36 ("Whereas MDL judges may consider the adequacy of lawyers appointed to leadership positions, the class action rule . . . allows class certification only after a judicial finding of adequate representation, which is also a necessary condition for any class action settlement or judgment to have a binding effect." (footnote omitted)).

The analysis we undertook at this stage of our study does not permit us to untangle the effect of all these factors. Nevertheless, we report some statistics that are suggestive of whether calls for increased diversity are reflected in the size and complexity of the leadership slates we analyzed.

1. Baseline Complexity Levels.—We begin by describing the general complexity of leadership slates in our dataset. As already noted, we found an average of 37.3 court actions appointing or removing leaders across the MDLs we studied, with substantial variation among MDLs. Another proxy for the complexity of leadership slates in our dataset is the average number of organizational units in an MDL.

Figures 4 and 5 chart the number of organizational units per MDL in our dataset. The average number of organizational units was 6.6. Again, we found considerable variation among MDLs. The median number of organizational units per MDL was 5, with a standard deviation of 5.1. Viewed in connection with our data on the types of plaintiff-side appointments, this provides another example of the "diverse uniformity" of contemporary MDL practice. Some organizational forms—namely, lead counsel and a committee or committees charged with overall management of the litigation—appear in virtually all MDLs we examined. But beneath this surface uniformity lies considerable variation in how MDLs are structured. MDL transferee courts not only have the authority to create ad hoc organizational forms, they in fact are doing so.
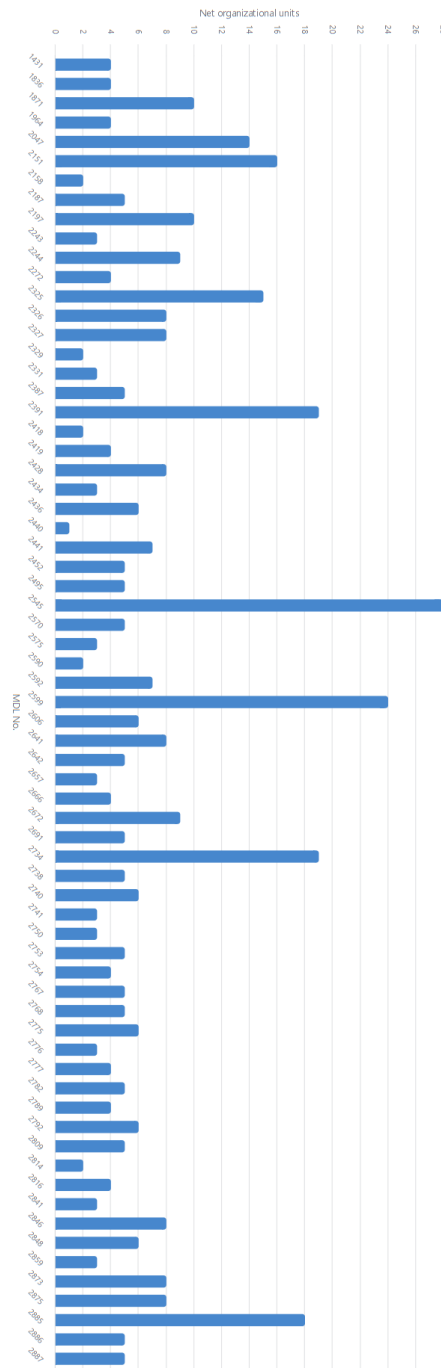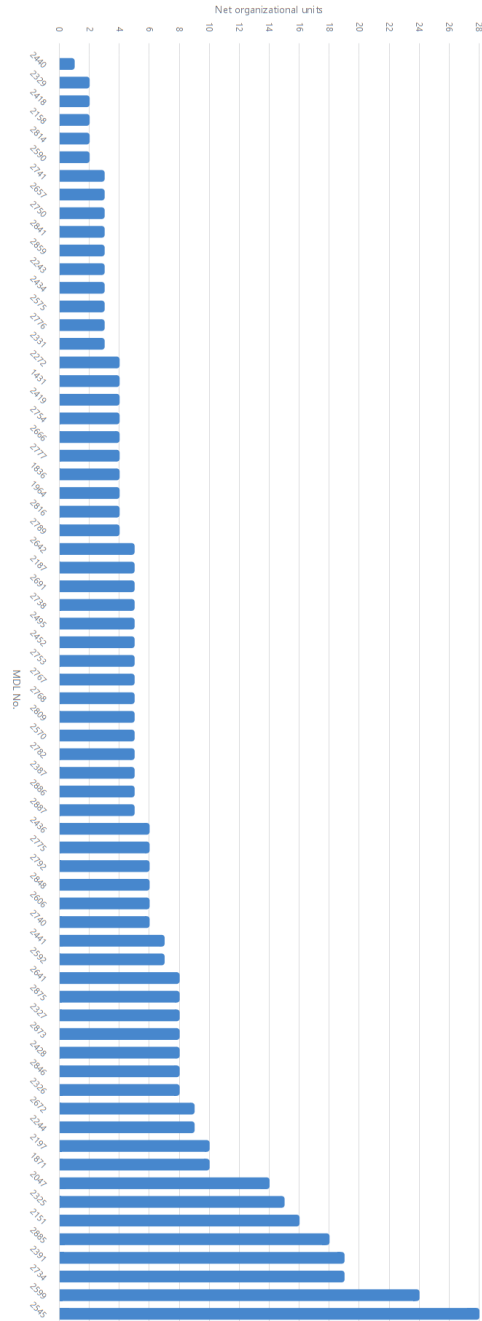
Figure 4: Organizational Units by MDL (by Date)

Figure 5: Organizational Units by MDL
(by Number of Organizational Units)

    2. Inviting New Leaders and Contesting Leadership Appointments.—We can sharpen our picture of leadership complexity by examining how it changes over time: Are leadership slates fixed at the beginning of an MDL and left in place as the case progresses? Do they change over time? And to what extent do these metrics vary or remain constant from one MDL to the next?

    An initial metric relevant to these questions is the number of interim appointments courts made. Some authors suggest that attorneys use interim appointments to establish a toehold from which they wrest control of MDLs from other attorneys.[106] On this account, attorneys are appointed on a temporary basis through a closed-door process and then use the connections and knowledge they form to make themselves indispensable and irreplaceable. But we found little empirical evidence to confirm the toehold theory. Only ninety-three of 2,475 appointments to leadership positions in our dataset were on an interim basis. Notably, as reflected in Figure 6 below, an excerpt from the initial appointment order in *In re 3M Combat Arms Earplug Products Liability Litigation*, many orders making interim appointments take pains to emphasize their interim, limited nature. One interpretation of these findings is that, by the time of our dataset, transferee courts were alert to the risk that interim appointments could be used to establish a toehold for permanent positions and worked to keep this from occurring.

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106. *See, e.g.*, Burch & Williams, *supra* note 25, at 1460. Analyzing a hybrid appointments process, Burch and Williams theorize that it

> allows temporary, "interim" lead counsel to apply, nominate liaison counsel and executive committee members, and appoint sub-committee members while simultaneously permitting an open application process . . . . [T]his process "empowers [temporary lead counsel] to handpick the majority of the Executive Committee" and leaves only a few positions "open to a transparent application process."

Id. (quoting Letter from Aaron S. Podhurst, Peter Prieto, Harley S. Tropin & Adam M. Moskowitz to Judge Jesse M. Furman at 2, *In re* Gen. Motors LLC Ignition Switch Litig., No. 1:14-md-02543-JMF (S.D.N.Y. July 8, 2014), ECF No. 32) (footnotes omitted).

Figure 6: Interim Appointment Order in *3M*

> **IV.   Appointment of Interim Lead and Liaison Counsel**
>
> The Court hereby appoints Bryan F. Aylstock of Aylstock, Witkin, Kreis & Overholtz, PLLC, 17 E. Main St., Pensacola, FL 32502, to serve as *interim* lead and liaison counsel for the plaintiffs. Mr. Aylstock is well-qualified to carry out the responsibilities of these positions on an interim basis, given his extensive experience in complex litigation, including a leadership role in a prior MDL before this Court, and his local presence. Applications for leadership positions will be solicited once a leadership structure is established.

Another metric relevant to the fixed vs. contested nature of leadership appointments is the frequency with which courts invite applications for leadership positions. All else equal, a judicial invitation to apply for a leadership position suggests that the court welcomes competition for leadership posts.

Seventy-nine of 274 appointment orders in our dataset (28.8%) indicated that the court had invited applications in connection with an appointment that it made. Of the sixty-eight MDLs we analyzed, forty-four (65%) contained an order in which a court invited applications for leadership positions.

Still another metric relevant to the fixed vs. contested nature of MDL appointments is the number of leadership appointment orders that were contested. We coded an order as "contested" if either the order itself or the MDL docket indicated that more than one applicant applied for an appointment that the court ultimately made. The key to contestedness, as we understood it, was whether there was a loser in the appointment process. If an attorney or firm applied for an appointment that another attorney or firm received, we deemed the order contested.

Thirty-seven of 274 appointment orders in our dataset were contested. Of our sixty-eight MDLs, twenty-nine contained contested appointment orders. Although not conclusive, this suggests to us that, during the period reflected in our data, the "private ordering" model of MDL leadership appointments continued to hold considerable sway, despite commentators' calls for judges to organize a process that more closely resembles an election or the award of a government contract. To the extent multiple attorneys vied for leadership positions reflected in appointment orders, the degree of contestation reflected in the orders themselves is modest. This seems consistent with the hard battles being fought behind closed doors as opposed to in public MDL dockets.

3. Leadership Complexity Through the Lifecycle of an MDL.—A more direct measure of the static vs. contested nature of leadership appointments is the number of orders affecting appointments that courts enter. If leadership is fixed at the beginning of a case and left alone, we would expect to see a small number of orders appointing leaders in each MDL, all else held equal. Courts appoint the leaders, and that is that. In contrast, if leadership evolves over time, we would expect to see a higher number of orders.

In our dataset, the number of orders per MDL ranged from one (in the just-filed *In re Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation*) to nineteen (in *In re Chinese-Manufactured Drywall Products Liability Litigation*). The average number of orders was 4; the median was 2; and the standard deviation was 3.55. A visual examination of trends again shows considerable inter-MDL variation, as reflected in Figure 1, above, and Figure 7, below.

We interpret these results as suggesting that there are essentially two modes through which leadership slates are formed. In what might be termed "Type 1" MDLs, a leadership slate is assembled accretively through a small number of case management orders. For instance, a court might appoint interim liaison counsel, then a leadership slate consisting of lead counsel, liaison counsel, and a management committee.

More notable to us is the pattern visible at the right end of the distribution, where courts entered a comparatively large number of orders over time. Table 4, below, reports the number of orders in the top five MDLs by number of orders in our dataset. Leadership appointments in these "Type 2" MDLs followed the same basic pattern as "Type 1" MDLs but departed from them along two dimensions. Courts periodically *reappointed* leadership slates, and they tended to *create additional organizational units* as the litigation progressed to take on tasks such as coordinating bellwether trials, administering settlements, and allocating common benefit fees.

A striking feature of these Type 2 MDLs is that as courts regularly entered appointment orders, they expanded leadership slates to include a mix of previously appointed attorneys and new entrants. We examined the MDLs listed in Table 4—the top five judged by number of orders entered—and created histograms that captured whether attorneys were appointed once, twice, or three or more times. *Chinese Drywall*, *Avandia Marketing*, and *C.R. Bard* saw high numbers of attorneys who were appointed once and a smaller group of attorneys who were appointed three or more times. In *Takata Airbag*, the pattern was reversed: most appointments went to attorneys who were appointed three or more times. Most interestingly, *Biomet* exhibited a bimodal distribution, with nineteen attorneys being appointed a single time, two being appointed twice, and twenty-one attorneys receiving three or more appointments.

We also examined underlying appointment orders in these five MDLs to determine whether courts were changing the attorneys appointed to lead counsel positions, as one would expect to see if courts were making major mid-stream changes to leadership slates. In none of the MDLs was a previously appointed lead counsel removed or replaced mid-litigation.

Figure 7: Orders by MDL (by Number of Orders Entered)
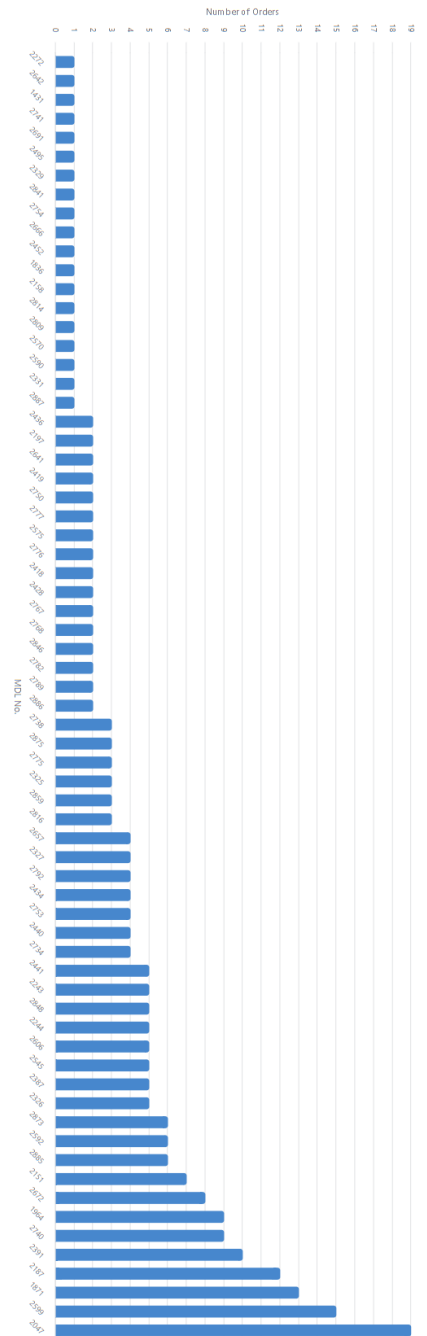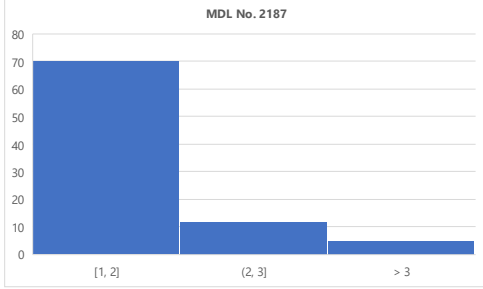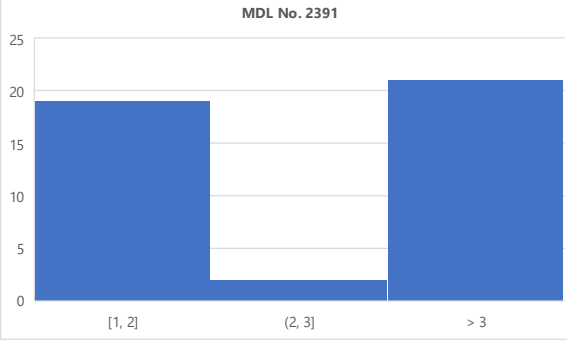
Table 4: Top 5 MDLs by Number of Orders Affecting Appointments
Entered

MDL No.	Caption	Number of orders entered	Attorneys by number of appointments
2047	*In re: Chinese-Manufactured Drywall Products Liability Litigation*	19	
2599	*In re: Takata Airbag Products Liability Litigation*	15	
1871	*In re: Avandia Marketing, Sales Practices and Products Liability Litigation*	13	

2187	*In re: C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation*	12	
2391	*In re: Biomet M2a Magnum Hip Implant Products Liability Litigation*	10	

Across Type 1 and Type 2 MDLs, leadership slates tended to expand over time. In our entire dataset, courts terminated a total of five organizational units. And there were only forty-four actions removing attorneys or law firms from leadership positions, many at the request of attorneys whose cases settled or who switched law firms.

Although far from definitive, these findings support three conclusions about the complexity and variability of MDL leadership slates and the possible effects of efforts to increase the diversity of court-appointed leaders. First, whether in Type 1 or Type 2 MDLs, leadership is not set in stone. Contrary to earlier studies that approached leadership slates as unvarying, we were able to capture that those slates, in fact, tend to grow over time, through the different phases of a products liability MDL. Second, these changes are one-way. Courts generally are not removing or replacing leaders who are appointed to leadership slates as much as they are expanding the leadership slate to address problems as they arise. Leadership tends to be dynamic, and it expands as MDLs progress.

Third, to the extent that it occurs, competition over leadership positions tends to happen early in the MDL life cycle; while leadership slates subsequently expand, these expansions are not associated with changes in lead counsel positions. We did not find evidence for the proposition that time-

limited appointments were used to "ensure that [leaders] continue to fulfill their duties" or that they provide "opportunities" to diversify leadership, as some leading authorities hope.[107] Even in cases where courts expressly appointed leaders for set time periods, the practice did not lead to competition for leadership posts as the MDL progressed. When presented with the opportunity to replace leaders after their terms expired, courts reappointed the same original leaders and increased the number of leadership slots to accommodate new ones.

4. Are Leadership Slates Becoming More Complex Over Time?—As Part I describes, prominent voices in the courts and the legal academy have urged courts and attorneys to ensure greater diversity in MDL leadership slates by creating larger, more complex slates. Did they?

Our point of departure is the trends in the number of appointments and number of organizational units that we already described. Figures 2 and 4 above chart the number of appointments and organizational units created in each MDL in our dataset over time, from MDL No. 1461 at the left of the *x*-axis to MDL No. 2887 at the right end of the axis. A review of these figures does not show any trend toward greater complexity over the period covered in our dataset.

We reach slightly different results when we divide our dataset into three equally sized time periods based on the date an MDL was created. As reflected in Table 5, this approach shows essentially no trend in *organizational units* by time period; the average number of organizational units changes from 6 in the early period to 6.8 in the middle period, then down to 6.6 in the late period. In contrast, the number of net appointments (appointments to leadership positions less removals from them) spikes during the middle period. It moves from an average of 30.6 in the early period to 48.2 in the middle period, then falls to 29.4 in the late period.

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107. *See, e.g.*, DUKE BEST PRACTICES, *supra* note 32, at 50 (recommending limited terms to ensure MDL leaders "continue to fulfill their duties"); *see also, e.g.*, INCLUSIVITY AND EXCELLENCE GUIDELINES, *supra* note 32, at 24 ("[R]evisiting appointments periodically may increase the chances that new lawyers, including women and diverse lawyers, can obtain positions on the leadership team . . . .").

Table 5: Organizational Units and Appointments by MDL Time Period

	Net Organizational Units (mean/median/standard deviation)	Net Appointments (mean/median/standard deviation)
Early period (MDL created Aug. 21, 2001, to June 21, 2007) (*N*=3)	6 4 2.8	30.6 31 15.1
Middle period (June 22, 2007, to April 21, 2013) (*N*=24)	6.8 5 4.8	48.2 24.5 56.5
Late period (April 22, 2013, to Feb. 2, 2019) (*N*=41)	6.6 5 5.5	29.4 16 34.5

If we assume that the actual number of appointments in our late period is higher than reported here because of the incompleteness of our data,[108] the trend in the number of appointments is suggestive of courts adding more attorneys to leadership slates to address concerns about diversity and the need to expand the ranks of MDL leaders. Nevertheless, we hesitate to draw strong conclusions from our data for three reasons.

First, our early time period has a very small number of observations: three MDLs. Second, the trend of increased appointments in the middle time period is largely driven by a small number of MDLs including *Chinese-Manufactured Drywall*, the pelvic mesh MDLs, and the *Takata Airbag Products Liability Litigation*. Third, the underlying data for our late period is incomplete. Because we only collected orders that had been entered by the summer of 2020, we do not have an accurate picture of the organizational complexity of late-period MDLs. It is possible that, when we have full data for the late period, the trend toward greater complexity that we observe in the middle period will continue. Or it may disappear.

In sum, our preliminary analysis provides little evidence that, as courts and commentators have called for more diverse leadership slates, the size or

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108. *See supra* text accompanying note 91.

complexity of leadership slates has increased. Although it is possible that further analysis will reveal such increases, they are not apparent from the data we analyze here.

F.   *Trends in Elite MDL Leadership*

If leadership slates are not becoming more complex over time, who is receiving the coveted appointments? As Part I described, the literature offers several hypotheses. While some contend that MDLs are effectively monopolized by a small network of elite "repeat players," others have emphasized that "every MDL is different" and the diversity of leadership appointments that is likely to result from these differences.

1. One-Shotters, Minor Repeat Players, and Super Repeat Players.—We begin by reporting the number of repeat appointments in our dataset. Figure 8 charts each attorney in our dataset by the number of times the attorney was appointed to a leadership position. Figure 9 in the Appendix presents the same data as a word cloud, with attorneys who appeared more frequently represented in larger type. In contrast to the approach used by Burch and Williams, we track discrete *appointments* as opposed to the number of *MDLs* in which an attorney is appointed. Thus, for example, an attorney who was appointed Lead Counsel and a member of a Plaintiffs' Steering Committee would be counted as receiving two appointments in our data.

Even using this more sensitive measure of appointments, 53.4% of the attorneys in our dataset—495 of 927 unique attorneys—were single-shotters. There were, furthermore, many of what might be termed "minor repeat players." Eight hundred and twenty unique attorneys (88.4%) were appointed between one and five times; and 871 attorneys (93.9%) were appointed between one and ten times. Judged by number of appointments, then, the supermajority of attorneys reflected in our data are not super repeat players who can be said to dominate MDL practice in any meaningful way.

At the right end of our distribution, however, we found a small number of attorneys who were indeed appointed quite a lot. Thirty-seven attorneys received ten or more appointments in our dataset.[109] And four attorneys—Elizabeth Cabraser, Thomas Cartmell, Christopher Seeger, and Hunter Shkolnik—were each appointed more than twenty times.

These findings complicate the image of MDL leadership that emerges from the debates we have described. Our data confirm the existence of an MDL bar whose members receive a high number of appointments. But MDL leadership within our dataset was diverse in terms of the balance between super-repeat-player elite attorneys, one-shotters, and minor repeat players. Most attorneys in our data fell outside the super-repeat-player category. And most appointments that we recorded went to these attorneys, not the super repeat players.

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109. Elizabeth Cabraser, Thomas Cartmell, Christopher Seeger, Hunter Shkolnik, Yvonne Flaherty, James Cecchi, Richard Arsenault, Mark Lanier, Navan Ward, Henry Garrard, Jayne Conroy, David Boies, Dawn Barrios, Clayton Clark, Peter Prieto, Dianne Nast, Ben Gordon, Riley Burnett, Carl Frankovitch, Bryan Aylstock, Todd Smith, Larry Boyd, Jeff Grand, Genevieve Zimmerman, Arnold Levin, Martin Crump, Trent Miracle, Peter Samberg, Renee Baggett, Joseph Rice, John Restaino, Michael London, Fred Thompson, Rachel Abrams, Roland Tellis, Michelle Kranz, and Karen Beyea-Schroeder.

Figure 8: Attorneys by Number of Appointments
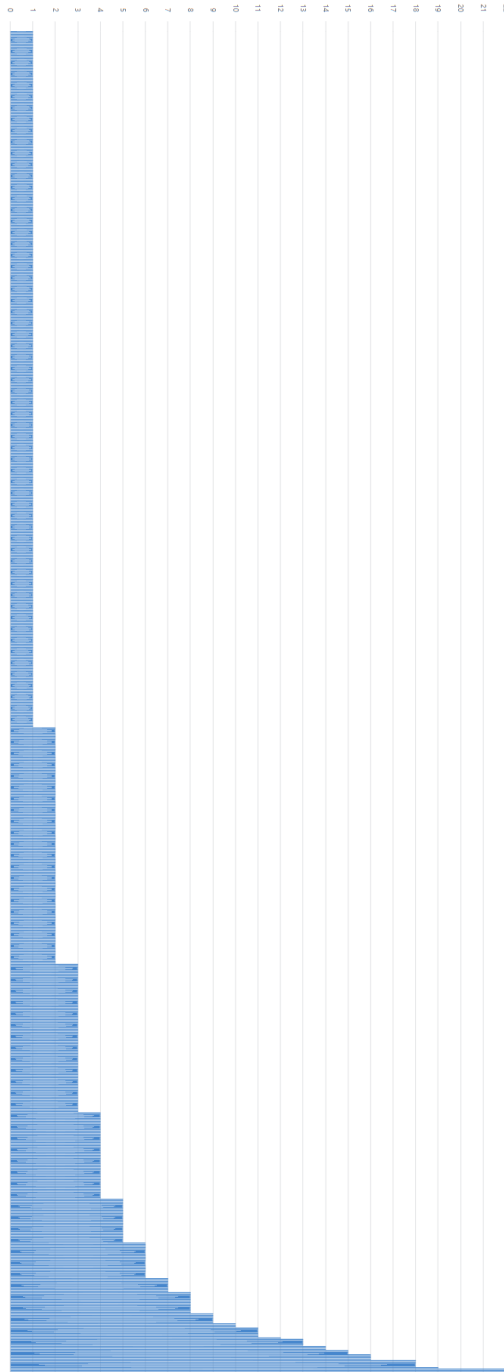
2. Movement Into the Super Elite.—MDL critics tend to depict the super-elite as relatively stable over time. According to critics, this stability reflects the long-term relationships among members of the elite MDL bar—competing attorneys are enmeshed in a repeated game of sorts and will look out for one another across the cases in which they participate.[110] As evocatively expressed by Myriam Gilles, this "loyalty" ensures "friendly firms get plenty of work" and "that their future motions for transfer will be reciprocally supported by other, powerful lawyers. This process is repeated in case after case, creating ad hoc coalitions that coordinate and divvy up leadership and power across time."[111]

We test these claims by comparing our findings concerning the frequency of attorney and law firm appointments against data on repeat players that forms the basis for Burch and Williams's 2017 article on repeat players in multidistrict litigation[112] and Burch's 2019 monograph on "mass tort deals."[113] Initially, we recreated two tables from Burch and Williams's 2017 article that reported the most frequently appointed attorneys and law firms in products liability MDLs. These tables ranked attorneys and law firms by the number of MDLs in which they appeared using data collected from MDLs that were pending in federal court in May 2013. As noted above, we analyzed orders in MDL that were pending in June 2019. Thus, while there is some overlap between the two datasets, our data provides a snapshot of practice taken six years after Burch and Williams's findings.

Our updated rankings appear in Tables 6 and 7 in the Appendix. To allow for ties, we report the sixty-five most frequently appointed attorneys. Thirty-seven (56%) do not appear in Burch and Williams's table of the "top 50" most frequently appointed attorneys. With respect to law firms, we report the sixty-five most frequently appointed repeat players (again to allow for ties). Of those sixty-five firms, thirty (46%) do not appear in Burch and Williams's list of the fifty most frequently appointed law firms. Whether looking at attorneys or law firms, about half of the appointees at the top of our rankings do not appear in the Burch and Williams top 50.

We then performed a series of analyses that drew on our more fine-grained counts of leadership appointments, which capture the possibility that

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110. *See, e.g.*, Burch, *Monopolies*, *supra* note 22, at 74 ("One theme emerged from this [research]: the outcomes seem to favor repeat agents. They achieved their goals time and again in concert—defendants gained finality, and lead lawyers increased their fees."); Dodge, *supra* note 21, at 366–67 (collecting criticisms of MDL repeat play); Gilles, *supra* note 24, at 178 ("[A] principal reason why some lawyers recurrently appear in MDLs is that they've managed to form, or join, fluid networks that are held together through mutually beneficial arrangements that are only possible among repeat players . . . .").

111. Gilles, *supra* note 24, at 177.

112. *See* Burch & Williams, *supra* note 25, at 1450 (describing the original dataset created for and analyzed by the article in order to study repeat players).

113. *See* BURCH, MASS TORT DEALS, *supra* note 22, at 76–77 (describing the study's dataset).

a single attorney or firm may be appointed many times within a single MDL, and compared our results to the earlier findings. The Burch and Williams data contains 228 repeat player attorneys who held leadership positions in more than one MDL. We normalized attorney names and analyzed how frequently these attorneys appear in our data. The two datasets contain 271 attorneys who appear in both of them.[114] Of Burch's 228 repeat players, 148 appear in our data. One hundred and twenty-seven have two or more appointments in our data; sixty-seven have five or more appointments; twenty-five have ten or more appointments[115]; and four—Elizabeth Cabraser, Christopher Seeger, Hunter Shkolnik, and Thomas Cartmell—have more than twenty appointments in our data. Overall, there is a substantial but not complete overlap between Burch's repeat players and the attorneys who received multiple appointments in our data. As we narrow our focus to attorneys who are super-repeat elite players in our data, the overlap decreases.

Isolating super-repeat players who appear in both datasets confirms this finding. We searched for attorneys who were appointed five or more times in our data and who also appeared in five or more MDLs in Burch's data and found twenty-nine. Four attorneys were appointed ten or more times in our data who appear ten or more times in Burch's data: Christopher Seeger, Richard Arsenault, Jayne Conroy, and Dianne Nast.

What of movement from "single-shotter" to repeat player status? Fifty-five single-shotters from the Burch data make a single appearance in our data. Our data quite possibly capture the same appointments, but to the extent they do not, these attorneys remained on the outskirts of MDL practice. Others' profiles rose. Twenty-three of Burch's single-shotters were appointed five or more times in our data.[116] And three of the Burch single-shotters—Genevieve Zimmerman, Peter Samberg, and Karen Beyea-Schroeder—were appointed ten or more times in our data. There was also movement in the minor repeat players who appeared in one to five MDLs in the Burch data. Sixty-eight such attorneys received five or more appointments in our data. Eleven were

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114. This count is underinclusive because of differences in how we coded attorney names compared to Burch. To facilitate name matching, we coded only first names and last names and omitted suffixes and middle initials. The Burch data includes prefixes, suffixes, multiple names (e.g., W. Mark Lanier), and middle initials.

115. Elizabeth Cabraser, Christopher Seeger, Hunter Shkolnik, James Cecchi, Thomas Cartmell, Richard Arsenault, Yvonne Flaherty, Dawn Barrios, Jayne Conroy, Ben Gordon, Carl Frankovitch, Dianne Nast, Arnold Levin, Jeff Grand, Larry Boyd, Martin Crump, John Restaino, Michael London, Trent Miracle, Bryan Aylstock, Joseph Rice, Michelle Kranz, Rachel Abrams, Renee Baggett, and Wendy Fleishman.

116. Genevieve Zimmerman, Peter Samberg, Karen Beyea-Schroeder, Justin Presnal, Lawrence Jones, Kristine Kraft, William Kershaw, Thomas Preuss, Pete Kaufman, Russell Budd, Brenda Fulmer, Andrea Bierstein, Richard Lewis, Paul Hanly, Richard Golomb, Steve Harrison, Jennifer Hoekstra, Matthew Haindfield, Kevin Parker, Eric Johnson, Behram Parekh, Franklin Azar, and Derriel McCorvey.

appointed ten or more times.[117] And three—James Cecchi, Dawn Barrios, and Ben Gordon—received fifteen or more appointments in our data.

We next created rankings of the most frequently appointed attorneys and law firms using appointment-level data as opposed to the number of MDLs in which an attorney or firm was appointed. Tables 8 and 9 in the Appendix report our results. Some well-known attorneys in the elite MDL bar appear on both Burch and Williams's leaderboard of the most frequently appointed attorneys and on ours. However, twenty-nine of the top fifty-four attorneys on our leaderboard are not on Burch and Williams's leaderboard. Looking at law firms, thirty-five of fifty-six firms on our leaderboard do not appear on the Burch and Williams leaderboard. For both attorneys and law firms, there was substantial movement in ordinal rankings.

While again emphasizing the preliminary and incomplete nature of our data, we believe these findings support several conclusions about the stability of elite MDL leadership. There unquestionably is an upper echelon of the elite bar that retained its position across the two datasets. At the same time, there is movement into the ranks of most frequently appointed attorneys and law firms and a corresponding movement out of those ranks as new entrants displace established attorneys and firms. We think this is inconsistent with a portrait of MDL leadership that does not evolve over time. Our data is suggestive of many other moderately concentrated markets for specialized public services in the United States. The top five US defense contractors have retained their market positions for decades at a time, for example, but far more variability surfaces when one looks across the top twenty in the industry.[118] Much like other forms of government contracting that require economies of scale and specialized knowledge to function, there doubtless are substantial barriers to entry in MDL, and established players wield significant power. But their position is not invulnerable.

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117. James Cecchi, Dawn Barrios, Ben Gordon, Larry Boyd, Jeff Grand, Genevieve Zimmerman, Carl Frankovitch, Trent Miracle, Peter Samberg, Michelle Kranz, and Karen Beyea-Schroeder.

118. *See, e.g.*, Jesse Ellman, Reed Livergood, David Morrow & Gregory Sanders, Ctr. for Strategic & Int'l Studs., Defense Contract Trends 30 (2011), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/110506_CSIS_Defense_Contract_Trends-sm2.pdf [https://perma.cc/NWG5-MA4V] (asserting that "[n]ot only were the top four contractors the same from 1999 to 2009, but they were in the same order" and noting that "the fifth company in 1999 was acquired by the company in third position in 2009, thus changing very little in the market composition," but also including a chart showing more movement among the top twenty contractors in that period); *see also* Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155, 172–73 (2000) (discussing concerns with certain types of government contracting, especially defense contracting).

III. Stability and Change in MDL Leadership

We set out expecting to find increases in the size and complexity of MDL leadership slates that coincided with increased awareness of MDL's diversity problem and calls to create larger, more complex slates to increase the diversity of MDL leaders. To our surprise, we found little evidence that the size or complexity of leadership slates was increasing. But—again to our surprise—we found movement in the ranks of elite MDL lawyers who, except for judges, arguably exert the most influence over mass tort litigation in federal court. Notably, however, those changes did not seem to impact other persistent aspects of MDL leadership, like the stubborn gender disparities serving on leadership that we document.

Our findings contrast with a recent case management order that highlights the type of changes that we expected our data would reveal. In 2020, the JPML centralized thousands of cases alleging that Zantac caused cancer before Judge Robin Rosenberg, who had been appointed to the federal bench in 2014.[119] As part of a competitive application process, the judge received over sixty applications and interviewed applicants via videoconference.[120] The judge ultimately appointed a fifteen-member steering committee, more than half of whom were women.[121] The judge also created a "leadership development committee" (LDC) in order to afford "younger and slightly less experienced attorneys an opportunity to participate in a leadership role in an MDL."[122] Observing that the MDL would change as the litigation advanced, Judge Rosenberg explained that she would monitor the leadership structure to ensure that "the various types of claimants [were] being appropriately and adequately represented."[123] In March 2022, as the number of unregistered claims in *Zantac* surged to 150,000, the Court appointed several new members to the steering committee, including five from the LDC; it also appointed twelve additional attorneys who had never

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119. *See In re* Zantac (Ranitidine) Prods. Liab. Litig., 437 F. Supp. 3d 1368, 1370 (J.P.M.L. 2020) (observing that "centralization before the Honorable Robin L. Rosenberg allows us to assign this litigation to an able jurist who has not yet had the opportunity to preside over an MDL").

120. Pretrial Order #20 at 1, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-02924-RLR (S.D. Fla. May 8, 2020), ECF No. 685.

121. *Id.* at 8–11.

122. *Id.* at 2, 6–7. Judge Rosenberg's order noted that she expected lawyers on the steering committee to "actively mentor and work closely" with the lawyers appointed to the leadership development committee "so they have the opportunity to play a meaningful role in various aspects of this MDL, including subcommittee assignments, and thereby gain further experience in preparation for future service on steering committees." *Id.* at 7.

123. *Id.* at 3.

received an MDL leadership appointment to the LDC based on their important "role on Plaintiffs' leadership team in prosecuting the MDL."[124]

Why did the type of the order made in *Zantac* not appear more widely in our data? While we can only speculate, our findings are consistent with several possible explanations. Calls for more voices in MDL leadership date back at least to 2011. Perhaps change is slow and the slice of MDL practice that we studied, beginning in 2001 and stretching through 2019, was too early to capture changes in leadership size and complexity related to concerns about MDL diversity. Perhaps Judge Rosenberg is an outlier, and the modal MDL judge is less willing to exercise judicial discretion to increase the diversity of leadership slates. Perhaps the modal judge shares her commitments in principle but is worried about attracting the attention of appellate courts who equate efforts to advance diversity and equity with unlawful discrimination.

Or perhaps the JPML's emphasis on increasing the ranks of transferee judge appointments gives rise to dynamics that work against diverse leadership slates.[125] New MDL judges may be even *more* reliant on repeat lawyers in complex litigation based on recommendations from experienced MDL judges or precisely because of the superior experience they enjoy managing such cases. Open competitive slates may still produce the same lead lawyers if judges place unusual emphasis on experience and financing or if lawyers negotiate slates away from judicial oversight. Set-term or annual-appointment procedures could still produce the same leaders over the life of a litigation, particularly when judges and lawyers fear changing horses in midstream.

Although we are in no position to choose between these explanations, the findings we present highlight a structural feature of MDL that is certain to shape future efforts to address MDL's diversity problem. Judges in MDL possess substantial discretion to devise ad hoc structures to manage litigation that cannot be designed in advance—including the power to delegate authority to lawyers, masters, and other court-appointed actors to do the

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124. Pretrial Order # 73 at 4–5, 7, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 9:20-md-02924-RLR (S.D. Fla. Mar. 8, 2022) (order "on Review of Plaintiffs' Leadership Structure and Additional Appointments").

125. To date, the few studies on "rookie" MDL judges have not found their leadership slates to be any more diverse than those appointed by veteran MDL judges. *See, e.g.*, Alissa del Riego, *Driving Diverse Representation of Diverse Classes*, 56 U. MICH. J.L. REFORM 67, 122 (2022) ("Curiously, women on the bench tend not to appoint other women . . . ."); Alissa Del Riego, *Courts Must Tackle Lack of Diversity in Class Counsel*, LAW360 (May 11, 2022, 5:56 PM), https://www.law360.com/articles/1489915/courts-must-tackle-lack-of-diversity-in-class-counsel [https://perma.cc/MVT8-UA3P] ("The gender of the judge seemed to matter little. Indeed, female district judges seemed surprisingly less inclined to appoint female attorneys to serve as class counsel than male judges.").

same.[126] And if every MDL is different, and personnel really *is* policy, then many of the tools required to change MDL also remain in private hands, shaped by private contracting, and outside the four corners of case management orders that have been the focus of recent reform efforts. These include questions difficult to understand without qualitative study of the role of financial resources, common benefit fees award allocations, professional networks, bias, managerial style, and the kinds of informal bargaining seen in other public institutions.

Countless features of MDL reflect the tension between understanding it as a form of public administration and private ordering and the top-down vs. bottom-up styles of legal innovation those conceptions entail. To the extent that MDL succeeds in fostering a new generation of leaders, the success will reflect the influence of all these forces. Every MDL is the product of both private ordering and the exercise of public legal authority. Future trends in the size, complexity, and diversity of leadership slates will bear the influence of these overlapping and competing influences.

Appendix

Table 6: Attorneys by MDL Appearances

Rank	Attorney	Number of MDL Appearances	Position in Burch and Williams (2017)*	Change
1	Hunter Shkolnik	12	16	+15
2	Yvonne Flaherty	11	13	+11
3	Christopher Seeger	9	2	-1
3	Jayne Conroy	9	6	+3
3	Richard Arsenault	9	1	-2
6	Dianne Nast	8	3	-3
6	Martin Crump	8	11	+5
6	Thomas Cartmell	8	18	+12

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126. *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 790 (2017) (viewing the MDL statute as "an example of a transsubstantive ad hoc procedural statute that addressed problems raised in a particular set of ongoing litigations, as well as a platform for encouraging and enabling judicial procedural innovations in the form of ad hoc procedure in future complex litigations").

6	Wendy Fleishman	8	N/A	
10	Ben Gordon	7	N/A	
10	Fred Thompson	7	15	+5
10	Joseph Rice	7	N/A	
10	Michael London	7	10	0
10	Rachel Abrams	7	21	+11
15	Elizabeth Cabraser	6	43	+28
15	Ellen Relkin	6	N/A	
15	Henry Garrard	6	31	+16
15	Michael Goetz	6	37	+22
15	Troy Rafferty	6	N/A	
20	Aimee Wagstaff	5	N/A	
20	Amy Eskin	5	N/A	
20	Annesley DeGaris	5	N/A	
20	Bill Robins	5	41	+21
20	Bryan Aylstock	5	44	+24
20	Carl Frankovitch	5	N/A	
20	Clayton Clark	5	49	+29
20	Dawn Barrios	5	N/A	
20	Genevieve Zimmerman	5	N/A	
20	James Cecchi	5	N/A	
20	John Restaino	5	17	-3
20	Joseph Osborne	5	14	-6
20	Peter Flowers	5	25	+5
20	Renee Baggett	5	N/A	
20	Riley Burnett	5	34	+14
20	Roger Orlando	5	N/A	
20	Russell Budd	5	N/A	
20	Timothy Becker	5	N/A	

20	Victoria Maniatis	5	39	+19
20	William McKee	5	N/A	
40	Alyson Oliver	4	23	-17
40	Arnold Levin	4	8	-32
40	Behram Parekh	4	N/A	
40	Christopher Coffin	4	N/A	
40	David Thomas	4	N/A	
40	Donald Migliori	4	N/A	
40	Douglass Kreis	4	N/A	
40	Harry Bell	4	N/A	
40	Julia Zaic	4	N/A	
40	Karen Beyea-Schroeder	4	N/A	
40	Karen Menzies	4	N/A	
40	Leonard Davis	4	N/A	
40	Michael Johnson	4	N/A	
40	Michelle Parfitt	4	7	-33
40	Navan Ward	4	N/A	
40	Paul Farrell	4	N/A	
40	Richard Golomb	4	N/A	
40	Richard Lewis	4	N/A	
40	Robert Salim	4	29	-11
40	Roger Denton	4	N/A	
40	Stacy Hauer	4	38	-2
40	Steve Berman	4	N/A	
40	Tara Sutton	4	N/A	
40	Trent Miracle	4	N/A	
40	Turner Branch	4	N/A	
40	W. Mark Lanier	4	24	-16

*We report attorneys' ordinal position in the Burch and Williams ranking, without accounting for ties.

Table 7: Law Firms by MDL Appearances

Rank	Law Firm	MDL Appearances	Position in Burch and Williams (2017)*	Change
1	Lieff Cabraser Heimann & Bernstein	22	5	+4
2	Motley Rice	19	7	+5
3	Aylstock Witkin Kreis & Overholtz	14	26	+23
4	Levin, Pantonio, Thomas, Mitchell, Rafferty & Proctor	13	17	+13
4	Baron & Budd	13	N/A	
4	Seeger Weiss	13	3	-1
7	Weitz & Luxenberg	12	8	+1
7	Sanders Viener Grossman	12	N/A	
7	Morgan & Morgan	12	24	+17
7	Johnson Becker	12	21	+14
7	Napoli Shkolnik	12	33	+26
12	Beasley Allen Crow Methvin Portis & Miles	11	6	-6
13	Lockridge Grindal Nauen	10	N/A	
13	The Lanier Law Firm	10	2	-11
13	Douglas & London	10	40	+27
16	Wagstaff & Cartmell	8	14	-2
16	Pendley, Baudin & Coffin	8	N/A	
16	Robins Kaplan	8	N/A	
16	Davis & Crump	8	N/A	
16	Andrus Hood & Wagstaff	8	N/A	
21	Napoli Bern Ripka Shkolnik & Associates	7	33	+12
21	Zimmerman Reed	7	10	-11
21	Levin Simes	7	N/A	

21	Neblett Beard & Arsenault	7	1	-20
21	Grant & Eisenhofer	7	N/A	
21	Fleming Nolen & Jez	7	N/A	
21	Goldenberg Law	7	N/A	
21	Meshbesher & Spence	7	N/A	
21	Levin Papantonio Thomas Mitchell Rafferty & Proctor	7	17	-4
21	Blasingame, Burch, Garrard & Ashley	7	43	+22
21	Cory Watson	7	N/A	
32	Simmons Hanly Conroy	6	16[**]	-16
32	Parker Waichman	6	30	-2
32	Nastlaw	6	N/A	
32	Ashcraft & Gerel	6	9	-23
32	Anapol Schwartz	6	18	-14
32	Cohen & Malad	6	N/A	
38	Levin, Fishbein, Sedran & Berman	5	4	-34
38	The Restaino Law Firm	5	20	-18
38	The Orlando Firm	5	N/A	
38	Schlichter, Bogard & Denton	5	N/A	
38	Freese & Goss	5	45	+7
38	Hausfeld	5	N/A	
38	Hagens Berman Sobol Shapiro	5	37	-1
38	Childers, Schlueter & Smith	5	N/A	
38	Carella Byrne Cecchi Olstein Brody & Agnello	5	N/A	
38	Golomb & Honik	5	N/A	
38	Jones Ward	5	N/A	
38	Foote Meyers Mielke & Flowers	5	27[***]	-11
38	Gori Julian & Associates	5	N/A	
51	Meyers & Flowers	4	27	-24

51	The Bell Law Firm	4	N/A	
51	Roda & Nast	4	35[****]	-16
51	Matthews & Associates	4	12	-39
51	Pittman, Dutton & Hellums	4	N/A	
51	Whitfield Bryson & Mason	4	41	-10
51	Heaviside Reed Zaic	4	N/A	
51	Hersh & Hersh	4	38	-13
51	Berger & Montague	4	N/A	
51	Bernstein Liebhard	4	41	-10
51	Herman Herman & Katz	4	12	-39

* We report firms' ordinal position in Burch & Williams, *supra* note 25, tbl A3, without accounting for ties.
** As Hanly Conroy Bierstein Sheridan Fisher & Hayes.
*** As Foote Meyers Mielke & Flowers.
**** As RodaNast.

Table 8: Attorneys by Number of Appointments

Rank	Name	Appointment Count	Position in Burch & Williams (2017)[*]	Change
1	Elizabeth Cabraser	23	43	+42
2	Christopher Seeger	21	2	0
3	Hunter Shkolnik	20	16	+13
4	James Cecchi	19	N/A	
5	Thomas Cartmell	19	18	+13
6	Navan Ward	18	N/A	
7	Richard Arsenault	18	1	-6
8	Yvonne Flaherty	18	13	+5
9	W. Mark Lanier	17	24	+15
10	David Boies	16	N/A	
11	Dawn Barrios	16	N/A	
12	Jayne Conroy	16	6	-6
13	Ben Gordon	15	N/A	
14	Henry Garrard	15	31	+17
15	Peter Prieto	15	N/A	
16	Carl Frankovitch	14	N/A	
17	Dianne Nast	14	3	-14
18	Arnold Levin	13	8	-10
19	Clayton Clark	13	49	-30
20	Jeff Grand	13	50	-30
21	Larry Boyd	13	N/A	
22	Todd Smith	13	N/A	
23	Martin Crump	12	11	-12
24	Fred Thompson	11	15	-9
25	John Restaino	11	17	-8

26	Michael London	11	10	-16
27	Peter Samberg	11	N/A	
28	Riley Burnett	11	34	+6
29	Trent Miracle	11	N/A	
30	Bryan Aylstock	10	44	+14
31	Genevieve Zimmerman	10	N/A	
32	Joseph Rice	10	N/A	
33	Michelle Kranz	10	N/A	
34	Rachel Abrams	10	21	-13
35	Renee Baggett	10	N/A	
36	Roland Tellis	10	N/A	
37	Wendy Fleishman	10	N/A	
38	Ellen Relkin	9	N/A	
39	Jane Sams	9	N/A	
40	Joseph Osborne	9	14	-26
41	Julia Zaic	9	N/A	
42	Justin Presnal	9	N/A	
43	Lawrence Gornick	9	N/A	
44	Amy Eskin	8	N/A	
45	Bill Robins	8	41	-4
46	Harry Bell	8	N/A	
47	Khaldoun Baghdadi	8	N/A	
48	Michael Goetz	8	37	
49	Paul Farrell	8	N/A	
50	Peter Flowers	8	26	-24
51	Ronald Tellis	8	N/A	
52	Thomas Anapol	8	28	-24
53	Troy Rafferty	8	N/A	
54	Douglass Kreis	7	N/A	

* We report the ordinal position of attorneys from Burch & Williams (2017) Table A2, without adjusting for ties.

Table 9: Law Firms by Number of Appointments

Rank	Firm	Appointment Count	Rank in Burch & Williams (2017)	Change
1	Motley Rice	40	7	+6
2	Lieff Cabraser Heimann & Bernstein	33	5	+3
3	The Lanier Law Firm	31	2	-1
3	Baron & Budd	31	N/A	
5	Aylstock Witkin Kreis & Overholtz	30	26	+21
6	Weitz & Luxenberg	28	8	+2
7	Wagstaff & Cartmell	26	14	+7
8	Neblett Beard & Arsenault	25	1	-7
9	Seeger Weiss	21	3	-6
10	Carella Byrne Cecchi Olstein Brody & Agnello	20	N/A	
11	Fisher, Boyd, Brown & Huguenard	19	N/A	
12	Levin, Pantonio, Thomas, Mitchell, Rafferty & Proctor	18	17	+5
13	Clark Love & Hutson	17	N/A	
13	Boies Schiller and Flexner	17	N/A	
15	Simmons Hanly Conroy	16	16*	+1
15	Lockridge Grindal Nauen	16	N/A	
15	Napoli Shkolnik	16	33**	+18

15	Johnson Becker	16	21	+6
19	Sanders Viener Grossman	15	N/A	
19	Podhurst Orseck	15	N/A	
19	Beasley Allen Crow Methvin Portis & Miles	15	6	-13
22	Beasley Allen Law Firm	14	6***	-16
22	Bernstein Liebhard	14	41	+19
24	Robins Kaplan	13	N/A	
24	Power, Rogers and Smith	13	N/A	
24	Blasingame, Burch, Garrard & Ashley	13	43	+19
27	Napoli Bern Ripka Shkolnik & Associates	12	33****	+6
27	Zimmerman Reed	12	10	-17
27	Morgan & Morgan	12	24	-3
27	Douglas & London	12	40	+13
31	Levin Papantonio Thomas Mitchell Rafferty & Proctor	11	17	-14
31	Andrus Hood & Wagstaff	11	N/A	
31	Hagens Berman Sobol Shapiro	11	37	+6
31	Jones Ward	11	N/A	
35	Pendley, Baudin & Coffin	10	N/A	
35	Fleming Nolen & Jez	10	N/A	
35	Anapol Schwartz	10	18	-20
35	Cory Watson	10	N/A	

35	Davis & Crump	10	N/A	
40	The Cochran Law Firm	9	N/A	
40	Seeger Salvas	9	N/A	
40	Meshbesher & Spence	9	N/A	
40	Hanly, Conroy, Bierstein, Sheridan, Fisher & Hayes	9	16	-24
40	Heaviside Reed Zaic	9	N/A	
40	Foote Meyers Mielke & Flowers	9	27	-13
40	Frankovitch, Anetakis, Colantonio & Simon	9	N/A	
47	The Bell Law Firm	8	N/A	
47	Levin Simes	8	N/A	
47	The Restaino Law Firm	8	20	-27
47	Ashcraft & Gerel	8	9	-38
47	Cozen O'Connor	8	N/A	
47	Hausfeld	8	N/A	
47	Golomb & Honik	8	N/A	
47	Grant & Eisenhofer	8	N/A	
47	Goldenberg Law	8	N/A	
56	Whitfield Bryson & Mason	7	N/A	
56	Walkup, Melodia, Kelly & Schoenberger	7	N/A	
56	Searcy Denney Scarola Barnhart & Shipley	7	N/A	
56	Saunders & Walker	7	29	-27
56	Roda & Nast	7	35	-21

56	Berger & Montague	7	N/A	
56	Freese & Goss	7	45	-11
56	Cohen & Malad	7	N/A	
56	Kreindler & Kreindler	7	N/A	
56	Kershaw, Cutter & Ratinoff	7	N/A	

* As Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP.
** As Napoli Bern Ripka Shkolnik, LLP.
*** As Beasley Allen Crow Methvin Portis & Miles.
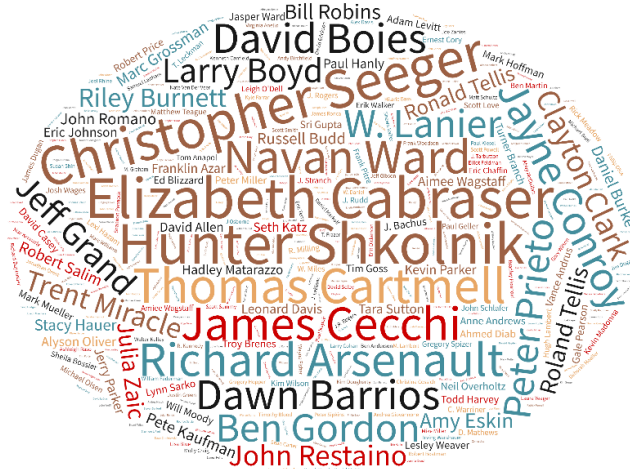**** As Napoli Bern Ripka Shkolnik, LLP.

Figure 9

Figure 10