

# JUDGING MULTIDISTRICT LITIGATION

(90 N.Y.U. L. Rev. forthcoming, 2015)

*Elizabeth Chamblee Burch\**

## ABSTRACT

*High-stakes multidistrict litigations saddle the transferee judges who manage them with an odd juxtaposition of power and impotence. On one hand, judges appoint and compensate lead lawyers (who effectively replace parties' chosen counsel) and promote settlement with scant appellate scrutiny or legislative oversight. But on the other, without the arsenal class certification once afforded, judges are relatively powerless to police the private settlements they encourage. Of course, this power shortage is of little concern since parties consent to settle.*

*Or do they? Contrary to conventional wisdom, this Article introduces new empirical data revealing that judges appoint an overwhelming number of repeat players to leadership positions, which may complicate genuine consent through inadequate representation. Repeat players' financial, reputational, and reciprocity concerns can govern their interactions with one another and opposing counsel, often trumping fidelity to their clients. Systemic pathologies can result: dictatorial attorney hierarchies that fail to adequately represent the spectrum of claimants' diverse interests, repeat players trading in influence to increase their fees, collusive private deals that lack a viable monitor, and malleable procedural norms that undermine predictability.*

*Current judicial practices feed these pathologies. First, when judges appoint lead lawyers early in the litigation based on cooperative tendencies, experience, and financial resources, they often select repeat players. But most conflicts do not arise until discovery and repeat players have few self-interested reasons to dissent or derail the lucrative settlements they negotiate. Second, because steering committees are a relatively new phenomenon and transferee judges have no formal powers beyond those in the Federal Rules, judges have pieced together various doctrines to justify compensating lead lawyers. The erratic fee awards that result lack coherent limits. So, judges then permit lead lawyers to circumvent their rulings and the doctrinal inconsistencies by contracting with the defendant to embed fee provisions in global settlements—a well recognized form of self-dealing. Yet, when those settlements ignite concern, judges lack the formal tools to review them.*

*These pathologies need not persist. Appointing cognitively diverse attorneys who represent heterogeneous clients, permitting third-party financing, encouraging objections and dissent from non-lead counsel, and selecting permanent leadership after conflicts develop can expand the pool of qualified applicants and promote adequate representation. Compensating these lead lawyers on a quantum-meruit basis could then smooth doctrinal inconsistencies, align these fee awards with other attorneys' fees, and impose dependable outer limits. Finally, because quantum meruit demands that judges assess the benefit lead lawyers' conferred on the plaintiffs and the results they achieved, it equips judges with a private-law basis for assessing nonclass settlements and harnesses their review to a very powerful carrot: attorneys' fees.*

---

\* Associate Professor, University of Georgia School of Law. My thanks to Thomas Burch, Brannon Denning, Howard Erichson, Myriam Gilles, Timothy Holbrook, Sam Issacharoff, David Marcus, Bo Rutledge, Charles Silver, Judge Jack B. Weinstein, Margaret Williams, Anonymous Transferee Judge, Anonymous Circuit Court Judge, and participants at the joint Emory/UGA faculty workshop, and the University of Georgia's faculty speaker's series for their insights on earlier drafts. No views or claims in this Article should be attributed to any of these outstanding individuals; they belong solely to the author. Many thanks also to Melissa Conrad-Alam, Ellen Clarke, David Ehrlich, and Savanna Nolan for their research and data collection assistance.

## TABLE OF CONTENTS

|   |    |
|---|----|
| INTRODUCTION .....  | 2  |
| I. MULTIDISTRICT LITIGATION MINUS CLASS CERTIFICATION .....                               | 7  |
| <i>A. Transferee Judges' Evolving Role</i> .....  | 7  |
| <i>B. Judicial Misgivings Over Attorney Conduct</i> .....                                 | 8  |
| II. THE LIMITS OF JUDICIAL POWER AND INHERENT AUTHORITY .....                             | 12 |
| <i>A. Appointing Lead Lawyers</i> .....   | 14 |
| 1. Adequate Representation Concerns .....   | 14 |
| 2. Repeat Player Concerns.....  | 22 |
| <i>B. Awarding and Cutting Attorneys' Fees</i> .....                                      | 28 |
| 1. Compensating Common Benefit Work .....   | 28 |
| 2. Capping Contingent Fees .....  | 35 |
| <i>C. Approving Aggregate Settlements</i> .....   | 40 |
| III. RETHINKING BEST PRACTICES IN MULTIDISTRICT LITIGATION .....                          | 43 |
| <i>A. Selection Criteria for Lead Lawyers</i> .....                                       | 44 |
| <i>B. Lead Lawyers' Fees: A Quantum-Meruit Theory of Fee Awards</i> .....                 | 51 |
| <i>C. Evaluating Settlements through Quantum-Meruit Fee Assessments</i> .....             | 57 |
| CONCLUSION .....  | 60 |
| APPENDIX OF REPEAT PLAYERS.....   | 60 |
| Table 1: Entrenched Repeat Players with Five or More Appearances as Lead<br>Lawyers ..... | 60 |
| Table 2: Entrenched Repeat Law Firms with Five or More Lead Lawyer<br>Appointments .....  | 62 |

## INTRODUCTION

Multidistrict litigation often involves billion-dollar lawsuits steeped in media attention such as litigation over asbestos, Apple's iPhone, the BP Oil Spill, Vioxx, Facebook's internet tracking, Google's street view service, Chinese-manufactured drywall, and Toyota's acceleration problems, to name but a few.<sup>1</sup> Yet, the transferee

<sup>1</sup> *E.g.*, Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007; Kit Chellel & Jeremy Hodges, *Facebook Suit Over Subscriber Tracking Seeks \$15 Billion*, BLOOMBERG TECHNOLOGY, May 19, 2012, available at: <http://www.bloomberg.com/news/2012-05-18/facebook-sued-for-15-billion-in-suit-over-user-tracking.html>; *Court Stays Litigation in Google Street View Case*, BLOOMBERG.COM, available at: <http://about.bloomberglaw.com/law-reports/court-stays-litigation-in-google-street-view-case-certifies-for-interlocutory-appeal-its-prior-order-ruling-that-interception-of-open-wifi-data-violates-the-wiretap-act/>; Kirk Johnson, *Chemical Company is Acquitted in Asbestos Case*, N.Y. TIMES, May 8, 2009; Andrew Martin, *Turning Point for Suits Over Chinese Drywall*, N.Y. TIMES, Oct. 12, 2012; John Schwartz, *Acord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES, Mar. 2, 2012; Bill Vlasic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations*, N.Y. TIMES, Dec. 26, 2012. .

judges who usher these cases toward settlement using innovative procedures are rarely subject to appellate scrutiny or legislative oversight.<sup>2</sup> And, while multidistrict litigation is ostensibly for pretrial purposes only, in practice, as the old song goes, “When You Leave that Way You Can Never Go Back.”<sup>3</sup> In fact, transferee judges have remanded a scant 2.9 percent of cases to their original districts.<sup>4</sup>

Three practices in particular raise concerns about the limits of judicial omnipotence and how that power affects adequate representation, doctrinal consistency, predictability, public perception, and plaintiffs’ attorneys’ incentives to shoulder expensive and time-consuming litigation. First, transferee judges create hierarchies of influence. To avoid having to communicate with hundreds of attorneys and streamline cases, judges appoint steering committees and other lead lawyers to conduct discovery, disseminate information, draft motions, negotiate settlements, and try bellwether cases. Yet, they rarely explain why they choose particular attorneys and may even handpick counsel with few or no involved clients. Although lead attorneys control the litigation and wrest decision-making power away from plaintiffs’ individually retained attorneys,<sup>5</sup> judges focus on their financing abilities, cooperative tendencies, and expertise—not adequate representation. These criteria further entrench repeat players who are often settlement artists and may be more concerned about fostering reciprocity among fellow attorneys, pleasing judges, and positioning themselves for future appointments than advancing plaintiffs’ heterogeneous interests.

Second, judges compensate lead lawyers. When lead attorneys assume work that goes well beyond what they would do for their own clients, they should be paid accordingly. But judges lack a unified doctrinal basis for doing so. They have borrowed piecemeal from class action’s common-fund doctrine, contract principles, ethics, and equity, but ignored the corresponding constraints of each. This mishmash has resulted in unpredictable outcomes, disgruntled attorneys, and a reduced incentive for “non-elite” lawyers to shoulder expensive, time-consuming

---

<sup>2</sup> See *infra* notes 56-60 and accompanying text.

<sup>3</sup> CONFEDERATE RAILROAD, *When You Leave That Way You Can Never Go Back*, on CONFEDERATE RAILROAD (Atlantic Nashville 1993); SAM NEELY, *When You Leave That Way You Can Never Go Back* (MCA Records 1983).

<sup>4</sup> Since its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, a total of 13,432 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 359,432 had been terminated in the transferee courts, and 89,123 were pending throughout the district courts. JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR (2013), available at: <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx>.

<sup>5</sup> This Article focuses on litigation in which collective action problems exist principally among plaintiffs’ counsel, but in some litigation, such as intellectual property, the collective action may exist primarily among defense counsel. Many of the arguments that I set forth will apply with equal force to the defense side in intellectual property litigation.

litigation. Those costs are further exacerbated in some cases where judges have cut individually retained counsels' contingent fee even after deducting lead-lawyer fees.<sup>6</sup>

Third, judges have presided over private settlements without a legal basis. They cite public-policy concerns or analogize multidistrict litigation to class actions, but most multidistrict cases are not certified as classes.<sup>7</sup> Unlike class actions in which Rule 23(e) demands a searching judicial inquiry into whether the settlement is fair, reasonable, and adequate, nonclass settlements are private contracts. Thus, by one view, unless the settlement itself authorizes the court to act,<sup>8</sup> these judges overstepped their power and have paternalistically meddled with plaintiffs' ability to contract with defendants.<sup>9</sup> Others advocate extending the dubious "quasi-class action"<sup>10</sup> moniker to allow judges to monitor nonclass settlements as they do class actions. But both views miss the mark. The first ignores attorneys' temptation to cross ethical boundaries to achieve finality and pretends that plaintiffs have conventional, one-on-one attorney-client relationships that allow them to monitor their own suit. This is plainly not the case when lawyers represent thousands of clients in the same litigation. Yet, the second view on quasi-class actions allows litigants and the judiciary to end-run Rule 23, strip away its due process protections, and create a grab bag from which they can select helpful provisions and ignore those that impede finality.<sup>11</sup>

As class certification has dwindled and courts rely increasingly on multidistrict litigation to resolve aggregate litigation, much work remains to be done on how we understand and theorize these practices. Although a few scholars have begun to recognize the significance of these decisions, they tend to focus on single issues without evaluating the spillover effects. Thus, by considering judicial practices holistically, this Article aims to present a unified theory of judicial power—and its limits.

By turning a critical lens on judicial power, this Article makes three principal contributions. First, it presents the first empirical look into the number of repeat players that transferee judges appoint to leadership positions. As such, it empirically supports persistent anecdotes about repeat play and suggests a reality in which

---

<sup>6</sup> See *infra* notes 192-222 and accompanying text.

<sup>7</sup> See *infra* notes 19-25 and accompanying text.

<sup>8</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552-53, n.7 (E.D. La. 2009) (discussing the Vioxx Settlement Agreement).

<sup>9</sup> See, e.g., Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012).

<sup>10</sup> See Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 CINCINNATI L. REV. 389 (2012) (criticizing the use of "quasi-class action").

<sup>11</sup> See *id.*, at 394; see also *Guice v. State Farm Fire & Cas. Co.*, No. 1:06CV1-LTS-RHW, 2006 WL 2359474 (S.D. Miss. Aug. 14, 2006) (observing that it would be "inconsistent" to "deny class certification . . . and at the same time allow [claims] to go forward in what the Magistrate accurately described as a 'quasi-class action lawsuit' . . . without regard for the rigid requirements for class certification.").

plaintiffs' attorneys must preference reciprocity, reputation, and cooperation over adequate representation and dissent. Given the due process concerns and group decision-making biases that arise when dissent is absent or salutary, judges should balance leadership committees to capture the benefits of outside perspectives and dissenters. Second, judges can compensate lead lawyers on a coherent and more predictable basis by distilling current theories down to their common denominator: quantum meruit. Quantum-meruit awards would align fees with other attorney-fee decisions and compensate leaders based on the value they actually add. Third, employing a quantum-meruit theory for fees would give judges a private-law basis for scrutinizing settlements. Because courts must evaluate the case's success to determine how much compensation is merited, it would likewise help stymie a trend toward self-dealing where repeat players insert fee provisions into master settlements and require plaintiffs and their attorneys to "consent" to fee increases to obtain settlement awards.

These proposals differ substantially from one set forth by Professors Miller and Silver who recommended adapting the lead-plaintiff process in securities class actions to fit multidistrict litigation.<sup>12</sup> Specifically, Silver and Miller suggest judges appoint a plaintiffs' management committee comprised of attorneys with the largest client inventory and that those attorneys then pick, compensate, and monitor the lawyers performing the common-benefit work.<sup>13</sup> While there is value in seeking an objective measure like client inventory, in reality, it rewards lawyers who purchase the largest number of undifferentiated clients from referral lawyers, motivates counsel to collect clients with weaker claims, empowers repeat players,<sup>14</sup> and further encourages attorneys to value reciprocity, reputation, and cooperation over adequate client representation. Although market-based solutions remain a viable option (particularly if implemented through a well-informed third-party financier<sup>15</sup>), this Article focuses on improving representation and predictability in decision-making and thus depends on a knowledgeable, neutral third party: the judge.

Part I sketches the host of concerns animating judicial decisions and incentives in multidistrict litigation such as the need to thwart self-dealing and manage agency problems between attorneys and their clients, prevent collusion, organize lawyers, and strike a delicate balance between too much and not enough judicial oversight. In many ways, certifying a class under Rule 23 simplified this balancing act by equipping

---

<sup>12</sup> 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 (2010).

<sup>13</sup> *Id.* at 159-75.

<sup>14</sup> Having repeat players on key committees is not an inherently negative scenario. Rather, it is the tit-for-tat reciprocity and lingering reputational concerns that suggest repeat players may sell out a sub-segment of the group when it furthers repeat players' self-interest. Likewise, there is a separate concern that many repeat players are appointed for the expertise as settlement artists, not because they are the best litigators.

<sup>15</sup> I have put forth a proposal along these lines in the past. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012).

judges with explicit authority to intervene. Yet, many of the abuses Rule 23 was designed to address tend to flourish in its absence. These abuses, both real and potential, prompt conscientious judges to push the limits of their authority to discourage coercive, collusive, or unfair settlements. But institutional pressure, with its steady drumbeat of settlement, complicates their task by layering judicial and systemic efficiency interests atop parties' interests.

Part II critiques the exercise of judicial power using extra-legal insights from social psychology as well as conventional due process. Part II.A explains that when judges emphasize expertise, cooperation, and financial resources, they tend to appoint repeat players and cultivate an environment in which attorneys must put their self-interest and reputation above representing clients with divergent interests. To support this proposition, this Part introduces the first empirical evidence on repeat players in leadership roles. As long hypothesized, although less than half of the law firms involved in product-liability multidistrict litigations are repeat players, attorneys from those firms filled over 78 percent of all leadership positions.<sup>16</sup>

Moving beyond their appointment, Part II.B critiques the piecemeal doctrinal theories used to compensate lead lawyers—class-action law's common-fund doctrine, contract principles, ethics, and equity. None of these theories fully explains judicial decisions, which leads to unpredictable fee awards. And these circumstances make it nearly impossible for dissenting attorneys to identify a doctrinal toehold for their objections. Part II.C extends these concerns over predictability and limits on judicial power to settlements and suggests that judges' current justifications for "approving" private, nonclass settlements suffer from similar shortcomings.

Part III identifies regulatory and doctrinal solutions to Part II's concerns. First, it proposes alternative criteria and procedures for appointing lead lawyers and expanding the pool of eligible candidates. For example, encouraging input and dissent from non-lead lawyers promotes adequate representation and permitting qualified attorneys to rely on third-party financing to fund common-benefit work expands the number of viable candidates. Second, it suggests that employing a quantum-meruit theory to compensate lead lawyers would align those decisions with fee awards more generally, impose predictable limits, and curtail the practice of uniformly reducing non-lead attorneys' contingent fees. Finally, because using a quantum-meruit theory requires judges to assess the benefit leaders conferred and the results they obtained for the plaintiffs, it supplies a valid basis for assessing private settlements. Although this authority is limited and thus not a gateway to the kind of wholesale settlement review that Rule 23(e) would countenance, it does furnish judges with enhanced policing authority tied to a consequential incentive: attorneys' fees.

---

<sup>16</sup> Please see *infra* notes 114-125 and accompanying text for additional information and qualifiers.

## I. MULTIDISTRICT LITIGATION MINUS CLASS CERTIFICATION

Transferee judges face a Herculean task. Coordinating hundreds or thousands of nominally similar cases entails managing countless intrinsic human elements—attorneys’ egos, injured plaintiffs, defendants with public-relation problems and fickle shareholders, not to mention greed, reputation concerns, and personal animosity. Section 1407 captures none of this when it authorizes the Judicial Panel on Multidistrict Litigation (“the Panel”) to oversee all federal dockets and transfer cases with a common question of fact to a single federal judge for coordinated pretrial handling.<sup>17</sup> The first hint that coordination requires more than strict deadlines comes when the Panel forgoes parties’ geographic convenience in favor of an experienced transferee judge.<sup>18</sup> While past experience helps ensure judicial competence, it also means that transferee judges may be repeat players who approach new litigation with their own assumptions, prejudices, and preferences.

*A. Transferee Judges’ Evolving Role*

Transferee judges’ experiences and preferences are increasingly constrained by changing procedural options, chiefly the gradual decline of class certification. Since the mid-1990s, Congress and the appellate courts have made it harder to certify a class by requiring plaintiffs prove Rule 23’s prerequisites by a preponderance of the evidence,<sup>19</sup> instructing judges to delve into a case’s merits when the merits overlap with class-certification requirements,<sup>20</sup> and complicating choice-of-law questions and manageability by providing federal courts with jurisdiction.<sup>21</sup> As researchers at the Federal Judicial Center found, the number of personal-injury and product-liability cases consolidated through multidistrict litigation has increased, while the number of class-certification motions has decreased, which “suggest[s] a declining rate of class certification.”<sup>22</sup> Yet, class certification offered transferee judges a dizzying array of

---

<sup>17</sup> 28 U.S.C. § 1407 (2014).

<sup>18</sup> See John G. Heyburn, II, *A View from the Panel: Part of the Solution*, 82 TULANE L. REV. 2225, 2240 (2008).

<sup>19</sup> See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *In re IPO Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

<sup>20</sup> See, e.g., *Hydrogen Peroxide*, 552 F.3d at 307; *Oscar*, 487 F.3d at 261; *IPO Sec. Litig.*, 471 F.3d at 41; *Szabo*, 249 F.3d at 676; see also PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.06 (2009). More recently, *Wal-Mart Stores, Inc. v. Dukes* strengthened the commonality standard under Rule 23(a) and ensured that defendants could raise individual defenses, which could prevent Rule 23(b)(3) certification. 131 S. Ct. 2541, 2559-61 (2011).

<sup>21</sup> Class Action Fairness Act of 2005 § 2(a), (b), Pub. L. No. 109-2, 119 Stat. 4, 5 (codified in scattered sections of 28 U.S.C.). Of course, one might say that because CAFA tends to inhibit class certification because of choice-of-law questions, the choice-of-law issues are actually much easier because they simply disappear once a class is not certified.

<sup>22</sup> Thomas E. Willging & Emery G. Lee, III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation after Ortiz*, 58 KAN. L. REV. 775, 777 (2010).

judicial powers to appoint class counsel,<sup>23</sup> ensure a fair settlement,<sup>24</sup> and award fees,<sup>25</sup> all of which helped prevent counsel from exploiting absent class members.

Waning class certification contributed to two developments. First, it forced multidistrict litigation to become the primary means for resolving aggregate litigation.<sup>26</sup> Yet, Congress never envisioned transferee judges concluding multidistrict cases; the plan was simply to streamline the discovery and pretrial process and then return cases to their home districts for trial.<sup>27</sup> Thus, nothing in section 1407 confers any additional authority beyond what is available through the ordinary Federal Rules. This leads to the second development: transferee judges have had to adapt to ambiguous authority despite lingering concerns over collusion, contingent fees, and attorney overreaching. So, as experienced transferee judges struggle to police the same self-interested behavior they witnessed in class-action practice, they find themselves without the tools that Rule 23 provided.

### *B. Judicial Misgivings Over Attorney Conduct*

Collusive circumstances in class actions initially forced judges into uncharted territory: no longer were they acting as neutral arbiters, but as inquisitors.<sup>28</sup> When both parties become “friends” of the deal and ask the court to approve and enforce a settlement class, judges can no longer depend on the adversarial system.<sup>29</sup> But just as they adapted to this new culture by assuming the mantle of a “managerial”<sup>30</sup> judge or even a “deal-broker,”<sup>31</sup> aggregate litigation changed again with the class action’s gradual decline.<sup>32</sup> Nevertheless, defendants’ desires have remained static: they want a global resolution that provides them with finality and closure.

So, even though class certification has decreased, experiments with ethically questionable means for achieving finality have not. Conflicts between attorneys and their clients and between the clients themselves continue to materialize. Plaintiffs’

---

<sup>23</sup> FED. R. CIV. P. 23(g).

<sup>24</sup> FED. R. CIV. P. 23(e).

<sup>25</sup> FED. R. CIV. P. 23(h), advisory committee’s notes.

<sup>26</sup> To be clear, multidistrict litigation has always played a substantial role in products liability litigation where individual issues tend to predominate over common ones, but less of a role in other areas that often proceeded as class actions like securities or antitrust.

<sup>27</sup> *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998); L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 L.A. L. REV. 157, 195-97 (2004).

<sup>28</sup> Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1983 (1998).

<sup>29</sup> Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. (forthcoming 2014).

<sup>30</sup> Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>31</sup> William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L. J. 371, 373 (2001).

<sup>32</sup> See Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement* (1984), 78 FORDHAM L. REV. 1265, 1269 (2009) (“Rather than considering corrective action to prevent overreaching by the plaintiffs’ bar, the courts used [asbestos] cases as a basis for almost destroying the class action . . .”).

firms might have tacit agreements or fee-sharing arrangements with one another that further their collective self-interest and tether their financial interests to each other instead of to each client's outcome.<sup>33</sup> Competing interests, attorney funding, and contingent fees can lead to quick or collusive settlements, underfunded litigation, exorbitant attorneys' fees, coercive settlement terms, and misallocated settlement proceeds.<sup>34</sup> For example, in *Johnsons v. Nextel Communications, Inc.*,<sup>35</sup> a group of clients hired a law firm to sue Nextel for employment discrimination, but the firm made a deal with the defendant that would give plaintiffs' lawyers kickbacks in exchange for convincing their clients to abandon their legal claims.<sup>36</sup>

Although judges often act carefully to stymie attorney abuses like these, they can also facilitate overreaching by approving new forms of self-dealing where lead lawyers use their bargaining position to increase their fees. For instance, in the *Guidant* litigation, Judge Frank initially issued a fee-transfer form that required participating plaintiffs and their counsel to allocate two percent of a plaintiff's gross monetary recovery to compensate lead lawyers and two percent for litigation costs.<sup>37</sup> Apparently unhappy with this compensation but not wanting to rob their fee award of its aura of contractual consent, the plaintiffs' steering committee negotiated their fees with the defendant. As a result, the Master Settlement Agreement permitted the steering committee to apply for fees, which plaintiffs and their attorneys "consented" to by accepting the deal.<sup>38</sup> Of course, controlling lead lawyers' compensation is a powerful bargaining chip that defendants do not give up freely, but exchange for things like lower settlement amounts, higher participation rates, and other beneficial provisions.<sup>39</sup> Despite the structural collusion and the lack of clear notice to plaintiffs and their attorneys, Judge Frank read the settlement as "contracting around" his initial order and upped lead lawyers' fees substantially, from 2 percent to 14.4 percent—an extra \$29.7 million.<sup>40</sup>

Lead lawyers' fee success in *Guidant* kick started a disturbing trend of permitting them to negotiate with defendants to include their fees in settlements. The Vioxx settlement followed closely on the heels of the *Guidant* settlement and, like *Guidant*, contracted around Judge Fallon's three-percent fee cap, raising it to eight percent and

---

<sup>33</sup> *E.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987).

<sup>34</sup> *See generally* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 525, 527-28 (1994) ("If counsel is without financial resources to handle litigation, he or she may feel pressured to settle some cases quickly to finance the litigation—to prime the pump, so to speak."); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 512-14 (2011) (noting that these divisions exist within the class context).

<sup>35</sup> 660 F.3d 131 (2d Cir. 2011).

<sup>36</sup> *Id.*

<sup>37</sup> *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*2 (D. Minn. Mar. 7, 2008).

<sup>38</sup> *In re Guidant*, 2008 WL 382174 at \*2-4, 16.

<sup>39</sup> Silver & Miller, *supra* note 12, at 134.

<sup>40</sup> *In re Guidant*, 2008 WL 382174 at \*2-4, 16; Silver & Miller, *supra* note 12, at 109, 118-19.

deducting the entire amount from individual attorneys' contingent fees.<sup>41</sup> Similarly, in the *Genetically Modified Rice Litigation*, Judge Perry ruled that she lacked jurisdiction to order state-court litigants to withhold and contribute 11 percent of plaintiffs' gross settlement recovery to a common fund that would compensate and reimburse lead lawyers.<sup>42</sup> Yet, the settlement agreement required *all* enrolling claimants (whether litigating in state or federal court) to contribute that amount to the common fund even though federal litigants surely benefitted more from lead attorneys' discovery efforts than did state-court plaintiffs.<sup>43</sup>

Repeat players' influence on this trend is readily apparent. Three of the four lead lawyers in *Guidant* were also appointed to leadership positions in *Vioxx*,<sup>44</sup> and one lead attorney in both of those litigations was also a lead lawyer in the *Genetically Modified Rice Litigation*.<sup>45</sup> To be clear, the trouble isn't with compensating lead lawyers who may benefit other attorneys and their clients, but in allowing those in power to negotiate their fee with the defendant—a classic form of structural collusion and breach of their fiduciary obligations.<sup>46</sup>

The *Vioxx* litigation was plagued with other ethical questions, too. For example, the settlement "offer" was actually a contract between the plaintiffs'

---

<sup>41</sup> Lawyers settled the *Guidant* litigation on July 12, 2007 and the *Vioxx* litigation on November 9, 2007. The respective judges involved issued their corresponding opinions about six months apart. See *In re Guidant*, 2008 WL 382174; *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. Aug. 27, 2008).

<sup>42</sup> *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP., 2010 WL 716190, at \*9-11 (E.D. Mo., Feb. 24, 2010) (creating a common benefit fund).

<sup>43</sup> *Genetically Modified Rice Litig. Settlement*, MDL No. 1811, para. 8.1.1, 8.1.2 (MDL Settlement Agreement). This issue is currently on appeal to the Eighth Circuit. *Don Downing & Adam Levitt, etc. v. The Phipps Group*, Case No. 12-4045 (8th Cir. 2012).

<sup>44</sup> The Lead Counsel Committee in *Guidant* included Richard Arsnauld, Elizabeth Cabraser, Seth Lesser, and Charles Zimmerman. See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 1708 (D. Minn. Dec. 19, 2005) (Pretrial Order No. 1 Designation of Plaintiffs' Lead, Liaison Counsel, and Defendants' Lead and Liaison Counsel). Richard Arsnauld and Elizabeth Cabraser were two of the eleven people appointed to the *Vioxx* Plaintiff Steering Committee, and Seth Lesser was appointed to the Government Actions Plaintiffs' Case Management Committee. *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. Apr. 8, 2005) (Pretrial Order No. 6); *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. July 9, 2009) (Pretrial Order No. 44).

<sup>45</sup> Richard Arsnauld was a lead attorney in all three litigations. *In re Genetically Modified Rice Litig.*, MDL No. 1811 (E.D. Mo. Apr. 18, 2007) (Order Appointing Leadership Counsel); *supra* note 44. Stephen Weiss, who was also named a lead attorney in the *Genetically Modified Rice Litigation*, is a partner of Chris Seeger, who was a lead attorney in *Vioxx*. In fairness, as Part II.B.1 explains in depth, no coherent rationale currently explains lead lawyers' fee awards, so attorneys are attempting to contract around this uncertainty.

<sup>46</sup> See John C. Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647-48 (1987) ("While no honest defendant's attorney would offer to exchange a low settlement for a high fee award (nor would a responsible plaintiff's attorney accept such an offer, if made), neither has to offer any such 'bribe,' because the legal rules applicable to class actions essentially do it for them."); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1990 (2011) (arguing that lead attorneys are fiduciaries to all the plaintiffs).

attorneys and Merck, which required each participating attorney to recommend the settlement to 100 percent of her eligible clients and to withdraw from representing any who refused.<sup>47</sup> If fewer than 85 percent of claimants consented, Merck could withdraw its offer and no one—plaintiffs’ attorneys included—would receive any money. The settlement also named Judge Fallon, who presided over the federal multidistrict litigation, as its “chief administrator,” a position that non-settling plaintiffs claimed made him appear partial.<sup>48</sup> Disgruntled plaintiffs cited language from one of Judge Fallon’s orders, which required non-settling plaintiffs to appear in courts around the country “to ensure that plaintiffs who are eligible for the Vioxx settlement program but who have not enrolled in the program have all necessary information available to them so they can make informed choices.”<sup>49</sup> Yet, plaintiffs had private counsel who had presumably already explained the deal to them. So, objectors argued the order had a pejorative quality to it. Nevertheless, the Fifth Circuit rejected both the argument that the settlement’s terms coerced plaintiffs’ consent<sup>50</sup> and the contention that Judge Fallon’s dual roles created conflicts demanding recusal.<sup>51</sup>

All of these examples—*Vioxx*, *Gaidant*, and *Genetically Modified Rice*—highlight concerns that arise during settlement. Nevertheless, transferee judges encourage settlement. First, Rule 16 expressly authorizes judges to facilitate settlement

---

<sup>47</sup> Vioxx Prod. Liab. Litig., MDL-1657, No. 05-01657 para. 1.2.8.1 (E.D. La.) (initial settlement agreement), *available at* [http://www.merck.com/newsroom/vioxx/pdf/Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf). For the many ways in which this agreement arguably ran afoul of the Model Rules of Professional Conduct, see Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 274-92 (2011).

<sup>48</sup> See Jef Feeley & Leslie Snadowsky, *Merck Vioxx Judge Threatens to End Suit Consolidation*, BLOOMBERG, Jan. 5, 2006, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOUXOdXoKAX8&refer=top\\_world\\_news](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aOUXOdXoKAX8&refer=top_world_news); see also MODEL CODE OF JUDICIAL CONDUCT Canon 2, Rule 206 and cmt.; Mark A. Peterson & Molly Selvin, *Mass Justice: The Limited and Unlimited Power of the Courts*, 54 LAW & CONTEMP. PROBS. 227, 230 (1991) (“Faced with mass tort litigation, judges are not simply neutral arbiters; rather, they have strong personal incentives to speed the judicial process, save costs and labor, and reduce redundancy.”); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 361-62 (1986); Weinstein, *supra* note 34, at 521 (“Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases.”).

<sup>49</sup> Brief for Plaintiff-Appellant at \*35-36, *In re Vioxx Prods. Liab. Litig.*, 2009 WL 7111920 (5th Cir. Aug. 31, 2009) (No. 09-30446).

<sup>50</sup> *In re Vioxx Prods. Liab. Litig.*, 412 Fed. Appx. 653, 653-54 (5th Cir. Dec. 17, 2010) (denying plaintiff’s motion to set aside his consent to settle). *But cf. In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133-34 (7th Cir. 1979) (“The subclass member is presented with an accept-or-else situation: if he does not accept, his federal claim is lost even though he cannot receive the benefits of the settlement package. . . . [B]eing of the opinion that the dismissal of the action is fundamentally unfair to nonconsenting subclass members, we cannot permit the [class] settlement in its present form to stand.”).

<sup>51</sup> *In re Vioxx Prods. Liab. Litig.*, 388 Fed. Appx. 391, 395-97 (5th Cir. July 16, 2010).

discussions before trial, and as pretrial judges, transferee judges would be remiss not to prompt these conversations.<sup>52</sup> Second, as Judge Weinstein has observed, “Federal judges tend to be biased toward settlement.”<sup>53</sup> Finally, the Panel views quickly settling a complex case as a hallmark of success that favorably disposes it to reward that judge with new litigation.<sup>54</sup> Multidistrict litigations are plum judicial assignments; they involve interesting facts, media attention, and some of the nation’s most talented attorneys. So, even though conflicting interests, misaligned incentives, and attorney overreaching crop up most prominently during settlement, judges have their own incentives to broker deals.

## II. THE LIMITS OF JUDICIAL POWER AND INHERENT AUTHORITY

Despite facing a task of mythic proportions, transferee judges possess the same powers as their mortal counterparts. Yet, the need for settlement, judicial misgivings about attorney misconduct and freeriding, and the lack of Rule 23’s explicit policing power persist, so judges innovate. They have stretched basic common law doctrines like their “inherent judicial authority” to fill the regulatory void. And while judges’ intentions in implementing these creative solutions are exemplary, these measures have downsides too.

Three practices, in particular, warrant scrutiny. First, in appointing attorneys to leadership positions, judges focus on experience, cooperative tendencies, and an ability to finance the litigation—factors that favor repeat players as evidenced by their filling over 63 percent of all leadership positions.<sup>55</sup> Emphasizing these traits can have detrimental effects like fear of dissenting and group decisionmaking biases.

---

<sup>52</sup> FED. R. CIV. P. 16(a)(5).

<sup>53</sup> Weinstein, *supra* note 32, at 1265; see also *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992) (observing that the JPML consolidated cases in front of Judge Raymond Acosta, but “[s]hortly thereafter, the Chief Justice appointed the Honorable Louis C. Bechtle as a ‘settlement judge,’” such that while Judge Acosta advanced the litigation toward trial, “Judge Bechtle endeavored to advance settlement prospects by determining individual and aggregate values for the cases”); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2288-89 (2008) (discussing settlement bias in multidistrict litigation).

<sup>54</sup> This observation is based principally on conversations I have had with federal judges and their clerks, the general perception that judges who receive these cases are especially capable, and the prestige and publicity that generally accompanies such an assignment. See generally Susan Willett Bird, *The Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475, 483 n.42 (1975) (reporting that related cases were “assigned specifically to Judge X . . . because he was ‘especially able’”); David F. Herr & Nicole Narotsky, *The Judicial Panel’s Role in Managing Mass Litigation*, SN066 ALI-ABA 249 (2008) (“The Panel undoubtedly considers the ability and reputation of a judge in determining whether to assign complex, multidistrict litigation to him or her. . . . In one case, [the Panel] expressly identified former Panel membership, as well as leadership roles in various federal court committees as a reason for selecting Chief Judge Sam Pointer as a transferee judge.”).

<sup>55</sup> Please see *infra* notes 114-125 and accompanying text for additional information and qualifiers.

Second, when judges invoke a variety of legal doctrines, analogies, and their inherent judicial authority to compensate lead lawyers, their decisions can be unpredictable and difficult to challenge. Finally, judges who publically approve or disapprove private settlements have not identified explicit authority that allows private parties to predict when judicial interference will occur or the boundaries for such conduct.

Despite attorney dissatisfaction with these decisions, several factors inoculate them from thorough appellate review.<sup>56</sup> First, because most multidistrict litigations result in private settlements, they are not reviewable on appeal, even when subject to public judicial commentary. Second, because most interim rulings are not dispositive orders, they are reviewable only through an extraordinary writ of mandamus or subsequent dismissal.<sup>57</sup> Motions to disqualify a lead attorney, for example, are not immediately appealable as a matter of right even though an attorney could theoretically petition for mandamus.<sup>58</sup> Third, even if the appellate court grants mandamus or reviews a dismissed case, it tends to do so using the highly deferential abuse-of-discretion standard.<sup>59</sup> Vague initial standards, subjective decisions about which attorney would best serve the plaintiffs, and the lack of precedent make this standard a formidable hurdle. Fourth, practical incentives counsel against objecting, at least with regard to lead-lawyer selections. An objecting attorney faces the risk that her peers will dub her non-cooperative and thus “ineligible” for future leadership roles. Plus, early objections could alienate dissenters from both the chosen leaders and the transferee judge, making them less effective advocates.<sup>60</sup> Consequently, if change is to be had, transferee judges must initiate it.

---

<sup>56</sup> See generally Carolyn A. Dubay, Trends and Problems in the Appointment and Compensation of Common Benefit Counsel in Complex Multi-District Litigation: An Empirical Study of Ten Mega MDLs 13 (Oct. 2010) (unpublished manuscript, on file with author) (“Discerning the practices of each MDL court with respect to common benefit counsel is daunting for a number of reasons. Decisions are rarely published, rarely appealed, and oftentimes records relating to fees are filed under seal.”); Silver & Miller, *supra* note 12, at 109, 118-19 (“[Judges] face no known risk of appellate review or reversal: no appointment decision seems ever to have been challenged, much less reversed.”).

<sup>57</sup> Transferee judges tend to issue “Lone Pine” orders after most plaintiffs’ cases are resolved through a comprehensive settlement. These orders require non-settling claimants to submit specific proof regarding their injuries to avoid dismissal. See *Lore v. Lone Pine Corp.*, No. L-33606-85., 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986); e.g., *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000).

<sup>58</sup> *Cunningham v. Hamilton County*, 527 U.S. 198, 207 (1999); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

<sup>59</sup> See *In re Dresser Indus., Inc.*, 972 F.2d 540, 542-43 (5th Cir. 1992). Dismissals under Rule 16(f) are reviewed using the abuse of discretion standard. *Nat’l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (“The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.”); e.g., *In re Vioxx Prods. Liab. Litig.*, 388 Fed. Appx. 391 (5th Cir. July 16, 2010) (using the abuse-of-discretion standard in reviewing the allegation that Judge Fallon should have recused himself based on his dual roles as judge and Chief Administrator of the Master Settlement Agreement).

<sup>60</sup> See Silver & Miller, *supra* note 12, at 119.

### A. *Appointing Lead Lawyers*

Current judicial practice in selecting attorney leadership, where courts stress expertise, cooperative abilities, and financial means can raise several concerns. First, valuing cooperation may encourage attorneys to be more concerned with impressing judges or their peers rather than vigorously representing clients whose interests differ from the majority.<sup>61</sup> Second, cooperation fosters a need for attorneys to curry favor with one another, which, when combined with the prevalence of repeat players,<sup>62</sup> can infect leadership committees with well-documented group decision-making biases, like conformity.<sup>63</sup> Third, appointing only repeat players may create groups of homogeneous thinkers who are less innovative.<sup>64</sup> Thus, focusing on experience and cooperation may cut against the notion that “diversity trumps ability” in disjunctive tasks like identifying and cultivating successful legal arguments.<sup>65</sup>

#### 1. *Adequate Representation Concerns*

Lead attorney hierarchies have not always held as much influence as they do today. Early groups coalesced mainly for convenience: they pooled expertise and financing, hired experts, created trial handbooks with “hot” documents, and even developed “schools” to train lawyers with similar cases in trial techniques.<sup>66</sup> But,

---

<sup>61</sup> This can cause a cascade effect that prompts them to discount contrary information. *See generally* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 55-59, 74 (2003) (suggesting “[i]n a reputational cascade, people think that they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others. Even the most confident people sometimes fall prey to this, silencing themselves in the process”).

<sup>62</sup> *See infra* Part II.A.2.

<sup>63</sup> *See generally* SUNSTEIN, *supra* note 61, at 62 (“Cascade effects and blunders are significantly increased if people are rewarded not for correct decisions but for decisions that conform to the decisions made by most people. In the real world, we are sometimes rewarded not for being right but for doing what others do. Such a system of rewards is likely to lead both individual and groups in bad directions.”).

<sup>64</sup> *See* SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES xiv (paperback ed., 2007).

<sup>65</sup> *See id.* at xiv-xv (“I.D. Steiner distinguished between *disjunctive tasks*, those in which only one person needs to succeed for the group to be successful, and *conjunctive tasks*, those in which everyone’s contribution is critical. Solving a vexing math problem is disjunctive: the more diverse heads, the better. In football, the offensive line’s task of protecting the quarterback is conjunctive. If any one lineman fails to do his job, the quarterback gets sacked. Diversity works best on disjunctive tasks because multiple approaches can be tried simultaneously, and one good idea means success for everyone.”). As Scott Page points out, “[m]ost real world tasks are neither purely disjunctive nor purely conjunctive,” which is likewise true for the work of a plaintiffs’ steering committee. *Id.* at xv. Conducting document review, for example, is likely to be a conjunctive task where everyone’s contribution is critical and one missed document can cause a host of problems. Making decisions about which arguments to pursue, however, is more of a disjunctive task—only one person needs to propose a winning theory for the group’s motion to succeed.

<sup>66</sup> Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 5-10 (1982); Byron G. Steir, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863,

absent unique financing arrangements,<sup>67</sup> group decision-making did not bind nonconsenting attorneys and leaders received fees solely from their own clients.<sup>68</sup>

By contrast, today's committees are formalized, far-reaching, and obligatory. The recent *Vioxx* multidistrict litigation alone included at least ten committees.<sup>69</sup> These committees do not exist simply for attorney convenience; they assume control of the litigation and their duties usurp the traditional attorney's daily responsibilities. Committees initiate and conduct discovery, act as spokespersons for all plaintiffs, call counsel meetings, examine and depose witnesses, coordinate trial teams, select cases for bellwether trials, submit and argue motions, and negotiate proposed settlements.<sup>70</sup> The individually retained attorney has no power to appoint or discharge the leaders who assume control of her clients' cases. Instead, she is relegated to an observer who can do little more than complain that the lead lawyers have violated their fiduciary obligations to the whole group.<sup>71</sup>

---

899-903. Examples of early groups include the late-1970s Swine Flu multidistrict litigation, which had a single 13-person steering committee, and the 1980s Dalkon Shield litigation, which had but one lead counsel. Rheingold, *supra* at 4.

<sup>67</sup> See, e.g., Burch, *supra* note 15, at 1287 (discussing the Agent Orange financing arrangement).

<sup>68</sup> See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 443 (1998) (noting that lead lawyers in the L-Tryptophan litigation "received no premiums for their groups service"); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1006 (1995) ("Notwithstanding the benefits of coordination, plaintiffs' lawyers usually insist on retaining ultimate control over their individual cases."); Bill Trine, *Remarks From Your Chair*, Newsletter of the ATLA L-tryptophan Litig. Group, Oct. 1993, at 2.

<sup>69</sup> See *In re Vioxx Prods. Liab. Litig. Pretrial Orders and Minute Entries*, <http://vioxx.laed.uscourts.gov/Orders/Orders.htm> (referencing a Plaintiffs' Steering Committee, Defendants' Steering Committee, State Liaison Committee, Plaintiffs' Liaison Counsel, Plaintiffs Steering Committee Executive Committee, Fee Allocation Committee, Third Party Payor Fee Allocation Committee, Government Actions Plaintiffs' Case Management Committee, and a Private Third-Party Payor Bellwether Trial Committee); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 1, 2008) (Pretrial Order No. 6B) (confirming the functions, duties, and responsibilities of the PSC, PLC, and the PSC Executive Committee). For another example, see *In re Zyprexa Prod. Liab. Litig.*, No. 04-MDL 1596 (E.D.N.Y. Feb. 15, 2011) (Order No. 38) (appointing a plaintiff steering committee to advise pro se litigants); see also Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 454 (2012).

<sup>70</sup> See, e.g., *In re Boston Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, at 10 (S.D.W.V. Feb. 29, 2012) (Pretrial Order No. 1); *In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, MDL No. 2187 (S.D.W.V. Feb. 1, 2011) (Pretrial Order No. 3); *In re Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179*, at 3-4 (E.D. La. Oct. 8, 2010) (Pretrial Order No. 8) (outlining the responsibilities of the Plaintiffs Steering Committee and the Plaintiff Executive Committee); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 17, 2005) (Pretrial Order No. 1) (outlining the Plaintiffs' Steering Committee's responsibilities); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1705, 2005 WL 3704679, at \*1 (D. Minn. Dec. 20, 2005).

<sup>71</sup> *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 234 (1st Cir. 1997) ("Whether or not there is a direct or formal attorney-client relationship between plaintiffs and the PSC, the PSC and

Evolving from organic, ad hoc groups to mandatory, formal committees has important implications for committee members' fiduciary obligations and adequate representation, particularly when group members' interests are in tension with one another. When ad hoc groups were purely voluntary,<sup>72</sup> the attorney consented to participate and, since that decision fell within her agency authority, her consent bound her client. But neither clients nor their attorneys freely consent<sup>73</sup> to multidistrict litigation or the subsequent selection of lead counsel on their behalf. This non-voluntariness makes the committee appointment more akin to choosing class counsel—where putative class members have no say in who represents them—than to ad hoc attorney groups. Yet, unlike selecting class counsel, judges seem to pay little attention to *Amchem*-like adequate-representation concerns in multidistrict litigation.<sup>74</sup>

Nevertheless, structural conflicts of interest among claimants or between claimants and lead lawyers persist and may arise at multiple points.<sup>75</sup> Some conflicts will be apparent while trying to establish liability, like significant differences in legal

---

its IRPA members necessarily owed a fiduciary obligation to the plaintiffs.”); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22; Silver & Miller, *supra* note 12, at 119-20. Some judges have, however, made efforts to ensure that the Plaintiffs Steering Committee keeps individually retained attorneys informed of the litigation's progress and have permitted individually retained attorneys to participate in fee disputes by teleconference. Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J.L. & SOC. PROBS. 451, 462 n.45 (2012) (noting a technique that he used in resolving the Zyprexa litigation).

<sup>72</sup> For examples of voluntary litigation groups, see Rheingold, *supra* note 66, at 14 (Appendix) (citing *Mer/29*, *The Pill*, *Asbestos*, and *Ford Transmission* cases as examples).

<sup>73</sup> Some judges have used actual contracts to tax participating attorneys at specified rates. See *infra* notes 179-191 and accompanying text.

<sup>74</sup> See *infra* note 82 and accompanying text.

<sup>75</sup> That is, a conflict of interest either between the “claimants and the lawyers who would represent claimants on an aggregate basis” or “among the claimants themselves that would present a significant risk that the lawyers for claimants might skew systematically the conduct of the litigation so as to favor some claimants over others on grounds aside from reasoned evaluation of their respective claims or to disfavor claimants generally vis-à-vis the lawyers themselves.” PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (2010). Professor John Coffee identified four basic structural conflicts that may arise in mass tort class actions:

- (1) internal conflicts that exist within the class—typically, because subcategories of class members are competing over the allocation of the settlement;
- (2) external conflicts that arise because class members (or their attorneys) have some extraneous reason for favoring a settlement that does not truly benefit the interests of all class members;
- (3) risk conflicts that arise because class members or class counsel have very different attitudes about the level of risk they are willing to bear; and
- (4) conflicts over control of the litigation.

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000). Although Professor Coffee focused on class actions, the same conflicts can arise in multidistrict litigation.

status, state laws,<sup>76</sup> claims,<sup>77</sup> or insurance-coverage questions,<sup>78</sup> while others may arise only when contemplating remedies.<sup>79</sup> Judges have attempted to quell these adequate-representation fears by proclaiming that lead attorneys have a duty to represent all plaintiffs.<sup>80</sup> Of course, class counsel has the same obligation.<sup>81</sup> But, without determining whether group members' interests are cohesive, simply recognizing that the obligation exists does not iron out conflicts or reduce incentives to sell out a subsegment of the group. Claiming otherwise contradicts the Supreme Court's principal ruling in *Amchem*: attorneys cannot simultaneously represent group members with

---

<sup>76</sup> When transferee courts do remand actions, they often cite case-specific differences in state laws as a reason for remanding. *E.g.*, *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1200 (D. Minn. 2012); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74 (D. Me. 2011); *In re Nuvaring Prods. Liab. Litig.*, No. 4:08MD1964 RWS., 2009 WL 4825170 (E.D. Mo. Dec. 11, 2009).

<sup>77</sup> *See, e.g.*, *In re Genetically Modified Rice Litig.*, MDL No. 1811 (E.D. Mo. Apr. 18, 2007) (order appointing leadership counsel) (appointing a separate representative for Mississippi farmers and another representative for farmers who would prefer to litigate individually in state court). For example, if lead lawyers' clients asserted only economic claims, but the entire plaintiff group included members with economic and physical injury claims, the attorneys may be less inclined to represent those with physical injuries.

<sup>78</sup> *E.g.*, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 556 F. Supp. 2d 941 (W.D. Wis. 2008) (subclassing a class action because of different statutes of limitation); *Maloney v. Califano*, 88 F.R.D. 293, 294-95 (D.N.M. 1980) (subclassing based on the time taken by the government to make disability determinations); *see also Daley v. Provena Hosps.*, 193 F.R.D. 526 (N.D. Ill. 2000) (subclassing debtors who received different form letters); *Francis v. Davidson*, 340 F. Supp. 351 (D. Md. 1972) (subclassing unemployed fathers who had applied unsuccessfully for certain benefits but were denied benefits for different reasons).

<sup>79</sup> For example, if some claimants required immediate medical attention, they would receive far less benefit from a settlement that provided research funds. *See generally Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (including claimants who had to have their heart valve removed immediately and thus did not benefit from the settlement's research and development fund without special representation); *see also JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES* 43 (Fed. Judicial Ctr. 1998) (expressing concern over the lack of separate representation in *Bowling v. Pfizer, Inc.*). *Bowling* would likely proceed as multidistrict litigation rather than a class action if litigated today.

<sup>80</sup> *In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 234 (1st Cir. 1997). Group representation under forced multidistrict litigation circumstances differs even from that in collective representation where clients can consent to their attorney representing and advancing the group's aggregate interests. *See Howard M. Erichson, Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. L. F. 519, 529-30 (discussing individual attorneys representing clients as a group). Committee appointments more closely resemble class counsel appointments. In class actions, counsel has to represent the best interests of all class members, but, because members have not consented to being represented in any meaningful way, their interests must be cohesive. When interests differ, as did the interests of those with present and future claims in *Amchem*, they must have separate representatives. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626-27 (1997).

<sup>81</sup> FED. R. CIV. P. 23(g)(4).

fundamentally incompatible interests.<sup>82</sup> Accordingly, papering over conflicts with a generic, fiduciary veneer is a nonviable fix.

In fact, multidistrict litigation heightens concerns about inadequate representation.<sup>83</sup> Although plaintiffs technically consent to settle and thus “opt in,” the dynamics of all-or-nothing settlements<sup>84</sup> and settlements where attorneys threaten to withdraw from representing non-settling clients<sup>85</sup> undermines clients’ theoretical autonomy. And, unlike in class actions, plaintiffs who feel inadequately represented cannot opt out or collaterally attack a settlement by contending that counsel failed to represent them in the first suit.<sup>86</sup> These plaintiffs must simply rely on their individual attorneys, who may be unable to voice clients’ concerns because the committee negotiating the settlement offer denied them a seat at the table and the offer demands that they recommend the deal to all or none of their clients. One solution then is to ensure that the lead lawyers around the table represent plaintiffs’ different views, a solution that the Manual for Complex Litigation endorses.<sup>87</sup>

The Manual for Complex Litigation makes two important but often overlooked points about adequate representation. First, it observes, “[c]ommittees are most commonly needed when group members’ interests and positions are sufficiently dissimilar to justify giving them representation in decision making.”<sup>88</sup> Second, it suggests that courts consider “whether designated counsel fairly represent the various interests in the litigation” and, “where diverse interests exist,” “designate a committee of counsel representing different interests.”<sup>89</sup> Nevertheless, practice demonstrates that courts stress the Manual’s other criteria—attorneys’ experience, financial resources, and cooperative abilities<sup>90</sup>—perhaps because they are easier to

---

<sup>82</sup> *Amchem Prods., Inc.*, 521 U.S. at 626-27; see also *infra* notes 258-259 and accompanying text (describing structural conflicts of interest).

<sup>83</sup> I have elaborated elsewhere on the relative degrees of cohesion and difference among plaintiffs’ positions in aggregate litigation elsewhere. See Elizabeth Chamblee Burch, *Litigating Groups*, 61 ALA. L. REV. 1, 25-33 (2009).

<sup>84</sup> Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979 (2010).

<sup>85</sup> Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265, 279-92 (2011).

<sup>86</sup> *McNeil v. Guthrie*, 945 F.2d 1163, 1167 (10th Cir. 1991); *Baylor v. United States Dep’t of Housing & Urban Dev.*, 913 F.2d 223, 225 (5th Cir. 1990); *Gillespie v. Crawford*, 858 F.2d 1101, 1102-03 (5th Cir. 1988).

<sup>87</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at §§ 10.221, 10.224; Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 37-43 (2009).

<sup>88</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at §§ 10.221, 10.224 (“[B]ecause appointment of designated counsel will alter the usual dynamics of client representation in important ways, attorneys will have legitimate concerns that their clients’ interests be adequately represented.”).

<sup>89</sup> *Id.* at § 10.224.

<sup>90</sup> See, e.g., *In re Boston Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, at 9 (S.D.W.V. Feb. 29, 2012) (Pretrial Order No. 1) (“The main criteria for PSC membership will be: (a) willingness and availability to commit to a time-consuming project; (b) ability to work cooperatively with others; and (c) professional experience in this type of litigation.”). See also *Dubay*, *supra* note 56,

assess without knowing much about the plaintiffs themselves.<sup>91</sup> After all, judges typically appoint the Plaintiffs' Steering Committee within a few weeks of receiving the transferred cases and before most discovery ensues.<sup>92</sup>

Two additional judicial practices likewise compound adequate-representation concerns: appointing attorneys to leadership positions who have no involved clients<sup>93</sup> and ratifying plaintiffs' attorneys' proposed leadership slate. First, when judges appoint counsel without affected clients, attorneys may feel more beholden to the judge than the plaintiffs. In theory, appointing a clientless lawyer lessens the fear that her duty to the group may conflict with her clients' specific interests.<sup>94</sup> But attorneys who are untethered to clients have little incentive to understand and identify conflicting interests, cannot be fired or replaced by plaintiffs' counsel, and serve purely at the court's behest. Plus, judges' incentives and objectives differ from clients' incentives and goals: transferee judges generally want to achieve global settlements that will land them more interesting and challenging multidistrict litigation assignments,<sup>95</sup> whereas plaintiffs want everything from compensation to an apology or injunctive relief.<sup>96</sup> Moreover, clientless lawyers' compensation comes

---

at 35 ("While the MCL4th suggests consideration of reasonableness of rates and diversity of representation, the courts with specific orders as to qualifications focused on experience in MDLs or complex litigation and the ability and resources to commit to the leadership responsibilities.").

<sup>91</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at § 10.224.

<sup>92</sup> Judge Fallon appointed the Plaintiffs' Liaison Committee in the same month he received the initial transfer and appointed the Plaintiffs' Steering Committee within two months. *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (JPML Feb. 16, 2005) (transferring cases to the Eastern District of Louisiana pursuant to § 1407); *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. Feb. 28, 2005) (Pretrial Order # 2) (appointing Plaintiffs' Liaison Counsel); *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. April 8, 2005) (Pretrial Order # 6) (appointing Plaintiffs' Steering Committee).

<sup>93</sup> For example, Judge Weinstein appointed Melvyn I. Weiss as chair of the *Zypprexa* Plaintiffs' Steering Committee even though he had no clients with pending claims in the litigation. And Judge Fallon appointed Russ Herman as liaison counsel despite having only a few clients. As Professors Silver and Miller point out, both Weiss and Herman are experienced dealmakers. Silver & Miller, *supra* note 12, at 151. *But see* Dubay, *supra* note 56, at 35 (observing that "in the Prempro MDL, the court specifically allowed the addition of PSC members without active MDL cases over the defendants' objections," yet noting that "representation of a plaintiff in a pending MDL may be necessary for some leadership positions, but not others").

<sup>94</sup> Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 625-26 (2006).

<sup>95</sup> *See* DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 150-52 (D. Mass. 2006) ("[I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial. . . . Indeed, MDL practice actively encourages retention even of trial-ready cases in order to 'encourage settlement.'").

<sup>96</sup> *See* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOCIETY REV. 645, 649 (2008); Tamara Relis, "It's Not About the Money!": *A Theory on Misconceptions of the Plaintiffs' Litigation Aims*, 68 U. PITT L. REV. 341, 363 (2006) ("Plaintiffs' articulated litigation aims were largely composed of extra-legal objectives of principle, with 41% not mentioning monetary compensation at all, 35% saying it was of secondary importance,

entirely from the court's ruling on fees, not private retainers. As Professors Silver and Miller have pointed out, this means that "a clientless lawyer will rationally want to settle on any terms a defendant will offer . . . [because she] has no stake in the MDL's upside potential, but will suffer greatly if negotiations fail."<sup>97</sup>

Second, when judges ratify plaintiffs' attorneys' picks for key positions, they can amplify adequate-representation concerns depending on the committee position. Judges tend to use one of two methods to select lead lawyers: a consensus method, where informal attorney networks choose their own leaders and the judge then confirms that slate,<sup>98</sup> or a competitive selection process where the court invites submissions and chooses among them. In the Vioxx litigation, for example, plaintiffs' attorneys nominated Chris Seeger and Andy Birchfield as co-lead attorneys over dinner in New Orleans; Judge Fallon then made their appointment official.<sup>99</sup>

Relying on self-selection methods can encourage undisclosed fee-sharing arrangements that may adversely affect settlement incentives,<sup>100</sup> tit-for-tat reciprocity

---

18% describing money as their primary objective in suing, and only one person (6%) saying it was money alone.").

<sup>97</sup> Silver & Miller, *supra* note 12, at 151.

<sup>98</sup> *E.g.*, *In re Neurontin Marketing & Sales Pract. & Prods. Liab. Litig.*, MDL No. 1629 (D. Mass. Dec. 14, 2004) (Order Granting Motion to Appoint Counsel) (appointing plaintiffs' counsel's proposed slate) (on file with author); *In re Genetically Modified Rice Litig.*, MDL No. 1811 (E.D. Mo. Apr. 18, 2007) (order appointing leadership counsel and observing that the group "most closely meets the 'private ordering' concept, because it has support of the larger number of plaintiffs and lawyers involved). The first Manual for Complex Litigation recommended this approach, though it changed course by the second edition and advised judges to oversee the appointment process. *Compare* MANUAL FOR COMPLEX LITIGATION (FIRST) §§ 1.92, 4.53 (1982); *with* MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.224 (1985). *See also* Rheingold, *supra* note 66, at 3-4 ("If there is MDL or a class action, the court sets the ground rules for a steering committee, and the decision of the committee binds all of the cases made part of the litigation. However, even then the actual selection of the members of the committee, and the determination of the number of lawyers, is usually left for the group to decide."). Informal selection methods vary and may simply be based on a vote of attorneys invited to a particular meeting.

<sup>99</sup> SNIGDHA PRAKASH, ALL THE JUSTICE MONEY CAN BUY 13-14 (2011). To be clear, my point is not that Birchfield and Seeger were unqualified for the position, but that—as Judge Fallon has recognized—self-selection methods can generate suboptimal incentives. *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 n. 4 (E.D. La. 2010) ("Moreover, the selection of lead counsel by their fellow attorneys would involve intrigue and side agreements which would make MacBeth appear to be a juvenile manipulator. Frequently, recommendations by attorneys for positions on leadership committees are governed more on friendship, past commitments and future hopes than on current issues."). For another example, see Daniel Wise, *Lawyers Pack World Trade Center Hearing*, N.Y. L.J., May 9, 1994, at 1 (describing how lawyers involved in the first World Trade Center bombing in 1993 created their own steering committee and submitted it to the judge for approval).

<sup>100</sup> *E.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1452 (E.D.N.Y. 1985) (approving a plaintiffs' management committee's internal fee-splitting agreement that would give financing attorneys three times the amount they advanced to finance the litigation); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987) (reversing Judge Weinstein's decision to approve the fee-splitting agreement).

among repeat players, good ol' boy networks,<sup>101</sup> and unrepresentative committees.<sup>102</sup> Lawyers have little incentive to consider adequate representation when brokering a consensus since representing more people leads to a higher fee and a greater ability to invest in the litigation.<sup>103</sup> And, because the multidistrict litigation statute requires only a common question of fact, plaintiffs' claims need not be cohesive.<sup>104</sup> Consequently, attorneys have little reason to call attention to divisions among their clients or consider those differences when proposing candidates.

Consensus selection is also problematic because the relevant plaintiff's bar is fairly small and the attorneys must work together frequently.<sup>105</sup> Thus, reputation and reciprocity matter among this group. Asked privately, attorneys might candidly assess their peers, but publically they may silence themselves out of concern that they will be ostracized and thus "ineligible" for future leadership positions. As such, they may rely solely on others' signals even if their own preferences conflict with the majority.<sup>106</sup> They are more apt to conform since the circumstances make it politically untenable to express dissenting views.<sup>107</sup>

Despite these concerns, consensus selection is actually preferable when appointing liaison counsel as opposed to lead counsel or steering committee members. Liaison counsel acts as a middleman between the court and plaintiffs' counsel by disseminating information, calling meetings, resolving scheduling conflicts, and maintaining document databanks.<sup>108</sup> Given that many attorneys have worked together before, they are likely to have superior knowledge about a lawyer's responsiveness and organizational skills. Thus, appointing the consensus nominee may work to the plaintiffs' and the judge's advantage, particularly if attorneys reached consensus through a secret ballot, which helps alleviate backlash concerns.<sup>109</sup>

---

<sup>101</sup> The majority of repeat players remain male. *See infra Appendix of Repeat Players, Table 1: Entrenched Repeat Players with Five or More Appearances as Lead Lawyers* (Eleven of fifty attorneys on this list are female, or approximately 22 percent).

<sup>102</sup> *In re Vioxx Prods. Liab. Litig.*, 760 F. Supp. 2d 640, 643 n. 4 (E.D. La. 2010). *But see* Silver & Miller, *supra* note 12, at 160-69 (arguing in favor of appointing lawyers with the largest client list to lead positions and then allowing them to appoint attorneys to perform common benefit work).

<sup>103</sup> Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 121 (2011).

<sup>104</sup> *Compare* 28 U.S.C. § 1407 (requiring a common question of fact) *with* FED. R. CIV. P. 23(a) (requiring a common question of law or fact and adequate representation); FED. R. CIV. P. 23(b)(3) (requiring that common questions predominate over individual ones).

<sup>105</sup> *See generally infra* Part II.A.2 (providing data on repeat players in leadership positions).

<sup>106</sup> *See* SUNSTEIN, *supra* note 61, at 57.

<sup>107</sup> *See id.* at 23-24 (noting that in cascades, "[p]eople will often neglect their own private information and defer to the information provided by their predecessors").

<sup>108</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at § 10.221.

<sup>109</sup> Using a secret ballot helps overcome the pressure toward conformity and consensus.

## 2. Repeat Player Concerns

When judges emphasize experience, cooperation, and financial resources in selecting lead lawyers, they may winnow the eligible attorney pool to repeat players. Although having some experienced repeat attorneys in key positions could benefit plaintiffs, repeat play can also create fertile soil for collusion, reciprocity concerns, and incentives to protect one's deal-making or collaborative reputation at the expense of uniquely situated clients.<sup>110</sup> Both repeat players and aspiring repeat players have rational, economic incentives to protect their reputations and develop reciprocal relationships to form funding coalitions,<sup>111</sup> receive client referrals, share information, and streamline tasks like document review.<sup>112</sup> As such, extra-legal, interpersonal, or business concerns may govern their interactions. Non-conforming lawyers may be ostracized and informally sanctioned, which promotes cooperation, but deters dissent and vigorous representation.<sup>113</sup>

Accordingly, to achieve some sense of how prevalent repeat players (individual attorneys and law firms) are in multidistrict litigation, I collected data from the 72 product-liability and sales-practices multidistrict litigations that were pending as of May 14, 2013.<sup>114</sup> If "repeat players" exist, these cases should provide a representative

---

<sup>110</sup> See *supra* note 65 (explaining the difference between disjunctive and conjunctive tasks).

<sup>111</sup> For example, the Vioxx Litigation Consortium included lawyers from five law firms and the Polybutylene Plumbing Litigation included 49 law firms. *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428 (Tex. Ct. App. 2000); Silver & Miller, *supra* note 12, at 126.

<sup>112</sup> See generally HEBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 220-23 (2004) (analyzing the role of reputation in contingent fee practice and referrals); Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 896-904 (describing networks of plaintiffs' counsel and the information sharing and referrals that occur between lawyers). Several sprawling, formal groups of plaintiffs' lawyers have formed over the years. *E.g.*, The American Association for Justice, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/default.htm> (formerly the American Trial Lawyers' Association).

<sup>113</sup> See Armin Faulk, Ernst Fehr & Urs Fischbacher, *Driving Forces Behind Informal Sanctions*, 73 *ECONOMETRICA* 2017 (2005) (finding that cooperating group members impose the most severe sanctions on defectors and that retaliation is a driving factor behind fairness-driven informal sanctions); Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter—The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 *ECON. J.* C1, C2-C3 (2002). Reciprocity and reputational concerns, along with trustworthiness, are most robust when people cooperate with one another over time in repeated interactions. See Frans van Dijk et al., *Social Ties in a Public Good Experiment*, 85 *J. PUB. ECON.* 275, 291-92 (2002).

<sup>114</sup> I identified the relevant cases using the Panel's list of pending MDLs as of May 14, 2013. Because many of the same attorneys who litigate product liability cases were also involved in the Deepwater Horizon Oil Spill litigation, the litigation in front of Judge Carl Barbier was also included. Two cases mentioned on that May 14, 2013 list were excluded because the orders were not electronically available (*In re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, which began in 1993, and *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, which began in 2000). *In re Plavix Marketing, Sales Practices and Products Liability Litigation* is a new MDL, thus only interim counsel, appointed on July 25, 2013, is included. Finally, I could identify only

sample for several reasons. First, product liability and sales practices comprise the largest portion of pending cases, constituting well over one-third of all multidistrict litigation.<sup>115</sup> Second, examining pending cases on a certain date includes data from cases transferred over a 22-year span.<sup>116</sup> Third, to the extent possible, I included data from all orders appointing lead lawyers (plaintiffs' steering committees, plaintiffs' liaison committees, discovery committees, trial committees, etc.), not just lead counsel or the plaintiffs' steering committee. When taken as a whole, this information should give an accurate sense of the scale of repeat play.

The data confirmed that repeat players are prevalent. Although only 31 percent of individual attorneys involved in multidistrict litigation were named to one or more leadership positions, the total number of positions this small group occupied is more revealing: repeat players held 749 out of 1,177 available leadership positions, or 63.6 percent.<sup>117</sup> Fifty attorneys were named as lead lawyers in five or more multidistrict litigations and they claimed 30 percent of all leadership roles.<sup>118</sup>

Repeat play among law firms was even more evident. Again, even though only 40.7 percent of law firms were repeat players in these suits,<sup>119</sup> lawyers from those firms occupied 78 percent of all available leadership positions.<sup>120</sup> Seventy law firms had attorneys who were named to five or more leadership roles, and attorneys from those firms were appointed to well over half of all lead-lawyer positions.<sup>121</sup> Put starkly, 16 percent of the involved law firms held nearly 54 percent of all leadership positions.

---

interim counsel in *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales Practices, and Products Liability Litigation*. This litigation currently contains only fourteen cases and is pending in front of Judge Cormac J. Carney.

<sup>115</sup> CALENDAR YEAR STATISTICS OF THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION 12 (2012) (showing 34 sales practices multidistrict litigations and 72 products liability litigations out of 291 total multidistrict litigations).

<sup>116</sup> As noted in footnote 114, two older cases were excluded because the orders were not available electronically, but *In re Asbestos Products Liability Litigation*, which began in 1991, is included in the data.

<sup>117</sup> There were 624 different individuals appointed to leadership positions and 195 of them were named more than once.

<sup>118</sup> See *supra* Appendix, Table 1 (listing attorneys who were named as lead lawyers in five or more product liability multidistrict litigations).

<sup>119</sup> There were 429 unique law firms involved and 175 of those firms had attorneys who were appointed to more than one leadership position.

<sup>120</sup> Two judges named entire law firms as lead or liaison counsel. Where possible, only the attorneys from the named law firm who were "to be notified by the court" on Pacer were included in the data. Thus, the number of available leadership positions from the law firm perspective was 1183, and lawyers from firms named more than once occupied 927 of those leadership positions.

<sup>121</sup> Specifically, attorneys named as lead lawyers from those 70 firms occupied 638 of 1183 available positions, or 53.9% of all the lead lawyer positions.

These numbers include five separate multidistrict litigations over pelvic repair systems transferred to Judge Joseph Goodwin.<sup>122</sup> Judge Goodwin named the same 62 attorneys as lead lawyers in four of those five cases.<sup>123</sup> While closely coordinating discovery, pretrial rulings, and counsel prevents inconsistent rulings and redundant requests, appointing the same lead lawyers is evidence of repeat play and suffers from the same limitations identified below. Nevertheless, coding those four litigations as one would reduce the percentage of repeat play: repeat attorneys would hold 54.9 percent of all lead-lawyer positions and repeat law firms would occupy 73.2 percent of the available positions.<sup>124</sup>

Some judges appeared to be more inclined to appoint repeat players than others.<sup>125</sup> For example, repeat players held seven out of ten positions in *In re Zurn Pex Plumbing Products Liability Litigation*; 15 of 17 in *In re Yasmin and Yaz Marketing, Sales Practices and Products Liability Litigation*; eight of nine in *In re Propulsid Products Liability Litigation*; 18 of 22 in *In re Actos Products Liability Litigation*; and 17 of 19 in *In re Zimmer Nexgen Knee Implant Products Liability Litigation*. By contrast, in *In re Ford Motor Co. E-350 Van Products Liability Litigation (No. II)*, Judge Esther Salas appointed only two repeat players out of 11 lead-lawyer positions, and, in *In re Con-Agra Peanut Butter Products Liability Litigation*, Judge Thomas Thrash selected only five repeat players to serve in 19 leadership positions.

In many ways, these findings are unsurprising; repeat players in highly specialized legal fields are common. As Professor Coffee recognized nearly 20 years ago, fewer than 50 firms specialized in asbestos litigation and even then only “a handful dominate[d] the field,” namely because attorneys need large case inventories to make mass litigation economically feasible.<sup>126</sup> Those circumstances have escalated in the years since: mass litigation is increasingly expensive (a single Vioxx case

---

<sup>122</sup> *In re American Medical Systems, Inc. Pelvic Repair Sys. Prods. Liab. Litig.*, 844 F. Supp. 2d 1359 (J.P.M.L. 2012) (“The actions in each MDL share factual issues arising from allegations of defects in pelvic surgical mesh products manufactured by AMS, Boston Scientific, and Ethicon, respectively.”).

<sup>123</sup> The same attorneys were named as lead lawyers in *In re American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation*, *In re Boston Scientific Corp. Pelvic Repair Systems Products Liability Litigation*, *In re C.R. Bard, Inc. Pelvic Repair Systems Products Liability Litigation*, and *In re Ethicon, Inc. Pelvic Repair Systems Products Liability Litigation*. *In re Coloplast Corp. Pelvic Support Systems Products Liability Litigation*, with the smallest number of cases, did not have identical lead lawyers appointed.

<sup>124</sup> Coding those four litigations as one would reduce the number of available lead-lawyer positions to 998; 548 of those positions were filled by attorneys who were also lead lawyers in other multidistrict litigations. Likewise, it reduces the number of positions for law firms to 1004; 735 of those positions were filled with lawyers from firms named more than once. Asterisks in Tables 1 and 2 in the Appendix illustrate the affect this anomaly would have on those numbers.

<sup>125</sup> The database did not take into account the date lead lawyers were appointed, so it could be that one particular judge appointed an attorney first and that others then followed suit.

<sup>126</sup> John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass tort Class Action*, 95 COLUM. L. REV. 1343, 1364-65 (1995); see also Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1590-96 (2004).

initially cost between \$1 million and \$1.5 million to develop<sup>127</sup>) and it may take years before attorneys receive a return on their investment.<sup>128</sup> Thus, when judges want experienced attorneys who can afford to finance not only their own clients' claims but unified discovery as well, the pool of "qualified" candidates is relatively small.

Although experience, financing abilities, and cooperative tendencies seem to be compelling selling points,<sup>129</sup> there are several reasons that appointing solely or predominately repeat players may fail to serve plaintiffs' best interests. First, seeking candidates with cooperative tendencies further encourages rational attorneys playing the "long game" to curry favor with one another and position themselves for future appointments. Leadership positions result in increased fees, prestige, and marketing opportunities.<sup>130</sup> Voicing the concerns of a minority of plaintiffs (particularly, when one has not been specifically delegated that task) can be politically unpopular and brand the dissenter a defector. Speaking up, for example, could derail a settlement that would generate a significant payoff for other plaintiffs' attorneys. Over time, expressing those opinions could lead to a reputation for being contrary and uncooperative, which would, in turn, decrease lucrative leadership opportunities.

Second, groups of repeat players who shun dissent are more likely to be infected by group decision-making biases like as cascade and conformity effects,<sup>131</sup> confirmation bias, and group polarization.<sup>132</sup> Cascades can occur when a few people

---

<sup>127</sup> Joe Nocera, *Forget Fair; It's Litigation as Usual*, N.Y. TIMES, Nov. 17, 2007, <http://www.nytimes.com/2007/11/17/business/17nocera.html?pagewanted=all>.

<sup>128</sup> Burch, *supra* note 15, at 1285-87.

<sup>129</sup> The Manual for Complex Litigation recommends these traits. MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at § 10.221.

<sup>130</sup> Dubay, *supra* note 56, at 8.

<sup>131</sup> See SUNSTEIN, *supra* note 61, at 62 ("Cascade effects and blunders are significantly increased if people are rewarded not for correct decisions but for decisions that conform to the decisions made by most people. In the real world, we are sometimes rewarded not for being right but for doing what others do. Such a system of rewards is likely to lead both individual and groups in bad directions."); Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 563, 564 (2002) ("[F]ormal and informal conformity pressures and the desire to preserve harmony within a group can override the motivation to critically appraise the relevant facts, thus (often) leading to poor decisions.").

<sup>132</sup> See SUNSTEIN, *supra* note 61, at 111-14, 118 (observing that "[a] deliberating group ends up taking a *more extreme position* than its median member took before deliberation began," a concept known as "group polarization," and that "those with a minority position often silence themselves or otherwise have disproportionately little weight in group deliberations"); Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 563, 564-65 (2002) ("[C]onfirmation bias' (a preference for information confirming one's position) was most pronounced in groups in which all members had favored the same alternative individually (so-called 'homogeneous groups') . . ."). Repeat play and agency relationships may, however, dampen other biases. See Linda Babcock, George Lowenstein & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 921 (1997).

signal that a particular position is correct and others fall in line in lieu of relying on their own contradictory information, whether that information concerns ethical obligations or knowledge that some clients might receive no benefit from proposed remedial relief.<sup>133</sup> The initial signal might be misinformed, such that mentioning this information or dissenting would alter the outcome, but when reciprocity and reputation are important, the tendency is to stay silent.<sup>134</sup>

Confirmation bias afflicts group decision-making when members' convictions cause them to discount contradictory evidence or interpret information in a way that supports their existing beliefs.<sup>135</sup> Similarly, group polarization—where a committee may adopt a more extreme position after discussing it with others who are likeminded<sup>136</sup>—occurs with greater frequency and intensity when group members are connected through friendship, mutual affection, or solidarity as repeat players may be.<sup>137</sup> Confident experts—such as successful repeat players—are even more likely to polarize groups.<sup>138</sup> So, if a steering committee discusses ways to encourage plaintiffs to accept its proposed settlement, but its members are unlikely to dissent, the discussion could lead them to adopt increasingly coercive terms like mandatory recommendation and withdrawal provisions.<sup>139</sup>

Third, appointing solely or predominately repeat players and emphasizing cooperation promotes consistent thinking and may not provide plaintiffs with the

---

<sup>133</sup> See SUNSTEIN, *supra* note 61, at 55-56, 74-75.

<sup>134</sup> *Id.* at 74-75.

<sup>135</sup> Joshua Klayman, *Varieties of Confirmation Bias*, in DECISION MAKING FROM A COGNITIVE PERSPECTIVE 385, 385-87, 398 (Jerome Busemeyer & Reid Hastie, eds. 1995); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 178, 210 (1998).

<sup>136</sup> See Michael A. Hogg, *Social Identity, Self-Categorization, and the Small Group*, in UNDERSTANDING GROUP BEHAVIOR: SMALL GROUP PROCESSES AND INTERPERSONAL RELATIONS 227, 234 (Erich Witte & James H. Davis, eds. 1996) (“[T]raditional explanations of group polarization fall into two broad categories: (a) those that emphasize compliance for self-presentational motives, with the culturally valued position as it is represented by the distribution of ingroup positions, and (b) those that emphasize the intrinsic persuasiveness of novel arguments brought up in discussion that support one’s original position.”).

<sup>137</sup> SUNSTEIN, *supra* note 61, at 79, 129-30; Michael A. Hogg & Sarah C. Hains, *Friendship and Group Identification: A New Look at the Role of Cohesiveness in Groupthink*, 28 EUROPEAN J. SOC. PSYCHOL. 323, 323-35 (1998).

<sup>138</sup> SUNSTEIN, *supra* note 61, at 129; Maryla Zaleska, *The Stability of Extreme and Moderate Responses in Different Situations*, in GROUP DECISION MAKING 163, 164 (H. Brandstetter et al, eds., 1982); Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671, 675 (2002) . Individuals working alone do, however, tend to brainstorm more ideas than groups. Gayle W. Hill, *Group Versus Individual Performance: Are N + 1 Heads Better than One?*, 91 PSYCHOL. BULL. 517, 527 (1982).

<sup>139</sup> CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 3 (2009); JAMES SUROWIECKI, THE WISDOM OF CROWDS 184-85 (2005); Michael A. Hogg & Scott A. Reid, *Social Identity, Self-Categorization and the Communication of Group Norms*, 16 COMMUNICATION THEORY 7, 18-19 (2006); see, e.g., *supra* notes 47-48 and accompanying text (discussing the Vioxx settlement).

most innovative representation.<sup>140</sup> Groups with cognitively diverse members—people with alternative perspectives, interpretations, and heuristics who are outside powerful lawyers’ stable of go-to people—may be more capable problem solvers and identify more successful solutions than homogeneous groups when performing disjunctive tasks.<sup>141</sup> Disjunctive tasks are those in which only one person needs to propose a winning strategy or idea in order for everyone to succeed (determining the best legal theory, identifying successful negotiating tactics, and selecting which issues to appeal, for example), as opposed to conjunctive tasks in which everyone must perform well for the group to succeed.<sup>142</sup> Conducting document review, for example, is a conjunctive task; one missed, critical document can pose setbacks for the entire group, thus everyone’s contribution is critical. Accordingly, to the extent that repeat play and fear of dissent promote uniform thinking, repeat players may be less innovative than outsiders attorneys when performing disjunctive tasks.

Finally, appointing repeat players may increase the likelihood of collusive settlements. Repeat players, aggregation, and judges who want to settle are the three traditional conditions that enable collusion.<sup>143</sup> And now that most multidistrict litigation settles without class certification, even the most vigilant judge lacks the formal tools to probe behind the scenes of what has then become a non-adversarial process.

These concerns over collusive conditions, cognitive homogeneity among lead lawyers, disincentives to dissent and decision-making biases add up to an overarching disquiet about whether repeat players can adequately represent the entire plaintiff group. While the temptation to appoint repeat players is understandable because judges know that their personalities are not caustic to deal-making and that they are dependable emissaries, convenience should not outweigh constitutional due process. Alleviating adequate-representation concerns demands a healthy infusion of new entrants, procedures that tolerate and promote dissent, and special appointments to represent plaintiffs with conflicting interests.<sup>144</sup>

---

<sup>140</sup> *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 42 at 2 (E.D. La. June 25, 2009) (emphasizing cooperation). Although transferee judges rarely explain their rationale for appointing particular attorneys, this basic assumption regarding homogeneity has been true in the securities class action context, where judges issue reasoned opinions about why they selected particular lead plaintiffs. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1134-46 (2011).

<sup>141</sup> See PAGE, *supra* note 64, at xiv-xv; Issacharoff, *supra* note 138, at 675 (“[Experts] are subject to routinized ways of approaching problems and to an unreflective ‘group think’ style of inbred behavior.”).

<sup>142</sup> See *supra* note 65 (explaining the difference between disjunctive and conjunctive tasks).

<sup>143</sup> Chamblee, *supra* note 27, at 170-71.

<sup>144</sup> See *infra* Part III.A.

### B. *Awarding and Cutting Attorneys' Fees*

As the push to become a lead lawyer suggests, attorneys' fees in multidistrict litigation are big business. Merck's Vioxx defense fees ran more than \$600 million annually and the settlement yielded plaintiffs' firms nearly \$2 billion.<sup>145</sup> While defense fees are typically paid through billable hours, plaintiffs' attorneys have their clients sign contingent-fee contracts, which entitle counsel to some percentage of her client's settlement or judgment—typically in the neighborhood of 33 percent.<sup>146</sup> When collected from thousands of clients, attorneys' fees can be staggering—one of the many reasons that judges feel compelled to intervene.<sup>147</sup> As compared with class-action awards, which average around twenty percent,<sup>148</sup> these fees may seem excessive. Consequently, judges have grappled with two critical questions: (1) how to compensate lead attorneys using a coherent rationale; and (2) how lead lawyers' compensation should affect the fees of non-lead attorneys who no longer have to bear the lion's share of the work or the financing risk.

#### 1. *Compensating Common Benefit Work*

To justify awarding fees to lead lawyers, judges have borrowed ad hoc from class-action law's common-fund doctrine,<sup>149</sup> contract principles, ethics, and equity. As this section explores, each theory standing alone is too sparse and cannot fully explain fee awards. But when lumped together, these theories appear to create a seamless facade. Yet, this doctrinal patchwork lacks predictable limits, prompts unexpected awards, and can undermine attorneys' incentives to shoulder complex, time-consuming cases.<sup>150</sup>

First, even though judges deny class certification,<sup>151</sup> they nevertheless invoke the class action's common-fund doctrine to compensate lead lawyers.<sup>152</sup> The common-

---

<sup>145</sup> Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES, Nov. 9, 2007.

<sup>146</sup> Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 284-86 (1998).

<sup>147</sup> Curtis & Resnik, *supra* note 68, at 434 (“[T]he work of judges on attorneys’ fees in all kinds of cases has exposed the courts to billing practices that upset them; judges have become impatient and distressed at the size of bills and the relationships between outcomes and costs.”). Of course, defense fees can be staggering, too, but judges rarely interfere with those fees.

<sup>148</sup> Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 258 (2004) (examining class-action awards from 1993 to 2008 and concluding that “[t]he mean fee to recovery ratio was 0.23 or 23 percent of the class award, but this percent varies by recovery size” and can range from eleven to thirty-nine percent); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 831 (2010) (concluding that fees and expenses in class actions averaged to twenty percent of the total settlement awards). For a detailed explanation of why multidistrict litigation costs attorneys more money to litigate than class actions do, see Burch, *supra* note 15, at 1288-1291.

<sup>149</sup> This is also referred to as the “common benefit doctrine.”

<sup>150</sup> I suggest an alternative rationale in Part III.B.

<sup>151</sup> *E.g.*, *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 499 (S.D.N.Y. 2009) (denying class certification because of the variety of illness alleged and other dissimilarities between

fund doctrine rests on restitution principles: a self-appointed, non-contractually retained attorney litigates on behalf of absent class members and benefits them when she settles (the “common fund”).<sup>153</sup> If the settlement compensated class members without paying counsel, it would unjustly enrich them at counsel’s expense.<sup>154</sup> Yet, this doctrine assumes that claimants implicitly consent to fee awards and count as passive beneficiaries, which is not the case in multidistrict litigation where active plaintiffs retain their own attorneys and have no ability to exit the multidistrict litigation.<sup>155</sup> As the *Restatement (Third) of Restitution and Unjust Enrichment* makes plain: “By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation cannot be explained entirely by restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court.”<sup>156</sup>

Still, the common-fund doctrine’s underlying rationale is attractive: when lead lawyers perform the work for individually retained attorneys, they benefit them. Failing to pay lead lawyers could thus unjustly enrich non-lead attorneys, particularly

---

plaintiffs); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 463 (E.D. La. 2006) (denying plaintiffs’ motion to certify a personal injury class); *Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008) (affirming the decision not to certify a Vioxx medical-monitoring class).

<sup>152</sup> *E.g.*, *In re Nineteen Appeals Arising Out of San Jan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606-07 (1st Cir. 1992); *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 770 (E.D. La. 2011); *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811, 2010 WL 716190, at \*4 (E.D. Mo. Feb. 24, 2010); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*4 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491-92 (E.D.N.Y. 2006); *In re Bextra & Celebrex Marketing Sales Pract. & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, 2006 WL 471782, at \*1 (N.D. Cal. Feb. 28, 2006); *see also* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV., at 15 (forthcoming 2013).

<sup>153</sup> *See* *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“The common fund doctrine reflects the traditional practice in courts of equity and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney’s fees.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt c (2011) (“Class counsel assumes for this purpose the role of restitution claimant; the restitution claim is asserted by the counsel against the class. Counsel asserts that the class will be unjustly enriched, at counsel’s expense, unless a reasonable fee is awarded from the common fund.”); Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656, 663-66 (1991).

<sup>154</sup> *Boeing Co.*, 444 U.S. at 478 (“The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant’s expense.”); *Case v. Continental Airlines Corp.*, 974 F.2d 1345 (10th Cir. 1992) (overruling the imposition of PSC fees where plaintiffs experienced no traceable benefits from the committee’s work); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt c (2011) (“The contingent nature of the class action fee—the fact that a fee is payable only in the event of success, and then only by deduction from the recovery—obviates most of the potential threat of forced exchange.”); *cf* *Curtis & Resnik*, *supra* note 68, at 427 (noting that the common fund “began in the nineteenth century when courts recognized that individual plaintiffs and their attorneys might, by virtue of victorious litigation, confer a benefit on third parties”).

<sup>155</sup> *Silver & Miller*, *supra* note 12, at 124-30.

<sup>156</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt c (2011).

freeriders who simply wait for lead lawyers to negotiate a proposed settlement.<sup>157</sup> Moreover, a non-lead attorney's retainer agreement assumes that she will complete the work and thus pays her a contingent fee.<sup>158</sup> But she's no longer doing most of the work.<sup>159</sup> Of course, this isn't due to neglect on her part; it's the result of a changed procedural environment. The question is whether that change creates compensable fees on a restitutionary basis, or non-compensable spillover effects.<sup>160</sup>

Thus enters the second, but related, doctrine: contract law. The *Restatement (Second) of the Law of Contracts* suggests that a contract such as a retainer agreement can be discharged if "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event[,] the non-occurrence of which was a basic assumption on which the contract was made."<sup>161</sup> Like the common fund, this doctrine's initial attractiveness is apparent, but ultimately translates poorly into multidistrict litigation. First, the client's principal purpose in hiring her attorney is for the attorney to satisfactorily resolve her case.<sup>162</sup> Yet, appointing lead lawyers frustrates the retainer agreement's purpose by putting the client's case into the lead lawyers' hands.<sup>163</sup> Second, the client, having little legal knowledge, may not contemplate the possibility that someone other than her attorney would litigate her

---

<sup>157</sup> *In re Nineteen Appeals Arising out of San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 606 (1st Cir. 1992) ("[W]hen a court consolidates a large number of cases, stony adherence to the American rule invites a serious free-rider problem. . . . [E]ach attorney, rather than toiling for the common good and bearing the cost alone, will have an incentive to rely on others to do the needed work, letting those others bear all the costs of attaining the parties' congruent goals.").

<sup>158</sup> *See Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) ("A problem does arise, however, if individual counsel entered a contingency agreement with his or her client on the assumption that individual counsel would perform all work associated with the case and that the agreed-upon fee would constitute the only fee for this work. Given that the appointment of lead and liaison counsel are being separately compensated for this work, these contingency fee arrangements may no longer be reasonable.").

<sup>159</sup> *Cf. In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*19 (D. Minn. Mar. 7, 2008) ("[A]lthough the fee arrangements may have been fair when the individual litigations were commenced, the Court concludes that many of the fee arrangements are likely not fair now because of the common benefit work and economies of scale . . .").

<sup>160</sup> *See infra* notes and 312-315 and accompanying text (discussing non-compensable externalities versus compensable work).

<sup>161</sup> RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 265.

<sup>162</sup> *See id.* at § 265 cmt a; WILLISTON ON CONTRACTS § 77:94 (noting that one of the conditions for deeming a contractual obligation dischargeable under the "doctrines of impracticability and frustration" is whether the frustrated purpose was "a principal purpose of that party in making the contract").

<sup>163</sup> *See In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1019 n. 17 (5th Cir. 1977) ("In a case like the one before us the lead counsel are not free to strike their own bargains but work under the court's order."); RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 265 cmt a; WILLISTON ON CONTRACTS § 77:94 (requiring that "the frustration must be substantial" before a judge should deem a contract impracticable).

case without her consent.<sup>164</sup> So, “without the default of either party, [the] contractual obligation becomes incapable of performance because the circumstances . . . render it a thing radically different from the undertaking contemplated by the contract.”<sup>165</sup> But the remedy is to discharge the contractual duty to pay. And transferee judges do not discharge contingent fees; they essentially reform the contract and institute the bargain they think the parties would have reached. While judges can reform agreements if they fail to reflect the parties’ true agreement,<sup>166</sup> or if there has been a mutual or unilateral mistake,<sup>167</sup> multidistrict litigation fits neither category.

Finally, transferee judges have cited their “inherent managerial authority” or “inherent equitable authority” as authorizing them to compensate lead attorneys.<sup>168</sup> They rationalize that the power to consolidate and manage complex litigation as well as the authority to appoint lead lawyers “necessarily implies a corollary authority to . . . compensate them for their work.”<sup>169</sup> This power, they claim, somehow derives from Federal Rule of Civil Procedure 42, which allows courts to consolidate actions and “make such orders . . . as may tend to avoid unnecessary costs or delay.”<sup>170</sup> But relying on this authority as a stopgap measure when positive law cannot be identified risks violating the Rules Enabling Act.<sup>171</sup> As such, inherent authority appears to have no limits: it is guided neither by consent nor contract principles and swells to fill whatever role it must, sacrificing transparency, predictability, and restraint in its wake.

Adding to this doctrinal patchwork, judges invoke these rationales at different litigation stages and depend on various means for implementing them. They have

---

<sup>164</sup> See RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 265 cmt a; WILLISTON ON CONTRACTS § 77:94 (noting that the party must not have assumed that the frustrating event would have occurred).

<sup>165</sup> WILLISTON ON CONTRACTS § 77:94.

<sup>166</sup> See, e.g., *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418 (D.C. Cir. 2006) (“The governing law is that ‘where an agreement has been reached by the parties but the writing does not accurately express [their] mutual agreement. . . reformation is appropriate.’” (quoting *Isaac v. First Nat’l Bank*, 647 A.2d 1159, 1162 n. 9 (D.C. Cir. 1994)).

<sup>167</sup> *Souls Farms, Inc. v. Schafer*, 797 N.W.2d 92, 108-09 (Iowa 2011) (“Where there has been a mistake . . . in the expression of the contract, reformation is the proper remedy.”)

<sup>168</sup> E.g., *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1017 (5th Cir. 1977); *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 770-71 (E.D. La. 2011); *In re Genetically Modified Rice Litig.*, 2010 WL 716190, at \*4 (E.D. Mo. Feb. 24, 2010).

<sup>169</sup> *In re Vioxx*, 802 F. Supp. 2d at 770; see also *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1016 (5th Cir. 1977) (“The court’s power is illusory if it is dependant upon counsel’s performing the duties desired of them for no additional compensation.”).

<sup>170</sup> FED. R. CIV. P. 42(a); see, e.g., *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1013-15 (5th Cir. 1977) (noting that Rule 42 confers “a broad grant of authority, particularly in the last clause”). Rule 42, however, speaks to consolidations under that rule, not to coordinated pretrial handling under § 1407 unless the judge also orders consolidation.

<sup>171</sup> 28 U.S.C. § 2072.

asked special masters<sup>172</sup> and committees of attorneys<sup>173</sup> to recommend fees, but the recent trend has been to require attorneys to sign fee-transfer agreements at the beginning of litigation.<sup>174</sup> Fee-transfer “agreements” (and most allocation systems) depend on the court creating a fund, which taxes plaintiffs’ gross monetary recovery—usually between two and six percent—and places the money in an interest bearing account to be divvied up among the lead lawyers.<sup>175</sup> Like the nebulous rationales supporting them, the percentages are arbitrary.<sup>176</sup> Most judges do not explain their chosen percentages<sup>177</sup> and when they do, they cite the piecemeal theories just mentioned,<sup>178</sup> previous multidistrict litigation assessments, or proposals from the steering committee—none of which have a dependable theoretical mooring.

In theory, fee-transfer agreements and fee provisions in settlements buttress tenuous doctrinal rationales by lending a veneer of coherence and consent to an

---

<sup>172</sup> *E.g.*, *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490-91 (E.D.N.Y. 2006) (“[T]he four settlement special masters were directed to consult with the parties in order to arrive at a recommended fee schedule cap and allocation of expenses.”).

<sup>173</sup> *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 32 (E.D. La. Nov. 20, 2007) (appointing fee allocation committee).

<sup>174</sup> *See, e.g.*, *In re Bextra & Celebrex Marketing Sales Pract. & Prod. Liab. Litig.*, 2006 WL 471782, at \*1, 8 (N.D. Cal. Feb. 28, 2006) (Exhibit A) (assessing four percent of the gross monetary recovery, two percent for fees and two percent for costs); *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, Pretrial Order No. 6, (D. Minn. Feb. 15, 2006); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 19, at 3 (E.D. La. Aug. 4, 2005) (assessing three percent of the gross monetary recovery, two percent for fees and one percent for costs, but noting that the two percent of fees comes from individual attorneys’ fee contracts whereas the assessment for costs comes from the client’s portion of the recovery).

<sup>175</sup> *See* William B. Rubenstein, *On What a “Common Benefit Fee” Is, Is Not, and Should Be*, CLASS ACTION ATTORNEY FEE DIGEST 87, 90 (Mar. 2009) (examining 21 reported cases using common benefit fees); *e.g.*, *In re Bextra & Celebrex Marketing Sales Pract. & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, 2006 WL 471782, at \*8 (N.D. Cal. Feb. 28, 2006) (“With respect to each client who they represent in connection with a Bextra and/or Celebrex related claim, whether currently with a filed claim in state or federal court or unfiled or on a tolling agreement, each of the Participating Attorneys shall deposit or cause to be deposited in an MDL Fee and Cost Account established by the District Court . . . a percentage proportion of the gross amount recovered by each such client which is equal to four percent (4%) of the gross amount of recovery of each such client (2% fees; 2% costs.)”); *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, Pretrial Order No. 6, (D. Minn. Feb. 15, 2006); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Pretrial Order No. 19, at 3 (E.D. La. Aug. 4, 2005); *In re Rezulin Prods. Liab. Litig.*, No. 00 CIV. 2843, 2002 WL 441342 (S.D.N.Y. Mar. 20, 2002).

<sup>176</sup> *See* Dubay, *supra* note 56, at 42.

<sup>177</sup> *E.g.*, *In re St. Jude Medical, Inc., Silzone Heart Valves Prods. Liab. Litig.*, No. MDL 1396, 2002 WL 1774232, at \*2 (D. Minn. Aug. 1, 2002) (“The assessment in such cases shall be six (6) percent of the ‘gross monetary recovery’ . . . .”); *In re Rezulin Prods. Liab. Litig.*, No. 00 CIV. 2843, 2002 WL 441342, at \*1 (S.D.N.Y. Mar. 20, 2002) (“‘Escrow Amount’ shall mean six percent (6%) of the Recovery in a Federal Rezulin Case and four (4%) of the Recovery in an electing State Rezulin Case.”).

<sup>178</sup> *E.g.*, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*4 (D. Minn. Mar. 7, 2008).

unruly legal minefield.<sup>179</sup> Fee-transfer agreements often contain recitals that mimic consideration, such as “Participating Attorneys are desirous of acquiring the PSC Work Product and establishing an amicable, working relationship with the PSC for the mutual benefit of their clients,” so they intend “to be legally bound hereby” and “agree” to certain assessments.<sup>180</sup> Similarly, when lead lawyers embed fee provisions within settlements,<sup>181</sup> they impart a consensual pretense even though the “settlement” may actually be a contract between plaintiffs’ attorneys and the defendant that requires attorneys to recommend the deal to their clients or withdraw from representing them.<sup>182</sup> “Consenting” attorneys receive their contingent fee, minus lead lawyers’ fees, only after enough clients agree.<sup>183</sup> Judges appear to embrace these “consensual” settlement measures; rather than chastising attorneys for self-dealing or holding them in contempt of court for undermining previous common-fund orders, they increase lead lawyers’ fees in accordance with the settlement.<sup>184</sup>

Of course, as in many contracts of adhesion, there is little genuine consent involved in accepting either fee-transfer agreements or settlements with fees embedded. Fee-transfer agreements are standardized forms, presented by those with superior bargaining power (the court and the steering committee) to attorneys with pending cases in the multidistrict litigation who have no choice but to accept them.<sup>185</sup> Attorneys cannot conduct discovery on their own, so they have few options but to use the common work product unless they remain solely in state courts.

Even state-court attorneys find it difficult to evade the fee agreement since federal judges use both carrots and sticks to encourage participation. For instance, if

---

<sup>179</sup> See Curtis & Resnik, *supra* note 68, at 437 (1998) (“[U]nless retainer agreements are modified in advance of or upon the creation of a PSC, no client has agreed by contract to pay the costs of aggregation . . .”).

<sup>180</sup> *In re Bextra & Celebrex Marketing Sales Pract. & Prod. Liab. Litig.*, No. M:05-CV-01699-CRB, 2006 WL 471782, at \*8 (N.D. Cal. Feb. 28, 2006) (Exhibit A).

<sup>181</sup> See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05–1708, 2008 WL 682174, at \*12 (D. Minn. Mar. 7, 2008) (“[A] common benefit payment from the Settlement Fund is expressly contemplated by the terms of the MSA. Thus, even if there was an agreement previously to utilize a straight assessment at 2% + 2%, the terms of the MSA contracted around it.”). See Silver & Miller, *supra* note 12, at 132-35 (critiquing the *Guidant* fee award).

<sup>182</sup> See, e.g., Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 1.2.8.1 (Nov. 9, 2007), available at: <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf>.

<sup>183</sup> See *id.*

<sup>184</sup> E.g., *In re Guidant*, 2008 WL 682174, at \*4; *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, Pretrial Order No. 6, (D. Minn. Feb. 15, 2006).

<sup>185</sup> Silver & Miller, *supra* note 12, at 132-35. Although one can debate the merits of adhesive contracts, there is something particularly troubling about them when they are promulgated by and enforced by the judiciary. See *infra* notes 338-341 and accompanying text (discussing the need for courts not to facilitate or assist exploitative action).

they agree, state counsel may receive and use the common-benefit work product, but if not, they are forbidden from receiving both the work product and any common-benefit fees, even if their efforts benefitted the plaintiffs as a whole through winning trial verdicts, for example.<sup>186</sup>

Similarly, there is little true consent when lead lawyers negotiate settlement offers that require plaintiffs' law firms to tender their entire client inventory or continue litigating in front of a judge who promoted and then publically blessed the deal.<sup>187</sup> Were those circumstances not cause enough for concern, some judges have even allowed lead lawyers to increase the fees set forth in initial fee-transfer agreements by upping the percentage through a later settlement.<sup>188</sup>

In *Guidant*, *Vioxx*, and the *Genetically Modified Rice Litigation*, the lead lawyers negotiating the settlement inserted provisions into the global agreement increasing their fee and requiring settling plaintiffs to waive their objections if they wanted to enroll.<sup>189</sup> In addition to the lack of genuine consent, this is troubling for the plain risk of structural collusion it presents by giving defendants some control over lead lawyers' fees. As Professors Silver and Miller point out, "[t]he defendant is happy to offer [lead attorneys] 'red-carpet treatment on fees'—higher common benefit fees cost the defendant nothing—in return for other things, such as a smaller settlement fund, a later funding date, or a higher participation threshold."<sup>190</sup> Thus, allowing lead lawyers to compensate themselves via settlement suggests collusion, not consent, and should be judicially reprimanded as self-dealing because it violates lead lawyers' fiduciary obligation to their principals.<sup>191</sup>

---

<sup>186</sup> *In re Chantix (Varenicline) Prods. Liab. Litig.*, MDL No. 2092, at 4-5 (N.D. Al. June 2, 2010) (Pretrial Order No. 7: Plaintiffs' Common Benefit Fee and Expense Fund); *In re Bextra & Celebrix Mktg. Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, 05-cv-01699 (N.D. Cal., Feb. 27, 2006) (Pretrial Order No. 8), available at: <https://ecf.cand.uscourts.gov/cand/bextra/> (assessing two percent as fees and two percent as costs for counsel who participates within 90 days of the court's order and an amount that "shall exceed the 4% assessment under the full participation option" for those who participate after 90 days). Similarly, to encourage early cooperation, some federal judges penalize latecomers by taxing them at a higher rate. *In re Chantix (Varenicline) Prods. Liab. Litig.*, MDL No. 2092, at 7-8 (N.D. Al. June 2, 2010) (Pretrial Order No. 7: Plaintiffs' Common Benefit Fee and Expense Fund) (assessing a six-percent fee for early participating counsel and an eight percent fee for later participating counsel).

<sup>187</sup> Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 207, 513 (2011).

<sup>188</sup> See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*11-12 (D. Minn. Mar. 7, 2008) (increasing the common benefit fee specified in the form agreements from four to 18.5 percent of the settlement); See Silver & Miller, *supra* note 12, at 132-35 (criticizing this practice).

<sup>189</sup> *Supra* notes 40-45 and accompanying text.

<sup>190</sup> Silver & Miller, *supra* note 12, at 134.

<sup>191</sup> See Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1990 (2011) (arguing that, as fiduciaries to to all the plaintiffs and the "disabled lawyers," lead attorneys should not use "their control of settlement negotiations to enrich themselves at disabled lawyers' expense" but could "[enrich themselves] by increasing claimants'

## 2. Capping Contingent Fees

Capping private contingent-fee contracts is perhaps the most controversial emerging judicial practice in multidistrict litigation.<sup>192</sup> Although this Article's empirical evidence on repeat players suggests that a limited market may exist that could lead to inflated fees,<sup>193</sup> some judges have taken fee awards into their own hands without justifying their extreme measures. Specifically, some judges have awarded lead lawyers a percentage of the total settlement amount, capped non-lead attorneys' contingent fees, and based those capped percentages on the already reduced settlement amount.<sup>194</sup> So, depending on the calculation method,<sup>195</sup> a non-lead attorney initially entitled to 33 percent of a \$1 million award who must allocate 8 percent of that total award to lead lawyers (as Judge Fallon charged in *Vioxx*) and whose fee is then capped at 20 percent of the remaining settlement (as Judge Frank

---

recoveries"); cf. RESTATEMENT (SECOND) OF AGENCY § 469 (“An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty . . .”).

<sup>192</sup> E.g., Jeremy Hays, *The Quasi-Class Action Model For Limiting Attorneys' Fees in Multidistrict Litigation*, 67 NYU ANNUAL SURVEY AM. L. 589 (2012); Aimee Lewis, *Limiting Justice: The Problem of Judicially Imposed Caps on Contingent Fees in Mass Actions*, 31 REV. LITIG. 209 (2012); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59 (2013); Silver & Miller, *supra* note 12, at 132-35. Although commentators have only recently begun to explore the issue in-depth, fee capping occurred in the early 1990s in the San Juan Dupont Plaza Hotel Fire Litigation. See *In re San Juan Dupont Plaza Hotel Fire Litig.*, No. MDL-721, 1993 WL 564466 (D. P.R. Nov. 24, 1993) (“The Court has already modified these contingent fee agreements once, imposing a ceiling of twenty-five percent (25%) for minor and incompetent plaintiffs and thirty-three percent (33%) for all other plaintiffs.”), *rev'd on other grounds*, 56 F.3d 295 (1st Cir. 1995).

<sup>193</sup> *But see* Silver & Miller, *supra* note 12, at 137-38.

<sup>194</sup> E.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*19 n.30 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prod. Liab. Litig.*, 424 F. Supp. 2d 488, 497 (E.D.N.Y. 2006) (awarding costs and lead lawyers' fees off the top of the general settlement fund, then awarding individual attorneys between 30 and 35 percent). In *Vioxx*, however, Judge Fallon capped all lawyers' fees at 32 percent and then allocated 8 percent of that amount to lead lawyers. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 607 (E.D. La. 2008).

<sup>195</sup> There are several methods for calculating fees:

(1) 20% of \$1,000,000 = \$200,000 as the total fee. Eight percent of that \$200,000 fee is \$16,000 in common-benefit fees. Therefore, lead lawyers would receive \$16,000 and individual counsel would receive \$184,000.

(2) 20% of \$1,000,000 = \$200,000 as the total fee. Eight percent of \$1,000,000 is \$80,000, which is the common-benefit fee. Therefore, lead lawyers would receive \$80,000 and individual counsel would receive \$120,000 (\$200,000-\$80,000 = \$120,000).

(3) 8% of \$1,000,000 = \$80,000, which is the common-benefit fee. \$1,000,000 - \$80,000 = \$920,000 net after the common-benefit fee is extracted. Twenty percent of that \$920,000 = \$184,000, thus individual counsel receives \$184,000.

The numbers cited in this sentence are based on the third method. Courts have used a combination of these methods to award fees. See *supra* note 194.

attempted to do in *Guidant*),<sup>196</sup> might receive \$184,000 as opposed to \$330,000—a significant reduction.

Reducing fees gained momentum when Judge Weinstein capped privately retained attorneys' fees at 35 percent in *Zyprexa*.<sup>197</sup> Although he cited a variety of doctrines ranging from class-action analogies to ethics, the real basis for his decision appears to have been a general concern about public perception and a specific concern about *Zyprexa* plaintiffs, who were “both mentally and physically ill and . . . largely without power or knowledge to negotiate fair fees.”<sup>198</sup>

Other courts, however, have overlooked Judge Weinstein's concern about legal incapacity and focused on plaintiffs' physical impairments and public perception.<sup>199</sup> In *Guidant*, for example, Judge Frank capped all contingent fees at 20 percent, with the caveat that special masters could adjust them upward “to a maximum of either 33.33%, the percentage previously agreed to in the individual cases . . . , or the limit imposed by state law, whichever of the three is less.”<sup>200</sup> This meant that some lawyers whose clients had agreed to a 40-percent fee received 28 percent of their client's gross recovery.<sup>201</sup> Building on *Zyprexa* and *Guidant*, in the *Vioxx* litigation, Judge Fallon capped individual attorneys' contingent fees at 32 percent plus reasonable costs.<sup>202</sup> Finally, in the Ground Zero workers' litigation against New York City, Judge Hellerstein simply ruled that he would not “approve” a settlement with a one-third contingent fee, cut plaintiffs' attorneys fees from the contractual amount of 33 percent to 25 percent, and prohibited them from charging clients some \$6.1 million in interest costs from third-party financing.<sup>203</sup>

---

<sup>196</sup> See *infra* note 220.

<sup>197</sup> *In re Zyprexa*, 424 F. Supp. 2d at 490-91 (allowing special masters to vary caps upwards to 27.5 percent and downwards to thirty). There are some instances of this happening earlier, however, in the bankruptcy context and in the breast implant litigation. See, e.g., *In re A.H. Robins Co.*, 182 B.R. 128 (E.D. Va. 1995) (determining that attorneys would be overcompensated by the full amount of their contingency fee and limiting their compensation to no more than 10 percent of claimants' pro rata payments); *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CA 93-77, 1994 WL 14580, at \*4 (N.D. Al. 1994) (capping fees at 25 percent).

<sup>198</sup> *In re Zyprexa*, 424 F. Supp. 2d at 491.

<sup>199</sup> See *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 560 (E.D. La. 2009); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 611-12 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at \*17-18 (D. Minn. Mar. 7, 2008).

<sup>200</sup> *In re Guidant*, 2008 WL 682174, at \*19.

<sup>201</sup> *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896006, at \*9-10 (D. Minn. Aug. 21, 2008).

<sup>202</sup> *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 556 (E.D. La. 2009) (noting that “extraordinary circumstances may exist which could warrant a departure (in either direction) from the 32% cap in individual cases”); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 617 (E.D. La. 2008).

<sup>203</sup> *In re World Trade Center Disaster Site Litig.*, 879 F. Supp. 2d 396, 403 n.29 (S.D.N.Y. 2012); *In re World Trade Center Disaster Site Litig.*, Nos. 21 MC 100, 21 MC 103, 2010 WL 4683610, at \*1 (S.D.N.Y. Nov. 15, 2010) (“Plaintiffs' counsel may charge no more than a 25 percent contingent fee, with expenses limited in accordance with previous orders, rulings, and agreements.”); Mark Hamblett,

Although Judge Fallon and Judge Frank both echoed Judge Weinstein's apprehensiveness over public perception and cited his quasi-class action analogy,<sup>204</sup> nothing about the plaintiffs in either *Vioxx* or *Guidant* suggested that they were *mentally* unfit to negotiate their own fees.<sup>205</sup> Also like Judge Weinstein, Judges Fallon and Frank identified a generic concern about the inherent conflicts between claimants and their attorneys in contingent-fee cases.<sup>206</sup> Yet, those arguments do not support an across-the-board fee cap where plaintiffs possess the legal capacity to enter into binding contracts.

First, while it is true that courts have been more cautious when it comes to contingent fees than billable hours,<sup>207</sup> judges should have some exceptional reason before interfering with private contracts when plaintiffs are physical ill or elderly, but mentally fit. *Farmington Dowel*, which Judge Frank and Judge Weinstein cited in support of their decisions,<sup>208</sup> involved extreme circumstances: a competent adult agreed to pay counsel one-third of his trebled antitrust damages plus the judicially determined amount awarded as a "reasonable attorney's fee" under Section 4 of the Sherman Act.<sup>209</sup> In rendering its decision, the First Circuit distinguished between its role under Section 4 and its ethical, supervisory power, noting that the latter "is reserved for exceptional circumstances" and "requires [the court] to arrive at a figure which it considers the outer limit of reasonableness."<sup>210</sup> *Rosquist*, the other main case that Judge Weinstein cited, involved a situation in which the court appointed a

---

*Plaintiffs Lawyers in 9/11 Cases Lose Bid to Recoup \$6.1 Million in Interest*, N.Y. L.J. Aug. 30, 2010, at 1; Mireya Navarro, *Terms Met, Payout Rises for Workers at 9/11 Site*, N.Y. TIMES, Sept. 13, 2011, at A28.

<sup>204</sup> *In re Vioxx*, 574 F. Supp. 2d at 611; *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*17 (D. Minn. Mar. 7, 2008). Concern about public perception stems from the high-profile nature of these cases and the significant media attention that results. See, e.g., *supra* note 1 (listing newspaper stories about multidistrict litigation).

<sup>205</sup> Judge Fallon suggested that *Vioxx* plaintiffs were "vulnerable" because of their advanced age and alleged personal injuries, but never argued they were mentally unfit. *In re Vioxx*, 650 F. Supp. 2d at 560 ("[L]ike the elderly and physically ill claimants in *Zyprexa* and *Guidant*, *Vioxx* claimants have all suffered some form of physical injury and many are elderly.>").

<sup>206</sup> *In re Vioxx*, 574 F. Supp. 2d at 611; *In re Guidant*, 2008 WL 682174 at \*17.

<sup>207</sup> Rather than affording them the usual hands-off approach typically reserved for fee contracts under the American rule, judges "closely scrutinize" contingent fees because they give attorneys an interest in the litigation's outcome. *Allen v. U.S.*, 606 F.2d 432, 435 (4th Cir. 1979); WILLISTON ON CONTRACTS § 62:9. Still, the only metric courts use in scrutinizing these contracts is whether the percentage is unreasonable—the award does not correlate with the value provided by the attorney. If the fee is unreasonable, then courts have either changed the calculation formula or used quantum meruit to award a fee. See, e.g., *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W. 2d 331 (Iowa 1980) (suggesting that where a contingent fee arrangement was void on public policy ground the law firm could still recover under quantum meruit); WILLISTON ON CONTRACTS § 62:9.

<sup>208</sup> *In re Guidant Corp.*, 2008 WL 682174, at \*18 n.29.

<sup>209</sup> *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90-91 (1st Cir. 1969).

<sup>210</sup> *Id.* at 90; see also *infra* note 340 and accompanying text (noting courts' self-regarding concerns).

guardian ad litem to protect orphaned minors.<sup>211</sup> Neither case justifies uniformly capping private contingent fees where mentally and legally competent adults assent to the arrangement.<sup>212</sup>

Second, despite repeated citations to the contrary, there is no such thing as a quasi-class action: a class is either certified or not.<sup>213</sup> Treating Rule 23 as a grab bag of authority to be invoked when convenient undermines the Rule's due process protections and structural assurances of fairness.<sup>214</sup> When judges cite the "quasi-class action" to justify cutting attorneys' fees, they risk lending an air of legitimacy to the case's outcome even though they have not subjected it to Rule 23's rigors.<sup>215</sup>

Third, when judges use their "inherent authority" or "inherent equitable authority"<sup>216</sup> to police individual attorneys' contingent fees, they must still tether that authority to a normative framework that dictates when a fee is reasonable.<sup>217</sup> The *ABA Model Rules of Professional Conduct* and most state ethics' rules contemplate a context-specific inquiry that considers factors such as customary fees in particular locations; time, labor, and skill required; results obtained; attorneys' experience and reputation; and attorneys' opportunity costs in accepting the matter.<sup>218</sup> Yet, courts have shied away from identifying the applicable ethics code or conducting choice-of-law inquiries that pinpoint which states' ethics rules apply to which attorneys.<sup>219</sup>

---

<sup>211</sup> *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982).

<sup>212</sup> *See* Ratner, *supra* note 192, at 81-83.

<sup>213</sup> Mullenix, *supra* note 10, at 389. *But see* Weinstein, *supra* note 32, at 480-81.

<sup>214</sup> Mullenix, *supra* note 10, at 389.

<sup>215</sup> *See* Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."); Mullenix, *supra* note 10, at 397-400.

<sup>216</sup> *See, e.g., In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554 (E.D. La. 2009); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006).

<sup>217</sup> Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 22 (2005) (noting that a court's inherent powers are meant to supplement the federal rules, but that states' ethical rules, the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of Professional Conduct, and norms of conduct established within the bar should frame judicial expectations); Ratner, *supra* note 192, at 77-78.

<sup>218</sup> ABA MODEL RULES OF PROF'L CONDUCT 1.5(a); Ratner, *supra* note 192, at 78.

<sup>219</sup> *See, e.g., In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 559 (citing the ABA Model Rules of Professional Conduct and cases from multiple jurisdictions, but not identifying which states' laws governed which attorneys' fees); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at \*18 (citing cases from multiple jurisdictions that capped excessive fees and relying on ethics principles without identifying a particular rule); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 492 (discussing general supervisory powers but not pinpointing specific ethical codes or provisions).

Nevertheless, they dubbed fees excessive across-the-board and capped them accordingly.<sup>220</sup>

Finally, conflicting interests exist between attorneys and clients in all contingent-fee cases, not just in multidistrict litigation. While judges may have inherent authority to regulate unreasonable fees<sup>221</sup> and contingency fees are treated with special care,<sup>222</sup> if concern over contingent fees alone were enough to justify routine judicial review, then nearly every personal-injury action in the country would demand scrutiny.

Judges' disquiet over fees may stem from two rationales. First, they are accustomed to awarding plaintiffs' attorneys class-action fees, which average around 20 percent of the class award.<sup>223</sup> So, a 33-percent (or more) contingent fee may seem excessive. Second, because attorneys benefit from the cost-savings that economies of scale engender, judges reason that this discount should be passed on to plaintiffs lest their attorneys receive a windfall.<sup>224</sup> Reduced costs result from both lead lawyers' efforts and aggregation in general. But once judges extract lead lawyers' fees from individual attorneys' fees, aggregation is the only cost-saving rationale that hasn't been taken into account.

The cost savings from aggregating clients is not an independent reason to reduce fees. Attorneys routinely aggregate cases and clients outside of multidistrict litigation. And lawyers who specialize in a particular area often recycle their work to benefit new clients—but they typically do not discount their fees. Rather, the aggregation benefits clients by creating leverage against the defendant and the “recycled” work product may encapsulate years of attorney expertise. So, what judges in multidistrict litigation deem cost-saving measures might ordinarily be seen as the justifiable price for expertise, experience, and leverage.

Likewise, the cost-savings generated by aggregating cases and appointing lead lawyers may not save individual attorneys as much as courts anticipate. When contrasted with class actions, multidistrict litigation contains additional risks and expenses for individual attorneys: they must advertise, recruit, screen, and interact

---

<sup>220</sup> Judge Frank eventually rejected the special masters' proposal that he cap fees at 25 percent across the board in favor of “the lesser of either the contractual fee, the state-imposed fee limit, or 37.18 percent of the client's gross recovery.” Silver & Miller, *supra* note 12, at 137.

<sup>221</sup> This has been questioned. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 776-79 (2001).

<sup>222</sup> Ratner, *supra* note 192, at 77-78. The Model Rules of Professional Conduct explicitly except contingent fees from the general ban on a lawyer assuming an interest in the litigation and subject them to multiple safeguards. ABA MODEL RULES OF PROF'L CONDUCT 1.8(e)(1), 1.5(c).

<sup>223</sup> See *supra* note 148.

<sup>224</sup> E.g., *In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire*, 982 F.2d 603, 606 (1st Cir. 1992) (“A court supervising mass disaster litigation may intervene to prevent or minimize an incipient free-rider problem and, to that end, may employ measures reasonably calculated to avoid ‘unjust enrichment of persons who benefit from a lawsuit without shouldering its costs.’”) (citing *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987)).

with many clients (as opposed to just named representatives); develop the history and facts surrounding each client's claim to prove specific causation; keep clients informed of the litigation's progress; and counsel clients on when and whether to settle.<sup>225</sup> Each activity significantly increases attorneys' administrative burden and staffing costs.<sup>226</sup> Yet, client recruitment helps amplify settlement pressure and thereby contributes to the group's collective good—a factor that receives little attention when judges cap fees.<sup>227</sup> So, while it may be true that particular attorneys stand to receive a windfall, that would be nearly impossible to determine without considering each attorneys' opportunity costs, sunk costs, and contribution to plaintiffs' overall outcome. Capping fees uniformly places the burden on objecting attorneys to demonstrate extraordinary circumstances entitling them to their contractually agreed upon fee.<sup>228</sup>

Finally, courts may under-appreciate contingent fees' insurance-like dimension. What appears to be a windfall for individual attorneys may actually reflect a gain in a much larger portfolio of risk that funds not only the present litigation, but other cases too.<sup>229</sup> Attorneys working on a contingent fee must diversify their cases and their risk so that their "winnings" reflect the expense of litigating both successful and unsuccessful cases.<sup>230</sup> Put differently, without some big wins, these attorneys may not be able to accept pro bono clients or cases without clear liability.

In sum, while aggregating plaintiffs' claims and appointing lead lawyers streamlines certain aspects of the cases, litigating may not be as economical as judges presume. And, while judges' experience with collusive settlements in the class-action context may justifiably prompt concern over contingent fees, their involvement must have predicable limits and quantifiable metrics. Reducing contingent fees should be the exception, not the rule. If such a cap is warranted, then it should be justified on an individual basis.

### *C. Approving Aggregate Settlements*

Given their concern over attorneys' fees and analogies to class actions, judges' interest in ostensibly private settlements is not surprising. After all, settlement and

---

<sup>225</sup> In the Dupont Plaza Hotel Fire litigation, individually retained attorneys who were not on the plaintiffs' steering committee (IRPAs) argued that the district court judge greatly undervalued their contribution to individual clients. *Id.*

<sup>226</sup> "Attorneys in the Vioxx Litigation Consortium considered 30,000 potential clients and accepted only 2000—a process which took a combined 1,601,150 hours by staff, paralegals, attorneys, nurse practitioners, and medical experts at a cost of \$13.5 million." Burch, *supra* note 15, at 1288.

<sup>227</sup> Silver & Miller, *supra* note 12, at 128-29.

<sup>228</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp.2d 549, 556 (E.D. La. 2009) (responding to the Vioxx Litigation Consortium's objection to fees and observing that "extraordinary circumstances may exist which could warrant a departure (in either direction) from the 32% cap in individual cases").

<sup>229</sup> KRITZER, *supra* note 112, at 10-19; Burch, *supra* note 15, at 1290.

<sup>230</sup> KRITZER, *supra* note 112, at 10-19.

fees go hand in hand, with some lead lawyers negotiating their fee and the settlement in one fell swoop.<sup>231</sup> Plus, the controversy over what many commentators view as meddling in fee awards extends to settlement “review,”<sup>232</sup> in part because judges cite similar authority for both. Unlike class actions in which Rule 23(e) requires judges to thoroughly assess whether the settlement is fair, reasonable, and adequate, nonclass settlements like those in *Guidant*,<sup>233</sup> *Zyprexa*,<sup>234</sup> *Vioxx*,<sup>235</sup> and *The World Trade Center Disaster Site Litigation*<sup>236</sup> are private agreements that parties presumably enter voluntarily. Thus, the existence of a legal basis for policing a “voluntary” settlement between private parties is uncertain at best.

This uncertainty has prompted courts and commentators to take two divergent views about judicial power in nonclass settlements. By one view, unless the

---

<sup>231</sup> E.g., *In re Guidant Corp.*, 2008 WL 682174, at \*4 (“The [Master Settlement Agreement] included a provision, section II.K, stating that the Court would determine the amount of the Common Benefit Payment.”). See generally Weinstein, *supra* note 32, at 529 (“In large class actions and other consolidated litigations, fees often determine the shape of settlements.”); Staff, *Judge Signs Off on Deal for Ground Zero Workers*, NPR, June 10, 2010 (observing that Judge Hellerstein rejected a previous settlement offer because the amount was too small and attorneys’ fees were too large).

<sup>232</sup> See, e.g., Grabill, *supra* note 9; Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011). But see Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 74 UMKC L. REV. 623, 623 (2006) (arguing that a separate judge should be appointed “to oversee efforts to achieve a global settlement of a mass tort”).

<sup>233</sup> *In re Guidant*, 2008 WL 682174 at \*10 (“Through the extraordinary efforts of the common benefit attorneys who contributed their time and skills, and advanced money to fund this litigation, Plaintiffs’ counsel achieved a global settlement of \$240,000,000.00 for 8,550 Plaintiffs. The Court notes that many of the individual cases likely are not strong stand-alone cases.”).

<sup>234</sup> Judge Weinstein set firm trial dates in the *Zyprexa* litigation to encourage settlement, as many trial judges do. *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2004 WL 2792123, at \*1 (E.D.N.Y. Dec. 2, 2004). But, once the parties reached an agreement in principal, he also appointed Ken Feinberg, Michael Rozen, retired Judge John Trotter, and Catherine Yanni as Settlement Masters to develop criteria for administering and evaluating claims, gather necessary information, implement a settlement plan for valuing claims, and mediate contested claims. *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2005 WL 1939339, at \*1 (E.D.N.Y. Aug. 10, 2005); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2005 WL 2237824, at \*1 (E.D.N.Y. June 30, 2005).

<sup>235</sup> During a status conference in the *Vioxx* litigation, Judge Fallon convened judges with the heaviest *Vioxx* dockets—Judge Carol Higbee from New Jersey state court, Judge Victoria Chaney from California state court, and Judge Randy Wilson from Texas state court—along with Plaintiffs’ lead lawyers and Defendants’ lead counsel and jointly announced that the parties should begin “serious settlement negotiations.” *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2010 WL 724084, at \*2 (E.D. La. Feb. 18, 2010); see also Susan Todd, *Inside the Vioxx Litigation*, THE STAR-LEDGER, Nov. 18, 2007 (“Fallon, Higbee and Chaney met in New Orleans. Over dinner they prepared for a meeting the next morning with attorneys from both sides. It was time, the judges had decided, for the lawyers to discuss a resolution.”). Once the lead lawyers reached a proposed settlement eleven months later, the judges reconvened to jointly announce and informally “approve” the settlement alongside the lead lawyers. See Transcript of Status Conference, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), available at <http://vioxx.laed.uscourts.gov/Transcripts/11-9-07.pdf>.

<sup>236</sup> See *infra* notes 240-241 and accompanying text.

settlement itself authorizes the court to act,<sup>237</sup> these judges overstepped their authority and paternalistically meddled with plaintiffs' contractual ability.<sup>238</sup> But this ignores the realities of mass litigation, where plaintiffs have attenuated relationships with their attorneys and their attorneys face powerful financial temptations to achieve closure by pushing ethical boundaries and coercing consent.<sup>239</sup> For example, the private settlement that Judge Hellerstein "rejected" in the litigation over injuries received while cleaning up Ground Zero offered a close-knit community of firefighters and police officers \$575 million if 95 percent of them accepted, but \$657.5 million if 100 percent agreed.<sup>240</sup> Even though Judge Hellerstein acknowledged the settlement offer's private nature, he was concerned with attorney overreaching, public perception, transparency, and whether the amount itself was fair.<sup>241</sup>

A second view credits the concerns Judge Hellerstein identifies and advocates extending the dubious "quasi-class action"<sup>242</sup> label to allow transferee judges to monitor large, private settlements as they would class actions under Rule 23(e).<sup>243</sup> On one hand, judicial involvement, particularly through published opinions, enhances the transparency and legitimacy of deals negotiated by self-interested attorneys that occur with little client involvement, monitoring, or consent. But on

---

<sup>237</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 552-53, n.7 (E.D. La. 2009) (discussing the Vioxx Settlement Agreement).

<sup>238</sup> See, e.g., Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1024 (2013) ("Claims belong to claimants, not to the judge."); Grabill, *supra* note 9. In *Vioxx*, Judge Fallon noted, "the parties have done more than simply ask the Court to approve a settlement agreement or move for a disbursement of funds. In fact, this Court is expressly authorized to be the Chief Administrator of the Settlement Agreement." *In re Vioxx*, 650 F. Supp. 2d at 557.

<sup>239</sup> See, e.g., *supra* notes 47-48 and accompanying text.

<sup>240</sup> Mireya Navarro, *Federal Judge Orders More Talks on 9/11 Deal*, N.Y. TIMES, Mar. 19, 2010; see also Alvin K. Hellerstein et al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 157 (2012).

<sup>241</sup> Judges Hellerstein's words are worth quoting:

Most settlements are private; a plaintiff and defendant come together, shake hands, and it's done with. Although the judge may look and see if there's some infant or some compromise or something else, basically it's the parties that decide. It's the parties that grant the fee. The judge has no part in it.

This is different. This is 9/11. This is a special law of commons. This is a case that's dominated my docket, and because of that, I have the power of review. If I don't think it is fair, I'm going to tell you that, and you will make the judgment how to deal with it.

Transcript of Status Conference at 54:14-24, 62:24, 63:8-12, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (S.D.N.Y. Mar. 19, 2010) (on file with author) ("I want accountability. I want judicial control over this process, because that's what's fair. If I'm the judge, I can be reversed. If the parties appoint someone, he's the dictator. We don't have dictators."); see also Order Approving Modified and Improved Agreement of Settlement, *In re World Trade Ctr. Disaster Site Litig.*, No. 1:21-mc-00100-AKH (S.D.N.Y. June 23, 2010), ECF No. 2091 (on file with author).

<sup>242</sup> See Mullenix, *supra* note 10 (criticizing the use of "quasi-class action").

<sup>243</sup> See Weinstein, *supra* note 32, at 529 ("In my view, consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements.").

the other, judges have engaged with private settlements to different degrees, and without clear limits or standards, there is less predictability.<sup>244</sup> Moreover, accepting the “quasi-class action” rationale permits attorneys and judges to circumvent Rule 23’s certification requirements, strip away its due process protections, and cherry pick its convenient aspects while ignoring those that impede closure.<sup>245</sup>

Consequently, what is needed, and what Part III.C offers is a middle ground that permits some judicial oversight, but likewise cabins judicial power. As that Part argues, compensating lead lawyers using a quantum-meruit theory would require judges to assess the litigation’s outcome to evaluate the case’s success and the lead lawyers’ contributions. This fee assessment thus provides a legitimate private-law basis for appraising nonclass settlements.

### III. RETHINKING BEST PRACTICES IN MULTIDISTRICT LITIGATION

As evidenced thus far, multidistrict litigation places transferee judges in uncharted territory yet burdens them with enormous responsibility. While the Manual for Complex Litigation provides judges with some guidance, it has not been updated since 2004 and thus provides no guidance on many recent developments. Accordingly, this Part suggests some substantive and procedural improvements for the three principal areas Part II critiqued: appointing lead lawyers, awarding those lawyers fees, and reviewing nonclass settlements.

First, because dissent is critical to adequate representation, thwarts detrimental group decision-making biases, and encourages innovation, judges should embrace avenues for to change the current norms that silence objectors and pressure attorneys toward cooperation and consensus. This can be achieved by designating lead lawyers to represent plaintiffs’ various interests, inviting objections, and conducting evidentiary hearings before choosing leaders. Second, compensating lead counsel on a quantum-meruit basis could clarify the muddled doctrinal lineage that judges have previously cited and would reflect the true nature of appointing lead lawyers, which is more akin to a forced client referral than a common fund. Finally, if judges embrace the quantum-meruit proposal, it would give them a legitimate basis to assess how much lead lawyers benefitted the plaintiffs through the results they achieved. Although this settlement review would be limited as compared with judicial review under Rule 23(e), conducting that review in the context of awarding fees supplies a powerful incentive against collusion.

---

<sup>244</sup> See, e.g., *supra* notes 233-236.

<sup>245</sup> The predominance aspect is often the stumbling block for actual class certification. FED. R. CIV. P. 23(b)(3). See Mullenix, *supra* note 10, at 390-91, 394; see also *Guive*, 2006 WL 2359474 (observing that it would be “inconsistent” to “deny class certification . . . and at the same time allow [claims] to go forward in what the Magistrate accurately described as a ‘quasi-class action lawsuit’ . . . without regard for the rigid requirements for class certification.”).

### A. Selection Criteria for Lead Lawyers

As Part II.A.2 demonstrated, transferee judges' emphasis on experience and financing abilities often results in appointing repeat players to leadership positions. Although having some seasoned lawyers in these roles may benefit plaintiffs,<sup>246</sup> the danger is that cooperative norms, reputational concerns, and conformity could lead to inadequately representing clients whose best interests conflict with the majority. Put plainly, when governing norms demand collaboration and shun dissent, plaintiffs' representation suffers.<sup>247</sup>

Both judges and committees can take steps to combat these negative effects. If committee members each briefly summarized their position in writing, collected them confidentially, and only then discussed the issue, that process would crystallize positions and make information known before leaders prompt others to fall in line behind them.<sup>248</sup>

Judges can alleviate these concerns by adopting the following strategies to select lead lawyers:

1. *Cognitive Diversity, Dissent, and Group Decisions.* Appointing a cognitively diverse leadership committee can encourage dissent and increase innovation on certain disjunctive tasks like identifying and cultivating successful legal arguments.<sup>249</sup> *Cognitive* diversity focuses on diverse knowledge and expertise as opposed to *identity* diversity, which includes visible differences such as race, ethnicity, age, gender, physical disabilities, and demographic dissimilarities.<sup>250</sup>

---

<sup>246</sup> See Issacharoff, *supra* note 138, at 675 (“Through repeat confrontations with a problem, errors that may trigger heuristic deficiencies in lay actors may be overcome, or at least compensated for.”).

<sup>247</sup> See Armin Faulk, Ernst Fehr & Urs Fischbacher, *Driving Forces Behind Informal Sanctions*, 73 *ECONOMETRICA* 2017 (2005) (finding that cooperating group members impose the most severe sanctions on defectors and that retaliation is a driving factor behind fairness-driven informal sanctions); Ernst Fehr & Urs Fischbacher, *Why Social Preferences Matter—The Impact of Non-Selfish Motives on Competition, Cooperation and Incentives*, 112 *ECON. J.* C1, C2-C3 (2002); Michael Schrage, *Daniel Kahneman: The Thought Leader Interview*, 33 *BUSINESS STRATEGY* 1, 4 (Winter, 2003). Reciprocity and reputational concerns, along with trustworthiness, are most robust when people cooperate with one another over time in repeated interactions. Frans van Dijk et al., *Social Ties in a Public Good Experiment*, 85 *J. PUB. ECON.* 275, 291-92 (2002).

<sup>248</sup> DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 84-85, 245 (2011) (“This procedure makes better use of the knowledge available to members of the group than the common practice of open discussion.”).

<sup>249</sup> See PAGE, *supra* note 64, at xiv-xv.

<sup>250</sup> *Id.* at 7-8; Eden B. King et al., *Conflict and Cooperation in Diverse Workgroups*, 65 *J. SOC. ISSUES* 261, 267-68 (2009); K.A. Jehn et al., *Why Differences Make a Difference: A Field Study of Diversity, Conflict, and Performance in Work Groups*, 44 *ADMIN. SCI. Q.* 741 (1999); Elizabeth Mannix & Margaret A. Neale, *What Differences Make a Difference?: The Promise and Reality of Diverse Teams in Organizations*, 6 *AM. PSYCHOL. SOC'Y* 31, 41-42 (2005). While identity diversity might occasionally be important for plaintiffs to feel adequately represented, it may also lead to stereotyping, social rifts, difficult intra-group relations, and increased conflict. Stephanie Francis Ward, *Women Should be Among Lead Lawyers*

Nevertheless, cognitive diversity is not as readily identifiable as identity diversity because it comes directly from training and experiences—traits that are imprecise and hard to evaluate.<sup>251</sup> Cognitive differences and personality traits are not the same thing, and thus cognitive abilities cannot reliably be measured with personality indicators like Myers-Briggs or OCEAN tests.<sup>252</sup> Even if judges could assemble a cognitively diverse group by focusing on ability, training, and experiences,<sup>253</sup> there would still be a danger that members' cognitive differences may converge; members may assimilate and become cohesive.<sup>254</sup>

Accordingly, leveraging outsiders' expertise is a more viable means of achieving cognitive diversity. This is the familiar idea behind hiring outside consultants. The organization hopes that an outsider will raise issues that insiders either cannot see or are afraid to voice.<sup>255</sup> Outsiders aren't smarter, they're just novel and different. They add value by offering a fresh perspective, challenging the status quo, and injecting new information into the discussion.<sup>256</sup>

"Outsiders" are readily available in multidistrict litigation. Judges and lead lawyers need look no further than the host of attorneys who were not appointed to lead positions. Inviting objections and soliciting feedback from outside attorneys on critical motions and strategy helps to avoid cognitive diversity's main pitfall—that it is too tough to recognize from the information applicants provide. When outsiders object and share new information, their actions may dovetail with adequate representation's aims: having someone represent your interests means having someone who will dissent on your behalf when your interests are jeopardized, vocalize your position to the group and, if that fails, to the judge.

2. *Plaintiffs' Heterogeneous Interests.* Even though dissenting outsiders can act as a safety net for adequate representation, they cannot substitute for representative leadership.<sup>257</sup> Appointing lead attorneys precludes plaintiffs' individually chosen

---

in *IUD Case*, *Federal Judge Says*, AMERICAN BAR ASSOCIATION REPORT, May 20, 2013; See King et al., *supra* note 250, at 278; Mannix & Neale, *supra* note 250, at 33-35, 42-43

<sup>251</sup> PAGE, *supra* note 64, at 302-10.

<sup>252</sup> *Id.* at 377 n. 3.

<sup>253</sup> See *id.* at 362.

<sup>254</sup> *Id.* at 343.

<sup>255</sup> See *id.* at 343-44; Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 563, 564 (2002) ("Initial preference heterogeneity was a necessary condition for disagreement at the time when the group started its information search. This consistent disagreement led to lower commitment to the preliminary group decision and lower confidence about having already found the best alternative (compared to homogeneous groups), and these two process, in turn, debiased group information seeking.")

<sup>256</sup> PAGE, *supra* note 64, at 344; Ulrich Klocke, *How to Improve Decision Making in Small Groups: Effects of Dissent and Training Interventions*, 38 SMALL GROUP RES. 437, 437-38, 460-62 (2007).

<sup>257</sup> Separate representation matters less in certain leadership positions, like liaison counsel. Liaison counsel disseminates information and acts more as a conduit than a decision maker. But

counsel from having a seat at the decision-making table and thus raises due process concerns if those attorneys do not adequately represent them. Adequate representation demands separate counsel when structural conflicts exist or where certain claimants' unique issues might not be fully developed.<sup>258</sup> Structural conflicts arise when there is a danger that counsel "might skew [the litigation] systematically" to favor some claimants over others "on grounds aside from reasoned evaluation of their respective claims or . . . disfavor claimants generally vis-à-vis the lawyers themselves."<sup>259</sup>

Structural conflicts present a high bar for truly separate representation. Plaintiffs' goals, injuries, claims, and remedies are likely to run the gamut, but often do not meet this threshold.<sup>260</sup> So, while separate counsel may not always be required, it is worthwhile for judges to solicit information from attorneys that reveals how familiar they are with those variations.

Selecting qualified representatives based on their clients' different interests is also more likely to create a cognitively diverse committee.<sup>261</sup> If lead lawyers' clients' aims and preferences vary, the committee will likely include dissenters who challenge the status quo and inject new information into the discussion.<sup>262</sup> Soliciting that information through leadership applications incentivizes attorneys to identify potential conflicts early on and, by making them explicit, take appropriate steps to ensure informed consent.<sup>263</sup>

3. *Litigation Financing Abilities.* Diversifying lead lawyers may be difficult if judges continue to heavily factor attorneys' ability to finance the litigation into their decisions and refuse to permit alternative financing arrangements. Established law firms tend to have more assets available to fund common-benefit work, which

---

adequate representation is critically important in conducting discovery, choosing bellwether cases, and negotiating settlement.

<sup>258</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. k (2009).

<sup>259</sup> PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a)(1)(B); see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 PENN. L. REV. 1649, 1677-1701 (2008).

<sup>260</sup> For detailed information on differences among claimants and how they may fall into more cohesive subgroups, see Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 121-25 (2011).

<sup>261</sup> See Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 563, 564 (2002) (noting that task-oriented conflict can counteract biased information seeking and that "one way to facilitate this task-oriented conflict is to select members with heterogeneous decision preferences when forming groups").

<sup>262</sup> See generally Stefan Schulz-Hardt et al., *Productive Conflict in Group Decision Making: Genuine and Contrived Dissent as Strategies to Counteract Biased Information Seeking*, 88 ORG. BEHAV. & HUM. DECISION PROCESSES 563, 582-83 (2002) (explaining that genuine dissent counteracts group polarization and proposing that appointing heterogeneous group members with different functional and educational background will produce dissent).

<sup>263</sup> If judges sense a fear among attorneys that such candor could prejudice their claims vis-à-vis defendants, then they could review applications in camera.

means that judges will continue to choose repeat players.<sup>264</sup> Yet, financing need not impede otherwise qualified attorneys if judges permit third-party funding arrangements. When properly disclosed to the court (as all alternative financing should be) and allowed by the relevant state bar, certain third-party financing can solve funding and monitoring problems.<sup>265</sup> Still, not all alternative financing arrangements are created equal: as I have explored in-depth elsewhere,<sup>266</sup> financing options can differ substantially, and each type has its own benefits and drawbacks.<sup>267</sup>

First, financiers might loan money directly to plaintiffs' law firms when those firms cannot secure loans from traditional sources, like banks. These recourse loans are secured by all of the firm's assets, including future fee awards. On the upside, loans to law firms may make newer market entrants and less liquid firms eligible for leadership positions. But, because these financiers charge significantly higher interest rates than banks, they may amplify the pressure to settle quickly and avoid added interest charges.<sup>268</sup>

The second novel, but more promising form of financing would be to permit the funder to contract directly with an attorney's clients for a percentage of the clients' proceeds.<sup>269</sup> This is akin to a plaintiff paying the financier a contingent fee—if she loses, she owes nothing, but if she wins, the contingency goes to the financier. In return, the financier pays the client's attorney on a billable-hour rate plus a small percentage of the funder's gross proceeds as a successful litigation bonus.<sup>270</sup> Like loaning money directly to law firms, this allows attorneys in firms with less capital to serve in leadership roles, but it also incentivizes sophisticated financiers to vet attorneys, monitor them, and keep costs reasonable. The financier's and attorney's self-interest tend to check one another in advantageous ways: working on a billable-hour rate incentivizes attorneys to spend time communicating with their clients and consulting with "outside" non-lead attorneys, which counterbalances a financier's push for quick settlement.<sup>271</sup> But the bonus rewards efficiency and productivity,

---

<sup>264</sup> See Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions* at 11 (forthcoming, DePaul Law Review), available at <http://ssrn.com/abstract=2292625> (noting "concerns that the 'usual characters' tend to dominate certain classes of aggregate litigation and that the established resources of some major players helps create an entrenched bar").

<sup>265</sup> Burch, *supra* note 15, at 1273, 1331 (discussing the need to disclose funding agreements to prevent collusion between attorneys and financiers who might aspire to influence or control litigation decisions).

<sup>266</sup> *Id.*

<sup>267</sup> Cf. Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 701, 705 (2014) ("Although [insurers and third-party funders] presumably use contracts to maximize the joint welfare of themselves and the parties they work with, the manner in which the contracts operate reflects the opposition of the parties in litigation. . . . Funding contracts are intended to maximize net expected gains from lawsuits.")

<sup>268</sup> Burch, *supra* note 15, at 1312-13, 1318-19.

<sup>269</sup> This percentage should not exceed a state's permissible contingent fee for attorneys.

<sup>270</sup> Burch, *supra* note 15, at 1319-20.

<sup>271</sup> The decision to settle should, of course, remain with the client. *Id.* at 1334-36.

which reduces attorneys' incentives to unduly prolong the litigation or duplicate effort.<sup>272</sup> The main drawback to this approach, however, is that it only covers costs for counsel's contractual clients, not the added amount needed to fund work for *all* plaintiffs' benefit.

A third option could thus work as a standalone financing arrangement or function alongside the previous proposal to cover common-benefit costs for plaintiffs with whom the lead lawyers have no contract. As with loans to plaintiffs' law firms, financiers could contract directly with firms to cover the cost of performing common-benefit work. The key to this arrangement's success, however, hinges on the contract's compensation provisions and ensuring that lead attorneys—not financiers—retain decision-making control.<sup>273</sup> If the funding contract simply loans the firm money at a specified interest rate, the dangers of a financier hijacking settlement discussions and lawyers pushing for an early settlement persist. If the funding contract pays the attorney on a billable-hour rate with the financier receiving lead lawyers' "contingent" fee award, then the attorneys might unnecessarily protract the litigation. But, if the funding contract pays lead lawyers on a billable-hour rate and includes a sliding-scale litigation bonus tied to the judge's performance assessment under quantum-meruit principles, this may appropriately balance both parties' incentives.<sup>274</sup>

Granted, claimants do not consent to this form of financing as they would if they contracted directly with the funder, but then they do not consent to judges appointing lead lawyers either. Yet, compensating lead lawyers necessarily rests on restitution, not contract principles. So, extending those restitutionary mores to financiers through quantum-meruit principles is not as far-fetched as it might initially seem. As Part III.B elaborates below, quantum-meruit considerations include assessing lead lawyers' work, the status of the case, and the litigation's outcome. Lead attorneys thus have an incentive to work hard to improve the settlement on plaintiffs' behalf and not to unduly protract the litigation. And, as sophisticated investors, financiers would presumably fund only qualified counsel, thereby alleviating some of the judge's vetting responsibilities.<sup>275</sup>

4. *Procedural Aspects of Lead Lawyer Appointments.* Information about financing, diverse interests, and attorneys' qualifications may not be readily available when cases are first transferred. As such, this section suggests modifying appointment procedures in four ways to reduce informational asymmetries and improve representation. First, as to timing, judges might consider appointing interim leadership until they can identify conflicting interests. The interim selection process could be an abbreviated version of the detailed procedures that follow, which include

---

<sup>272</sup> *Id.* at 1320-23.

<sup>273</sup> *See generally id.* at 1320-23 (discussing various possibilities for decision-making control and arguing that clients should retain ultimate control over their settlement decisions).

<sup>274</sup> *See infra* Part III.B.

<sup>275</sup> *See* Issacharoff, *supra* note 264, at 11.

publishing a proposed leadership slate followed by a “notice and comment” period with confidential objections and supporting documentation.<sup>276</sup> Once appointed, interim counsel would serve until enough information exists to assess plaintiffs’ heterogeneous interests and potential structural conflicts.<sup>277</sup>

That informational tipping point might arise upon receiving a motion for class certification, or earlier, depending on how quickly the issues develop and how soon attorneys file suit. Class certification motions can prove helpful in singling out conflicts given that they leverage defendants’ incentives to pinpoint dissimilarities among the plaintiffs. But reaching that tipping point also requires a critical mass of plaintiffs’ attorneys to have appeared. A recent study by the Federal Judicial Center demonstrates that highly specialized repeat players appear earlier in multidistrict litigation than do other attorneys, making their first appearance an average of 73 days after transfer.<sup>278</sup> Repeat players with fewer appearances arrive after 333 days, and on average, attorneys appear 419 days post-transfer.<sup>279</sup> This suggests that judges will have more attorneys from which to choose if they wait longer than three months to appoint permanent leadership.

Second, conducting an evidentiary hearing can introduce non-repeat players to the court, increase transparency, and help prevent informational cascades.<sup>280</sup> Cascades based on misinformation are less likely to occur with an open vetting process where competing attorneys object, inject new information into the discussion, and provide reasons for appointing one person over another.<sup>281</sup> As such, this provides judges with an opportunity to distinguish between meritorious challenges and strategic ones designed to extort backroom “pay-offs.”<sup>282</sup> Moreover,

---

<sup>276</sup> See, e.g., *In re Boston Scientific Corp., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2326, at 9 (S.D.W.V. Feb. 29, 2012) (Pretrial Order No. 1) (“Written objections may be made to the appointment of a proposed applicant or nominee. . . . Any objections should be concise yet thorough and have any necessary documentation attached.”).

<sup>277</sup> For more information on structural conflicts, see *supra* note 259 and accompanying text.

<sup>278</sup> Margaret S. Williams, Emery G. Lee, III & Catherine R. Borden, Repeat Players in Multidistrict Litigation, at 38 (forthcoming, *Journal of Tort Law*, 2014) (on file with author) (“On average, attorneys appear 419 days after centralization—more than a year. Among our repeat player group (ten or more MDL proceedings in the study period), attorneys appeared on average 333 days after centralization—just under a year. . . . But super-repeat attorneys, with 30 or more MDL proceedings, appeared on average after just 73 days.”).

<sup>279</sup> *Id.*

<sup>280</sup> See Professor Samuel Issacharoff and Judge R. David Proctor, Selection and Compensation of Counsel in Multi-District Litigation, 2012 Transferee Judges Conference (Oct. 23, 2012) (suggesting common application forms to facilitate comparisons) (power point on file with author).

<sup>281</sup> See SUNSTEIN, *supra* note 61, at 64, 70-72.

<sup>282</sup> This practice is well known in the class-action context. E.g., Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 432-33. Given anecdotal evidence and the overlap of repeat players in both contexts, there is reason to think it persists in multidistrict litigation.

an evidentiary hearing provides counsel an opportunity to ask the judge questions about the process and state her case for selection.<sup>283</sup>

Third, judges can improve the information they receive about applicants by tailoring application forms for specific positions, using the evidentiary hearings to glean additional information, soliciting feedback from law clerks, and then assimilating and scoring applicants based on their relevant qualifications.<sup>284</sup> As Nobel Prize winning economist Daniel Kahneman suggests, formulas and scores (as opposed to expert intuition) tend to better predict a candidate's success by combating the halo effect, where positive initial impressions influence later judgments.<sup>285</sup> To create an application form, Kahneman suggests selecting a few relevant traits that are prerequisites for success in the position, making a list of questions for each trait, and ultimately scoring those traits on a 1-to-5 scale.<sup>286</sup> For example, based on the typical responsibilities of plaintiffs' steering committee, judges might seek members who are organized, responsible and responsive; excel in written and oral communication; demonstrate leadership skills; have experience conducting depositions and large-scale document review; have expertise in the litigation's subject matter; and represent clients with various injuries and claims (or only a subset of interests). After creating a list of relevant traits, judges should then recruit other evaluators with less insider knowledge (such as term law clerks) to review the forms and score the applicants.<sup>287</sup>

Reviewers would rate attorneys' qualifying traits based on the applications and information gleaned during the evidentiary hearing. Kahneman recommends collecting the information "one trait at a time, scoring each before . . . mov[ing] on to the next one," then, without discussing scores with each other, tabulate them to create a presumptive leadership roster.<sup>288</sup> At that point, the judge should consider whether the presumptive slate adequately represents plaintiffs' various interests.<sup>289</sup> She could then substitute qualified attorneys who represent clients with conflicting interests and who would promote discourse and dissent.<sup>290</sup>

---

<sup>283</sup> Issacharoff & Proctor, *supra* note 280.

<sup>284</sup> *Id.*

<sup>285</sup> KAHNEMAN, *supra* note 248, at 82-83, 222-33.

<sup>286</sup> *Id.* at 232.

<sup>287</sup> This further combats the halo effect and the impulse to empower only known attorneys, while sidelining personal biases. *See id.* at 232.

<sup>288</sup> *Id.* at 232, 245-46. Note that while this is somewhat of an "objective" measure, it differs substantially from Professors Silver and Miller's proposal of assigning presumptive leadership to those with the largest client inventory. Silver & Miller, *supra* note 12. As noted, that approach can reward attorneys who collect an undifferentiated mass of cases with varying claims and complicate settlement.

<sup>289</sup> It may be less important to have diverse representation for purely administrative positions, like liaison counsel.

<sup>290</sup> *See* PAGE, *supra* note 64, at 362; Owen Fiss, *Foreword—The Forms of Justice*, 93 HARV. L. REV. 1, 21 (1979) (referring to the touchstone for a good judicial decision or approved settlement as whether the court "tolerates, or even invites, a multiplicity of spokesmen . . . each perhaps representing different views as to what is the interest of the victim group").

Finally, some judges have suggested imposing one-year “term” limits on leadership appointments such that they can continually reassess the lawyers’ effectiveness.<sup>291</sup> While this does provide added incentive for lead lawyers to continue working hard, it has the downside of making them principally beholden to the judge. Lead lawyers vigorously representing their clients could be in danger of replacement if they displease the judge, which may encourage them to curry judicial favor at the expense of fulfilling their fiduciary obligations to plaintiffs. The better alternative might be to allow non-lead attorneys to request substitutions or additions to the roster if lead lawyers neglect cases or if new information on conflicts comes to light.<sup>292</sup>

*B. Lead Lawyers’ Fees: A Quantum-Meruit Theory of Fee Awards*

Selecting lead lawyers is, of course, only half the battle; once chosen, judges face compensation questions.<sup>293</sup> As Part II.B explained, judges have traditionally relied on an amalgam of doctrines to accomplish this task, which has resulted in less predictability and created an opportunity for repeat players to “contractually” increase their fees. The mismatch is apparent: a judicially appointed lead lawyer who does not operate under the goodwill afforded by contractual consent should likewise have the judge set her fees through a transparent process, not through backdoor trades with the defendant that are slipped into a settlement.

What is needed then is a standard by which judges assess the value lead lawyers add. Such a standard exists in quantum meruit.<sup>294</sup> Quantum meruit lies at the heart of each of the theories judges have invoked in the past to piece together compensation decisions—contract, restitution, and equity—and compensates lead lawyers for contributions that benefit the plaintiffs.<sup>295</sup> Given that lead lawyers benefit different plaintiffs to different degrees, this allows judges to tailor awards to match the circumstances. As such, it could likewise reduce compensation for

---

<sup>291</sup> Issacharoff & Proctor, *supra* note 280.

<sup>292</sup> Some judges have, for example, helped ensure adequate representation by appointing a new plaintiffs’ steering committee for non-settling plaintiffs after the original committee negotiates a proposed deal with the defendant. *E.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 261-62 (E.D.N.Y. 2006). Judge Fallon appointed additional counsel to the plaintiffs’ steering committee to represent ineligible or not enrolled claimants post-settlement. *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. Jan. 8, 2010) (Pretrial Order No. 45A).

<sup>293</sup> This is, however, controversial. Professors Silver and Miller’s proposal, for example proposes selection methods but does not provide for judicial compensation. Silver & Miller, *supra* note 12.

<sup>294</sup> Quantum meruit is generally used only where parties do not agree to compensation in advance and can thus be thought of as a theory of recovery as opposed to a substantive legal theory, such as contracts.

<sup>295</sup> See BLACK’S LAW DICTIONARY, quantum meruit (9th ed. 2009); Lauren Krohn, *Cause of Action by Attorney to Recover Fees on Quantum Meruit Basis*, 16 CAUSES OF ACTION 85, § 3 (1988).

freeriding attorneys who do little more than file cases, wait for lead lawyers to negotiate a proposed settlement, and collect their fee.

Courts have long used quantum-meruit awards to compensate attorneys where they were discharged without cause and work on contingent fees,<sup>296</sup> they dispute how to divide fees among themselves,<sup>297</sup> they voluntarily withdraw with good cause,<sup>298</sup> no fee agreement exists,<sup>299</sup> local counsel is fired before a contingency occurs,<sup>300</sup> and even when attorneys serve as special counsel to a debtor in bankruptcy.<sup>301</sup> Likewise, the *Restatement (Third) of the Law Governing Lawyers* gives counsel a right to recover “a fair fee in quantum meruit” when “a client and lawyer have not made a valid contract providing for another measure of compensation.”<sup>302</sup> In multidistrict litigation, even though the client contracts with her chosen attorney, she typically has no contract with the lead lawyers. Rather, the situation is more akin to a forced referral or sale, where the individual’s attorney hands clients over to the lead lawyers who bundle and pursue some aspects together.<sup>303</sup> Thus, grounding lead lawyers’ fee awards in quantum meruit brings them in line with actual practice and with attorneys’ fees jurisprudence more generally.

Granted, given its lineage in contract, equity, common-benefit funds, and attorneys’ fees, the law surrounding quantum-meruit awards is jumbled, to say the least. Although lead lawyers plainly have the burden of establishing their fee’s reasonableness and hence the value they conferred,<sup>304</sup> assessing that value can vary depending on the cases cited. Relying on cases where attorneys failed to contract in

---

<sup>296</sup> See, e.g., *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (2d Cir. 1988); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 401 F. Supp. 2d 1120, 1124 (D. Nev. 2005); *Marks v. Struble*, 347 F. Supp. 2d 136, 144 (D.N.J. 2004); *Byrne v. Leblond*, 25 A.D.3d 640, 641 (N.Y. Ct. App. 2006); *Joseph M. Perillo, The Law of Lawyers’ Contracts is Different*, 67 *FORDHAM L. REV.* 443, 457-58 (1998).

<sup>297</sup> E.g., *Kirschner & Venker, P.C. v. Taylor & Martino, P.C.*, 627 S.E.2d 112 (Ga. Ct. App. 2006) (holding that local counsel was entitled to recover the quantum meruit value for its services even though the firm was fired before the contingency became payable); *Carr v. Pearman*, 860 N.E. 2d 862 (Ind. Ct. App. 2007); *Byrne v. Leblonde*, 25 A.D.3d 640, 641-42 (N.Y. Ct. App. 2006); *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) (requiring attorneys to split contingent fee in proportion to the value of services rendered).

<sup>298</sup> E.g., *Stall v. First Nat’l Bank of Buhl*, 375 N.W.2d 841, 845 (Minn. Ct. App. 1985).

<sup>299</sup> E.g., *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 401 F. Supp. 2d 1120, 1128 (D. Nev. 2005); *Jacks v. Sullinger*, 224 So. 2d 583, 583-85 (Ala. 1969).

<sup>300</sup> E.g., *Kirschner & Venker*, 627 S.E.2d at 113.

<sup>301</sup> E.g., *In re EBW Laser, Inc.*, 333 B.R. 351, 357 (Bankr. M.D.N.C. 2005); *In re Allen*, 217 B.R. 952 (Bankr. M.D. Fl. 1998); see generally *Krohn, supra* note 295, at § 3 (“A quantum meruit analysis of attorneys’ fees will therefore be appropriate in virtually any case in which the value of legal services is at issue.”).

<sup>302</sup> *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 39 (2000).

<sup>303</sup> *Curtis & Resnik, supra* note 68, at 447 (recognizing the “forced referral or sale” of individual cases to PSC members and suggesting that paying PSC members for their work reflects the concept of “quantum meruit”).

<sup>304</sup> *Jacks v. Sullinger*, 224 So. 2d 583 (Ala. 1969); *Anderson v. Anchor Org. for Health Maintenance*, 654 N.E.2d 675 (Ill. Ct. App. 1995); *Krohn, supra* note 295, at § 4.

advance with clients, for instance, would be inappropriate since those circumstances result in conservative fees and do not capture the uniqueness of multidistrict litigation committees.<sup>305</sup> Similarly, standards used to assess fees under fee-shifting statutes are designed with different public-policy goals in mind and run the risk of being too generous. Instead, leadership committees are most analogous to a situation in which the client employs her chosen attorney and that attorney, in turn, relies on (in effect, employs) lead lawyers.

Because “quantum meruit” implies a recovery goal—“how much is merited”—as opposed to a specific cause of action, assessing fair value<sup>306</sup> should depend on the lead lawyers’ billing practices (whether hourly billing or contingent fees), work, and time spent;<sup>307</sup> the status of the case; and the amount of work the individual plaintiffs’ chosen attorneys contributed to the outcome.<sup>308</sup> Judges should also consider the case’s success, lead lawyers’ opportunity costs, and whether the attorneys assumed financial risk to pursue the litigation.<sup>309</sup> In this vein, quantum-meruit awards entail a fact-specific, contextualized evaluation of lead attorneys’ work and risk over time as opposed to a flat percentage-of-the-fund tax at the beginning of litigation, which could over or under compensate in certain circumstances.<sup>310</sup>

---

<sup>305</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt (c) (2000) (“A conservative evaluation is usually appropriate in assessing fees under this Section. When a lawyer fails to agree with the client in advance on the fee to be charged, the client should not have to pay as much as some clients might have agreed to pay.”).

<sup>306</sup> *Id.* at § 39 cmt (b)(ii) (discussing how to measure fair value).

<sup>307</sup> See *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717 (5th Cir. 1974) (assessing time spent on a case); *Ackermann v. Levine*, 610 F. Supp. 633 (S.D.N.Y. 1985), *aff’d in part, rev’d in part* 788 F.2d 830 (2d Cir. 1986) (examining specific services rendered); *Hiscott & Robinson v. King*, 626 A.2d 1235 (Pa. Ct. App. 1993) (considering an attorney’s hourly billing rate); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c (2000); Perillo, *supra* note 296, at 448.

<sup>308</sup> See *generally* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt (c) (2000) (“The standard rate or hourly fee might be modified by other factors bearing on fairness, including success in the representation and whether the lawyer assumed part of the risk of the client’s loss, as in a contingent-fee contract.”); Lester Brickman, *Setting the Fee when the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 392-93 (1992).

<sup>309</sup> *E.g.*, *Richardson v. Parish of Jefferson*, 727 So. 2d 705 (La. Ct. App. 1999); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 39 cmt. c (2000). Although Congress has not provided guidance for awarding attorneys’ fees in multidistrict litigation, bankruptcy provides an important comparison. In bankruptcy, judges can award trustees “reasonable compensation for actual, necessary services” and “reimbursement for actual, necessary expenses.” 11 U.S.C. § 330(a)(1)(A), (B) (2014). Reasonable compensation is calculated based on a number of factors including “time spent,” “rates charged,” “whether the services were necessary . . . or beneficial,” whether the services were timely given the case’s complexity, and what other comparably skilled practitioners would charge. 11 U.S.C. § 330(a)(3) (2014). But the statute specifically prohibits judges from compensating attorneys for duplicate or unnecessary services, as well as services that were not “reasonably likely to benefit the debtor’s estate.” 11 U.S.C. § 330(a)(4) (2014).

<sup>310</sup> See Curtis & Resnik, *supra* note 68, at 442 (arguing that fees “should be based on fact-specific, contextualized evaluations that include assessments of risk, as it changes over time and payments for investments of both capital and of work, including the provision of services of individual litigants”).

While lead lawyers might theoretically insert provisions within a master settlement agreement that alert enrolling state-court plaintiffs (and their counsel) that their award will be subject to the federal judge's quantum-meruit fee assessment, those assessments should ultimately reflect the value lead lawyers added to the cases. Although lead attorneys may confer substantial value on state cases by negotiating a settlement, unless state-court attorneys relied on joint discovery efforts, lead lawyers may have benefitted them less. Thus, the fee should reflect a proportional reduction. As this suggests, adhering to a quantum-meruit theory demands certain limits, which could improve predictability and consistency in awarding fees.

First, because the general theory supporting quantum-meruit recovery is that the circumstances have changed and judges are implementing the fee that is merited based on lead lawyers' work, the total contingency charged to clients should not fluctuate. Put simply, if a client agreed to a 30-percent contingent fee, that percentage should remain static. She is paying attorneys to complete the work on her case. Her chosen attorney has, in effect (though not necessarily willingly), hired a second set of attorneys to do a portion of that work. So, the court may award lead lawyers whatever portion of that fee reflects their value.

Second, courts often exclude pro se litigants from having to pay lead lawyers' fees and costs even though they, like claimants with counsel, may benefit from lead attorneys' efforts.<sup>311</sup> It is true that pro se litigants have not retained any lawyer and thus have not consented whatsoever to legal representation. But allowing them to "opt out" is inconsistent with a quantum-meruit theory, which hinges on someone receiving a benefit for which they have not paid. That is true even if the court subscribes to the common fund's interpretation of quantum meruit: the purpose of a common fund is to "require others—in the absence of contract—to contribute ratably to the cost of securing the common benefit."<sup>312</sup> Under that rule, all claimants are linked by their joint interest in "a common legal position."<sup>313</sup> Because their interests are interconnected and lead lawyers have benefitted them by advancing the ball in some material way, judges should not excuse pro se litigants from paying lead-lawyer fees.

Third, if lead attorneys have their own clients as they should,<sup>314</sup> quantum meruit suggests the court should compensate them only for the benefit they confer on others beyond the work they would typically perform for their own cases.<sup>315</sup> Just

---

<sup>311</sup> See, e.g., *In re Air Crash Disaster at Florida Everglades* on December 29, 1972, 549 F.2d 1006, 1010 n. 5 (5th Cir. 1977) ("Claimants who had not retained counsel were excluded from payment of the fee.").

<sup>312</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt a (2011).

<sup>313</sup> *Id.*

<sup>314</sup> *Supra* notes 94-97 and accompanying text.

<sup>315</sup> *Cf Air Crash Disaster at Florida Everglades*, 549 F.2d at 1017 (responding to the criticism that attorneys should not be paid for doing something they would have to do on behalf of their own clients with the following, "It is uncertain that appellants or any other plaintiff lawyers would have

think: if several lawyers won big verdicts on their own in separate courts, the positive externalities from those trials would spill over to other cases around the country. Yet, the beneficiaries would not pay for the externality. As the restitutionary basis for class-action awards makes plain, “class counsel may base a claim for fees only on the *enhanced* recovery obtained for a class: the difference, in other words, between what the class received in consequence of the lawyer’s intervention and what the class would have received without it.”<sup>316</sup> Of course, measuring this gain in multidistrict litigation is much harder since a judge cannot simply identify the reasonable value of an attorney’s service.<sup>317</sup> Consequently, judges have prohibited lead attorneys from reporting “time spent on developing or processing individual issues in any case for an individual client” and allowed only “time spent on matters common to all claimants” when requesting a fee.<sup>318</sup>

Fourth, quantum meruit suggests that automatically awarding a flat percentage<sup>319</sup> of plaintiffs’ awards without considering the circumstances or the work completed may be inappropriate since it should be “an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.”<sup>320</sup> For instance, if cases were transferred back to their original fora for trial as Congress intended, reflexively awarding lead lawyers a flat percentage of plaintiffs’ settlement could be unreasonable given that individual counsel ushered in the final result.<sup>321</sup> To be sure, this does not suggest using the lodestar method in lieu of a percentage method; rather, it means that judges should tailor the percentage to the circumstances.

Tailored fee awards could thus vary depending on whether a case is remanded, if it goes to trial, if and when it is settled, the role lead lawyers played in achieving that settlement, and the overall cost-savings achieved through economies of scale and mass settlement.<sup>322</sup> As the Eighth Circuit recognized in assessing fees against

---

been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage”).

<sup>316</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt c (2011).

<sup>317</sup> See Candace Saari Kovacic-Fleischer, *Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment*, 27 REV. LITIG. 127, 130 (2007).

<sup>318</sup> *In re Guidant Defibrillators Prods. Liab. Litig.*, MDL No. 05-1705, Pretrial Order No. 6, at 9 (D. Minn. Feb. 15, 2006).

<sup>319</sup> See, e.g., *Air Crash Disaster at Florida Everglades*, 549 F.2d at 1010-11 (5th Cir. 1977) (observing that the district court awarded lead lawyers an 8-percent contingent fee).

<sup>320</sup> BLACK’S LAW DICTIONARY, quantum meruit (9th ed. 2009).

<sup>321</sup> Cf PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13 cmt. b (“[T]he percentage method may not be feasible when the value of the common fund is difficult to assess. . . . In those circumstances, the court should use the lodestar method.”); MANUAL FOR COMPLEX LITIGATION, *supra* note 71, at § 21.71 (“Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees.”).

<sup>322</sup> In this way, the fee award is not only concerned with whether the work was performed by lead lawyers or individual counsel, but whether aggregation diminished the total amount of work per client.

class-action opt-outs who landed in multidistrict litigation, awarding an automatic, across-the-board percentage risks giving lead lawyers a windfall, particularly if one case goes to trial and includes a significant punitive-damage award: “assuming one plaintiff receives \$1,000,500 in damages, lead counsel would be entitled to \$300,000 and liaison counsel would be entitled to \$100,000. . . . A fee award that gives court-appointed counsel a windfall and unfairly penalizes either plaintiffs or defendants does not constitute ‘fair reimbursement and compensation.’”<sup>323</sup> Likewise, small judgments or settlements run the risk of under compensation.<sup>324</sup>

This principle of tailoring fee awards to the work completed and result obtained risks becoming a double-edged sword by further pressuring lead lawyers to settle. Yet, substantial pressure to settle already exists<sup>325</sup> and, as the next section explores, using a quantum-meruit theory to award fees would give the transferee judge a private-law basis to assess the settlement’s terms. Thus, this inquiry should help alleviate concerns about collusive deals, deals that favor some claimants over others on unreasonable grounds, and deals that disfavor claimants generally vis-à-vis the lead lawyers.<sup>326</sup>

Finally, nothing in quantum-meruit theory allows judges to indiscriminately cap contingent-fee agreements. If judges’ concern is that individual counsel will receive a windfall since they no longer perform the lion’s share of the work, then that concern should be addressed by increasing lead lawyers’ share, not cutting contingent fees. Of course, this does not mean that judges cannot address an exorbitant fee in individual circumstances,<sup>327</sup> but doing so would require assessing whether that fee is unreasonable under the relevant state law and whether state law permits judicial modification of fee awards.<sup>328</sup>

In sum, determining how much lead lawyers have benefitted individual counsel and their clients in specific cases will depend heavily on adversarial litigation to yield the relevant information. Even though appraising fair value should vary depending on a number of inputs<sup>329</sup> and entail a fact-specific, contextualized evaluation of lead

---

<sup>323</sup> *Walitalo v. Iacocca*, 968 F.2d 741, 748 (8th Cir. 1992). Courts have likewise voiced this concern in awarding fees from a common fund in class actions. *E.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 222 (2d Cir. 1987).

<sup>324</sup> *Walitalo*, 968 F.2d at 748.

<sup>325</sup> *See supra* notes 52-54 and accompanying text (discussing judges’ incentives to encourage settlement) and notes 105-107 and accompanying text (discussing attorneys’ reputations, which would extend to reputations as dealmakers).

<sup>326</sup> *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.07(a) (2010).

<sup>327</sup> *See Int’l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1277 (8th Cir. 1980) (noting the court’s power to monitor contingency fees for reasonableness).

<sup>328</sup> *See supra* notes 218-219 and accompanying text.

<sup>329</sup> Inputs include factors such as the lead lawyers’ billing rates, work, and time spent; the type of work the lead lawyer performed (i.e., the committee on which she served); the status of the case and its success; the amount of work the plaintiffs’ chosen attorney contributed to the outcome; lead lawyers’ opportunity costs; and whether the attorneys assumed financial risks when pursuing the litigation.

attorneys' work and risk over time, judges could place cases in categories based on factors like whether the case is in state or federal court and whether individual counsel relied on lead lawyers' discovery efforts. They could further dissect lead lawyers' value based on committee assignment; certain committees like the plaintiffs' steering committee or executive management committee may play a larger role (and thus confer a larger benefit) in achieving a satisfactory outcome. Conducting hearings would provide objectors an opportunity to make their case and would equip judges with enough information to tailor the lead lawyers' fee to each case (or each category). Hearings and orders have the added benefit of making the fee award appealable—an essential error-correcting tool that lead lawyers sometimes dodge by writing fees into private settlements.

*C. Evaluating Settlements through Quantum-Meruit Fee Assessments*

In class actions, there is no shortage of concern over self-dealing, collusion, and principal-agent problems, but as the introductory examples of *Vioxx*, *Guidant*, and the *GMO Rice Litigation* illustrated in Part I, those concerns do not dissipate when judges deny class certification. Although clients are not absent in multidistrict litigation as they are in class actions, they are not able to monitor their attorneys as they might in truly individual litigation. When attorneys represent hundreds of plaintiffs in the same suit, communicating meaningfully and fully informing each client becomes more difficult pragmatically and logistically unless attorneys embrace technology to disseminate information widely.<sup>330</sup> Information about one's own case says little about how the litigation is progressing overall, so even clients who receive regular updates may not have a complete picture.

In many ways, multidistrict litigation complicates the incentives, dynamics, and temptations that Rule 23 simplified through heightened judicial control and scrutiny. Rather than addressing a single dynamic between largely absent class members and class counsel, multidistrict litigation incorporates a pyramid relationship where lead lawyers act as agents for individual attorneys who act as agents for their clients. Not only must agents watch other agents over whom they lack any control, but the judge also lacks any formal power to police the settlement.<sup>331</sup>

---

<sup>330</sup> E.g., Robert Klonoff et. al, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. PITT 727 (2008); Jack B. Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 COLUM. J. L. & SOC. PROBS. 451 (2012). This is not to say that attorneys representing many clients in the same litigation do not comply with Model Rule of Professional Conduct 1.4, but that the character of the relationship itself changes from a one-on-one relationship to a less personal group setting.

<sup>331</sup> Some argue that judges have no business approving or getting involved in nonclass settlements because individual plaintiffs freely consent to the deal. Grabill, *supra* note 9, at 164, 173. While this is technically true, it overlooks the coercive nature of some settlements. In the *Vioxx* litigation, for instance, the settlement offer required attorneys to recommend the deal to all of their clients and to withdraw from representing those who refused. Plus, settling plaintiffs had to decide whether to settle without ever knowing how much compensation they would receive. For a detailed

These circumstances present a quandary for the scrupulous transferee judge when parties announce a private settlement that the judge thinks is unfair. Circumstances like those led Judge Hellerstein to publically denounce the settlement reached in the Ground Zero workers' litigation against New York City, which made achieving the settlement's required participation rate a foregone impossibility.<sup>332</sup> Plus, the prevalence of repeat players and the trend toward lead lawyers' self-dealing by writing their fee terms into settlements suggest the need for safeguards. Yet, given the misplaced adventure into "quasi-class actions," parties also need predictability and parameters on judicial review.<sup>333</sup>

Awarding lead lawyers' fees on a quantum-meruit basis provides judges a valid but limited foothold for reviewing settlements.<sup>334</sup> While limited in scope, linking the settlement's merits to lead lawyers' attorneys' fees creates a powerful disincentive toward self-dealing or collusion. As noted, quantum-meruit awards require assessing the results obtained and the objective benefit to the client,<sup>335</sup> such as whether lead

---

rationale as to why individual consent does not diminish the need for judicial involvement, see Burch, *supra* note 187, at 512-16.

<sup>332</sup> See *supra* notes 240-241 and accompanying text.

<sup>333</sup> See *supra* notes 242-245 and accompanying text (casting doubt on quasi-class actions as a viable rationale). But see Grabill, *supra* note 9, at 164, 173 (arguing that individual consent should suffice without judicial involvement).

<sup>334</sup> This does not preclude other less formal means of prompting parties to reevaluate settlement terms. For example, settling parties often ask the court to issue *Lone Pine* orders that govern non-settling plaintiffs, which a judge could refuse to do if she thought the settlement coercive. Settlements likewise might include enforcement jurisdiction, which would allow the court to enforce a settlement if challenged. For more on these two possibilities, Grabill, *supra* note 9, at 179-82.

<sup>335</sup> See *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 195 (D. Mass. 1991) ("The key issue in this case is the mechanism for determining the appropriate level of an attorney's fee award, on a quantum meruit theory, where the attorney's contributions were limited to the early stage in the litigation and, while workmanlike, did not reflect special skill and had little influence on the ultimate outcome of the case. . . . Where a higher level of skill is necessary, or where the efforts of course bear a more substantial relation to the ultimate favorable outcome, a share in the contingency 'bonus' would obviously be the more appropriate course."); *520 East 72nd Commercial Corp. v. 520 East 72nd Owners Corp.*, 591 F. Supp. 728, 739 (S.D.N.Y. 1988), *aff'd* without op., 872 F.2d 1021 (2d Cir. 1989); ("In determining the value of an attorney's services in quantum meruit, the following factors must be considered (1) The difficulty involved in the matters in which services were rendered; (2) The nature of the services; (3) The amount involved; (4) The professional standing of counsel; (5) The results obtained."); *In re Hall*, 415 B.R. 911, 923 (Bankr. M.D. Ga. 2009) ("Under quantum meruit, attorneys fees are valued in light of the amount of the work done and by the results obtained. The court must determine whether the client received any benefit from the services and the value of the services rendered. Value is determined in terms of value to the client.") (citing *Lewis v. Smith*, 618 S.E.2d 32, 35-36 (Ga. Ct. App. 2005)); *Richardson v. Parish of Jefferson*, 727 So. 2d 705, 708 (La. Ct. App. 1999) (citing *Johnson v. Ins. Co. of N. Am.*, 666 So. 2d 1286 (La. Ct. App. 1996)) ("A quantum meruit analysis properly evaluates not merely the hours expended, but the results and benefit obtained."); *Swain v. Kamalsky*, No. 916193C, 1996 WL 33401226, at \*5 (Mass. Super. Ct. July 30, 1996) ("Since the efforts of Simon and Fine bore the most substantial relation to the favorable outcome of the case, Bader's efforts should be valued on a quantum meruit basis."); *Krohn*, *supra* note 295, at § 4 ("The third category of factors relevant to determining a reasonable attorney's fee concerns

lawyers' work produced a desirable outcome.<sup>336</sup> Thus, while the judge lacks the authority to "reject" a settlement, if lead lawyers negotiate a deal that is of little benefit to plaintiffs, then their attorneys' fees would be diminished proportionally. Similarly, if the settlement grid grossly under-compensated claimants with severe injuries and strong proof of specific causation, then lead lawyers' fees should likewise suffer.<sup>337</sup>

Some might claim that even this modest fairness review insults autonomous agents. But there is substantial cause for concern when judges informally "approve" of settlements as they may when settling parties request that they issue *Lone Pine* orders<sup>338</sup> to non-settling plaintiffs or when they enforce settlements if a party breaches.<sup>339</sup> As Seana Shiffrin explains, a court's concern in contexts like these "need not represent an effort to supplant the judgment or action of the contracting parties," but "may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action."<sup>340</sup> Put differently, just because plaintiffs have the right to enter these deals doesn't mean that the government should assist parties in carrying them out if the terms are unduly harsh.<sup>341</sup> On the contrary, tying lead lawyers' compensation to the outcome they helped produce can maintain a delicate balance: it preserves the parties' decision-making autonomy on one hand, but promotes both procedural fairness and institutional integrity on the other.

---

the result or outcome of the attorney's representation of the client. This includes analysis not only of the ultimate benefit received by the client as a result of the attorney's services, but also the cost to the attorney of pursuing the client's case.").

<sup>336</sup> See, e.g., *In re Hall*, 415 B.R. at 923 (determining value to the client).

<sup>337</sup> To be sure, this is not a perfect solution since the number of plaintiffs' with less severe claims will tend to exceed those with serious injuries. Thus, some danger of overcompensating persists even under a quantum-meruit approach.

<sup>338</sup> *Lone Pine* orders typically require non-settling plaintiffs to provide some evidentiary support for their claims. See *supra* note 57; e.g., *In re Vioxx Prods. Liab. Litig.*, 509 Fed. Appx. 383, 384-85 (5th Cir. 2013) ("[A] *Lone Pine* order imposed certain discovery requirements on such plaintiffs, including production of pharmacy and medical records, expert reports, and answers to Merck's interrogatories."). As Jeremy Grabill describes,

private mass tort settlements tend to be accompanied by requests to the court for *Lone Pine* orders to govern plaintiffs who choose not to opt in and any copycat plaintiffs who may file claims after the settlement is announced in hopes of a quick payday. The parties' desire for these types of orders in connection with private mass tort settlements can provide another leverage point for a judge who may have concerns about a contemplated settlement.

Grabill, *supra* note 9, at 179.

<sup>339</sup> After cases settle, plaintiffs typically dismiss their case under Rule 41. In *Kokkonen v. Guardian Life Insurance Co. of America*, the Supreme Court held that "[w]hen the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2) . . . the parties' compliance with the terms of the settlement contract (or the court's 'retention of jurisdiction' over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order." 511 U.S. 375, 381 (1994).

<sup>340</sup> Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUBLIC AFFAIRS 205, 224 (2000).

<sup>341</sup> See *id.*

## CONCLUSION

Multidistrict litigation remains a high-stakes gamble for everyone involved. But that gamble should hinge on the suit’s substantive merits—not on whether lead attorneys will fairly represent claimants’ heterogeneous interests, collude with defendants to insert their fees into settlements, or fall prey to well-documented group decision-making biases. Nor should that gamble encompass doctrinal unpredictability in awarding lead lawyers’ fees, capping individual attorneys’ contingent fees, or commenting on nonclass settlements without a legal basis. Centering the gamble on substantive merits requires judges to wield and constrain their authority in ways that promote procedural legitimacy and doctrinal consistency.

Accordingly, first, judges should delay appointing permanent lead lawyers until they have sufficient information on conflicts of interest and, as it becomes available, consider selecting qualified attorneys who use appropriate third-party financing. This will help ensure claimants’ diverse interests are adequately represented and that repeat players are not the only eligible candidates. Second, because the power to appoint lead lawyers should likewise entail the power to compensate them, judges need not warp consent through forced fee-transfer agreements. They should likewise reprimand self-dealing lead lawyers who try to circumvent quantum-meruit fee assessments through settlement negotiations with the defendant. Neither plaintiffs nor their attorneys contractually consent to appointing lead lawyers, thus lead lawyers’ fees should be allocated by the judge through a transparent process—not through the backdoor of settlement. Third, assessing how lead attorneys benefitted plaintiffs and compensating them for that added value requires judges to consider the litigation’s outcome from plaintiffs’ perspective. When the litigation settles, judges must thus assess the settlement’s attributes. Paying lead lawyers on a quantum-meruit basis should thus foster fidelity to the claimants—not to other lawyers or the judge. Finally, encouraging leadership committees to entertain input from non-lead attorneys on critical motions and strategy, as well as permitting objections during judicial hearings on those key motions will leverage dissent to promote adequate representation and combat group decision-making biases.

## APPENDIX OF REPEAT PLAYERS

Table 1: Entrenched Repeat Players with Five or More Appearances as Lead Lawyers

| Attorney <sup>342</sup> | Lead Lawyer Appearances | Law Firm                  |
|-------------------------|-------------------------|---------------------------|
| Richard Arsenault       | 17*                     | Neblett Beard & Arsenault |
| Daniel Becnel, Jr.      | 14                      | Becnel Law Firm LLC       |

<sup>342</sup> For a detailed explanation of these numbers, which multidistrict litigation cases were included in this assessment, and why appointing these repeat players may be problematic, see *supra* Part II.B.2, specifically notes 114-125 and accompanying text.

|                        |     |  |
|------------------------|-----|--|
| Dianne Nast            | 14* | NastLaw LLC  |
| Christopher Seeger     | 14  | Seeger Weiss, LLP                                    |
| Jerrold Parker         | 11* | Parker Waichman                                      |
| Jayne Conroy           | 10* | Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP   |
| Michelle Parfitt       | 10* | Ashcraft & Gerel, LLP                                |
| Mark Robinson, Jr.     | 10  | Robinson Calcagnie & Robinson                        |
| Arnold Levin           | 9   | Levin, Fishbein, Sedran & Berman                     |
| Michael London         | 9   | Douglas & London, P.C.                               |
| Martin Crump           | 8*  | Davis & Crump, PC                                    |
| W. Mark Lanier         | 8   | Lanier Law Firm                                      |
| Hunter Shkolnik        | 8*  | Napoli Bern Ripka Shkolnik, LLP                      |
| Fred Thompson III      | 8*  | Motley Rice  |
| Thomas Cartmell        | 7*  | Wagstaff & Cartmell                                  |
| A.J. De Bartolomeo     | 7*  | Girard Gibbs   |
| James R. Dugan         | 7   | Dugan Law Firm                                       |
| Yvonne Flaherty        | 7*  | Lockridge Grindal Nauen                              |
| Pete Flowers           | 7*  | Foote Meyers Mielke & Flowers, P.C.                  |
| Dave Matthews          | 7*  | Dave Matthews & Associates                           |
| Richard Meadow         | 7*  | Lanier Law Firm                                      |
| Joseph A. Osborne      | 7*  | Babbitt, Johnson, Osborne & LeClainche, P.A.         |
| John Restaino          | 7*  | Restaino Law Firm                                    |
| Rachel Abrams          | 6*  | Levin Simes LLP                                      |
| Thomas Anapol          | 6*  | Anapol Schwartz                                      |
| Bryan Aylstock         | 6*  | Aylstock, Witkin, Kreis & Overhotz                   |
| Ed Blizzard            | 6*  | Blizzard, McCarthy & Nabers                          |
| Elizabeth Cabraser     | 6   | Lieff Cabraser Heimann & Bernstein LLP               |
| John Climaco           | 6   | Climaco, Wilcox, Peca, Tarantino & Garofoli Co., LPA |
| Doug Monsour           | 6*  | Monsour Law Firm                                     |
| Alyson Oliver          | 6*  | Oliver Law Group                                     |
| Christopher Placitella | 6*  | Cohen, Placitella & Roth                             |
| Robert Salim           | 6*  | Salim-Beasley, LLC                                   |
| Joseph Zonies          | 6*  | Reilly Pozner LLP                                    |
| Andres Alonso          | 5   | Parker Waichman Alonso LLP                           |
| Riley Burnett          | 5*  | Law Offices of Riley Burnett, Jr.                    |
| Eric Chaffin           | 5*  | Chaffin Luhana LLP                                   |
| Clayton Clark          | 5*  | Clark, Love & Huston                                 |
| Erin Copeland          | 5*  | Fibich, Hampton, Leebron, Briggs & Josephson         |
| Roger Denton           | 5   | Schlichter Bogard & Denton                           |
| Henry Garrard, III     | 5*  | Blasingame, Burch, Garrard & Ashley, P.C.            |
| Michael Goetz          | 5*  | Morgan & Morgan                                      |
| Jeff Grand             | 5*  | Bernstein Liebhard, LLP                              |
| Stacy Hauer            | 5*  | Johnson Becker                                       |
| Scott Love             | 5*  | Clark, Love & Hutson                                 |
| Victoria Maniatis      | 5*  | Sanders, Wiener, Grossman, LLP                       |
| Michael Miller         | 5*  | Michael J. Miller, Esq.                              |
| Mark Mueller           | 5*  | Mueller Law  |
| Derek Potts            | 5*  | Potts Law Firm                                       |
| Bill Robins, III       | 5*  | Heard, Robins, Cloud & Black LLP                     |
| Joseph Saunders        | 5*  | Saunders & Walker                                    |

\*Number includes appointment to all four coordinated *Pelvic Repair Systems Products Liability Litigations* pending before Judge Joseph Goodwin. Coding these four cases as one to account for the overlap would cause those with seven or less appointments to be excluded from this list.

Table 2: Entrenched Repeat Law Firms with Five or More Lead Lawyer Appointments

| Number of MDL Positions by Firm <sup>343</sup> | Law Firm Name   |
|--|---|
| 22*  | Levin, Middlebrooks, Thomas, Mitchell, Rafferty & Proctor, P.A. |
| 21**   | Motley Rice LLC   |
| 21*  | Parker Waichman LLP   |
| 20*  | Neblett Beard & Arsenault                                       |
| 20   | Seeger Weiss LLP  |
| 18*  | Beasley, Allen, Crow, Methvin, Portis & Miles, P.C.             |
| 18*  | The Lanier Law Firm   |
| 17   | Lieff Cabraser Heimann & Bernstein, LLP                         |
| 16*  | Robinson Calcagnie Robinson Shapiro Davis, Inc.                 |
| 15*  | Aylstock, Witkin, Kreis & Overholtz, PLLC                       |
| 15   | Levin, Fishbein, Sedran & Berman                                |
| 14*  | Ashcraft & Gerel LLP  |
| 14   | Becnel Law Firm LLC   |
| 13*  | Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP              |
| 12*  | Anapol Schwartz   |
| 12*  | Lockridge Grindal Nauen PLLP                                    |
| 12*  | Roda Nast PC  |
| 12   | Shepherd, Finkelman, Miller & Shah, LLP                         |
| 11   | Douglas & London, P.C.  |
| 11*  | Sanders Viener Gorssman LLP                                     |
| 10**   | Clark, Love & Huston  |
| 10*  | Morgan & Morgan P.A.  |
| 10   | Weitz & Luxenberg, P.C.   |
| 9**  | Blasingame, Burch, Garrard & Ashley, P.C.                       |
| 9  | Climaco, Wilcox, Peca, Tarantino & Garofoli Co., LPA            |
| 9  | Cory Watson Crowder & DeGaris, P.C.                             |
| 8*   | Babbitt, Johnson, Osborne & Le Clairche, P.A.                   |
| 8*   | Davis & Crump, P.C.   |
| 8*   | Johnson Becker PLLC   |
| 8*   | Matthews & Associates   |
| 8*   | Napoli Bern Ripka Shkolnik, LLP                                 |
| 8  | Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C.            |
| 8*   | Wagstaff & Cartmell   |
| 8  | Zimmerman Reed  |
| 7*   | Cohen, Placitella & Roth, P.C.                                  |
| 7*   | Foote Meyers Mielke & Flowers, P.C.                             |
| 7*   | Girard Gibbs LLP  |
| 7  | Hagens Berman Sobol Shaipro LLC                                 |
| 7*   | Levin Simes LLP   |

<sup>343</sup> This includes firms with five or more affiliated attorneys named as a lead lawyer in a product liability multidistrict litigation. For a detailed explanation of these numbers, which multidistrict litigation cases were included in this assessment, and why appointing these repeat firms may be problematic, see *supra* Part II.B.2, specifically notes 114-125 and accompanying text.

|    |   |
|----|---|
| 7* | The Miller Firm, LLC                              |
| 7* | Restaino Law Firm, P.C.                           |
| 7  | Simmons Browder Gianaris Angelides & Barnerd LLC  |
| 6* | Bernstein Liebhard LLP                            |
| 6* | Blizzard, McCarthy & Nabers                       |
| 6  | Burg Simpson Eldredge Hersh & Jardine, P.C.       |
| 6* | Fibich, Hampton, Leebron, Briggs & Josephson, LLP |
| 6  | Finkelstein Thompson LLP                          |
| 6  | Herman, Herman, Katz & Cotlar, LLP                |
| 6* | Lewis & Roberts, PLLC                             |
| 6* | The Monsour Law Firm                              |
| 6* | Reilly Pozner LLP                                 |
| 6  | Schlichter Bogard & Denton, LLP                   |
| 5* | Andrus Hood & Wagstaff                            |
| 5  | Audet & Partners, LLP                             |
| 5  | Baron & Budd                                      |
| 5* | Chaffin Luhana LLP                                |
| 5* | Greene Ketchum Bailey Walker Farrell & Tweel      |
| 5* | Heard, Robins Cloud & Black                       |
| 5  | Heninger Garrison Davis, LLC                      |
| 5* | Hersh & Hersh                                     |
| 5  | Kiesel Boucher Larson LLP                         |
| 5* | Kline & Specter, P.C.                             |
| 5* | Law Offices of Riley Burnett, Jr.                 |
| 5* | Mueller Law                                       |
| 5* | The Oliver Law Group                              |
| 5* | Potts Law Firm                                    |
| 5  | Richardson, Patrick, Westbrook & Brickman, LLC    |
| 5  | Saunders & Walker                                 |
| 5  | Seeger Salvas LLP                                 |

\*Number includes firms with one attorney appointed to all four coordinated *Pelvic Repair Systems Products Liability Litigations* before Judge Joseph Goodwin. Coding these four cases as one would cause those firms with seven or fewer appointments to be excluded from this list.

\*\*Number includes firms with two attorneys appointed to all four coordinated *Pelvic Repair Systems Products Liability Litigations* before Judge Joseph Goodwin. Coding these four cases as one would cause those firms with eleven or fewer appointments to be excluded from this list.