A Closer Look at Participation Agreements: Criticisms and Jurisdiction

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Federal courts are described as "courts of limited jurisdiction." Thus, when a federal court with a pending multi-district litigation (MDL) lawsuit requires attorneys with cases outside of the MDL to contribute toward any common-benefit fees awarded in an MDL, an immediate question arises about the court's authority. Recently, the use of participation agreements in MDLs has brought this jurisdictional question to the surface. The view emerging in the Third and Ninth Circuits is that once a participation agreement is incorporated into a court order in a federal MDL, the court has jurisdiction to tax lawyers on cases outside of the MDL. On its face, it seems as though federal judges have found a means to obtain jurisdiction over a matter through the fee-related liability of lawyers involved with cases in other courts. This Note argues that this jurisdiction must be beyond judicial reach.

The Third and Ninth Circuits believe that federal MDL judges have jurisdiction when a participation agreement is included in the court's order. This Note terms this belief as the "managerial view," allowing the extension of jurisdiction outside of the MDL as part of a court's managerial power. In contrast, the Fourth and Eighth Circuits assert that federal MDL judges lack authority over cases outside of the MDL—regardless of any agreements signed—and that consent of the parties cannot establish subject matter jurisdiction. This Note terms this belief as the "limited-reach view," restricting the extension of jurisdiction outside of the MDL.

This Note is the first to consider whether federal courts have the subject matter jurisdiction to impose common-benefit fund assessments on lawyers outside of the federal MDL. In support of the limited-reach view, this Note argues that these courts do not have jurisdiction and criticizes the most recent court to speak on this issue: the Ninth Circuit. Consequently, this Note recommends that the Supreme Court should weigh in on this circuit split and adopt a bright-line rule that aligns with the limited-reach view by holding

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that federal courts do not have jurisdiction over fee agreements outside of the MDL.

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Introduction

In the realm of multi-district litigation (MDL), the interplay between participation agreements and judicial oversight unveils a complex landscape of legal dynamics. As courts grapple with the management of MDL

proceedings, the divergent views of various federal circuit courts and the nuanced examinations of participation agreements underscore critical questions surrounding equity, jurisdiction, and judicial authority.

The current divide centers on two fundamentally different approaches. On one side, the "managerial view"—adopted by the Third and Ninth Circuits—holds that once a participation agreement is incorporated into a court order, MDL judges may enforce its terms even against attorneys litigating outside the MDL. Courts embracing this view justify their authority by invoking inherent managerial powers, principles of equity, and ancillary jurisdiction to enforce court orders. They view the MDL judge as a central coordinating authority with broad discretion to preserve judicial efficiency and ensure fair compensation for lead counsel. On the other side, the "limited-reach view"—endorsed by the Fourth and Eighth Circuits—insists that federal courts cannot exercise jurisdiction over cases or attorneys absent an independent source of subject matter jurisdiction. This view rejects the notion that consent or incorporation into a court order can extend a federal court's constitutional authority, emphasizing that procedural efficiency cannot override foundational jurisdictional limits. This Note argues that the limited-reach view is the correct one, and that federal courts should not exercise jurisdiction over fee assessments in cases outside the boundaries of an MDL.

But beneath this jurisdictional conflict lies a deeper structural problem. Participation agreements are often thought of by courts as voluntary arrangements between equal parties—but in practice, they are anything but. Lead counsel in MDLs, empowered by judicial appointment and access to privileged information, operate from a position of overwhelming leverage. Prospective participants, by contrast, face information asymmetries, unequal bargaining power, and implicit pressure from judges to sign agreements that bind their recoveries—even in cases never before the MDL court. These agreements, often resembling contracts of adhesion, blur the lines between consent and coercion, and allow federal judges to stretch their authority under the guise of managerial necessity. As this Note argues, the legitimacy of participation agreements is not merely a doctrinal question of jurisdiction, but a constitutional concern that implicates federalism, procedural fairness, and the proper role of the judiciary.

This Note proffers that should the Supreme Court choose to weigh in on the circuit split, the Court should adopt a bright-line rule limiting the jurisdiction of federal MDL judges to federal MDL plaintiffs. In other words, the Court should adopt a bright-line rule that tracks with the limited-reach view that courts only have jurisdiction over the advocates in their courtroom.

Part I of this Note delves into the multi-faceted views of the costs and benefits of participation agreements. Part II of this Note outlines the federal circuit debate between the limited-reach and managerial views. Part III of

this Note is divided in three sections: subpart III(A) criticizes the Ninth Circuit's decision in *In re Bard*; subpart III(B) argues against the managerial view; and subpart III(C) argues for the adoption of the limited-reach view. Part IV of this Note proposes that the Supreme Court create a bright-line rule that aligns with the limited-reach view to end the ongoing debate. This Note then concludes by briefly addressing the costs and benefits of adopting the proposed limited-reach view on participation agreements.

I. Participation Agreements: Uses and Flaws

Part I of this Note is divided into three subparts: Subpart I(A) discusses the definition of participation agreements, the costs and benefits of joining such agreements, and the problems with them—beginning with the relationship between MDL judges and the attorneys appointed to lead the litigation (commonly referred to as "lead counsel"[1]). Subpart I(B) discusses the unfair advantages that so-called repeat players have in negotiating an agreement with prospective plaintiffs. Further, this subpart delves deeper into the advantages lead counsel might enjoy in MDLs. In addition, it explores the problem with the lack of information communicated to prospective plaintiffs, before discussing the finality of participation agreements, locking plaintiffs into the agreement once it is signed. Subpart I(C) next discusses the application of the presumption of unjust enrichment in some courts. This Note argues that this presumption is faulty and fails to completely account for the contributions made by participating plaintiffs' attorneys (commonly referred to as "participating counsel"[2]).

A. Defining Participation Agreements

Participation agreements are voluntary agreements between plaintiffs' attorneys with cases pending in the MDL and/or in state court.[3] The substance

1. The *Manual for Complex Litigation* states that "Lead Counsel" is:

> Charged with formulating (in consultation with other counsel) and presenting positions on substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.

MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221 (2004).

2. *See generally, e.g.*, Case Management Order No. 9, *In re* Paraquat Prods. Liab. Litig., No. 3:21-md-03004-NJR (S.D. Ill. Aug. 30, 2022) (limiting common-benefit fee recovery to "Participating Counsel" who signed agreements or were court-appointed).

3. *See, e.g.*, Case Management Order No. 14 at 2, *In re* Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Relevant Prods. Liab. Litig., No. 3:09-md-02100-DRH (S.D. Ill. Mar. 8, 2010) (defining Participation Agreements as a "voluntary . . . Agreement between plaintiffs' attorneys who have cases pending in the MDL and/or in state court.").

of a participation agreement typically includes a provision where non-MDL plaintiffs' attorneys (prospective participants) pay "common-benefit assessments" from the gross recoveries obtained in relevant cases in state or federal court.[4] Some contracts specify that the agreement extends to "filed, unfiled, and tolled cases" in state or federal court.[5] In exchange, plaintiffs' attorneys will have access to a "common-benefit work product."[6] The scope of common-benefit assessments depends on the terms of the contract but generally includes a variety of information such as prior expert witness testimony, scientific research, and bellwether transcripts.[7] Participation agreements help plaintiffs' attorneys with similar claims cooperate with lead counsel for settlement within the MDL.[8] Thus, theoretically at least, both lead counsel and non-lead plaintiffs' attorneys should benefit.

When prospective plaintiffs outside the MDL sign onto the participation agreement, they are referred to as "participating counsel."[9] The MDL's lead counsel receives a piece of the participating counsel's pie if there is an award or settlement in the case.[10] Participating counsel can thus theoretically leverage participation agreements by using the common-benefit work product to their benefit in settlement negotiations in federal or state court.

Few legal scholars have delved into the discussion of participation agreements and whether the judiciary should reconsider the role of

4. *See, e.g.*, *id.* at 4–5 (establishing the common benefit fee and expense fund).

5. *E.g.*, Case Management Order No. 4 at 4, *In re* Bard Implanted Port Catheter Prods. Liab. Litig., No. 2:23-md-03081-DGC (D. Ariz. Oct. 26, 2023) ("Participating Counsel agrees to pay common-benefit assessments from the gross recoveries obtained in all filed, unfiled, and tolled cases and/or claims in state and/or federal court in which they have a fee interest . . . .").

6. *E.g.*, Case Management Order No. 14, *supra* note 3, at 2; *see also, In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 826 (D. Ariz. 2022) ("Compensable common benefit work included meetings and conference calls, discovery, document review, expert retention and discovery, motion practice, court appearances, plaintiff-specific discovery and motion practice on bellwether cases, bellwether trials, and settlement efforts."); *In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP, 2010 WL 716190, at *5–6 (E.D. Mo. Feb. 24, 2010) (describing objecting plaintiffs as benefiting from "the leadership group's work in discovery, motion practice, and bellwether trials"), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

7. *E.g.*, Case Management Order No. 4, *supra* note 5, at 2–3, 12.

8. *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, 156 (2010) (describing how MDLs can "improve the odds of settling by concentrating lawsuits," creating "unified control," and "facilitating cooperation across courts").

9. *See, e.g.*, Case Management Order No. 14, *supra* note 3, at 2 (explaining that those who execute a Participation Agreement are referred to as "Participating Counsel" and are entitled to access "Common Benefit Work Product" developed in the MDL).

10. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 20 (2019) (explaining that lead attorneys may be awarded "common-benefit fees," requiring plaintiffs who win or settle judgments to compensate lead lawyers for their work).

participation agreements in MDLs.[11] However, the use of participation agreements in federal MDLs—including the relationship between federal judges and lead counsel—ought to be critically examined. And exploring the flaws of participation agreements reveals a symptom of an even greater problem: management dysfunction and constitutional doubt regarding the "inherent powers" of a federal judge to manage an MDL docket.

An examination of the flaws of participation agreements should begin at the moment when an MDL's lead counsel asks a prospective plaintiffs' attorney to join the agreement.[12] At this moment, then, it logically follows that the prospective plaintiff has three options: (1) agree to the proposed participation agreement and sign onto it; (2) disagree to the proposed participation agreement and decline to sign onto it; or (3) negotiate a different participation agreement to which both parties may sign onto. This Note, however, argues that participation agreements are inherently unfair.[13] In fact,

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11. Of what little scholarship on this subject exists, no one has gone into great detail about how prospective plaintiffs' attorneys are disadvantaged before signing a participation agreement. The discussion around participation agreements often happens in passing and revolves around how judges make participation agreements coercive. *See, e.g.*, BURCH, *supra* note 10, at 21 ("Judges forbid attorneys from discovering information from the defendant on their own in the federal proceeding, so they have few options but to rely on the leaders' work."); Silver & Miller, *supra* note 8, at 131 ("From almost every angle, the strategy of using imposed agreements to legitimate fee and cost transfers was poorly conceived. The most obvious problem was that the exchanges were forced. Disabled lawyers could neither choose the managerial lawyers they wanted nor bargain over terms nor refuse to deal."). Professor Silver and Professor Miller wrote about participation agreements in the context of showing how lead lawyers are attempting to devise new strategies—like the use of settlement negotiations—to increase their compensation beyond the participation agreement itself. *Id.* at 131. This Part takes a different approach, however, by focusing on prospective plaintiffs' attorneys' perspectives before and after entering into a participation agreement. In addition, the discussion in this Part seeks to undermine federal judges' invocation of "inherent powers" to justify the extension of jurisdiction over non-federal MDL cases.

Additionally, there has been little scholarship on the general problem of parallel litigation with the use of participation agreements. *See* J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 12 (2012) ("[T]here has been relatively little scholarly attention paid to the problem that non-removable state cases pose for federal MDL proceedings.").

12. For an example of a participation agreement, see generally Pretrial Order No. 2, *In re* Gadolinium Based Contrast Agents Prods. Liab. Litig., No. 1:08-gd-50000-DAP (N.D. Ohio Feb. 20, 2009). This Pretrial Order defines the purpose of the Participation Agreement as follows:

> This Participation Agreement is a private cooperative agreement between plaintiffs' attorneys to share common benefit work product both in this MDL and in the various state courts. Plaintiffs' attorneys who sign on to this Agreement (Participating Counsel) are entitled to receive the MDL "common benefit work product" and the state-court "work product" of those attorneys who have also signed the Participation Agreement.

Id. at 2.

13. The core rationale behind an MDL judge executing the terms of a participation agreement is unjust enrichment. But it is not clear whether lead counsel is legitimately unjustly enriched where a non-MDL participant uses common-benefit work. Professor Silver discusses this matter with

so-called "repeat players"[14] already have an edge up in the MDL process, as these lawyers are hand-selected and favored by judges.[15] As just one example, repeat players are more likely to receive favorable negotiated settlement terms for their clients.[16]

There are two main considerations that have undermined the fair use of participation agreements. First, just as repeat players in MDLs have an advantage when it comes to settlement, the players also have a leg up during the negotiation of participation agreements.[17] Second, judges often use a "carrot and stick" approach to incentivize participating counsel to join a settlement agreement that agrees to common-benefit fees beyond what was initially included in the participation agreement.[18] These considerations are discussed in more detail in the next subpart.

B. The Unfair Advantage for Repeat Players

Whenever two parties enter into an agreement, there is always a risk of informational or power asymmetry.[19] This risk is no less present in the MDL context, where both parties incur risks of their own.[20] However, the degree and kind of these risks differ depending on where one sits at the negotiating table. As discussed, repeat players have an advantage when it comes to

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regards to settlement agreements, and the concerns are equally applicable in the context of participation agreements. *See generally* Charles Silver, *The Suspect Restitutionary Basis for Common Benefit Fee Awards in Multi-District Litigations*, 101 TEXAS L. REV. 1653 (arguing that MDL judges are misapplying the law of restitution and unjust enrichment by regulating attorneys' fees).

14. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1453 (2017) (defining "repeat players" as those "who encounter the legal system [of MDLs] time and time again").

15. *See* Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 142, 145–47 (2012) ("Overall, the empirical literature, while limited, supports the assumption that more experienced attorneys exercise more power in the legal system, measured as obtaining more favorable outcomes for their clients.").

16. *Id*. at 146–47.

17. *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 81 (2017) (stating that once repeat players are in power as lead counsel, they "may use their advantage to influence, create, perpetuate, and enforce practices").

18. As Professor Elizabeth Chamblee Burch explains, "the overwhelming message sent by transferee judges is that leadership appointments—and the lucrative fees accompanying them—are conditioned upon cooperation and team play," prompting attorneys to "silence their discord and achieve financial success by playing the long game." *Id.* at 91–92. The "stick," here, consists of potential penalties for noncooperation, such as higher fee assessments. *See id.* at 131–32 (providing empirical examples in which the final fee assessment was higher for participating counsel than the initial percentages of fee amounts).

19. For a survey of how bargaining power disputes affect judicial analysis of contracts, see generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

20. *See* Burch, *supra* note 17, at 87 (citing agency-monitoring concerns and higher common-benefit fees as examples of risks in the MDL context).

participation agreements.[21] Admittedly, this advantage can sometimes be hard to prove because, just as settlement terms are "shrouded by private, closed-door" negotiations,[22] so too are participation agreements. Even still, we know that repeat players have powerful chips to play. Professor Elizabeth Chamblee Burch, for instance, has stated that lead counsel can act like "oligopolies and cartels."[23] Further, Professor Burch has recognized that lead counsel has the power to "access and inflict costs," "suggest common-benefit fee allocations, and report uncooperative behavior to the judge."[24] While this power might be most useful to lead counsel *after* a participation agreement has been signed, they can nonetheless exploit this influence to build leverage *during* participation-agreement negotiations. And this makes sense considering that lead counsel creates these agreements and sends them out to prospective plaintiffs' attorneys in the first place: Why would the lead counsel not act in their best interest?

Moreover, repeat players have the advantage of knowing the merits of the MDL more than a prospective participant. Outside of the common-benefit work product, prospective participants are unlikely to really know whether the MDL is a "sinking ship" or not. During negotiations, lead counsel is the only party who really knows what is going on in the MDL.[25] Of course, participating counsel may judge the merits of the MDL, estimate how much of an investment the case is worth, and calculate the value of the common-benefit fund from the outset—but at this negotiating stage, before any agreement has been reached, participating counsel naturally lacks whatever information is *inside* the MDL.[26] Accordingly, then, a prospective plaintiff's choice to join a participation agreement is a judgment call, and a rather risky

21. *See* Burch & Williams, *supra* note 14, 1465 (summarizing the advantages of repeat players in MDL proceedings, including "bargaining credibility," "negotiating and work-distribution authority," and "judicial deference to claims handling").

22. Burch, *supra* note 17, at 87.

23. *Id.* at 122.

24. *Id.*

25. Lead counsel in an MDL often has a unique and comprehensive understanding of the case due to their central role in managing the litigation. They are responsible for overall strategy, coordinating discovery, conducting settlement negotiations, and overseeing communication with the court and other parties. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 1, § 10.221 (describing the unique responsibilities of lead counsel). This position allows lead counsel to have access to all facets of the litigation, from discovery to settlement discussions, which other parties may not fully grasp due to their limited scope of involvement.

26. Imagine, for example, that an attorney is approached by lead counsel in an MDL and asked to participate. At that point, the prospective plaintiffs' lawyer must assess a flurry of questions related to the lead counsel's competence and success, the relationship between the judge and lead counsel, the amount of work expected from participating counsel, the potential increase in common-benefit fees beyond the scope of the participation agreement, and the possibility of collusion between lead counsel and the defendant at the expense of participating plaintiffs. These questions, however, cannot be fully answered from whatever surface-level information the prospective attorney has at their disposal before entering the MDL.

one at that. Yet, this example shows just one way in which lead counsel has an advantage over participating counsel in participation-agreement discussions. At best, a prospective participant can make a reasoned judgment. But in doing so, they nonetheless lack the same level of understanding as lead counsel, who is already heavily involved with the day-to-day operation of the MDL.

Prospective plaintiffs' attorneys looking to sign onto a participation agreement thus bear several risks. For one, a prospective plaintiffs' attorney must—to the best of their ability—identify whether the MDL is a "sinking ship." A "sinking ship" MDL is one that could be worthless despite looking fruitful from the outset of litigation. Thus, if participating counsel signs onto an agreement to participate in a "sinking ship" MDL, then neither they nor their clients will recognize any financial benefit in the future.

Second, prospective plaintiffs' attorneys must trust lead counsel to tell the truth during participation negotiations. For example, lead counsel may incentivize a prospective participant by saying the prospective participant would not have to work substantially more on their cases or any other case once they sign the participation agreement. But then, after the agreement has been signed, lead counsel may have the prospective participant do significantly more work than originally understood. Similarly, lead counsel might give an estimate for shared costs in the litigation. But since the prospective participant is unaware of the true size of shared cost, they must either trust lead counsel's statements or make their own prediction based on incomplete information. If the prospective participant refuses to complete the extra work or pitch in for the shared costs, lead counsel can report to the federal MDL judge that the participating counsel is being uncooperative.[27] And although participating counsel has the ability to object,[28] they rarely exercise that power.[29] But this lack of objections from participating counsel is not necessarily because they are satisfied with the terms of their participation agreement but because they generally understand the risks associated with the role of an objector,[30] as evidenced by the presence of silent objectors in an MDL.[31] Even when participating counsel wants to speak

27. *See* Burch, *supra* note 17, at 122 (describing how lead counsel acts like a cartel when suggesting common-benefit fee allocations and reporting uncooperative behavior to the judge).

28. In this context, to "object" refers to Plaintiff's ability to object to fees on the MDL docket. In a study across thirty MDLs, less than 40% had known objections. *Id.* at 109 tbl. 2.

29. *See id.* at 135 ("Plaintiffs' lawyers know all too well what happens behind the scenes and how it affects them and their clients, but their payoff for cooperating, staying silent, and playing the long game is currently more profitable than competing.").

30. *See id.* at 122 ("Objecting in the face of judicially sanctioned cooperative norms and powerful repeat players can render [participating plaintiffs' attorneys] ineligible for future leadership roles and diminish their chances of receiving common-benefit work.").

31. *See id*. at 135 (finding that "staying silent" is a "more profitable [strategy] than competing" with lead counsel).

out—especially in situations with large amounts of fees on the line (such as an increase in common-benefit fees or leadership selection)—objectors still tend to remain silent.[32] But the full extent of these risks are only revealed *after* participating counsel signs the participation agreement and joins the MDL. Yet prior to signing, the prospective participant must nevertheless assess these risks, perhaps by taking whatever lead counsel says at their word. And without significant insight pertaining to lead counsel's reputation or whatever information is inside the MDL, prospective plaintiffs' attorneys can be left in the dark.

Accordingly, prospective participants must make a judgment call without sufficient information, which keeps counsel (and their clients) guessing about the future of their case. And once bound by the participation agreement, participating counsel cannot withdraw from the MDL without breaching its terms.[33] This finality ties participating counsel to the participation agreement no matter what information they find once inside the MDL. Considering the function of participation agreements across an MDL, the agreements begin to look less like negotiated terms between two equal parties and more like contracts of adhesion.[34] In a podcast hosted by the American Law Institute, Professor Burch described the following:

> Participation agreements are what I tend to think of as kind of your classic case of a contract of adhesion, where you have the judge that says, "Hey, why don't you sign this agreement?" And if you don't, you're not going to have any access to the discovery materials. But those participation agreements not only cover the cases within the MDL, but they also cover state-court cases.[35]

But no matter the academic debate over the validity of participation agreements, the legal field must consider the coercive nature of the attempt for federal MDL judges to get prospective plaintiffs' attorneys to sign onto

32. *Id.* at 122–24.

33. *See, e.g.*, *In re* Avandia Mktg. Sales Pracs., 658 F. App'x 29, 34–37 (3d Cir. 2016) (holding that any attorney that signed onto the participation agreement was bound to the terms of the agreement).

34. For a discussion on adhesion contracts, see Nicholas S. Wilson, *Freedom of Contract and Adhesion Contracts*, 14 INT'L & COMPAR. L.Q. 172, 175–76 (1965).

35. *Reasonably Speaking: "MDLs Go Mainstream: Mass Torts Today,"* AM. L. INST. (Nov. 2020), https://www.ali.org/news/podcast/episode/mdl-mass-torts [https://perma.cc/G5B3-BFXU]. Professor Burch's point was more recently echoed by an appellate advocate who argued a recent common-benefit fee case before the Ninth Circuit. Alison Frankel, *Appeals Court OKs 'Common Benefit' Fees in Bard IVC Filter Litigation. Next Stop Supreme Court?*, REUTERS (Aug. 28, 2023, 4:02 PM), https://www.reuters.com/legal/government/appeals-court-oks-common-benefit-fees-bard-ivc-filter-litigation-next-stop-2023-08-28/ [https://perma.cc/AHP4-J5DD] (noting that the appellate attorney explained that "[p]laintiffs' lawyers with clients whose cases have been transferred into MDL proceedings have no choice but to agree to participate, lest they be denied access to the discovery they need in order to provide adequate representation to their clients").

an agreement and the use of those agreements as a means to reach cases outside of the MDL.[36] These inherent issues with participation agreements raise serious federalism and fairness concerns. In one case, for example, a federal MDL judge drafted an order that requested common-benefit assessments to all cases, state and federal, "regardless of whether any substantive benefit was conferred" by the plaintiffs' steering committee (i.e. lead counsel).[37] In another case discussed in more detail later, a court imposed a fee interest on *any* attorney who had signed a participation agreement.[38]

As a consequence of the federal MDL judges' role, the power dynamic in favor of lead counsel, and the possibility of court orders expanding MDL jurisdiction into cases not before the court, fair negotiations between parties are rare. These issues exacerbate the infrequency of negotiations in MDLs, considering that repeat problems occur when other prospective plaintiffs become aware of lead counsel negotiating agreements. Put more simply, if lead counsel negotiates the terms of the participation agreement with *one* group of plaintiffs' attorneys, then *all* groups of plaintiffs will follow suit and seek to negotiate. But since the power dynamic already favors lead counsel, they have little incentive to invite the risks associated with negotiating with prospective plaintiff attorneys. To the contrary, it seems that lead counsel gets to pick and choose who they want to work with. For instance, lead counsel can ask a number of prospective plaintiffs' attorneys to sign on their participation agreement terms; if the prospective plaintiffs decline the offer, then lead counsel can just move on to the next person.

But what good does upholding the status quo achieve? Participating counsel should have more bargaining power in participation agreement negotiations so that the playing field is leveled. And in turn, by levelling the playing field, MDLs will become more cooperative between lead and participating attorneys—both inside and outside of the federal MDL. Additionally, efforts to equalize the bargaining power could reduce satellite litigation (outside of the MDL) pertaining to fee assessments, and attorneys outside of the MDL would be more incentivized to litigate their cases in state court.

In sum, a number of issues arise when we examine participation agreements in the MDL context. Prospective plaintiffs' attorneys looking to sign onto a participation agreement suffer many disadvantages relative to lead counsel, including power and informational imbalances. And the

36. *See* Burch, *supra* note 17, at 116–18 (describing cases in which federal judges imposed common-benefit taxes on state-court plaintiffs).

37. Plaintiff's Opposition to Plaintiffs' Executive and Steering Committees' Motion for Entry of a Common Benefit Order at 4, *In re* DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., No. 1:10-md-02197-DAK (N.D. Ohio Nov. 22, 2011).

38. *In re* Avandia Mktg. Sales Pracs., 658 F. App'x 29, 34–37 (3d Cir. 2016).

binding nature of participation agreements, often proposed by repeat players, makes it less likely that participating counsel will vocalize their opposition to the agreement if they find something objectionable. Moreover, as discussed later, depending on which federal circuit the litigation is in, prospective plaintiffs' attorneys are at risk of having cases outside of the federal MDL be assessed by the federal MDL judge.[39] If a prospective plaintiffs' attorney feels nudged by a judge to sign a participation agreement, then they risk having their state-court cases assessed by the federal court as well. All these factors play a role in the decisions of prospective plaintiffs' attorneys faced with the choice of whether to join a participation agreement.

C. The Assumption of Unjust Enrichment

As discussed later, the managerial view of participation agreements permits federal MDL judges to "manage" proceedings by extending jurisdiction to cases outside of the MDL.[40] This view relies, in part, on principles of equity to justify federal MDL judges taxing participating counsel outside of the MDL. But the managerial-view analysis rests on the assumption that non-lead attorneys unjustly benefit from lead counsel's hard work. This subpart raises preliminary questions regarding the "compelling equities" argument of the managerial view by focusing on whether non-lead attorneys are unjustly enriched, and if so, to what extent.

Judges may assume that participating counsel is unjustly enriched without payment for the assessment fees in a participation agreement. This assumption is used by federal judges to justify, in part, the exercise of jurisdiction over cases outside the MDL.[41] However, scholars have criticized this assumption as a misapplication of the unjust enrichment doctrine.[42] This Note takes the argument a step further, contending that it is actually *lead counsel* who is unjustly enriched at the expense of participating counsel who contribute to the common-benefit work product.

The "core" equity principle of participation agreements is that plaintiffs' attorneys who benefit from the common-benefit work should pay for their use of that work product. But this assumption raises questions. At face value, the idea of "paying back" the creators of common-benefit work makes sense. But as judges and scholars have pointed out, there are instances where this

39. *See infra* Part II.

40. *See infra* notes 126–29 and accompanying text.

41. Silver, *supra* note 13, at 1654.

42. *See, e.g.*, *id.* at 1670–72 (arguing that MDL judges misapply the doctrines of restitution and unjust enrichment by regulating attorneys' fees); Burch, *supra* note 17, at 146–47 (identifying deviations in contemporary common-benefit fee practices from well-accepted restitutionary theories).

assumption makes no sense at all.[43] As Professors Geoffrey Miller and Charles Silver explain, for example, "There are 'no passive recipient[s] of benefits' in MDLs because all claimants are outfitted with lawyers."[44] Yet, the doctrine of unjust enrichment relies on this "passivity requirement." In the context of participation agreements, this means that judges should only target participating "free-riders" and only apply the common-fund doctrine when participating counsel have made "*no significant contribution*" to the common fund.[45] But as Professors Miller and Silver argue, there are almost no "free-riders" in the MDL context.[46] Participating counsel tends to get a bad reputation for waiting for settlement negotiations, while lead counsel tends to "cast themselves as heroes" of the story.[47] Participating counsel also "provide[s] essential services,"[48] but their contributions can be overlooked in discussions about the fairness of fee assessments and how much non-lead lawyers owe to lead counselors. This raises serious questions: What happens, for example, when participating counsel has successful cases both within and outside the MDL? What happens when participating counsel strengthens the bargaining power against the defendant(s)? Are these fee assessments truly equitably assessed in such scenarios?[49]

Participating counsel, in some sense, takes on a leadership role by determining what is best for their own cases in the MDL. Lead counsel, however, may use their ability to increase common-benefit awards to engage in secret negotiations with the defendant, outside the presence of

43. *See* Silver, *supra* note 13, at 1655 (contrasting the general endorsement of the author's prior work on "restitution-based defense of fee awards in class actions" with the lack of comparable scholarly support for a "restitutionary foundation for fee awards in MDLs"); *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 969 (N.D. Cal. 2021) ("[T]he idea of a lawyer in the MDL getting better results for a state court client as a result of access to 'MDL work product' seems unremarkable—hardly an event that district courts should reach to the outer limit of their powers (or beyond) to address."), *dismissed for lack of jurisdiction*, No. 3:16-md-02741-VC, 2022 WL 16646693 (9th Cir. 2022).

44. Silver & Miller, *supra* note 8, at 127 (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. e (AM. L. INST., Tentative Draft No. 3, 2004)).

45. *Id.* at 128 (quoting RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30(3)(c) (AM. L. INST., Tentative Draft No. 3, 2004)).

46. *See id.* at 129 (describing, for example, how non-lead lawyers may contribute to the MDL by creating leverage and forcing defendants to defend more trials simultaneously).

47. *Id.* at 128.

48. *Id.*

49. Additionally, as Professors Miller and Silver note: "[T]he law of restitution generally refuses to ask judges to allocate credit equitably." *Id.* at 129. This reflects a concern about the subjectivity involved in these decisions, which can open the door to coercion. When judges allocate credit, they risk pressuring counsel by threatening to favor one side over the other. Given that the equitable analysis of participation agreements is already flawed, the law's hesitation to let judges allocate credit equitably should make us especially cautious. Allowing federal MDL judges to invoke their inherent powers to allocate credit as they see fit only compounds the risks of unfairness and coercion.

participating counsel.[50] This ability of lead counsel to negotiate common-benefit fees outside the presence of participating counsel should make courts extra wary of common-benefit demands after settlement.

Despite the fact that lead counsel may deal with defendants in bad faith, participating counsel still typically gets the short end of the stick. Judges, for instance, may use their management powers to force lawyers to sign participation agreements that expand their jurisdiction.[51] Likewise, as mentioned, lead counsel has bargaining power that puts participating counsel at the mercy of their negotiations with defendants.[52] And judges might not consider the collusive behavior of lead counsel whenever deciding whether participating counsel has been unjustly enriched.

* * *

The aforementioned flaws of participation agreements deserve more scrutiny. In a world in which these agreements are misleading and unfair, federal MDL judges should be even more wary of assessing fees on cases outside of the MDL. And an appropriate wariness must begin with identifying the problems with participation agreements, the power dynamics between participating and lead counsel, and judicial biases towards lead counsel.

This Note argues that unjust enrichment, on either side, should be left unanswered because if principles of equity are being used to assess participating counsel's fees, then they ought to be used with *precision*. A blindfolded approach to equity misses a key consideration: the degree of participating counsel's contribution to the MDL work product. Likewise, an analysis without nuance avoids the central question of whether participation agreements are fair. And even in those cases of identifiable unjust enrichment, assessment of fees should be confined to those cases that are within the federal MDL court. Setting a higher standard and narrowing the scope of analysis will push judges to only use the common-benefit doctrine on the clearest cases of unjust enrichment.

In addition to the unfairness of participation agreements and biased relationships with lead counsel, judges must also reflect on the limits of their

50. *See id*. at 134 (explaining that "[s]tructural collusion also occurs in MDLs when lead attorneys use settlement negotiations to 'contract around' their 'agreements' with non-lead lawyers" and that "secrecy makes it difficult for non-participants to monitor [such] negotiations").

51. *See* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 14 (2021) (describing "coercive participation agreements [that] often cover not only plaintiffs *in* the MDL but plaintiffs *outside* of its jurisdiction").

52. *See* Burch, *supra* note 17, at 122 (describing the hesitation of non-lead lawyers to object to the actions of lead counsel); *supra* note 51 and accompanying text.

authority. One might ask what has happened to the restraint judges displayed early in the history of MDLs.[53] As Professors Miller and Silver explain:

> [T]he quasi-class action approach [of MDLs] has serious downsides. By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs' lawyers' incentives to serve clients well.[54]

Participation agreements are intended to promote efficiency and collaboration between plaintiffs' attorneys; but instead, these agreements create significant inequities tilted towards the demands of lead counsel. These agreements unfairly favor repeat players and may lead to significant power and informational imbalances at the disadvantage of non-lead attorneys. Yet, federal MDL judges frequently emphasize the *voluntary* nature of these contracts and overlook the coercive context in which they are signed.[55] Consequently, the current equitable analysis that justifies a federal judge's jurisdictional extension to out-of-court cases is flawed. It is incumbent that federal MDL judges conduct a more fair and equitable process regarding fee agreements, and that process must begin with the recognition that there are imbalances between prospective plaintiffs' and lead counsel regarding participation agreements.

II. Circuit Split: The Managerial View and the Limited-Reach View

As indicated, federal MDL judges have used participation agreements to justify extending their jurisdiction to cases outside the MDL. This Part assesses four circuit decisions in which the extension of jurisdiction was at issue.

A. The Limited-Reach View of the Fourth and Eighth Circuits

This subpart analyzes two circuit court decisions addressing jurisdictional limits in MDL participation agreements. First, it examines the Fourth Circuit's decision in *In re Showa Denko*[56] (*Showa Denko*), which struck provisions requiring contributions from state-court and unfiled claims. Next, it reviews the Eighth Circuit's decision in *In re Genetically Modified Rice*[57] (*Genetically Modified Rice*), which reaffirmed that federal courts lack

53. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2121–22 (2000) (describing, in 2000, that judges were too "reluctant to delve too deeply into the relationships among the various lawyers and the way they allocate and spend the moneys paid to them").

54. Silver & Miller, *supra* note 8, at 111.

55. *See infra* note 137 and accompanying text.

56. *In re* Showa Denko K.K. L–Tryptophan Prods. Liab. Litig.–II, 953 F.2d 162 (4th Cir. 1992).

57. *In re* Genetically Modified Rice Litig., 764 F.3d 864 (8th Cir. 2014).

jurisdiction over state-court plaintiffs, even in cases involving unjust enrichment. This judicial restraint exemplifies what this Note deems the 'limited-reach view' of participation agreements and jurisdictional extension.

1. The Fourth Circuit: Showa Denko.—In *Showa Denko*, the Fourth Circuit reversed an administrative order which had allowed the district court to extend obligations to plaintiffs with cases "not before the court."[58] The administrative order required plaintiffs' counsel to contribute $1,000 and 0.5% of the value of settlement "[i]n all cases presently filed or later filed in these proceedings."[59] The order purported to limit these cases to parties before the court, but as the Fourth Circuit noted, paragraph 4 of the order applied its obligations to "actions venued in state courts, untransferred federal cases, and unfiled claims in which any MDL defendant is a party or payor."[60] The Fourth Circuit determined that this paragraph, read in totality with the order, essentially "compels contributions from plaintiffs in state or federal litigation who are not before the court and by claimants who have chosen not to litigate but to compromise their claims outside of the court."[61] The circuit further noted federalism and comity concerns—expressing worry that paragraph 5 of the order, which effectively ordered the defendant to share discovery materials within the MDL with those not before the court, might interfere with "discovery proceedings in state court."[62] Ultimately, the court found that paragraphs 4 and 5 were too broad and must be stricken from the order.[63]

While *Showa Denko* is a rather short opinion, it is one of the earliest circuit cases to raise federalism issues within the context of participation agreements. And over twenty years later, in a similar case, the Eighth Circuit relied on the Fourth Circuit's decision.

2. The Eighth Circuit: Genetically Modified Rice.—The Eighth Circuit adopted the Fourth Circuit's reasoning in *Genetically Modified Rice*, holding that the federal district court overseeing an MDL was correct to determine it lacked authority to order parties in state-court cases to contribute to a settlement fund.[64]

58. *Showa Denko*, 953 F.2d at 166–67.
59. *Id.* at 164.
60. *Id.* at 166.
61. *Id.*
62. *Id.*
63. *Id.*
64. *In re* Genetically Modified Rice Litig., 764 F.3d 864, 866, 874 (8th Cir. 2014).

In *Genetically Modified Rice*, lead counsel requested the formation of a common-benefit trust.[65] The requested trust would require plaintiffs' attorneys to contribute amounts from settlements and judgments related to cases pending in state courts (outside of the MDL).[66] Three groups of plaintiffs and the defendants objected to the formation of the trust, arguing that the district court lacked the authority and jurisdiction to enter the requested order.[67] The district judge, Catherine D. Perry, held that the common-benefit trust would be formed, but its scope restricted.[68] While acknowledging the existence of a free-rider problem, Judge Perry nonetheless held that the court lacked jurisdiction to order state-court plaintiffs to contribute to the common-benefit trust.[69] Judge Perry noted that it was "abundantly clear that the plaintiffs in the related state-court cases have derived substantial benefit from the work of the leadership counsel in these federal cases."[70] She continued by explaining that "[t]he lawyers and plaintiffs who have not agreed to join in the trust will have been unjustly enriched if they are not required to contribute to the fees of the leadership lawyers."[71] Despite her recognition of this free-rider problem, Judge Perry ultimately wrote: "I do not have jurisdiction to order hold-backs for those state cases. This is so even though the plaintiffs' lawyers who have state cases also have cases before me."[72] Simply, Judge Perry found that incorporating an agreement with terms that gave the court jurisdiction over cases outside of the MDL was not allowed even though the state plaintiffs were unjustly enriched.

In reconciling the tension between the free-rider problem and the district court's duty to follow federalism principles, Judge Perry insinuated that lead counsel and plaintiffs' attorneys should negotiate with the free-rider risk in mind and that state judges ought to consider appropriate remedies.[73] One can understand Judge Perry's words to mean that having cases in both an MDL and state court does not give federal courts jurisdiction over cases outside of the MDL. Her holding seems rooted in the idea that in federal courts, subject

65. *In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010), *aff'd*, 764 F.3d 874 (8th Cir. 2014).

66. *Id.* at *4.

67. *Id.* at *3.

68. *Id.* at *1.

69. *Id.*

70. *Id.*

71. *Id*.

72. *Id.*

73. *See id.* at *5 (noting that those who did not agree to join the common-benefit trust will be unjustly enriched "unless their settlement agreements or the state courts having jurisdiction over their cases rectify this unfair free-riding by requiring their participation in the fund").

matter jurisdiction takes priority over the law of restitution.[74] Essentially, a court that lacks subject matter jurisdiction cannot act even when unjust enrichment occurs.[75]

After Judge Perry's ruling, lead counsel in *Genetically Modified Rice* still sought to tax state-court litigants through settlement and later brought the issue up on appeal.[76] But the Eighth Circuit affirmed the district court's judgment and reasoning.[77] The circuit echoed the Fourth Circuit's reasoning in *Showa Denko* that "[a]lthough district courts have discretion in orchestrating and conducting multi-district litigation," the court's authority is "merely procedural and does not expand the jurisdiction of the district court to which the cases are transferred."[78] Lead counsel attempted to argue that because the assessment would be paid by plaintiffs' counsel (as opposed to the plaintiffs themselves), the district court only needed jurisdiction over the plaintiffs' *attorneys* and the defendant, rather than the actual plaintiffs.[79] Additionally, lead counsel asserted that the district court had jurisdiction to withhold related state-court cases and that state plaintiffs' attorneys must contribute as a matter of equity.[80] But the Eighth Circuit found these arguments unpersuasive, stating that "state-court cases, related or not, [were] not before the district court."[81]

For the Eighth Circuit, the issue was a black and white one—the district court either had jurisdiction or it did not. The circuit pointed out that the state-court plaintiffs "neither agreed to be part of the federal MDL nor participated in the MDL Settlement Agreement."[82] But still, the court went further, stating that "[e]ven if the state plaintiffs' *attorneys* participated in the MDL, the district court overseeing the MDL [would] not have authority over separate disputes between state-court *plaintiffs* and [the defendant]."[83] And with regards to any equity-related concerns, the Eighth Circuit found that "equity is insufficient to overcome limitations on federal jurisdiction."[84]

74. *See id.* ("Requiring all the lawyers who have benefitted from the work of the leadership team to contribute to their fees would be in the interests of justice, but it is beyond my jurisdiction to order.").

75. It is this view that essentially underpins the basis of this Note.

76. *See* Burch, *supra* note 17, at 117 ("Lead lawyers in the *Genetically Modified Rice* litigation contracted around the judge's decision not to include state-court litigants through settlement.").

77. *In re* Genetically Modified Rice Litig., 764 F.3d 864, 874 (8th Cir. 2014) ("The district court correctly held that it lacked jurisdiction to order holdbacks from the state-court recoveries.").

78. *Id.* at 873 (quoting *In re* Showa Denko K.K. L–Tryptophan Prods. Liab. Litig.–II, 953 F.2d 162, 165 (4th Cir. 1992)).

79. *Id*. at 874.

80. *Id*.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

What is apparent from *Genetically Modified Rice* is that both the district court and Eighth Circuit drew a hard jurisdictional line grounded in federalism: A federal court cannot exercise jurisdiction over state-court plaintiffs without federal question or diversity jurisdiction. Participation agreements are contracts governed by state law, and almost all agreements are between non-diverse parties.[85] Accordingly, the bare existence of a participation agreement should not give a federal court jursidiction over state-court claims.

B. The Managerial View of the Third and Ninth Circuits

This subpart explores what this Note dubs the "managerial view" of participation agreements by analyzing the Ninth Circuit's decision in *In re Bard*[86] (*Bard*) and the Third Circuit's in *In re Avandia*[87] (*Avandia*). It begins, however, by examining Judge Chhabria's opinion in *In re Roundup*[88] (*Roundup*), which, while ultimately rejecting the use of participation agreements to extend jurisdiction, outlines the managerial view's core reasoning and exposes inherent tensions within its rationale. Next, this subpart demonstrates how both the Third Circuit in *Avandia* and the Ninth Circuit in *Bard* cement their holdings firmly in the inherent managerial authority of federal MDL judges.

1. Judge Chhabria's Opinion in Roundup.—Judge Vince Chhabria's opinion in *Roundup* is frequently cited by MDL scholars and courts.[89] *Roundup* involved an MDL against Monsanto for their weedkiller product, which contained an ingredient associated with the development of cancer in a large group of plaintiffs.[90] The primary issue in the case was whether the district court for the Northern District of California could "holdback" the

85. *See In re* Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010) (describing participation agreements in MDLs as private cooperative agreements, or contracts, between plaintiffs' attorneys); *see also* Charles A. Weiss, *Drafting Choice of Law and Choice of Forum Provisions for U.S. Agreements*, HOLLAND & KNIGHT (Aug. 16., 2021), https://www.hklaw.com/en/insights/publications/2021/08/drafting-choice-of-law-for-us-agreements [https://perma.cc/7R6H-2LC4] (explaining that "[i]n the United States, contracts are governed by state law").

86. *In re* Bard IVC Filters Prod. Liab. Litig., 81 F.4th 897 (9th Cir. 2023).

87. *In re* Avandia Mktg. Sales Pracs. & Prods. Liab. Litig., 617 F. App'x 136 (3d Cir. 2015).

88. *In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950 (N.D. Cal. 2021), *dismissed for lack of jurisdiction*, No. 3:16-md-02741-VC, 2022 WL 16646693 (9th Cir. 2022).

89. *E.g.*, Elizabeth Chamblee Burch, *MDL for the People*, 108 IOWA L. REV. 1015, 1028 n.63 (2023); D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEXAS L. REV. 1595, 1601 n.17, 1610 n.52 (2023); Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEXAS L. REV. 1623, 1642 n.111 (2023); Silver, *supra* note 13, at 1655, 1663, 1666–68, 1671 n.90. The opinion has been cited by numerous courts as well. *E.g.*, *Bard*, 81 F.4th at 907, 909–11; *In re* HIV Antitrust Litig., No. 19-cv-02573-EMC, 2023 WL 7397567, at *3, *5 n.5 (N.D. Cal. Nov. 8, 2023); Nat. Res. Def. Council v. EPA, 38 F.4th 34, 41 (9th Cir. 2022).

90. *Roundup*, 544 F. Supp. 3d at 953.

recoveries of participating plaintiffs outside of the MDL that had access to common-benefit work product.[91] Judge Chhabria held that no holdback would be ordered.[92]

Judge Chhabria distinguished between (1) plaintiffs in the MDL; (2) plaintiffs not in the MDL but whose attorney happened to have other cases within the MDL; (3) claimants outside the MDL who were represented by a lawyer who signed a participation agreement; and (4) people with no connection at all to the MDL.[93] Regarding the third and fourth categories of parties, Judge Chhabria acknowledged that it "seem[ed] strange to exercise power over a nonparty's recovery from a state court judgment."[94] He noted that a "far less intrusive" alternative would be "authorizing lead counsel to directly charge a lawyer who wishes to use confidential MDL work product, and then allowing that lawyer to decide, with their client *and without involvement of a federal court*, who should shoulder that cost."[95]

Additionally, Judge Chhabria explained how it's not necessarily inequitable for a lawyer to benefit from the work of others.[96] He added that "[t]he presence of free riding, and the desire to address it, is not itself a source of judicial power."[97] Furthermore, he stated that "[a]s it relates to the type of holdback order contemplated in this MDL, that power does not seem to come from the common-fund doctrine."[98] Instead, Judge Chhabria found that the "right source" of authority for holdbacks is the "inherent managerial authority."[99] While he acknowledged and interpreted the Third Circuit's opinion in *Avandia* to allow a district court to enforce a participation agreement through ancillary jurisdiction, he noted that "it's still questionable whether a district court has . . . 'jurisdiction' . . . over the recovery of someone whose lawyer signs a participation agreement."[100] Judge Chhabria also cited the Eighth Circuit's opinion in *Genetically Modified Rice*, but explained that he thought the issue in *Roundup* was "probably not [one] of subject matter jurisdiction" but rather "'jurisdiction' in the more generic sense."[101] Judge Chhabria ultimately did not decide whether the district court

91. *Id.* at 957.

92. *Id.* at 973.

93. *Id.* at 957.

94. *Id.* at 968.

95. *Id.* (emphasis added).

96. *See id.* at 969 ("[T]here is nothing inherently wrong with lawyers (and by extension their clients) benefitting from the work of other lawyers without paying them. That happens all the time in our legal system.").

97. *Id.* at 960.

98. *Id.*

99. *Id.* at 962.

100. *Id.* at 967.

101. *Id.* (citing *In re* Genetically Modified Rice Litig., 764 F.3d 864, 874 (8th Cir. 2014)).

had authority, but stated that "even if" the court had authority, it should refuse to exercise it.[102]

Judge Chhabria's opinion in *Roundup* exemplifies how federal district judges question the derivation of the authority to assess cases outside of the MDL: Some say it is the "inherent powers," others say it is principles of equity, and others say there is no such authority.[103]

2. The Third Circuit in Avandia.—In *Avandia*, the Third Circuit affirmed the district court for the Eastern District of Pennsylvania's ruling that subjected both MDL and non-MDL cases to assessments and holdbacks.[104] The circuit court agreed that if the district court ordered "total strangers" to the litigation to contribute to the fund from non-MDL cases, then it would exceed its jurisdiction.[105] Specifically, the Third Circuit cited the United States Supreme Court's opinion in *Kokkonen v. Guardian Life Insurance Co. of America*[106] for the proposition that a "breach of the agreement would be a violation of the order," and that a district court has "jurisdiction to determine whether one of its orders has been violated."[107] According to the Third Circuit, it is this jurisdiction that in turn allows the court to determine whether "an *agreement* incorporated into a court order has been breached," as such power is "within the court's 'ancillary jurisdiction.'"[108]

Notably, however, although the Third Circuit addressed the "total strangers" issue, it failed to fully address those more ambiguous situations where attorneys have cases both within and outside the MDL. Under *Avandia*'s reasoning, such cases can be reached, whereas "total strangers" remain beyond the district court's jurisdiction. By focusing on attorneys involved in both MDL and non-MDL cases, the court effectively broadens its influence to related cases outside the MDL.

Furthermore, the circuit court in *Avandia* neglected to discuss the coercion which imbues participation agreements.[109] This lapse in the Third Circuit's argument was a mistake; it is important to consider the pressures on participating counsel to join the agreements. In fact, judges can coercively create jurisdiction they would otherwise lack by compelling lawyers to enter into agreements that can later be incorporated into court orders. And given

102. *Id.* at 968.

103. *See* Silver, *supra* note 13, at 1654–55, 1677 (arguing that MDL judges lack the authority to force individually retained plaintiffs' attorneys to pay court-appointed lead attorneys).

104. *In re* Avandia Mktg. Sales Pracs. & Prods. Liab. Litig., 617 F. App'x 136, 138 (3d Cir. 2015).

105. *Id.* at 141.

106. 511 U.S. 375 (1994).

107. *Avandia*, 617 F. App'x at 142 (quoting *Kokkonen*, 511 U.S. at 381).

108. *Id.* (emphasis added) (quoting *Kokkonen*, 511 U.S. at 381).

109. *See generally id.* (acknowledging the *importance* of participation agreements but failing to address any potential *coercion* the might accompany the signing of such agreements).

that the violation of court orders would be a breach (and likely sanctionable conduct), judges can thus exercise jurisdiction over the cases since court orders are well within the jurisdictional gambit of federal judges. But this discussion was absent in *Avandia*. In this case, participating counsel had argued the court was effectively "finding subject-matter jurisdiction by agreement of the parties."[110] However, the court rejected this contention and stated that the "agreement itself is not the source of the District Court's authority" and instead relied on the "responsibility to appoint and supervise a coordinating committee of counsel" to justify the jurisdiction.[111] On its face, this seems like a work-around to the jurisdictional boundaries of the court.

3. The Lower Court in Bard.—In *Bard*, the Ninth Circuit reviewed the lower court's order that incorporated a participation agreement between plaintiffs' attorneys.[112] The participation agreement terms specified that attorneys would have access to the common-benefit work product in exchange for an assessment from the gross recoveries obtained in all cases benefiting from that work product.[113] This included all "un-filed cases, tolled cases, and/or cases filed in state court in which [participating counsel] have a fee interest."[114] The district court established an assessment fee of 8% (6% for attorneys' fees and 2% for expenses) but later increased the attorneys' fees to 8%, bringing the total fee to a 10% assessment on the gross recovery.[115] After the MDL was settled, one of the participating counselors objected to the holdback assessments, arguing that the district court lacked authority to order such holdbacks.[116] The Ninth Circuit rejected this argument and held that non-MDL cases could be assessed.[117]

The district court's opinion addressed two issues: (1) why Judge Chhabrias' opinion was inapplicable to the case before it, and (2) where the court had the authority to implement an order assessing non-MDL cases. Writing for the District of Arizona, Judge David G. Campbell distinguished *Bard* from Judge Chhabria's opinion in *Roundup* in several ways—but his main focus surrounded principles of equity, consent, and reliance. First, Judge Campbell stated that in the case before him, common-benefit

110. *Id.* at 143.

111. *Id.*

112. *In re* Bard IVC Filters Prod. Liab. Litig., 81 F.4th 897, 901–02, 906 (9th Cir. 2023).

113. Case Management Order No. 6 at 10, *In re* Bard IVC Filters Prods. Liab. Litig., No. 2:15-md-02641-DGC (D. Ariz. Dec. 18, 2015).

114. *Id.* at 17.

115. *Bard*, 81 F.4th at 902 & n.3.

116. *Id.* at 906–07.

117. *See id.* at 911 ("Although there are circumstances under which a district court lacks the authority to order holdbacks from non-MDL cases . . . the district court did not exceed its authority here.").

assessment occurred *early* in the MDL, whereas in *Roundup*, common-benefit assessment occurred *later*.[118] Moreover, Judge Campbell recognized that unlike the attorneys in *Roundup*, the participating counselors in *Bard* had known for approximately six years that the court's "assessment would be required."[119]

Second, Judge Campbell noted that there was "no doubt" that the attorneys with non-MDL cases had benefited from the common-benefit work product and "advanced the ball for [their] clients."[120] In Judge Campbell's estimate, this further distinguished the case from *Roundup*, in which Judge Chhabria doubted that the attorneys benefited from the common-benefit work product.[121] Third, Judge Campbell noted that much of the common-benefit work in *Roundup* had been placed on the public docket and was "available to any member of the public for free."[122] By contrast, in *Bard*, only some of the work product could be found in the public docket, and "much of it [was] not public and would not be accessible to lawyers who [were] not Participating Counsel."[123] Judge Campbell lacked sympathy for the participating counselors, writing that "[they] could have avoided paying assessments on recoveries from [their] unfiled and state-court cases by declining to become Participating Counsel."[124]

Next, Judge Campbell turned to the question of whether the district court had authority to impose common-benefit assessments, asserting three sources of authority by which to assess fees of non-MDL plaintiffs: (1) the federal MDL statute; (2) the court's "inherent" powers; and (3) the common-benefit doctrine, which encompasses principles of fairness and equity.[125] Regarding the statutory source, Judge Campbell noted that 28 U.S.C. § 1407(b) provides that the Judicial Panel on Multidistrict Litigation (JPML) transfers cases to MDL judges for "coordinated or consolidated pretrial proceedings."[126] Judge Campbell stated that while JPML statute does not on its face confer power, it makes clear that judges may exercise those powers that are "necessary" to "manage and complete those pretrial proceedings."[127]

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118. *See In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 830 (D. Ariz. 2022) ("In contrast [to *Roundup*], this Court set the original 8% holdback percentage less than five months after the MDL started."), *aff'd*, 81 F.4th 897 (9th Cir. 2023).

119. *See id*. (stating that the plaintiffs' participating counsel had "known since 2016 that this assessment would be required of it and its clients").

120. *Id*. at 829.

121. *See id*. ("Judge Chhabria found no correlation between the lawyers who signed the participation agreement in his case and those who were granted access to common benefit work.").

122. *Id*. at 828.

123. *Id*.

124. *Id*.

125. *Id*. at 830.

126. *Id*. at 831 (quoting 28 U.S.C. § 1407(b)).

127. *Id*.

This power, in the court's view, must be exercised for the court to "perform the task assigned to it by the MDL statute [which] necessarily requires the power to assure reasonable compensation for the efforts of lead counsel."[128] Judge Campbell added: "Without a common benefit fund mechanism, MDL courts would not only be unable to attract good counsel for leadership roles, they would be unable to attract any counsel."[129]

Judge Campbell also sourced his authority to assess non-MDL cases in the court's "inherent powers,"[130] delineating the limiting principles that must be followed by the court—namely that the "exercise of an inherent power must be a reasonable response to the problems and needs confronting the court's fair administration of justice."[131] Judge Campbell found that the lower court's order, which had incorporated the participation agreement, "f[ell] within these limits."[132] Notably, he stated that the court's exercise of its inherent power to impose common-benefit assessments was "bolstered by the fact that [participating counsel] knowingly entered into the Participation Agreement" and that the attorneys and their clients "clearly benefitted" from the MDL's common-benefit work product.[133]

Judge Campbell found his final source of authority under the common-fund doctrine, which recognizes "the creation of a common fund in order to pay reasonable attorneys' fees for legal services beneficial to persons other than a particular client."[134] He held that "[t]he compelling equities of the common-benefit doctrine apply fully here" and "fairness required [participating counsel's] attempt to avoid paying assessments be denied."[135] Judge Campbell distinguished his opinion from Judge Chhabrias' "narrow[]" construction of the fund doctrine, noting that the "equitable reality . . . is the same" regardless of whether the court exercised control over a *res*.[136] Ultimately, Judge Campbell concluded that participating counsel "voluntarily signed on" and that "[s]imple fairness" required he deny their request to avoid paying assessments on their non-MDL cases.[137]

Judge Campbell's opinion makes clear that he believed the culmination of three sources of authority gave him the authority to assess cases not before the federal court in the MDL. He cemented much of his opinion on principles

128. *Id.*

129. *Id.*

130. *Id.* at 831 (quoting *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 189 (S.D.N.Y. 2020)).

131. *Id.* at 832 (quoting *Gen. Motors*, 477 F. Supp. 3d at 189).

132. *Id.*

133. *Id.* at 833–34.

134. *Id.* at 836.

135. *Id.* at 838, 905.

136. *Id.* at 837–38.

137. *Id*. at 838–39.

of equity and fairness. However, participating counsel argued on appeal that no assessment should be paid for cases that were: (1) filed in federal court after the MDL closed; (2) filed in state court; or (3) never filed in any court.[138]

4. The Ninth Circuit in Bard.—The Ninth Circuit's opinion in *Bard* adopted much of Judge Campbell's language from his district court opinion. The Ninth Circuit began by noting that the question of the district court's authority is "not a question of subject-matter jurisdiction under the circumstances of this case, where plaintiffs' counsel entered into a participation agreement in exchange for common-benefit work product."[139] Instead, the circuit stated that the district court was not "exercising jurisdiction over cases or parties before it," but was instead "exercising jurisdiction over the MDL."[140] The Ninth Circuit continued: "[P]ursuant to that jurisdiction, the [c]ourt has authority to regulate the conduct of the MDL parties and MDL counsel, even where such regulation affects the interests of others."[141] The court then framed the question in *Bard* as "whether the district court's order requiring common-benefit assessments in non-MDL cases is within the scope of its authority to regulate the conduct of MDL counsel and parties."[142] It answered that question in the affirmative, rooting its justification in reasoning from the Third Circuit—specifically, that "a breach of the agreement would be a violation of the order"[143] and that "[b]ecause a district court has jurisdiction to determine whether one of its orders has been violated, it may adjudicate whether an agreement incorporated into a court order has been breached."[144] The court adopted the Third Circuit's "ancillary jurisdiction" argument that the court has jurisdiction in cases where its orders are violated.[145] The Ninth Circuit (like the Third Circuit) focused on the fact that participating counsel "voluntarily entered into a participation agreement with Plaintiffs' Lead Counsel and agreed to assessments against its clients' recoveries in non-MDL cases in exchange for access to MDL common-benefit work product."[146]

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138. *See In re* Bard IVC Filters Prod. Liab. Litig., 81 F.4th 897, 903–05 (9th Cir. 2023) (reviewing plaintiffs' arguments that all cases outside of the MDL should be exempted from assessment).

139. *Id*. at 907.

140. *Id*. (quoting *In re* Gen. Motors LLC Ignition Switch Litig., 477 F. Supp. 3d 170, 189 (S.D.N.Y. 2020)). However, this distinction is later criticized as a fiction in this Note. *See infra* Part III.

141. *Id.* (quoting *Gen. Motors*, 477 F. Supp. 3d at 189).

142. *Id*.

143. *Id*. at 908 (citing *In re* Avandia Mktg., Sales Pracs., 617 F. App'x 136, 142 (3d Cir. 2015) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994))).

144. *Id.* (quoting *Avandia*, 617 F. App'x at 136).

145. *Id*.

146. *Id*.

Distinguishing *Bard* from *Genetically Modified Rice*, the Ninth Circuit further stated:

> As the Eighth Circuit explained, the state-court plaintiffs had not agreed to be part of the MDL and had not participated in the MDL settlement, and the participation of their attorneys in the MDL or the MDL settlement, without more, did not provide the district court with "authority over separate disputes between state-court *plaintiffs* and [the defendant]." Unlike this case, the MDL plaintiffs' counsel had not entered into a participation agreement, which was incorporated into a court order, and in which they agreed to assessments in non-MDL cases in exchange for access to common-benefit work product. Thus, the state-court plaintiffs in *Genetically Modified Rice* were strangers to the MDL.[147]

In the court's view, then, the distinguishing fact between the cases was that counsel in *Genetically Modified Rice* had not entered into a participation agreement. (In addition, the Ninth Circuit found that Judge Chhabria's analysis in *Roundup* was not dispositive either because of the reasons elucidated by the lower court.)[148]

Ultimately, the Ninth Circuit observed that the participating counselors in *Bard* were not "complete strangers" to the MDL, noting that they "reaped the benefit of [the participation] agreement by repeatedly accessing common-benefit work product and using it in [their] non-MDL cases."[149] The court further stated that "after knowingly and voluntarily entering the participation agreement, [participating counsel] cannot now complain that the district court lacked authority to enforce its orders incorporating that agreement."[150] Here, the Ninth Circuit's holding underscores the expectation that all parties in the MDL, including participating counsel, must adhere to a participation agreement's terms once benefitting from it.

However, this brings this Note to the pressures faced by participating attorneys that might vitiate their consent. As discussed, when attorneys are judicially compelled to agree to a participation agreement's terms under duress or unequal bargaining conditions, the equity of these agreements comes into question.[151] In these situations, the fairness of enforcing participation agreements should be especially scrutinized, and judges ought to adequately consider whether true consent was given and whether the resulting fee assessments are genuinely equitable.

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147. *Id*. at 910 (quoting *In re* Genetically Modified Rice Litig., 764 F.3d 864, 874 (8th Cir. 2014)).

148. *See id.* ("Moreover, as the district court here described at length, the *Roundup* decision is distinguishable from this case for several reasons.").

149. *Id.* at 911.

150. *Id*.

151. *See supra* note 34 and accompanying text.

Ultimately, the Ninth Circuit's opinion echoes Judge Campbell's view of fairness, equity, and consent. However, as this Note explains,[152] the Ninth Circuit should have engaged in more analysis.

III. A Tale of Two Views: The Ninth Circuit's Flaws and the Case for the Limited-Reach View

This Part critically examines the Ninth Circuit's reasoning in *Bard*, highlighting the court's failure to meaningfully distinguish the case from *Genetically Modified Rice* and its improper reliance on attorney consent. It then argues that the managerial view embraced by the Ninth Circuit improperly uses equitable principles to expand jurisdiction.

A. Bard*: Where the Ninth Circuit Got It Wrong*

The Ninth Circuit's attempt to distinguish the facts of *Genetically Modified Rice* from those of *Bard* was insufficient to justify the court's holding. The elephant in the room—whether the district judge had the authority to impose an agreement with terms that gave the court jurisdiction outside of the MDL—was not fully addressed. The Ninth Circuit addressed *Genetically Modified Rice* in only a few sentences,[153] sidestepping the nearly identical similarities between the participation agreement in *Bard* and the settlement agreement in *Genetically Modified Rice*. The following sections directly critique the Ninth Circuit's decision in *Bard*, although these criticisms reflect a broader disapproval of the managerial view in general.

1. Genetically Modified Rice *and* Bard *Were More Alike than the Ninth Circuit Admitted*.—The Ninth Circuit's attempt to distinguish between the facts of *Bard* and *Genetically Modified Rice* focused predominantly on the parties' consent to enter into a participation agreement. The court found the *Bard* plaintiffs had "voluntarily" entered into a participation agreement and that the agreement was entered into a court order.[154] On the other hand, the court emphasized that the state-court plaintiffs in *Genetically Modified Rice* did not enter into an agreement where they agreed to "assessments in non-MDL cases in exchange for access to common-benefit work product."[155] The court made sure to note that the state-court plaintiffs in *Genetically Modified*

152. *See supra* Part III.

153. The Ninth Circuit distinguished *Genetically Modified Rice* from *Bard* in the following sentence: "Unlike this case, the MDL plaintiffs' counsel had not entered into a participation agreement, which was incorporated into a court order, and in which they agreed to assessments in non-MDL cases in exchange for access to common benefit work product." *Bard*, 81 F.4th at 910. The court then concluded, on this basis alone, that the state-court plaintiffs in *Genetically Modified Rice* were "strangers to the MDL." *Id.*

154. *Id.* at 911.

155. *Id.* at 910.

Rice had not entered into a participation agreement, participated in the MDL settlement, or agreed to be part of the MDL.[156] As such, the state-court plaintiffs were, in the Ninth Circuit's words, "strangers to the MDL."[157] However, that description was not necessarily a fair one.

The Ninth Circuit does not give credit to the factual similarities between the two cases. First, although there was no participation agreement at issue in *Genetically Modified Rice*,[158] the settlement agreement itself functionally acted like a participation agreement: It required lawyers with even one client in the program to waive all objections against a global settlement.[159] Given that lawyers have a general duty to act in the best interests of their clients (rather than in their own best interests),[160] that requirement appears coercive. Additionally, the terms of both agreements were nearly identical regarding the required holdback assessments, which would be administered by the MDL judge to pay the parties that contributed to the respective common-benefit work products.[161]

Both settlement agreements and participation agreements are designed to create opportunities for plaintiffs with cases in state courts to settle, ideally ensuring that these plaintiffs can benefit from the terms negotiated in the MDL.[162] However, the fairness of these opportunities can vary depending on the specific terms and implementation of the corresponding agreement. While settlement and participation agreements both aim to provide resolutions to state-court plaintiffs, they may fall short due to specific terms that result from the coercive nature of judicial pressure to get these agreements signed.

At issue in both *Bard* and *Genetically Modified Rice* were the state-court plaintiffs' attorneys who had been unjustly enriched by their access to and use of the common-benefit work product.[163] These attorneys used the

156. *Id.*

157. *Id.*

158. *See generally* MDL Settlement Agreement, *In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP (E.D. Mo. Feb. 24, 2010) (omitting any discussion about participation agreements).

159. *Id*. at Exhibit D.

160. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 2025) ("A lawyer must also act with commitment and dedication to the interests of the client . . . .").

161. *See* Case Management Order No. 6, *supra* note 113, at 10 (requiring an 8% holdback assessment for all plaintiffs' attorneys subject to the order); MDL Settlement Agreement, *supra* note 158, § 8.1.1 (requiring 8% of all payments to be "directed to the common benefit trust fund for attorneys' fees").

162. BURCH, *supra* note 10, at 62.

163. *See In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010) (describing that some lawyers and plaintiffs had been unjustly enriched by the common-benefit work), *aff'd*, 764 F.3d 864 (8th Cir. 2014); *In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 839 (D. Ariz. 2022) ("Simple fairness requires that

common-benefit work product to attain substantial settlement value for their clients in state court without paying for the service.[164] Moreover, in both cases, the agreements made by the parties had been incorporated or referenced into a federal court order: In *Genetically Modified Rice*, the settlement agreement explicitly referenced the federal court order to manage the payment of the common-benefit fund.[165] Similarly, in *Bard*, the participation agreement was incorporated within the federal MDL judge's order.[166] MDL settlement agreements, like participation agreements, are made, in part, to provide closure to lead counsel that they will be compensated for their efforts.[167] Hence, the closure provisions in MDL settlement agreements often coerce attorneys.[168]

Without further explanation from the court as to why these two agreements should be treated differently, litigants are left in the dark when the court echoed the Third Circuit by stating that the agreement itself "is not the source of the [d]istrict [c]ourt's authority."[169] And if it is indeed the case that the authority instead comes from the court's "responsibilities to appoint and supervise a coordinating committee of counsel,"[170] which includes its responsibility to ensure that lead counsel is paid for its contributions, then how does the participation agreement in *Bard* really differ from the settlement agreement in *Genetically Modified Rice*?

In truth, the settlement agreement in *Genetically Modified Rice* was functionally equivalent to a participation agreement. As Judge Perry wrote: "The purpose of the proposed trust is to pay fees and expenses of attorneys

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[participating counsel's] request [to avoid paying assessments on non-MDL cases] be denied."), *aff'd*, 81 F.4th 897 (9th Cir. 2023).

164. *See Bard*, 603 F. Supp. 3d at 829 (describing plaintiffs' counsel's use of the common-benefit work to "reach[] a settlement with Bard that include[d] more than 500 clients"); *Genetically Modified Rice*, 2010 WL 716190, at *1 ("[I]t is abundantly clear that the plaintiffs in the related state-court cases have derived substantial benefit from the work of the leadership counsel in these federal cases.").

165. *See Genetically Modified Rice*, 764 F.3d at 867 (describing that all payments to the common-benefit fund must "be made as if Judge Perry's February 24, 2010 Common Benefit Fund Order applied to those claims").

166. *Bard*, 81 F.4th at 902.

167. D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1184–85 (2013) (explaining how MDL settlements rely on closure provisions to incentivize claimants' participation, ensure lead counsel compensation, and ultimately achieve closure or peace by discouraging continued litigation).

168. *See id.* at 1189–90 (noting that closure provisions can sometimes coerce claimants into accepting inadequate settlements while rewarding the Plaintiffs Steering Committee with substantial fees but also recognizing their utility in enabling claimants to credibly offer defendants peace in exchange for settlement premiums).

169. *Bard*, 81 F.4th at 908 (quoting *In re* Avandia Mktg., Sales Pracs. & Prods. Liab. Litig., 617 F. App'x 136, 143 (3d Cir. 2015)).

170. *Id.* (quoting *Avandia*, 617 F. App'x at 143).

who perform work benefitting all of the plaintiffs."[171] Like the participation agreement in *Bard*, the settlement agreement in *Genetically Modified Rice* required that lead counsel and other counsel who contributed to the common-benefit trust be fairly compensated.[172] In both cases, it is clear that the courts had authority to responsibly manage coordinating counsel, but only in *Bard* did the Ninth Circuit extend that authority to include the management of cases not before the federal MDL court.[173]

2. The Court's Improper Focus on Who Signs What.—Additionally, the Ninth Circuit repeated in *Bard* that the "state-court plaintiffs"—rather than the state-court plaintiffs' *attorneys*—never agreed to join a participation agreement.[174] Technically, this is correct—but even so, several considerations were not accounted for in the opinion. First, and most importantly, the Ninth Circuit focused on whether MDL plaintiffs' *counsel* had agreed to join a participation agreement rather than the plaintiffs themselves, but when discussing *Genetically Modified Rice*, the court focused on the actions of state-court plaintiffs themselves, as opposed to those of state-court plaintiffs' counsel.[175] A fairer equivalency would have been whether plaintiffs' counsel in *Genetically Modified Rice* signed the agreement like the plaintiffs' counsel did in *Bard*. If the Ninth Circuit had compared apples to apples, it would have found that "most of the lawyers representing plaintiffs in state cases" had "agreed to join in the [common-benefit] trust" in *Bard*.[176]

Second, the participation agreement, regardless of who signs it, sets holdbacks on the portion of attorneys' fees already decided between the client and attorney. In *Genetically Modified Rice*, the same was true of the settlement agreement. Whether the clients or their attorneys sign the agreement should make no difference in the court's analysis. The focus should not be on "who signed what" but rather on (1) the agreement and (2) the validity of its contents.

The Ninth Circuit also stated that the state-court plaintiffs in *Genetically Modified Rice* were "strangers to the MDL."[177] Even if one ignores that the

171. *In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

172. *See Genetically Modified Rice*, 764 F.3d at 870 (describing that payments must be made to the common-benefit fund for costs and expenses incurred by attorneys providing a common benefit).

173. *Bard*, 81 F.4th at 908.

174. *Id*. at 910.

175. *See id.* at 910 ("Unlike this case, the MDL plaintiffs' counsel had not entered into a participation agreement . . . .").

176. This language is in reference to the lower court's finding in *Genetically Modified Rice*, 2010 WL 716190, at *1.

177. *Bard*, 81 F.4th at 910.

court was focused on the wrong set of people (plaintiffs versus plaintiffs' counsel), it still failed to address the hypothetical posed by the Eighth Circuit: that *even if* "the state plaintiffs' *attorneys* participated in the MDL, the district court overseeing the MDL does not have authority over separate disputes between state-court *plaintiffs* and [the defendant]."[178] Here, the Eighth Circuit's focus was on the district court's authority rather than on whether the plaintiffs' attorneys participated in the MDL. The Eighth Circuit cared about whether the terms of the agreement gave the federal MDL court jurisdiction or authority beyond its constitutional and statutory scope. If so, the court seems to have drawn a firm line: No agreement, regardless of whether it is incorporated, signed, stamped, approved, or otherwise, can confer upon a court jurisdiction that it would otherwise not have directly available to it. Yet, this sort of analysis is completely absent from the Ninth Circuit's opinion. If the facts of *Bard* had been before the court in *Genetically Modified Rice*, the Eighth Circuit would still likely have come to the same conclusion because it seemed to care less about consent, voluntariness, and freedom to contract, and more about whether the terms of the participation agreements confer upon a federal MDL judge jurisdiction that the court otherwise would not have. The Eighth Circuit made its priorities even more clear when it acknowledged that even though there had been unjust enrichment by the state-court plaintiffs' counsel, "equity is [still] insufficient to overcome limitations on federal jurisdiction" to order holdbacks from the state-court recoveries.[179]

3. Sidestepping the Jurisdictional Elephant in the Room.—Counsel in *Bard* noted that the Ninth Circuit's reasoning in the case focused too much on consent.[180] More specifically, counsel believed that consent was a red herring, since plaintiffs' lawyers with clients whose cases have been transferred into MDL proceedings have no choice but to agree to participate, lest they be denied access to the discovery they need to provide adequate representation to their clients.[181] This is not to say that the Ninth Circuit's holding is meritless—equitable principles should be considered. But when federal courts are deciding whether to exercise jurisdiction that they are unsure of, there ought to be a presumption against the exercise of such jurisdiction, as exemplified by those courts that have employed the limited-reach view.

178. *In re* Genetically Modified Rice Litig., 764 F.3d 864, 874 (8th Cir. 2014).

179. *Id.*

180. *See* Frankel, *supra* note 35 (describing a phone call in which counsel in *In re Bard* said the Ninth Circuit "skirted the real question" in that case of "whether MDL courts do or do not have the power to apply assessments against non-MDL cases").

181. *Id.*

B. The Managerial View Improperly Uses Equity to Jurisdiction-Grab

The managerial view's reliance on principles of equity is misplaced because it fails to adequately consider the flaws in participation agreements. As discussed earlier, participation agreements present significant disadvantages for attorneys asked to join as participating counsel.[182] These attorneys have limited options to negotiate, evaluate the value of the common-benefit work product, or object to lead counsel's proposals. Furthermore, they must prioritize their clients' interests, which requires signing the participation agreement and adhering to the judge's recommendations and lead counsel's decisions. This creates a substantial imbalance, placing participating counsel at significant risk of losing money and time compared to those leading the MDL. Yet, the Ninth Circuit's reasoning in *Bard* overlooks these dynamics entirely.

Bard leans heavily on the purported voluntariness of participation agreements, asserting that state-court plaintiffs' counsel willingly entered into these agreements. However, as previously discussed, this voluntariness is illusory. Attorneys are coerced into signing participation agreements because access to critical MDL discovery—resources necessary to adequately represent their clients—hinges on participation. This dynamic creates an imbalance of power, effectively forcing attorneys to accept terms dictated by MDL lead counsel.

Because participation agreements often resemble contracts of adhesion, federal MDL judges should exercise greater caution when enforcing their terms. Any agreement incorporated into a court order warrants significant scrutiny. This principle is not new. In *Showa Denko*, the court carefully examined the administrative order incorporating the agreement and ultimately found that non-MDL plaintiffs could not be assessed by a federal judge.[183] Likewise, in *Genetically Modified Rice*, the lower district judge applied a similar analysis and chose to exercise limited jurisdiction.[184] In both cases, the courts demonstrated appropriate restraint, ensuring that jurisdiction was not improperly extended.[185]

This type of careful analysis of the participation agreement, seemingly rooted in a presumption against extending jurisdiction, is noticeably absent from the managerial view. In both *Bard* and *Avandia*, the courts emphasized that the parties had voluntarily agreed to the terms of the agreements.[186] However, neither court sufficiently addressed the validity of the agreement's terms or whether it was possible for parties to effectively consent to extend a

182. *See supra* Part I.
183. *See supra* section II(A)(1).
184. *See supra* section II(A)(2).
185. *See supra* sections II(A)(1)–(2).
186. *See supra* sections II(B)(3)–(4).

federal MDL court's jurisdiction.[187] This omission reveals a significant shortcoming in the managerial approach.

At bottom, participation agreements, due to their coercive nature, cannot serve as a legitimate basis for jurisdictional authority. The managerial view's reliance on these agreements as falling within an MDL court's authority to manage coordinating counsel, without proper scrutiny, exposes a fundamental flaw in its framework. By failing to critically evaluate participation agreements, courts tip the scales of equity in favor of lead counsel, concluding—often improperly—that participating counsel has been unjustly enriched. This misstep enables courts to extend their jurisdiction to cases outside the federal MDL, resulting in an overreach of their authority.

C. The Limited-Reach View: A Safeguard Against Jurisdictional Overreach and Coercion

Unlike the managerial view, the limited-reach view provides a clear check against jurisdictional overreach, addressing the flaws of participation agreements while reinforcing the principles of federalism through judicial restraint. This approach aligns with the principles of federalism by recognizing the limits of federal MDL judges' authority and preserving the rights of state-court litigants. In contrast, the managerial view relies on equitable principles to justify expanding jurisdiction, disregarding the federalism principles that limit federal judges from jurisdiction grabbing.

Cases like *Genetically Modified Rice* and *Showa Denko* demonstrate how the limited-reach view applies judicial restraint to participation agreements. In both cases, the courts carefully analyzed the terms of the agreements before incorporating them into orders and concluded that non-MDL plaintiffs could not be assessed by federal MDL judges. These decisions illustrate the importance of scrutinizing participation agreements to ensure that federal judges do not use them as a backdoor to expand their jurisdiction. By setting boundaries on these agreements, the limited-reach view prevents MDL judges from incorporating terms that would otherwise be inoperable, thereby avoiding jurisdictional overreach and protecting the integrity of the judicial system.

The limited-reach view also provides a practical solution to the challenges posed by participation agreements. Consider a hypothetical scenario: What if a participation agreement explicitly allows the assessment of state-court cases that received no benefit from the common-benefit work product? Imagine further that this case was completely secluded from the federal MDL judge and the participating attorney happened to have a single case before the federal MDL. In such a tenuous situation where no unjust enrichment is involved, should the federal MDL judge be able to assess those

187. *See supra* sections II(B)(3)–(4).

cases outside the federal MDL? Under the managerial view, the likely answer is yes. But under the limited-reach view, the answer is (correctly) of course not. A court cannot—and should not—gain jurisdiction it otherwise lacks by incorporating terms into its orders. Doing so would improperly rely on federal common law.[188] And as Professor Tobias Wolff noted, "when ancillary jurisdiction in the issuing forum is the only option for federal enforcement," the proper administration of federal consent decrees "requires less reticence and greater clarity among judges in discussing federal common law as a source of authority."[189]

In addition to its jurisdictional benefits, the limited-reach view better addresses the inherent flaws of participation agreements. Attorneys often feel coerced into signing these agreements to access necessary MDL discovery, leaving them little room to negotiate or challenge unfair terms. The limited-reach view does more to ensure that attorneys are not forced into terms that disproportionately favor lead counsel. By giving careful scrutiny of participation agreements, rather than simply rubberstamping whatever agreements come into the courtroom, the limited-reach view thus incentivizes fairer negotiations benefiting both lead and participating counsel.

Ultimately, the limited-reach view strikes the right balance between preserving statutory jurisdiction and protecting attorneys from coercive agreements. By rejecting jurisdictional overreach and requiring careful scrutiny of participation agreements, it ensures that MDL judges operate within their proper limits, upholding the principles of federalism and fairness.

IV. The Supreme Court's Role and Adoption of the Limited-Reach View

In this Part, this Note provides an overview of what the Supreme Court should consider, how the Court should consider it, and what the Court should ultimately hold.

To begin with, the best holding would be one that both resolves the circuit split and sets, implicitly or explicitly, a minimum standard for future analysis of participation agreements. It is perhaps not enough that the Supreme Court only address whether a federal MDL judge has jurisdiction over a non-MDL case; rather, the Supreme Court should consider principles of equity, and determine whether those principles even exist in the questions

188. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75–77, 80 (1938).

189. Tobias Barrington Wolff, *Consent Decrees and Federal Jurisdiction*, 84 U. PITT. L. REV. 457, 491–92 (2022).

before a federal MDL judge.[190] Answering the scope-of-analysis question will necessarily provide the answers to other questions.[191]

Beyond that, however, the Supreme Court should adopt a bright-line rule that reflects the limited-reach view. This bright-line rule would assist the Court to address: (1) whether federal MDL judges have the authority to assess common-benefit fees, and if so, from where; (2) whether federal MDL judges can assess common-benefit fees from cases not within the court's jurisdiction; and (3) to what degree participating counsel is unjustly enriched, if at all, or whether courts should completely disregard the need for equitable considerations. The Court's adoption of the limited-reach view as a bright-line rule would help alleviate these concerns.

Skepticism surrounds MDL judges' "inherent powers" to assess common-benefit fees.[192] And yet, it is not entirely clear, whether federal MDL judges even have the authority to assess *attorneys'* fees in MDLs.[193] In

190. Although the Supreme Court *should* be interested in resolving the circuit split over the extension of jurisdiction, Howard Bashman, appellate counsel for plaintiffs in *Bard*, stated in an interview that "[t]his does seem like the kind of issue the U.S. Supreme Court would be interested in." Alison Frankel, *Appeals Court Will Decide if Lawyers Can Evade Common Fund Fees in Consolidated Cases*, REUTERS (Apr. 14th, 2023 at 2:37 PM), https://www.reuters.com/legal/litigation/appeals-court-will-decide-if-lawyers-can-evade-common-fund-fees-consolidated-2023-04-14/ [https://perma.cc/5VNQ-V6D3].

191. Alternative proposals suggest compensating lead counsel based on the actual value of common-benefit work provided. *See* Burch, *supra* note 17, at 146 (discussing how lead counsel can be compensated on a quantum meruit basis). The quantum meruit framework shifts away from percentage-based assessments and introduces tiered pricing packages, allowing state-court attorneys to purchase only the specific MDL work product they need. On the back end, federal judges could award fees to state-court attorneys who contribute meaningfully to the federal litigation. Judge Chhabria's proposal in *Roundup* similarly suggested letting lead counsel directly charge attorneys for access to MDL work product and leaving cost allocation to the attorneys and their clients. *See In re* Roundup Prods. Liab. Litig., 544 F. Supp. 3d 950, 968 (N.D. Cal. 2021) (surmising that lead counsel can directly charge a lawyer who wishes to use confidential MDL work product without the involvement of a federal court), *dismissed for lack of jurisdiction*, No. 3:16-md-02741-VC, 2022 WL 16646693 (9th Cir. 2022). These proposals are great at trying to reduce inequities by leveling the negotiating field and encouraging judges to compensate state-court counsel for the value they add to the federal MDL suit; however, they also rely heavily on judicial oversight to assess and price work product, creating administrative burdens and leaving room for disputes over valuation. But more importantly, they fail to address the fundamental jurisdictional issues: Even under the quantum meruit framework, federal MDL judges would still be involved in regulating agreements that implicate state-court cases, risking jurisdictional overreach. Compared to these frameworks, the bright-line rule advocated in this Note offers a simpler and clearer solution, and one that sets clear jurisdictional boundaries.

192. For an example of a recent, in-depth criticism, see generally Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 B.Y.U. L. REV. 1869 (2023). *But see generally* Lynn A. Baker, *The "Inherent Powers" of Multidistrict Litigation Courts*, 51 PEPP. L. REV. 559 (2024) (critiquing Professors Pushaw's and Silver's article and concluding that MDL courts have the authority to appoint lead counsel and order common benefit assessments).

193. As Professor Silver explained:

Bard, the court looked to three different sources of authority to determine the basis of the court's authority to tax non-federal MDL plaintiffs.[194] But still, the question lingers: What's the source? Is it the common-fund doctrine? The JPML statute? Or maybe the "inherent powers" of the court? Traditional and equitable principles? And anyhow, regardless of the source of their authority, courts should be wary of assessing fees, especially where claims that the court is reaching beyond its jurisdiction are involved. Just as the Supreme Court has answered similar questions in class actions,[195] the Court can and should answer these questions in the MDL context.

Thus, the brightest line that the Court can draw is to simply hold that federal MDL judges cannot assess common-benefit fees on cases outside of the federal MDL. Judge Perry reflected this view in *Genetically Modified Rice*,[196] and for good reason. This rule would push lead counsel and prospective participants to negotiate more carefully. For example, participating counsel can condition the agreement on having only federal cases assessed or paying a standard fee for materials within the MDL. Of course, this may lead to problems with lead counsel overstating the value of the common-benefit work product. However, given that participation agreements are contractual by nature, any alleged breach is still something that can be adjudicated by state courts.[197] In other words, lead counsel still has an avenue to pursue their unjust enrichment claims. Thus, adopting a bright-line rule that limits the scope of assessment to federal MDL cases can foster fairer negotiations, clearer participation agreements between counsel, and still allow lead counsel to bring breach of contract claims when

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> 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.
>
> 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.

See Silver, *supra* note 13, at 1677.

194. *In re* Bard IVC Filters Prods. Liab. Litig., 603 F. Supp. 3d 822, 830 (D. Ariz. 2022).

195. *See, e.g.*, Bristol-Myers Squibb Co. v. Superior Ct., 137 S. Ct. 1773, 1777 (2017) (holding that due process did not permit the state court exercise of specific personal jurisdiction over nonresident claims in a California class action).

196. *See In re* Genetically Modified Rice Litig., No. 4:06-MD-1811-CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010) ("I do not have jurisdiction to order hold-backs for those state cases."), *aff'd*, 764 F.3d 864 (8th Cir. 2014).

197. Even if federal MDL judges do not have jurisdiction over non-MDL cases, that does not prevent lead counsel from bringing a breach of contract claim in state court, for instance.

necessary. Ultimately, this approach would reduce litigation costs related to attorneys' fees and refocus on the primary purpose of participation agreements—fostering cooperation.[198]

Furthermore, non-MDL, state-court attorneys might feel more comfortable bringing suits in state court[199] if they do not have to worry about federal MDL judges assessing their cases. This would benefit lead counsel as well—the more successful non-MDL cases that go to court, the more bargaining leverage lead counsel has against the defendant. Additionally, state-court attorneys can often get successful discovery rulings that otherwise would not have been available in a federal MDL.[200] Consequently, lead counsel would benefit more when non-MDL counsel feels secure in bringing their cases. And this would solve the problem with participation agreements, as well. The parties looking to negotiate an agreement would no longer fight about state or federal cases and for what percentage. Instead, the fight returns to the negotiation phase.

Conclusion

The complex dynamics of participation agreements in MDLs raise significant concerns about judicial authority, equity, and federalism. This Note analyzes the flaws often inherent to participation agreements, the "managerial view," and the "limited-reach view," revealing crucial insights into the jurisdictional reach of federal MDL judges and the broader implications for fairness and judicial overreach.

Central to these concerns is the coercion by federal MDL judges to get parties to sign participation agreements and the subsequent use of these agreements to assess cases not before the court. This practice raises serious federalism and fairness concerns. The "managerial view," endorsed by the Ninth and Third Circuits, asserts that federal MDL judges have inherent powers to extend their authority to non-MDL cases. This approach aims to promote efficiency and coordination within MDL proceedings, ensuring that attorneys are appropriately compensated for access to common-benefit work. However, the managerial view often results in judicial overreach and coercive agreements, as demonstrated in *Bard* and *Avandia.* The reliance on equity and consent in these cases fails to mitigate the significant power imbalances and the coercive pressures applied by judges to secure these agreements.

198. *See, e.g.*, Pretrial Order No 2, *supra* note 12, at 1–2 (describing the order as a voluntary "cooperative agreement" for the purpose of providing "fair and equitable sharing").

199. *See supra* subpart I(B).

200. *See* Silver & Miller, *supra* note 8, at 129 (describing valuable services that non-lead lawyers can provide, including with obtaining discovery).

In contrast, the "limited-reach view," supported by the Fourth and Eighth Circuits, prioritizes federalism principles by limiting federal MDL judges' authority to cases directly before them. This perspective underscores the importance of respecting jurisdictional boundaries and adhering to constitutional and statutory limits. Cases such as *Showa Denko* and *Genetically Modified Rice* highlight the necessity of ensuring fairness in judicial proceedings by maintaining a clear demarcation between federal and state-court jurisdictions. This view insists that equitable considerations, while important, cannot override the foundational principles of federal jurisdiction.

The coercive nature of participation agreements further complicates the landscape, revealing issues of management dysfunction and constitutional doubt regarding MDL judges' "inherent powers." The pressures exerted by judges to secure these agreements and their subsequent enforcement on non-MDL cases necessitate a re-evaluation of their use and enforcement. Courts should adopt a more precise and scrutinizing approach to ensure fairness and prevent the undue expansion of judicial authority.

To address these concerns, the Supreme Court should consider adopting a bright-line rule that confines the assessment of common-benefit fees to cases within the federal MDL, just as the limited-reach view supports. Such a rule would provide clear guidelines, reduce litigation costs, and uphold principles of federalism and judicial integrity. Additionally, by embracing a bright-line rule, the legal framework for participation agreements in MDL proceedings can be refined to balance efficiency, fairness, and the integrity of judicial authority. Adopting the limited-reach view would help ensure that participation agreements genuinely serve their intended purpose of fostering cooperation and efficiency without compromising the fundamental principles of federalism or the equitable treatment of all parties involved.