

## Louisiana Law Review

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Volume 75 | Number 2

*The Rest of the Story:*

*Resolving the Cases Remanded by the MDL*

*A Symposium of the Louisiana Law Review*

*Winter 2014*

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# Centripetal Forces: Multidistrict Litigation and Its Parts

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### Repository Citation

Catherine R. Borden, Emery G. Lee III, and Margaret S. Williams, *Centripetal Forces: Multidistrict Litigation and Its Parts*, 75 La. L. Rev. (2014)

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# Centripetal Forces: Multidistrict Litigation and Its Parts

Catherine R. Borden, Emery G. Lee III, and Margaret S. Williams\*

## INTRODUCTION

Almost by definition, multidistrict litigation is complex. One consequence of this complexity is that multidistrict litigation may be viewed from a variety of perspectives. First, multidistrict litigation may be viewed from the perspective of its share of overall civil litigation in the federal courts. Commentators sometimes stress that a relatively large percentage of all civil litigation takes place within multidistrict aggregations,<sup>1</sup> a point that is also sometimes made in official court reports.<sup>2</sup> Multidistrict litigation may also be viewed at the level of centralized proceedings and thus understood at the level of what one might term “individual aggregations.” Such a perspective lends itself to a discussion of global settlements and the practical and ethical issues involved in negotiating and reviewing such.<sup>3</sup> Relatedly, multidistrict

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\* The authors are researchers at the Federal Judicial Center. Affiliation is provided for identification only. The views expressed in this Article are those of the authors and not those of the Federal Judicial Center or any other judicial-branch entity. This work has benefited from the comments of our FJC colleagues, including Joe Cecil and Dan Holt, as well as the comments of participants in the Symposium, especially Francis McGovern.

1. See, e.g., John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 26, 26 (2012) (estimating that MDL cases account for more than 15% of all civil litigation in the federal courts); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014) (same).

2. Fluctuations in the number of new MDL cases are often evident in the courts’ overall statistics. In 2012, for example, the courts reported that civil filings based on diversity of citizenship declined by 15%, “primarily because of a 60 percent decline in filings of multidistrict litigation (MDL) cases related to asbestos (down by 22,561 cases).” See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2012, “U.S. DISTRICT COURTS,” available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-district-courts.aspx>, archived at <http://perma.cc/7CCM-TYBB> (last visited Sept. 17, 2012).

3. See, e.g., Elizabeth Chamblee [Burch], *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 195–96 (2004) [hereinafter Burch, *Unsettling Efficiency*] (“[T]he practical consequence of transfer translates into a non-opt out class action for pretrial purposes and produces settlement as would class certification. . . . Consequently, efficiency through procedural devices, without the balance of fairness, does not necessarily correlate into just outcomes.”).

litigation may be viewed from the perspective of the “repeat player” attorneys who often play a decisive role in the shape and ultimate outcome of proceedings.<sup>4</sup>

A less common frame, perhaps, is that of the constituent civil actions which together comprise the proceedings proposed for centralization. From the perspective of a centralized proceeding or of a repeat player with a large inventory of claims, these constituent civil actions—referred to as “MDL cases”—may seem relatively unimportant. Unless an MDL case is selected as a potential bellwether trial case,<sup>5</sup> for example, little individualized discovery or activity may actually take place. And yet, the sheer volume of MDL cases suggests that scholars and policymakers should not focus exclusively on the other levels of analysis. There is certainly room for increasing our understanding of these essential parts of MDL proceedings.

Scholars and policymakers have a reasonably adequate understanding of what happens to cases resolved by a transferee court in a centralized MDL proceeding. But there are two categories of MDL cases that are not resolved in an MDL transferee court: cases that are part of a motion to transfer before the Judicial Panel on Multidistrict Litigation that is not granted, and the section 1407 remand cases, which are centralized but then remanded to the transferor court at the conclusion of common pretrial matters in the aggregate proceeding. In the terms used by the organizers of this Symposium, these cases are decidedly *disaggregated*. With respect to the first category, the MDL cases are aggregated in a motion and, possibly, in the Panel’s deliberations but then not formally aggregated. With respect to the second category, the MDL cases are formally aggregated in the centralized proceeding but then broken back into separate civil actions. It is safe to say that much less is known, in general, about these two groups of cases at the margins of the MDL process.

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4. See generally Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1 (2009) (discussing role and incentives of repeat players); Margaret S. Williams et al., *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141 (2012) (using social network analysis to identify and map the network of repeat plaintiff attorneys in MDL proceedings); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. (forthcoming 2015) (mapping repeat players’ appointments to leadership positions in centralized proceedings).

5. A bellwether trial (sometimes called a “test” trial) is a trial of a representative case in an MDL proceeding intended “to provide meaningful information and experience to everyone involved in the litigation.” Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008).

Using a variety of data sources, this Article systematically examines the universe of MDL cases—centralized and non-centralized—with a special emphasis on these two groups of disaggregated cases. Part I provides a brief overview of the MDL process. Part II then provides a systematic analysis of the centralization of MDL cases, with a special focus in Part III on cases that are non-centralized. Somewhat surprisingly, many non-centralized cases do eventually end up transferred to another district, either to another MDL proceeding or to another federal venue under 28 U.S.C. § 1404(a). Part IV provides an analysis of the termination of centralized MDL cases—most of which terminate in the transferee court—and Part V documents what happens to section 1407 remand cases when they return to the transferor court. We find that few section 1407 remand cases are actually tried post-remand; most settle.

### I. THE MDL PROCESS

In this Article, the term “MDL cases” is used to describe all cases that come before the Judicial Panel on Multidistrict Litigation (the Panel), regardless of whether they are ever transferred and made part of an MDL proceeding. MDL cases are handled by the Panel under the authority granted by the Multidistrict Litigation Act of 1968.<sup>6</sup> The Panel may centralize “civil actions involving one or more common questions of fact” before a single district judge “for coordinated or consolidated pretrial proceedings” when doing so will promote “the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>7</sup>

The first cases that become MDL cases are those subject to a motion to transfer,<sup>8</sup> in which a party requests that a group of cases be centralized before a single district judge, called the transferee judge. If the Panel grants the motion, it issues a Transfer Order. *Centralized* MDL cases—including non-transferred cases already in the transferee district—become part of an MDL *proceeding* in the transferee court. If the Panel denies centralization by issuing an Order Denying Transfer, the cases remain in the district courts in

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6. See 28 U.S.C. § 1407 (2012).

7. *Id.* § 1407(a).

8. In the early days of the Panel, show-cause orders played a major role, but they are no longer very common. See Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 8.1, 277 F.R.D. 480 (2011) [hereinafter Panel Rules].

which they were initially filed or removed to. Non-centralized cases are discussed in detail below.<sup>9</sup>

The centralization decision does not end the Panel's work. Cases continue to come before the Panel as potential *tag-alongs*. Tag-along cases involve common questions of fact with already centralized cases or cases subject to a pending centralization motion.<sup>10</sup> Potential tag-alongs in other districts are usually brought to the Panel's attention by attorneys in centralized proceedings or by parties in the potential tag-alongs. If the common questions of fact are apparent, the Panel's clerk issues a Conditional Transfer Order (CTO). The CTO becomes final, and the cases are transferred, after seven days if no party objects.<sup>11</sup> When tag-along status is disputed, the Panel will issue an order granting or denying transfer. Some tag-along cases are already before the Panel while it is considering centralization. Between the filing of the motion and the Panel's centralization decision, a number of potential tag-along cases may already have been added to the docket. The Panel is aware of the cases and may refer to them in its centralization decision—the number of potential tag-alongs can inform the Panel's decision for or against centralization.<sup>12</sup> But these early potential tag-alongs are not typically governed by the order granting or denying centralization. If centralization is granted, these cases will typically be included in the first CTO.

The Panel plays no role in adjudicating the merits of MDL cases, regardless of whether the cases are centralized.<sup>13</sup> The

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9. See *infra* at notes 29–75 and accompanying text.

10. It should be noted that, in this paper, we define tag-alongs slightly differently than the Panel does. “‘Tag-along action’ refers to a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407.” Panel Rules, *supra* note 8, at Rule 1.1(h). Because “[p]otential tag-along actions filed in the transferee district do not require Panel action,” they are not technically considered tag-alongs and are consolidated or coordinated using the transferee court's procedures for intra-district reassignment of cases. *Id.* at Rule 7.2(a). In this Article, we use the term “tag-along” to mean all cases centralized after the original transfer motion is decided, whether or not they originate in the transferee district.

11. See *id.* at Rule 7.1(b), (c).

12. See, e.g., *In re Gen. Motors Corp. Dex-Cool Prods. Liab. Litig.*, 293 F. Supp. 2d 1381 (J.P.M.L. 2003) (ordering transfer of a single action to join one other action pending in district where eight tag-along actions expected).

13. In the words of a former Panel chairman:

Bear in mind that we don't become involved, at all, in the merits of the claims or disputes in multidistrict litigation. We really are gatekeepers, deciding whether certain litigation should be let through the gates, so to speak, and, if so, where it should go. After that, it's entirely within the

transferee court has the same authority with respect to pretrial proceedings as it would in any other case.<sup>14</sup> Centralized cases are either disposed of in the transferee court (by termination of the case, remand to state court, transfer to another district, etc.), or remanded to their transferor courts. The Panel retains the authority to remand centralized cases back to their transferor courts. The MDL Act requires remand “at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”<sup>15</sup>

Although remand is required if all pretrial matters are concluded, the transferee court need not wait until that point. Centralization is intended to “promote the just and efficient conduct”<sup>16</sup> of the centralized cases, not to ensure that no pretrial matters remain for the transferor court. In determining when to suggest remand, the guiding principle is whether common issues have been resolved and only individual issues remain. As a guide for judges states, “[r]emand is not appropriate if there is more to be done on the cases as a group. But remand may be appropriate if the remaining proceedings relate to individual cases and issues rather than to the entire docket or to groups of cases.”<sup>17</sup> The transferee court or any party may file a suggestion of remand before the Panel.<sup>18</sup> In practice, the Panel generally remands cases only when the transferee court has filed a suggestion of remand.<sup>19</sup> Later

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prerogative of the transferee judge to manage the litigation and make all procedural and substantive rulings the case might require in a pretrial context.

*Chair of Judicial Panel Sees Role as Gatekeeper*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.), Nov. 2005, at 2.

14. “During the pendency of the MDL, [the transferee judge] may exercise all the powers available to a federal judge in any other case.” BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL CTR., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES: A POCKET GUIDE FOR TRANSFEREE JUDGES 3* (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/MDLGdePL.pdf/\\$file/MDLGdePL.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/MDLGdePL.pdf/$file/MDLGdePL.pdf), archived at <http://perma.cc/44GC-AV4V>.

15. 28 U.S.C. § 1407(a) (2012). The Supreme Court has ruled that a transferee court may not transfer cases to itself under 28 U.S.C. § 1404 for purposes of conducting a trial after pretrial matters have been resolved. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998).

16. 28 U.S.C. § 1407(a) (2012).

17. ROTHSTEIN & BORDEN, *supra* note 14, at 48.

18. Panel Rules, *supra* note 8, at Rule 10.1(b).

19. “Consideration of remand may be initiated by any of three means: motion of any party, suggestion of the transferee court, or on the Panel’s own initiative. Of these, suggestion of remand by the transferee court is both the most common and the most likely to result in remand being ordered.” DAVID HERR,

sections explore the commonality of remand, but first we turn to aggregate litigation to provide a comparison.

## II. MDL CASES CENTRALIZED AND NON-CENTRALIZED

Simply put, there are a lot of MDL cases. The Panel Cases Database contains information on 463,795 cases that have appeared on the Panel's docket.<sup>20</sup> Products liability cases heavily dominate this database, accounting for 93% of the cases. Securities is the next largest case category, making up just 1.4% of the database. Only 20% of all MDL *proceedings* involve products liability claims, but the overwhelming majority of *cases* that are considered by the Panel involve such claims. The Panel Cases Database is, in fact, dominated by a few mammoth products liability proceedings. The largest, not surprisingly, is MDL No. 875, *In re Asbestos Products Liability Litigation (No. VI)*, which accounts for 200,265 cases, or 43% of the database. MDL No. 875 and the ten next largest products liability proceedings account for 71% of the database.<sup>21</sup> All the non-products

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MULTIDISTRICT LITIGATION MANUAL § 10:6 (2014) (footnote omitted). *See also* Panel Rules, *supra* note 8, at Rule 10.1(b) (“Typically, the transferee judge recommends remand of an action, or a part of it, to the transferor court at any time by filing a suggestion of remand with the Panel.”)

20. The Panel Cases Database was created for this project using MDL case records collected by the JPML clerk's office. These data are used by the JPML, for example, in compiling its annual reports. *See, e.g.*, Judicial Panel on Multidistrict Litig., Calendar Year Statistics of the United States Judicial Panel on Multidistrict Litigation, January through December 2013, *available at* [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Calendar\\_Year\\_Statistics-2013.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2013.pdf), archived at <http://perma.cc/89DN-2YP6>. The records appear to be complete for cases docketed after the Panel's automation in 1992; prior to 1992, the records are limited to a few specific proceedings, including MDL 875 (initiated in 1991). Less than 1% of the cases have a disposition date prior to 1991. Inclusion of that small number of cases is unlikely to affect our findings. For more information on the data used, see *infra* Technical Appendix.

21. These proceedings are, in order of size: *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992); *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, MDL No. 1203, 2010 U.S. Dist. LEXIS 121169 (E.D. Pa. Nov. 15, 2010); *In re Welding Fume Prods. Liab. Litig.*, 364 F. Supp. 2d 669 (N.D. Ohio 2005); *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 2100, 2011 U.S. Dist. LEXIS 95475 (S.D. Ill. Aug. 25, 2011); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2007 WL 2406850 (E.D. La. Aug. 20, 2007); *In re Prempro Prods. Liab. Litig.*, MDL No. 1507, 2010 U.S. Dist. LEXIS 50748 (J.P.M.L. May 17, 2010); *In re Am. Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2325, 2012 U.S. Dist. LEXIS 71479 (J.P.M.L. May 22, 2012); *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2327, 2013 U.S. Dist. LEXIS 179053 (S.D. W. Va. Dec. 20,

liability cases account for just 7%. There are almost as many cases in MDL No. 926 (*In re Silicone Gel Breast Implant Products Liability Litigation*) in the database as there are cases from all other non-product liability types of proceedings (air disaster, antitrust, and so on) combined.

How does the Panel dispose of the individual cases on its docket? How many of those cases actually become part of a centralized MDL proceeding through transfer or related means? A case becomes part of a centralized MDL proceeding—identified in this Article as a “centralized MDL case” whether or not transferred—when it is disposed of in one of four ways by the Panel. These are identified in the database by the following codes: Transfer; CTO Final; NTN; and TR’E Severed.

(1) *Transfer*. A case may be transferred to a transferee court by a Transfer Order. A Transfer Order is typically the centralization decision, but a decision on a disputed potential tag-along may also be termed a Transfer Order.

(2) *CTO Final*. A case may be transferred to a transferee court subsequent to a Transfer Order in a Conditional Transfer Order. The CTO is “conditional” for seven days; at the expiration of that time, absent any objection, the CTO is made final and the case is transferred to a proceeding. These are tag-along cases, discussed above.<sup>22</sup>

(3) *NTN*. A case may be made part of an MDL proceeding in the district in which it was originally filed, and thus without transfer. These cases are called “NTN” cases in Panel argot—i.e., “No Transfer Necessary” cases. NTN cases are considered “centralized” for purposes of this Article. They may be either cases included in an original motion to transfer or cases filed later in the transferee district.

(4) *TR’E Severed*. Cases may be created within an existing MDL proceeding through a procedure known as “Transferee Severed.” This procedure splits an already centralized case into separate actions; in a sense, it is “reverse joinder,” in that multiple parties joined in a single case are severed into multiple cases for purposes of the proceeding.<sup>23</sup>

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2013); *In re Baycol Prods. Liab. Litig.*, 218 F.R.D. 197 (D. Minn. 2003); *In re Seroquel Prods. Liab. Litig.*, MDL No. 1769, 2009 U.S. Dist. LEXIS 124798 (M.D. Fla. Jan. 30, 2009).

22. See *supra* notes 10–12 and accompanying text.

23. This procedure has only been used since 2004, and the nearly 100,000 cases are found in only 20 proceedings. These are obviously large proceedings, for the most part, including *Asbestos*, *Diet Drugs*, *Prempro*, *Welding Fumes*, *Vioxx*, and *Seroquel* proceedings as well as the following: *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 69 Pa. D. & C.4th 320 (Pa. C. P. 2003); *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563 (S.D. Tex. 2005); *In re Ortho Evra Products Liability Litigation*, 422 F. Supp. 2d 1379 (J.P.M.L. 2006);



Together, these four disposition codes, representing different avenues of centralization, account for 96% of the cases before the Panel. In other words, a relatively small number of cases on the Panel's docket are not centralized—and many, if not most, of those are not centralized because the case terminated in the potential transferor district court prior to final action by the Panel.<sup>24</sup> The denial of a motion to transfer accounts for just 0.7% of all case dispositions in the Panel Cases Database.

The most common disposition was CTO Final, which accounts for 180,904 cases, or 42% of all case dispositions. In short, tag-along cases are a common feature of multidistrict litigation. NTN cases represent the next largest category of dispositions, with 104,752 cases—25% of all dispositions. Next are the transferee-severed cases, which account for 99,799 cases (23%), and then the transfers, which amount to 22,433 cases (5%). A large number of MDL cases, nearly half, are *centralized but not transferred* because they were originally filed in the transferee court (NTN cases) or have been created as new cases in the transferee court (Transferee Severed cases).

One additional point should be made with respect to NTN cases. In some MDL proceedings, the parties agree to—and the judge issues an order allowing—direct filing. In direct filing, new plaintiffs may file actions in the transferee district, even if venue is not proper.<sup>25</sup> Provision may be made for eventual transfer under 28 U.S.C. §

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*In re Aredia & Zometa Products Liability Litigation*, MDL No. 1760, 2008 U.S. Dist. LEXIS 43433 (M.D. Tenn. May 13, 2008).

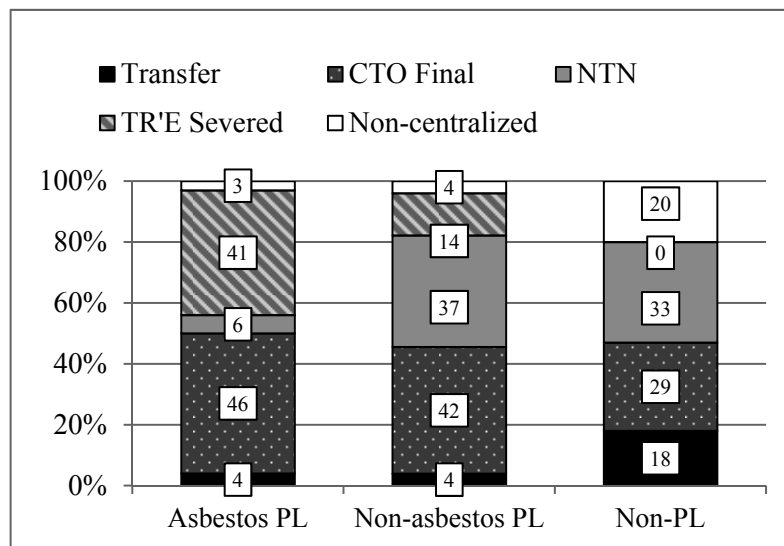
24. Why are we confident enough to state that most of these cases terminate in the potential transferor court prior to a Panel disposition? Of the Panel dispositions that do not result in a case becoming part of an MDL proceeding—about 4% of all dispositions—the most common code is “No Action Taken,” which accounts for 2% of all dispositions (or half of all dispositions in cases that do not become part of an MDL proceeding). These cases are likely terminated in the potential transferor court prior to Panel action—thus no action is required by the Panel. Similarly, the CTO may be vacated if the case terminates in the potential transferor district during the seven-day stay; these dispositions account for 1.5% of all dispositions. Other codes that appear infrequently in the database are “SCO Vacated” (i.e., Show Cause Order Vacated), “Motion Moot,” and “Motion Withdrawn.” The denial of the motion to transfer a proceeding accounts for just 0.7% of all case dispositions.

25. See, e.g., Court Management Order, *In re Actos (Pioglitazone) Products Liab. Litig.*, No. 6:11-md-2299 (W.D. La. Apr. 9, 2012) available at <http://www.lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.2012APR09.pdf>, archived at <http://perma.cc/CY28-MDEM?type=pdf>; Case Management Order No. 7, *In re Tylenol (Acetaminophen) Mktg., Sales Practices and Prods. Liab. Litig.*, No. 2:13-md-2436 (June 17, 2013) available at <https://www.paed.uscourts.gov/documents/MDL/MDL2436/CMO7.pdf>, archived at <http://perma.cc/CCX9-8XQ3?type=pdf>.

1404(a) to an identified district for trial.<sup>26</sup> When direct filing is permitted, a large number of NTN cases may not indicate that the controversy is largely local.

The disposition codes for asbestos, non-asbestos products liability, and all other cases are summarized in Figure 1. For asbestos cases (the first column, representing 166,697 total cases), CTO Final (46%) is the most common disposition, and Transferee Severed (41%) is the second most common. Transferee Severed cases are much more common in the asbestos MDL proceeding than in either non-asbestos products liability or in non-products liability—in the latter category, the procedure has been used in just two cases (rounds to 0% in the figure). In the asbestos cases, NTN and Transfer dispositions account for 6% and 4% of asbestos cases, respectively. Together, these four dispositions comprise 97% of all asbestos case dispositions for the period 1992–2013.<sup>27</sup> Non-centralized cases account for just 3% of asbestos products liability Panel dispositions.

FIGURE 1: PANEL CASE DISPOSITIONS, 1992–2013



For non-asbestos products liability cases (second column, 227,919 cases), the most common disposition code, again, was

26. See ROTHSTEIN & BORDEN, *supra* note 14, at 30.

27. This analysis excludes the large number of asbestos cases transferred in the initial order in 1991; if those cases were included, transfer becomes a much more common disposition for asbestos cases. We have excluded 1991 because the database is probably not complete for that year. See *supra* note 20.

CTO Final—42%. The NTN disposition, 37%, is the second most common, and is much more common in non-asbestos products liability cases than in asbestos cases. Together, these codes account for 79% of the non-asbestos products liability cases. Transferee Severed cases account for 14% of the non-asbestos products liability cases, and Transfer accounts for 4%. Altogether, 96% of the non-asbestos products liability cases included in the analysis became part of an MDL proceeding, comparable to the figure for the asbestos cases. Only 4% of the non-asbestos products liability cases are not centralized.

The non-products liability cases (third column, 32,224 cases) show a very different pattern than the asbestos and non-asbestos products liability cases. Most important, a much higher percentage of non-products liability cases are not centralized—20%, compared to 3–4% in the other categories. And within the centralization categories, the disposition codes also differ from the other columns. The CTO Final rate is much lower for non-products liability cases, just 29%, and Transfer is a much more common disposition, accounting for 18% of such cases. There are also a substantial number, 33%, of NTN cases. These findings indicate that, in non-products liability cases, there are fewer tag-along cases (the CTO Final cases), and relatively more cases are centralized in the initial Transfer Order.

It is worth noting that, for each column in Figure 1, the Transfer and CTO Final categories amount to approximately 50%. But there are far more tag-alongs (CTO Final cases) in the products liability categories, in both percentage and in absolute numbers.

### III. SPOTLIGHT ON NON-CENTRALIZED CASES

In keeping with the Symposium's theme of disaggregation, this Article focuses in part on those cases that were potentially part of an aggregate MDL proceeding but were not centralized. These are cases that were included in a motion before the Panel but that the Panel did not centralize.<sup>28</sup> In some cases, the Panel did not actually rule on the motion's merits, either because the motion was withdrawn or mooted by a motion case's resolution in the potential transferor district. After all, if the motion contains cases from only two districts, and the case(s) in one district conclude(s), then the

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28. This includes a small number of cases that were part of a show-cause order instead of a motion. For purposes of this section, "motion" includes show-cause orders. Moreover, as discussed *infra*, some of these cases were ultimately centralized in a separate motion.

motion loses its multidistrict character and the Panel need not decide on centralization. For this portion of the paper, cases brought before the Panel from 2000 through 2013 were examined. Cases where no action was taken by the Panel, typically because the case terminated before the Panel could act on it, have been removed. Of the nearly 3,400 non-centralized cases in the 2000–2013 database,<sup>29</sup> 62% were denials, with the remainder almost evenly divided between withdrawn and mooted motions.

FIGURE 2: NON-CENTRALIZED CASES, BY TYPE (N=3,386)

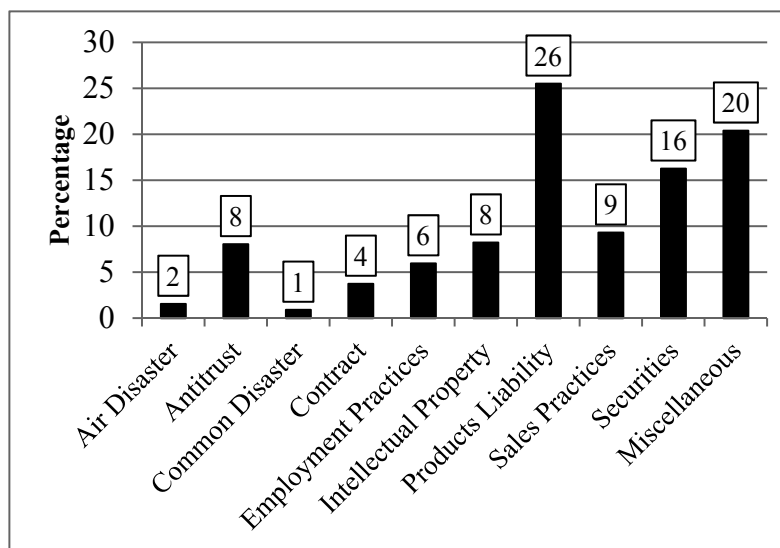


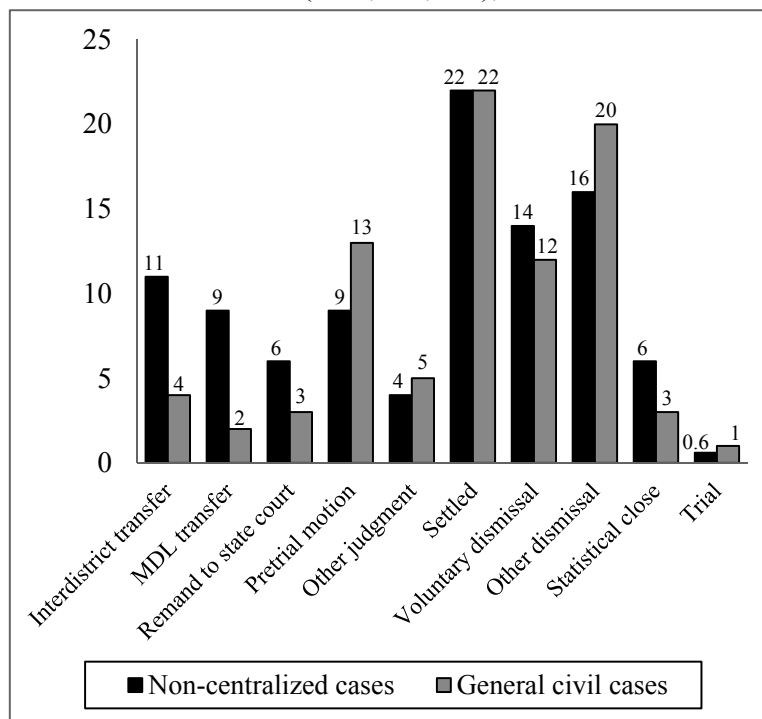
Figure 2 shows the non-centralized cases, by type, during the 2000–2013 timeframe. Interestingly, products liability cases are still the most common types of cases (26%), although they are not as common among the non-centralized cases as they are in the overall universe of MDL cases—recall that in the Panel Cases Database, they account for 93% of all cases. This also shows that some transfer motions involving products liability claims do not present sufficient common fact issues to merit centralization. More individualized fact questions may predominate in certain kinds of cases. One recent—if somewhat gruesome—example of this was in MDL No. 2079, *In re Table Saw Products Liability Litigation*. Forty-two plaintiffs in several districts moved for centralization on the theory that the table saws shared a common defect, i.e., the

29. See Technical Appendix, *infra*.

“lack [of] ‘flesh detection’ technology.”<sup>30</sup> The Panel denied the motion, concluding that any “common issues . . . are overshadowed by the non-common ones. Each action arises from an individual accident that occurred under necessarily unique circumstances.”<sup>31</sup>

The second largest category of non-centralized cases is the catch-all “miscellaneous” category at 20%.<sup>32</sup> Other than securities (16%), no other category accounts for more than 10% of the non-centralized cases. In short, the non-centralized cases come in all types, with relatively less common types of litigation (Common Disaster, Air Disaster) represented by fewer cases.

FIGURE 3: DISPOSITIONS FOR NON-CENTRALIZED AND GENERAL CIVIL CASES (N=2,978,781), 2000–2013



30. *In re* Table Saw Prods. Liab. Litig., 641 F. Supp. 2d 1384, 1384 (J.P.M.L. 2009).

31. *Id.*

32. Miscellaneous proceedings are those that do not fit within any of the existing categories (e.g., securities, antitrust, products liability). Examples include *In re McDonald's Corp. Promotional Games Litigation*, 192 F. Supp. 2d 1381 (J.P.M.L. 2002); *In re InPhonic, Inc.*, 460 F. Supp. 2d 1380 (J.P.M.L. 2006); and *In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation*, 469 F. Supp. 2d 1348 (J.P.M.L. 2006).

Figure 3 shows how non-centralized MDL cases (3,366 cases) terminated in their original district courts, set against general civil cases (2,978,781 cases) for the same time period—2000 through 2013.<sup>33</sup> (The termination of centralized cases is discussed separately in the next section.) The non-centralized MDL cases, interestingly, are much more likely to terminate by transfer to another district, either through a section 1404(a)<sup>34</sup> transfer or an MDL transfer *in a different proceeding* (section 1407 transfer) than civil cases in general. Eleven percent of non-centralized MDL cases are transferred to another district under section 1404(a), as compared to 4% of civil cases in general. Of course, section 1404(a) transfers are a viable alternative to MDL transfers, especially in litigation involving a relatively small number of cases. The Panel has held that “[w]here there are only a limited number of actions and the involved parties are amenable to Section 1404 transfer, such transfer is generally preferable to centralization under Section 1407.”<sup>35</sup> One potential advantage of section 1404(a) transfer as opposed to section 1407 transfer is that under the former, transfer is “not . . . for pretrial purposes only.”<sup>36</sup>

Similarly, 9% of non-centralized MDL cases are ultimately made part of another MDL proceeding.<sup>37</sup> Overall, 2% of civil cases terminate in the transferor court by MDL transfer, which is, in itself, an interesting figure. Although this finding that 9% of cases in denied motions terminate by MDL transfer initially looks like some error in the underlying data, there are clearly situations in which this occurs. In some circumstances, the Panel may consider both an industry-wide centralization and defendant-specific

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33. The analysis in this section is limited to MDL cases filed during or after 2000, and thus is narrower than the preceding discussion of the Panel Cases Database.

34. See 28 U.S.C. § 1404(a) (2012) (“For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . .”).

35. *In re Gaiam, Inc., Water Bottle Mktg., Sales Practices and Prods. Liab. Litig.*, 672 F. Supp. 2d 1373, 1374–75 (J.P.M.L. 2010). See also *In re Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (“Seeking transfer under Section 1404(a) or seeking to dismiss or stay duplicative actions under the first-to-file doctrine are among the variety of options available to avoid duplication of efforts.”); *In re Republic W. Ins. Co. Ins. Coverage Litig.*, 206 F. Supp. 2d 1364, 1365 (J.P.M.L. 2002) (“There is a reasonable prospect that the multidistrict character of the actions here before us may be eliminated by district court action on motions presently pending . . . for transfer of venue . . .”).

36. *In re Republic*, 206 F. Supp. 2d at 1365.

37. A bit of a technical point: Obviously, our unit of analysis is not “the case,” but “the case-in-a-motion,” as the same case can be part of more than one motion to centralize.

centralizations as options. Consider, for example, MDL No. 1456, *In re Pharmaceutical Industry Average Wholesale Price Litigation*, which was centralized by the Panel in 2002.<sup>38</sup> Four defendant pharmaceutical companies moved for centralization in four separate motions.<sup>39</sup> The Panel considered centralization on “a company-by-company basis”<sup>40</sup> but determined that such a strategy would potentially create “an unwieldy situation.”<sup>41</sup> Instead, it denied three of the four motions and transferred the cases in all four motions to the District of Massachusetts for pretrial proceedings.<sup>42</sup>

In other instances, attorneys seeking centralization can succeed in achieving centralization with a “second bite” at the apple. In the Lipitor litigation, for example, the Panel initially denied a first motion to transfer, which was filed by the plaintiffs in three cases in the District of South Carolina.<sup>43</sup> In addition to the three actions in the movants’ district, the Panel’s order indicated that there were 23 additional related federal cases.<sup>44</sup> The Panel’s August 2013 order stated that “[a]ll responding plaintiffs support centralization,”<sup>45</sup> but that “[c]ommon defendant Pfizer Inc. strenuously opposes centralization.”<sup>46</sup> The Panel’s order explained the denial in the following manner:

Upon a cursory review, one might think these cases represent a clear candidate for centralization. The subject actions do share factual issues arising from allegations that taking Pfizer’s cholesterol drug can result in the development of type 2 diabetes, and that Pfizer failed adequately to warn consumers of this problem. The number of actions pending in this litigation might, in other circumstances, be sufficient to justify centralization. However, other factors weigh against centralization here. In

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38. See *In re Immunex Corp. Average Wholesale Price Litig.*, 201 F. Supp. 2d 1378 (J.P.M.L. 2002).

39. The four motions were MDL No. 1453, *In re Immunex Corp. Average Wholesale Price Litigation*; MDL No. 1454, *In re Pharmacia Corp. Average Wholesale Price Litigation*; MDL No. 1455, *In re Glaxosmithkline Corp. Average Wholesale Price Litigation*; and MDL No. 1456, *In re Baxter International, Inc. Average Wholesale Price Litigation*. See *id.* at 1378. The last of these motions was restyled as *In re Pharmaceutical Industry Average Wholesale Price Litigation*. See *id.* at 1381–82.

40. *Id.* at 1380.

41. *Id.*

42. *Id.* at 1381.

43. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices and Prods. Liab. Litig.*, 959 F. Supp. 2d 1375, 1375 (J.P.M.L. 2013).

44. *Id.* at 1375 n.1.

45. *Id.* at 1375.

46. *Id.* at 1376.

particular, almost half of the actions currently comprising this litigation are pending in a single district—the District of South Carolina, and many of the actions involve common plaintiffs’ counsel. The South Carolina actions already are proceeding in a coordinated fashion before one judge, and, importantly, Pfizer represents in its brief that it is “ready and willing to work with Plaintiffs’ counsel in the [non-South Carolina] actions to appropriately coordinate any common discovery or other pretrial matters across the cases.” Given that express representation, the limited number of involved actions, and the overlap among counsel, we do not believe that creation of an MDL is necessary at this time.<sup>47</sup>

The Panel concluded that, although the number of actions involved in the litigation was large enough to justify centralization in some circumstances, in the *Lipitor* litigation there was sufficient “overlap among counsel”<sup>48</sup> that centralization was not warranted. In effect, common plaintiffs’ counsel and a “ready and willing”<sup>49</sup> common defendant would be able to coordinate pretrial proceedings outside of the formalities of an MDL proceeding.

In a second order filed in February 2014, however, the Panel ordered centralization of the *Lipitor* litigation.<sup>50</sup> The number of related actions had increased from 26 to 56,<sup>51</sup> with an additional 170 potential tag-alongs; actions were pending in 40 districts and before more than 100 judges.<sup>52</sup> The Panel also pointed to an apparent decrease in the overlapping of counsel in the related actions: “the number of involved plaintiffs’ firms has grown as well. In our judgment, the increased presence of apparently unique counsel, coupled with the increased number of involved actions, districts, and judges, makes it highly difficult, if not impossible, to coordinate this litigation effectively on an informal basis.”<sup>53</sup>

Another example of a successful “second bite” at the apple regarding centralization is the *Plavix* litigation. In December 2011, the Panel denied a motion to transfer filed by the defendant pharmaceutical companies.<sup>54</sup> The motion sought centralization of

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47. *Id.* (footnote and citation omitted).

48. *Id.*

49. *Id.*

50. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices and Prods. Liab. Litig. (No. II)*, 997 F. Supp. 2d 1354, 1357 (J.P.M.L. 2014).

51. *See id.* at 1355–56.

52. *See id.*

53. *Id.*

54. *In re Plavix Prods. Liab. Litig.*, 829 F. Supp. 2d 1378, 1378 (J.P.M.L. 2011). In this instance, the plaintiffs opposed centralization. *Id.*



ten actions pending in the District of New Jersey and single actions pending in the Eastern and Southern Districts of New York.<sup>55</sup> In a brief order, the Panel summarized its reasoning: “The limited number of actions and relatively few involved counsel . . . weigh against centralization. The District of New Jersey plaintiffs are all represented by the same law firms, and plaintiffs in [the New York districts] also share counsel.”<sup>56</sup> In February 2013, however, the Panel ordered transfer of some but not all pending actions to the District of New Jersey, citing “a significant change in circumstances.”<sup>57</sup> Among the changing circumstances the Panel cited were an increase in the number of related actions, such that actions were pending in a total of 14 districts,<sup>58</sup> an increase in the volume of related state-court actions, signaling a potential increase in federal cases,<sup>59</sup> and that “the number of law firms in the litigation also has increased significantly . . . . In the present docket, there are not only more involved actions but also significantly more involved counsel.”<sup>60</sup>

It is interesting to note that Pfizer, in its brief opposing centralization the second time in the *Lipitor* litigation, argued in part that centralization would “lead to the filing of a large number of ‘non-viable’ cases (e.g., cases in which the subject plaintiffs already had diabetes before they began taking Lipitor).”<sup>61</sup> These issues may be most acute for potential plaintiffs with claims based on injuries that are not substance specific, like many kinds of cancer or (as in *Lipitor*) diabetes.<sup>62</sup> In other words, formal

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55. *Id.* at 1379.

56. *Id.* at 1378 (footnote omitted).

57. *In re Plavix Prods. Liab. Litig.* (No. II), 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013). Again, the plaintiffs opposed centralization. *See id.* at 1377. The Panel denied, without prejudice, transfer of twelve actions in two districts in which motions to remand to state court were pending. *See id.* at 1380.

58. *See id.*

59. *See id.* On this point, the existence of a large number of potential tag-alongs was key: “The Miller Firm, which represents plaintiffs in a number of the constituent actions in this docket, states that it represents plaintiffs in ‘hundreds’ of cases filed in California and Illinois, and defendants assert that the total number of state cases exceeds 2,000. This dramatic increase . . . suggests that the number of related federal actions will increase as well.” *Id.* at 1378.

60. *Id.* at 1379. Again, the presence of “unique law firm[s] (*i.e.*, [firms] that [appear] in no other related action)” indicates that informal coordination of pretrial proceedings may not be adequate. *Id.* at 1379.

61. *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices and Prod. Liab. Litig.* (No. II), 997 F. Supp. 2d 1354, 1355–56 (J.P.M.L. 2014).

62. *See, e.g.*, PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 9 (1986) (“[T]he pathways of causation are difficult to detect, the time periods extend over decades, and the effects are not readily isolated or scientifically understood. In some cases the victims may not even

aggregation of the *Lipitor* litigation would increase the claiming rate in the overall litigation.<sup>63</sup> There are clearly incentives for attorneys in some circumstances to seek MDL centralization as a strategy. In some instances, parties attempt to manufacture multidistrict aggregation by filing a similar case in a second district. As the Panel noted in one such instance: “It is only the existence of the moving party’s newly-filed action in District Y that gives the litigation its multidistrict character.”<sup>64</sup> In another instance, involving an airplane crash in Pakistan, the defendants moved to consolidate two actions, one pending in the Central District of California, the other in the Northern District of Alabama.<sup>65</sup> The Panel noted that “if plaintiff in the Northern District of Alabama action had not filed his claims in both districts, the multidistrict character of this litigation would not exist.”<sup>66</sup>

Remands to state court were also a more common outcome for the non-centralized cases than for civil cases in general: 6% compared to 3%, respectively. Non-centralized cases were also more likely to terminate by “statistical closing” than civil cases in general, 6% to 3%.<sup>67</sup> This finding suggests that some non-centralized cases were placeholders filed to manufacture a multidistrict

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know that they have been harmed or that their harm is associated with a particular agent.”).

63. See, e.g., 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, 189 (2001). “Aggregation may also lead to higher claiming rates, meaning that larger numbers of plaintiffs come forward to obtain compensation.” *Id.* (footnote omitted). In some circumstances, either the quality of the additional plaintiffs’ claims, or the value of their claims, would be too small to be brought as individual actions. See *id.* at 198 (discussing cases in which “losses were comparatively small, [so that] securing individual legal representation on a contingency-fee basis would have been more problematic unless plaintiff attorneys were prepared to pursue individual claims in a mass, but non-class, litigation”).

64. *In re* Transocean Ltd. Sec. Litig. (No. II), 753 F. Supp. 2d 1373, 1375 (J.P.M.L. 2010). The Panel order described the facts in the Transocean motion as “curious,” and noted that there were contentions from parties opposing centralization that “the real reason [the movant] is now seeking centralization in the Southern District of Texas is that under Second Circuit law, [the movant] is not eligible for appointment as lead plaintiff.” *Id.* at 1374 n.2.

65. *In re* Air Crash Near Islamabad, Pakistan, on July 28, 2010, 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011).

66. *Id.*

67. Statistical closing is an administrative procedure used to close cases, and thus to eliminate cases from a court’s statistical reports, when the docket is inactive and no further proceedings are contemplated. See ADMIN. OFFICE OF THE U.S. COURTS, CIVIL STATISTICAL REPORTING GUIDE 29 (Version 1.1, Mar. 2010).

litigation out of a single action, as discussed in the preceding paragraph. Interestingly, non-centralized cases were not more likely to settle than civil cases in general. The “settlement” disposition accounts for 22% of cases in both categories. The “voluntary dismissal” category often includes settlements, as well. Combining these categories yields a settlement rate of 36% for non-centralized cases and 34% for civil cases in general.

A very low percentage of non-centralized cases go to trial (less than 1%), but this is true of civil cases in general (1%). The dockets of all the non-centralized trial cases were examined using PACER. Although the “Trial” column in Figure 2 represents 19 case dispositions, further research found only 12 actual trials, mostly because of intra-district consolidation of non-centralized but related cases. It is probably not wise to generalize about 12 cases, but as with trial cases in general, these were unusual cases. In *Eli Lilly & Co. v. Actavis Elizabeth L.L.C.*,<sup>68</sup> for example, plaintiff pharmaceutical manufacturer sued another pharmaceutical manufacturer for patent infringement in the District of New Jersey. There was a related case in the Eastern District of Virginia, providing for the multidistrict nature and giving rise to the plaintiff’s motion to transfer<sup>69</sup>—but the Eastern District case was dismissed, mooting the motion.<sup>70</sup> After more than five years of litigation—the docket runs to 760 entries, including several additional defendants and an appeal to the Federal Circuit—and a six-day bench trial, the court entered a final judgment in January 2013, awarding plaintiff with just \$57,488.73 in costs.<sup>71</sup> From the perspective of costs, both parties probably would have been better off settling, but it seems unlikely that the parties were interested in settlement. But at least the plaintiffs in the *Atomoxetine Patent Litigation* were awarded *something*. Perhaps the most unusual trial case we examined was *Mooney v. Allianz Life Ins. Co.*,<sup>72</sup> a class action fraud action against a seller of deferred annuities. The Panel denied transfer of overlapping class actions that had reached “a significantly advanced stage,” with certified classes in “four actions, and fact discovery . . . completed (or . . . nearing completion) in three

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68. *Eli Lilly & Co. v. Actavis Elizabeth L.L.C.*, 676 F. Supp. 2d 352 (D.N.J. 2011).

69. *See Eli Lilly*, No. 07-cv-3770 (DMC) (D.N.J. filed Dec. 14, 2007).

70. Pleading No. 17 at 1, *In re Atomoxetine Patent Litig.*, MDL No. 1924, No. 2:07-45 (J.P.M.L. Mar. 18, 2008) (“The Panel has now been advised that the listed Eastern District of Virginia action was dismissed.”).

71. Clerk’s Order Granting in Part and Denying in Part Plaintiff’s Motion to Tax Costs, *Eli Lilly*, 676 F. Supp. 2d 352 (D.N.J. Jan. 22, 2013).

72. Class Action Complaint and Demand for Jury Trial, *Mooney v. Allianz Life Ins. Co.*, 244 F.R.D. 531 (D. Minn. Feb. 9, 2006) (No. 0:06-545).

of them.”<sup>73</sup> One of these certified class actions was tried before a jury in the District of Minnesota. The jury found that the defendant had engaged in fraud “but none of the Plaintiffs were harmed as a direct result of the misrepresentation or deceptive practice. No damages were awarded.”<sup>74</sup> This is a rare find, indeed: a certified consumer class action that went to trial, combined with a plaintiff’s verdict without damages.

#### IV. TERMINATION OF CENTRALIZED CASES

The Panel Cases Database provides very limited information on the nature of centralized case termination in MDL proceedings. The most common code is “Closed,” appearing in 261,729 of the 339,480 cases with termination information (77%).<sup>75</sup> This code does not indicate the reason that the MDL cases were terminated in the transferee district—i.e., whether the MDL cases were closed as the result of a global settlement, some other form of settlement, a ruling on a dispositive motion, a trial verdict, or simply based on a voluntary dismissal without settlement. Moreover, because these cases have different docket numbers in the transferor and transferee courts, the matching technique that was used to identify the non-centralized cases generally will not work with centralized cases.

TABLE 1: TERMINATION CODES FOR MDL CASES, 1992–AUGUST 2013 (SOURCE: PANEL CASES DATABASE) (N=339,480)

Termination Code	Asbestos [MDL 875]	All Other Products Liability	Non-Products Liability
Closed	71%	85%	70%
CRO/Remand Final	1%	6%	3%
State Court	2%	7%	5%
Admin. Closed	25%	0%	3%
N	163,267	150,793	25,420

Table 1 summarizes the disposition codes for terminated MDL cases, breaking out the asbestos cases, all other products liability cases, and all non-products liability proceedings as separate columns. As Table 1 makes very clear, 71% of asbestos cases that

73. *In re Allianz Life Ins. Co. of N. Am. Deferred Annuity Mktg. & Sales Practices Litig.*, 517 F. Supp. 2d 1364, 1365 (2007).

74. Jury Verdict, *In re Allianz*, 244 F.R.D. 531 (D. Minn. Oct. 16, 2009).

75. 80% of the cases in the database had terminated as of August 2013. There were 87,360 pending MDL cases as of that date.

have terminated in the Eastern District of Pennsylvania were coded as “Closed” in the database, and another 25% were coded as “Administratively Closed.”<sup>76</sup> Together, these two codes account for 96% of all asbestos terminations. One percent of asbestos cases—a total of 760 cases over the course of the proceeding—were remanded to transferor courts, and 2% were remanded to state court.<sup>77</sup>

The pattern for non-asbestos products liability cases is different. “Closed” is still the most common code—occurring in 85% of the terminated MDL cases—but very few of these cases were administratively closed (rounds to zero). However, a much larger proportion of non-asbestos products liability cases were remanded to the transferor court—6% of all MDL terminations—and a much larger proportion were remanded to state court—7%. It would be overly hasty to conclude, however, that remands to transferor courts are widely distributed among non-asbestos MDL proceedings. Remands to the transferor court were concentrated in just five MDL proceedings: 59% of remands were in MDL No. 926 (*In re Silicone Gel Breast Implants Products Liability Litigation*); 14% were in MDL No. 1014 (*In re Orthopedic Bone Screw Products Liability Litigation*); 6% in MDL No. 1148 (*In re Latex Gloves Products Liability Litigation*); 6% in MDL No. 1407 (*In re Phenylpropanolamine (PPA) Products Liability Litigation*); and 4% in MDL No. 1507 (*In re Prempro Products Liability*). These five MDL proceedings account for 89% of all section 1407 remands in non-asbestos products liability proceedings. Outside of these proceedings, remand to the transferor court for further proceedings has been a very uncommon occurrence. The same is true for remands to state court; 76% of all remands to state court in non-asbestos products liability cases were in just two proceedings: 50% in MDL No. 1535 (*In re Welding Fume Products Liability Litigation*), and 26% in MDL No. 926 (*In re Silicone Gel Breast Implants Products Liability Litigation*).

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76. Moreover, 98% of the asbestos cases in the database had terminated as of the last update. Few cases now remain in this MDL proceeding. This is a remarkable development, given the history of this litigation. See generally Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?* 23 WIDENER L.J. 97 (2013) (documenting history and new developments in the asbestos multidistrict proceeding, authored by current transferee judge).

77. Transferee judges have the power to rule on section 1447 remand motions in transferred cases. See, e.g., J.P.M.L & FED. JUD. CTR., TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES 5 (2009).

In the non-products liability cases, closure in the transferee court is still the most common termination code, at 70%. Three percent of non-products liability cases are remanded to the transferor court, and 5% are remanded to state court.<sup>78</sup>

In short, in most MDL proceedings, few, if any, cases terminate other than by closure in the transferee court. Further research is needed to identify exactly how these cases terminate in the transferee court—by global settlement or other means.

#### V. SECTION 1407 REMANDS, 2000–2013

As discussed in the preceding section, section 1407 remands to the transferor court are relatively uncommon; most centralized cases are resolved in the transferee court, with or without a global settlement.<sup>79</sup> This section analyzes the 2,361 section 1407 remand cases that were identified in the 2000–2013 database, a subset of the cases in the prior section on which more complete information was found. These cases were found in 127 MDL proceedings—i.e., in most proceedings, there are no remands to the transferor court. Even in the MDL proceedings with section 1407 remands, remands were not terribly common. The modal number of remands in these 127 proceedings is one (52 of the proceedings had a single remand). Table 2 lists the MDL proceedings with the most section 1407 remand cases. The most section 1407 remands in this period, 20%, were in MDL No. 1407 (*In re Phenylpropanolamine (PPA) Products Liability Litigation*). Not surprisingly, 17% of all the remands in the database were in MDL No. 875 (*In re Asbestos Products Liability Litigation (VI)*). Given that this is the largest MDL proceeding of all time, this makes a great deal of sense. The asbestos MDL proceeding is followed by several other large products liability MDL proceedings: MDL No. 1507 (*In re Prempro Products Liability Litigation*), 15% of remands; MDL No. 1148 (*In re Latex Gloves Products Liability Litigation*), 9%; MDL 1203 (*In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*), 5%; MDL No. 1760 (*In re Aredia and*

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78. In the non-products liability cases, moreover, the remands are more widely distributed among proceedings. No single non-products liability proceeding accounts for more than 15 % of remands to state court, and no single proceeding accounts for more than 21 % of remands to the transferor courts.

79. See also Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16, 21 (2004) (“At that point, the litigation, like all cases for that matter, tends to settle or is resolved by summary judgment rulings by the transferee judge, so remand for trial is unnecessary. The cases go away through settlement or some other thing. It is only occasionally that cases are remanded . . .”).

*Zometa Products Liability Litigation*), 5%; MDL No. 1373 (*In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*), 4%; and MDL No. 2016 (*In re Yamaha Motor Corp. Rhino ATV Products Liability Litigation*), 2%. These eight large proceedings account for 75% of all section 1407 remands during this period.<sup>80</sup> Section 1407 remand cases were also identified in 119 additional proceedings, accounting for another quarter of remands. Eighty-nine percent of the section 1407 remand cases are products liability cases, which is consistent with the percentage of all centralized cases that are products liability.

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80. It is interesting to note that several of the proceedings with the highest numbers of section 1407 remands were also proceedings in which there was a de facto global settlement rather than a court-approved global settlement. Presumably, the critical issues in these proceedings were decided in the transferee court, with the plaintiff attorneys and defendants agreeing on a framework to begin settling cases, either individually or in groups. Some of these settlements would have occurred before remand to the transferor court, but others may have occurred after. In *PPA*, there was evidence that settlement was piecemeal, yet added up to be more or less global, with remanded cases adding their pieces. There was no global settlement, although there was a class settlement relating to Dexatrim, one of the products containing PPA. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. 2:01-md-01407 (W.D. Wash. May 10, 2013) (Chattem, Inc.'s, Motion to Enforce Settlement/Judgment and to Enjoin). Yet the court noted "the considerable success achieved for plaintiffs in this litigation," including "settlements exceed[ing] \$307,500,000," in awarding \$15.5 million in fees to attorneys who performed work that benefitted all plaintiffs. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. 2:01-md-01407 (W.D. Wash. Sept. 18, 2009) (order granting common benefit fee committee's petition and directing payment of fees earned by attorneys performing common benefit work). The court determined that the *PPA* litigation, centralized in 2001, had matured by the end of 2003 and set forth a procedure for any party's attorney to petition for a suggestion of remand order. See *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, No. 2:01-md-01407 (W.D. Wash. Nov. 18, 2003) (case management order no. 17 remand of cases). Because other parties could object to remand, the procedure seems designed to expedite remand of cases when the parties were in agreement, and thus perhaps in the process of settling.

TABLE 2: MDL PROCEEDINGS WITH MOST SECTION 1407 REMANDS, 2000–2013

Proceeding	Number of section 1407 Remands	Percentage of section 1407 Remands
MDL No. 1407	479	20%
MDL No. 875	399	17%
MDL No. 1507	356	15%
MDL No. 1148	204	9%
MDL No. 1203	111	5%
MDL No. 1760	107	5%
MDL No. 1373	86	4%
MDL No. 2016	39	2%
119 additional proceedings	580	25%

Studying the ultimate disposition of the section 1407 remand cases proved to be quite challenging. The textbook section 1407 remand case should have at least two records in the transferor court.<sup>81</sup> First, the case will close in the transferor court when transferred to the transferee court. Second, after remand it will reopen, thus creating a new record, and then close in the transferor court again at some point.<sup>82</sup> It is not uncommon, however, for cases to have more than two records in the transferor court in the courts' civil Integrated Data Base (IDB), signaling that, for some reason, the district court closed the case and then re-opened it at least one additional time—either before or after the section 1407 transfer and remand sequence. To address this issue, the disposition code for the last record for a case not coded “statistical close” was treated as definitive. In the event that the only post-remand record was coded “statistical close,” that code was assigned.

Two other sets of cases proved to be even more problematic. Some section 1407 remand cases from the Cases Database do not match to the IDB at all—a general issue discussed briefly in the Technical Appendix. Another set of section 1407 remand cases only had a single record in the IDB; i.e., they deviate from the textbook model described in the preceding section. In some of these cases, the

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81. In the IDB, a new case record is typically generated whenever a case is reopened. For example, a case that is closed with the granting of summary judgment in the district court and then re-opened with an appellate remand reversing that judgment would appear in the IDB two times.

82. Because cases are typically assigned a new docket number in the transferee court, it is not feasible to match case records in the transferor and transferee courts.



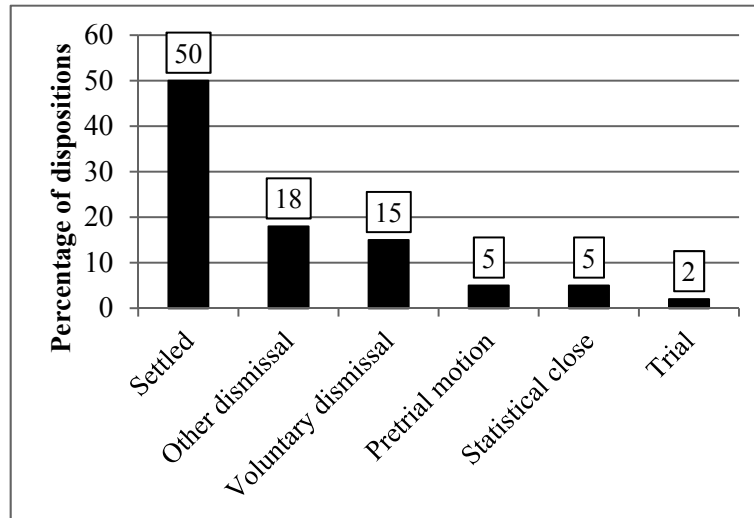
single record represented the pre- and post-centralization case in one record. It appears that, in a small subset of MDL cases, the transferor court does not actually close the record at the time of the section 1407 transfer; if these cases are subsequently remanded, there is no second record, but the new disposition information is assigned when the remanded case closes in the transferor court (technically, for a second time). In a second subset of the single-record cases, the remanded case appears to have been assigned a new docket number in the transferor court and thus cannot be matched to the corresponding pre-transfer case record. This need not be “error” on the part of the transferor court. Some of these remand cases are, technically, “new” cases, created in the transferee court through the transferee severed procedure described above.<sup>83</sup> In Figure 4, all cases were included, including single-record cases, with non-transfer dispositions, that match to the IDB.

As can be seen in Figure 4, the most common disposition for a section 1407 remand case back in the transferor court is settlement, which accounts for half of all records (50%). Other dismissal (18%) and voluntary dismissal (15%) account for another third of the records. Because many, and probably most, of these dispositions are also the result of a settlement, it is likely safe to conclude that more than eight in ten section 1407 remand cases terminate with a settlement in the transferor court. This is an interesting finding—settlement in the transferee court is hardly an unusual occurrence, after all. But for some reason, these cases were settled only after remand. It is likely that, in some of these cases, the settlement after remand is an individual settlement removed from a more comprehensive settlement, if any, in the transferee court. It is also likely that, in some of these cases, the settlement reached in the transferor court was related to a more comprehensive settlement in the transferee court.

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83. *See supra* note 23 and accompanying text.

FIGURE 4: DISPOSITIONS FOR REMAND CASES (N=1,608), 2000–2013



It is also interesting that 5% of section 1407 remand cases were resolved on a pretrial motion in the transferor court, most likely on summary judgment. As in the trial cases, section 1407 remand does not necessarily mean that all issues related to an individual plaintiff's claims have been resolved in the transferee court. It only means that the issues common to the centralized MDL cases have been resolved.<sup>84</sup> In a relatively small percentage of section 1407 remand cases, then, defendants prevail on a motion for summary judgment relating to an individual plaintiff's claims. Many, if not most, of the summary judgment cases probably turn on issues of individual causation. In a products liability action, for example, an order in the MDL proceeding establishing general causation does not relieve individual plaintiffs of making a showing of specific causation after a section 1407 remand.<sup>85</sup> Individual causation appears to be a common

84. See *supra* notes 16–18 and accompanying text.

85. See, e.g., Order Granting in Part and Denying in Part Plaintiff's Motion to Modify/Discharge/Declare not Applicable Protective Order Issued in MDL Action, *Nelson v. Matrixx Initiatives, Inc.*, No. 3:09-2904, 2012 WL 1380259 (N.D. Cal. Oct. 10, 2012) (granting summary judgment to defendants because plaintiff was unable to provide admissible expert testimony on specific causation); *c.f.* Order, *Meade v. Ford Motor Co.*, No. 1:09-1833, 2011 WL 4402539 (N.D. Ga. Sept. 20, 2011) (granting summary judgment because plaintiff's expert witnesses' testimony was insufficient to establish a design defect, despite recall). Summary judgment on the basis of missing expert evidence is not limited to the products liability cases, however. See, e.g., Memorandum and Order, *Sciallo et al. v. Tyco Int'l Ltd.*, No. 1:03-7770, 2012 WL 2861340 (S.D.N.Y. July 9, 2012) (granting summary judgment in a

issue in asbestos section 1407 remand cases, given the difficulty that many plaintiffs have providing evidence that the plaintiff's injuries were proximately caused by any particular defendant's asbestos-containing products.<sup>86</sup> But summary judgment can be granted on other grounds, as well. In a few cases, summary judgment was granted to defendants on statute-of-limitations grounds in the transferor court—even if the cases had been part of an MDL proceeding for several years.<sup>87</sup>

Relatedly, the surprisingly low trial rate for the section 1407 remand cases—only 2%, representing 27 jury verdicts, two bench trials, and one directed verdict—must be considered in light of the distinction between individual and common issues in a centralized MDL proceeding. The MDL transferee court will suggest remand when it has completed common pretrial proceedings, but that does not necessarily mean that the constituent cases are “ready for trial.” There may in fact be a great deal of individual discovery remaining in a section 1407 remand case. Moreover, the settlement rate must be considered in relation to the trial rate. To the extent that the parties face further discovery costs in the section 1407 remand cases, this may provide an incentive to settle back in the transferor court. To the extent that there is a “firm” trial date, the parties may also have powerful incentives to settle.

The trial rate for section 1407 remand cases is similar to the trial rate for civil cases in general. On this point, there is a bit of historical irony. When the Judicial Conference proposed the creation of the multidistrict litigation procedure in the 1960s, some critics of the proposal argued that it could create injustice to have one judge manage the pretrial proceedings and a different judge, much less familiar with the issues than the transferee judge, preside at trial in the same case.<sup>88</sup>

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securities fraud action because plaintiffs had failed to timely file expert evidence to support loss causation).

86. *Wannall v. Honeywell Int'l, Inc.*, 292 F.R.D. 26 (D.D.C. 2013) (plaintiff was unable to show that exposure to defendant's asbestos-containing products was sufficient cause of decedent's mesothelioma, given multiple exposures).

87. *See, e.g., Bryant v. Wyeth, Inc.*, 816 F. Supp. 2d 329 (S.D. Miss. 2011) (granting summary judgment in a products liability action on statute-of-limitations ground, after case had been in transferee court several years); Memorandum, Opinion, and Order, *Linton v. Wyeth Inc.*, No. 1:04-705, 2012 WL 5303850 (S.D. Miss. Oct. 25, 2012); *see also* Order, *Dvorak v. Prudential Ins. Co.*, No. 0:97-cv-7018 (S.D. Fla. Oct. 26, 2001) (granting summary judgment in a sales practices action based on Florida's statute of limitations for fraud claims).

88. *See, e.g., A Proposal to Provide Pretrial Consolidation of Multidistrict Litigation: Hearing on H.R. 8276 Before the Subcomm. on Improvements in Judicial Machinery*, 89th Cong. 89 (1966) (letter from Hon. Emanuel Celler)

This does not appear to have been an actual problem in the overwhelming majority of section 1407 remand cases, which themselves represent only a very small percentage of all centralized MDL cases.<sup>89</sup>

The 30 trials—and again, mostly jury verdicts—represented in Figure 3 took place in nine proceedings. So out of the 127 proceedings with section 1407 remand cases, a trial disposition could not be located in 118, or 93%. In other words, most MDL proceedings do not produce section 1407 remands, and even the MDL proceedings that produce them do not appear to result in individual trials. The MDL proceedings in which the trial dispositions were located are listed in Table 3. There were seven trials on remand in MDL No. 1507 (*In re Prempro Products Liability Litigation*) and MDL No. 1760 (*In re Aredia and Zometa Products Liability Litigation*), and six in MDL No. 1373 (*In re Bridgestone/Firestone Tires Products Liability Litigation*). We also identified three trials each in MDL No. 875 (*In re Asbestos Products Liability Litigation*) and MDL No. 1203 (*In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine Products Liability Litigation)*). These are all large MDL proceedings, accounting for large numbers of remands during our study period, so it makes sense that most of the trial dispositions occurred in these cases.

TABLE 3: TRIALS IN SECTION 1407 REMAND CASES, 2000–2013

Proceeding	Number of trials
MDL No. 1507	7
MDL No. 1760	7
MDL No. 1373	6
MDL No. 875	3
MDL No. 1203	3
MDL No. 1061	1
MDL No. 1132	1
MDL No. 1148	1
MDL No. 1721	1
Total	30

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(“It follows that if a case is pretried in a distant forum by other parties in other cases under the procedures followed by a different court injustice may well result.”).

89. Remand to the transferor district does not necessarily mean that a different judge will try the case, even in the event of a trial. The transferee judge may seek an interdistrict assignment for purposes of trying a remanded case in the transferor district. *See* ROTHSTEIN & BORDEN, *supra* note 14, at 5.

During the Symposium discussion in March, Professor McGovern suggested that some asbestos trials were likely missing. Given the difficulties matching some of the section 1407 remand records to the IDB, we have no doubt that this is probably true. Further analysis of the IDB indicates 21 asbestos products liability cases terminating by trial in districts other than the Eastern District of Pennsylvania since 2000; some of these cases are likely section 1407 remand cases that we cannot match to the Cases Database.

#### CONCLUSION

When the organizers of this Symposium asked us if we were interested in writing something on the subject of “Disaggregation” in the context of multidistrict litigation, it did not take us long to focus on these two categories of cases—those cases that are part of a transfer motion that is not granted, and those cases that are transferred but then subsequently remanded to the transferor court. In a very real sense, these cases are at the margins of the MDL process. Most cases are centralized, especially if one factors in the large numbers of tag-along cases in some products liability proceedings. And few centralized cases are remanded to the transferor court, and even post-remand, the most likely outcome for an MDL case is settlement.

This raises the question: What role does remand play in contemporary multidistrict litigation? Perhaps the potential for remand is best understood as a tool to assist the transferee judge in focusing the parties on global resolution. Plaintiffs may disfavor disaggregation because they will lose the concentrated pressure on defendants of hundreds or thousands of cases.<sup>90</sup> On the other hand, defendants may fear remand because it creates the potential for multiple trials, each one a gamble that may result in a huge judgment.<sup>91</sup>

The Panel has in recent years made clear that remand is not a failed outcome in MDL proceedings. Once efficiencies in pretrial proceedings have been exploited, it is appropriate to return the cases to their transferor districts. By statute, one of the goals of the MDL process is to create efficiencies in the judicial system. By having one judge working through several similar cases in a single proceeding, instead of multiple judges working on individual cases across the country, judicial time and resources are saved. The Panel frequently cites efficiency as a reason for centralizing cases

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90. See Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U.L. REV. 667, 693–94 (2013) [hereinafter Burch, *Disaggregating*].

91. See *id.*

in a proceeding.<sup>92</sup> Commentators have expressed concern about remand because transferor judges may lack the expertise in the subject matter of the litigation that transferee judges have accumulated during the proceedings.<sup>93</sup> Nonetheless, we find these cases to be similar to all other civil litigation in how they terminate: relatively few go to trial. Given a goal of efficiency, it is hardly surprising that centralization is so often the Panel's decision, and that substantially many more cases are centralized than denied.<sup>94</sup> Although centralization is frequent, it is hardly a definite outcome, and attorneys who attempt to manufacture litigation in multiple districts see the Panel call out their actions and deny centralization.<sup>95</sup> Of course, if it is later determined that there are legitimate reasons for centralization, the Panel is willing to revisit its decision as seen in the *Plavix* and *Lipitor* litigations.<sup>96</sup> Moreover, if efficiency is a goal—and it seems fair to say that it is—the rarity of remanding cases should not be surprising either. Remand is a tool transferee judges can use to manage litigation, but it is rarely necessary, even in the most complex of MDLs such as *Asbestos* and *PPA*. In a world of aggregate litigation, there is relatively little disaggregation once constituent cases are combined through centralization.

#### TECHNICAL APPENDIX

To examine the nature of disaggregate litigation, we relied on two databases. The first database, called the Panel Cases Database, was compiled from data provided by the Panel in August of 2013. The data reports the case number, district of filing, potential MDL proceeding number and type of proceeding, as well as the Panel's decision regarding centralization, the date of the decision, and the action taken by the Panel with respect to the case (e.g., CTO,

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92. See, e.g., 28 U.S.C. § 1407 (2012); Margaret S. Williams and Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424 (2013); Burch, *Unsettling Efficiency*, *supra* note 3, at 195–96.

93. Burch, *Diasgregating*, *supra* note 90, at 696.

94. Emery G. Lee III, Catherine Borden, Margaret S. Williams, and Kevin M. Scott, *Multidistrict Centralization: An Empirical Examination*, (Fed. Judicial Ctr., working paper) (on file with authors).

95. See, e.g., *In re Transocean Ltd. Sec. Litig.* (No. II), 753 F. Supp. 2d 1373, 1375 (J.P.M.L. 2010); *In re Air Crash Near Islamabad, Pakistan*, on July 28, 2010, 777 F. Supp. 2d 1352, 1353 (J.P.M.L. 2011).

96. *In re Plavix Prods. Liab. Litig.* (No. II), 923 F. Supp. 2d 1376, 1378 (J.P.M.L. 2013); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.* (No. II), MDL No. 2502, 2014 WL 661589 (J.P.M.L. Feb. 18, 2014).

NTN). The Panel's data include a wide array of cases, but are only complete since about 1992 when the Panel began to automate its records.

The data from the Panel were merged with the IDB maintained by the Federal Judicial Center and available from ICPSR. This data includes case information including filing and termination dates and districts, nature of suit code, case disposition, as well as other information such as trial date (if any). The most recent version of the civil IDB contains records for all cases filed (or terminated) since 2000. For this reason, our analysis of matched cases is generally limited to the period from 2000 to 2013; our analysis of the Cases Database generally extends to 1992.

The data from the IDB were matched to the Panel's data using an SQL merge to join the two databases, matching on district and case number. The merge allowed us to include all the Panel cases—those that did match to a case in the IDB as well as those that did not. There were 338,737 cases in the merged dataset, 12,397 of which did not match to the IDB. Many of the unmatched cases were in older MDL proceedings, leading us to believe that the Panel's case number was not the original case number, making it impossible to match. With the data merged, we then removed any duplicate cases from the database. Although the duplicate cases had the same case number, they often had different filing dates. Generally speaking, we wanted the last record in the sequence of filing dates, assuming the last record did not have a disposition code of statistical close (a disposition code frequently used for record keeping purposes, after all substantive matters in the case are resolved). There were a few cases where every disposition code in the sequence of cases was statistical close, and so we simply took the last case in the sequence, consistent with our other coding decisions. After removing all duplicate cases, we were left with 315,516 cases, 96% of which had a match with a case in the IDB. It is on these cases that we conducted our analysis.