

# The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal

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I.	INTRODUCTION .....	108
II.	THE QUASI-CLASS ACTION MODEL OF MDL MANAGEMENT .....	113
	A. <i>MDL Basics and Three Selected Aggregations</i> .....	114
	B. <i>Selection and Empowerment of Managerial Attorneys</i> .....	118
	C. <i>The Common Fund Doctrine as Applied to MDLs</i> .....	120
	1. The Enrichment Requirement .....	122
	2. The Implied Consent Requirement .....	124
	3. The Impracticability of Bargaining Requirement .....	124
	4. The Passive Beneficiary Requirement .....	126
	D. <i>Using Control of an MDL to Increase One's Compensation</i> .....	131
	E. <i>Caps on Contingent Fees</i> .....	136
	F. <i>Allocating CBW Payments among Managerial Attorneys</i> .....	141
III.	OPTIMIZING MANAGERIAL LAWYERS' INCENTIVES .....	143

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A.	<i>The Basic Economics of CBW</i> .....	143
B.	<i>Judicial Manipulation of Incentives</i> .....	146
C.	<i>Judicial Selection of Managerial Attorneys</i> .....	149
D.	<i>The Impact of Judicial Fee Regulation on the Profitability of CBW</i> .....	152
E.	<i>Factors that Matter Other than Fees</i> .....	155
F.	<i>Enriching the Economics of Producing CBW: The Choice of Counsel Matters</i> .....	157
IV.	THE PMC PROPOSAL .....	159
A.	<i>The Proposal</i> .....	160
B.	<i>The Proposal's Advantages</i> .....	169
1.	Selection of Counsel .....	169
2.	Compensation of Counsel .....	170
3.	Monitoring .....	172
4.	Preserving Judicial Independence .....	173
5.	Improving Fairness and Trust among Plaintiffs' Attorneys .....	174
V.	CONCLUSION.....	176

## I. INTRODUCTION

The preferred way of handling mass tort lawsuits in the federal courts has long been for the Judicial Panel on Multi-District Litigation (“JPML”) to transfer and consolidate the cases in a single federal district court.<sup>1</sup> Federal judges have handled over one thousand multi-district litigations (“MDLs”), the biggest of which have involved tens of thousands of plaintiffs with billions of dollars in liability claims.<sup>2</sup>

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1. Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 185–86 (2001) [hereinafter Hensler, *Revisiting the Monster*]; Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 895 (2001) [hereinafter Hensler, *The Role of Multi-Districting*].

2. The Diet Drugs MDL encompassed over 18,000 personal injury lawsuits, as well as a class action with 6 million members. *In re Diet Drugs*, 282 F.3d 220, 225 (3d Cir. 2002). The settlement required the defendant to pay over \$6 billion, of which more than \$600 million was awarded to MDL counsel and class counsel combined. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 456–59 (E.D. Pa. 2008) [hereinafter *In re Diet Drugs Prods. Liab. Litig.*]. The Vioxx MDL encompassed approximately 50,000 claimants. The settlement cost \$4.85 billion. See, e.g., Daniel Fisher, *Will the Vioxx Settlement Work?*, FORBES.COM, Nov. 13, 2007, [http://www.forbes.com/2007/11/12/merck-vioxx-lawsuits-biz-health-cz\\_df\\_1112vioxx.html](http://www.forbes.com/2007/11/12/merck-vioxx-lawsuits-biz-health-cz_df_1112vioxx.html); *Morning Edition: Merck Reaches \$4.8 Billion Settlement in Vioxx Case* (NPR radio broadcast Nov. 9, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16147998>. The lead attorneys in the MDL and related state court actions have requested 8 percent of the settlement fund, \$388 million, in

Given this wealth of experience, one would expect MDL procedures to be highly developed, carefully considered, and transparent. In some respects, they are.<sup>3</sup> But procedures that are central to the operation of MDLs on the plaintiffs' side are rudimentary and opaque. These procedures also raise serious policy concerns that have not previously been identified or addressed. Consider four examples.

Appointment of Lead Attorneys. Judges appoint the lawyers who run MDLs on the plaintiffs' side. Their choices can be puzzling. For example, judges sometimes give lead positions to lawyers with few or no clients in an MDL, passing over other lawyers whose clients number in the hundreds or thousands. Judges also wield the appointment power with unfettered discretion. They need not explain why they choose some lawyers rather than others, and rarely do. They face no known risk of appellate review or reversal: no appointment decision seems ever to have been challenged, much less reversed.

Compensation of Lead Attorneys. Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements. Typically, fee awards range from 4 percent to 6 percent of total recoveries, but smaller and larger percentages can be found.<sup>4</sup> This practice supposedly rests on the common fund doctrine, a creature of the law of restitution which undergirds fee awards in class actions. Yet the Supreme Court has never said the doctrine applies in MDLs, which are consolidations rather than class suits, and the American Law Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* suggests otherwise: "By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles."<sup>5</sup>

Neutralized Opposition. Because MDL judges select lead attorneys and control their compensation, lead attorneys rarely challenge them. In practical effect, MDL judges are lead lawyers'

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common benefit fees. The Settlement Channel, The Vioxx Settlement. What Does It Mean and What Happens Next?, <http://thesettlementchannel.squarespace.com/the-settlement-channel-blog/2007/11/10/the-vioxx-settlement-what-does-it-mean-and-what-happens-next.html> (Nov. 10, 2007, 09:11 EST).

3. For example, MDL judges now plan openly and successfully for inter-court cooperation, which makes pre-trial discovery proceed more smoothly. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 49–50 (2007).

4. See William B. Rubenstein, *On What A "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATT'Y FEE DIG. 87, 88–90 (Mar. 2009) (reporting fee award percentages for twenty-one MDLs).

5. RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004).

clients.<sup>6</sup> Fee-related concerns also cause non-lead lawyers to fear MDL judges, who take from them the money lead lawyers receive. By challenging an MDL judge, a non-lead lawyer must be willing to risk retribution in the form of a heavy fee tax. Because judges leave the size of forced fee transfers open until litigation ends, obedience is the prudent course for non-lead lawyers until an MDL formally concludes—or even longer when non-lead lawyers have cases in other MDLs being handled by the same judge.

Ungrounded Regulation. MDL judges not only tax non-lead lawyers; they also cut non-lead lawyers' fees. For example, an MDL judge might order a non-lead lawyer with a 40 percent contingent fee contract to give 8 percent to the lead attorneys and to rebate another 8 percent to the client. The lawyer would end up with a 24 percent fee, meaning that the contractual fee was cut almost by half. Although judges justify forced rebates by arguing that MDLs reduce non-lead lawyers' costs, they make no serious effort to connect the amount rebated to the amount saved. A rigorous econometric analysis of scale economies in MDLs would require an expert armed with data and a model. Judges never consult such experts. They invent numbers instead.

Obviously, these fee reductions give lawyers involved in MDLs another reason to be deferential. The price of impertinence may be an exceptionally large fee cut. Less apparent is the impact fee cuts have on non-lead lawyers' incentives. By rendering contingent fees unpredictable, judges discourage non-lead lawyers from providing services that would help clients. A downward spiral is predictable: fee cuts discourage lawyers from working hard, leading judges to demand larger rebates because they see lawyers slacking off. The spiral will primarily benefit defendants, who will face fewer claims and enjoy cheaper settlements when plaintiffs' lawyers find litigation less profitable.

The four practices just described—judicial appointment of lead attorneys, judicial control of lead attorneys' compensation, forced fee transfers, and fee cuts—jointly constitute the emerging “quasi-class action” approach to MDL management. Picking up on an idea first advanced by the Fifth Circuit in the mid-1970s, several judges have recently ruled that MDLs are “quasi-class actions.”<sup>7</sup> The label is apt,

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6. See Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2129 (2000) (“Judges now have the power of payment, serving more like clients and consumers . . .”).

7. See, e.g., *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2009 WL 2408884, at \*3 (E.D. La. Aug. 3, 2009); *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2008 WL 2511791, at \*1

they contend, because a judge presiding over an MDL enjoys the same broad equitable powers as a judge presiding over a class action, including the power to implement the four practices just described. Writing in 2000, Professor Judith Resnik observed that judges were “reluctant to delve too deeply” into fee-related matters in mass tort cases.<sup>8</sup> In the past decade, they overcame that reluctance. Judges now regulate mass tort MDLs extensively and assert particularly expansive power over fees.

Although the judges’ intentions are exemplary—they are trying to fashion tools with which to resolve complicated, multi-party cases in reasonable time and at reasonable cost—the quasi-class action approach has serious downsides. By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs’ lawyers’ incentives to serve clients well.

This Article is the first to examine systematically the rules and norms that govern the appointment, powers, compensation, and monitoring of lead attorneys in MDLs.<sup>9</sup> After analyzing and critiquing existing practices, it proposes a new MDL management approach. The proposal would establish a default rule requiring an MDL judge to appoint a Plaintiffs’ Management Committee (“PMC”) made up of lawyers with valuable client inventories: often, but not necessarily, lawyers with the largest numbers of signed clients. The PMC would then select, set compensation terms for, and monitor a group of

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(E.D.N.Y. June 19, 2008). The roots of the quasi-class action doctrine extend back to *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 (5th Cir. 1977) (observing that “the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large.”) [hereinafter *Everglades Crash*]. Judge Weinstein appears to have first enunciated the idea in *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480–81 (1994) (“What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions . . . . It is my conclusion . . . that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.”).

8. Resnik, *supra* note 6, at 2121–22. Even at the start of the decade, however, “judges ha[d] begun to reserve some of the money (formerly conceived to ‘belong’ to individual attorneys) to pay common benefit lawyers.” *Id.* at 2175.

9. Many scholarly writings address MDLs as an important species of litigation and discuss examples of their use. See, e.g., RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT (2007); Hensler, *Revisiting the Monster*, *supra* note 1; Hensler, *The Role of Multi-Districting*, *supra* note 1; 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 (2008); Resnik, *supra* note 6. However, no prior writing discusses the pros and cons of the quasi-class action approach to MDL management or the specific procedures identified in the text.

common benefit attorneys (“CBAs”) who would perform the common benefit work (“CBW”) MDLs require. CBW is legal work beneficial to all plaintiffs, such as discovery relating to factual issues common to all plaintiffs’ claims.<sup>10</sup> PMC members would receive only fees from their signed clients, but this should motivate them to select, incentivize, and monitor CBAs with care because good CBW will make their client inventories more valuable. CBAs would draw fees on a *pro rata* basis from all lawyers with cases in an MDL. Having the largest client inventories, PMC members would pay the most. This would motivate them to obtain the best combination of quality and price from the available CBAs. Attorneys not on the PMC would benefit automatically from the PMC members’ efforts to help themselves.

This approach would act as a default rule, which judges would follow in the absence of an agreement among the PMC and other lawyers on a different governance structure. Allowing consensual agreements to displace the default rule ameliorates the problem of forcing all consolidations into a single mold. It also gives attorneys the option of using governance structures with duties that are well-established under the law governing partnerships, corporations, or other joint ventures to address known problems, such as the possibility that lawyers in charge of an MDL will exploit attorneys in lesser positions.

The presiding judge’s involvement in the management of the plaintiffs’ side of an MDL would ordinarily end with the appointment of the PMC. The judge would be available to adjudicate any claims of mismanagement or wrongful behavior and, as now, to ensure that non-lead lawyers receive appropriate opportunities to develop unusual or unique aspects of their clients’ cases. Because the judge would have limited control over the choice of PMC members and would otherwise be removed from compensation issues on the plaintiffs’ side, both the lawyers’ and the judges’ independence would be restored. Our proposal would also promote objectivity and transparency, harmonize the interests of lead attorneys and plaintiffs, reduce disputes over lawyers’ fees, and improve monitoring of CBW. Lastly, it would foster good incentives by fixing lead attorneys’ compensation in advance.

MDL judges could adopt most elements of our proposal directly. They already appoint lead attorneys. The proposal simply gives them criteria to apply when doing so and requires them to make appealable findings of fact. In these respects, the proposal resembles the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which requires a

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10. For a more detailed discussion of the nature of CBW, see *infra* Part III.A and accompanying notes.

trial judge handling a securities class action to appoint as lead plaintiff the party with the largest financial stake in the litigation. This proposal has more potential than the PSLRA to improve the conduct of litigation, however. Only some investors put in charge of securities fraud class actions have the expertise, knowledge of the case, and financial interests needed to manage large lawsuits effectively. Under our proposal, all PMC members will have these attributes, for all will be successful lawyers with valuable client inventories.

This Article is structured as follows: Part II describes the MDL management practices used in three recent cases—*Guidant*, *Vioxx*, and *Zyprexa*—all of which endorse the “quasi-class action” doctrine. Part III characterizes the economic problem these control rules address—the optimal production of CBW—and critiques the manner in which the practices are applied. Part IV sets out our proposal and defends it against various objections. Part V concludes.

## II. THE QUASI-CLASS ACTION MODEL OF MDL MANAGEMENT

The cases we discuss in this Article involve large numbers of lawsuits—sometimes tens of thousands—which are consolidated for pre-trial litigation purposes in a single federal court.<sup>11</sup> These MDLs resemble class actions in one obvious respect: many plaintiffs claim to have suffered harm from a common action or course of conduct, such as the manufacture and sale of a pharmaceutical. But the MDLs we discuss are *not* class actions: they are not brought pursuant to Federal Rule of Civil Procedure 23; they are not certified under the Rule 23 standards of commonality, typicality, numerosity, adequacy of representation, predominance, and superiority; there is no representative plaintiff; and there is no attorney appointed by the court as counsel for the entire class. The MDLs simply aggregate individual lawsuits in a single court pursuant to 28 U.S.C. § 1407 for the sake of convenience and efficiency.

Like many other MDLs involving defective product claims, the MDLs we discuss are not class actions for good reason. They are mass tort cases in which differences in exposure, background health conditions, knowledge, and other factors preclude class certification

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11. A federal MDL typically includes all related cases filed in federal courts, but fails to catch cases that were filed in state courts from which they could not be removed. When significant state court litigation exists, inter-court coordination may occur. See Elizabeth J. Cabraser, *In Rem, Quasi In Rem, and Virtual In Rem Jurisdiction Over Discovery*, 10 SEDONA CONF. J. 253, 261 (2009) (“[F]ederal courts have increasingly recognized the great advantages of active federal/state court coordination, particularly in multi-jurisdictional mass torts.”).

under the standards set forth in *Amchem Products, Inc. v. Windsor*<sup>12</sup> and *Ortiz v. Fibreboard*,<sup>13</sup> cases in which the Supreme Court rejected attempts to resolve complex claims for personal injury due to asbestos exposure by means of a class action structure.<sup>14</sup> In some of these MDLs, the presiding judge denied a motion for class certification, establishing clearly that a class action could not proceed.<sup>15</sup>

Even so, the judges presiding over these MDLs referred to the proceedings as “quasi-class actions.” The attraction of the label is understandable. Judges have considerable power to manage class actions as they wish, and judges overseeing MDLs want the same powers. But the label is also dangerous. Class action procedures may not be necessary or appropriate in MDLs.

### A. MDL Basics and Three Selected Aggregations

In 1968, Congress authorized the JPML to transfer related cases pending in diverse federal courts to a single forum for pre-trial processing. The object was to “promote the just and efficient conduct of [the] actions”<sup>16</sup> by taking advantage of scale economies and creating opportunities for global settlements.<sup>17</sup> The JPML has been active ever since.<sup>18</sup> As of 2009, it “ha[d] considered motions for centralization in over 2,000 dockets involving . . . millions of claims . . . . These dockets encompass[ed] litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability

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12. 521 U.S. 591, 628 (1997).

13. 527 U.S. 815, 864 (1999).

14. The Federal Judicial Center found that the rate at which mass tort cases were certified as class actions for trial declined after *Amchem* and *Ortiz*, while the frequency of certification for purposes of settlement increased. THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS 4 (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/\\$file/amort02.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/$file/amort02.pdf).

15. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 461–63 (E.D. La. 2006).

16. 28 U.S.C. § 1407(a) (2007).

17. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (“One of the values of multidistrict proceedings is that they . . . afford a unique opportunity for the negotiation of a global settlement.”); Resnik, *supra* note 6, at 2149 (observing that “the MDL impulse to aggregate” reflects concerns “about waste and inefficiency”).

18. Not everyone is happy about this. For a thoughtful discussion of many problems associated with expanded use of JPML’s power to consolidate lawsuits, see Marcus, *supra* note 9.

cases; patent validity and infringement; antitrust price fixing; securities fraud; and employment practices.”<sup>19</sup>

The largest MDLs encompass thousands of cases filed by legions of attorneys.<sup>20</sup> Unfortunately, precise statistics are not available. Neither the JPML, the Administrative Office of the U.S. Courts, nor any other organization collects much data on MDLs.<sup>21</sup> We therefore constructed a picture of contemporary MDL management in the product liability area by studying three major MDLs.<sup>22</sup> We selected *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation* (“Guidant”), *In re Vioxx Products Liability Litigation* (“Vioxx”), and *In re Zyprexa Products Liability Litigation* (“Zyprexa”) for several reasons. First, all are products liability cases, the most common type of MDL.<sup>23</sup> The management of these cases should therefore reflect the wisdom of the federal judiciary accumulated over many MDLs and many years. Second, these MDLs arose recently and around the same time. About a year-and-a-half separates the earliest JPML transfer date (April 4, 2004—*Zyprexa*)

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19. United States Judicial Panel on Multidistrict Litigation, An Overview of the United States Judicial Panel on Multidistrict Litigation, [http://www.jpml.uscourts.gov/General\\_Info/Overview/overview.html](http://www.jpml.uscourts.gov/General_Info/Overview/overview.html) (last visited Nov. 12, 2009).

20. Lawyers with large inventories of signed clients often work in teams or groups.

21. JPML gathers some data and produces cursory reports, which are available at United States Judicial Panel on Multidistrict Litigation, Statistical Information, [http://www.jpml.uscourts.gov/General\\_Info/Statistics/statistics.html](http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html) (last visited Nov. 12, 2009). JPML also produces specialized reports for a fee. Neither the reports themselves nor an index of them is publicly available. E-mail from Ariana Estariel to Charles Silver (July 10, 2008, 02:51:00 CST) (on file with author). The JPML is also so short of staff that it cannot even produce a list of its data fields for an independent researcher to examine. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, New York University Law and Econ. Working Paper 6 n.18 (N.Y. Univ. Law & Econ. Working Papers, Paper No. 174, 2009), available at [http://lsr.nellco.org/nyu\\_lewp/174/](http://lsr.nellco.org/nyu_lewp/174/).

22. Fees have been managed in similar or identical ways in other cases. See, e.g., *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. M.05-CV-01699-CRB, 2006 WL 471782, at \*2–11 (N.D. Cal. Feb. 28, 2006).

23. The JPML currently divides cases into the following categories: air disaster, antitrust, contract, common disaster, employment practices, intellectual property, miscellaneous, products liability, sales practices, and securities. It has used other categories in the past. The categories do not necessarily track doctrinal lines. See Mark Merrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 CLASS ACTION LITIG. REP. 110, 111 n.4 (2007). Williams et al. report that “Only 20 percent of all MDL proceedings involve products liability claims, but the overwhelming majority of cases that are considered and transferred by the Panel involve such claims.” Margaret S. Williams, Richard A. Nagareda, Joe S. Cecil, Tom Willging, Kevin M. Scott & Emery G. Lee, *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation* 13 (Aug. 3, 2009) (unpublished manuscript, available at <http://ssrn.com/abstract=1443375>). More than 90 percent of cases in MDLs involve products liability claims. *Id.*

from the latest (November 7, 2005—*Guidant*).<sup>24</sup> The cases thus collectively provide a detailed snapshot of contemporary MDL management techniques. Third, all three cases are pure consolidations, meaning that none was handled as a class action. This simplifies the study of the MDL control rules because we need not account for complications that arise when (as sometimes happens) both aggregation procedures are employed concurrently.<sup>25</sup> Fourth, the judges who handled these cases, Judges Donovan Frank (*Guidant*), Eldon Fallon (*Vioxx*), and Jack Weinstein (*Zyprexa*), are the principal authors of the emerging doctrine defining MDLs as “quasi-class actions.” The cases therefore present an opportunity to assess a developing doctrinal innovation. Fifth, all three judges employed the control rules of greatest interest to us. Each judge appointed lead<sup>26</sup> and liaison<sup>27</sup> attorneys, set these lawyers’ compensation, and heavily regulated the fees all lawyers could charge. Finally, all three cases produced enormous settlements. *Vioxx* was the largest, at \$4.85 billion; *Zyprexa* came in second at \$700 million; and *Guidant* trailed the field at \$195 million. These are large sums, even by the standards of group litigation.

Although the three MDLs are quite similar, they differ in some interesting respects. First, the judges handling them have different amounts of experience with MDLs. Judge Weinstein is a seasoned veteran, with eight terminated MDLs under his belt and two active MDLs on his docket.<sup>28</sup> Judges Frank and Fallon, on the other hand,

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24. The *Vioxx* litigation was transferred on February 16, 2005. *In re Vioxx Prods. Liab. Litig.*, MDL Docket No. 1657, 2007 WL 3354137, at \*4 (E.D. La. Nov. 9, 2007).

25. For a case exemplifying these complications, see *In re Diet Drugs Prods. Liab. Litig.*, *supra* note 2. For discussions of the differences between aggregate procedures, see, for example, Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1773–84 (2005); Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991).

26. Lead Counsel handles “substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221; *see also id.* § 10.224 (discussing the court’s role in managing and overseeing counsel); *id.* § 22.62 (regarding the organization and designation of counsel by the court).

27. Liaison Counsel, usually a local attorney, handles “administrative matters, such as communications between the court and other counsel . . . , convening meetings of counsel, advising parties of developments, and . . . managing document depositories and . . . resolving scheduling conflicts.” MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

28. In the world of complex litigation, Judge Weinstein is a living legend and a continuing source of inspiration to many, including us. Many of his cases have become the focus of scholarly

are relative newcomers. Neither has completed a single MDL, although both have handled complex lawsuits of other types. The proceedings thus present an opportunity to see how closely less seasoned judges hew to the path blazed by their senior colleague. As readers will see, although there is a strong tendency to follow the leader, there also are important points at which Judges Frank and Fallon have struck out on their own.

Second, *Zyprexa*, the earliest of the three MDLs, involved claimants who were psychologically handicapped. The claimants used *Zyprexa* because they had schizophrenia or bipolar disorder. One might therefore reasonably believe the *Zyprexa* claimants had a special need for protection, including perhaps protection from the lawyers they retained. Feelings of paternalism certainly and strongly colored Judge Weinstein's conduct of the case. No similar basis for concern existed in *Guidant* or *Vioxx*, as no mental illness or like deficiency afflicted the claimants in these MDLs. The *Guidant* and *Vioxx* claimants suffered serious injuries, including heart attacks and strokes; they were, however, typical plaintiffs. Many tort cases involve plaintiffs with devastating injuries, yet these plaintiffs are deemed responsible adults and are treated as such.<sup>29</sup> We know of no physical basis on which to distinguish the *Guidant* and *Vioxx* claimants from other plaintiffs with serious injuries.

Third, although all three MDLs encompassed large numbers of claimants, the volume of litigation varied greatly. About 4,000 lawsuits alleging injuries from defective defibrillators were pending when *Guidant* settled.<sup>30</sup> The *Zyprexa* settlement resolved about 8,000 cases, approximately 75 percent of the litigation faced by Eli Lilly, the manufacturer.<sup>31</sup> By comparison, the withdrawal of *Vioxx* from the market triggered an avalanche of lawsuits. "As of December 2007, there were approximately 26,600 *Vioxx* cases involving 47,000 individual 'plaintiff groups' . . . . Approximately 25,800 claimants were in the federal MDL and 15,850 in proceedings in the New Jersey

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articles and books. See, e.g., PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

29. See, e.g., David M. Studdert et al., *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 *NEW ENG. J. MED.* 2024, 2026 (2006) (studying random sample of medical malpractice cases and finding that 80 percent involved injuries that caused significant or major disability or death).

30. Gordon Gibb, *Guidant Settles 4,000 Claims, Avoids Trial - For Now*, *LAWYERSANDSETTLEMENTS.COM*, July 30, 2007, available at <http://www.lawyersandsettlements.com/articles/01194/guidant-settles.html>.

31. Alex Berenson, *Lilly to Pay \$690 Million in Drug Suits*, *N.Y. TIMES*, June 10, 2005, at C1, available at <http://www.nytimes.com/2005/06/10/business/10lilly.html?scp=1&sq=lilly%20to%20pay%20%24690&st=cse>.

Superior Court; an additional 14,100 claimants had entered into Tolling Agreements with Merck. This indicates a total of 60,100 potential claims in the settlement as of December 2007.”<sup>32</sup>

In theory, differences in size could affect judges’ behavior. Judges may give plaintiffs’ attorneys a freer hand in smaller MDLs, which involve fewer lawyers. Judges may also reduce non-lead lawyers’ fees less in smaller MDLs because these proceedings generate fewer economies of scale. Whether these differences or others influenced the judges remains to be seen.

### *B. Selection and Empowerment of Managerial Attorneys*

The need to centralize control arose in all three MDLs. However, instead of asking the claimants’ attorneys to create a unified governance structure, all three judges did so themselves.<sup>33</sup> Each appointed a small number of lead and liaison attorneys to an executive committee and a larger number of attorneys to a Plaintiffs’ Steering Committee (“PSC”).<sup>34</sup> As the cases progressed, each judge also created additional committees for specific purposes, such as conducting settlement negotiations or coordinating with attorneys handling state court cases. Most often, the members of these specialized committees were also lead or liaison attorneys or PSC members. Sometimes, however, the judges appointed lawyers who previously held no formal responsibilities. This was true of the *Vioxx* Fee Allocation Committee and the *Vioxx* Negotiating Committee, both of which encompassed attorneys with state court cases who had not previously been involved in the MDL.

The judges selected lead attorneys from pools of volunteers. They did not explain their choices, even though, as discussed below, some of their selections were puzzling. The judges were free to pick the lawyers they wanted because the standards governing appointments of attorneys to managerial positions are extremely weak and the risk of reversal is essentially nil. There appears to be no reported case in which a disappointed lawyer appealed an unfavorable appointment decision from an MDL judge, let alone one in which an

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32. Kritzer Aff. ¶ 62, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Mar. 31, 2009) (citing Joint Report No. 30 of Plaintiffs’ and Defendants’ Liaison Counsel 8 (Dec. 12, 2007)).

33. The *Manual for Complex Litigation* encourages judges to impose governance structures. See MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.22, 10.224, 22.62.

34. In *In re Zyprexa*, Judge Weinstein created two PSCs as a result of settlements that required restructuring the plaintiffs’ control structure. See *Zyprexa MDL Judge Gives A Bit More In Fees, But Denies Multipliers, Disbursement*, 13-12 MEALEY’S EMERGING DRUGS & DEVICES 7 (2008) (“A second PSC is now representing plaintiffs not included in the initial settlement with Lilly.”).

appointment order by an MDL judge was reversed.<sup>35</sup> The *Manual for Complex Litigation* advises MDL judges to consider lawyers' qualifications, competence, interests, resources, and commitment, but these criteria are so vague that, as a practical matter, judges appoint the lawyers they want for reasons known only to them.<sup>36</sup>

In theory, the dearth of challenges to judicial appointments could indicate that lawyers are satisfied with judges' selections. In fact, anyone with experience in MDLs knows this is not so. Lawyers relegated to non-lead positions often chafe mightily. They refrain from appealing partly because they do not wish to alienate MDL trial judges, who have considerable power to make life unpleasant for them.<sup>37</sup> Also, as a practical matter, the option of appealing is closed. The legal standards are vague, the facts concerning lawyers' abilities are inherently subjective, and judges usually appoint well-qualified lawyers to lead positions. Consequently, a lawyer denied a lead position would likely find an abuse of discretion impossible to prove.

Once chosen, lead attorneys receive plenary control over MDLs. For example, the order Judge Frank entered in *In re Guidant Corp.* empowered the lead attorneys to:

Determine . . . and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) . . . the position of the Plaintiffs on all matters arising during pretrial proceedings . . . ; . . . [c]oordinate the initiation and conduct of discovery on behalf of Plaintiffs . . . ; . . . [c]onduct settlement negotiations on behalf of Plaintiffs . . . ; . . . [d]elegate specific tasks to other counsel in a manner to ensure that pretrial preparation for the Plaintiffs is conducted effectively, efficiently, and economically; . . . [e]nter into stipulations, with opposing counsel, necessary for the conduct of the litigation; . . . [p]repare and distribute to the parties periodic status reports; . . . [m]onitor the activities of co-counsel to ensure that schedules are met and unnecessary expenditures of time and funds are avoided; . . . [p]erform such other duties as may be incidental to proper coordination of Plaintiffs' pretrial activities or authorized by further Order of the Court; and . . . [s]ubmit, if appropriate, additional committees and counsel for designation by the Court.<sup>38</sup>

By putting particular attorneys in charge of these matters, Judge Frank relegated other attorneys to more passive roles. He also created relationships of dependency. A group of disabled attorneys had to rely on a coterie of litigation managers to develop their clients' cases. The disabled lawyers' clients also lost control. They were at the mercy of lawyers they never hired and could not discharge.

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35. This is based on a Westlaw search.

36. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.224.

37. See *infra* note 118 (discussing the penalties Judge Fallon imposed on lawyers who challenged his handling of fees in the *Vioxx* MDL).

38. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2005 WL 3704679, at \*1 (D. Minn. Dec. 20, 2005).

The *Manual for Complex Litigation* recognizes the vulnerable position of disabled lawyers<sup>39</sup> and their clients. To protect them, it subjects lead attorneys to a fiduciary duty, requiring them to “act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.”<sup>40</sup> The injunction would be unnecessary if the interests of managerial lawyers, non-lead lawyers, and claimants were always the same. But their interests may conflict, and often do. As shown below, lead lawyers frequently encounter opportunities to enrich themselves at others’ expense. The fiduciary duty requires them to “act . . . in the interests of all parties and parties’ counsel” in these situations.<sup>41</sup>

### C. *The Common Fund Doctrine as Applied to MDLs*

Given that MDL judges can appoint managerial attorneys, it may seem a foregone conclusion that they can compensate managerial attorneys too. Judges certainly think so: they often comment that the power to appoint would be “illusory” without the power to remunerate.<sup>42</sup>

The source of an MDL judge’s power to remunerate is not obvious, however.<sup>43</sup> The MDL statute says nothing about fees.<sup>44</sup> The federal class action rule provides no authority either. It permits a

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39. We use the labels “non-lead lawyer,” “limited lawyer,” and “disabled lawyer” interchangeably.

40. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22.

41. *Id.*

42. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at \*5 (D. Minn. Mar. 7, 2008) (memorandum opinion and amended order regarding attorney’s fees) (quoting *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1005, 1016 (5th Cir. 1977)); see also *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 99-20593, 2002 WL 32154197, at \*17 (E.D. Pa. Oct. 3, 2002) (“As a corollary to this appointment, the court must be permitted to compensate fairly the attorneys who serve on such a committee.”).

43. An interesting question, beyond the scope of this article, is whether federal or state law regulates fee awards in MDLs containing cases over which the federal courts have jurisdiction based on diversity of citizenship. Because fee awards affect substantive rights, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245–46 (1975), one might contend, per *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and subsequent cases, that state law applies. However, this could pose serious administrative difficulties in MDLs, which often draw cases from many states. One might therefore contend that this is an appropriate context in which to develop a federal common law of procedure. MDL judges seem to have reached this conclusion, though without arguing for it explicitly.

44. One could argue that the statute empowers judges to create a federal common law of fees. *Cf. Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 450–51 (1957) (inferring federal courts’ power to fashion federal law for the enforcement of collective bargaining agreements). Thus far, no federal court has made this argument.

federal judge to grant fee awards “that are authorized by law.”<sup>45</sup> The question at hand, which Rule 23 does not answer, is whether any “law” authorizes fee awards to lead attorneys in MDLs.

Judges contend that the common fund doctrine authorizes fee awards to lead lawyers in MDLs.<sup>46</sup> Fee awards in class actions rest on this doctrine.<sup>47</sup> But MDLs are not class actions, and on close inspection one sees that, for many reasons, the attempt to invoke the common fund doctrine in MDLs must fail.

The *Restatement (Third) of Restitution and Unjust Enrichment* agrees. It observes that the “predominant rationale [for fee awards in consolidations] is not unjust enrichment but administrative convenience.”<sup>48</sup> This comment goes to the heart of the matter. The common fund doctrine applies only when claimants are unjustly enriched. To be unjustly enriched, however, more is required than that claimants benefit from the efforts of others—much more. People often receive spillover benefits produced by others—called positive externalities—which the law of restitution allows them to enjoy free of charge. The few contexts in which restitution is required meet a host of other requirements. When one examines these requirements, it is clear that the common fund doctrine does not apply to MDLs.

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

46. See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (setting fee caps at 35 percent of client’s recovery for attorneys involved in the MDL, subject to individual increase or decrease at discretion of Special Masters); see also *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 607 (E.D. La. 2008) (awarding 32 percent of common fund to attorneys involved in the *Vioxx* MDL); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at \*19 (capping fee awards for attorneys in this MDL at 20 percent, subject to individual increase by petition to the Special Masters). Some commentators agree. See, e.g., Mary Katherine Bedard, *Attorney Fee Awards and the Common Fund Doctrine: Hands in the Plaintiffs’ Pockets?*, PLAINIFF MAG. 1, 2 (2008) (“It is without question that a court has the power to award fees from a common fund to designated counsel who performed tasks on behalf of the group.”); Mark G. Boyko, *The Role of Judges and Special Masters in Post-Settlement Claims Administration*, 11 MEALEY’S EMERGING DRUGS & DEVICES 33 (2006) (“While MDL plaintiffs are represented by counsel of their choosing, and likely have contingency fee agreements with them, those retail attorneys and their clients benefit collectively from the work of those on the plaintiffs steering committee, and, therefore, owe at least some portion of their settlement share to the leading plaintiffs counsel who oversaw uniform discovery, argued motions and otherwise protected the interest of all cases in the MDL.”); 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, 430 (“At the conclusion of such litigations, when attorney fee payments come into play, the equitable common fund doctrine enables judges to supervise the payment of fees and costs to attorneys.”).

47. For a detailed examination of the restitutionary basis for fee awards in class actions, see Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656 (1990–1991); see also *Alyeska Pipeline*, 421 U.S. at 245–46 (describing origins and justification for the common fund doctrine).

48. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004).

## 1. The Enrichment Requirement

One condition for restitution is that after receiving benefits produced by others, claimants must be better off than they would have been on their own. This requirement is easily met in class actions that yield payments, for without the class action many, most, or all class members would have recovered nothing. As the Supreme Court observed in *Amchem*:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.<sup>49</sup>

Class actions typically aggregate claims worth little or nothing in conventional lawsuits.

MDLs have a different, and even contrary, core purpose. Every claimant caught up in an MDL has a claim large enough to warrant a conventional lawsuit. In fact, every claimant has already sued. Every claimant also has an attorney who is aggressively pushing his or her case toward resolution in a favorable court. If the primary purpose of the class action is to remedy a litigation drought, the purpose of an MDL is to deal with a litigation flood. When a torrent of lawsuits threatens to overwhelm the courts, judges protect their limited resources by diverting the flow into an MDL. After all, the MDL's core purpose is "administrative convenience," as the *Restatement* rightly observes.<sup>50</sup> But the predictable effect of such "convenience" is to make plaintiffs worse off by denying them the advantages of decentralized litigation under the control of their own attorneys.

"Commentators generally agree that MDL practice favors the defense," as Judge William G. Young observed in *DeLaventura v. Columbia Acorn Trust*.<sup>51</sup> This is partly because "MDL practice is slow, very slow."<sup>52</sup> Plaintiffs usually favor early trials. Defendants prefer to put off the day of reckoning. By forcing plaintiffs to incur substantial delays, MDLs reduce the value of their claims.

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49. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

50. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b. (Tentative Draft No. 3, 2004); see also *Silver*, *supra* note 47, at 664–65 (setting out conditions for the application of the common fund doctrine in class actions); *Silver*, *supra* note 25, at 497–500 (explaining differences between class actions and consolidations that make it difficult to apply the common fund doctrine in the latter).

51. 417 F. Supp. 2d 147, 155 (D. Mass. 2006).

52. *Id.* at 150.

A bigger problem is that MDL judges cannot try cases transferred to them. They can only prepare these cases for trial.<sup>53</sup> This limitation on MDL courts declaws plaintiffs in transferred cases by depriving them of the weapon that pressures a defendant to pay a reasonable amount in settlement: the threat of forcing an exchange at a price set by a jury.<sup>54</sup> The standard economic model of settlement implies this result directly.<sup>55</sup> Under this model, parties settle for the plaintiff's expected gain at trial because the plaintiff can credibly threaten the defendant with an equivalent loss. A plaintiff who cannot get to trial can threaten a defendant only with additional litigation costs or other secondary costs. As Judge Young wrote:

Once trial is no longer a realistic alternative, bargaining shifts in ways that inevitably favor the defense. After all, a major goal of nearly every defendant is to avoid a public jury trial of the plaintiff's claims. Fact-finding is relegated to a subsidiary role, and bargaining focuses instead on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims.<sup>56</sup>

In theory, a plaintiff caught up in an MDL can threaten a defendant with a trial in the original forum. Once a case is fully prepared, an MDL judge is supposed to send it back to the transferor court. In fact, however, remand is exceedingly unlikely. “[I]t is almost a point of honor among transferee judges . . . that cases . . . shall be settled rather than sent back to their home courts for trial.”<sup>57</sup> Even Judge Fallon, a proponent of MDLs, admits that “the centralized forum can resemble a ‘black hole,’ into which cases are transferred

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53. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

54. The same problem arises in so-called “settlement-only classes,” where returns are often meager because class counsel cannot credibly threaten defendants with class-wide judgments at trial. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 399 (2000) (arguing that claimants and class counsel are “disarmed” in settlement-only classes because they cannot threaten the defendant with a class-wide judgment at trial). The U.S. Supreme Court made the same point in *Amchem Products, Inc. v. Windsor*, pointing out that a consequence of “permitting class designation despite the impossibility of litigation” would be that “class counsel . . . would be disarmed.” 521 U.S. 591, 621 (1997).

55. John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

56. *DeLaventura*, 417 F. Supp. 2d at 155.

57. *Id.* at 150, 152. An empirical study conducted by the Federal Judicial Center reports that 82.5 percent of all non-asbestos products liability cases closed in the MDL courts to which they were referred. Emery G. Lee, Margaret Williams, Richard A. Nagareda, Joe S. Cecil, Thomas E. Willging & Kevin M. Scott, *The Expanding Role of Multidistrict Consolidation in Federal Civil Litigation: An Empirical Investigation* 48 (Aug. 3, 2009), available at <http://ssrn.com/abstract=1443375>. Although this implies an 11.5 percent remand rate, the figure is misleading. Six MDLs account for the vast majority of the remands. *Id.* at 17–18. Unless an entire MDL fails, a plaintiff involved in an MDL has little chance of obtaining a remand.

never to be heard from again.”<sup>58</sup> Being stuck forever in a court that cannot preside over a trial and that wants a global settlement at all costs, plaintiffs caught up in MDLs have little bargaining leverage. No wonder “[d]efendants generally want centralization; plaintiffs generally don’t.”<sup>59</sup>

## 2. The Implied Consent Requirement

Differing purposes also explain why claimants can opt out of class actions but not MDLs. Allowing opt-outs in class actions enables class members with viable claims to proceed separately when this strategy is best for them. It is therefore consistent with the core purpose of the class action, which is to help claimants who are better off as part of a group. By contrast, allowing opt-outs would defeat the core function of the MDL, which is to conserve resources by consolidating as many lawsuits as possible in a single forum. Because MDLs disadvantage claimants, many would head for the exits if opt-outs were allowed.

The bar on opt-outs also undermines attempts to apply the common fund doctrine in MDLs, as the *Restatement (Third) of Restitution and Unjust Enrichment* observes.<sup>60</sup> By voluntarily remaining in a class when given the right to opt out, class members lend a degree of consent to the requirement of paying fees. “The class members’ right . . . to opt out . . . tends to resolve, insofar as practicable, remaining objections on the score of forced exchange.”<sup>61</sup> No implication of consent arises in MDLs because no opt-out right exists.<sup>62</sup>

## 3. The Impracticability of Bargaining Requirement

The law of restitution bars forced compensation when producers and recipients can bargain directly. When bargaining is

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58. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

59. *DeLaventura*, 417 F. Supp. 2d at 156.

60. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. b (Tentative Draft No. 3, 2004) (“By comparison with [fee awards in] class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court.”).

61. *Id.* However, the idea of implied consent appears largely fictional in this context, given that most class members fail to opt out because of simple inertia.

62. Silver, *supra* note 25, at 499.

practicable, producers who wish to be paid for their services must negotiate for payments.<sup>63</sup>

In class actions, bargaining normally is impracticable. Claims are too small to justify the cost of negotiating, and claimants' identities and whereabouts are unknown. The numerosity requirement highlights this difficulty. As the *Restatement* explains:

The fundamental premise of class certification—that the class is too numerous to permit individual joinder—tends to support a critical element of the restitution claim in these circumstances, namely, that the claimant was justified in proceeding in the absence of contract with the defendant (here, the individual class member or common-fund “beneficiary”).<sup>64</sup>

No analogue to the numerosity requirement applies to MDLs. Nor, if one existed, would it be met. All plaintiffs' names and addresses are known because all have sued. The names and addresses of all lawyers are known too, making it practicable for lead lawyers and limited lawyers to bargain face-to-face.<sup>65</sup>

A corollary of the impracticability of bargaining requirement is the doctrine that a provider who could have negotiated with all beneficiaries but chose to negotiate only with some is fully compensated when in receipt of the contracted-for fee the willing beneficiaries agreed to pay. As the *Restatement* observes:

A further difficulty [with claims for common fund compensation] stems from the fact that the lawyer's involvement . . . usually has a contractual basis from the outset, in the agreement with the clients by whom the lawyer is retained. The lawyer's subsequent claim to recover an additional fee from nonclients, over and above what the clients have agreed to pay, will therefore encounter the objection that there is no unjust enrichment if the [lawyer] has been compensated, pursuant to contract, for the performance in question; no entitlement to restitution in respect of incidental benefits resulting from compensated employment that the claimant is free to undertake or to decline.<sup>66</sup>

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63. “The law's strong preference for contractual over restitutionary liability accounts for the general rule by which a person who seeks compensation for benefits conferred on another . . . must ordinarily found the claim on an agreement with the recipient.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. f (Tentative Draft No. 3, 2004).

64. *Id.* § 30 cmt. b (“The fundamental premise of class certification—that the class is too numerous to permit individual joinder—tends to support a critical element of the restitution claim in these circumstances, namely, that the [fee] claimant [here, class counsel] was justified in proceeding in the absence of contract with the defendant (here, the individual class member or common-fund ‘beneficiary’).”).

65. MDLs may create some bargaining impediments that do not exist in their absence. For example, in an MDL, lead lawyers and limited lawyers are caught up in a bilateral monopoly. Once appointed by a court, lead lawyers are the only sellers of CBW and limited lawyers are the only buyers. Efficient exchanges are difficult to negotiate in this environment. Before an MDL is created, this problem does not exist. Any lawyer can offer to provide CBW, and any lawyer can agree to buy it.

66. *Id.* § 30 cmt. a.

The intuition is simple. If the fees the signed clients agreed to pay were insufficient to cover the work required to represent them, the lawyer had the option of negotiating to receive additional fees from other claimants or attorneys. Because the lawyer failed to do that, an inference arises that the signed clients' fees were large enough to justify the work required to represent them. This weakens the case for forcing supplemental payments.

In MDLs, the possibility of forming larger litigation groups voluntarily is clear. Many or most plaintiffs participate in such groups. For example, about two thousand clients were represented by lawyers belonging to the Vioxx Litigation Consortium ("VLC"), a group of cooperating attorneys. Other lawyers also represented large client groups. Nothing prevented the lawyers from joining forces to create even bigger groups. In fact, enormous coalitions sometimes form. In *In re Polybutylene Plumbing Litigation*,<sup>67</sup> forty-nine law firms collectively represented about thirty-seven thousand plaintiffs, with a single firm taking the helm on most claimants' behalf. The firms shared fees pursuant to contractual referral fee agreements. When mergers fail to occur, then, the logical inference is that the lawyers see too little advantage. They expect the groups they represent separately to generate sufficient recoveries and fees to justify the work.

#### 4. The Passive Beneficiary Requirement

The common fund doctrine generally disallows demands for forced payments from claimants who hire their own attorneys.<sup>68</sup> Only

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67. 23 S.W.3d 428 (Tex. App.-Houston [1 Dist.] 2000). The famous MER/29 litigation provides another example of managing mass litigation contractually. See Paul D. Rheingold, *The MER/ 29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 123 (1968) (describing mass defective products litigation in which 288 lawyers or law firms formed a group to finance discovery and other litigation activities).

68. See, e.g., *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 770 (9th Cir. 1977) ("[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney's fees."); *id.* at 771–72 ("[T]he reimbursement of the representative attorneys beyond the terms of their individual contracts was limited to that portion of the fund allocated to beneficiaries which had not participated in the suit [by hiring attorneys of their own]."); *Nolte v. Hudson*, 47 F.2d 166, 168 (2d Cir. 1931) ("[W]here [litigants] are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other [litigants].") (citation omitted); *Blue Cross and Blue Shield of Alabama v. Freeman*, 447 So. 2d 757, 759 (Ala. Civ. App. 1983) (The common fund doctrine does not apply to "one who joins as a party in the suit, assists in the prosecution or contributes toward the expense of the recovery of the fund . . ."); *Valder Law Offices v. Keenan Law Firm*, 129 P.3d 966, 972 (Ariz. Ct. App. 2006) (holding common benefit fees could not be assessed on party "[b]ecause of the presence of counsel, actively involved on behalf of [the client]"); *Draper v. Aceto*, 33 P.3d 479, 484 (Cal. 2001) ("[A] court may award attorney's fees from a common fund to an attorney who has succeeded in preserving a fund when equity requires it," but . . . 'this cannot be done when there are multiple

claimants who sit on their hands, as absent class members normally do, can be made to pay. As the *Restatement (Third) of Restitution and Unjust Enrichment* explains:

Common-fund recovery is rarely available from a party who has retained and paid his own legal counsel. While the difficulty of comparing the lawyers' respective contributions is presumably part of the explanation, the more influential fact is simply that such a party cannot be characterized as a passive recipient of benefits provided by others.<sup>69</sup>

There are no “passive recipient[s] of benefits” in MDLs because all claimants are outfitted with lawyers.<sup>70</sup>

The passivity requirement plays two roles. First, it identifies free-riders, i.e., people who could help bear the cost of producing a common benefit but choose not to, knowing they will enjoy the benefit whether they contribute or not. Obviously, claimants who hire attorneys are not free-riders. They agree to bear the cost of producing their gains. Nor are claimants' disabled lawyers free-riders. The lawyers do not choose to refrain from performing CBW when offered the chance. They are prevented from doing so by MDL judges and lead lawyers, who force them to the sidelines.

Second, the passivity requirement frees judges from having to decide how much any individual lawyer contributed to the outcome. Entirely lost in the quasi-class action cases—where judges may

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beneficiaries of the fund and all—or substantially all—are represented by various counsel.’ ” (quoting *Estate of Korthe*, 88 Cal. Rptr. 465, 466 (Cal. Ct. App. 1970)); *Steinberg v. Allstate Ins. Co.*, 276 Cal. Rptr. 32, 34 (Cal. Ct. App. 1990) (“The [common fund] doctrine does not apply . . . when each party has retained counsel, and each counsel actively prosecuted the case or actively participated in creation of the settlement.”); *Estate of Korthe*, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970) (explaining that the accepted rationale for common-fund recovery “applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands”); *Means v. Montana Power Co.*, 625 P.2d 32, 37 (Mont. 1981) (“[O]nly inactive or passive beneficiaries should be forced to bear the costs of litigation under the common fund doctrine.”); *Estate of Kierstead*, 237 N.W. 299, 300 (Neb. 1931) (denying recovery, notwithstanding “substantial benefit” conferred on defendants, where claimants “were notified that the defendants had employed another as their attorney”); *Hurst v. Cavanaugh*, No. 90-J-7, 1992 WL 208918, at \*5 (Ohio Ct. App. Aug. 21, 1992) (holding that common fund doctrine cannot apply to persons represented by counsel who were active in the litigation); *Traveler’s Ins. Co. v. Williams*, 541 S.W.2d 587, 590 (Tenn. 1976) (The common fund doctrine “is never applied against persons who have employed counsel on their own account to represent their interests.”); *DuPont v. Shackelford*, 369 S.E.2d 673, 677 (Va. 1988) (explaining there are no “free rides” where all parties are represented by counsel); see also Jean F. Rydstrom, Annotation, *Construction and Application of “Common Fund” Doctrine in Allocating Attorneys’ Fees Among Multiple Attorneys Whose Efforts Were Unequal in Benefiting Multiple Claimants*, 42 A.L.R. FED. 134 § 2b (2005) (explaining that the common benefit doctrine does not “permit the allowance of fees from a fund created where all parties interested are represented by counsel of their own selection, each counsel in such case being required to look to his own client for compensation”) (emphasis added).

69. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. e (Tentative Draft No. 3, 2004).

70. *Id.*

oversee the division of fees among more than one hundred law firms—is that when many hands contribute to a successful result, courts of equity typically refuse to ask how much each person contributed. The common fund doctrine reflects this traditional constraint. It applies only when “the beneficiary, whether in person or by counsel, has made *no significant contribution* to the transaction by which the common fund is created, preserved, or enlarged.”<sup>71</sup> When everyone contributes something of importance, no one receives restitution from anyone else.

In class actions, the “many hands” problem rarely arises. Most class members are entirely passive. They do not have lawyers and, *a fortiori*, they do not have lawyers who contribute in any significant way to the eventual result. Class counsel does all the work and deserves all the credit.

In MDLs, by contrast, “[t]he common benefit lawyers simply do not do 100% of the legal work.”<sup>72</sup> All lawyers contribute to the final result. Although lead attorneys understandably cast themselves as heroes, non-lead attorneys provide essential services too.<sup>73</sup> To see this, one need only consider the sources of bargaining leverage plaintiffs have in MDLs, perhaps the most significant of which are the number of claims and their quality. Non-lead lawyers help create this leverage by identifying and activating potential clients, evaluating their claims, contracting with them, and filing lawsuits for them. For example, the VLC reviewed 30,000 potential claimants, of whom it agreed to represent only 2,000. The screening process consumed 126,000 work hours by staff and paralegals, 10,000 hours by nurse practitioners, 23,300 hours by attorneys, and 850 hours by physicians and other medical experts. The VLC’s out-of-pocket cost was \$13.5 million.<sup>74</sup> It is impossible to know how much the VLC’s efforts strengthened the position of the plaintiffs in the negotiations that produced the global settlement, but they clearly added something.

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71. *Id.* § 30(3)(c) (emphasis added).

72. William B. Rubenstein, *On What A “Common Benefit Fee” Is, Is Not, and Should Be*, 3 CLASS ACTION ATT’Y FEE DIG. 87, 89 (2009).

73. Prevailing practices in MDLs recognize this by reimbursing many non-lead lawyers for expenses incurred in connection with services deemed to be of common benefit to all claimants. See Pre-Trial Order No. 51, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Sept. 23, 2009), available at <http://vioxx.laed.uscourts.gov/Orders/PTO51.pdf> (same); Transcript of Status Conference at 43, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Sept. 17, 2009) (on file with author) (indicating that 112 lawyers applied for reimbursement of common benefit costs).

74. Affidavit of Walter Umphrey, Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingency Fees and Alternatively for Entry of Judgment at 31, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Dec. 10, 2008).

Non-lead lawyers may also create bargaining leverage by keeping clients out of MDLs. This strategy, which forces defendants to do battle on several fronts, preserves the possibility of obtaining trial verdicts in state courts chosen by plaintiffs. For example, by keeping their clients' cases *out* of the *Vioxx* MDL, non-lead lawyers forced Merck to defend thirteen trials "before juries in state courts in New Jersey, California, Texas, Alabama, Illinois, and Florida."<sup>75</sup> Some of these trials produced enormous verdicts, pressuring Merck to pay more in settlement.<sup>76</sup>

Non-lead lawyers also provide valuable services that are more mundane. They develop the history of each client's exposure to or use of a product and the details of each client's injury. In *Vioxx*, for example, the MDL court required plaintiffs claiming cardiovascular injury to provide medical information and to authorize the release of medical records. Disabled lawyers helped clients with these tasks. Disabled lawyers must also ensure that lead attorneys obtain discovery and brief legal issues bearing on unique aspects of their clients' claims, such as causation of illnesses that are relatively uncommon. Finally, they also advise clients about the costs and benefits of settling and help those who wish to settle to file claims.

Because many hands contribute to the success of MDLs, doling out shares in common fund fee awards is unavoidably messy. Each fee-seeking attorney casts himself or herself in the best possible light and minimizes the contributions of others.<sup>77</sup> Matters are even worse when, as often happens, a global settlement resolves cases pending in diverse courts, for judges may then have to evaluate contributions made by lawyers in other forums.

As stated, the law of restitution generally refuses to ask judges to allocate credit equitably. It may authorize transfers from a free-riding lawyer to a hardworking attorney, but not from one hardworking attorney to another. This is true even if one lawyer

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75. Fallon, Grabill & Wynne, *supra* note 58, at 2335.

76. See, e.g., *Vioxx Jury Adds \$9 Million in Punishing Merck* (National Public Radio broadcast Apr. 11, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5336787&ps=rs> (reporting that a New Jersey jury added \$9 million in punitive damages to a \$4.5 million compensatory award in favor of a *Vioxx* plaintiff); Aaron Smith, *Jury: Merck negligent*, CNN MONEY, Aug. 22, 2005, <http://money.cnn.com/2005/08/19/news/fortune500/vioxx/index.htm> (reporting that a Texas jury ordered Merck to pay \$253 million in compensatory and punitive damages to a *Vioxx* plaintiff).

77. Fee applications always make attorneys' efforts seem heroic. For a standard example of the genre, see Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses at 52–66, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Jan. 20, 2009), and see also Curtis & Resnik, *supra* note 46, at 448, who state that "assessing the value of contributions of a multitude of attorneys to a particular outcome is very difficult."

“performed the greater part of the work.”<sup>78</sup> The massive allocation schemes found in MDLs today—schemes that transfer funds among tens or hundreds of lawyers, each of whom may have made important contributions—go well beyond the traditional bounds of equity. MDL judges are presiding over sizeable business ventures, not doling out restitution.

The seminal case supporting the application of the common fund doctrine in MDLs, *In re Air Crash Disaster at Florida Everglades on December 29, 1972* (“*Everglades Crash*”),<sup>79</sup> does not justify these reallocations. The Fifth Circuit’s decision to affirm an award of about \$270,000 turned on two facts: the trial judge allowed all lawyers with cases in the MDL to help develop the litigation (i.e., no lawyers were disabled), and only lawyers who elected to free-ride when given the opportunity to help were required to pay. “[T]he [trial] court . . . made clear . . . that all counsel were free to participate in discovery”; the lawyers taxed to pay the lead attorneys “conceded” that they allowed others to do the work.<sup>80</sup> “The district judge . . . exclud[ed] . . . attorneys who continued to be active” in the litigation from having to pay.<sup>81</sup> Limiting the tax to lawyers “who elected not to participate in the pre-trial activities” made the forced exchange more palatable and limited the burden to true free-riders.<sup>82</sup>

*Everglades Crash* provides little authority for modern MDL practices. Today, judges prevent many or most lawyers from helping with discovery or performing other CBW. They then tax all lawyers—including those who provide no, little, or much CBW—to create a fund from which common benefit fees can be paid. They then decide which lawyers provided how much CBW (including lawyers who performed beneficial work outside an MDL, such as by trying stand-alone cases to verdicts) and how much each lawyer’s effort is worth. The *Everglades Crash* trial judge addressed a simple problem of unjust enrichment created when two lawyers voluntarily chose to free-ride instead of rolling up their sleeves and pitching in.<sup>83</sup> Today’s MDL judges run businesses which they design and control, allocating responsibilities and rewards as they deem appropriate.<sup>84</sup>

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78. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30(3)(c), cmt. e, illus. 21 (Tentative Draft No. 3, 2004).

79. 549 F.2d 1006, 1014–15 (5th Cir. 1977) [hereinafter *Everglades Crash*].

80. *Id.* at 1009.

81. *Id.* at 1019.

82. *Id.* at 1020.

83. *Id.* at 1011.

84. Despite the limited precedential value of *Everglades Crash*, the 8 percent fee awarded by the trial judge appears to be taking on a life of its own. In the *Vioxx* MDL, also pending in the

*D. Using Control of an MDL to Increase One's Compensation*

As explained, lead attorneys are fiduciaries who must put the interests of claimants and non-lead lawyers ahead of their own. Recently, however, lead attorneys have used their control of settlement negotiations to increase their compensation. They have built favorable fee and cost-reimbursement provisions into global settlements and have required claimants and non-lead attorneys to waive any objections they may have to these provisions as a condition for participating. Judges know about this behavior but have not condemned it. Some have even approved these self-enriching acts.

To understand the lead attorneys' strategy, some background is required. Seeking a firmer foundation for fee awards in MDLs, some judges required limited lawyers to sign fee transfer agreements. The agreements required that moneys be set aside from claimants' settlement payments for common benefit fees. The amount set aside was usually small, such as 2 percent for common benefit fees and 1 percent for reimbursement of costs. The agreements also recited the limited lawyers' desire to be "legally bound."<sup>85</sup>

From almost every angle, the strategy of using imposed agreements to legitimate fee and cost transfers was poorly conceived. The most obvious problem was that the exchanges were forced. Disabled lawyers could neither choose the managerial lawyers they wanted nor bargain over terms nor refuse to deal. The less obvious problem was that the use of agreements undermined the common fund doctrine, which grants a right to payment only when contracting is

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Fifth Circuit, the lead attorneys also request a fee award of 8 percent and cite *Everglades Crash* in support. Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses at 50–51, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Jan. 20, 2009). Any serious regulator would reject this effort to use the earlier case as a template for the later one, the two MDLs presenting radically different production problems. *Everglades Crash* involved a small number of persons killed in an airplane accident, a handful of lawyers, and a common fund fee request for \$275,000. 549 F.2d at 1008–09, 1011. The *Vioxx* MDL contains tens of thousands of persons claiming to have been injured by a defective drug, lawyers by the hundred, and a demand for over \$300 million in common fund fees. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2009 WL 2408884, at \*4–5 (E.D. La. Aug. 3, 2009).

85. Judges Fallon and Frank promulgated such agreements in *Guidant* and *Vioxx*. Agreement (Full Participation Option) at 1–5, Pre-Trial Order No. 19, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Aug. 4, 2005). Judge Weinstein does not appear to have used form agreements in *Zyprexa*. Other judges have done so, however. *See, e.g., In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. MDL 1699, 2006 WL 471782, at \*2 (N.D. Cal. Feb. 27, 2006) (J. Breyer) ("For all cases whose counsel have agreed within 90 days of this Order to cooperate with the MDL by signing an appropriate agreement . . . the assessment in such cases shall be two percent (2%) as fees and two percent (2%) as costs . . . of the 'gross monetary recovery.'").

impracticable, as previously explained. If the form “agreements” really were binding contracts, the common fund doctrine had to go. Of course, if the “agreements” were not binding, their existence changed nothing.

In practice, however, a different problem emerged: the lead attorneys wanted more money than the agreements entitled them to collect. To get around the agreements, which the MDL judges promulgated at their request, the lead attorneys might have sought orders increasing the amounts set aside for common benefit compensation.<sup>86</sup> But this direct approach had an obvious downside: it would have deprived the fee set-aside of its consensual gloss. Hoping to preserve the impression that moneys were being withheld by agreement, the lead attorneys devised a different strategy. They wrote provisions into the global settlement agreements increasing the set-asides, and they required disabled lawyers and their clients to waive objections to these provisions as a condition for enrolling in the settlements. In short, they used their control of settlement negotiations to make more money available for themselves.

The strategy worked in *Guidant*. Although the form agreements promulgated in that MDL limited the charge for CBW to 4 percent, Judge Frank ordered that 18.5 percent of the \$240 million settlement be set aside for common benefit fees and expenses, including 14.4 percent (\$34.5 million) in common benefit fees.<sup>87</sup> When limited lawyers cried foul, Judge Frank observed that the *Guidant* master settlement agreement (“MSA”) authorized him to determine the size of the common benefit fee award.<sup>88</sup> To him, this meant that even if the 4 percent cap once was binding, “the terms of the MSA contracted around it.”<sup>89</sup>

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86. This approach was taken in *Bextra*. See Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund at 4, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. MDL 1699 (N.D. Cal. July 7, 2008) (amending Pretrial Order No. 8 and increasing the set aside for common benefit fees from 4 percent to 8 percent).

87. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 451076, at \*1 (D. Minn. Feb. 15, 2008). The order set aside \$10 million in cost reimbursements, only \$3.5 million of which was slated to cover the managerial attorneys’ out of pocket expenses. *Id.*

88. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at \*12 (D. Minn. Mar. 7, 2008) (observing that “a common benefit payment from the Settlement Fund is expressly contemplated by the terms of the MSA”).

89. *Id.* Judge Frank also argued that the form agreements allowed the managerial lawyers to apply for more than 4 percent in “class action attorneys’ fees.” *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at \*11 (D. Minn. Mar. 7, 2008). The observation was irrelevant, however, because no class action was certified, or even sought to be certified, in the *Guidant* MDL, as Judge Frank knew. *Id.* (observing that “the Plaintiffs did not ultimately seek class certification”). Judge Frank’s real

Judge Frank's analysis is troubling. The *Guidant* MSA neither mentioned the 4 percent cap nor gave any indication that it would be exceeded. Because the MSA was silent, the limited lawyers appear to have been blindsided. They did not know they had consented to a common benefit fee increase when they enrolled clients in the settlement, assuming they had indeed consented.

A more fundamental concern is that by "contracting around" the form agreements, the lead attorneys used their control of settlement negotiations to enrich themselves. This was opportunistic behavior that violated their fiduciary duty to put others' interests ahead of their own. Instead of rewarding the managerial attorneys for "contracting around" the agreements, Judge Frank should have chastised them. Worse, by involving Boston Scientific Corporation, the defendant, in the process of increasing the 4 percent ceiling, the lead attorneys gave the defendant bargaining leverage. Boston Scientific knew the lead lawyers needed its help to obtain a fee increase. Presumably, it conditioned its agreement on some concession it would not otherwise have obtained.

When a lawyer representing a plaintiff bargains with a defendant over fees, a conflict arises.<sup>90</sup> This is well understood in class actions. When a defendant controls the amount class counsel is paid, the defendant can offer "red-carpet treatment on fees" in return for favorable terms elsewhere.<sup>91</sup> In other words, the defendant can trade higher fees for lower relief. Class counsel is willing to play along because class counsel receives the fee, not the relief. Courts and commentators have highlighted this conflict repeatedly.<sup>92</sup> Professor

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point was that he never expected the form agreements to limit his powers. *Id.* (observing that "the Court . . . contemplate[d] additional common benefit payments in the event of settlement").

90. Lester Brickman, *Contingency-Fee Con-Men*, WALL ST. J., Sept. 25, 2007, at A18 ("It is beyond cavil that plaintiffs' lawyers negotiating their fees directly with, and separately payable by, a defendant . . . breach lawyers' fiduciary obligations to clients."). Like most conflicts, this one may be waived by an informed client. In MDLs, the conflict is not even acknowledged, let alone waived.

91. *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 728 (3d Cir. 2001); *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991).

92. Multiple judicial decisions condemned the conflict. *See, e.g.*, *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000) ("A client who employs a lawyer to litigate against a third party has a legitimate interest in having his lawyer refrain from taking the third party's money in exchange for throwing the fight."). Academic commentary likewise abounds. *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 (1986) ("Often, the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs. At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees."); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 42-43

Coffee framed it as problem of “structural collusion” in which class counsel and a defendant naturally settle on terms that are good for the negotiators but bad for the class.<sup>93</sup>

Structural collusion also occurs in MDLs when lead attorneys use settlement negotiations to “contract around” their “agreements” with non-lead lawyers. The lead attorneys want the fee increase. The defendant is happy to offer them “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. An exchange that is mutually advantageous for the negotiators occurs naturally. When secrecy makes it difficult for non-participants to monitor negotiations, as typically is true in MDLs, the conflict is especially “pronounced.”<sup>94</sup> Only persons not at the bargaining table are harmed. Here, those persons are claimants and non-lead attorneys.

Emboldened by the success of the lead attorneys in *Guidant*, the lawyers in charge of the *Vioxx* MDL used their control of settlement negotiations to write extensive fee-related provisions into the MSA.<sup>95</sup> One raised the cap on common benefit fees from 3 percent to 8 percent, expressly superseding Judge Fallon’s order setting the 3 percent cap, and provided that the entire 8 percent would be deducted from lawyers’ contingent fees.<sup>96</sup> Another provision authorized a separate award of common benefit expenses.<sup>97</sup> And yet another required limited lawyers and their clients to agree to the first two

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(2002) (discussing various forms sweetheart deals can take in class actions and mass tort cases); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 145 (2001) (describing class action practice as “a world in which lawyers make fabulous fees for achieving very little,” while “defendant-corporations make sweetheart deals to dispose of serious liability at bargain-basement rates”); Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1016 (2008) (“Self-interested class counsel are willing to settle on the cheap in exchange for generous attorneys’ fees.”); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 933 (1996) (observing that class counsel can “entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class”).

93. John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 647–48 (1986–87) (describing how opportunities for structural collusion arise in class actions); Coffee, *supra* note 92, at 718.

94. *In re Mark M. Hager*, 812 A.2d 904, 912 (D.C. 2002).

95. Interestingly, in *Bextra* the managerial lawyers did not “contract around” their agreements, but asked the court for an order raising the common benefit set aside instead. *See supra* note 86. This was the proper way to proceed, because it did not involve an abuse of the lead attorneys’ control of settlement negotiations.

96. Master Settlement Agreement § 9.2.1, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Nov. 9, 2007).

97. *Id.* § 9.2.2.

provisions as a condition for enrolling in the settlement.<sup>98</sup> These provisions made almost \$400 million available to pay for CBW, about \$240 million more than was available under the 3 percent cap, and insulated the lead attorneys' self-enriching gambit from attack.

The lead attorneys' object is to give the forced fee transfer a consensual veneer. A memorandum supporting the lead attorneys' request for \$388 million in common benefit fees makes this explicit. It contends that claimants and non-lead attorneys agreed to the fee increase by enrolling in the settlement.<sup>99</sup> The argument is laughable. The lead lawyers' job was to build a bridge from litigation to settlement for the benefit of all claimants and attorneys. They built the bridge, but they then forbade anyone from crossing it without paying them a toll. Were a lawyer for a single client to use a settlement negotiation to extract a fee increase from the client, the violation of the fiduciary duty would be patent. That the lawyers who used their control of settlement negotiations to enhance their fees were lead attorneys in an MDL changes nothing. They used their position to benefit themselves at the expense of those they were charged to represent.<sup>100</sup> Conduct of this sort establishes a predicate for fee forfeiture, not for fee enhancement.<sup>101</sup>

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98. *Id.* § 1.2.4. By including this provision in the MSA, the lead attorneys in *Vioxx* breached their fiduciary duties a second time, the first time being when they used their control of settlement negotiations to increase the fund available to pay their fees. The lead attorneys thought the settlement was the best option for many claimants. They therefore knew that limited attorneys would be ethically bound to enroll at least some clients in the settlement, even though a lawyer enrolled even a single client had to waive any and all objections to the common benefit fee and cost provisions. In practical effect, the lead lawyers used limited lawyers' professional responsibilities to render limited lawyers powerless to oppose their opportunistic gambit.

99. Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses, *supra* note 77, at 22.

100. Judge Alice Gibney, the trial judge presiding over the state court consolidation of Kugel Mesh cases in Rhode Island, recently made the conflict that arises when plaintiffs' lawyers bargain separately over relief for their clients and fees for themselves a fixture of the negotiations in that case. She expressly authorized the lead attorneys to negotiate a "payment from [the] defendants . . . separate from and in addition to any payment made to any plaintiff, which separate payment(s) is intended to be for common benefit attorneys' fees and expenses". *In re All Individual Kugel Mesh Cases*, No: PC-2008-9999 (Superior Court, Providence, R.I.), Assented to Assessment Order (R.I. Aug. 11, 2009). The order is ill advised.

101. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) ("A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.").

*E. Caps on Contingent Fees*

In *Vioxx*, it is not known whether the managerial attorneys will receive the entire \$388 million or some lesser amount. Judge Fallon has yet to rule on their compensation. However, he has ruled that limited lawyers will provide all the money for common-benefit fees, meaning that claimants will not pay extra for it. In an order capping all lawyers' charges at 32 percent, he held that fees for CBW "[would] be deducted from the individual plaintiffs' attorneys' fees."<sup>102</sup> Assuming Judge Fallon awards the full 8 percent in common benefit fees, the 32 percent cap on total charges implies that the limited lawyers will net fees of 24 percent.

Judge Fallon's order caught most lawyers by surprise. He provided neither notice nor a hearing before capping their fees, even though his action cost the lawyers about \$390 million.<sup>103</sup> Even so, a disinterested observer might have predicted this move. Judge Fallon was using *Guidant* and *Zyprexa* as models, and lawyers' fees were also reduced in those cases. Judge Weinstein capped contingent fees at 20 percent for clients who were to receive \$5,000 lump-sum payments and at 35 percent for clients who were to receive more.<sup>104</sup> Judge Frank initially set contingent fees at 10 percent for managerial attorneys (who would also receive common benefit fees)<sup>105</sup> and at 20 percent for limited lawyers (who would not).<sup>106</sup> These caps sparked a rebellion, which Judge Frank ultimately dealt with by setting the total

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102. *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 607 (E.D. La. 2008).

103. This assumes an average retainer agreement providing for a fee of 40 percent plus costs. In failing to give adequate notice, Judge Fallon also followed Judge Frank, who capped disabled lawyers' contingent fees in an order the main purpose of which was to set the common benefit fee award. When the disabled lawyers protested, Judge Frank defended himself by asserting that a footnote to the PSC's fee award submission gave all attorneys notice that their fees might be reduced. Order Regarding Requests for Motions to Reconsider the Court's March 7, 2008 Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 3, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. Mar. 28, 2008). The footnote, which merely pointed out the Court's power to evaluate contingent fee agreements, was plainly inadequate. It neither said limited lawyers' fee agreements were unreasonable nor asked the Court to impose a fee cap. Judge Frank also stated that the lawyers who complained of lack of notice "should [have been] well aware of the case law supporting the Court's inherent right and responsibility to review contingency fee contracts for fairness." *Id.* at 3 n.2. Obviously, the knowledge that a court can review a contingent fee is no substitute for notice that it will do so at a particular time.

104. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490–91 (E.D.N.Y. 2006).

105. Order Regarding Determination of the Common Benefit Attorney Fee Amount at 5, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. Feb. 15, 2008).

106. Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 48, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. Mar. 7, 2008).

allowable charge for any client, including the cost of CBW, at the lesser of the contractual fee, the state-imposed fee limit, or 37.18 percent of the client's gross recovery.<sup>107</sup> He rejected an across-the-board cap of 25 percent proposed by two Special Masters.<sup>108</sup>

Noticeably, the caps varied greatly. Judge Weinstein's 35 percent cap was considerably higher than Judge Fallon's 24 percent cap. The caps set or recommended in *Guidant* fell between these extremes. One might think the caps varied because the judges tailored them to the unique facts of their MDLs. The procedures they employed eliminate this possibility. The caps differed for no better reason than that the judges chose different numbers.

The stated reason for capping fees in MDLs is that aggregation reduces lawyers' costs by generating economies of scale.<sup>109</sup> This is plausible. Standing alone, however, scale economies do not justify fee cuts. To see why, one must understand two things: first, aggregation is predictable; second, lawyers compete for clients in competitive markets. In combination, these factors should cause lawyers to pass the benefits of scale economies onto clients without any prodding from judges.

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107. Thirteen law firms urged Judge Frank to reconsider his ruling. *Id.* at 1–2 n.1. Notably, the group of objectors included the entire Lead Counsel Committee (LCC). *Id.* Judge Frank stuck to his guns. Thereafter, sixty-seven attorneys or law firms filed requests with the Court's Special Masters to increase their fees from 20 percent to 33 percent, as Judge Frank had allowed them to do. This group also included members of the LCC. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896006, at \*3 n.8 (D. Minn. Aug. 21, 2008). Overwhelmed by the flood of requests, the Special Masters urged Judge Frank to raise the cap to 25 percent for all lawyers across the board. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896018, at \*1 (D. Minn. June 30, 2008). Judge Frank rejected their recommendation because it would have required some clients to pay more in total fees than their contracts required. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896006, at \*10 (D. Minn. Aug. 21, 2008). To ensure that no client paid more than the contract price, he imposed the cap described in the text.

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

109. *See In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006) (“[M]uch of the discovery work [limited lawyers] would normally have done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs’ steering committee.”); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at \*18 (D. Minn. Mar. 7, 2008) (“Because of the mass nature of this MDL, the fact that several firms/attorneys benefited from economies of scale, and the fact that many did or should have benefited in different degrees from the coordinated discovery, motion practice, and/or global settlement negotiations, there is a high likelihood that the previously negotiated contingency fee contracts would result in excessive fees.”); Order & Reasons at 19, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Aug. 27, 2008) (“[T]he Court must assess the reasonableness of the contingent fees in light of the fact that the economies of scale have led to a global settlement offering considerable benefit to the attorneys.”).

Regarding predictability, when widely sold drugs or other products impose harms on large populations, claimant groups always form.<sup>110</sup> MDLs are also predictable.<sup>111</sup> Every experienced lawyer knew the JPML would designate MDL courts to handle the cases involving Vioxx, Guidant defibrillators, and Zyprexa.

That the market for legal services is highly competitive any mass tort lawyer can also attest. When news breaks of a possible mass tort, advertising lawyers shift into high gear, referral networks activate, and competition for clients begins. Over 1,100 law firms participated in the Vioxx litigation alone.<sup>112</sup> Barriers to entry are low. Any lawyer can advertise on a website or in a newspaper, and many do. Potential plaintiffs can easily use the Internet to find law firms willing to handle drug-related cases. They can also comparison shop by allowing multiple firms to compete for their cases.<sup>113</sup> In an expert report submitted in the Vioxx MDL, Professor Joshua D. Wright reported that 1,832 different firms participated in products liability MDLs from 2004 to 2008.<sup>114</sup> He concluded that market failure was not a practical possibility.<sup>115</sup>

As a matter of economic theory, then, scale economies (assuming they exist) provide no justification for fee cuts. Market pressure should force lawyers competing for products liability cases to price their services efficiently. Even if the theoretical case were less clear-cut, however, it would remain to determine how large judicially imposed fee reductions should be. To answer that question, one would have to quantify the extent to which prices were inflated. In an antitrust case alleging overcharges for goods or services, this determination would require testimony from an expert economist or

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110. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004).

111. It is common knowledge that “the MDL panel . . . overwhelmingly favors the procedure it administers. Thus, once the MDL panel decides to consider a matter pursuant to Section 1407(a), transfer is more than likely.” *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006). One study finds that transfer and consolidation are overwhelmingly likely in products liability cases with multiple cases filed when the defendant supports the motion. Mark Herrmann & Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 Class Action Litig. Rep. (BNA) 110 (Feb. 9, 2007).

112. Status Conference at 22, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Dec. 10, 2008).

113. *See, e.g.*, An Attorney for You, <http://www.anattorneyforyou.com> (last visited Nov. 12, 2009) (website enabling consumers to obtain offers of representation from competing law firms).

114. Affidavit of Joshua D. Wright, Memorandum in Support of Motion for Reconsideration/Revision of Order Capping Contingency Fees and Alternatively for Entry of Judgment at 10, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Dec. 10, 2008).

115. *Id.*

accountant based on an established methodology.<sup>116</sup> Yet, when concluding that lawyers' fees were hundreds of millions of dollars too high, Judges Fallon, Frank, and Weinstein considered no evidence of this type—or any other. They appear to have thought that a court exercising its inherent power needs neither a sound methodology nor competent evidence when cutting fees. This cannot be right. The efficient price for legal services is an empirical matter, and judges cannot properly resolve empirical matters by means of armchair speculation.

The variation in fee caps across the three MDLs thus reflects mainly the judges' differing intuitions about the fees disabled lawyers can reasonably charge. The variation may also reflect other considerations, such as the size of the reduction each judge thought the limited attorneys in his MDL would accept without making a fuss.

Although the fee caps varied, the judges' desire to protect plaintiffs from excessive charges served as a constant theme in all three cases. Each judge wanted to reduce plaintiffs' litigation costs. When combined with the desire to pay the managerial attorneys, this meant that all three judges had to cap limited lawyers' fees at levels low enough to free up the money they thought the managerial lawyers deserved. Other things being equal, a larger payment for CBW required a lower cap on fees.

In combination, the fee caps and forced payments for CBW substantially reduced limited lawyers' earnings.<sup>117</sup> In *Guidant*, Judge Frank calculated that his three-part cap allowed a limited lawyer with a 40 percent retainer agreement to collect 28 percent of a client's gross recovery, a discount of 30 percent.<sup>118</sup> This understates the impact of

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116. THOMAS V. VAKERICS, ANTITRUST BASICS § 3.03 (2009).

117. To challenge fee caps, lawyers must be willing to run considerable risks. When the VLC challenged the fee cap in *Vioxx*, Judge Fallon issued a sua sponte order appointing the Civil Litigation Clinic at the Tulane Law School to represent their clients' fee-related matters. Order, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Dec. 19, 2008), available at <http://vioxx.laed.uscourts.gov/Orders/TulaneClinic.pdf>. He also ordered the VLC lawyers to send their clients copies of his order, thereby fomenting animosity between the lawyers and their clients which did not previously exist. *Id.* After holding a hearing, Judge Fallon then reaffirmed his original fee cap order, giving no weight whatever to or even mentioning the evidence and arguments the VLC submitted. Order, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Aug. 3, 2009). Finally, he entered two further orders the net effect of which was to place all and only the VLC lawyers' fees in escrow until their challenge to the 32 percent order was resolved, including the 24 percent fee to which their entitlement was undisputed. Pre-Trial Order No. 49, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Sept. 23, 2009), available at <http://vioxx.laed.uscourts.gov/Orders/PTO49.pdf>; Pre-Trial Order No. 50, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Sept. 23, 2009), available at <http://vioxx.laed.uscourts.gov/Orders/PTO50.pdf>. It is difficult to find a legitimate purpose for any of these measures.

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

his ruling. Under his cap, a plaintiff's total fee burden could not exceed 37.18 percent of the gross recovery. If the common benefit fee equaled 15 percent, simple subtraction shows that the most any limited lawyer could charge was 22.18 percent. If that is right, then Judge Frank's cap actually cost a lawyer with a 40 percent contract 45 percent of his fee.

The 32 percent cap set in *Vioxx* is slightly less draconian, even assuming Judge Fallon awards the entire 8 percent set aside to the managerial attorneys. To make room for the 8 percent payment under the 32 percent cap, a lawyer with a 40 percent contingent fee agreement would have to charge 24 percent. That amounts to a substantial 40 percent discount on the contractual rate.

Cuts of 40 to 45 percent fundamentally change the economics of mass tort representations. Although the matter has not been studied empirically, it seems obvious that reductions of this magnitude will influence lawyers' behavior. Presumably, they will have the same impact as other price and wage controls, which, when set below market-clearing levels, cause the quantity and quality of goods and services to decline.<sup>119</sup> This will harm claimants by making representation harder to find and by reducing the value of their cases. Tort reform groups (and the politicians they sponsor) support limits on contingent fees for this reason.<sup>120</sup> They know that claimants who cannot hire lawyers cannot sue.<sup>121</sup>

Having said that fee caps dampen lawyers' incentives, we nonetheless agree that claimants should not have to pay extra for CBW. All lawyers with clients in an MDL accepted the wages set in their contracts as compensation for providing all the legal services

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119. Caps on prices and wages are the subject of a large literature. For a review of the use of price controls in the United States, see HUGH ROCKOFF, *DRASTIC MEASURES: A HISTORY OF WAGE AND PRICE CONTROLS IN THE UNITED STATES 1-4* (1984). See also Hugh Rockoff, *Price Controls*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (2d ed. 2007), <http://www.econlib.org/library/Enc/PriceControls.html> ("Price ceilings . . . cause shortages."); Thomas Sowell, *An Ancient Fallacy: Price Controls*, *CAPITALISM MAG.*, June 27, 2002, <http://www.capmag.com/article.asp?ID=1684> ("It is not just the quantity supplied that declines under price controls. Quality also declines.").

120. See, e.g., Terry Carter, *Tort Reform Texas Style*, *A.B.A. J.*, Oct. 2006, at 30, 34 (reporting that Texas Governor Rick Perry, a proponent of tort reform, proposed a cap on contingent fees); Patrick Danner, *Lawyers' Fees Come Under Fire*, *MIAMI HERALD*, Jan. 3, 2004, at 1E (reporting that the Florida Medical Association backed a constitutional amendment capping contingent fees in medical-liability cases).

121. On the importance of access to counsel as a condition for suing, see Charles Silver & David A. Hyman, *Self-Representation in Paid Bodily Injury Claims in Texas, 1988-2005* (paper presented at ABA Section of Litigation Symposium on Access to Civil Justice, Dec. 4-5, 2008) (on file with ABA) (finding that less than 1 percent of paid bodily injury claimants filed lawsuits without retaining attorneys).

their clients reasonably required. This compensation should cover the effort CBW requires. The problem with fee caps is that they reduce lawyers' fees below market-clearing levels without either a theory of market failure or empirical evidence of inflated charges—not because CBW consumes a fraction of the fees claimants agreed to pay.

*F. Allocating CBW Payments among Managerial Attorneys*

Once the dollars available to pay for CBW are fixed, it remains to allocate them among the lead attorneys. This can be a messy process in which lawyers, including lawyers with cases outside an MDL, compete for shares of a limited fund.<sup>122</sup> In *Guidant* and *Vioxx*, Judges Frank and Fallon appointed fee allocation committees charged with deciding which lawyers' efforts were worth how much.<sup>123</sup> The conflicts were horrendous. The committees had to value their own members' work, including work by managerial lawyers with few or zero signed clients for whom common benefit fees would be the only reward.<sup>124</sup> They also had to evaluate contributions by lawyers whose work was done outside the MDL. The *Guidant* allocation committee was not up to the task. Its report provoked so many complaints that Judge Frank abandoned it.<sup>125</sup>

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122. Lawyers with cases in state courts share in common benefit fees because global settlements involve their clients as well as claimants in an MDL. Sometimes, these lawyers must subject themselves to regulation by an MDL judge as a condition for enrolling their clients in a global settlement. For example, Sections 9.2.3–9.2.5 of the *Vioxx* Master Settlement Agreement provided that Judge Fallon would oversee distribution of common benefit fees, after appointing a fee allocation committee and in cooperation with other identified judges. Settlement Agreement §§ 9.2.3–9.2.5, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), available at <http://www.browngreer.com/vioxxsettlement/images/pdfs/mastersa.pdf>.

123. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 451076, at \*1 (D. Minn. Feb. 15, 2008); see also Settlement Agreement §§ 9.2.4, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007), available at <http://www.browngreer.com/vioxxsettlement/images/pdfs/mastersa.pdf> (granting Judge Fallon authority to establish the Fee Allocation Committee). The allocating committees' recommendations were subject to judicial review.

124. In *Guidant*, Judge Frank appointed six lawyers to a Common Benefit Attorney Fee and Cost Committee: four members of the PSC and two lawyers with cases in both the MDL and the Minnesota state courts. *Guidant*, 2008 WL 451076, at \*1. In *Vioxx*, Judge Fallon named nine lawyers to an Allocation Committee: three members of the Plaintiffs' Executive Committee; two PSC members; and four attorneys with state court cases. Pre-Trial Order No. 32 at 1–2, *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 20, 2007), available at <http://vioxx.laed.uscourts.gov/Orders/vioxx.pto32.pdf>.

125. Order of United States District Court Judge Donovan W. Frank at 1, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB) (D. Minn. May, 27, 2008), available at [http://www.mnd.uscourts.gov/MDL-Guidant/Pretrial\\_Minutes/2008/080527ord05md1708.pdf](http://www.mnd.uscourts.gov/MDL-Guidant/Pretrial_Minutes/2008/080527ord05md1708.pdf).

By involving themselves in the fee allocation process, judges again use class action procedures as models for MDLs. In the famous *Agent Orange* case, Judge Weinstein used the lodestar method to calculate the fee award.<sup>126</sup> His decision specified the amount each member of the PSC would receive based upon the time each lawyer put into the case. However, the PSC members had previously agreed to pool the award and reallocate it according to a plan of their own devise, the purpose of which was to reward lawyers who rescued the case from disaster by contributing financial capital late in the day.<sup>127</sup> This naturally meant that lawyers who logged many hours but contributed no capital would receive less than Judge Weinstein awarded, while lawyers who contributed capital but logged few hours would receive more. David Dean was one of the lawyers who wound up on the short end of the stick. He challenged the reallocation on appeal, and the Second Circuit sided with him, holding that the ultimate allocation cannot deviate substantially from the trial court's award.<sup>128</sup>

The Second Circuit's opinion provoked an obvious criticism: plaintiffs' attorneys know how to finance large lawsuits better than judges do, and "fee-splitting agreements that seem outrageous to a reviewing court may have strong efficiency justifications."<sup>129</sup> When it comes to fee allocations, the right regulatory stance in both class actions and MDLs is probably "benign neglect."<sup>130</sup> But judges are missing the opportunity to handle MDLs correctly because they are importing class action procedures whole-hog. In MDLs, lead attorneys can allocate fees contractually. They do not need the help of judges, and judicial interference with their arrangements is likely to do claimants more harm than good.

\* \* \*

The discussion in this Part illustrates how Judges Fallon, Frank, and Weinstein gave in to the gravitational pull of the class action model, progressively adapting to MDLs control rules that evolved in litigation under Rule 23. The judges appointed counsel to managerial positions, oversaw their performance of those responsibilities, and set attorneys' fees for members of the quasi-class—all of which are activities undertaken by judges supervising class action litigation. Judges have missed the fact that MDLs differ

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126. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 221 (2d Cir. 1987).

127. *Id.* at 218.

128. *Id.* at 222–23.

129. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 903 (1987).

130. *Id.*

from class actions in respects that often render class action procedures inappropriate.

### III. OPTIMIZING MANAGERIAL LAWYERS' INCENTIVES

This Part uses simple microeconomic analysis to clarify the role fee transfers can play in encouraging the optimal provision of CBW. It also explains why judges are unlikely to regulate managerial lawyers' incentives correctly and identifies other problems that arise when judges regulate lead lawyers' compensation.

#### *A. The Basic Economics of CBW*

Lead lawyers perform CBW. This category of effort includes all litigation-related services displaying a property known as jointness: when produced or performed once, many plaintiffs can use such services without reducing their value for any other plaintiff. A deposition of a fact witness could be an example of CBW. Once one attorney deposes a witness thoroughly, any number of plaintiffs can use the transcript when developing their claims; the witness need not be interrogated again. Pleadings, motions, briefs, deposition summaries, document reviews, electronic databases, document repositories, trial notebooks, and stipulations can all be examples of CBW.

Because CBW consists of joint goods and services, its production raises a problem of collective action. Rather than bear the cost of CBW, each claimant would prefer to wait for someone else to produce it and then use it free of charge. If everyone free-rides, however, everyone suffers, as no CBW is produced. Fortunately, the problem may have at least a partial solution. Claimants who refuse to pay for CBW can be denied access to it. Because lawyers do not have to share their work product with non-clients, they can use contracts to discourage free-riding.

Contracts are imperfect solutions, however, as they contain two important defects. First, it is impossible to prevent free-riding completely. Once a pleading, motion, or other document is filed with a court or otherwise made publicly available, anyone can obtain it without paying legal fees. Other work product, even if not publicly available, may be leaked to persons not entitled to it. Free-riders can even benefit from CBW they do not physically possess. For example, suppose Lawyer L produces a new legal theory that strengthens her clients' claims. This theory may make the defendant willing to pay more to settle all pending cases, not just Lawyer L's, even if other

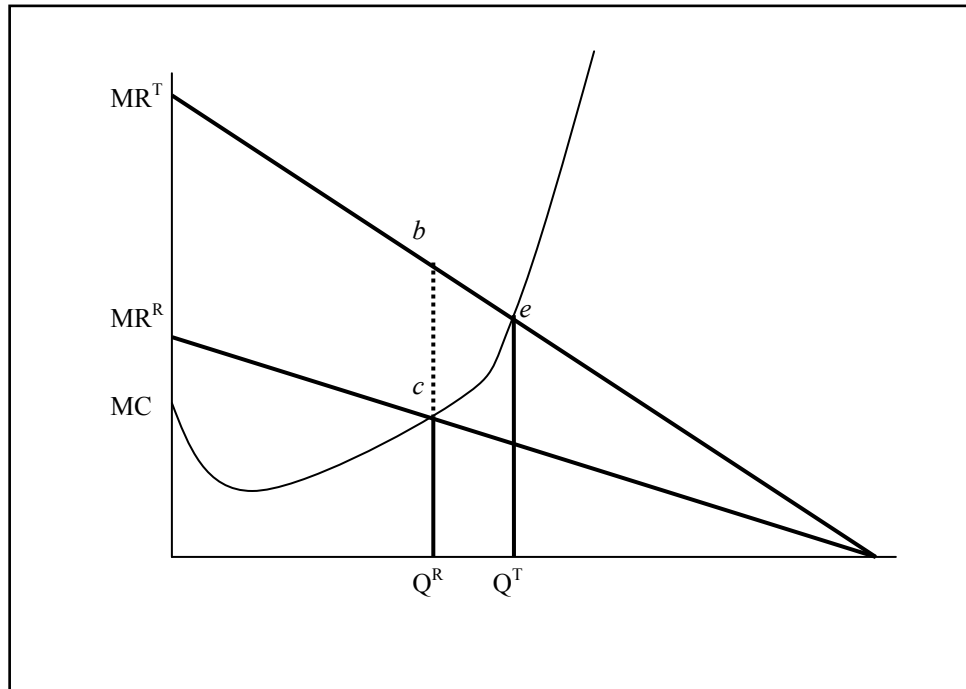
lawyers do not know about that theory. The defendant may pay more across the board because it expects other lawyers to find out about Lawyer L's theory or because it expects settlement values to become publicly known. Because Lawyer L gets no share of others' gains, her incentive to develop legal theories is diminished.

Second, when claimants form multiple litigation groups, no single group may want the level of CBW that would be optimal for all claimants as a whole. Figure I describes this problem. It assumes the existence of a total population T of identical claimants and a subgroup R whose members are represented by a common attorney.  $MR^T$  and  $MR^R$  are the marginal return curves for, respectively, T and R. The total marginal return to T or R from any unit of CBW is the sum of the marginal gains enjoyed by the claimants who belong to each group.<sup>131</sup> These curves slope downward to the right, reflecting the assumption that the marginal value of CBW for each claimant declines as the supply of CBW increases. The marginal cost ("MC") curve for CBW falls initially as economies of scale are realized, then rises at higher levels of production as diseconomies set in. Part of the MC curve lies below  $MR^R$  and  $MR^T$ , reflecting the assumption that a positive level of CBW is optimal for both groups.

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131. Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 388 (1954).

FIGURE I. OPTIMAL PROVISION OF COMMON BENEFIT WORK



$Q^R$ , the point where  $MR^R$  and  $MC$  intersect, is the optimal quantity of CBW for R. This is the amount of CBW a contract that harmonizes the interests of R's members and their lawyer would encourage the lawyer to provide. However,  $Q^R$  would be a suboptimal level of CBW for T.  $Q^T$ , the optimal quantity of CBW for group T, is identified by the point at which  $MR^T$  and  $MC$  intersect. Because  $MR^T \geq MR^R$ ,  $Q^T \geq Q^R$ .

In theory, cooperation could ameliorate these difficulties. By joining forces, claimants (or, more realistically, their attorneys) could form all-encompassing aggregations producing optimal incentives. In practice, cooperation occurs on an impressive scale but tends to be far from complete. In *Guidant*, *Vioxx*, and *Zyprexa*, attorneys established working groups with thousands of clients. But no one group formed to coordinate all the work, and many small clusters of claimants remained. This incomplete cooperation poses problems for defendants and courts, as well as plaintiffs. When thousands of claimants form tens or hundreds of working groups, defendants and judges must perform the same or similar work repeatedly. This duplication is expensive even if not all repetitive efforts can be characterized as waste.

The possibility identified in Figure I, however, is merely that—a possibility. Whether untapped economies of scale are available in MDLs is an empirical question. Instead of facilitating the production of CBW at an optimal level for an entire group, forced aggregation may saddle claimants with agency costs by putting them at the mercy of lawyers they cannot control or discharge. MDLs may also undermine plaintiffs' ability to bargain for payments by saddling them with lengthy delays and making trials impracticable. By saying that, in theory, consolidation may provide an opportunity for judges to improve incentives, we make a limited claim.

### *B. Judicial Manipulation of Incentives*

Figure I greatly simplifies the economics of producing CBW, but it makes the relevant point. In theory, MDLs have the potential to improve upon cooperation by aggregating more cases than cooperation can reach. In terms of Figure I, an MDL creates an opportunity to move from  $Q^R$  toward  $Q^T$  by making it economically rational to pay a plaintiffs' attorney for a higher level of production. The opportunity is not all upside, however. Forced aggregation carries risks as well.

The first point to appreciate is that the lawyer for subgroup R has a preexisting incentive to provide  $Q^R$  units of CBW. If R's lawyer was given control of an MDL containing all members of T and was prohibited from extracting supplemental fees from anyone, R's lawyer would still find it advantageous to produce  $Q^R$  units of CBW because of the expected fees from R's members. If all MDL claimants were allowed to use the CBW, the group as a whole would realize outcome  $b$  in Figure I. In other words, T would enjoy a positive level of CBW with no supplemental payment.

The second point, related to the first, is that the incentive to produce  $Q^R$  remains as long as the members of R pay what they agreed, even if members of T who are not in subgroup R are allowed to use the CBW for free. There may be good reasons to charge members of T for access to CBW produced at the expense of subgroup R, but an incentive to produce CBW for all claimants in an MDL would exist even without forced transfers.

When it decided *Everglades Crash*, the Fifth Circuit appears to have understood that fee transfers are meant to build upon lawyers' pre-existing incentives.<sup>132</sup> There, the lawyers opposing the forced fee transfer asked "why [they should have to] pay [the managerial lawyers]," who had sixty cases in the MDL, "for doing what they would

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132. *Everglades Crash*, 549 F.2d 1006, 1017 (5th Cir. 1977).

have done anyhow on behalf of their own clients?”<sup>133</sup> The question posed the economic issue squarely: Why was a supplemental incentive needed? The Fifth Circuit answered as follows:

It is uncertain that [the managerial] lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. *The [managerial lawyers] 60 cases may affect the amount paid them as lead counsel* but not the power of the court to require payment.<sup>134</sup>

Obviously, the first sentence missed the point. The objecting lawyers did not dispute the managerial lawyers’ right to control discovery. They questioned the need to pay them extra for conducting discovery, arguing that the lead lawyers would have expended the same effort for the benefit of their signed clients anyway. From an economic perspective, the proper response was that a supplement was needed (assuming one was) because the lawyers’ pre-existing incentives were suboptimal. The second sentence hits much closer to the mark. It suggests that MDL judges should take account of incentives to produce CBW provided by lawyers’ signed clients, transferring less money when fees expected from signed clients are larger. This is what judges would do if their object was to move from  $Q^R$  to  $Q^T$ .

In fact, MDL judges almost never take account of lawyers’ pre-existing incentives in any explicit way. A rare exception is an opinion Judge Weinstein issued in *Zyprexa* in response to the PSC’s request for a second fee award. In the course of denying most of the second request, he pointed out that three law firms with positions on the PSC “derived substantial fees from representing individual clients who settled their claims in the first phase of the [MDL]: Burg Simpson, Douglas & London, and Seeger Weiss earned \$23.5 million, \$21.9 million and \$78.5 million, respectively.”<sup>135</sup> The total is just shy of \$124 million. Judge Weinstein seems to have thought that the PSC members had sufficient incentives to provide CBW without additional fees because their signed clients had paid them so handsomely.

Judge Weinstein may also have given weight to payments from signed clients when he evaluated the *Zyprexa* PSC’s first application for fees, which he approved in full. If he did, however, he neither said so explicitly nor explained how he took account of this information when deciding how much money to transfer. In these respects, his behavior is typical. Despite the Fifth Circuit’s observation in *Everglades Crash* that fees from signed clients bear on the size of

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133. *Id.*

134. *Id.* (emphasis added).

135. *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596, 2008 WL 1844000, at \*5 (E.D.N.Y. Apr. 22, 2008).

forced fee transfers, there is no practice of requiring managerial attorneys to disclose what their signed clients will pay.<sup>136</sup> Nor does any doctrine tell judges how to use this information should they happen to have it. “[N]o specific rules” govern the size of common benefit fees in MDLs, as the judge presiding over the multi-billion dollar *Diet Drugs* settlement observed in 2002.<sup>137</sup> Awards need only be “fair and reasonable.”<sup>138</sup>

This doctrinal vagueness reflects a failure on the part of judges to articulate a coherent theory of fee transfers in MDLs. Instead of thinking about MDLs on their own terms, judges have borrowed the fee jurisprudence of class actions, as previously explained.<sup>139</sup> Yet the analogy to class actions again turns out to be strained. In MDLs, lawyers often have valuable client inventories. The attorneys on the *Vioxx* PSC collectively stand to collect more than \$300 million from their signed clients, even without a common benefit fee award. The pre-existing incentives of class counsel, by contrast, are usually much weaker. Class counsel typically has a few signed clients whose claims, standing alone, scarcely justify the cost of litigation. The problem in class actions is to create incentives from whole cloth; in MDLs, it is to enhance pre-existing incentives that may already be quite strong. For this reason, side-by-side comparisons of fees in class actions and MDLs are misleading: they ignore the (often substantial) fees managerial attorneys in MDLs receive from their signed clients. Even so, judges sometimes justify MDL fee awards by comparing them to class action awards.<sup>140</sup>

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136. In *Zyprexa*, Judge Weinstein learned about the fees the lead attorneys received from their signed clients indirectly. A special master obtained this information for him. *See id.* at \*5 nn.12–13 (indicating use of Special Masters in collecting evidence).

137. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F. Supp. 2d 442, 492 (E.D. Pa. 2008); *see also* Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 9, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) (“fees awarded in common fund cases may not exceed what is ‘reasonable’ under the circumstances”) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)).

138. *In re Diet Drugs*, 553 F. Supp. 2d at 492.

139. *See id.* (applying factors developed for use when awarding fees in class actions while observing that the “factors ... do not strictly apply to the MDL because we are not dealing with a class settlement fund.”); *see also In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at \*16 (D. Minn. Mar. 7, 2008) (applying multi-factor approach endorsed by the Eighth Circuit in a class action) (citing *In re Xcel Energy, Inc., Sec., Derivative & “ERISA” Litig.*, 364 F. Supp. 2d 980, 992–93 (D. Minn. 2005)).

140. *See, e.g.*, Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 11–12, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) (approving the PSC’s request for 4 percent of the settlement fund partly because it compared favorably with the fees awarded in identified class actions with large settlement funds).

Several factors increase the probability that judges will misestimate the fee transfers needed to close the gap between  $Q^R$  and  $Q^T$ . The distance between  $Q^R$  and  $Q^T$  varies both across cases and with the makeup of managerial attorney groups. Neither  $Q^R$  nor  $Q^T$  can be directly observed. Accurate assessments of their values would require serious study by expert economists and open court procedures allowing cross examination of their testimony. Once appointed, managerial lawyers have incentives to maximize fee transfers by understating  $Q^R$  and overstating  $Q^T$ . Judges lack incentives to set transfers correctly and have other agendas, such as reducing plaintiffs' contingent fees.

Judges may even use the wrong formula when paying for CBW. In the vast majority of plaintiff representations, attorneys work for contingent percentage fees set before any significant work is done. In MDLs, by contrast, judges pay managerial lawyers for CBW by the hour at rates set ex post after reviewing their time sheets. They also apply fee multipliers. The only apparent justification for using this compensation approach is that judges like it. A justification tied to plaintiffs' welfare would be more compelling, given that the object of compensation arrangements is to motivate lawyers to serve clients well.

### *C. Judicial Selection of Managerial Attorneys*

When Congress enacted the Private Securities Litigation Reform Act ("PSLRA") in 1995, it gave lead plaintiffs the power to "select and retain" class counsel and relegated trial court judges to the back seat.<sup>141</sup> Congress's decision reflected its belief that a sophisticated plaintiff with a large financial interest in the outcome of a lawsuit has an incentive to hire a good attorney at a reasonable rate. A judge, by contrast, has less information, more limited access to the legal services market, and no "skin in the game."<sup>142</sup>

In MDLs, however, judges select lead attorneys. The *Manual for Complex Litigation (Fourth)* advises MDL judges "to take an active part in the decision on the appointment of counsel," and it specifically

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141. 15 U.S.C. § 78u- 4(a)(3)(B)(v) (2007); *see also* Cohen v. U.S. Dist. Ct. for N. Dist. of Cal., No. 09-70378, 2009 WL 3681701, at \*4 (9th Cir. Nov. 5, 2009) ("The logical interpretation of the statute's failure to provide an intricate procedure for the district court to follow after rejecting the lead plaintiff's selection is that the power to select lead counsel remains in the hands of the lead plaintiff.")

142. Warren Buffett is thought to be the author of this phrase. *See, e.g.*, Answers.com, <http://www.answers.com/topic/skin-in-the-game> (last visited Nov. 12, 2009).

discourages them from letting attorneys select their own leaders.<sup>143</sup> It offers two reasons for judicial activism: the desire to ensure adequate representation, and the need to police lead attorneys' fees.<sup>144</sup> Neither is compelling. By selecting inferior lead lawyers or overpaying for CBW, lawyers with cases in an MDL would harm their clients and themselves.<sup>145</sup> One should therefore expect them to hire good managerial attorneys at reasonable rates. Limited lawyers also know their contemporaries well and interact with them frequently. This should enable them to make good choices, to monitor performance effectively, and to set appropriate rates.<sup>146</sup> The need for stringent judicial policing of lead attorneys fees is far from clear.

A skeptic might argue that judicial control actually benefits judges, who crave interesting, challenging, and high-profile MDL assignments. The best way to get more assignments from the JPML is

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143. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.244 (2004).

144. *See id.* ("Deferring to proposals by counsel without independent examination . . . invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs.")

145. Collusion could lead to excessive charges for CBW, as discussed above. *See supra*, Part II.D.

146. Commenting on a prior draft of this article, one reader observed that judicial regulation of lead lawyers' fees in MDLs is a continuing response to the many fee abuses that have occurred when lawyers were left unsupervised. The reader specifically mentioned the infamous *Fine Paper* case, in which a circus erupted after the lead attorney accused other lawyers of committing various forms of billing fraud in an effort to win as much of the \$50 million settlement for themselves as possible. Following lengthy hearings and a thorough audit, the outraged trial judge found that the fee applications were "grossly excessive" and cut the total amount requested by 80 percent. *In Re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 68 (E.D. Pa. 1983); *see also* Coffee, *supra* note 129, at 907–10 (discussing the controversy relating to attorneys' fees in *Fine Paper*).

*Fine Paper* shows quite clearly that lawyers cannot be allowed to set their own fees. Insofar as limited lawyers are concerned, this is not a problem in MDLs because their fees are regulated contractually. The same would be true if fees for CBW were regulated by agreements among attorneys. Judge Kozinski made a similar point in his dissent in *In re FPI/Agretech Securities Litigation*, 105 F.3d 469, 477 (9th Cir. 1997), also an MDL. The question there was whether the district court judge erred by refusing to enforce a fee sharing agreement among the lead attorneys. Although Kozinski agreed that judicial control of fees is "entirely appropriate" when attorneys apply for fee awards from common funds, he thought the fee sharing agreement was a valid contract and should have been enforced. *Id.* Noting that "[l]awyers, no less than any others, are entitled to arrange their affairs by private contract," Kozinski argued that judges must evaluate common fund fee requests because these requests lack natural bounds. *Id.* By contrast, judicial regulation has no place when a valid contract establishes a fee sharing arrangement and enforcement of the contract would not impact the total amount paid in fees.

Properly considered, *Fine Paper* actually weighs against the quasi-class action method and in favor of our proposal. Under existing arrangements, judges rely on lead attorneys to recommend amounts for common benefit fee awards in MDLs. This encourages abuses of the type that occurred in *Fine Paper* and necessitates careful judicial scrutiny of fee requests. Under our proposal, described in further detail below, lead lawyers' fees would be set upfront by other lawyers who would suffer if lead lawyers were to overcharge. This would substantially reduce the need for judicial monitoring.

by handling prior assignments well.<sup>147</sup> To judges, this means achieving global settlements that save other judges from having to preside over follow-on trials, as previously explained. MDL judges may use many tools to accomplish this end, not just those identified as components of the quasi-class action method. For example, they may refuse to rule on motions to remand cases to transferor courts or to state courts from which they were removed. By leaving remand motions pending, MDL judges encourage mass tort defendants to remove all state court cases, increasing the number of cases consolidated in MDL courts and expanding the reach of judges' power.

The hope of ending all litigation may explain why judges sometimes give important positions to lawyers with few or no signed clients.<sup>148</sup> In *Zyprexa*, Judge Weinstein named Melvyn I. Weiss chair of the PSC. Weiss's firm had no clients in the MDL, but he was a consummate settlement architect.<sup>149</sup> In *Vioxx*, Judge Fallon gave the position of liaison counsel to Russ Herman, whom he also put on the PSC and the Plaintiffs' Negotiating Committee and made chair of the Fee Allocation Committee. When the MDL began, Herman had fewer signed clients than many other lawyers, but he too was an experienced deal-maker.

Conflicts can arise when lawyers with few or no clients hold important positions. Clientless lawyers depend entirely on judges' largesse. Beholden more to judges than to plaintiffs, they can be expected to prefer the former over the latter when interests collide. This may put them at odds with lawyers with valuable client inventories, causing friction on the plaintiffs' side. The desire of lawyers with few or no clients to maximize fee transfers is also a predictable source of strain. Contingent fee lawyers with valuable inventories have some interest in maximizing recoveries, but clientless lead lawyers who charge by the hour have none. Their interest lies in billing as much time as a presiding judge will allow. Having done that, a clientless lawyer will rationally want to settle on any terms a defendant will offer. After all, the lawyer has no stake in the MDL's upside potential, but will suffer greatly if negotiations fail.

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147. The criteria that formally govern the JPML's choices of transferee fora are discussed in David F. Herr, *Multidistrict Litigation Manual* ch. 7 (2008). According to Herr, "[t]he [JPML] undoubtedly considers the ability and reputation of a judge" when making assignments, and also "look[s] specifically to prior experience as a transferee judge in MDL proceedings." *Id.* § 7.11.

148. See *Everglades Crash*, 549 F.2d 1006, 1017 (5th Cir. 1977) (commenting that "[i]n the next case the best available lead counsel may have one case out of 100").

149. Original PSC's Memorandum of Law in Support of Its Motion for an Award of Attorneys' Fees and Reimbursement of Expenses at 2 n.2., *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (JWB) (RLM) (E.D.N.Y. Oct. 18, 2006).

Judicial control of appointments and fees compromises judges' independence as well. By appointing managerial attorneys, an MDL judge begins an iterated relationship with the attorneys that lasts until the proceeding ends and the lawyers are paid. Every step in the pre-trial process can build a sense of reciprocity. As the distance narrows between the judge and the appointed lawyers, it becomes more and more difficult for the judge to act objectively, which may mean sending the lawyers home empty-handed or slashing their fees.<sup>150</sup> One might have to involve MDL judges so deeply in plaintiffs' affairs if there were no better alternative. "You can't beat something with nothing," as the saying goes. But there are other options, as we show in Part IV.

*D. The Impact of Judicial Fee Regulation on the Profitability of CBW*

Because  $Q^T$  is unobservable, it is important to know whether judges regulate managerial lawyers' compensation in a way that incentivizes them to optimize production of CBW. It seems they do not. In *Zyprexa*, for example, Judge Weinstein disallowed most of the PSC's supplemental request for \$6.5 million in attorneys' fees. Evidently, he concluded that the PSC had expended more time on CBW than it should have. If Judge Weinstein was right to deny the submitted hours, then the method he used to calculate pay for CBW encouraged attorneys to overproduce, requiring careful oversight to protect limited attorneys from overbilling.<sup>151</sup>

The likely culprit is the policy of paying for CBW by the hour.<sup>152</sup> This compensation method makes time spent on CBW especially profitable because it enables managerial lawyers to collect for the same effort twice. *Zyprexa* provides an apt example. There, Judge Weinstein capped lawyers' contingent fees on large cases at 35 percent, granted in full the lead attorneys' request for over \$30 million in common benefit fees and expenses, and generated the money needed to pay them by imposing a tax against the entire settlement

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150. Reciprocity is deeply engrained in humans. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) (exploring how cooperation strategies developed and using game theory to predict results). Even trivial gifts like coffee mugs and pens have been found to influence decisions.

151. Judicial orders rejecting fee requests from managerial attorneys ex post can, however, deter managerial lawyers from logging excessive hours in future cases.

152. See, e.g., Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 6, *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (JBW) (RLM) (E.D.N.Y. Dec. 29, 2006) (observing that the PSC submitted "detailed time records" for review); *id.* at 11 (noting that the PSC requested compensation for more than "65,283 hours working for the common benefit of all plaintiffs").

fund. The managerial lawyers thus collected 35 percent of the gain CBW generated for their signed clients *plus* \$30 million from all settling claimants. The latter group included the lawyers' signed clients. Not only did the lawyers collect for the same work from two sources; they charged their own clients twice for the same work.<sup>153</sup>

The ability to collect from multiple sources makes CBW more profitable than it would otherwise be. The magnitude of the increase depends on the facts. Imagine Lawyer L, who, outside an MDL, represents 100 identical clients pursuant to 40 percent contingent fee agreements. Now assume that between Time 1 and Time 2, L expends 1,000 hours on CBW and that this effort increases the expected value of the signed clients' cases by \$2.5 million. L's expected fee on the CBW is therefore \$1 million ( $\$2.5 \text{ million} * .4 = \$1 \text{ million}$ ), or \$1,000 per hour. Assuming a competitive market, this level of compensation should not enable L to collect any rents.<sup>154</sup>

Now assume the following: (1) at Time 1, L's 100 cases are consolidated in an MDL with 900 identical cases; (2) L is appointed lead counsel; (3) L devotes the same 1,000 hours to CBW between Time 1 and Time 2 with the same effect on L's clients' cases; (4) the court awards L \$1,000/hour for this time, or \$1 million; and (5) as in *Zyprexa*, the court generates money to pay L by taxing every claimant \$1,000. L's total fee for CBW is the sum of his receipts from his signed clients and the payment awarded by the court, or \$1,960,000 ( $((\$2,500,000 - \$100,000) * .4) + \$1,000,000 = \$1,960,000$ ). This is almost double the amount L would have received from his signed clients alone. L's hourly rate for CBW has increased from \$1,000 to \$1,960.

When L's fees and the court-imposed tax are combined, this arrangement costs L's signed clients more than their contracts require. The signed clients pay L \$960,000 and they pay the court \$100,000, yielding a total of \$1,060,000. To protect the clients, a judge might follow Judge Frank's lead in *Guidant* by capping their fees at the contract amount. This would require L to rebate \$60,000, and would reduce his total compensation for CBW to \$1,900 per hour. Obviously, this is still far more than his signed clients alone would have paid and an excessively profitable rate.

A judge could also follow Judge Fallon's example. In *Vioxx*, Judge Fallon capped all clients' fees at 32 percent and required

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153. This assumes that time expended on CBW increased the value of claims by more than \$30 million.

154. Rents are payments exceeding wage earners' long-run opportunity costs. See A. Ross Shepard, *Economic Rent and the Industry Supply Curve*, 37 S. ECON. J. 209, 209 (1970), for a further brief explanation of "economic rent."

managerial lawyers' fees to come out of this amount. On this approach, L's signed clients would have to pay at most \$800,000 ( $\$2.5 \text{ million} * .32 = \$800,000$ ), meaning that L could charge them only \$700,000, assuming no change in the \$100,000 tax imposed by the court. L's total compensation would then be \$1.7 million, still 70 percent more than he would have collected outside the MDL.

CBW would have been a profit center even under the cap Judge Frank first applied in *Guidant*. This cap allowed managerial lawyers to charge their clients 10 percent of the amounts they netted after 15 percent of the fund was set aside to pay common benefit fees. Under this cap, L could have collected \$250,000 ( $\$2.5 \text{ million} * .1 = \$250,000$ ) from his signed clients plus \$1 million from the court, yielding \$1.25 million in total compensation and an hourly rate of \$1,250.

Because the fee transfer mechanism makes time spent on CBW more profitable, it changes the equilibrium allocation of lawyers' time, increasing the hours devoted to CBW and decreasing the time expended on other services. When representing only his signed clients, a profit-maximizing L would cease producing CBW when the expected marginal fees from it and other forms of work were equal. In the example, this point was assumed to be reached when the marginal return from CBW was \$1,000. When appointed lead counsel, L performs the same comparison but, because CBW is more profitable, L cuts back on other activities and invests the free time in CBW. If CBW is worth \$1,250 per hour (or any amount that generates rents), L rejects all other employment opportunities and produces CBW full time. This incentive persists as long as court-awarded compensation is flowing; neither  $Q^T$  nor any other quantity provides a natural stopping point. The profitability of CBW also creates an incentive to fabricate hours and to characterize as CBW time actually spent on other things. The potential of the hourly rate to encourage billing fraud is well-known.

Because neither judges nor anyone else can observe  $Q^T$ , the profitability of CBW under the standard arrangement will predictably lead to overcompensation of lead attorneys. Judges appoint lawyers to lead positions and, having appointed them, rely on them for advice concerning the amount of time CBW requires. Because the standard arrangement makes CBW excessively profitable, however, lead lawyers' assessments will be biased. They will always prefer higher levels of CBW to lower ones, and will advise judges accordingly. Claimants' attorneys will have little power to counter lead attorneys' estimates. Their self-interest in reducing fee transfers will be apparent; their disagreements with lead attorneys will be subjective;

and their influence on the court will be weakened by their status as back-benchers.

To avoid making CBW excessively profitable, a judge would have to prohibit a lawyer from charging his signed clients for any of their gains attributable to CBW produced during time for which the lawyer received payment from the court. Calculating this offset would be difficult. Plaintiffs' attorneys may not know how much value an increment of CBW added to their clients' claims. The value of claims at any given time can only be guessed. Even if they did know, they would have incentives to misreport because doing so would increase their fees. In theory, judges could make their own assessments guided by court-appointed expert economists—an expensive and cumbersome process that would produce educated guesses, at best.

### *E. Factors that Matter Other than Fees*

To this point, we have focused on fees to the exclusion of other forces that influence lawyers' willingness to produce CBW. Real lawyers' motives are complex. Most attorneys, in our experience, genuinely care about their clients. Even when clients number in the hundreds or thousands, they want to obtain justice for them and to see them do well.<sup>155</sup> Most plaintiffs' lawyers, again in our experience, also dislike the defendants they sue. They think drug companies, device manufacturers, and other producers make obscene profits by deceiving regulators and exploiting vulnerable consumers. In addition, many plaintiffs' attorneys enjoy publicity and prestige. They desire higher standing in their profession for its own sake and because it enhances their ability to gain clients. Finally, plaintiffs' attorneys also value opportunities to build litigation skills, to work with other attorneys, and to develop reputations for winning big cases.

MDLs afford many of the opportunities plaintiffs' attorneys crave, which is one reason why lead counsel positions are much sought and highly prized.<sup>156</sup> Lead attorneys meet in chambers with judges,

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155. Lawyers and clients may also believe that gaining justice includes using MDL settlements to strengthen policies that protect consumers from defective products. In other words, private litigation may supplement regulation, which claimants or plaintiffs' attorneys may think is too weak. We do not consider this motivation in this section, but do not mean to deny its existence.

156. Lawyers chosen for lead positions routinely advertise the fact. The *Vioxx* case provides many examples. See, e.g., About Russ Herman, [http://www.hhkc.com/apg\\_a9\\_Russ\\_M\\_Herman.aspx](http://www.hhkc.com/apg_a9_Russ_M_Herman.aspx) (last visited Nov. 12, 2009) ("Liaison Counsel and Member of PSC Executive Committee and In Re *Vioxx*: MDL1657."); Attorney Profile: Andy D. Birchfield, Jr., <http://www.beasleyallen.com/attorney/Andy-Birchfield/> (last visited Nov. 12, 2009) ("In April of 2005, Andy was chosen to co-lead the Plaintiff's Steering Committee for the federal *Vioxx*

work with the most successful plaintiffs' lawyers in the country, handle communications within plaintiff groups, meet with lawyers and judges handling unconsolidated cases, converse directly with defendants' most influential officers, and talk with the press. Sometimes, they testify before congressional committees, participate in Supreme Court cases, or work with high-profile mediators. They are regularly invited to speak at continuing legal education programs and conferences, to lecture law students, and to publish articles describing their experiences in law reviews. Lead attorneys control the flow of large volumes of business to settlement administrators and expert witnesses. They may also meet with lawyers and claimants across the country to provide information, address concerns, and take credit for their accomplishments. To hold a lead position in a large MDL is to participate in civil litigation at the highest level.

Lead attorneys also enjoy opportunities to build important skills. They strategize, develop legal theories, argue motions, coordinate discovery, take apex depositions, prepare experts, and design settlement structures. They build document repositories and create trial notebooks. They preside over or participate in organizations of claimants' attorneys that may be bigger and wealthier than their own law firms. These skills and experiences help lawyers attract future clients and referrals, and obtain judicial appointments in future MDLs and class actions. They also enhance lawyers' chances of being invited to collaborate with other attorneys on large cases.

Lead lawyers in MDLs may also enjoy opportunities to seem unusually successful. Judicially ordered aggregation can improve the odds of settling by concentrating lawsuits in a small number of forums, placing them under unified control, and facilitating cooperation across courts. Consolidation can thus enable a group of lead attorneys to claim that their efforts produced an exceptional outcome that was actually due in some measure to other causes.<sup>157</sup>

In theory, these non-monetary factors can reduce the need to pay managerial lawyers for CBW. They can also affect the need to monitor their actions. Judges are, however, poorly placed to decide how much weight these factors deserve. The policy of setting managerial lawyers' fees *ex post* also ties judges' hands by making it

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Litigation MDL."); Firm Overview and History, <http://www.lfsblaw.com/overview.jsp> (last visited Nov. 12, 2009) ("Partner Arnold Levin . . . continues to serve on Plaintiffs' Steering Committees and Executive Committees of many important cases including . . . the Vioxx Products Liability Litigation").

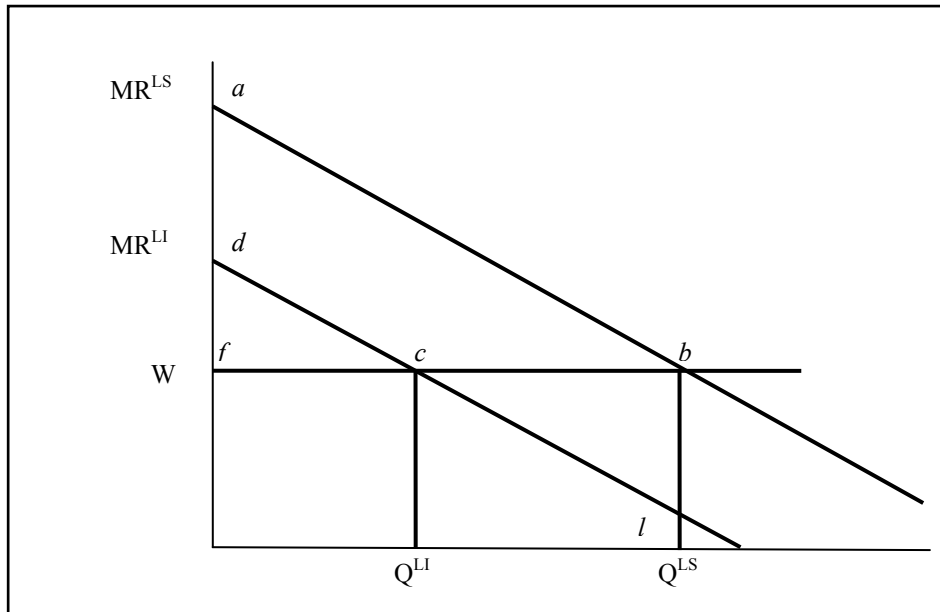
157. Distinguishing between returns for which an agent is responsible and returns attributable to other causes, usually described as "nature," is a core problem for principals.

impossible for them to comparison-shop. Having previously appointed a group of attorneys and allowed them to negotiate a global settlement, a judge cannot fire the group on the ground that other lawyers would have charged less because they were more strongly motivated by other considerations. Realistically, a judge cannot even reduce a fee award on this ground. Having appointed a group of attorneys without setting their rates in advance, a judge is bound to accept their usual and customary charges.

*F. Enriching the Economics of Producing CBW:  
The Choice of Counsel Matters*

The choice of managerial attorneys affects claimants. Some attorneys are better litigation strategists, negotiators, legal theorists, advocates, or risk-takers than others. Some teams of attorneys are better than others, too. Their members respect each other, like each other, trust each other, cooperate, and avoid unnecessary costs. Figure II casts the difference between superior and inferior representation as a difference in the marginal return to T per unit of CBW.  $L^S$  is the superior lawyer or lawyer-group, and its marginal return on effort is higher.  $L^I$  is the inferior lawyer or lawyer-group, and its marginal return is lower. Both are assumed to be paid the same hourly wage ( $W$ ).

FIGURE II. IMPACT OF LAWYER QUALITY ON VALUE OF CBW



With  $L^I$  in charge, the claimant group fares best when  $Q^{LI}$  of CBW is produced. The net gain to the group after paying  $L^I$  is the triangle  $dcf$ . With  $L^S$  in charge, the optimal level of CBW is  $Q^{LS}$ , which is larger than  $Q^{LI}$  in reflection of  $L^S$ 's higher marginal return on effort. The net gain to the group after paying  $L^S$  is triangle  $abf$ , which obviously exceeds  $dcf$  in size. Given the quality difference, it clearly matters to claimants whether  $L^I$  or  $L^S$  has control of the case.

Judges, however, have no particular interest in putting MDLs in the hands of attorneys who are superior providers of CBW. This should not be surprising: the procedural system does not give judges a stake in the size of plaintiffs' recoveries. But it does bestow prestige upon judges who resolve complex cases. Consequently, a judge overseeing an MDL will want to manage the litigation successfully.<sup>158</sup> Unless the judge is inclined to dismiss all claims, the judge will want to achieve a global settlement. One must therefore expect a judge to keep lawyers' settlement-related abilities in mind when deciding which lawyers will control an MDL.

A judge who wished to appoint a team of superior lawyers would also face a second hurdle: the judge might not know which lawyers are best. MDL judges do not scour the continent looking for attorneys offering the best combination of quality and price. They usually draw managerial lawyers from a pool of volunteers that includes mainly lawyers with cases in the MDL (as well as others who may never have appeared in the MDL court before). If the best managerial lawyer is not in the pool, the lawyer will not be appointed.<sup>159</sup> Even within the pool, judges may not know some or many of the lawyers or have any other solid basis on which to gauge their abilities.

Even if judges could reliably identify the best lawyers, they would not know how to incentivize them. Although judges claim the inherent authority to regulate lawyers' fees, they do not know how or how much lawyers should be paid. The manner of regulating lead lawyers' compensation reflects this. Judges pay lead attorneys contingent hourly rates. In the market for legal services, plaintiffs

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158. For a discussion of the possibility that the JPML keeps judges' ability to settle complex cases in mind when deciding where to locate MDLs, see Marcus, *supra* note 9, at 2288–89.

159. As previously stated, MDL judges occasionally appoint client-less attorneys to lead positions. These lawyers seem to always be local attorneys who are known to the court. Judges' reasons for appointing these lawyers are unknown, but they may be following the MANUAL FOR COMPLEX LITIGATION (FOURTH). After explaining that the role of liaison counsel is to handle "administrative matters," the Manual adds that "[l]iaison counsel will usually have offices in the same locality as the court." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221. Computers and electronic communications have surely rendered this instruction obsolete.

rarely use this arrangement. They pay lawyers contingent percentage fees. Referral fee arrangements also use this structure. Other work-sharing arrangements use different arrangements, but contingent hourly rates are only one possibility and, although evidence is hard to come by, they do not appear to be preferred.<sup>160</sup> Where cooperating plaintiffs' attorneys tailor compensation and cost-sharing arrangements to their needs, MDL judges use a "one-size-fits-all" approach. Judges also prohibit lead attorneys from reallocating time-based income streams, even though reallocations might reasonably be expected to help plaintiffs by aligning attorneys' interests with theirs.<sup>161</sup>

We do not mean to exaggerate the points made in this Section. As a historical matter, judges have often given control of MDLs to outstanding attorneys. Because judges enjoy working with successful lawyers, this should not be surprising. Many lead lawyers have also had large numbers of signed clients and have represented all claimants well, which should not be surprising either. Lead lawyers face considerable pressures from multiple sources to do well. Our point is not that existing appointment procedures fail routinely; it is that they have certain systematic defects. They are opaque, and they are designed to serve judges' interests, not claimants'. Judges should consider a range of options before settling on those currently in place. In the next Part, we propose what we believe to be a better way to manage common benefit work in MDL cases.

#### IV. THE PMC PROPOSAL

Using a simplified account of the microeconomics of producing CBW, Part III identified a problem that MDLs have the potential to address. That problem, as discussed, is also difficult for MDL judges to resolve. This Part proposes an alternative to judicial control that seems likely to produce superior results.

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160. In the MER/29 litigation, which occurred in the time before MDLs, cooperating lawyers supported the production of CBW by making a \$100 initial payment, a \$200 supplement, and an assessment capped at \$1,000 that varied with the number of cases a lawyer was handling. Rheingold, *supra* note 67, at 123.

161. *See, e.g., In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216, 218 (2d Cir. 1987) (striking down a fee sharing agreement entered into by members of the class action's PMC that reallocated the time-based fee award).

*A. The Proposal*

The portion of the proposal intended as a default rule builds on the existing model for selecting attorneys in securities class actions. The PSLRA entitles the so-called “most adequate plaintiff”—presumptively, the plaintiff with the largest financial stake in the case—to select and retain counsel for all claimants. In many cases, the most adequate plaintiff is an institutional investor such as a pension fund, as discussed in an influential article by Professors Elliot Weiss and John Beckerman.<sup>162</sup> An institutional investor—having both business sophistication and a lot of money at stake—can be relied on, at least in theory, to hire a skilled attorney at a competitive price and to use a fee structure that motivates the lawyer to maximize the net recovery. Empirical evidence tends to confirm that securities litigation under the PSLRA framework reduces fees in securities cases without adversely affecting quality.<sup>163</sup>

A PSLRA-style mechanism would not be an appropriate way to select a lead attorney in an MDL like *Guidant*, *Vioxx*, or *Zyprexa*. The plaintiffs in these cases are individuals, not businesses, and their ability to evaluate and bargain with attorneys is limited. Compared to institutional investors in securities fraud cases, their stakes are minuscule.<sup>164</sup>

Weiss and Beckerman’s intuition can be adapted to MDLs, however. One need only see that plaintiffs’ attorneys can act as plaintiffs’ bargaining agents. A lawyer representing 2,000 identical signed clients with 40 percent contingent fee agreements has a financial interest equal to that of 800 clients. Such a lawyer stands to collect 40 percent of the clients’ marginal gains when production of CBW increases from  $Q^R$  to  $Q^T$  in Figure II. Plaintiffs’ attorneys also know the best lawyers (or can easily learn who they are), have access to the entire legal services market, understand the risks and gains associated with mass tort litigation, and have incentives to bargain for competitive fees. Furthermore, they possess the necessary sophistication to monitor the production of CBW.

Because a lawyer with a large inventory of signed clients should rationally want a superior lawyer to provide CBW at a

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162. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2105 (1995).

163. Weiss & Beckerman, *supra* note 162, at 2090 (reporting that the mean share of the settlement accounted for by the largest single claimant in twenty cases studied was 13.1 percent).

164. *Id.*

reasonable rate, the proposal relies on such a lawyer to select and retain common benefit counsel (“CBC”) for an MDL. After allowing all lawyers with cases in an MDL to apply, a judge would appoint a Plaintiffs’ Management Committee (“PMC”) comprised of the lawyer or group of cooperating lawyers with the most valuable client inventory. The PMC would then select a lawyer (or lawyer-team) outside the PMC to provide CBW for the entire MDL. The PMC would also set the CBC’s compensation, which would be funded by a tax on the MDL recovery, for the payment of which claimants would receive a credit against their own attorneys’ fees. The CBC’s fee would thus be spread across all lawyers with clients in an MDL in proportion to the value of the clients’ claims. Having the most valuable inventory of cases, the PMC would have a sizeable stake in both the cost and quality of CBW. In other words, the PMC would have an incentive to obtain the CBC offering the best combination of quality and price.

Of course, these desirable incentives and capacities would not necessarily generate positive results if the PMC members could simply appoint themselves to perform CBW. Self-appointment would recreate the conflicts of interest that exist in MDLs today. The harmful consequences of self-appointment might even outweigh the improvements in quality and efficiency the proposal is supposed to afford. Accordingly, the proposal would generally exclude PMC members from performing CBW except at their own expense.<sup>165</sup> Their role, instead, would be to (1) select others to do the CBW, (2) set the CBC’s compensation, and (3) monitor the CBC’s performance of that work. If members of the PMC do no CBW, their incentives are closely—but not perfectly—aligned with those of the claimants and other attorneys in the case.<sup>166</sup>

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165. PMC members need not always be excluded from providing CBW. Occasionally, a PMC attorney could be uniquely qualified for a particular job. The proposal might allow exceptions in these situations, with the consent of other PMC members and the approval of the court. Presumably, the order granting the exception would identify the services to be performed and set appropriate limits on its scope. The requirement that PMC members may not perform CBW except at their own expenses could be waived by agreement among all attorneys.

166. Ex ante, the PMC’s incentives would be imperfect because situations could exist in which the PMC would profit by foregoing opportunities beneficial to claimants. For example, suppose the PMC could spend \$10 million on a CBC expected to generate a \$50 million recovery or \$20 million on a CBC expected to produce a \$60 million recovery. The claimants, who one may assume are obligated to pay 40 percent contingent fees, would prefer the latter option, which generates a net recovery of \$36 million to the former, which nets only \$30 million. But the PMC would prefer the latter, which generates a net fee (after paying the CBC) of \$10 million (\$20 million – \$10 million), to the former, which pays them only \$4 million (\$24 million – \$20 million). After the CBC is hired, however, the PMC’s interests would fully align with the claimants’. Both would ignore the cost of CBW and desire the largest possible recovery.

The proposal would also allow PMC members to participate (generally on an unpaid basis) in settlement negotiations without specific prior judicial authorization. Settlement often is the single most important event in the life of an MDL, and the proper analysis of settlement opportunities requires an overview of the litigation as a whole. With many clients depending on them, PMC members would have appropriate incentives to work effectively on behalf of all claimants when negotiating global settlements. To be clear, the PMC could assign responsibility for settlement negotiations to the CBC. But it could also retain control of negotiations for itself or give control to other attorneys. The proposal gives the PMC maximum flexibility.

A judge could also exercise a degree of discretion in selecting the PMC, subject to the general constraint of assigning control to a lawyer or lawyer-group with a valuable client inventory. The PSLRA provides an analogy here. That statute creates a rebuttable presumption that the candidate with the largest financial interest is the “most adequate plaintiff.”<sup>167</sup> A trial judge, however, may give control to a different candidate (presumably, the named plaintiff with the second largest stake) if the largest stakeholder “will not fairly and adequately protect the interests of the class.”<sup>168</sup> The statute identifies one potential cause of inadequate representation—unique defenses—but does not exclude other possible causes.

The proposal for MDLs could contain a similar backstop. Representatives who serve on the PMC would have to demonstrate their ability to provide adequate and loyal services for the benefit of all plaintiffs. If a judge believed that a volunteer lacked the capacity to perform effectively as a member of the PMC, the court would not have to appoint that person but would have to give reasons for excluding an otherwise-qualified candidate. For example, in theory, a conflict of interest could exist between an identifiable set of plaintiffs and the winner of the competition for control of the PMC. This might be true if the winner represented no clients of the identified type and, consequently, had little incentive to develop evidence bearing uniquely on their claims. Some flexibility in the joints may be needed to address problems like these. As a condition for competing, judges could require candidates for the PMC to demonstrate comprehensive representation of all discrete plaintiff groups after setting out the groups’ identities in an order.<sup>169</sup> Obviously, inadequate representation could also be

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167. 15 U.S.C. § 78u-4(a)(3)(B)(ii) (2006).

168. *Id.* § 78u-4(a)(3)(B)(iii)(II)(aa).

169. The Supreme Court has long been concerned about conflicts of interests in class actions that threaten to saddle segments of a class with inadequate representation. *See, e.g., Ortiz v.*

threatened if the winner of the competition were to die or otherwise become incapacitated. Ad hoc arrangements could handle problems like these.<sup>170</sup>

The court could also exercise discretion in deciding who, among competing applicants, has the most valuable client inventory. Ordinarily, size should be a reliable guide. When competing lawyers have similar mixes of clients and seem otherwise indistinguishable, the one with the most clients would win. But size may not always be dispositive for two reasons. First, cases have a range of expected payoffs and are not necessarily evenly distributed among attorneys. Some mass tort lawyers specialize in cases with severe injuries, such as asbestos lawyers, who represent only clients with mesothelioma; other lawyers assemble large blocks of cases in which less serious injuries predominate. Some lawyers screen clients carefully before agreeing to represent them; others accept requests for representation more readily. And even when cases seem similar, some lawyers obtain higher values than others. Qualitative factors like these can make the value of competing lawyers' inventories difficult to compare. Second, a mechanical rule requiring the appointment of the attorneys with the largest number of plaintiffs might encourage lawyers to accumulate clients regardless of the quality of their claims or the severity of their injuries.<sup>171</sup> The fear of an influx of plaintiffs with baseless claims is not imaginary. Mass tort suits and settlements have attracted multitudes of persons whose claims were questionable, frivolous, or fraudulent.

These problems, while real, are also manageable. Indeed, judges in MDL cases have already devised workable procedures to address the problem of inventory cases with low litigation or settlement value. In the welding fumes cases, for example, the MDL judge developed a simple mechanism for identifying and excluding

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Fibreboard Corp., 527 U.S. 815, 856 (1999) (stating that present and future claims must be divided into subclasses with separate representation to prevent conflicting interests of counsel); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (stating the need for individuals whose sole duty is to represent members of that subgroup, not the entire class); *Hansberry v. Lee*, 331 U.S. 32, 44 (1940) (finding that parties who challenged an agreement were adequately represented when the agreement was formed). Adequate representation is equally important in MDLs. See PROJECT ON THE PRINCIPLES OF AGGREGATE LITIG. (2003–present), [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=7](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7).

170. For example, a judge could appoint a group of lawyers to a PMC subject to the condition that they join forces with another attorney whose inventory contains claimants with identified injuries.

171. See Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1232–35 (2008) (describing procedures used by lawyers to accumulate massive inventories of asbestos cases).

weak cases.<sup>172</sup> Judge Kathleen O'Malley entered a case management order requiring each plaintiff to provide a Notice of Diagnosis certifying that a licensed medical doctor had examined the plaintiff and diagnosed a manganese-induced neurological disorder.<sup>173</sup> This led to the dismissal of about 25 percent of the pending claims.<sup>174</sup> If "piling on" is a problem at the outset of MDLs, it should often be possible to use a procedure like Judge O'Malley's to exclude many weak claims.<sup>175</sup>

Even with appropriate screening mechanisms, however, differences in client quality are likely to remain. But courts can deal with this type of distinction. An analogous problem arises in class actions brought under the PSLRA. Although the statute requires the court to determine which person competing for the role of lead plaintiff has "the largest financial interest in the relief sought by the class," it does not provide a formula for making this assessment.<sup>176</sup> Nor is the right way of proceeding necessarily self-evident. One applicant may have suffered the largest absolute loss (measured in terms of dollars paid out and received when securities were bought and sold), but another may claim to have lost the most money during the period when the fraud is thought to have occurred. A good deal of litigation would be required to resolve close calls in PSLRA cases with a high degree of certainty. Instead of calculating the size of an applicant's financial interest in a rigorous and demanding way, judges have developed a rough and ready multi-factor approach that relies on certain basic information.<sup>177</sup> Once the pool is narrowed to a group of

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172. This paragraph is adapted from Brickman, *id. at* 1294–97. See also Ralph A. Davies, *A Balanced Perspective: The Welding Fume Litigation*, FOR DEF., Aug. 2007, at 14, 17, <http://forthedefense.org/CD/Public/FTD/2007/August/2007%20August%20FTD%20-%20Welding%20Fume%20Litigation.pdf> (last visited Nov. 12, 2009) (discussing Judge O'Malley's method for weeding out weak cases).

173. Brickman, *supra* note 171, at 1303 (citing *In re Welding Fume Prods. Liab. Litig.*, MDL No. 1535, Case No. 1:03-CV-17000, at 6 (N.D. Ohio Mar. 31, 2006) (case administration order)).

174. Brickman, *supra* note 171, at 1294 (citing *In re Welding Fumes Prods. Liab. Litig.*, MDL No. 1535, Case No. 1:03-CV-17000 (N.D. Ohio Nov. 8, 2005) (report of proceedings of jury trial)).

175. Plaintiffs can also "pile on" after settlement. The settlement of the *Diet Drugs* litigation provides an example. Although medical evidence led the defendant to predict about 36,000 claims, over 87,000 were submitted. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 226 F.R.D. 498, 505, 508 (E.D. Pa. 2005). Back-end piling on, however, while a significant problem for the administration of MDL cases, would not affect our proposal for the selection of PMC members, which we anticipate will be done at the beginning of the case.

176. *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 440 (S.D. Tex. 2002) ("The PSLRA does not delineate a procedure for determining the 'largest financial interest' among the proposed class members.").

177. *Id.* ("The four factors relevant to the calculation are (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs.").

applicants with similar financial stakes, a court might as well require them to draw straws. All can be expected to do the job well.

Under our proposal, judges should evaluate lawyers' client inventories the same way. The object is to put MDLs under the stewardship of lawyers who will take seriously the task of providing CBW because they have a lot of money at stake. Success in this endeavor does not depend on quantifying a lawyer's financial interest to the nearest thousand dollars, or even to the nearest ten thousand dollars. It is probably more important to develop clear valuation rules than highly accurate ones so as to avoid pointless litigation. Thus, the court would make a preliminary inquiry into the value, as well as the number, of claims. Applicants for a position on the PMC would have to make a showing to the court, documenting the number of clients they represent and arraying the clients by injury groups. However, the court would not need to conduct a "mini-trial" on this question; it usually should be sufficient to derive an ordinal ranking of the value of applicants' inventory. If subsequent events demonstrate that an applicant has distorted or exaggerated the value of his or her inventory, the court has ample authority to impose sanctions, which could include exclusion from the PMC or monetary penalties such as forfeiture of fees earned as a PMC member.

As mentioned, PMC members would normally work without additional compensation, meaning they would receive only the fees their signed clients agreed to pay, minus a proportionate share of the cost of CBW. This arrangement could be altered by agreement. Lawyers not on the PMC who thought it advantageous to offer supplements would be free to do so. For example, all lawyers might agree to reimburse the costs PMC members incur when handling administrative functions, such as the functions liaison counsel normally performs. These tasks include distributing notices, orders, filings, and other documents. Web-based services like LexisNexis have made it easy to perform these ministerial functions. Limited lawyers might often agree to reimburse PMC members for the actual out-of-pocket costs, the alternative being to reimburse the CBC and possibly to pay more for CBW. Limited lawyers might also reimburse PMC members for expenses incurred when negotiating global settlements or performing other services.

Although the PMC's presumptive fee award would be zero dollars, the trial court would retain discretion to order a payment (but would use the power sparingly). The primary role of PMC lawyers is to provide general oversight and input on strategy. One might think of them as an MDL board of directors, the members of which are paid solely in options or shares. PMC lawyers will not ordinarily attend

depositions, immerse themselves in discovered documents, or write briefs. They will be litigation leaders and will enjoy the reputation, prestige, and publicity incident to that role. When combined with the fees received from their signed clients, these non-pecuniary benefits should ordinarily eliminate the need for separate compensation.

Ideally, the trial court will decide whether and how much supplemental compensation the PMC will receive before its members are appointed. The court could, for example, make known its intention to set aside a small percentage of any ultimate settlement or judgment—say half of 1 percent—as compensation for the PMC attorneys in the event the case results in a recovery for plaintiffs within the MDL framework. With fees set so low, the danger associated with judicial errors would be relatively slight. Such a percentage fee would have the same desirable qualities of any percentage fee in terms of aligning the interests of attorneys and those they serve and also reducing the need for burdensome auditing of hours claimed on a lodestar basis. Advance notice would additionally enable all lawyers with cases in an MDL to offer their services and to volunteer to accept less compensation. Willingness to accept a smaller transfer might then provide a basis for choosing between lawyers with similar client inventories.

How would the CBC be compensated? In our proposal, the PMC would negotiate a retainer agreement with the CBC—similar to a retainer agreement for ordinary litigation. Presumably the CBC would be given a contingent fee, but issues such as the percentage, the use (or not) of a (rising or falling) sliding scale of percentages, adjustments tied to events in the litigation (such as motions to dismiss, summary judgments, or appeals), and the allocation of responsibility for the payment of costs and expenses, would all be left to private bargaining. Judicial review would be available only to police fraud or other abuses.<sup>178</sup>

One compensation question is unique to the MDL context, however. Not all MDLs resolve all pending cases—indeed, the MDL process is not intended for the final resolution of controversies, being instead (at least in theory) a pretrial procedure. A few MDLs have, in

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178. When commenting on drafts of this article, several readers identified reciprocal agreements between the PMC and the CBC as a potential source of corruption. The PMC in Case 1 would hire a particular CBC at a high wage with the understanding that the CBC would return the favor in Case 2, where the CBC would attempt to become PMC. To discourage such arrangements, judges could require lawyers chosen as PMC or CBC to disclose prior appointments to these roles and to disavow any side deals. Judges could also impose prophylactic rules limiting the frequency with which lawyers can swap positions.

fact, ended when pretrial preparations were complete, at which point active cases were returned to the forums from which they came.

If the possibility of remand is to be more than a mirage, however, a plan must be in place for taxing cases returned to transferor courts. This issue arises under existing procedures as well as under our proposal, but may be more successfully managed under the latter. For one thing, our proposal may facilitate consensual arrangements to govern fee sharing in remanded cases. For another, when bargaining with the CBC, the PMC could establish scales in which the CBC's fees would depend on how remanded cases fared. For example, the CBC might receive a higher fee on cases that settled soon after remand and a lower fee on remanded cases that were resolved after trials. Arrangements like these would reflect the value of the CBC's efforts and preserve lawyers' incentives to prosecute cases zealously after remand.

Having described the proposal in detail, we reemphasize its status as a default rule which can be supplanted by agreement of the PMC and other attorneys with cases in an MDL. To appreciate the value of the default rule approach, it helps to conceptualize the plaintiffs' side of an MDL as a group of investors (lawyers representing clients with valuable claims) who pool their assets to pursue a common goal (the maximization of claim values and, thereby, contingent fees). The investors place their assets under the control of a common group of agents or managers, who receive compensation for working for the common good. Collectively, the investors and managers operate as a firm.

Under the quasi-class action approach to MDL management, the governance structure for the firm is determined in an odd way. The investors hand over all control rights to a government official—a judge, who has, at best, no interest in the performance of the firm or, at worst, interests at odds with those of the investors. The judge cannot be replaced, cannot be incentivized monetarily to want the best outcome for the investors, and suffers none of the constraints that normally apply in labor markets, such as the requirement of possessing or demonstrating the knowledge, skill, and trustworthiness needed to convince investors to hand over assets. The judge may also reshuffle the investors' interests in the firm at any time, meaning that ex ante contributions may not reliably predict ex post payouts. The manner of designing a governance structure embodied in the quasi-class action approach to MDL management has no analogue in the

capitalist world,<sup>179</sup> and for good reason: investors do not use it because it cannot reasonably be expected to produce optimal governance for any firm. Our default proposal improves on the quasi-class action approach by putting governance in the hands of a controlling investor (or a group of cooperating investors) with a large stake in the outcome of litigation.

Although our proposal is a step in the right direction, for two reasons it may be improved by allowing attorneys with cases in an MDL the option of designing a governance structure they prefer. First, MDLs differ in ways that seem likely to bear on the design of optimal governance structures. For example, some MDLs involve far more claimants or attorneys than others. If the severity of monitoring problems correlates with the number of participants, different governance structures may be needed in the two contexts. As one governance structure may not work best in all MDLs, it is reasonable to give attorneys freedom to design structures that are custom-made for particular consolidations.

Second, placing complete control of an MDL in the hands of a PMC may create unforeseen opportunities for the PMC to exploit other investors. Exploitation is a recognized problem in real firms run by majority stakeholders. For this reason, the law governing corporations and other business ventures safeguards minority investors' interests in a variety of ways. Of particular importance are common law duties that require majority stakeholders to treat minority owners fairly. Lawyers in an MDL might find it advantageous to borrow these protections by forming corporations, limited partnerships, or other organizations where the duties of investor-managers are well known. For example, by providing contractually for the application of Delaware law and the arbitration of disputes, a group of investor-attorneys might avoid a good deal of uncertainty about the PMC's rights and responsibilities.

The observation that MDL lawyers might find it attractive to use established business forms raises several questions. One is whether state bar rules or other laws would force lawyers to use forms, such as partnerships or limited liability partnerships, recognized as permissible vehicles for the delivery of legal services to the public. We would not impose this constraint. As long as lawyers practice in firms that are approved structures, we see no reason to

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179. When calling for greater judicial oversight of fees in mass tort cases, Professor Resnik identified some of the many difficulties of setting fees correctly. Resnik, *supra* note 6, at 2177–80. Yet, she offered few reasons for believing that judges would regulate lawyers' compensation well. In a prior article, Professor Resnik also acknowledged that serious conflicts and information problems hamper judicial regulation of fees. Curtis & Resnik, *supra* note 46, at 452–53.

limit the range of options they can use to organize the delivery of CBW in an MDL. Another question is whether transactions costs or other impediments will prevent lawyers from designing optimal structures or possibly from organizing spontaneously at all. The answer is sure to be “yes” on some occasions, but this shows only that the proposal is imperfect, not that the quasi-class action approach is better. A final question is whether voting rules other than unanimity may suffice to displace the default rule. In other words, might the default rule be displaced by a coalition containing fewer than all lawyers with cases in an MDL? As structured, the proposal does not require unanimity. We would allow the court to establish decision-rules for determining whether the default organization proposed in this paper will be displaced by some other structure. We predict that, once the proposal is in place, informal norms governing the formation of coalitions will arise, and bargaining over control will become more structured.

### *B. The Proposal's Advantages*

The proposed mechanism has attractive features: it provides a superior mechanism for selecting, monitoring, and compensating counsel; it safeguards judicial independence; and it tends to achieve fairness and reduce distrust and animosity among plaintiffs' counsel.<sup>180</sup>

#### 1. Selection of Counsel

The proposal involves two selection stages: (a) selection of the PMC by the court, and (b) selection of the CBC by the PMC. In both stages, our proposal offers advantages over the current system. Judges will be limited to selecting PMC members under explicit standards and on the basis of written applications. The unreviewable discretion and lack of transparency that characterize the current practice will be replaced by objectivity, clarity, and sensible selection criteria. This will alleviate the existing concern that judges appoint CBC for inappropriate reasons.

PMCs, in turn, will be well-positioned to select the CBCs. Having valuable client inventories from which they hope to receive

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180. Some MDLs contain class actions. We have not tailored the proposal for use in these proceedings. One possibility would be to award fees separately for class counsel and the CBC, as was done in *Diet Drugs*. 226 F.R.D. at 504. This might be workable if the tasks to be performed by class counsel and the CBC were divided upfront, for the PMC could then negotiate with the CBC knowing which tasks the CBC would perform. This seems both awkward and artificial, however. Class counsel and the CBC have the same job: providing CBW.

substantial contingent fees, PMC attorneys will have much to gain from the effective provision of CBW. In this respect, their incentives will align strongly with those of all plaintiffs.<sup>181</sup> PMC members will also have excellent information on which to select the CBC. They will often have worked with candidates for the CBC position and thoroughly appreciate their backgrounds and capacities. Unlike judges, who observe work product of teams of attorneys, members of the PMC will often have observed the work product of individual attorneys. They will know, much more than judges, details about interpersonal relationships, personality characteristics, and work habits—issues that can play an important role in the practical conduct of litigation. PMC members will also be better equipped than judges to negotiate retainer agreements with candidates for the CBC position and to ensure that those agreements contain appropriate safeguards for the protection of the plaintiffs as a group.

Finally, PMC lawyers who know little about other attorneys initially will always have incentives to learn which lawyers are best at particular tasks. By finding lawyers who are good at taking discovery and performing other pretrial tasks, they will increase the value of their clients' claims and increase their fees. Judges have no analogous incentive.

## 2. Compensation of Counsel

Judges are also less suited to setting and allocating fees for CBW. Judges gain nothing when CBC's fees are low, lose nothing when CBC's fees are high, and have no direct financial stake in the quality of CBW. Self-interest thus provides judges no incentive to ensure that the CBW fees are reasonable. Moreover, the evidence suggests that judges have not, in fact, done a particularly scientific job at setting fees. As shown in Part II, common benefit fees appear to have been set on a largely ad hoc basis, possibly according to considerations such as the politics of the plaintiffs' group or the judge's prediction of the level of dissatisfaction a particular fee will create among the limited attorneys. Sometimes judges appear to

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181. An example will make the PMC's incentives clear. Suppose that all claimants in an MDL are identical, that the PMC represents half of them pursuant to 40 percent contingent fee agreements, and that PMC can hire Lawyer A or Lawyer B as CBC. Both lawyers want the same fee, 5 percent of the gross recovery, but A is the better pick and will generate an expected recovery 10 percent larger than B (\$110M vs \$100M). If A is hired, the PMC's fee will be  $(\$110M)(.5)(.4) - (\$110M)(.05)(.5) = \$19.275M$ . If B is hired, the PMC will earn less— $(\$100M)(.5)(.4) - (\$100M)(.05)(.5) = \$17.5M$ . By hiring the inferior lawyer, the PMC would harm itself. This will be true as long as the PMC promises the CBC less than its entire contingent fee. Obviously, the PMC also does better by bargaining down A's fee.

award particularly generous fees without reference to market prices; at other times they extract concessions with a bludgeon, as Judge Frank did in *Guidant* by setting lead attorneys' hourly rates below market levels.<sup>182</sup> Judges have no particular background or expertise in negotiating fee agreements with counsel; this is not part of their judicial function, and memories of having performed this role in practice may be distant and unhelpful.

Our proposal will permit the use of innovative combinations of incentives and monitoring to encourage the production of high-quality CBW at the lowest possible expense. This flexibility is important because every MDL is different. *Vioxx* involved more than five times as many claimants as *Zyprexa* and more than ten times as many claimants as *Guidant*. Only *Zyprexa* claimants had serious psychological disabilities. *Guidant* claimants, all of whom had implanted defibrillators, were in much poorer health prior to use of the product than *Vioxx* claimants. *Guidant* also involved a medical device, not a drug. These and countless others differences could affect the way MDLs should be funded and developed. Experienced lawyers know what to make of these things, but judges likely do not. Judges go from one MDL to another calculating CBW the same way—that is, at hourly rates for amounts of time lead attorneys deem reasonable. The reason for preferring this “one-size-fits-all” approach is not apparent.

PMC members could also use non-monetary incentives to their advantage. Serving as CBC in a high-profile products liability MDL is a plum assignment. Lead attorneys gain prestige, enhance their ability to obtain clients and referrals, develop valuable skills, and so on. Recognizing the desirable nature of the CBC assignment, PMCs could use non-monetary benefits to obtain CBCs who offer a superior combination of quality and price. PMCs could also use competition among attorneys to maximize this advantage. For example, innovative judges have carried out auctions of the lead counsel role in class action cases.<sup>183</sup> Although this strategy has been criticized, especially for

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182. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*15 (D. Minn. Mar. 7, 2008) (capping lead lawyers' rates at \$400 per hour and paralegals' rates at \$150 per hour, when the highest submitted charges were \$745 and \$290, respectively).

183. See, e.g., *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 470–73 (N.D. Cal. 1994) (comparing three firms competing to be class counsel); *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 542–47 (N.D. Cal. 1990) (analyzing three bids for lead counsel). For general discussion of auctions as means for addressing agency costs in class action cases, see Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105–16 (1991).

securities fraud cases,<sup>184</sup> it appears in some cases to have significantly reduced fees without sacrificing quality.<sup>185</sup> Members of a PMC could experiment with an auction approach for selecting CBCs. They might also require a CBC to “buy into” an MDL. Mass tort litigation often requires attorneys to bear significant costs upfront. The members of a PMC may believe that a CBC can be properly incentivized only if he or she has a share of the sunk costs.

The proposal also allows fees for CBW to exceed their historical levels. Although we have pointed out factors that seem likely to cause lead attorneys to be overpaid, in any given instance the presiding judge may pay them too little. Judges often cut lead attorneys’ fee requests, reducing their hours or their hourly rates or disallowing claimed services entirely. Presumably, lead attorneys know judges’ predilections and refrain from performing services for which judges will not award sufficient compensation. When CBW is reasonably expected to increase claimants’ recoveries on net, judges do not help claimants by being overly parsimonious.

### 3. Monitoring

Judges are at a disadvantage when it comes to monitoring the performance of CBW in MDLs. Judges are busy individuals with many cases on their dockets. Their exposure to any single proceeding, even one as complex and interesting as a products liability MDL, tends to be episodic. They are not equipped, nor do they wish, to audit the quotidian work of CBC. Even if they could observe this work—and generally they cannot—they are poorly equipped to determine whether work is being performed in a cost-effective manner. Our proposal would improve monitoring of CBW by placing this task in the PMC, expert attorneys with high expectations, immediate access to

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184. See *In re Cendant Corp. Litig.*, 264 F.3d 201, 278–79 (3d Cir. 2001) (rejecting auction approach in private securities litigation); Lucian Arye Bebchuk, *The Questionable Case for Using Auctions to Select Lead Counsel*, 80 WASH. U. L.Q. 889, 891–99 (2002) (criticizing the use of auctions for selecting class counsel); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650, 695–702 (2002) (arguing that optimality of auctions depends on key assumptions that are not met when selecting class counsel). *But see* Geoffrey Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 643–50 (2003) (advocating ex post auctions for lead counsel rights at the time of settlement).

185. See Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys’ Fees in Securities Class Actions* 23 (St. John’s Legal Studies Research Paper No. 06-0034, 2006) (finding that fees in securities class actions tend to be lower when lead counsel rights are auctioned), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=870577#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870577#).

work product, and strong incentives to see that the work is done well. The PMC members will lose the most if the CBC performs poorly or overcharges.

Members of the PMC would have excellent sources of information with which to perform these monitoring tasks. Unlike the institutional investors who are frequently chosen as lead plaintiffs in securities class actions, the members of the PMC will all be attorneys. Their training and professional experience qualify them to monitor the work product of those who are chosen to carry out the CBW. PMC members are, moreover, attorneys for clients with cases in the litigation, and thus can be presumed to have case-specific knowledge and expertise. Because they will presumptively be the attorneys with the most valuable client inventories, they have multiple exposures to the key issues in the litigation. With many clients, they have the opportunity to observe general themes or features of the litigation that might not be apparent to an attorney with a small number of clients. Accordingly, they would be expected to be excellent monitors of the CBC attorneys.

#### 4. Preserving Judicial Independence

Existing practices compromise judicial independence by placing judges in uncomfortably tight relationships with members of the PSC.<sup>186</sup> The current regime of unfettered judicial discretion naturally sparks concerns, whether or not justified, that judges are too closely associated with the attorneys they appoint to leadership roles. The concern goes both ways: some may worry that the lead attorneys may be too influential with the judge, while others may consider that the judge's enormous power over the selection and compensation of counsel makes the lawyers occupying the leadership posts too subservient to the judicial will.

Our proposal addresses both concerns. It adds transparency by substituting objective standards for the current discretionary regime. If and when judges pass over attorneys with large and valuable client inventories, they will have to state reasons for putting lawyers with few or no clients in charge. This will alleviate the appearance of favoritism. The recommended procedures for compensating CBCs provide even greater assurance of independence. Judges would no longer be in the position of awarding hundreds of millions of dollars for CBW, on the basis of little analysis and no objective justification.

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<sup>186</sup> For a discussion of how existing practices compromise judges' independence, see *supra* text accompanying notes 126–129.

The fees for the PMC attorneys would be either zero or a small percentage of the MDL recovery. Meanwhile, fees for the CBC would be established, not by the judge, but by the PMC members. No adverse inferences about judicial independence could be drawn from this process.

##### 5. Improving Fairness and Trust among Plaintiffs' Attorneys

We have also seen that existing practice tends to foment distrust, anger, and dissention among plaintiffs' attorneys. Some attorneys are richly rewarded for serving in leadership roles or performing common benefit work; others see their expected profits from privately negotiated fee agreements evaporate as judges tax them for common benefit work done by others. Attorneys who assemble large inventories by advertising for clients tend to be denigrated as crass mercenaries whose only role is to free-ride on the efforts of others—an attitude that resonates with long-standing suspicion of advertising and marketing of legal services.<sup>187</sup>

The quasi-class action approach gives control of MDLs to lawyers skilled at managing lawsuits and providing CBW. It also rewards these lawyers lavishly, while capping other lawyers' fees at sub-market rates. The quasi-class action model thus punishes plaintiffs' attorneys whose main contribution is "rainmaking" and devalues the service of reaching potential clients and getting them to assert claims. In placing lawyers "who do the work" above lawyers "who troll for clients," the quasi-class action approach reflects the (unwarranted) disdain many judges, lawyers, bar associations, politicians, and others have for lawyers who advertise. This Article does not debate the merits of attorneys' efforts to market legal services,<sup>188</sup> but it is appropriate to note, first, that judges may discourage lawyers from reaching out to potential clients by reducing compensating for this service, and, second, that judges have no special insights into the amount of marketing that is good for society or the reputation of the legal profession.

This proposal will award control of the PMC on the basis of inventory value. It follows that judges will (and should) give control to

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187. This tendency is reflected in many policies regulating lawyers, including restrictions on advertising and referral fees.

188. Opponents of lawyer advertising contend that it damages the profession's reputation. Empirical studies have not borne this out. Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 514 (1998); Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315, 333-34 (1998).

attorneys who advertise for clients some percentage of the time. Advertising should not disqualify a lawyer from serving on the PMC. Attorneys with valuable inventories of cases have the most to gain—and the most to lose—from the activities of the CBC. It is, accordingly, appropriate that they be given a leadership role in the selection, compensation, and monitoring of these attorneys. An advertising attorney who is incapable or unwilling to do the job properly will gain financially by joining forces with superior case managers. The possibility that incompetent lawyers will exercise control is not an equilibrium result.

The proposal may also enhance relationships among lawyers by encouraging the formation of large cooperating groups. As explained, the proposal will award control of an MDL to the lawyer or lawyer-group with the most valuable client inventory. If control is valuable or if lawyers prefer to be part of control groups for other reasons, incentives will exist for lawyers to improve their odds of winning competitions by teaming up with others. At the limit, a grand coalition of all lawyers with cases in an MDL would arise. Such a coalition would regulate all lawyers' responsibilities for common benefit fees and expenses contractually, eliminating the need for coerced fee sharing. Even if grand coalitions are unlikely, it is plausible that coalitions representing more than half the claimants would form. Coalitions of this size, which would meet the "minimum winning" threshold identified by game theorists, would reduce the need for forced transfers, even if they would not eliminate it.<sup>189</sup>

Although our proposal has yet to be applied in any MDL, judges have sometimes left the task of organizing the production of CBW in consolidations to attorneys, with good results. The famous MER/29 litigation is one example.<sup>190</sup> The litigation against Tenet Healthcare stemming from unnecessary heart surgeries at its Redding, California hospital is another. Although the investigation into Tenet's practices and the resulting litigation received extensive coverage in the media,<sup>191</sup> the story of the cooperation among plaintiffs' lawyers is less well-known.<sup>192</sup>

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189. WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 32 (1962).

190. See Rheingold, *supra* note 67, at 123–24 (1968) (describing the operation of the plaintiffs' lawyers).

191. See, e.g., Christian Berthelsen & Victoria Colliver, *Tenet Settles Surgery Probes: Hospital Giant Agrees to Pay \$54 Million*, S.F. CHRON., Aug. 7, 2003, at B1 (Tenet settling federal investigation); Reuters, *\$395 Million Payment to Settle Unnecessary-Surgeries Suits*, N.Y. TIMES, Dec. 22, 2004, at C10 (Tenet settling private claims).

192. The details that follow were provided in two memoranda by Richard Frankel, an attorney involved in the litigation. We are grateful for the information Mr. Frankel provided and

In the Tenet Healthcare litigation, over seven hundred plaintiffs filed lawsuits in a California state court. Three California law firms represented about 90 percent of them. The remaining plaintiffs were divided among several firms, each of which had a small number of clients. In what might seem a surprising move, two of the California firms with large client groups paired up with two Texas firms to develop the litigation. The Texas lawyers, who formerly served as co-counsel with one of the California firms, had previously scored a large success in litigation against Tenet. Working together, the California and Texas lawyers survived Tenet's efforts to get the cases dismissed and secured a \$395 million settlement. No fee transfers occurred—the lawyers collected fees only from their signed clients. The firms shared common expenses by agreement. The law firms with few clients enjoyed the lead lawyers' work product without charge, but the lead lawyers were happy to share. They gained by having almost complete freedom to manage the litigation as they wished.

## V. CONCLUSION

MDLs are an important feature of the American litigation landscape. Unfortunately, the control structures that govern these massive proceedings are poorly designed. With good intentions, judges have taken to characterizing these cases as “quasi-class actions” and have used the authority the label confers to exercise unfettered control over the selection and compensation of lead attorneys. Existing practices lead to the selection and compensation of counsel on the basis of opaque and arbitrary criteria; threaten judicial independence; draw unfair and unreasonable distinctions among groups of counsel on the plaintiffs' side; and permit the arbitrary, capricious, or unreasonable exercise of judicial power.

This Article proposes a simple, workable, and effective alternative to the existing system. It recommends implementation of a default mechanism, inspired by the PSLRA, that would place MDLs under the control of management committees composed of attorneys with valuable client inventories. These attorneys would possess the right incentives and expertise to properly manage the common benefit work. The management committee would then select, retain, and monitor other attorneys who perform the common benefit work under privately negotiated fee agreements. The court would stand back from

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for his views on the economics of mass tort representations and cooperation among groups of attorneys.

the process, exercising only a limited authority to prevent potential abuse. This system would foster fairer, more efficient, and more appropriate management of complex MDLs in American courts.