The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-District Litigations

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Introduction

There is, or should be, universal agreement that judges must manage Multi-District Litigations (MDLs) lawfully. For example, they must abide by the Federal Rules of Civil Procedure (FRCP), which "govern the procedure in all civil actions and proceedings in the United States district courts."[1] Yet, academic commentators have argued that widely used MDL procedures violate the law in many ways.[2]

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1. FED. R. CIV. P. 1. *See also In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 844 (6th Cir. 2020) (observing that "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance").

2. *See, e.g.*, Charles Silver, Comment, *What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 181, 183 (2012) (characterizing MDL as the "Wild West" of civil litigation); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 111

The legality of the manner of handling lawyers' fees merits careful study because judges regulate fees far more muscularly in MDLs than is customary. Ordinarily, contracts govern both the amounts that plaintiffs pay their lawyers and the terms, if any, on which lawyers share fees. In MDLs, judges assert control over both matters. They routinely override the contractual entitlements of individually retained plaintiffs' attorneys (IRPAs). They also require IRPAs to pay court-appointed lead attorneys enormous sums—hundreds of millions of dollars in the largest proceedings—even though IRPAs neither hire lead attorneys nor agree to pay them anything.[3] Not surprisingly, IRPAs often complain.[4]

Because the few sentences in the MDL statute that address procedures say nothing about fees,[5] judges have sought authority for their actions elsewhere. They have invoked the inherent power to manage litigation,[6] argued that MDLs are quasi–class actions in which they may exercise powers conferred by Rule 23 of the Federal Rules of Civil Procedure,[7] and invoked the equitable power to cure unjust enrichment.[8] I have pointed out

(2015) (describing MDL as "something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies").

3. For discussions of fee-related practices commonly employed in MDLs, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 109 (2010) and Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 59 (2013).

4. *E.g.*, ALM Media, *Lawyers Duel Over $503M Fee Award in Syngenta Corn Settlement*, LAW.COM (Dec. 17, 2018), https://www.yahoo.com/now/lawyers-duel-over-503m-fee-125050560.html [https://perma.cc/E9XL-HC5R]; Andrew Strickler, *Judge OKs $1.3M Deal Ending 4-Year Rice GMO Fee Spat*, LAW360.COM (Sept. 13, 2017, 8:57 PM), https://www-law360-com.eu1.proxy.openathens.net/articles/963634/judge-oks-1-3m-deal-ending-4-year-rice-gmo-fee-spat [https://perma.cc/53NU-QUX8]; Sheilla Dingus, *Attorneys Challenge Brody's Attorney Fee Allocations in NFL Concussion Settlement*, ADVOCACY FOR FAIRNESS IN SPORTS (Aug. 14, 2019), https://advocacyforfairnessinsports.org/nfl-concussion-settlement/attorneys-challenge-brodys-attorney-fee-allocations-in-nfl-concussion-settlement/ [https://perma.cc/6CZH-QBF3].

5. 28 U.S.C. § 1407.

6. *See In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 424 F. Supp. 3d 456, 496 (E.D. La. 2020) ("[T]he Court . . . finds authority to assess common benefit attorney fees in its inherent managerial authority . . . . The Fifth Circuit has long recognized that a court's power to consolidate and manage litigation necessarily implies a corollary authority to appoint lead or liaison counsel and to compensate them for their work."); *see also In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1016 (5th Cir. 1977) (contending that a district court's power to appoint lead counsel would be "illusory if it [depended] upon lead counsel's performing the duties desired of them for no additional compensation").

7. *See, e.g.*, *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (stating that the MDL action "may be properly characterized as a quasi-class action"). For a discussion of the uses made of the quasi-class action rationale in MDLs, see generally Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847 (2017).

8. For a defense of the restitutionary rationale, see generally Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014).

deficiencies in the first two rationales elsewhere.[9] In this Article, I critique the contention that the law of restitution and unjust enrichment empowers judges to transfer funds because IRPAs benefit from lead attorneys' efforts and can properly be made to pay.

MDL judges cling to this rationale firmly.[10] With the singular exception of Judge Vince Chhabria, whose thoughtful opinion in *In re Roundup Products Liability Litigation*[11] may mark a turning point, MDL judges appear to consider it settled law.[12] But it is not and never could be—first and foremost because it is doctrinally incoherent. Nor is it settled as a matter of authority because the Supreme Court has not considered it. In this regard, it is critical to distinguish MDL fee sharing from fee awards in class actions, which the Court has specifically approved.[13] Vital differences in the procedural setting make it relatively easy to justify class action fees by reference to principles of unjust enrichment, but impossible to do so for forced fee transfers in MDLs.

The unjust enrichment rationale also lacks scholarly support. Three decades ago, I published a sustained and detailed restitution-based defense of fee awards in class actions.[14] The article has since been cited repeatedly and endorsed in the Restatement (Third) of Restitution and Unjust Enrichment.[15] No comparable academic project provides a restitutionary foundation for fee awards in MDLs. Although law professors have argued in favor of compensating lead attorneys when appearing as advocates and

9. *See* Silver & Miller, *supra* note 3, at 121 (criticizing the quasi-class action rationale); Robert J. Pushaw & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigation*, BYU L. REV. (forthcoming 2023) (manuscript at 63), https://ssrn.com/abstract=3893764 [https://perma.cc/LX2G-56TK] ("[T]reating MDLs as quasi-class actions ignores . . . differences."). Others have also criticized the quasi-class action rationale. *See* Stephen B. Burbank, The MDL Court and Case Management in Historical Perspective 5 (April 28, 2017) (presented at George Washington University Law School), https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/MDL.GWU.pdf [https://perma.cc/T2Q5-4EVK] (characterizing the quasi-class action doctrine as "the most risible" concoction to emerge from the "kitchen-sink approach to sources of authority" that MDL judges employ).

10. *E.g.*, *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *3 (E.D. La. Mar. 24, 2020); *In re* Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010); *In re* Vioxx Prods. Liab. Litig., 802 F. Supp. 2d 740, 770 (E.D. La. 2011).

11. 544 F. Supp. 3d 950 (N.D. Cal. 2021).

12. *Id.* at 960.

13. Boeing Co. v. Van Gemert, 444 U.S. 472, 478–79 (1980).

14. Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991).

15. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011).

experts, they have not defended the practice on restitutionary grounds in published scholarly works.[16]

No academic commentator has even disputed the observation, found in § 29 of the Restatement, that the real basis for fee awards in consolidations is administrative convenience:

> By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation cannot be explained entirely by restitution principles . . . . The fact that such fees may not be authorized by § 29 is probably irrelevant, however, since their predominant rationale is not unjust enrichment but administrative convenience.[17]

The Restatement supports this observation with a citation to *In re Air Crash Disaster at Florida Everglades*,[18] the foundational Fifth Circuit case that lead lawyers and judges routinely invoke when contending that restitutionary principles justify forced fee transfers in MDLs.[19] In the Restatement's view, it is a mistake to offer *Everglades Crash* for this proposition because the decision does not rest on restitutionary grounds.[20]

This Article will show that the law of restitution and unjust enrichment does not warrant forced fee transfers in MDLs. Part II will begin the discussion by identifying the elements of the common fund doctrine. Part III will then show that neither the doctrine nor the general imperative to do equity that the law is said to embody supports forced fee transfers in MDLs. Part IV will focus on hybrid MDLs—which begin as consolidations of separate lawsuits but settle as class actions—and show that the procedural

16. Many authors describe fee-related practices in MDLs without probing the soundness of their justifications. A treatise entry in Newberg and Rubenstein on Class Actions provides an example. The discussion reports that judges possess inherent authority to award fees without offering an account of the inherent powers doctrine that supports this belief. *See* WILLIAM B. RUBENSTEIN, 5 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 15:114 (6th ed. 2022) (noting that courts invoke the inherent powers doctrine in order to award fees in MDL cases but failing to analyze whether that invocation is doctrinally justified). A careful assessment of the constitutional basis for the doctrine shows that judicial practices relating to the appointment and compensation of lead attorneys in MDLs are abuses. *See* Pushaw & Silver, *supra* note 9, at 3 ("As currently managed, MDLs are patently unconstitutional.").

17. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011). *See also id.* at reporter's note c ("In contrast to the standard view of class-action fees, which explains them as restitutionary, the leading accounts of fees to court-appointed counsel in consolidated litigation refer to additional factors, independent of unjust enrichment, to justify the imposition of a liability by court order.").

18. 549 F.2d 1006 (5th Cir. 1977).

19. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011); *e.g.*, Amorin v. Taishan Gypsum Co. Ltd., 861 F. App'x 730, 734–35 (11th Cir. 2021) *cert. denied*, 142 S. Ct. 769 (2022) (citing *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1017–19 (5th Cir. 1977)).

20. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note c (AM. L. INST. 2011).

change leaves unaltered the conclusions reached in Part III. Part V concludes by asking scholars who endorse the fee-related procedures used in MDLs to publish normative works that set out deep justifications for them.

II. The Common Fund Doctrine

Discussions of the common fund doctrine typically start with *Trustees v. Greenough*,[21] a case whose paradigm facts nicely frame the purpose and limits of the equitable doctrine.[22] The restitution claimant in *Greenough* was a holder of bonds secured by a trust indenture. Suspecting malfeasance, this individual bondholder retained counsel and pursued costly litigation at his own expense, leading eventually to the replacement of the faithless trustees and a restoration of trust assets. These restored trust assets constituted the original "common fund." The bonds were in bearer form, so any coordination or prior agreement to share litigation expenses with fellow bondholders was naturally impossible.[23] But once the fund had been secured, the courts held that the claimant was entitled in equity to reimbursement of his litigation expenses from the other bondholders who benefited from his successful initiative and expenditures.[24]

Greenough made "a perfect case from a restitution viewpoint."[25] The claimant, acting reasonably in the protection of his own interests, *unavoidably* conferred significant net benefits on persons similarly situated. The nature of the transaction meant that the bondholders' interests were exactly aligned. Moreover, because the bondholders could not be identified, prior coordination or agreement between them was impossible. In such a case there is no question of imposing a liability for unrequested benefits that should have been the subject of contract—benefits that the recipient should have had a chance to refuse.[26] Recovery from a fund that was already under the supervision of the court guaranteed that no beneficiary would be required to make an expenditure; the courts merely applied the usual rule that a trust bears the expense of its own administration.

This persuasive case for traditional common fund recovery is largely paralleled today in the class action setting. Class members (like the unidentified bondholders) would be unjustly enriched if they obtained a share

21. 105 U.S. 527 (1881).

22. The first three paragraphs of this section are borrowed with slight modifications from Professor Kull's expert report. Kull, *supra* note *, at 4–6.

23. *Id.* at 528–29.

24. *Id.* at 537.

25. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 reporter's note d (AM. L. INST. 2011).

26. According to the Restatement summary of the common fund rule: "A beneficiary is liable in restitution only if . . . liability will not impose an obligation that should properly have been the subject of contract between the claimant and the beneficiary." *Id.* § 29(3), (3)(d).

of the judgment without contributing to the cost of obtaining it. The baseline rule of no liability for unrequested benefits is preserved by class members' ability to opt out. The equitable claim is not as perfect as in *Greenough*, because the restitution claimant (class counsel) and the beneficiaries (class members) are not similarly situated: because counsel seeks a fee from a class recovery, counsel and class members are, to that extent, adverse. Given the key advantages of class actions, however, this relaxation of the original equitable test was easily justified. Allowing compensation to class counsel for unrequested services makes it possible to provide legal services that would not otherwise be provided at all.[27] The numerosity of the class, the difficulty of identifying class members, and the small stakes of most individual claims all mean that the needed services could never be supplied pursuant to contract.

Bargaining Impediments: The law of unjust enrichment takes a back seat to the law of contract, meaning that it strongly disfavors compensation when beneficiaries' liabilities for services can and should be handled by agreement.[28] Restitution for unrequested benefits, voluntarily conferred, that a recipient had no chance to refuse will generally be denied.[29] This restriction recognizes the superiority of markets as means of determining what services are worth and establishes the law's reluctance to force exchanges. *Greenough* is the perfect common fund case partly because the active bondholder could not have identified those who were passive, a necessary predicate to a market transaction. The existence of bargaining impediments is perhaps the principal reason why fees in class actions are so easily analogized to common fund recovery.[30]

Beneficiaries' Passivity: Equity traditionally draws a sharp distinction between passive free riders and active contributors. It (sometimes) requires the former to share the burden incurred by the latter, but it does not reallocate burdens among the latter, it being impossible to measure the value of different contributors' services with precision.[31] Instead, equity normally requires active contributors to bargain among themselves over the terms of their cooperation, as attorneys often do when working together voluntarily.[32]

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27. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.").

28. *Id.* § 29 cmt. g.

29. *Id.*

30. *See id.* § 29 cmt. b ("Where the nonclient beneficiary (and restitution defendant) is identifiable before the intervention takes place, the lawyer is under the same necessity as any other restitution claimant to justify the decision to proceed in the absence of contract.").

31. *Id.* § 29 cmt. f.

32. *See* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1650 (1974) (noting that the California Court of Appeal concluded in one case

In *Everglades Crash*, the Fifth Circuit recognized the difference between passive free riders and active contributors repeatedly. It summarized prior applications of the common fund doctrine outside of MDLs by observing that fees were typically assessed against "persons who ha[d] not employed lawyers . . . . One who hires and pays his own lawyer is not a free rider if the attorney is a contributor to the final results."[33] It also noted with approval that the district court's order imposing an 8% tax on lawyers' contingent fees applied to all IRPAs "except those attorneys who had actively participated in the pre-trial activities," which all had the opportunity to do.[34]

The distinction drawn by the Fifth Circuit between active and passive attorneys was taken from traditional common fund cases in which the claim typically runs between active and passive *litigants*.[35] Given a lawsuit in which multiple parties have identical interests—recurring instances involve will contests, challenges to the legality of taxes, and condemnation proceedings—it is often the case that some of the parties retain lawyers, while others remain entirely passive. When the lawsuit terminates favorably to the parties whose interests are aligned, those who bore the expense of litigation seek restitution from those who did not. The usual response is to assess the recoveries of the passive litigants—ideally by a charge against the "common fund" the litigation has created—while exempting from the assessment those litigants who retained their own counsel.[36] The equitable basis for a requirement of contribution is the same, whether the object is to equalize burdens between (i) active attorneys and passive clients; (ii) active and passive litigants (those who retain counsel and pay fees and expenses vs. those who do nothing); and (iii) active and passive attorneys in the matter of common benefit work.

When courts do make a distinction between the respective contributions of active participants, it is normally in circumstances where those

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that "[a]ny inequity [in attorney fee payment] . . . could only be prevented by arrangements the lawyers made between themselves").

33. *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d. 1006, 1019 (5th Cir. 1977).

34. *Id.* at 1008, 1011.

35. *See* Dawson, *supra* note 32, at 1601–09 (describing *Greenough* and *Central R.R. & Banking Co. v. Pettus* as the traditional common fund cases); Trustees v. Greenough, 105 U.S. 527 (1881); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885).

36. *See, e.g.*, Vincent v. Hughes Air W., Inc., 557 F.2d 759, 770 (9th Cir. 1977) ("[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees."); Gen. Fin. Corp. v. N. Y. State Rys., 3 F. Supp. 975, 976 (W.D.N.Y. 1933) ("Where creditors are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other creditors."); *In re* Estate of Korthe, 9 Cal. App. 3d 572, 575 (1970) (stating that the common fund rationale "applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands"); *In re* Crum, 14 S.E.2d 21, 22, 24 (S.C. 1941) (approving common fund award where nonclient beneficiaries "were in default throughout the progress of the case" and "stood aloof and without counsel").

contributions have been "manifestly unequal."[37] For example, in certain will contests where "the charities that ultimately benefited most had sat on the sidelines until a very late stage and then employed lawyers who seemingly contributed little[,] the fact that the charities had their own lawyers was simply ignored."[38]

Common Fund: A right to payment also arises only when litigation produces or measurably increases the value of a common fund—one that is available for distribution pro rata to all beneficiaries or that enriches them automatically, for example, by increasing the value of a corporation in which all hold shares.[39] Standard examples of such funds include a decedent's estate following a successful will contest, or the amount recovered in settlement of a class action.[40]

The existence of a common fund establishes that the interests of the various claimants are exactly aligned. It means, usually, that one claimant cannot act to advance his own interests without simultaneously advancing *pari passu* the interests of the others. So long as each claimant retains a right of exit—or if bargaining impediments prevent individual arrangements—this perfect alignment of the interests usually justifies an inference that passive beneficiaries would have agreed to pay for services voluntarily, had they been asked, because they can only wind up better off on net.

Insufficient Incentives: A final limitation, which applies whenever unrequested services are delivered, is that, with limited exceptions, the provider must not act pursuant to a contract with a customer.[41] For example, a construction company that renovates one house in a neighborhood has no claim to additional payments from the owners of other homes even if the values of all properties increase. The law assumes that the contract with the owner compensates the builder in full and provides a sufficient incentive to perform the work. The owners of other properties are entitled to enjoy any

37. John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1648 (1974). Because judges put lead attorneys in charge of MDLs, IRPAs often contribute little. However, in cases like *Everglades Crash* where the passivity requirement was found to be met, beneficiaries were inactive voluntarily, not because judges ordered them to sit on their hands. *Everglades Crash*, 549 F.2d at 1009.

38. Dawson, *supra* note 32, at 1648.

39. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29(3) (AM. L. INST. 2011) (indicating that a beneficiary to a common fund is liable to a claimant only when there is "measurable value added to the beneficiary's interest in the common fund by the claimant's intervention").

40. Dawson, *supra* note 32, at 1602–03, 1642, 1642 n.149, 1643 n.150 (describing *Greenough* as a class action and both *Carmack v. Fidelity-Bankers Trust Co.* and *In re Faling's Estate* as will contests); Carmack v. Fidelity-Bankers Trust Co., 177 S.W.2d 351 (Tenn. 1944); *In re* Faling's Estate, 228 P. 821 (Or. 1924).

41. *Id.* at cmt. b (noting that where claimants are compensated pursuant to contract there is no "entitlement to restitution" with respect to "incidental benefits resulting from compensated employment that the claimant was free to undertake or to decline").

spillover benefits for free. The Restatement specifically applies this limitation to payment claims asserted by attorneys.[42]

III. Neither the Common Fund Doctrine nor the General Impulse to Cure Unjust Enrichment Warrants Forced Fee Transfers in Multi-District Litigations

In re Xarelto (Rivaroxaban) Products Liability Litigation[43] was a pure MDL, meaning that it began as a consolidation of related lawsuits and ended the same way, not as a class action.[44] When it settled, the presiding judge, Eldon Fallon, awarded the lead attorneys almost $100 million in common benefit fees.[45] In keeping with the prevailing practice, Judge Fallon funded the award by taxing IRPAs' contractual fees.[46] As a result, IRPAs retained less than two-thirds of the amounts their fee agreements with their clients entitled them to receive.

Because the IRPAs had not agreed to pay the lead attorneys, Judge Fallon needed a noncontractual legal basis for this action. He claimed to find one in two sources: the common fund doctrine and the federal courts' inherent powers.[47] Regarding the former, he sometimes wrote as though he believed the doctrine's formal requirements were met. After observing that "the common fund or common benefit doctrine . . . [is] most commonly applied to awards of attorney fees in class actions," he observed that "the common fund doctrine is not limited solely to class actions" and that "MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs."[48] By speaking of the "doctrine" so often, Judge Fallon conveyed the impression that, in his view, the requirements for its application are met in MDLs.

At other times, Judge Fallon seemed to rely on a general equitable impulse to cure unjust enrichment while recognizing that the technical requirements of the common fund doctrine are *not* met in MDLs. In the following passage, for example, he referred to a "common benefit concept" that transcends procedural contexts:

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42. *Id.*

43. MDL No. 2592, 2020 WL 1433923, at *1 (E.D. La. Mar. 24, 2020).

44. *Id.* at *1–2.

45. *Id.* at *10. Funds paid to plaintiffs who received small payments were exempted from these levies. *Id.*

46. *Id.* Dollars to cover common benefit expenses came out of the settlement, which contained a $25 million fund earmarked for this purpose. *Id.* These costs were thus spread across all settling plaintiffs and their attorneys.

47. For a critique of the inherent powers rationale, see generally Pushaw & Silver, *supra* note 9.

48. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *2–3 (E.D. La. Mar. 24, 2020).

> As class actions morph into multidistrict litigation, as is the modern trend, the common benefit concept has migrated into the latter area. The theoretical bases for the application of this concept to MDLs are the same as for class actions, namely equity and her blood brother, quantum meruit. However, there is a difference. In class actions the beneficiary of the common benefit is the claimant; in MDLs the beneficiary is the individually retained attorney (contract counsel).[49]

The references to equity and quantum meruit convey Judge Fallon's belief in the existence of a general mandate to cure unjust enrichment by seeing that lawyers are compensated appropriately for their work.

Rather than saddle Judge Fallon with a position he may not endorse, I will address both alternatives. Subpart III(A) will consider whether the requirements of the common fund doctrine are met in MDLs. Subpart III(B) will take up the common benefit concept by asking whether unjust enrichment would occur without forced fee transfers.

A. In MDLs, the Requirements of the Common Fund Doctrine Are Not Met

The existence of a common fund is a doctrinal requirement for a restitutionary right to an award of attorneys' fees. In class actions, the fund is the merits recovery, which benefits all absent claimants. Applying a tax against the recovery spreads litigation costs across all class members in proportion to their gains.

In MDLs, judges require IRPAs, not claimants, to pay lead attorneys.[50] Because the claimants are contractually bound to pay their retained attorneys, judges cannot ask them to pay additional fees to other lawyers appointed by courts. MDL practice avoids this necessity by reallocating fees payable pursuant to contingent fee contracts among the various lawyers in accordance with a judge's idea of who deserves what.[51] However, fees paid pursuant to contingent fee contracts are not common funds. Barring an agreement to share fees, they belong solely to the lawyers whose clients pay them.

In the *Xarelto* litigation, Judge Fallon bypassed the "no common fund" problem by a means that, from a doctrinal perspective, is a sleight of hand. Instead of treating the existence of a common fund *created by litigation* as a

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49. *Id.* at *3.

50. Ratner, *supra* note 3, at 68, 68 n.32. For an example, see *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. CV-MDL-2592, 2020 WL 1433923, at *10 (E.D. La. Mar. 24, 2020).

51. *See* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 70 (2013) (showing that judges use caps on IRPAs' contingent fees to free up funds that they then transfer to lead attorneys by granting common benefit awards).

prerequisite for awarding fees, he asserted that the doctrine empowers judges to gain control over funds by other means, stating:

> Since the nineteenth century, . . . the Supreme Court has recognized an equitable exception to [the rule that parties must bear their own litigation costs], known as the common fund or common benefit doctrine, that permits *the creation of a common fund* in order to pay reasonable attorney[s'] fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries.[52]

The doctrine does not do this. It empowers judges to tap funds that are "created, increased or protected by successful litigation," as the Fifth Circuit wrote in *Everglades Crash*.[53] In the *Xarelto* MDL, the only such fund was the settlement recovery. But Judge Fallon did not tap that fund. Instead, he created a new one by taxing IRPAs' fees.[54]

In the *Roundup* litigation, Judge Vince Chhabria recognized the difference between a true common fund created by litigation and a faux fund created by a judge. When considering the lead attorneys' request to order the defendant to withhold money from settlements for the purpose of funding a common benefit award, he observed that:

> Lead counsel ha[d] not asked this Court to reimburse them from some fund or property interest that was preserved or established as a result of a victory against, or settlement with, Monsanto[, the defendant]. Rather, lead counsel asked the Court to *create* a fund at the outset—before any judgment was entered and before liability was established—and to require contributions from individual recoveries down the line, whenever they were reached. Exercising equitable jurisdiction over a fund ultimately secured by litigation to reimburse the plaintiff who secured it seems quite different from creating a fund at the beginning of litigation and requiring contributions to that fund from individual recoveries in anticipation of the MDL lawyers needing to be reimbursed.[55]

By concluding that the common fund doctrine does *not* justify the imposition of holdback orders, Judge Chhabria distinguished himself from other MDL

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52. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *2 (E.D. La. Mar. 24, 2020) (emphasis added). *See also In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010) (describing the Court's recognition of the common benefit doctrine).

53. *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1017 (5th Cir. 1977).

54. *In re Xarelto*, 2020 WL 1433923, at *10. If the claimants' recoveries constituted a common fund, Judge Fallon could have taxed them without distorting the doctrine as he did. This would have caused other problems, however—the primary one being that claimants would have been forced to pay more than their contracts required for the services they received. Judge Fallon might have cured this problem by cutting IRPAs' contractual fees, but neither the common fund doctrine nor the law of restitution and unjust enrichment more generally confers that power.

55. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 959 (N.D. Cal. 2021).

judges. The latter enter these orders routinely and seem not to know that the doctrine empowers them to tax existing funds rather than to create new ones.

The difference between taxing an existing fund and creating a new fund for the purpose of putting money under MDL judges' control is not a verbal quibble or a formality. Blurring this basic distinction tends to disguise the fact that a familiar form of words—"the common fund doctrine"—is being invoked to achieve ends that recognized principles of law and equity do not support.

The judges who decided *Everglades Crash* did not bend the common fund doctrine to their will. They upheld the forced fee transfer because they believed that the district court had inherent power to order it.[56] They did contend that equity "reinforced" the inherent power—an odd thing to say given that different bodies of law are involved[57]—but they knew that *Everglades Crash* did "not quite fit" the equitable fund model.[58] They considered that detail unimportant, however, because unlike "*Greenough* and its progeny," which were "private sector cases," the many lawsuits that stemmed from the plane crash "involve[d] larger interests," such as managing the federal court's burgeoning docket, "whose vindication command[ed] affirmative intervention by the court," including the appointment and compensation of lead attorneys.[59] The correct reading of *Everglades Crash* is that the power to transfer fees existed because the district court needed it to manage the litigation.

Other passages buttress this assessment. For example, when the IRPAs whose contingent fees were taxed pointed out that sixty signed clients were paying for the lead attorneys' services, the Fifth Circuit did not discuss the law of unjust enrichment; it raised a managerial concern:

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56. Per Judge Godbold:

> Managerial power is not merely desirable. It is a critical necessity. The demands upon the federal courts are at least heavy, at most crushing. Actions are ever more complex, the number of cases greater, and in the federal system we are legislatively given new areas of responsibility almost annually . . . . We face the hard necessity that, within proper limits, judges must be permitted to bring management power to bear upon massive and complex litigation to prevent it from monopolizing the services of the court to the exclusion of other litigants.

Everglades Crash, 549 F.2d at 1012.

57. *Id.* at 1017. The inherent powers doctrine enables courts to deploy procedures without which they could not adjudicate cases. The law of restitution contains substantive doctrines that regulate the rights and obligations of persons who confer and receive benefits in the absence of prior agreements regarding compensation. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. d (AM. L. INST. 2011) ("Restitution is the law of nonconsensual and nonbargained benefits . . . . [It] deal[s] with the consequences of transactions in which the parties have not specified for themselves what the consequences of their interaction should be."). If by obligating beneficiaries to pay service providers the law of restitution sometimes makes lawsuits easier to manage, that is merely a coincidence.

58. *Everglades Crash*, 549 F.2d at 1019.

59. *Id.* at 1019.

> It is uncertain that appellants or any other plaintiff lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. The Committee members' 60 cases may affect the amount paid them as lead counsel but not the power of the court to require payment.[60]

The Fifth Circuit also invoked managerial concerns when dismissing the objection that if the award was upheld, "lead counsel [would be] paid twice for the same work."[61] It cited:

> [T]he broader responsibilities that lead counsel bear and the larger interests that they serve. Because of the nature of the case that will trigger appointment, lead counsel's services are in part for all parties with like interests and their lawyers. To a degree, lead attorneys become officers of the court. By making manageable litigation that otherwise would run out of control they serve interests of the court, the litigants, the other counsel, and the bar, and of the public at large, who are entitled to their chance at access to unimpacted courts.[62]

The listed considerations may provide sound policy rationales for supplementing lead attorneys' wages, but they do not ground the legality of forced fee transfers in the existence of unjust enrichment.

The Fifth Circuit also ignored the issue of bargaining impediments. The law of restitution strongly resists the imposition of a "forced exchange"—an obligation to pay for a benefit that a recipient had no opportunity to refuse.[63] Almost invariably, therefore, a claimant who recovers in unjust enrichment for a voluntary conferral of unrequested benefits can point to circumstances that made it difficult or impossible to bargain with the recipient over compensation in advance. Typical illustrations include services rendered in an emergency, or services that the defendant—although obligated to perform—has refused to supply.[64] In a standard common fund case or a class action, the difficulty or impossibility of prior bargaining is an important part of the justification for imposing liability for unrequested services.

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60. *Id.* at 1017.

61. *Id.*

62. *Id.*

63. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. e (AM. L. INST. 2011).

64. *See, e.g.*, *id.* §§ 20–22 (explaining the topic of "Emergency Intervention"). As the Restatement observes:

> A private party normally cannot compel another to pay for benefits conferred without request, no matter how appropriate the transaction or how reasonable the terms of the compensation demanded, if the effect of payment would be to complete an exchange that—had it been proposed as a contract—the recipient would have been free to reject.

Id. § 30 cmt b.

In the MDL context, by contrast, that justification is frequently absent. In *Everglades Crash*, whatever impediments to bargaining may have existed did not prevent lawyers from carving up the workload and distributing assignments.[65] This is hardly unusual. In the aftermath of mass torts, lawyers often work together voluntarily before cases are formally consolidated. After the mass shooting that occurred at Marjory Stoneman Douglas High School in Florida, lawyers with cases in the state and federal courts entered into a confidentiality and joint prosecution agreement that set out the terms on which they would share materials.[66] In the GMO corn litigation against Syngenta, which involved tens of thousands of farmers and was spread across three courts, the plaintiffs' attorneys negotiated a joint prosecution agreement that included terms relating to the payment of common benefit fees.[67]

Lawyers also cooperated voluntarily in the *Roundup* litigation where Judge Chhabria noted that "it was not difficult to decide which lawyers should take the lead because only one group came forward, presenting themselves as a slate."[68] No competition for control occurred because the lawyers started working together on agreed terms long before the MDL was created. In a letter to the court requesting appointment as lead counsel, Aimee Wagstaff discussed their arrangement:

> A team of Plaintiffs' attorneys across the nation has been working together to advance this litigation. This team filed the first Roundup® cases, filed most of the federal cases on file as of the date of PTO 1, has extensive experience leading and participating in MDLs generally, and is comprised of experienced trial attorneys with vast experience in mass torts and bellwether trials. . . . The attorneys comprising this team developed the factual and legal pleadings that underlie this litigation, successfully briefed and argued the motions to dismiss filed by Monsanto in federal districts (and also in two state actions), have selected a document vendor and are jointly reviewing documents, and have retained experts. Our team has a proven track record of working collaboratively and efficiently in large, complex cases with one another and with opposing counsel, and in this particular case we have worked together seamlessly and collaboratively for the past 13 months. We have met dozens of times

65. *See Everglades Crash*, 549 F.2d at 1009 (discussing informal cooperation that occurred prior to the creation of an MDL).

66. *See* Motion to Terminate Podhurt Orseck, P.A. as Lead Counsel at 5–6, Guttenberg v. United States, No. 0:18-cv-62758-WPD (S.D. Fla. Dec. 12, 2021), ECF No. 421 (indicating that counsel for victims entered into agreement to cooperate and share materials).

67. Report & Recommendation of Special Master Ellen Reisman Regarding Attorneys' Fees, Expenses, & Service Awards at 6, 61, *In re* Syngenta AG MIR162 Corn Litig., No. 2:14-md-02591-JWL-JPO (D. Kan. Nov. 21, 2018), ECF No. 3816 (highlighting that the plaintiffs' attorneys signed an agreement to establish a common benefit fee framework).

68. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 954.

> to advance the speedy and just adjudication of these cases. We have created a joint litigation fund, housed in Denver at Andrus Wagstaff, and are mindful of containing expenses. We believe the team's efforts have succeeded to date, evidenced by the fact that, to our knowledge, all firms with cases on file as of this filing support appointment of the team in the proposed positions.[69]

Lawyers at nineteen law firms supported Wagstaff's application.[70] Presumably, most or all participated in the working group she described.

Wagstaff provided no details about the working group's financial arrangements. She did not say how the lawyers were handling costs or whether they agreed to share fees. But the reported existence of "a joint litigation fund" establishes that some such provisions were in place.[71] And if the lawyers who participated in the joint venture were able to establish ground rules for themselves, could they not also have brought other IRPAs into the fold and set common benefit fees by agreement?

Because the practice of awarding attorneys' fees from nonclients in class actions is often justified on the ground that lawyers have deficient incentives, it also bears noting that the financial interests of lawyers with cases in MDLs may be much greater. The flood of lawsuits that necessitates the creation of an MDL is one piece of evidence supporting this observation. It shows that lawyers expect individual cases to be profitable, perhaps because they will enter into joint ventures or refer them to lawyers with larger numbers of clients. The tendency of candidates for lead positions in MDLs to possess sizeable inventories also indicates that their financial interests are strong. If a need exists to supplement their incentives by forcing other lawyers to pay them, it must be proven, not presumed.

In his *Roundup* opinion, Judge Chhabria made the preceding point about lead lawyers' incentives while also noting the difficulty of fine-tuning compensation:

> One could imagine an argument that there should be no holdback at all for this MDL. The argument would go something like this: Yes, the lead lawyers invested a great deal of time and money in these cases, but now they're likely making so much from settling their own "inventories" that they can each afford to buy their own island. . . . No doubt that the distribution of attorney compensation in this MDL is imperfect, but perfection can almost never be achieved in the area of attorney compensation—that would be a game of whack-a-mole. And there's no indication that the distribution is so out of whack as to

69. Letter from Aimee H. Wagstaff at 1–2, *In re* Roundup Prods. Liab. Litig., No. 3:16-md-02741-VC (N.D. Ca. Oct. 20, 2016), ECF No. 11.

70. *Id.* at exhibit 2.

71. *Id.* at 2.

> justify the effort and time involved in holding back money from people's recoveries and figuring out how to redistribute it.[72]

By asserting that their incentives are deficient, lead attorneys put MDL judges in the position of public regulators who must estimate the revenues needed to compensate them fairly. But judges possess neither the training in economics nor the data needed to perform this task correctly. Only by the luckiest of accidents will fee awards supplement lead attorneys' incentives correctly.

In *Xarelto*, Judge Fallon argued that common benefit fee awards are needed to "encourage attorneys to accept the considerable risks associated with prosecuting complex, multi-plaintiff matters for the benefit and protection of all plaintiffs' rights."[73] But he identified no substantial costs or risks that the lead attorneys would not also have incurred when representing only their signed clients. When doing the latter, they would have had to prepare and depose the same witnesses whose testimony was needed in the MDL; review the same documents that would have been used as evidence; prepare, argue, and defend the same pleadings and motions; engage the same experts; and so forth. By describing the services that cooperating lawyers delivered before the creation of the *Roundup* MDL, the Wagstaff letter provides positive support for the belief that lead attorneys and lawyers with large inventories carry similar workloads.

To conclude that the common fund doctrine supports the practice of awarding fees in pure MDLs, one must ignore a host of serious problems. Litigation does not produce the pools of money from which dollars are drawn to pay lead attorneys: judges' orders do. IRPAs' fees are individual payments made pursuant to contracts with their clients, not common funds. There are no passive beneficiaries because all claimants hired lawyers and sued, and because IRPAs, who are forbidden by judges from representing their clients in the usual way, are not free riders. Bargaining impediments may be insubstantial, as shown by the fact that attorneys often work together cooperatively before MDLs are formed, and lead attorneys' incentives may not require supplementation. The argument that the common fund doctrine supports the practice of requiring IRPAs to pay lead attorneys in MDLs is wholly unconvincing.

B. The General Impulse to Cure Unjust Enrichment

Because "[t]he common law is not a brooding omnipresence in the sky,"[74] the belief that the authority to award fees in MDLs rests upon a

72. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d at 969.

73. *In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., MDL No. 2592, 2020 WL 1433923, at *3 (E.D. La. Mar. 24, 2020).

74. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917).

general common benefit concept not embodied in a doctrine articulated by a sovereign is hard to square with the rule of law. Yet, the belief enjoys considerable support. Judge Fallon embraces it[75] and Professor William Rubenstein agrees. The latter contends that a "more general concept of unjust enrichment underlies judicial decisions in this area and helps explain [MDL] courts' reliance on the common fund theory, as well as on their inherent authority, in common benefit cases."[76] In support, he cites *Amorin v. Taishan Gypsum Co*.,[77] a recent opinion in which the Eleventh Circuit wrote that "common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements."[78]

In *Amorin*, IRPAs whose cases were remanded from a Louisiana MDL to a federal district court in Florida negotiated a settlement with a group of defendants who paid more than $40 million to resolve just shy of 500 claims. After the IRPAs collected their contingent fees, the lead attorneys in the MDL asked the Florida judge to impose a common benefit levy.[79] They argued that the IRPAs should turn over 60% of their earnings because "a substantial amount of [the lead attorneys'] foundational work was used to secure the [Florida settlement]."[80]

The Florida judge agreed that a debt existed. She found that the IRPAs' clients benefited "from the years of litigation conducted" by the lead attorneys in the Louisiana MDL.[81] She also cited a Most Favored Nations (MFN) clause in the Florida settlement that entitled the IRPAs' clients to an additional $13 million after the class action certified in the MDL court resolved on superior terms.[82]

But the Florida judge thought the IRPAs owed less than the lead attorneys wanted. Although the lead attorneys received 60% of the total fee fund when the class action settlement occurred in the MDL, the Florida judge reasoned that the IRPAs before her should pay only 45% because, by negotiating and administering a separate settlement, they did more work than the IRPAs whose cases remained in Louisiana.[83]

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75. Fallon, *supra* note 8, at 376.

76. Declaration of Professor William B. Rubenstein in Support of Application for Motion for an Award of Common Benefit Fees at 17, Guttenberg v. United States, No. 0:18-cv-62758-WPD (S.D. Fla. Feb. 7, 2022), ECF No. 469.

77. 861 F. App'x 730 (11th Cir. 2021) *cert. denied*, 142 S. Ct. 769 (2022).

78. Rubenstein Declaration, *supra* note 76, at 16 (quoting *Amorin*, 861 F. App'x at 734).

79. *Amorin*, 861 F. App'x at 732.

80. *Id.*

81. Amorin v. Taishan Gypsum Co., No. 11-22408-CIV, 2020 WL 11232641, at *6 (S.D. Fla. May 22, 2020), *aff'd*, 861 F. App'x 730 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 769 (2022) (order granting award of fees to lead counsel).

82. *Id.* at *1 n.3, *6.

83. *Id.* at *5, *7.

On appeal, the Eleventh Circuit affirmed. After explaining that "[t]he [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense," it cited *Everglades Crash* for the proposition that "common benefit fees—grounded in the courts' equity power—need not satisfy rigid eligibility requirements."[84] It supported the call for laxity by invoking the need to manage MDLs efficiently:

> Particularly in complex litigation, courts have broad managerial power that includes significant discretion in awarding fees. The panel in [*Everglades Crash*] explained the "much larger interests" that arise in MDL cases—not only the sheer number of plaintiffs and claims involved but also the importance of effectively and efficiently managing the crushing caseloads of federal courts. . . . Thus, the "broad grant of authority" awarded to trial courts when consolidating cases necessarily includes the ability to compensate appointed counsel that carry "significant duties and responsibilities."[85]

In a subsequent passage, the Eleventh Circuit observed that:

> [P]reventing appointed [MDL] counsel from recovering awards when their work leads to massive recoveries down the road [in remanded cases] would make it harder for courts to find capable and competent lawyers to take on that work in the future.[86]

Plainly, the more general concept of unjust enrichment is an alloy in which the primary metal is administrative need or convenience. In *Amorin*, the premise that "courts have broad managerial power that includes significant discretion in awarding fees" was sufficient by itself to support the conclusion that the district court could tax the IRPAs' contingent fees.[87] Unjust enrichment was a trace element whose addition contributed nothing of substance but did enable the Florida court to invoke its equitable powers.

The tincture added nothing of substance because the law of restitution does *not* condemn freeriding. It is blackletter law that "[t]he fact that a recipient has obtained a benefit without paying for it does not of itself establish that the recipient has been unjustly enriched."[88] Except in limited circumstances, freeriding is fine—even encouraged:

> It is a fact of common experience that a person may benefit from the effort and expenditure of others without incurring a legal obligation to pay. To be the subject of a claim in restitution, the benefit conferred

84. *Amorin*, 861 F. App'x at 734 (citing *In re* Air Crash Disaster at Fla. Everglades, 549 F.2d 1006, 1019 (5th Cir. 1977)) ("Because the payment was assessed against the attorneys this case does not quite fit in the equitable fund cases. It need not precisely fit.").

85. *Id.* at 734–35 (citations omitted).

86. *Id.* at 735.

87. *Id.* at. 734.

88. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 (AM. L. INST. 2011).

> must be something in which the claimant has a legally protected interest, and it must be acquired or retained in a manner that the law regards as unjustified. Otherwise, the fact that we derive advantage from the efforts and expenditures of others is not "unjust enrichment" but one of the advantages of civilization.[89]

This statement is as true for the fruits of litigation as for other positive externalities. Plaintiff B, who copies a complaint or a legal brief filed by Plaintiff A, has no duty to pay. Nor does Defendant B, who benefits from a precedent or a no-liability verdict produced in a case litigated by Defendant A. "[F]ree riding occurs all across our legal system," as Judge Chhabria observed.[90]

As a positive matter, it was true in *Amorin* that the IRPAs acquired the benefit of the MDL lawyers' work "in a manner that" the Florida district court judge and the Eleventh Circuit "regard[ed] as unjustified."[91] But neither court discussed the basis for this normative characterization which, upon being examined, is plainly mistaken. IRPAs do not free ride by choice. They are passive because MDL judges forbid them from acting. The orders that appoint lead attorneys typically provide "that the MDL leadership attorneys are 'the only attorneys permitted' to undertake various tasks."[92] Because judges forbid IRPAs from providing services, it is incoherent to contend that IRPAs acquire benefits "in a manner that the law regards as unjustified."[93]

Assuming it to be true that judges cannot manage MDLs without putting some lawyers in charge and shackling others, the result is not unjust enrichment by any recognized measure. Rather, this practical reality (if it is one) merely bears out the Restatement's observation that the "predominant rationale" for fee awards in MDLs "is not unjust enrichment but administrative convenience."[94] The problem that needs addressing is not of the type that the law of restitution exists to cure. The Eleventh Circuit's fear that a denial of compensation would discourage lawyers from serving as lead

89. *Id.* at cmt. b.

90. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 960 (N.D. Cal. 2021).

91. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 at cmt. b (AM. L. INST. 2011). *See also* Amorin v. Taishan Gypsum Co., 861 F. App'x 730, 735 (11th Cir. 2021) (recognizing that MDL counsel was the one who did the legwork to bring about the action).

92. Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representations in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469, 480 (2020) (quoting Case Mgmt. Order No. 1, *In re* Bard IVC Filters Prods. Liab. Litig., No. 2:15-md-02641-DGC (D. Ariz. Oct. 30, 2015)*; see also* David L. Noll, *What Do MDL Leaders Do? Evidence From Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 455–56 (2020) (describing the various ways in which non-lead MDL attorneys are restricted). For an example, see Case Management Order No. 2.A, *In re* Aqueous Film-Forming Foams Prods. Liab. Litig., No. 2:18-mn-02873-RMG (D.S.C. June 26, 2019), ECF No. 130.

93. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 2 cmt. b (AM. L. INST. 2011).

94. *Id.* § 29 cmt. c.

attorneys suffers the same defect. If true, it warrants legislative action, not restitution.

The Restatement uses an example in which freeriding prevents a desirable project from occurring to explain the common law's position.

> The protection commonly afforded to property rights and contractual liberty . . . comes at an important cost: the invitation to strategic behavior and "free riding" on the part of the owner whose contribution to an enterprise is being sought. If A calculates correctly that B's necessity is so great that A can refuse to contribute to the project and enjoy its benefits at B's expense, the result is a kind of unjust enrichment. On the next occasion, moreover, B may respond to A's strategic behavior by declining to proceed; with the result that a project that would have been mutually advantageous to A and B, and socially beneficial besides, may be frustrated by the parties' bargaining failure. Both this degree of unjust enrichment and this degree of inefficiency are ordinarily tolerated as necessary consequences of rights incident to private property. *Where the cost of such bargaining failure is judged to be too high, the response of the law is not to expand an owner's liability in restitution, but to require the desired behavior by direct regulation* . . . .[95]

The assertion that MDLs will be unmanageable unless lead attorneys are paid merits the same response. The problem is not that unjust enrichment would occur in a form the common law has historically corrected; it is that the MDL statute ought to be changed.

In short, the common law embodies no general concept of unjust enrichment of the sort that MDL judges invoke. The contention that it does collides head-on with the law's refusal to create a general obligation to pay for services that are rendered without request. If the law embodies a general concept, it is that a duty to pay for unrequested benefits exists only when certain demanding and rigorously defined conditions are met. In other words, by invoking an indefinitely malleable general concept, judges stand the law of restitution on its head. They decide that a situation in which A receives something from B without paying for it is an instance of unjust enrichment even though the law of restitution would squarely reject any claim for payment that B might assert. It seems obvious that a judge who orders A to pay B in such a situation is using the general concept of unjust enrichment as a fig leaf to hide the pursuit of a different objective—namely, administrative convenience.

The common fund doctrine is an exception to the general presumption against restitution, which operates in limited circumstances where certain vital inferences can confidently be drawn. The main inferences are that

95. *Id.* § 30 cmt. b (emphasis added).

cooperative working arrangements cannot be negotiated in advance of services being delivered and that all beneficiaries will wind up better off monetarily even after fees are paid. In class actions, these inferences are solid. The baseline for absent class members, who often cannot be identified and are entirely passive, is a $0 recovery. From their perspective, a positive payment from a common fund—even one diminished by a fee levy—can only be an improvement.

By contrast, in MDLs, forced fee transfers can make IRPAs worse off. The transfers require them to purchase lead attorneys' services at prices set by courts. No one can say whether the prices exceed the values IRPAs derive from the services lead attorneys provide. The fact, assuming it is one, that lead attorneys' efforts save IRPAs time and reduce their risks only shows how murky the matter is. To transfer funds in appropriate amounts, judges must estimate these effects and assign values to them. Perhaps because there is no reliable way to do this, they do not even try.[96] In *Amorin*, for example, the Florida judge offered little but the fact that the IRPAs negotiated and administered the $40 million settlement in support of the conclusion that they should keep 55% of their fees rather than the 40% retained by the IRPAs whose clients participated in the class action settlement in the MDL.[97] She neither estimated the fees the IRPAs would have received and the costs they would have incurred had they represented their signed clients in the usual way, nor concluded that they were better off on net after paying the lead attorneys. And what the judge said about the MFN clause was wrong.[98] Credit for the $13 million increase triggered by the class settlement in the MDL belonged to the Florida IRPAs who negotiated the MFN clause for the benefit of their clients. The lead attorneys in the MDL simply got the best deal they could for the class, which is what they were legally bound to do and what the class members paid them to accomplish.

IV. Hybrid MDLs

Nothing better illustrates the tendency to invoke vague, general concepts than judges' frequent use of the phrase "quasi-class action" to describe MDLs. The label is tailor-made to blur essential differences between procedures that are wholly distinct. Consolidations are aggregations of *filed lawsuits* that, while remaining separate, are prepared for trial collectively.

96. *Cf. In re* Xarelto (Rivaroxaban) Prods. Liab. Litig., No. CV-MDL-2592, 2020 WL 1433923, at *5–10 (calculating only the reasonable value of the work performed by the lead counsels, not the value of the resulting time saved and increased efficiency of the IRPAs).

97. Amorin v. Taishan Gypsum Co., No. 11-22408-CIV, 2020 WL 11232641, at *7 (S.D. Fla. May 22, 2020), *aff'd*, 861 F. App'x 730 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 769 (2022).

98. *See id.* at *4, *6 (stating that "claimants were able to increase their recovery through the global settlement's impact on the Most Favored Nations . . . clause" and "increased their total recovery to [over $12M] when they 'liquidated their MFN rights'").

Class actions are representative suits in which a named plaintiff stands in judgment on behalf of a multitude of claimants who have *not* sued. The class action, which permits virtual representation under defined conditions, is one of the few exceptions to the rule of due process that lawsuits bind only parties who are properly named and served.[99]

Academic commentators have criticized the use of the quasi-class action metaphor repeatedly.[100] But there are contexts in which MDLs and class actions must be considered together. Some MDLs consolidate class actions that were filed separately, often in different courts. Parallel antitrust class actions may be handled this way.[101] Other MDLs begin as ordinary consolidations of individual lawsuits but settle as representative proceedings. This transition occurs, for example, when judges certify settlement classes in MDLs that aggregate lawsuits alleging personal injuries.[102]

When MDLs include class actions from the outset, 28 U.S.C. § 1407 and Rule 23 of the Federal Rules of Civil Procedure work together straightforwardly. The statute empowers a transferee judge to coordinate pretrial proceedings in the actions, and the rule governs the manner of handling class-related issues in each lawsuit, including certification, appointment of counsel, notice, and settlement.[103] To put the matter another way, the statute confers no powers or responsibilities that are class action specific, and the rule confers no powers or responsibilities that are MDL specific. Although needs to coordinate discovery, motions practice, and other matters relating to class-wide issues exist only in MDLs that include class suits, this fact is of no particular importance. Lawsuits differ in the matters they require judges to address pre-trial. Some involve experts whose credentials and methods must be examined. Some have special procedural requirements imposed by other laws. Some require choice of law analyses.

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99. *See* Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)) (identifying the class action as an exception to the "'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'").

100. *See, e.g.*, Silver & Miller, *supra* note 3, at 111 ("[T]he quasi-class action approach has serious downsides."); Burbank, *supra* note 9, at 5 (deploring the "risable . . . so-called 'quasi class action'" as a "kitchen sink" justification by MDL judges); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 112 (2015) (footnotes omitted) ("[T]here is no such thing as a quasi-class action: A class is either certified or not. Treating Rule 23 as a grab bag of authority to be invoked when convenient undermines the Rule's due-process protections and structural assurances of fairness.").

101. Silver & Miller, *supra* note 3, at 114–15 (describing pre-trial consolidation by the Joint Panel on Multidistrict Litigation, including of antitrust cases); Burch, *supra* note 100, at 79, 79 n.27 (discussing antitrust in the context of MDLs "becom[ing] the primary means for resolving aggregate litigation").

102. *E.g.*, *In re* NFL Players' Concussion Injury Litig., 307 F.R.D. 351, 361, 371 (E.D. Pa. 2015).

103. 28 U.S.C. § 1407(b); FED. R. CIV. P. 23.

The statute empowers MDL judges to coordinate the handling of all pretrial matters, whatever they may be.[104]

When MDLs that start out as aggregations of individual lawsuits settle as class actions, the analysis is the same. Section 1407 and Rule 23 again have separate domains. Rule 23 and the common law expounding upon it govern all class-related issues, such as whether absent plaintiffs are adequately represented and a settlement merits approval.[105] Section 1407 governs all MDL issues, such as how cases filed by non-settling plaintiffs will proceed toward trial.[106]

Despite the neatness of the separation, there may be a perception that certification of a settlement class resolves any uncertainty that exists about the applicability of the common fund doctrine in an MDL. As noted, the class action is the doctrine's natural home. Certification of a settlement class inside an MDL may therefore seem to establish that the predicates required by the common fund doctrine are met.

It does not. The existence of a certified class action is neither a necessary condition for the applicability of the doctrine nor a sufficient one. The first point is better established than the second, but both are correct. As the Restatement observes:

> The recovery authorized by § 29 does not depend on whether the underlying litigation—by which a common fund is secured for multiple beneficiaries—takes the procedural form of a class action. From the restitution standpoint, it is *irrelevant* whether legal proceedings that secure a common benefit were brought in the name of an individual plaintiff or on behalf of a class.[107]

"Irrelevant" is a strong word, but it is the right one. The common fund doctrine applies when its requirements are met. The certification of a class suggests that they are, just as a blaring smoke detector suggests the existence of a fire. In both contexts, though, a direct assessment of the facts may establish that the signal was misleading.

The belief that the requirements of the common fund doctrine are met is especially likely to be unwarranted when settlement classes resolve aggregations that begin as pure MDLs. In these instances:

- Many claimants, possibly all, hired IRPAs and sued. These claimants are not passive free riders. They took steps to vindicate their rights and have their own contracted-for fees to pay.

104. 28 U.S.C. § 1407(b).

105. FED. R. CIV. P. 23.

106. 28 U.S.C. § 1407(b).

107. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011) (emphasis added).

- IRPAs may have been able to negotiate the terms on which a joint venture would proceed. They may even have worked together voluntarily before lead attorneys were appointed, as in the *Roundup* and *Marjory Stoneman Douglas High School* MDLs.[108]
- IRPAs may not be enriched unjustly because they filed lawsuits and likely took other steps for the benefit of their clients until judges ordered them to sit on their hands.[109]
- The fees that lead attorneys stand to collect from clients who were signed or referred may have provided sufficient incentives to bear the relevant costs and risks. The magnitude of any supplement that may be warranted will also be impossible to calculate.
- If lead attorneys' fees are to be paid by IRPAs, the latter's earnings will not constitute a common fund. They will consist of separate payments from signed clients in which only IRPAs have interests.

In short, certification of a settlement class in a previously pure MDL leaves unchanged the facts that determine whether the common fund doctrine applies, and those facts may warrant a negative conclusion in a hybrid MDL for the same reasons they did initially.[110]

To reach a conclusion other than the one argued for here, one must believe that a procedural change—certification of a settlement class in a previously pure MDL—can create a substantive right to compensation that would not otherwise exist. Rule 23 confers no such power. It permits a court to award attorneys' fees that are "authorized by law."[111] Here, the relevant body of doctrine is the law of restitution and unjust enrichment, which entitles lawyers to fee awards from common funds under defined conditions—none of which is the certification of a settlement class. Using Rule 23 to create a new right to payment would also run afoul of the Rules Enabling Act, which permits the creation of only procedures that leave substantive rights unchanged.[112]

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108. *See supra* notes 66, 68–70 and accompanying text.

109. Many IRPAs have responded to existing MDL management practices by adopting a business model on which they amass clients and wait for lead attorneys to do the work. *See* Silver & Miller, *supra* note 3, at 110 (explaining that cuts in IRPAs' contingent fees trigger "[a] downward spiral" because they "discourage lawyers from working hard"). This is a rational response, but the existence of this business model cannot justify the management practices that foster it.

110. To be clear, certification of a settlement class in a proceeding that began as a pure MDL establishes the propriety of taxing neither claimants nor IRPAs. It may be wrong to tax the claimants because they took steps to vindicate their claims and wrong to tax IRPAs because their fees are not common funds, because lead attorneys can bargain with them directly, etc.

111. FED. R. CIV. P. 23(h).

112. 28 U.S.C. § 2072(b).

V. Conclusion

Federal judges have looked high and low for sources of authority to regulate lawyers' fees in MDLs. They have argued that MDLs are quasi-class actions in which they may exercise powers conferred by Rule 23. They have invoked the inherent power to manage litigation. And they have asserted a general power to cure unjust enrichment. They have even blended these rationales together, contending that the existence of unjust enrichment provides an additional reason for asserting the inherent power to manage litigation.[113]

One has the sense that MDL judges are fudging. If any of these rationales suffices individually, why offer the others? And if they work only when combined, what are their individual deficiencies and how does weaving them together remedy their defects? The ordinary commitment to analytical rigor requires considerably more clarity about these matters than judges have provided.

Fundamental questions remain to be answered, too. Are MDL judges really free to play fast and loose with the doctrines that collectively constitute the common fund exception to the rule that persons who provide unrequested services have no right to payment? Do they really possess a roving commission to cure unjust enrichment whenever they claim to perceive it? And does this power exist in contexts where lawyers could have bargained for payment in advance and may even have participated in joint ventures on agreed terms?

Judges' misapplication of the law of restitution and unjust enrichment contributes to the impression that MDLs are the Wild West of civil litigation, a charge expressed by academics that tort reform groups subsequently embraced.[114] The dearth of scholarship supporting the various asserted justifications for fee-related practices strengthens this concern. Academic commentators have not published careful defenses of the uses MDL judges make of their inherent powers, the aptness of the quasi-class action metaphor, or the applicability of the common fund doctrine, despite having had plenty of time to do so. Now that all three rationales have been challenged, perhaps they will.

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113. *See* Silver & Miller, *supra* note 3, at 121 (criticizing the quasi-class action rationale); Pushaw & Silver, *supra* note 9, at 50–51 (criticizing the inherent powers rationale); Fallon, *supra* note 8, at 376 (describing the justifications underpinning the quasi-class action rationale).

114. Andrew Bradt and Calen Bennett contend that the rhetoric in the Sixth Circuit's opinion in *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838 (2020), was taken from briefs submitted by the U.S Chamber of Commerce and Lawyers for Civil Justice, organizations that have long campaigned against aggregate litigation and lobbied for tort reform. Andrew Bradt & Calen Bennett, Adult Supervision? Opioids, Mandamus, and "Law Reform" in Multidistrict Litigation 3 (Oct. 25, 2020) (unpublished manuscript) (on file with authors). If so, the chorus calling for MDL reform includes a range of voices, some of whose authors, including me, have spoken out loudly against tort reform for decades.