Multidistrict Litigation and the Field of Dreams

D. Theodore Rave*

This Article analyzes the so-called Field of Dreams problem in multidistrict litigation (MDL). Once an MDL is up and running, the story goes, plaintiffs' lawyers flood the proceeding with meritless claims in the hopes that they will be swept into a global settlement before anyone ever looks closely at them. Critics have called this the most pressing problem with MDLs today and lobbied both Congress and the Federal Rules Committee for MDL-specific rules to address it. This Article analyzes the empirical and normative dimensions of the MDL Field of Dreams. While the empirical evidence behind existing complaints about meritless claims in MDL is exceedingly thin, the economic intuition behind the phenomenon is quite plausible: if you reduce the cost of litigation, as MDL does, more claims with lower expected values will enter the system. Assuming, then, that some significant portion of those new claims are meritless, this Article asks, what, exactly, is wrong with that? It examines several potential problems an influx of meritless claims could create from both the defendants' and plaintiffs' perspectives. While some of these concerns are serious, others are overblown. And the types of claims that garner the most criticism—those filed by people who have not been exposed or injured—are actually the least problematic. Many of the real problems that the Field of Dreams creates can be addressed through private ordering and case management techniques that are within the existing powers of the MDL judge and do not require a radical overhaul of MDL procedures.

* Professor of Law, University of Texas School of Law. Thanks to David Adelman, Lynn Baker, Edith Beerdsen, Bob Bone, Andrew Bradt, Maureen Carroll, Zach Clopton, Jens Dammann, Mechelle Dickerson, Seth Endo, Nora Freeman Engstrom, Howie Erichson, Willy Forbath, Myriam Gilles, John Golden, William Hubbard, David Hyman, Samuel Issacharoff, Jason Itkin, Carolyn Kuhl, Jennifer Laurin, Rick Marcus, Susie Morse, Scott McCown, David Noll, Charlie Silver, Maya Steinitz, Todd Venook, Abe Wickelgren, Jay Westbrook, and Diego Zambrano for helpful comments.

Introduction

One of the most frequent complaints about federal multidistrict litigation (MDL) today—particularly in the mass tort context—is that it attracts large numbers of very weak or frivolous claims. This is commonly referred to as the "Field of Dreams" problem: "If you build it, they will come."[1] Once the Judicial Panel on Multidistrict Litigation (JPML) has centralized cases into an MDL, the story goes, plaintiffs' lawyers flood the proceeding with new claims that never would have been filed individually. And many (or even most, depending on the telling) of those claims are meritless because plaintiffs' lawyers lack the incentives to properly vet them before filing. Theirs is a volume business: collect as many claims as possible and then park them in the MDL in the hopes that they'll be swept into some global settlement without anyone ever looking closely at them. There are other villains in this story too: late-night TV lawyers, lead generators, claims aggregators, third-party litigation funders, and others whose business model is drumming up litigation, though exactly how they fit in is not always spelled out.

This is not a new phenomenon. Francis McGovern observed the elastic nature of mass torts decades ago.[2] And the Federal Rules Advisory Committee's Working Group on Mass Torts described the problem in its 1999 report to the Judicial Conference.[3] Much of the debate at that time, however, focused on the potential for an all-or-nothing judgment in a mass tort class action to exert unfair settlement pressure on defendants. Those sorts of mass tort class actions are largely a thing of the past.[4] The current

1. FIELD OF DREAMS (Universal Pictures 1989). The label is usually attributed to the late Francis McGovern. The actual line from the movie is "If you build it, *he* will come," though its frequent misquotation has (perhaps fittingly here) achieved almost mythical status.

2. *See* Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1033 (1995) (describing the elastic nature of mass torts as "the tendency of more plaintiffs to file suit as the case disposition rate increases and transaction costs decrease").

3. ADVISORY COMM. ON CIV. RULES AND THE WORKING GRP. ON MASS TORTS, REPORT ON MASS TORT LITIGATION 5 (1999).

4. *See, e.g.*, Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 388 (2005) ("At this point, courts and commentators appear to agree: the mass tort class action is dead as a doornail."); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 731 (2013) (recounting the decline of class

complaint is that by lowering the costs of litigation, MDLs themselves are attracting a flood of meritless litigation—and not just weak or low expected-value claims, but real garbage, like claims by plaintiffs who never even used the defendant's product or suffered any injury. Indeed, some defense-side interest groups have called this "the most pressing problem with MDLs."[5]

As MDLs have grown to make up an increasing share of the federal docket (more than 50% of pending civil cases by some estimates), there has been a recent push in Congress and in the Federal Rules Advisory Committee to adopt new MDL-specific rules to deal with the Field of Dreams problem through rigorous early vetting procedures and expanded interlocutory appeal.[6] And important scholarship by Nora Freeman Engstrom, Elizabeth Chamblee Burch, and others has started to focus on mechanisms for screening claims in MDLs, like so-called *Lone Pine* orders, plaintiff fact

actions more generally); *cf.* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 516 (2013) (recounting the paradigm shift from class actions to nonclass aggregate claims resolution).

5. Letter from Amy Sherry Fischer, President, Int'l Ass'n of Def. Couns., to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Prac. and Proc. (Oct. 30, 2019) (available at https://www.uscourts.gov/sites/default/files/19-cv-ee_suggestion_from_iadc_0.pdf) [https://perma.cc/A8KM-9RH2] ("The most pressing problem with MDLs is that they are filled with what can only be called 'junk' claims."); *see* Letter from Cory L. Andrews, Vice President of Litig., Washington Legal Found. to the Advisory Comm. on Civ. Rules, Comm. on Rules of Prac. and Proc. (Sept. 23, 2019) (available at https://www.wlf.org/wp-content/uploads/2019/09/In-re-MDL-Reform-Comments-23Sep21019.pdf) [https://perma.cc/PMR3-2TRC] ("Perhaps the greatest source of MDL inefficiency is the tendency to attract meritless claims.").

6. *See, e.g.*, Fairness in Class Action Litigation Act and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017) (proposing statutory changes to MDL procedures); MULTIDISTRICT LITIGATION SUBCOMMITTEE REPORT, *in* ADVISORY COMM. ON CIV. RULES 145–46 (2020), https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf [https://perma.cc/BQ3H-XSJZ] (describing proposals to address "what might be called the 'Field of Dreams' problem"); @Rules4MDL, TWITTER (Jan. 31, 2023, 4:09 PM), https://twitter.com/rules4mdls [https://perma.cc/B2QH-W8QS] (advocating for new Federal Rules of Civil Procedure applicable to MDLs); LAWS. FOR CIV. JUST., COMMENT TO THE ADVISORY COMMITTEE ON CIVIL RULES AND ITS MDL SUBCOMMITTEE: THE RULE 16.1 SKETCH AND THE MDL "RULES PROBLEM": HOW A PROMPT TO REQUIRE BASIC DUE DILIGENCE WOULD HELP FIRST-TIME MDL JUDGES MANAGE NEW PROCEDURES AND AVOID COMMON PITFALLS 1–2 (2022), https://www.uscourts.gov/sites/default/files/22-cv-t_suggestion_from_lcj_-_rule_16_0.pdf [https://perma.cc/K6HF-C8UA] (providing suggestions for revising Federal Rule of Civil Procedure 16.1 to combat unsupportable MDL claims).

sheets, and case census orders.[7] But the underlying Field of Dreams problem in modern MDL has been the subject of only limited academic scrutiny.[8]

My goal in this Article is to consider two questions, one empirical and one normative. First, does the Field of Dreams phenomenon actually happen? And second, assuming that it does, is it actually a *problem*? The short answers are: (1) probably and (2) it depends, but maybe not as big a problem as you might think.

I. Does the Field of Dreams Phenomenon Happen?

I won't keep you in suspense. I can't answer this empirical question with any confidence—but neither can anyone else who has tried.

In their submissions before Congress and the Rules Committee, defense-side interests routinely assert that 30–40% of claims in mass tort MDLs are frivolous (e.g., filed by people who have not been injured, who never used the drug or product at issue, or who have duplicative claims).[9] But however often it is repeated, this number has very little empirical evidence backing it up. It appears to be derived by dividing the number of claimants who were paid in the *Vioxx* settlement by the total number of claims filed in the *Vioxx* litigation.[10] It doesn't take a Ph.D. in statistics to see why it is not valid to extrapolate from a single litigation to the entire field of mass tort

7. *E.g.*, Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 YALE L.J. 2, 22–25 (2019); Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation*, 129 YALE L.J. F. 64, 64–65 (2019); MARGARET S. WILLIAMS, EMERY G. LEE III & JASON A. CANTONE, FED. JUD, CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008–2018 3 (2019), https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf [https://perma.cc/VAZ9-BGTC]; Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 349–50 (2014).

8. Excepting, of course, Nora Freeman Engstrom and Todd Venook's excellent contribution to this symposium, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEXAS L. REV. 1623 (2023). Other exceptions include: Jeff Lingwall, Issac Ison & Chris Wray, *The Imitation Game: Structural Asymmetry in Multidistrict Litigation*, 87 MISS. L.J. 131, 133 (2018) (focusing on duplicative claims); S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEM. L. REV. 559, 562 (2012) (focusing on asbestos and fen-phen settlements); Dodge, *supra* note 7, at 347–50 (explaining why some plaintiffs' lawyers in MDLs may file claims without investigating them).

9. *See, e.g.*, LAWS. FOR CIV. JUST., REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES: RULES FOR "ALL CIVIL ACTIONS AND PROCEEDINGS": A CALL TO BRING CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS BACK WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE 4 (2017), https://www.uscourts.gov/sites/default/files/17-cv-rrrrr-suggestion_lcj_0.pdf [https://perma.cc/PS4U-UQ4T] ("MDL cases are notoriously characterized by a very high number of meritless claims. By one estimate, approximately 30 to 40 percent of plaintiffs' claims are dismissed at the settlement stage."). Lawyers for Civil Justice, in turn, cites Malini Moorthy, *Gumming Up the Works: Multi-Plaintiff Mass Torts*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 1, 2016), https://instituteforlegalreform.com/video/gumming-up-the-works-multi-plaintiff-mass-torts/ [https://perma.cc/S4FM-A9MF] (asserting 30–40% figure with no data to support it).

10. John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *MDL Proceedings: Eliminating the Chaff*, U.S. CHAMBER INST. FOR LEGAL REFORM, Oct. 2015, at 11–12.

MDLs or why claims that are not ultimately paid in a settlement are not a valid proxy for claims that were frivolous at the outset of the litigation. I am not aware of any serious empirical study of the number of meritless claims in MDLs.

Defense-side interests also point to voluntary dismissals of bellwether cases before trial as evidence that lots of junk claims are pending in MDLs: "For example, if half of the claims randomly selected for trial are dismissed before trial, that result would strongly suggest that the total claims number is misleading—that the litigation is not nearly as substantial as those numbers may suggest."[11] Judges sometimes note this phenomenon as well.[12] But it is easy to overread voluntary dismissals. Not all cases that are voluntarily dismissed lack merit. As repeat players with many cases in the MDL, lead plaintiffs' lawyers want to put their best foot forward in bellwether trials, knowing that the results will send a signal about the value of the remaining cases. Just as repeat-player defendants will overpay to settle strong cases selected for bellwether treatment, repeat-player plaintiffs' lawyers, fearing the spillover effects of a loss, have incentives to dismiss even cases that they could in good faith take to trial.[13] So we cannot necessarily infer from bellwether dismissals that the remaining cases are devoid of merit any more than we can infer from bellwether settlements that the remaining cases are a slam dunk.

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11. JOHN H. BEISNER & JESSICA D. MILLER, WASHINGTON LEGAL FOUND., LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED 27 (2009).

12. *See, e.g.*, *In re* Fosamax Prods. Liab. Litig., No. 06-MD-1789, 2012 WL 5877418, at *3 (S.D.N.Y. Nov. 20, 2012) ("[T]he Court has reason to believe that spurious or meritless cases are lurking in the some 1,000 cases on the MDL docket" because "more than 50% of the cases set for trial have been dismissed, and some 31% of cases that have been selected for discovery have been dismissed . . . after both parties have expended time and money on case-specific discovery."); *see also* Pretrial Order #59 at 1, *In re* Cook Med., Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. MDL 2440, 2015 WL 3385719, at *1 (S.D. W. Va. May 19, 2015) (abandoning the bellwether process after plaintiffs voluntarily dismissed all four cases selected for trial and twenty-four of the thirty cases in the bellwether discovery pool and plaintiffs' counsel moved to withdraw in four of the remaining cases rather than answer summary judgment motions).

13. *See generally*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 100 (1974) (noting that repeat players "play for rules" over the entire series of cases instead of focusing on the outcome of a single case). Their one-shotter clients may prefer to roll the dice at trial rather than take nothing at all with a voluntary dismissal. 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, 107–08 (2019). But even if they cannot ethically pay their clients to drop their cases, lawyers may find other mechanisms to take care of them, such as high–low agreements or dismissals without prejudice followed by referrals to other plaintiffs' lawyers for inclusion in any aggregate settlement that might later emerge.

Still, no one involved in MDLs on either the plaintiff or defense side seems to doubt that the flow of relatively weak claims into MDLs is a real phenomenon.[14] As one MDL judge explained:

> [B]ased on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.[15]

And the economic intuition behind the Field of Dreams phenomenon is easy to understand: if you lower barriers to entry in litigation, more people will enter.

MDL significantly lowers barriers to entry for mass tort claims. By consolidating similar cases filed all over the country in front of a single judge for coordinated pretrial proceedings, MDL creates huge efficiencies for parties and courts. And MDL allows plaintiffs and their lawyers to take advantage of economies of scale. The marginal cost of filing another tagalong claim in an MDL is much lower than the cost of filing an individual lawsuit that will be litigated on its own.[16] So it is no surprise that once an MDL has

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14. *See, e.g.*, Perry Cooper, *Defendants' Gripes with MDLs, and What to Do About Them*, BLOOMBERG L. (Oct. 26, 2017), https://www.bloomberglaw.com/bloomberglawnews/class-action/X4RSHHK000000?bna_news_filter=class-action#jcite [https://perma.cc/ERZ5-JLXK] (quoting leading plaintiffs' attorney Chris Seeger as agreeing "that cases that truly have no merit are a real problem in MDLs"). Engstrom and Venook catalog several examples of MDLs that appeared to contain large numbers of meritless claims, including *Silica*, *Diet Drugs*, *Vioxx*, *Deepwater Horizon*, *Fosamax*, *Digitek*, *Abilify*, *Zostavax*, and *3M*. Engstrom & Venook, *supra* note 8, at 9–11.

15. *In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., No. 4:08-MD-2004, 2016 WL 4705807, at *2 (M.D. Ga. Sept. 7, 2016). Judge Land lamented the time he had spent "deciding summary judgment motions when plaintiff's counsel should have known that no good faith basis existed for pursuing the claim to the summary judgment stage" because the statute of limitations had run, the plaintiff had no specific causation expert, or the plaintiff did not respond to the motion. *Id.* at *1. Other judges have made similar observations. *See, e.g.*, *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1225–26 (9th Cir. 2006) (quoting Judge Rothstein's status conference) ("[T]he time has come to figure out which of these cases are real and which of them aren't.").

16. This phenomenon is not unique to MDLs. Any mass consolidation of claims offers economies of scale, and the plaintiffs' bar can and does achieve at least some degree of economy by informally aggregating cases outside of any formal procedure. *E.g.*, Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–87 (2000). Indeed, the Chamber of Commerce has raised strikingly similar complaints about the recent trend towards mass arbitration—that high percentages of claims are filed on behalf of claimants who "had never purchased the product or service at issue . . . or otherwise never suffered the injury alleged." Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett & Carmen Longoria-Green, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, Feb. 2023, at 37. But MDLs are high profile and where most of the action (and controversy) is today. And MDLs have features that may lower marginal costs more than informal aggregation or other procedures, such as nationwide

been created, additional claims enter the system. And on the whole, it seems safe to assume that many of these claims will have lower expected values than claims that would have been filed in the absence of an MDL or some other form of aggregate proceeding.

It's worth noting that many of these new claims may not even be formally filed in court. It is not uncommon in mass tort litigation for defendants to enter tolling agreements with plaintiffs' firms under which they agree to toll the statute of limitations for claimants who have retained lawyers but not yet filed suit. Tolling agreements save plaintiffs (and their lawyers) the cost of filing fees, and they shield defendants from the negative publicity of mass filings. Many claims (sometimes orders of magnitude more than the number of suits actually filed)[17] therefore end up sitting on MDL's "shadow docket."[18] The parties know about them, but they are largely invisible to the public. Presumably defendants require claimants to make some threshold showing of claim validity in exchange for tolling the statute of limitations.[19] This requirement may force claimants with relatively weaker claims to go ahead and file them in court, feeding the narrative that MDLs are full of garbage claims.

Plaintiffs' lawyers' incentives may also contribute to weaker claims flowing into the system. Once an MDL is up and running, there is, from the lawyer's perspective, little downside to adding more claims and some potential upside. If there are more potential plaintiffs out there—and the cost of adding new claims is essentially fixed—the more claims a lawyer brings, the more money that lawyer stands to make in contingency fees.[20] Having a

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reach and an inability to opt out of pretrial coordination. *See* Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1718 (2017) (explaining how MDLs are efficient for all involved parties).

17. In the *Zantac* litigation, for example, fewer than 2,500 cases were filed in the MDL, while a case census order revealed more than 150,000 unfiled claims listed on the court's registry. *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, 2022 WL 17480906, at *6 (S.D. Fla. Dec. 6, 2022). In the *Roundup* litigation, a "few thousand cases" were filed in the MDL, while "tens of thousands" remained in state court and "many more" waited in the wings unfiled, for a total of "well over a hundred thousand cases" filed or "in the works." *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 953 (N.D. Cal. 2021).

18. I borrow this term from STEVEN VLADECK, THE SHADOW DOCKET (2023).

19. Tolling agreements are not widely publicly available, but to enter the unfiled claims registry in *Zantac* (and thus benefit from the defendant's agreement to toll the statute of limitations), claimants had to fill out a "Case Census Plus" form providing, under penalty of perjury, certain information about drug use and injury. Pretrial Order #15, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, 2020 WL 1640021, at *4, exhibit B (S.D. Fla. Apr. 2, 2020).

20. *See, e.g.*, Engstrom, *supra* note 7, at 31–32 (contrasting the usual incentives of plaintiffs' lawyers, who bear risk under contingent fee arrangements, to carefully screen claims with MDL lawyers' desire to amass as many claims as possible); McGovern, *supra* note 2, at 1026 (same); Lingwall et al., *supra* note 8, at 181–83 (same); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1045 (1993) (same).

bigger "inventory" of claims can make a lawyer a bigger player in the MDL and may increase that lawyer's chances of being appointed to a leadership or steering committee position (a role that typically comes with additional common-benefit fees).[21] Adding more claims imposes more costs on the defendant (sort of the inverse of a "scorched earth" defense strategy). Carefully screening claims for quality when signing up clients is costly, so a lawyer who thinks there is a chance that weak claims will get paid in an eventual settlement is better off filing them.[22] And precisely because valuing claims can be costly, defendants may sometimes be willing to pay a nuisance value in a global settlement to get rid of even very weak claims.[23]

Structural features of MDL can also contribute to this phenomenon. If the MDL judge focuses on discovery and motions relating to common issues first, leaving individual issues until later in the litigation (or for the transferor judges on remand)—a perfectly understandable strategy for managing a mass of cases—then weak or meritless cases may go untested until late in the game. And the litigation may settle before any such testing occurs, especially if the MDL judge, facing a massive influx of claims, encourages global settlement.

So, while it is difficult to get a handle on the magnitude of the phenomenon, it is quite plausible that MDLs bring more claims into the litigation system and that, on average, those claims will tend to have lower

21. *See, e.g.*, RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 224 (2007) (explaining that the number of claims a firm has on file or ready to be filed in the tort system will "determine its place at the negotiating table" and "enhance its influence" over committees of plaintiffs' lawyers handling MDL pretrial proceedings); *cf.* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 161 (2010) (recommending a default rule that MDL leadership positions go to the lawyers with the most valuable client inventory). MDL judges can reduce plaintiffs' lawyers' incentives to pad their inventories with meritless claims by not using inventory size as a criterion for selecting lead lawyers.

22. *See* Engstrom, *supra* note 7, at 31 (explaining that in mass tort litigation, fixed costs and rewards dependent on claim volume reduce lawyers' incentives to carefully screen claims). The way the referral market works on the plaintiffs' side of mass torts can sometimes make it hard for plaintiffs' lawyers to screen their claims, even if they want to. So-called lead generators run a volume business. They advertise for claims, do little screening on intake, and then refer their inventories to other lawyers as an all-or-nothing bundle. The lawyers on the receiving end have to take the chaff if they want any of the wheat. *See, e.g.*, Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG BUSINESSWEEK (Dec. 12, 2013, 9:41 PM), https://www.bloomberg.com/news/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale [https://perma.cc/DTX4-TNXW] (describing how one lead generator finds plaintiffs and funnels them to attorneys).

23. *See, e.g.*, Sullivan v. DB Invs., Inc., 667 F.3d 273, 310–11 (3d Cir. 2011) (holding that settlement to avoid litigation with all potential plaintiffs, regardless of the merits of their claims, is a "valid, and valuable, incentive to class action settlements"); *see also* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEXAS L. REV. 1165, 1168 (2020) ("When hundreds or thousands of claimants are included in the settlement, this process of determining each claimant's settlement offer value will be time-consuming and expensive.").

expected values than claims that would have been filed in the absence of an MDL. The more difficult question is whether there is anything wrong with that. It is to that question that I now turn.

II. Is the MDL Field of Dreams a Problem?

What are the normative implications of the flow of relatively weaker claims into MDLs?

As a preliminary matter, the mere fact that MDLs lead to more claims being brought cannot be a problem on its own. Additional litigation isn't necessarily bad; in fact, it may be good.[24] Some of those claims may be meritorious, but the plaintiffs might not have known about the availability of relief until they saw an MDL lawyer's advertisement. Or the claims might have been too expensive to bring individually because of the need for expensive expert testimony or the like. Just because a claim has a negative expected value doesn't mean that it is meritless.[25] And it is not obvious why defendants should be entitled to benefit from the costs of litigating such claims on an individual basis.[26]

In that sense, the Field of Dreams "problem" might be an example of MDL's success in increasing the efficiency of litigation. It's like the old adage that building a superhighway will lead to traffic because more drivers will use it.[27] But traffic hardly means that the highway was a failure. If we lower the cost of suing by increasing the efficiency of litigation, more people can and will sue. So, if we think that courts serve some salutary function in civil litigation, then we should want more people to be able to use them. There may be traffic on the superhighway, but it's getting more people where they need to go.

While not all of the additional claims enabled by MDL will be frivolous, neither will they all be winners. Instead, the strength of the additional claims will fall on a spectrum:

- Some will be strong claims where the plaintiffs were unaware of the availability of relief until the MDL was formed.

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24. *See generally* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION (2017) (arguing that litigation is essential to protecting democracy).

25. Indeed, science-heavy drug defect claims can cost upwards of $250,000 to litigate to trial. Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017).

26. *See* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. 475, 522–27 (2016) (discussing whether individual or aggregate litigation is the appropriate baseline for measuring substantive legal entitlements). When claims must be litigated individually, the practical result may be that they are not litigated at all, undermining both the compensation and deterrence rationales for litigation. *E.g.*, Gilles, *supra* note 4, at 378.

27. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEXAS L. REV. 1821, 1840 (1995) ("If you build a super-highway, there will be a traffic jam.").

- Some will be meritorious claims that would have been too expensive to litigate individually.
- Some claims will ultimately turn out to be losers, but—due to factual or legal uncertainty resolved during the litigation—were not frivolous at the time they were brought.
- Some claims will be frivolous (or even fraudulent), like plaintiffs who aren't really injured, whose claims are barred by the statute of limitations, or who didn't even use the product or weren't exposed to the conduct that is the subject of the litigation.[28]
- And some claims may fall into a grey area—claims by people who really are hurt and where the defendant really did something bad, but for whom current law (or science) offers no recourse because they cannot prove that the defendant's conduct caused their specific injuries.

As noted above, claims that are only brought into existence because of an MDL are, on average, likely to have lower expected values than claims that would have been brought individually. But it is difficult to know where on the spectrum the bulk of these claims fall, and the data that defense-side interests have presented to the Rules Committee tell us very little.

Let us assume, then, that at least some significant portion of these claims are meritless or even frivolous. That is, after all, defendants' central complaint about the Field of Dreams: putting aside contested legal theories or difficult scientific questions about causation, MDL attracts large numbers of claims where the plaintiffs were not even exposed or injured. Assuming that is true, what is wrong with parking a bunch of garbage claims in an MDL while the meritorious ones are litigated?

Maybe nothing. If the claims are really meritless, the plaintiffs will never win them, and the defendant can refuse to settle them. There is, of course, the added cost to courts and parties of litigating additional lawsuits. But just as the efficiencies of MDL reduce the plaintiffs' marginal costs in

28. Here I adopt Robert Bone's definition of a frivolous lawsuit: "A suit is frivolous (1) when a plaintiff files knowing facts that establish complete (or virtually complete) absence of merit as an objective matter on the legal theories alleged, or (2) when a plaintiff files without conducting a reasonable investigation which, if conducted, would place the suit in prong (1)." Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 533 (1997). Mass tort MDLs have included both types of suits that Bone labels as frivolous. There have been several instances, particularly in mass torts alleging injuries that are difficult to diagnose or verify like silicosis or asbestosis, where some lawyers worked with unscrupulous doctors to produce fake medical diagnoses. *See, e.g.*, *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 635–36 (S.D. Tex. 2005) (finding that lawyers knowingly fabricated silicosis claims); *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F. Supp. 2d 442, 476 (E.D. Pa. 2008) (describing how attorneys ran echocardiogram "mills" to create fake diagnoses). The more common complaint today is not that plaintiffs' lawyers knowingly file fraudulent claims, but that they file claims in MDLs without doing any investigation at all and thus do not know whether their clients suffered cognizable injuries.

bringing new claims, those efficiencies also reduce the marginal costs to defendants in opposing them and to courts in adjudicating them.[29] Plus, modern MDL practice already includes several procedures to identify and screen out weak claims.[30] For example, MDL judges routinely require plaintiffs to fill out fact sheets that identify the bases for their claims and the nature of their injuries.[31] Judges may impose *Lone Pine* orders that require plaintiffs to come forward with evidence of causation on pain of dismissal.[32] And some MDL judges have experimented with case census orders to obtain basic information about plaintiffs' claims even earlier in the process. None of this is costless, to be sure. But for the litigation costs of frivolous claims to be a real problem, we'd have to conclude that those costs exceed the benefits of enabling meritorious claims.

The presence of numerous frivolous claims in MDL could be troubling if the frivolous claims resulted in unjustified wealth transfers—that is, if they

29. Additionally, many of the costs associated with litigating weak or frivolous claims can be deferred while the MDL judge and parties focus on common issues and strong claims first. Claims that just sit on the MDL docket waiting their turn don't impose much in the way of litigation costs on the defendant or court while they wait.

30. *See* Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, 107 KY. L.J. 467, 476–77 (2018) (cataloging formal and informal methods for screening claims).

31. *See* WILLIAMS ET AL., *supra* note 7, at 1 (noting that between 2008 and 2018, fact sheets were used in 87% of MDLs with more than 1,000 actions). Engstrom and Venook acknowledge that simple fact sheets are largely successful at weeding out nonmeritorious claims, but they argue that fact sheets do too little to deter the filing of such claims because "[t]hey do nothing to recalibrate broader incentives." Engstrom & Venook, *supra* note 8, at 1638. I question this conclusion. If plaintiffs' lawyers get the message that junk claims will be dismissed at the fact-sheet stage instead of paid a nuisance value in settlement, their incentives to file such claims will go down.

32. Professor Engstrom has argued that *Lone Pine* orders go too far in the other direction and offer an end run around Rule 56's safeguards for summary judgment. Engstrom, *supra* note 7, at 43–44. While I agree that fact sheets are usually better tools for weeding out meritless claims, I'm not convinced that *Lone Pine* orders are inconsistent with Rule 56. A summary judgment motion can be made at any time until 30 days after the close of discovery and triggers a significant production burden on a nonmoving party who will bear the burden of proof at trial (i.e., a typical plaintiff). *See* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (noting that the nonmoving party must go beyond the pleadings and provide affidavits, depositions, or answers to interrogatories); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 83 (1990) (explaining that *Celotex* places "the burden of production upon the nonmovant to come forward with evidence of the full range of facts in dispute"); D. Theodore Rave, Note, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 880–81 (2006) (stating that under *Celotex*, "the production burden on a defendant-movant is very low," while "the burden on the nonmovant who will bear the burden of proof at trial (a typical plaintiff) is very high"). Further, Rule 56(f) authorizes the court, after giving notice and a reasonable time to respond, to enter summary judgment sua sponte. Fed. R. Civ. P. 56(f). Although courts often characterize *Lone Pine* orders as case management orders under Rule 16(f)(1)(C), they could easily be recast as sua sponte summary judgment orders under Rule 56(f) without changing their basic screening function. Two important consequences would flow from such a recharacterization: (1) plaintiffs should be allowed to answer *Lone Pine* orders with affidavits under Rule 56(d) showing good cause why they need more time to take discovery, and (2) appellate courts should review *Lone Pine* dismissals de novo instead of for abuse of discretion. On this point, I agree with Engstrom.

induced defendants to settle with plaintiffs who had no legal entitlement to recover.[33] But defendants need not settle these claims. Plaintiffs with frivolous claims have little leverage in settlement negotiations because, by definition, they cannot win at trial. And the strategy of filing frivolous claims to extract nuisance-value settlements doesn't work if the defendant is a repeat player that invests in developing a reputation for fighting.[34] While MDL defendants often prefer to settle claims en masse, they can—and do—build filters into any aggregate settlements they negotiate by including stringent claims criteria that plaintiffs have to satisfy to be eligible for a payment.

Still, critics of MDL insist that the Field of Dreams is a problem—perhaps the single biggest problem with MDL today—and point to it in support of proposed reforms.[35] So below I identify several potential normative concerns for defendants and plaintiffs and offer some preliminary thoughts on each.

A. Problems for Defendants

1. Settlement Pressure.—Defendants often argue that the mass influx of cases into an MDL unfairly pressures the defendant, who cannot afford to risk firm-threatening liability, to settle before the merits of those claims can be tested.[36] But this argument had more force in the class action context, where a single loss at trial could result in massive liability to the entire class.[37] Even when the plaintiffs' claims are very weak, a risk-averse defendant "may

33. These sorts of unjustified wealth transfers are obviously a problem on rights-based grounds (though on the same grounds, it is also a problem when meritorious claims are not paid because litigation costs are too high). They could also be a problem on utilitarian grounds if they occurred frequently enough to distort *ex ante* incentives. Bone, *supra* note 28, at 577–78.

34. *See id.* at 540 ("By litigating instead of settling the first few frivolous suits, a repeat-player defendant can build a reputation for fighting. Once established, this reputation will signal other frivolous plaintiffs not to expect a settlement, and so they will not sue.").

35. *See supra* notes 5–6 and accompanying text (discussing the push for MDL reform).

36. *See, e.g.*, LAWS. FOR CIV. JUST., *supra* note 9, at 5 (stating that one of the main purposes of reducing non-meritorious claims is to prevent coercing settlement); Beisner et al., *supra* note 10, at 13 (citing Mark Moller, *The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform*, 28 HARV. J.L. & PUB. POL'Y 855, 883 (2005)) (discussing the emphasis on settlement); Lingwall et al., *supra* note 8, at 182 ("[T]he sheer number of plaintiffs may provide pressure to settle."); Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 587 (2008) ("In addition to simply boosting the total damage award, the addition of a fraudulent claim also enhances the likelihood of settlement. If the defendant faces the risk of an enormous judgment representing the claims of thousands of plaintiffs, it will feel great pressure to settle in order to avoid a bankrupting damages judgment.").

37. Charles Silver has argued that this sort of settlement pressure does not raise significant normative concerns in the class action context either. Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 NYU L. REV. 1357, 1359–60 (2003). But even if you don't buy Silver's argument, the problem is not present in the typical mass tort MDL.

not wish to roll th[o]se dice."[38] Instead, it may settle at a premium to avoid the (admittedly small) chance of a catastrophic loss at a class action trial.

But unless a class action is certified for litigation purposes within the MDL (a rarity in mass tort cases), there is no all-or-nothing moment when the defendant can lose to all of the plaintiffs. To the contrary, the MDL judge will have to remand most of the cases back to the districts where they were originally filed before plaintiffs can prevail in their trials.[39]

A different and more subtle form of settlement pressure might be present in MDLs. If an MDL proceeding becomes so large that it turns into an unmanageable "black hole" where the parties cannot get to trial, then the defendant might be coerced into settlement to avoid endless and expensive litigation.[40] This could be a problem if the sheer size and duration of the litigation effectively denies defendants their day in court.[41]

I am, however, skeptical that even large and slow MDLs inundated with weak claims are coercing defendants in this manner. First, it is not clear that delay hurts defendants more than it helps them. Typically, in litigation, it is

38. *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).

39. *See* Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998) (citing 28 U.S.C. § 1407(a)). An MDL defendant can, however, *win* against all plaintiffs in one fell swoop if the MDL judge grants summary judgment on a common issue (such as preemption or general causation) that applies to all plaintiffs' claims. *See, e.g.*, *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, 2022 WL 17480906, at *167–68 (S.D. Fla. Dec. 6, 2022) (granting summary judgment in all cases after excluding plaintiffs' general causation expert under *Daubert*); Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 KAN. L. REV. 219, 232–39 (2017) (collecting other examples of MDL courts granting summary judgment). Given this opportunity to win big (without the risk of losing big), defendants may actually *benefit* from an MDL Field of Dreams, as plaintiffs who have not filed suit in the MDL (or who are sitting on tolling agreements) will not be bound by the preclusive effect of the MDL court's judgment. *See* Home Depot USA, Inc. v. LaFarge N. Am., Inc., 59 F.4th 55, 64 (3d Cir. 2023) ("[An MDL judge] does not have the authority to create special rules to bind plaintiffs by the findings of previous proceedings in which they were not parties, even by a proceeding as thorough as the multidistrict common issue trial.") (cleaned up).

40. This argument resembles Milton Handler's critique of class actions. Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8–9 (1971).

41. *See* Silver, *supra* note 37, at 1392–93 (discussing the argument that certification of class actions can cause defendants to lose their day in court). It could also be a problem if the MDL judge unfairly manages the case to coerce defendants into settling. I use the terms *unfairly* and *coerce* advisedly here. I do not consider it unfair or coercive for MDL judges to set aggressive discovery or deposition schedules, to target discovery on defendant-specific issues before plaintiff-specific ones, to delay ruling on motions that defendants want decided, to schedule early bellwether trials, to order the parties to mediation, to take other steps to move the litigation along with an eye towards settlement, or to encourage settlement generally. But some judges may go too far. *See* Brown, *supra* note 8, at 567–69 (describing practices by judges in Madison County asbestos cases of "rejecting requests for more definitive statements or discovery defendants needed to prepare for trial effectively, limiting the defense case for trivial discovery oversights, and forcing defendants to prepare for multiple trials on the same day while allowing the plaintiff to choose which one would proceed when that day arrived"). MDL judges should remain scrupulously neutral between the parties.

plaintiffs (who want the money), not defendants (who already have it), who are in a hurry to get to trial.

Second, much of this concern can be dealt with through effective case management techniques. Plaintiff fact sheets and targeted discovery can identify strong and weak claims, and summary judgment, *Lone Pine* orders, and informal negotiation can weed out the duds.[42] For the remaining claims, increased use of remands for trial (which defendants often oppose) can speed the time to adjudication.[43]

Third, it is not clear that the pressure created by delay is significantly worsened by the presence of meritless claims in the mix alongside meritorious ones. It might be a different story if the entire MDL were made up of meritless claims. That would allow plaintiffs with no entitlement to relief to unilaterally impose significant litigation costs on the defendant. But such an MDL is unlikely to have a very long half-life. Indeed, MDL aggregation can stop the development of a mass tort in its tracks just as easily as it can start it. Consider the *Silica* litigation, which was touted in the early 2000s as the "next asbestos," but was "essentially over" just two years after thousands of questionable claims were transferred into an MDL and subjected to Judge Jack's fact sheets, *Daubert* hearing, and summary judgment.[44]

In the more typical Field of Dreams situation, the defendant will already be facing the expense and delay of contesting many potentially meritorious claims. Meritless claims also sitting in the queue seem unlikely to change the dynamic fundamentally. Defendants can refuse to settle claims that lack merit. They need not settle with all plaintiffs at once or on the same terms.[45] Separating wheat from chaff may come with costs of its own and might delay

42. *See* Smith, *supra* note 30, at 470 (describing formal and informal mechanisms used to screen claims).

43. *See* D. Theodore Rave & Francis E. McGovern, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW AND CONTEMP. PROBS., no. 2, 2021, at 21, 22–23 (explaining the function of remand in the hub-and-spoke model of MDL).

44. Brown, *supra* note 8, at 579–80 (quoting Martha Sharp, *Silica: The Next Asbestos?*, 3 ENFORCE: INS. POL'Y ENFORCEMENT J., no. 3, 2004, at 5, 6 and STEPHEN J. CARROLL, LLOYD DIXON, JAMES M. ANDERSON, THOR HOGAN & ELIZABETH M. SLOSS, RAND INST. FOR CIV. JUST., THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA ix (2009)).

45. Defendants frequently find it beneficial to settle with all plaintiffs at once in a single global settlement, but it is the desire to avoid adverse selection and the costs of valuation (which I return to below) that induce defendants to pay a premium for peace, not some interminable mass of meritless cases. *See* D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1193–94 (2013) (examining several ways that comprehensive settlement creates value for defendants); *see also* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 747–49, 760–61 (1997) (explaining the advantages of group-wide settlements for defendants).

settlement until the sorting is done, but that's not the same as coercing the defendants into settlement by denying them adjudication.

2. Anchoring Effect.—Another potential problem with a massive influx of meritless claims into an MDL is that it may create a perception of wrongdoing where there was none. Observers will assume that when one person brings a crazy claim, there must be something wrong with the plaintiff; when 1,000 people bring crazy claims, there must be something wrong with the defendant.[46] This may manifest within the litigation by shaping the perception of judges and jurors, or it may manifest outside of the litigation by creating a public relations problem for the defendant, triggering accounting or securities reporting requirements, or attracting regulatory scrutiny.[47] If these effects are driven primarily by the number of claims filed instead of their underlying merit, the Field of Dreams problem could hamper an innocent defendant's business operations or pressure the defendant to settle to end the public relations debacle.

It is not clear whether the sheer number of claims drives public perception more than the underlying merits of the litigation. High profile events like jury awards, product recalls, or government investigations may be more important. Nor is it clear that a mass tort litigation would get off the ground without at least some subset of claims that has real promise.[48] But it is at least plausible that the number of claims affects the perception of parties, judges, and the public. The effect on parties may be self-reinforcing, particularly if the defendant's solvency is in doubt, as plaintiffs rush to get their claims on file before they miss out.[49] And it may distort the parties' incentives to invest in the litigation, as the scale and apparent stakes go up. But the effects on perception may also be dynamic. Early filings send a signal about the potential for recovery, but if that triggers an avalanche of claims,

46. Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, LITIG., Summer 1998, at 43, 45.

47. *See* Lingwall et al., *supra* note 8, at 151–58, 164–66 (discussing loss contingency accounting and reporting requirements for mass tort defendants).

48. *See* McGovern, *supra* note 2, at 1023–24 (describing the life cycle of a mass tort); *but cf.* David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 460–61 (1999) (reviewing MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996)) (describing how phantom risk claims can form the initial basis of mass litigation). Bernstein (and Angell) point to the breast implant litigation as an example of the tort system being overrun with cases alleging phantom risks. Note, however, that filings on a massive scale and formation of an MDL did not occur until after Dow Corning had lost several jury trials, damaging internal documents had been made public, and the FDA had announced a moratorium on implant sales. *Id.* at 474–75, 477, 484–85.

49. *See* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1726 (2002) (describing how a tragedy of the commons can develop when plaintiffs fear that the defendant's assets are scarce).

the signaling value of new claims goes down, and courts and the public (or at least sophisticated observers like investors) may begin to discount it.

For all their yelling and screaming about the Field of Dreams problem, however, defendants often take steps to facilitate the collection of cases in MDLs. They frequently remove cases filed in state court and ask the JPML to transfer them to the MDL. And defendants sometimes enter direct filing stipulations to make it easier for plaintiffs to file claims directly in the MDL forum without the initial step of filing in some other district first and seeking transfer.[50] These actions suggest that for many defendants, the negative perception generated by MDL aggregation does not outweigh its benefits.

Defendants who are really concerned about the anchoring effect of large numbers of cases have tools to keep claims off the MDL docket and out of the public eye. They can—and often do—enter tolling agreements with plaintiffs' firms to keep their clients' cases from being filed.[51] Indeed, the oft-touted (and seemingly ever increasing) percentage of federal cases pending in MDLs may vastly *understate* the number of mass tort claims out there.[52] Plus, the defendant may have another way out besides settlement: win some trials (or, if the claims are really weak, some summary judgment motions) and the litigation will dry up, as it did in *Silica*.[53]

3. Shifting Costs of Valuation.—Funneling weak claims into an MDL shifts some of the cost of valuing claims from plaintiffs' lawyers to defendants and the courts.[54] Of course, much of the litigation process (from pleading and discovery on through trial) is designed to help the parties put a

50. *See* Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 763 (2012) ("[A]t courts' encouragement, defendants agree to allow plaintiffs to file their cases directly into the MDL court.").

51. *See supra* note 17 and accompanying text.

52. The latest figure touted by Lawyers for Civil Justice is that 70% of pending federal civil cases (excluding social security and prisoner cases) are part of an MDL, up from about 40% just a few years ago. Laws. for Civ. Just., *MDL Case as a Percentage of Federal Civil Caseload*, RULES 4 MDLS, https://www.rules4mdls.com/_files/ugd/6c49d6_3014148f902a47bdac63d404cb3ab40c.pdf [https://perma.cc/GHE5-B785]. This growth is driven almost entirely by one MDL, the *3M Combat Earplugs* litigation, which includes more than 290,000 claims. *See* Engstrom & Venook, *supra* note 8, at 11. To put that in perspective, the *Zantac* and *Roundup* litigations each had over 100,000 unfiled claims sitting on tolling agreements, with only a few thousand filed in each MDL. *See supra* note 17 and accompanying text.

53. *See supra* note 44 and accompanying text.

54. *See, e.g.*, Lingwall et al., *supra* note 8, at 175–76, 183 (stating that the asymmetric structure of an MDL provides plaintiff's attorneys little incentive to screen their cases, which then puts the burden of screening on defendants and the courts); LAWS. FOR CIV. JUST., MDL PRACTICE AND THE NEED FOR FRCP AMENDMENTS: PROPOSAL FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES 1–2 (2018), https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl__tplf_proposals_for_discussion_9-14-18__004_.pdf [https://perma.cc/Y5XD-3C4V] (explaining that plaintiff fact sheets shift the cost of vetting claims to defendants and the courts who have to review them for basic information and point out errors to plaintiffs).

dollar value on a claim, and there is no *a priori* reason why plaintiffs should bear the bulk of the cost of that valuation. But the pleading and ethical rules do place an obligation on plaintiffs' lawyers to screen out meritless claims before filing.[55] When they fail to do so, some costs are shifted to the defendant and court. Defendants need not settle these claims, of course, but valuation of claims through litigation can be costly, and defendants can avoid or reduce those costs through settlements that substitute approximate values for judicially determined ones.

This potential for settlement creates a moral hazard. Mass tort plaintiffs will often have asymmetric information: they know, for example, whether they've used the defendant's product and really been injured, while the defendant may not.[56] And even if they haven't been injured by the defendant, some plaintiffs may file a claim anyway to impose valuation costs on the defendant and try to extract a settlement.[57] How concerned we should be about this depends on how much valuation costs.

If the cost of distinguishing between a frivolous and meritorious claim is low, then defendants will not face much pressure to settle frivolous cases. If, for example, a frivolous claim can be identified through a simple inquiry into whether the plaintiff used the product at issue and suffered the alleged injury or whether the statute of limitations has run or the plaintiff has filed duplicative claims, the defendant will never pay anything to settle that claim. Even if the MDL judge did not adopt a plaintiff fact sheet that screened such claims out, defendants can—and routinely do—build into their settlements claims-eligibility criteria that require plaintiffs to show that they have valid claims before receiving any payments.[58]

When the costs of valuation are low, it does not take much investment for the defendant to overcome plaintiffs' informational advantage and

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55. *E.g.*, FED. R. CIV. P. 11.

56. Bone, *supra* note 28, at 542. This will not always be the case. In prescription drug cases, for example, the defendant may have better records about whether the plaintiffs used their products and when. Cases where the defendant has asymmetric information require a different analysis. *See id.* at 550 (explaining how the informed-defendant model differs from the informed-plaintiff model).

57. *See id.* at 548–49 (describing an equilibrium predicted by the informed-plaintiff model in which if the proportion of potential frivolous suits is large, the defendant will settle with some, but not all plaintiffs); *cf.* D. Theodore Rave, *Tort Claims as Property Rights*, 69 DEPAUL L. REV. 587, 596 (2020) (describing how legal claims can have value as put options independent of the underlying merits).

58. *See, e.g.*, Settlement Agreement § 2 at 8–13, *In re* Vioxx Prods. Liab. Litig., MDL 1657 (E.D. La. Nov. 9, 2007) (requiring claimants to clear injury and proximity "gates" to be eligible for payment); Settlement Agreement § 3.01–03 at 11–14, *In re* Yasmin and Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig., No. 3:09-md-02100 (S.D. Ill. Mar. 15, 2013) (requiring claimants to submit claims package with documentation of use and injury to receive payment); 2015 ASR Settlement Agreement at 22–24, *In re* DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig., No. 1:10-md-2197 (N.D. Ohio Mar. 2, 2015) (requiring proof of use and injury for payment).

distinguish between frivolous and meritorious claims. Once the parties have symmetrical information, a rational defendant will quickly adopt a fighting strategy to establish a reputation for never paying nuisance value to settle frivolous claims.[59] MDLs are precisely the kind of litigation where repeat-player defendants will be keenly aware of reputational effects and can credibly signal to repeat-player plaintiffs' lawyers on the other side that filing frivolous suits will not be a winning strategy.[60] Rational plaintiffs' lawyers know this and should not bother to file claims that they know can easily be identified as frivolous.

But what if MDLs reduce the marginal cost of filing so much that plaintiffs' lawyers do file such claims? That is the gravamen of the Field of Dreams complaint—that some MDL plaintiffs' lawyers file claims without doing any pre-suit investigation at all—"get a name, file a claim."[61] But again, if the costs of valuation are low, even claims filed with no investigation do not seem too concerning. The plaintiffs' decision to file will not send much of a signal about claim value because the defendant, aware of the potential for a large proportion of claims to be frivolous, is already unlikely to settle any claims without testing them first;[62] that signal is weakened even further if the defendant suspects that the plaintiffs' lawyer did not investigate. And if it is easy to distinguish between frivolous and meritorious claims, then it will not cost much to screen them out either through the fact sheet process or on the back end in settlement claims criteria.

The dynamic might be different if plaintiffs could impose asymmetric costs on defendants by, for example, flooding the MDL with barebones complaints and then propounding discovery requests that require costly responses without having to respond to motions or discovery requests themselves.[63] And it is true that defendants often complain that MDLs operate asymmetrically by preventing defendants from testing the merits of individual claims through motion practice or individualized discovery, while the court focuses on discovery and motion practice into common issues.[64]

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59. Bone, *supra* note 28, at 539–41.

60. *Id.* at 540–41.

61. LAWS. FOR CIV. JUST., COMMENT TO THE ADVISORY COMMITTEE. ON CIVIL RULES AND ITS MDL SUBCOMMITTEE: FIXING THE IMBALANCE: TWO PROPOSALS FOR FRCP AMENDMENTS THAT WOULD SOLVE THE EARLY VETTING GAP AND REMEDY THE APPELLATE REVIEW ROADBLOCK IN MDL PROCEEDINGS 8 (2020), https://www.uscourts.gov/sites/default/files/20-cv-aa_suggestion_from_lawyers_for_civil_justice_-_mdls_0.pdf [https://perma.cc/RPV5-L5TG].

62. *See* Bone, *supra* note 28, at 549, 572 (describing how in both the informed-plaintiff and informed-defendant models, defendant will refuse to settle most claims when the expected proportion of frivolous claims is high).

63. *See* Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 20–22 (1996) (showing that a plaintiff who can force the defendant to invest in the litigation without having to invest himself can extract a settlement).

64. *See* LAWS. FOR CIV. JUST., *supra* note 54, at 3 (asserting, perhaps hyperbolically, that Rules 8, 9, 11, 12(b) and 56 do not function in MDLs to test meritless cases).

But this asymmetry may be more imagined than real. Unless *all* of the claims in an MDL are frivolous, the parties—on both sides—will have to do the work on common issues anyway in order to resolve the stronger cases. And simply inundating an MDL with tagalong cases based on barebones short-form complaints does not enable a plaintiffs' lawyer to start propounding asymmetric discovery requests; the court-appointed lead lawyers are the ones who have control over discovery. The unvetted claims are just along for the ride.[65]

The primary concern here is one of wasted resources (assuming that plaintiffs could have investigated more cheaply), not unjustified settlement payments. And if valuation costs are low, not that many resources are wasted; someone had to screen these claims at some point. They are not doing much harm sitting on the MDL docket in the meantime. Nor are valuation costs shifted entirely to defendants and courts; responding to fact sheets or satisfying settlement claims-eligibility criteria shifts much of that cost back to plaintiffs and their lawyers.

These concerns are much more significant, however, when the cost of valuing claims is high and plaintiffs have asymmetric information. Where, for example, a mass tort involves injuries that are difficult to verify or medical diagnoses that are easy to fake, meritless claims cannot be screened out through simple questions about exposure and injury on fact sheets or in settlement claims criteria. Identifying fake or fraudulent claims requires testing the plaintiffs' diagnoses, which may involve additional medical exams or deposing the plaintiffs' doctors. Some uninjured plaintiffs, therefore, may file, hoping that the high cost of valuation will induce the defendant to settle.[66]

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65. In this way, MDLs are different from mass arbitrations where creative plaintiffs' lawyers have figured out how to leverage the asymmetric fee structures of the arbitration clauses with class action waivers that have proliferated in the wake of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). In an attempt to make individual arbitration appear "consumer friendly," many companies agreed to pay the lion's share of arbitration fees and costs, confident that without the class action, most consumers just wouldn't bother to bring small claims one-by-one. Several plaintiffs' firms have called their bluff by collecting and filing thousands of individual arbitration claims, triggering an immediate obligation for defendants to spend millions of dollars in filing fees. While it is hard to feel anything but schadenfreude towards defendants' complaints that plaintiffs are *actually using* the arbitration procedures they touted as superior to class actions, the fee asymmetries do place considerable pressure on the defendant to settle independent of the underlying merits of the claims. *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1340–41 (2022) (explaining how fees and fee-shifting provisions are leveraged in mass arbitration to generate settlement pressure). That sort of asymmetry, however, is not present in mass tort MDLs.

66. *See* Rave, *supra* note 57, at 593 n.25 (noting that the value of the claim as an option goes up as uncertainty about the valuation of the underlying merits increases). High valuation costs might also increase plaintiffs' lawyers' incentives to file without investigating first in the hopes that the defendant will offer to settle without looking closely at the claim. But it costs little for the court or defendant to test whether there has been an investigation (i.e., has the plaintiff been diagnosed by a

Defendants are still unlikely to settle many of these claims because of the potential that doing so would increase plaintiffs' incentives to bring more. But, given the cost of fighting them, they may settle some.[67] Thus, the potential for substantially increased litigation costs and unjustified wealth transfers is greater when valuation costs are high. This is a difficult problem and not one that currently proposed reforms to the MDL process would address.[68] Though it is worth noting that defendants might benefit from having such claims filed in the MDL, where the valuation process will be judicially supervised, instead of having them informally aggregated in plaintiffs' lawyers' offices waiting for a global settlement.

4. Shifting Focus to Common Issues.—MDL shifts focus from individual issues to common issues. Defendants sometimes call this litigating the mass, not the tort.[69] In individual litigation, a defendant's discovery and motion practice will focus on the easiest way to win the case. If there is a problem with specific causation, for example, the defendant will move for summary judgment on that issue, and the court will address it because that is the easiest way to dispose of the case. In an MDL, though, if some plaintiffs have problems with specific causation, resolving those issues won't resolve the litigation. So, the MDL judge may prioritize discovery into, and motions about, common issues like fault and general causation, leaving individual issues that could dispose of weaker claims for later.

This is not necessarily a normative concern (especially if there *is* fault and general causation). It's not obvious why the defendant should be entitled to any particular order of operations in discovery or motion practice. Certainly, the Federal Rules of Civil Procedure don't dictate any such order.[70] And the defendant would have to bear discovery costs into those common issues anyway, so long as at least one plaintiff could show specific causation. On efficiency grounds, starting with common issues is an eminently sensible way to manage the litigation. Indeed, if the defendant wins on a common

licensed doctor?), even if the underlying claim validity is harder to test (i.e., is the doctor wrong or lying?). So, uninvestigated claims should be easy to screen out.

67. *See* Bone, *supra* note 28, at 549, 572 n.154 (explaining that when information is asymmetrical and "the proportion of potential frivolous suits is large enough," defendants will adopt a mixed strategy of fighting most suits but settling some).

68. Engstrom and Venook's intriguing proposal to base each lawyer's common-benefit fee assessments on the percentage of claims in the lawyer's inventory that survived an early fact sheet screen, for example, would not do anything to change the incentives to file fraudulent claims with fake medical diagnoses. Engstrom & Venook, *supra* note 8, at 18–19. Nor would the proposals currently being floated in front of the Rules Advisory Committee.

69. *E.g.*, BEISNER & MILLER, *supra* note 11, at 3–7.

70. *See* FED. R. CIV. P. 16 (empowering the district judge to set or modify timing of discovery and pretrial motions). Most of the Rules that do mention timing include a proviso allowing the court to order otherwise. *E.g.*, FED. R. CIV. P. 26(a)(1), 56(b).

issue, like general causation or preemption, that might absolve it of liability as to all claims and obviate the need to look at *any* case-specific matters.

But, if the defendant starts losing motions or bellwether trials on fault and general causation, the bad publicity and other attendant costs may become too great to bear, and the defendant may look to settle all outstanding claims. (This could be especially true if the verdicts come with large punitive damages awards.) Some of the claims with specific causation problems or other individual issues may get swept into the settlement at that point.

Note that this shift is not really a problem with the kinds of truly frivolous claims that feature so prominently in the Field of Dreams narrative. As explained above, defendants can easily insist on settlement claims criteria that require proof of exposure and injury (and perhaps some rough proxy for specific causation, like a maximum time period between exposure and injury) to weed out the real junk. But grey area claims, where truly injured plaintiffs face insurmountable hurdles in showing specific causation, might get paid.

Although they are not the subject of defendants' loudest complaints, grey area claims present the hardest question for MDL's Field of Dreams. These claims are not frivolous or fraudulent; these claimants really were exposed and injured; and the defendant is not blameless. But plaintiffs with grey area claims face challenges in proving their cases because tort law's individualized focus doesn't match the aggregate nature of the problem.[71]

If what you care about most in a procedural system is accurate application of the substantive law, then paying grey area claims may be problematic. Plaintiffs who cannot hope to prove an essential element of their claims have no legal entitlement to recover. And settling with them anyway can have a distorting effect on *ex ante* incentives to comply with the law.

But with grey area claims where the defendant really did something wrong and the plaintiffs really are injured, settlement may satisfy other values where aggregation reveals weaknesses in the tort system.[72] Indeed, settlement may get closer to optimal deterrence than dismissing claims where plaintiffs cannot prove specific causation, if it forces a defendant that

71. *See, e.g.*, Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 185, 219 (describing "the mismatch between rules that define party status in terms of the private nature of the rights asserted and a set of underlying substantive claims which . . . do not fit within the framework of identifiably individual claims").

72. *See id.* at 219–20 (explaining how settlement may be able to provide closure that the formal procedural system cannot); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1179 (2009) ("[T]he ability of a legal system to resolve the repeat harms associated with mass society is itself an important justice value, one that brings recompense to the many, deters untoward behavior, and provides a critical private lever to prevent state regulatory monopoly."); Rave, *supra* note 57, at 605–06 (arguing that settlements can increase horizontal equity and promote deterrence); *cf.* Hylton, *supra* note 36, at 589 ("For those defendants that are guilty of unambiguously malicious conduct, such as deliberately exposing consumers or employees to a substantial and hidden risk of injury, the need to worry about overdeterrence lessens greatly, and the more important problem to avoid is underdeterrence.").

imposes risks of harm on large populations to internalize the cost of its conduct on an aggregate scale.[73] A mass settlement including grey area claims might be a better outcome precisely because it is, in some sense, lawless. The defendant is settling a PR problem, and the plaintiffs are getting a form of social insurance. By reducing the cost of filing and shifting the early focus of the litigation from individual to common issues, MDL aggregation may result in a soft recalibration of the substantive law.

If that is what's going on with grey area claims, I'm not convinced that it's illegitimate, even on rights-based grounds. The pressure towards settlement that defendants feel is not the result of procedure altering substantive rights.[74] There is no Rules Enabling Act or *Erie* problem here. No court will order a defendant to pay because it created an aggregate risk of harm when state tort law says otherwise. Instead, it is the sequencing of how issues are teed up and decided in the MDL—the focus on common issues and the defendants' conduct before individual issues like specific causation—that generates external pressures on the defendant to settle to avoid bad PR or regulatory scrutiny.

Surely this is different from how things would play out in individual litigation, but it's not obvious why individual litigation should be our baseline for considering external pressures to litigate or settle.[75] That plaintiffs might benefit from the external pressure generated by aggregate litigation seems no less legitimate than the benefit mass tort defendants derive all the time from their resource and repeat-play advantages in individual litigation, where costs can prevent even plaintiffs with the most meritorious cases from suing at all. Defendants have a right not to be ordered to pay a judgment when the plaintiff cannot make out all the elements of a claim, but defendants do not have a right to litigate those elements in the order they choose. Unlike qualified immunity, there is no right to be free from tort *litigation*.

B. Problems for Plaintiffs

MDL plaintiffs don't complain about the Field of Dreams phenomenon nearly as much as defendants. But an excess of weak claims in an MDL could

73. Rave, *supra* note 57, at 606; *see also* Lee Anne Fennell, *Accidents and Aggregates*, 59 WM. & MARY L. REV. 2371, 2423–25 (2018) (explaining how problems with specific causation can let defendants "systematically off the hook when they did cause, on average, a certain quantum of harm").

74. It does not, therefore, violate Richard Nagareda's "preexistence principle." *See* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 157 (2003) ("[A] class settlement—unlike public legislation—enjoys no mandate to alter unilaterally the [preexisting] rights of class members.").

75. *See* Rave, *supra* note 26, at 523–27 (discussing aggregate versus individual baseline).

raise problems for plaintiffs as well. Space constraints do not allow for a full analysis, but it is worth flagging areas of potential concern.

1. Backlog.—A flood of weak claims into an MDL may create a backlog, delaying the ability of plaintiffs with stronger claims to get to trial. The flood of claims may even exhaust the defendant's assets before more deserving plaintiffs can recover. It would surely be a normative concern if the most deserving plaintiffs could never recover because the uninjured were ahead of them in line.

But it seems like aggregation in an MDL (or another proceeding like a class action or bankruptcy) is actually the solution to this type of problem. Aggregation allows the judge to deliberately sequence cases, avoid races to judgment, and oversee any equitable distribution of limited assets that might become necessary far more effectively than dispersed litigation.[76] And if the MDL judge becomes a bottleneck because of the influx of more cases than one judge can handle, creative case management and strategic remands to transferor courts (like the hub-and-spoke model adopted in the *Opiates* MDL) can help relieve the pressure.[77]

2. Dilution.—The presence of many weak claims in an MDL may dilute the value of strong claims. A lawyer with a reputation for carefully vetting claims and only bringing very strong ones can command a premium when settling.[78] Conversely, a lawyer with a large proportion of weak claims in her inventory may lack credibility in settlement negotiations. When plaintiffs know more about the merit of their cases than the defendant, the presence of weak claims in the mix reduces the signaling value of filing suit and can frustrate the settlement of strong claims if the defendant feels the need to litigate more often to deter frivolous filings.[79] And losses at bellwether trials (or voluntary dismissals to avoid such losses) can reduce the going rate for plaintiffs' claims across the board. While more claims mean more plaintiffs to share the costs of litigation, and including more claims may increase the top-line number in any global settlement, the plaintiffs with the strongest claims might not benefit from the presence of weaker claims. Their per capita share may go down.

76. *E.g.*, Rave & McGovern, *supra* note 43, at 37.

77. *Id.* at 22–23.

78. *E.g.*, David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1257–58 (2012); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 513, 537–41 (1994).

79. *See* Bone, *supra* note 28, at 596–97 (discussing how informational asymmetry can lead to the filing of frivolous suits and frustrate settlement of legitimate suits).

3. Damages Averaging.—Related to the problem of dilution is the potential for a sort of tyranny of the majority in settlement allocation. If weak claims outnumber strong claims, the negotiating parties may tend to overcompensate plaintiffs with the weakest claims and undercompensate plaintiffs with the strongest claims.[80] This is particularly likely when it is costly to distinguish between weak and strong claims, and the defendant (fearing adverse selection) insists on near total participation by all plaintiffs as a condition of settlement. The negotiators need to offer enough money to everyone to get all of the plaintiffs onboard (and deter strategic holdouts). The result is that the nuisance value of the weak claims may come out of the pockets of the plaintiffs with the strongest claims.

4. Lack of Voice.—The more claims are channeled into an MDL, the more procedures will need to be streamlined, which may interfere with plaintiffs' ability to participate personally and realize procedural justice. Social science research has long recognized how much litigants value the ability to tell their stories, and the loss of opportunities for individual participation is an inevitable tradeoff in aggregate proceedings like MDLs.[81] But it is not obvious how the presence of additional meritless claims affects the ability of MDL plaintiffs to have their voices heard in court. Opportunities for voice in MDL are already pretty sparse.

A slight variation on this concern would note that perceptions of procedural justice do not always require plaintiffs to have an opportunity to be heard in a formal judicial proceeding. Telling their stories to mediators, or even their own lawyers, can increase plaintiff satisfaction with the process. If lawyers stop carefully screening claims as the costs of filing go down, however, and thus make no effort to distinguish between meritorious and meritless claims, even plaintiffs with strong claims might then find their lawyers uninterested in hearing about their experiences.

5. Mismatch of Expectations.—Plaintiffs whose claims aren't screened upfront may be misled into believing that they are entitled to a significant recovery. If plaintiffs respond to ads touting big paydays, but their lawyers never analyze their medical records or confirm their exposure, their expectations for the litigation may be unrealistic. When they recover little or nothing at the end of the day, or their lawyers tell them that they will

80. *See* Charles Silver & Lynn A. Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1481 (1998) ("Allocation plans used in class actions inevitably involve some degree of damage averaging.").

81. *See, e.g.*, Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 721 (2015) ("The potential pitfall of aggregate litigation is . . . the loss of control and, in particular, of voice."). *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (exploring how processes and procedures influence individuals' satisfaction with the resulting outcome).

withdraw as counsel if they don't voluntarily dismiss their cases, these plaintiffs may be profoundly dissatisfied.[82] Plaintiffs with meritorious claims may also have unrealistic expectations for the litigation and may wind up disappointed if their overextended lawyers don't explain the process, risks, timeframe, and potential limits on their take-home recoveries, like medical liens. Even if such instances of disappointment are rare—and I have no way of knowing whether they are or are not—they can undermine faith in the MDL process.

* * *

For each of these concerns, the relevant question is, "compared to what?" Would plaintiffs be better off if the costs of filing suit were higher and fewer claims were filed? Would plaintiffs with strong claims be better off if more resources were devoted to screening out weak claims at some earlier point in the litigation?[83] Would plaintiffs with weaker claims be better off if lawyers refused to take their cases at all? This is not the place for a detailed analysis, and reasonable minds could differ, but I suspect that on balance, for most plaintiffs, the answer to these questions is no.[84]

Conclusion

MDL lowers the cost of litigation, and in doing so encourages more claims to flow into the litigation system. Simple economics predicts that many of these claims will have lower expected values than claims that would be filed in the absence of MDL. At least some of these new claims appear to be meritless or frivolous, though the scale of the phenomenon is unclear.

Many people think the Field of Dreams is a big problem, but critics of MDL have not clearly articulated the normative reasons why. Some of their reasons—like the unfair settlement pressure exerted by a mass of cases—

82. *See* Elizabeth Chamblee Burch & Margaret S. Williams, *Perceptions of Justice in Multidistrict Litigation: Voices from the Crowd*, 107 CORNELL L. REV. 1835, 1874–75, 1881–85 (2022) (reporting survey responses from some MDL plaintiffs who felt that their litigation goals were not achieved and their attorneys pressured them to settle). I question how representative this study is. *See* Lynn A. Baker & Andrew Bradt, *Anecdotes Versus Data in the Search for Truth About Multidistrict Litigation*, 107 CORNELL L. REV. ONLINE 249, 250–52 (2022) (discussing the limitations of Burch and Williams' study). But at least some plaintiffs in some MDLs have expressed these sentiments, so the concern is worth taking seriously.

83. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 Reporter's Notes cmt. f (AM. L. INST. 2010) ("The two most common reasons for such damage averaging are that in small-value cases, the cost of distinguishing the value of each individual claim may not be cost justified, and in larger cases, it is difficult to get a precise calculation of each individual's exact entitlement without a full evidentiary hearing."); Rave, *supra* note 57, at 604 ("[A]ny savings in the process of valuation goes to the parties to the transaction.").

84. *See* Bradt & Rave, *supra* note 13, at 90–97 (explaining how MDL aggregation can benefit plaintiffs); *cf.* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.04 Reporters' Notes cmt. f (AM. L. INST. 2010) ("Although there is a tendency to think that justice is rougher in aggregate lawsuits than individual representations, in fact rough justice is the norm everywhere.").

don't hold up to scrutiny. And the types of claims about which critics complain the loudest—where the plaintiffs did not use the product at issue or were not injured—are the least problematic. Claims like these can be easily identified as frivolous, and allowing them to sit on the MDL docket while stronger claims are litigated does not appear to change the dynamics of the litigation fundamentally. At the end of the day, these claims are not paid, and the marginal costs they impose while waiting to be screened out are relatively small.

Other concerns are more serious. When MDLs attract fraudulent claims that are costly to identify as such, like fake medical diagnoses, it can lead to wasted resources and unjustified wealth transfers. Perhaps ironically, by framing the Field of Dreams narrative around unexposed and uninjured plaintiffs whose lawyers file first and investigate later, critics have obscured the more serious problem. The real problem is not how to deter such junk filings, but rather what to do with plaintiffs whose injury diagnoses are difficult to verify.

Finally, some concerns are uncertain. MDL's shift in focus from individual issues to common issues can alter the settlement dynamics around grey area claims where plaintiffs struggle to prove specific causation, even though the defendant really did something wrong, and plaintiffs really suffered injuries. But the normative dimensions of this change are complicated and depend on the values one prioritizes for litigation.

Defendants have pointed to the Field of Dreams problem to argue for significant changes to MDL procedures, such as requiring much more extensive early vetting of all claims, or even for abandoning MDL altogether in favor of alternatives like bankruptcy.[85] But such across the board changes are not called for. Many of the problems meritless claims raise can be handled through incremental changes in case management techniques (such as a tailored use of plaintiff fact sheets) or defendant self-help (like including claims-eligibility criteria in settlements) without the need for any radical overhaul of MDL procedures. Again, the question in evaluating any procedural system is always, "compared to what?" Changes like the early vetting procedures proposed by defendants come with their own costs. And those costs may exceed the benefits of eliminating the chaff, especially if they deter plaintiffs with meritorious claims from filing or result in make-work on claims that defendants would have won anyway on common

85. *See* Brief for National Association of Manufacturers & Product Liability Advisory Council, Inc. as *Amici Curiae* in Support of Appellee at 3–4, *In re* LTL Management, L.L.C., No. 22-2003 et al. (3d Cir. Aug. 22, 2022) (arguing that bankruptcy is better equipped than MDL to resolve mass tort lawsuits); Andrew D. Bradt, Zachary D. Clopton & D. Theodore Rave, *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309, 322–23 (2022) (describing how defense interests attempt to undermine public faith in mass tort MDLs to support shift to bankruptcy).

questions like general causation. Likewise, a shift to bankruptcy comes with many costs and may, in fact, exacerbate the Field of Dreams phenomenon.[86]

By lowering the costs of litigation, MDL makes it easier to file lower expected-value and even meritless claims. Certainly, the influx of meritless claims is not a benefit; courts and parties should attempt to screen them out where possible. But my general intuition is that if you reach the point in your logic where lowering litigation costs is a bad thing, you may need to reexamine your premises.

86. In mass tort bankruptcies, all tort creditors are often assigned equal rights to vote on the plan of reorganization without more than a cursory look at the underlying merits of their claims. *See, e.g.*, Kane v. Johns-Manville Corp., 843 F.2d 636, 646–47 (2d Cir. 1988) (holding that it was harmless error for the bankruptcy court to weigh all claims equally); Melissa B. Jacoby, *Sorting Bugs and Features of Mass Tort Bankruptcy*, 101 TEXAS L. REV. 1745, 1757 (2023) (noting the bankruptcy norm of placing all mass tort claimants into a single voting class and valuing all of their claims at $1 regardless of severity). Because voting on reorganization—not the threat of trial—is the real source of power in a mass tort bankruptcy, this creates incentives to flood the bankruptcy with meritless claims in order to gerrymander the vote.