

## MDL IN THE STATES

*Zachary D. Clopton & D. Theodore Rave*

**ABSTRACT**—Multidistrict litigation (MDL) is exploding. MDL makes up a large and increasing portion of the federal civil docket. It has been used in recent years to manage and resolve some of our largest controversies: opioids, NFL concussions, Volkswagen “clean” diesel, and many more. And, given its growing importance, MDL has come to dominate the academic literature on complex litigation.

At its base, MDL is a tool to coordinate related cases across different courts in service of justice, efficiency, and fairness. These goals are not unique to the federal courts. State courts handle far more cases than federal courts, including the kinds of complex disputes that could benefit from coordination. Yet state MDL procedures are virtually absent from the scholarly literature.

This Article offers a systematic study of state MDLs. Surveying the laws of every state, we find that about half the states have developed their own MDL-like procedural devices. What makes MDL distinctive is that it allows some official or institution to consolidate cases and to assign them to a handpicked judge. Therefore, we develop in this Article the first taxonomy of state MDL mechanisms based on which officials or institutions are given this substantial power. Along the way, we explore the other ways that states have tailored their MDL rules. We also provide case studies of three state MDL systems and report previously unpublished data on how state MDLs work.

Building on these findings, this Article offers an institutional analysis of state MDL. We find that state MDLs distribute important cases to courts and judges in ways that depart dramatically from the default rules of judicial administration. These choices have important consequences for litigant control, judicial power, and both inter- and intrastate relations, which can be amplified in states where judges are elected. In these ways, different types

government officials.

**AUTHORS**—Professor of Law, Northwestern Pritzker School of Law; George A. Butler Research Professor and Associate Professor of Law,

NORTHWESTERN UNIVERSITY LAW REVIEW

University of Houston Law Center. For helpful comments and conversations, we would like to thank Lori Andrus, Lynn Baker, Emily Berman, Bob Bone, Pam Bookman, Beth Burch, Sarah Crooks, David Dow, Dave Fagundes, Brian Fitzpatrick, Robert Freedman, Abbe Gluck, Maria Glover, Steve Herman, Lonny Hoffman, Sam Issacharoff, Olatunde Johnson, Carolyn Kuhl, David Kwok, Alexandra Lahav, Steve Landsman, Dave Marcus, Altom Maglio, James Nelson, Ellen Relkin, Judith Resnik, Jessica Roberts, Joe Sanders, Dave Schwartz, Gerson Smoger, David Sugarman, Irene Ten Cate, Diego Zambrano, and participants in the AALS Annual Meeting Civil Procedure Section, the Civil Procedure Workshop, the SEALS Civil Procedure Discussion Group, the Clifford Symposium, and the Pound Civil Justice Institute’s Academic Symposium. Research Librarians Ashley Arrington and Katy Badeaux provided invaluable assistance tracking down primary sources, and Haley Martin and Douglas Wagner provided helpful research assistance.

INTRODUCTION .....	1651
I. TAXONOMY AND INSTITUTIONAL DESIGN .....	1656
A. <i>Taxonomy</i> .....	1657
B. <i>Institutional Design of State MDL Systems</i> .....	1663
C. <i>Consolidation Rules</i> .....	1669
D. <i>Management</i> .....	1671
E. <i>Source of Law</i> .....	1675
F. <i>A Brief Comment on Variation</i> .....	1676
II. CASE STUDIES .....	1676
A. <i>California</i> .....	1677
B. <i>Texas</i> .....	1686
C. <i>Indiana</i> .....	1693
D. <i>Other States</i> .....	1697
III. ASSESSMENT.....	1699
A. <i>Interstate Political Economy?</i> .....	1700
B. <i>Intrastate Forum Shopping</i> .....	1703
C. <i>Intrastate Judicial Politics</i> .....	1707
D. <i>Federal–State Competition</i> .....	1712
E. <i>Interjurisdictional Cooperation</i> .....	1714
CONCLUSION .....	1718
APPENDIX A: STATE MDL RULES, STATUTES, AND STANDARDS .....	1719
APPENDIX B: CALIFORNIA COORDINATED PROCEEDINGS DATA.....	1728
APPENDIX C: TEXAS MDL DATA.....	1732

## INTRODUCTION

Imagine a major storm causes damage to thousands of homes. As is often the case, a wave of insurance litigation follows in its wake. Homeowners file hundreds of cases in dozens of courts alleging that insurance companies relied on unlawful procedures when denying or reducing insurance claims. There could be many advantages to coordinating this mass of cases, especially if there is a good chance that they will be resolved together in a global settlement. At the very least, duplicative discovery and inconsistent judgments could be avoided if the cases could be consolidated in front of a single judge. But which judge? And how is that judge selected?

As every lawyer knows, the answers to these questions matter tremendously. Judges vary along many important dimensions. Some judges are active case managers; others let the parties run the show. Some are pushy about settling cases; others love taking cases to trial. Some are plaintiff-friendly; others sympathize with defendants. And because so much mass litigation ends in settlement, most of their decisions will never be subject to meaningful appellate review.

In federal courts, related cases like these can be consolidated in a multidistrict litigation (MDL). The Judicial Panel on Multidistrict Litigation (JPML), a panel of seven federal judges selected by the Chief Justice of the United States, is authorized to consolidate cases and transfer them to a single handpicked judge for coordinated pretrial proceedings.<sup>1</sup> MDL has come to dominate the federal civil docket, and it has been used to manage and resolve some of our largest controversies, such as the BP oil-spill disaster, the NFL concussion litigation, and the Volkswagen “clean”-diesel scandal.<sup>2</sup> The federal MDL process is well studied and well understood.<sup>3</sup> And, perhaps

---

<sup>1</sup> See 28 U.S.C. § 1407(a), (d).

<sup>2</sup> By some (potentially misleading) estimates, MDL accounts for nearly 50% of the entire federal civil docket. See Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1305, 1314–16 (2020) [hereinafter Clopton, *MDL as Category*] (citing sources and questioning this statistic). For more rigorous estimates, see generally Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245 (2019). For an excellent history of the MDL statute and overview of the procedure, see generally Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017).

<sup>3</sup> Because federal MDL is well-studied and well-understood, there are too many sources to cite here. For a selection of recent articles that informed this project, see, for example, Lynn A. Baker & Stephen J. Herman, *Layers of Lawyers: Parsing the Complexities of Claimant Representation in Mass Tort MDLs*, 24 LEWIS & CLARK L. REV. 469 (2020); Bradt, *supra* note 2; Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017) [hereinafter Bradt & Rave, *The Information-Forcing Role*]; Andrew D. Bradt & D. Theodore Rave, *It’s Good to Have the “Haves” on Your Side: A Defense of Repeat Players in Multidistrict Litigation*,

surprisingly given the stakes of some of these controversies, the best evidence so far suggests that the consolidation process operates in a largely nonpartisan way.<sup>4</sup> Thus, the federal courts have rather successfully formalized the consolidation of related cases from around the country.

But what if these same cases were pending in state courts or were divided up between federal and state courts? State courts handle more than sixty times as many cases as federal courts, including the types of mass disputes that could benefit from coordination.<sup>5</sup> Yet the various ways that states handle MDL-like litigation have been virtually absent from the scholarly literature.<sup>6</sup>

This lack of attention is not because states simply mirror the federal courts. Many state MDL procedures differ dramatically from federal MDL procedures and from each other. And these differences can be magnified because, in many states, judges are elected to represent local or statewide constituencies. So, in addition to all the ways that any two MDL judges may differ, state MDLs also interact with electoral politics. Some of the elected

---

108 GEO. L.J. 73 (2019) [hereinafter Bradt & Rave, *It's Good to Have the "Haves"*]; ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019) [hereinafter BURCH, MASS TORT DEALS]; Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017) [hereinafter Burch, *Monopolies*]; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017); Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713 (2019) [hereinafter Clopton & Bradt, *Party Preferences*]; Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511 (2013); Judith Resnik, "Vital" State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts, 165 U. PA. L. REV. 1765 (2017); Charles Silver & Geoffrey P. Miller, *The Quasi-class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010); Margaret S. Williams & Tracey E. George, *Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation*, 10 J. EMPIRICAL LEGAL STUD. 424 (2013).

<sup>4</sup> See Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 925–27 (2018) [hereinafter Bradt & Clopton, *MDL v. Trump*].

<sup>5</sup> NAT'L CTR. FOR STATE CTS., CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 6 n.36 (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/13376/civiljusticerepot-2015.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticerepot-2015.pdf) [perma.cc/RG2S-45E4] (first citing NAT'L CTR. FOR STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS (2015); and then citing *Table C. U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending December 31, 2013 and 2014*, U.S. CTS. <https://www.uscourts.gov/sites/default/files/c00dec14.pdf> [https://perma.cc/5N4K-STQ3]).

<sup>6</sup> The best existing treatment of state MDL procedures is a seventeen-year-old treatise that is out of print: MARK HERRMANN, GEOFFREY J. RITTS & KATHERINE LARSON, STATEWIDE COORDINATED PROCEEDINGS: STATE COURT ANALOGUES TO THE FEDERAL MDL PROCESS (2d ed. 2004). We cite the handful of other exceptions focusing on one state or another in Parts II and III, *infra*.

state judges will be Democrats, others Republicans. Some will have to cater to big-city voters, others to rural constituents. Some will have received sizeable campaign contributions from plaintiffs' lawyers, others from big businesses, including insurance companies. Again, it matters greatly which judge manages the consolidated proceeding and how that judge is selected.

To be more concrete, imagine the insurance cases from the hypothetical storm were pending in Texas state courts. Indeed, this situation is based on a real set of Texas state cases.<sup>7</sup> Texas has an MDL statute that would allow these cases to be brought together for coordinated proceedings.<sup>8</sup> The power to consolidate, and with it the power to assign the consolidated cases to a particular judge, is vested in a panel of judges appointed by the state's elected chief justice. The Texas chief justice has been a Republican—and has appointed a Republican-majority panel—for the entire existence of Texas MDL.<sup>9</sup> It goes without saying that empowering a statewide panel of elected judges to reallocate important cases from one locally elected trial judge to another has significant consequences for litigants, voters, and intrastate relations.<sup>10</sup>

Had the same events happened in Indiana, however, they would have played out differently than in Texas or the federal courts. In Indiana, the decision whether to consolidate related cases is vested in the locally elected trial judge with whom the first of the cases was filed.<sup>11</sup> Litigants presumably respond to this design strategically. Plaintiffs' lawyers, if given the opportunity, might choose to file their first case in front of the most plaintiff-friendly judge, perhaps one elected from a heavily Democratic corner of the state. That judge could then vacuum up cases from across the state—even if the vast majority of the related lawsuits were filed in front of judges elected by very different constituencies. Thus, the Indiana version of this story implicates the horizontal distribution of power among locally elected judges, instead of the vertical distribution between state and local actors. Again, the consequences for litigants, voters, and intrastate relations are significant.

In Texas, Indiana, and every other state with an MDL system, these consequential departures from the usual rules of venue and case assignment have played out with relatively little scrutiny or critical analysis because

---

<sup>7</sup> See *In re Farmers Ins. Co. Wind/Hail Storm Litig.*, 481 S.W.3d 422 (Tex. J.P.M.L. 2015).

<sup>8</sup> TEX. GOV'T CODE ANN. § 74.161 *et seq.* (West 2019); TEX. R. JUD. ADMIN. 13.

<sup>9</sup> See *infra* Section II.B.

<sup>10</sup> We have more to say about Texas MDL *infra* Section II.B and in D. Theodore Rave & Zachary D. Clopton, *Texas MDL*, 24 LEWIS & CLARK L. REV. 367 (2020) [hereinafter Rave & Clopton, *Texas MDL*].

<sup>11</sup> IND. R. TRIAL P. 42(D).

scholars have not been paying attention. This Article aims to change that by undertaking a comprehensive study of state MDL systems. Approximately half the states—including those with the largest legal markets—have some sort of MDL procedure that gives some judge or judges the power to consolidate and assign many of the state’s most important cases.<sup>12</sup> We aim to unmask these processes and explore the consequences and tradeoffs they entail.

Our descriptive contribution starts with a detailed survey of MDL practice in the states. We bring together state statutes and rules, interviews with judges and rulemakers, unpublished judicial records and committee deliberations, and our analysis of published and unpublished state judicial data. In Part I, we examine the variety of institutional-design choices that states have made and develop the first taxonomy of state MDL systems. More specifically, we divide states into four categories: those with (1) an “institutional” model in which some centralized institution other than a trial judge (such as a panel or the state supreme court) is empowered to consolidate cases, (2) a “peer” model in which trial judges with pending cases are empowered to consolidate cases from other peer judges around the state, (3) “ad hoc” approaches to certain mass litigations, and (4) no MDL procedures. Our institutional analysis turns on the central question of who decides whether and in front of which judge cases should be consolidated, though we also catalog in the main text and in the Appendices various other MDL issues on which states have made different choices.

To gain a better understanding of how state MDLs work on the ground, in Part II we offer case studies of the MDL systems of two institutional states (California and Texas) and one peer state (Indiana) that vary on multiple dimensions. We examine the history and design of these states’ MDL systems, and we report new data on how frequently the procedures are used, in which types of cases, and on the diversity of judges selected. We also report in Part II previously unpublished data about the extent of consolidation in the other states with MDL procedures. We find that state MDLs handle a substantial number of cases of national importance in parallel—and often in cooperation—with federal MDLs, mostly related to products liability. But we also find that state MDLs more frequently handle cases of statewide importance, across a wide range of subject matters, for which federal jurisdiction is likely unavailable. In other words, while state MDLs offer opportunities for federal–state cooperation, they are more than mere adjuncts to the federal MDL system.

---

<sup>12</sup> See *infra* Section I.A.

We draw on this descriptive work to develop an institutional analysis in Part III. First, we consider but ultimately reject the idea that state MDLs are a locus of interstate competition. The limits of state jurisdiction, and, perhaps more importantly, the goliath of federal MDL, mean that states are unlikely to use MDL procedures to compete with each other for judicial business.

But this is not to say that political economy is irrelevant. Our second observation is that *intrastate* political economy—the competition between plaintiff- and defense-side interests—has implications for state MDL design choices. For example, the decision to empower trial judges versus external institutions to consolidate cases has significant consequences for the ability of parties to shop for their preferred forums and judges, which in turn shifts the balance of power between plaintiffs and defendants within the state. Empowering external institutions tends to blunt plaintiffs' ability to forum shop to the benefit of defense-side interests, while empowering peer trial judges creates opportunities for plaintiffs to exert greater control over which courts and judges will hear their cases.

Our third observation links this analysis to two other aspects of state judiciaries: how judges are selected (elected versus appointed) and what constituencies they represent (local versus statewide). Analyzing state MDLs in light of state judicial selection emphasizes the stakes for the allocation of judicial authority within the states, and sometimes for the will of the people expressed in judicial elections. For example, allowing a chief justice who was elected statewide to reassign cases from one locally elected trial judge (say in a conservative county) to another (say in a liberal county) has obvious consequences for the division of authority within the state and for the legitimacy of the judge's ultimate decision. This is not to say that any particular combination of MDL procedure and judicial selection is right or wrong. Different states might reasonably make different choices about how to allocate judicial power and which values to prioritize in mass litigation. But it does mean that state MDL design interacts with fundamental questions of government power and democratic legitimacy. And it is not always clear that the designers of state MDL systems, who typically talk in terms of judicial administration, have fully thought through the implications of their design choices on these issues.

Fourth, although we find no evidence that states adopted their MDL procedures in order to affect federal MDLs, the design of state MDLs has implications for complex disputes pending in both state and federal courts. A frequent objection to federal MDL is that it supposedly empowers a handful of plaintiffs' lawyers who may not represent the interests of all plaintiffs. The presence of parallel state MDLs headed by different—but also powerful—plaintiffs' lawyers may serve a checking function against the

federal lead counsel, just as states might do in a federal system. The potential for state MDLs to reduce agency costs through this form of federal–state competition comes at some cost to collective action, so we do not suggest that state MDLs are always positive additions to a nationwide dispute. But they have the capacity to substantially change litigation dynamics in ways that cannot be ignored.

Fifth and finally, we return to issues of interstate relations to consider how state MDLs affect interjurisdictional cooperation. For one thing, the variation in state MDL procedures creates the opportunity for learning among policymakers and MDL judges—and, indeed, even since beginning this project, we have been contacted by multiple states seeking to use our results to help design their own state MDL systems.<sup>13</sup> State MDLs also create opportunities for cooperation on actual cases. Particularly when nationwide disputes are chopped up into state and federal court components, we find that state MDLs offer potential forums for judicial cooperation. To take just one high-profile example, in the litigation surrounding the opioid crisis, there are nine state MDLs working in cooperation with the federal MDL proceeding.<sup>14</sup> Looking forward, we suggest that the presence of concurrent litigation should often cut in favor of state-level consolidation.

In sum, this Article shows that the complex-litigation landscape consists of more than just federal MDL. State courts play an important role in resolving complex disputes. We find that states are adapting to that role by designing their own systems for coordination and management. And while this study does not permit us to identify the ideal state MDL system, it does demonstrate that state MDL choices have important consequences for litigants, courts, and voters.

## I. TAXONOMY AND INSTITUTIONAL DESIGN

To better understand the landscape of state MDLs, in this Part we survey the laws of all fifty states, creating the first taxonomy of state MDL systems. We then survey how MDL states handle important institutional-design questions related to consolidation, assignment, and case management. Our results, which build on a practitioner treatise compiled more than a

---

<sup>13</sup> We have received such inquiries from representatives of Florida and Ohio, two large states without MDL procedures.

<sup>14</sup> See generally Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, DEPAUL L. REV. (forthcoming 2021) (manuscript at 6–8) <https://papers.ssrn.com/a=3680074> [<https://perma.cc/Z5EQ-S8RK>] [hereinafter Clopton & Rave, *Opioid Cases and State MDLs*] (discussing cases in New York, Pennsylvania, West Virginia, Texas, South Carolina, Illinois, Massachusetts, Connecticut, and California).



decade ago,<sup>15</sup> reveal wide variation among the states in the designs of their MDL systems.

Before diving in, though, there is an important scope question to be answered: What are state MDLs? Taking a cue from the federal statute, we are not focused on any particular case type (e.g., mass torts).<sup>16</sup> Instead, we are looking for special mechanisms that depart from the ordinary venue or venue-transfer rules to allow for consolidation or coordination of cases across different courts within a single state. Provisions that allow for the transfer of cases to other proper venues (e.g., 28 U.S.C. § 1404) or the consolidation of issues or cases pending within a single court (e.g., Federal Rule of Civil Procedure 42), therefore, would not qualify as “state MDLs.”<sup>17</sup>

### A. Taxonomy

The first step in our project is to create a taxonomy of state MDLs. Although there are many ways to divide the universe, we settled on four broad categories: (1) states that rely on institutions outside of the trial courts to decide whether and where to consolidate cases (institutional MDL); (2) states that rely on trial judges with pending cases to decide whether to consolidate cases from other trial judges (peer MDL); (3) states that have a history of ad hoc consolidation (ad hoc MDL); and (4) states that do not appear to have any mechanism for MDL-like consolidation. As explained in Part III, these simple divisions have major consequences for how state MDLs affect important values.

The results of our taxonomy are reproduced in Table 1 and displayed geographically in Figure 1.<sup>18</sup> The balance of this Section will say a bit more

---

<sup>15</sup> See generally HERRMANN ET AL., *supra* note 6 (surveying existing state MDL procedures).

<sup>16</sup> See 28 U.S.C. § 1407; Clopton, *MDL as Category*, *supra* note 2, at 1316–17 (discussing federal MDL case types). For this reason, although interesting, we are not focused here on special state rules for complex or other subcategories of cases that might overlap with MDL but that do not involve the consolidation of cases across courts. See, e.g., ARIZ. R. CIV. P. 26.2 (dividing cases into tiers, with Tier 3 being most complex); CAL. R. CT. 3.400–3.402; *Special Sessions of the Superior Court*, CONN. JUD. BRANCH, <https://jud.ct.gov/external/super/spsess.htm#ComplexLitigationDocket> [<https://perma.cc/CVT8-MUZR>] (outlining Connecticut’s “Complex Litigation Docket”); FLA. R. CIV. P. 1.201 (outlining Florida’s “Complex Litigation” rule); 231 PA. CODE R. 1041.1 (detailing Pennsylvania’s special provisions for asbestos cases). Nor are we interested here in the fact that the Montana legislature, by statute, created a special asbestos claims court. MONT. CODE ANN. § 3-20-101 (2019).

<sup>17</sup> We acknowledge that the label “MDL” may be technically inaccurate for states that do not divide their courts into “districts.” But because MDL comes with many connotations that help contextualize our analysis, we use the label despite its technical inaccuracy for some states.

<sup>18</sup> The map was produced using “United States of America with States – Blue” by FreeVectorMaps.com. *Map of the United States of America with States – Blue*, FREE VECTOR MAPS, [https://freevectormaps.com/united-states/US-EPS-02-4002?ref=search\\_result](https://freevectormaps.com/united-states/US-EPS-02-4002?ref=search_result) [<https://perma.cc/VE67-5GMW>].

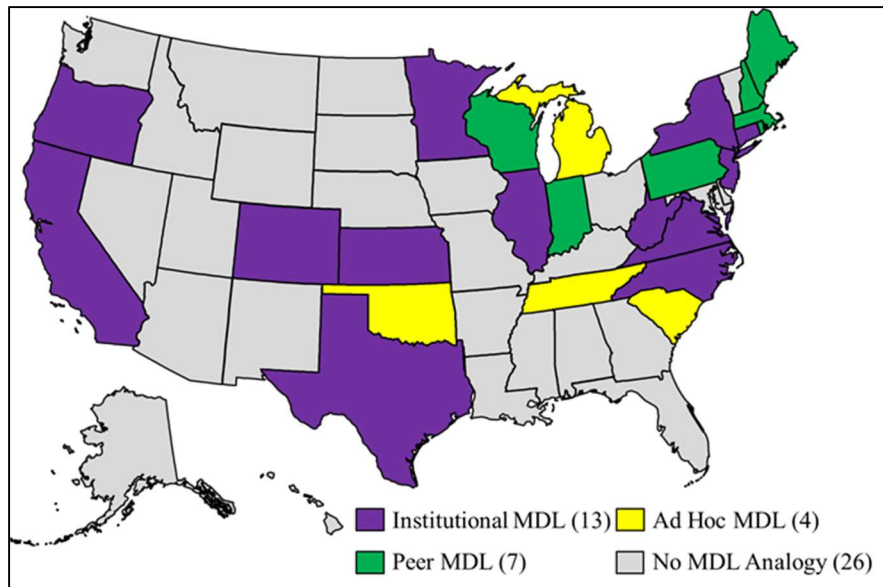
NORTHWESTERN UNIVERSITY LAW REVIEW

about each of our categories and how we resolved close cases. Additional information and citations to relevant sources are included in Appendix A.

TABLE 1: STATE MDL TAXONOMY

<b>Institutional MDL</b>	<b>Peer MDL</b>	<b>Ad Hoc MDL</b>	<b>No MDL Analogy</b>
California	Indiana	Michigan	Alabama
Colorado	Maine	Oklahoma	Alaska
Connecticut	Massachusetts	South Carolina	Arizona
Illinois	New Hampshire	Tennessee	Arkansas
Kansas	Pennsylvania		Delaware
Minnesota	Rhode Island		Florida
New Jersey	Wisconsin		Georgia
New York			Hawaii
North Carolina			Idaho
Oregon			Iowa
Texas			Kentucky
Virginia			Louisiana
West Virginia			Maryland
			Mississippi
			Missouri
			Montana
			Nebraska
			Nevada
			New Mexico
			North Dakota
			Ohio
			South Dakota
			Utah
			Vermont
			Washington
			Wyoming

FIGURE 1: STATE MDL TAXONOMY



### 1. Institutional MDL

Our first category comprises those states with institutional MDL procedures. What distinguishes these states is that they rely on some institution independent of trial judges to decide whether to consolidate or coordinate cases pending in different courts and to decide which trial judge should handle those cases. Institutional MDL systems may rely on a dedicated panel for multidistrict litigation, the state's highest court, or the state's chief justice to make the consolidation decision.

Thirteen states have adopted institutional MDL procedures: California, Colorado, Connecticut, Illinois, Kansas, Minnesota, New Jersey, New York, North Carolina, Oregon, Texas, Virginia, and West Virginia.<sup>19</sup> We describe in more detail the particulars of these states' procedures below.<sup>20</sup>

Including Connecticut in this category was a close call because it has a hybrid MDL procedure. Connecticut law permits related cases to be transferred by the trial judges, by party consent, or by the chief court administrator (appointed by the chief justice).<sup>21</sup> The ability of a trial judge with pending cases to transfer them for consolidated proceedings would

<sup>19</sup> See *infra* Table A1. Oregon's MDL procedure, however, is limited to class actions pending in different courts. OR. R. CIV. P. 32(K).

<sup>20</sup> See *infra* Section I.B.

<sup>21</sup> See CONN. GEN. STAT. § 51-347b (2019).

place Connecticut in the peer category. But we have chosen to include Connecticut in the institutional category because of the option to rely on another judicial actor—here the chief court administrator—to transfer cases without a trial judge’s approval.

### 2. *Peer MDL*

Our second category comprises states that authorize state trial judges as trial judges—not as panel members, as in the federal and some state systems—to consolidate cases across judicial districts. Seven states fit this description: Indiana, Maine, Massachusetts, New Hampshire, Pennsylvania, Rhode Island, and Wisconsin.<sup>22</sup>

Peer MDL models also vary. In some states, the judge in the earliest filed action can order cases filed around the state to be transferred and consolidated in that court. In other states, any judge with a pending case can decide on consolidation and transfer. Still other states require the concurrence of both the transferor and transferee judges to effect a consolidation. We describe these different models below,<sup>23</sup> but they all share the salient feature of assigning consolidation responsibility to trial judges with pending cases.

### 3. *Ad Hoc MDL*

Our third category comprises four states that have engaged in ad hoc MDL-like procedures: Michigan, Oklahoma, South Carolina, and Tennessee.<sup>24</sup>

In Michigan, the supreme court ordered consolidation of mass litigation on at least two occasions: breast-implant cases in 1993 and antitrust cases against Microsoft in 2000.<sup>25</sup> Both times, the Michigan Supreme Court issued detailed orders that specified many aspects of the consolidated proceedings,

---

<sup>22</sup> See *infra* Table A1. A close call here is Maryland. Maryland has a special rule that allows trial judges to transfer cases with common questions of law or fact across judicial circuits, but ultimately we do not think it belongs in the peer MDL category. MD. R. CIV. P. 2-327(d). The reason is that the rule specifies that the transferor judge may transfer a case only to a court in which the case could have been brought. In other words, it works like a typical venue transfer, and the normal rules of venue apply. (Technically, the rule requires that circuit administrative judges approve the transfer as well, but, unlike Connecticut, that does not displace the role of the transferor judge.)

<sup>23</sup> See *infra* Section I.B.2.

<sup>24</sup> See *infra* Table A1.

<sup>25</sup> See *In re* Microsoft Antitrust Litig., Admin. Order No. 2000-5 (Mich. 2000) & *In re* Silicone Gel Implant Prod. Liab. Litig., Admin. Order No. 1993-2 (Mich. 1993), <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Administrative%20Orders.pdf> [<https://perma.cc/A8WK-8F7V>].

but without any MDL-specific rule or statute.<sup>26</sup> The Michigan Supreme Court considered, but ultimately rejected, similar consolidation of asbestos cases.<sup>27</sup>

In Oklahoma, the supreme court ordered the consolidation of state breast-implant litigation in 1993, relying on its “general supervisory and administrative powers” under the Oklahoma constitution.<sup>28</sup> Since then, the court has relied on these powers to consolidate other cases on an ad hoc basis, but there is no rule or statute governing its decisions.<sup>29</sup>

The Supreme Court of South Carolina also consolidated state breast-implant litigation for pretrial proceedings only.<sup>30</sup>

The fourth state in this category is Tennessee. Unlike the previous three, what makes Tennessee ad hoc is that it has a consolidation procedure only in the local rules of one of its districts. The Local Rules of Practice for Shelby County provide that, upon motion, all of the judges of the court can sit together to decide whether consolidation is appropriate.<sup>31</sup> Such consolidation is permitted even for cases in multiple divisions within the district. We include Tennessee among the ad hoc states because this local rule shows that statewide authorities have essentially left MDL up to the local courts—a different sense of ad hoc.

---

<sup>26</sup> See *id.* Interestingly, the procedures for these two ad hoc consolidations differed in significant ways. For example, the breast-implant cases were consolidated for pretrial purposes only, while the Microsoft cases were consolidated for all purposes, including trial. *Id.*

<sup>27</sup> Prohibition on “Bundling” Cases, Admin. Order No. 2006-6 (Mich. 2006), [https://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-47\\_08-09-06\\_unformatted-order.html](https://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-47_08-09-06_unformatted-order.html) [<https://perma.cc/BRZ2-9J3R>]. The court explained:

[T]he Court has determined that trial courts should be precluded from “bundling” asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery.

*Id.* In considering consolidation, the court drafted a proposed order that built on elements of the two prior consolidations. See Proposed Admin. Order Regarding Asbestos-Related Disease Litig., ADM File No. 2003-47 (Mich. 2006), [https://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-47\\_02-23-06\\_unformatted-order.html](https://www.icle.org/contentfiles/milawnews/Rules/Ao/2003-47_02-23-06_unformatted-order.html) [<https://perma.cc/DX8Y-KN6Y>].

<sup>28</sup> *In re Okla. Breast Implant Cases*, 847 P.2d 772, 772–73 (1993).

<sup>29</sup> See HERRMANN ET AL., *supra* note 6, at 447 (explaining this dynamic and citing examples of cases consolidated under this constitutionally derived authority).

<sup>30</sup> See *In re Breast Implant Prod. Liab. Litig.*, 503 S.E.2d 445, 446 (S.C. 1998); see also HERRMANN ET AL., *supra* note 6, at 515 (noting this example). We are not aware of other consolidation orders of this kind in South Carolina.

<sup>31</sup> SHELBY CNTY., TENN., THIRTIETH JUD. DIST. AT MEMPHIS, LOCAL RULES OF PRACTICE r. 28 (2012), [https://www.shelbycountytn.gov/DocumentCenter/View/413/rules\\_of\\_the\\_court?bidId=](https://www.shelbycountytn.gov/DocumentCenter/View/413/rules_of_the_court?bidId=) [<https://perma.cc/6E98-5AC8>].

Note that, although we feel relatively comfortable with our list of institutional and peer states (having scoured state statutes and court rules) and the four states we have identified here, we are less sure that we have identified all the states that have, at some point, engaged in ad hoc consolidation. Such is the nature of ad hocery.<sup>32</sup>

#### 4. *No MDL Analogy*

Twenty-six states appear to have no special MDL-like procedures.<sup>33</sup> Ordinary venue transfers are, of course, possible in these states. These states also typically allow the consolidation of different cases pending in a single court, and some even have special procedures for handling certain types of cases (e.g., asbestos litigation).<sup>34</sup> But we have found no statutory or rules-based mechanisms for consolidating or coordinating cases across venues in these states.

#### 5. *The Road Not Taken*

Finally, we would be remiss for not mentioning here that at least two states considered adopting MDL procedures but declined.

In 2007, the chief justice of the Kentucky Supreme Court established what came to be called the Mass Tort and Class Action Litigation Committee.<sup>35</sup> In its 2010 Final Report, the Committee explained that it had considered but declined to pursue a special MDL-like procedure for complex cases. The Committee wrote: “While Kentucky has many jurisdictions, the relative infrequency of cases spanning multiple circuits renders multi-district litigation rules unnecessary.”<sup>36</sup>

Around the same time, Ohio began to consider an MDL rule at the behest of Mark Herrmann,<sup>37</sup> author of the leading practitioner treatise on state MDLs. Herrmann’s 2007 suggestion led to a 2014 memorandum prepared

<sup>32</sup> See generally Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 767 (2017) (describing the general practice of ad hoc procedure making).

<sup>33</sup> The states are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, South Dakota, Utah, Vermont, Washington, and Wyoming. See *infra* Table A1.

<sup>34</sup> See, e.g., MONT. CODE ANN. §§ 3-20-102, 3-20-103 (2019) (creating special asbestos claim court); ARIZ. R. CIV. P. 26.2 (dividing cases into tiers, with Tier 3 being most complex).

<sup>35</sup> See KY. SUP. CT., MASS TORT AND CLASS ACTION LITIGATION COMMITTEE: FINAL REPORT 3 (2010), <https://courts.ky.gov/resources/publicationsresources/Publications/MassTortandClassActionLitigationCommitteeFinalReport.pdf> [<https://perma.cc/8YPK-ZMXA>].

<sup>36</sup> *Id.* at 4.

<sup>37</sup> See SUP. CT. OF OHIO, MEMORANDUM RE: RECOMMENDATION FOR A MULTI-DISTRICT LITIGATION PROGRAM (2014); SUP. CT. OF OHIO, ADVISORY COMM. ON CASE MGMT., MEETING MINUTES (2014); SUP. CT. OF OHIO, MEMORANDUM RE: ADVISORY COMMITTEE ON CASE MANAGEMENT 2014 ANNUAL REPORT (2015).

for the state’s Advisory Committee on Case Management. A subcommittee recommended the creation of an MDL rule, but the full committee ultimately did not adopt that recommendation.<sup>38</sup> While there remains some interest for pursuing this sort of rule reform in Ohio, the issue is not presently on the Committee’s agenda.

### B. Institutional Design of State MDL Systems

The previous Section created a taxonomy of states based on the structure of their MDL systems. But our general labels do not tell the entire story. The choice between vesting the consolidation decision in a centralized institution versus in a trial judge has important consequences for how these systems interact with party choice and judicial power. Within the institutional and peer MDL categories, we find significant differences in the ways that these states allocate institutional or peer control. We describe those differences here and summarize them in Table 2 at the end of this Section.<sup>39</sup> These choices connect not only with MDL design but also with questions of judicial selection. We, therefore, also report in this Section (and discuss in detail in Part III) the methods of selecting judges in the states.<sup>40</sup>

#### I. Institutional States

Within our institutional MDL category, different states authorize different institutions to decide whether and where to transfer and consolidate cases. The three primary approaches are (1) a dedicated MDL panel, (2) the

---

<sup>38</sup> See *supra* note 37.

<sup>39</sup> In addition to citations to particular provisions, we provide citations to all of the relevant statutes and rules in Table A1 *infra*.

<sup>40</sup> There is, of course, far more to say about judicial selection (and its connection to case outcomes) than we can say here. For just a few examples addressing these issues, see HERBERT M. KRITZER, JUSTICES ON THE BALLOT: CONTINUITY AND CHANGE IN STATE SUPREME COURT ELECTIONS (2015) (reporting on the historical patterns of state supreme court elections and analyzing the reasons behind the changes in the methods); Herbert M. Kritzer, *Judicial Elections in the 2010s*, 67 DEPAUL L. REV. 387 (2018) (updating the analysis in *Justices on the Ballot* with data from 2013 through 2016 elections); Adam Bonica & Maya Sen, *The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Introduce Ideology into Judicial Selection*, 60 J.L. & ECON. 559 (2017) (exploring how ideology influences the selection of judges); Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1732 (2017) (assessing whether “certain methods of selection have resulted in judiciaries that skew to the left or right compared with the public at large in those states”); Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 233 (2020) (exploring “the relationship between the ideology, gender, and race of U.S. Court of Appeals judges and decisions addressing class certification”).

state's highest court, and (3) the state's chief justice. Here we catalog some additional variations in how these institutions are composed and selected.<sup>41</sup>

*a. Dedicated panel*

One of the most distinctive features of the federal MDL statute is its reliance on a panel of judges to consolidate, transfer, and assign MDLs.<sup>42</sup> For that reason, we start our inquiry with states that use panels.

Five states rely on a specialized MDL panel to consolidate cases: Colorado, New York, Texas, Virginia, and West Virginia.<sup>43</sup> Three of these states, Texas, Virginia, and West Virginia, also authorize the panel to assign consolidated cases to specific judges, as in the federal system.<sup>44</sup> In New York, the panel decides where to send consolidated cases, but the administrative judge of the selected transferee court assigns the cases to a particular judge.<sup>45</sup> In Colorado, the panel has the power to make recommendations to the chief justice, who makes the ultimate decision on which judge will hear the consolidated cases.<sup>46</sup>

Panel design in these states varies on multiple dimensions. One such dimension is panel selection. In the federal system, the Chief Justice alone selects panel members.<sup>47</sup> Because all federal judges are appointed, and because an appointed Chief Justice selects the panel members, the federal Panel has a double layer of insulation from electoral politics. But state models of judicial selection vary considerably. No state MDL panels are directly elected, providing at least one layer of insulation, but some panels are chosen by, and composed of, elected judges.

---

<sup>41</sup> Here, as elsewhere, we rely on the formal allocation of decisional authority. It is possible, for example, that when a state authorizes the supreme court to decide on consolidation, in practice the chief justice makes the decision. But for our purposes, such a state would be described as one in which the supreme court decides.

<sup>42</sup> See 28 U.S.C. § 1407.

<sup>43</sup> See *infra* Table A1.

<sup>44</sup> See 28 U.S.C. § 1407(b) (“[C]oordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation.”); *infra* notes 198–211 and accompanying text (discussing Texas’s MDL procedure, including the MDL panel’s assignment powers); VA. CODE ANN. § 8.01-267.4 (2020) (providing that Virginia’s MDL panel “may order some or all of the actions transferred to a circuit court in which one or more of the actions are pending for purposes of coordinated or consolidated pretrial proceedings”); W. VA. TRIAL CT. R. 26.05(c) (permitting the MDL panel to “request the assignment by the Chief Justice of additional active or senior status circuit court judges to assist the Panel in resolving Mass Litigation or proceedings therein as needed”).

<sup>45</sup> See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69(b)(2), (c)(1) (2020).

<sup>46</sup> See COLO. R. CIV. P. 42.1(a)(1), (h); *Beckord v. Dist. Ct.*, 698 P.2d 1323, 1327 (Colo. 1985).

<sup>47</sup> See 28 U.S.C. § 1407(d).



Colorado and Texas rely on their chief justices alone to select panel members.<sup>48</sup> The Colorado chief justice is appointed and subject to retention elections; the Texas chief justice is elected in partisan elections.<sup>49</sup> In West Virginia, the chief justice selects the panel, subject to approval by the supreme court.<sup>50</sup> All justices of the West Virginia supreme court are elected in nonpartisan elections. In New York, the panel is selected by the chief administrator of the courts for the state,<sup>51</sup> who is an administrative officer appointed by the chief judge of New York's highest court with advice and consent of an administrative board.<sup>52</sup> The New York chief judge is, in turn, appointed by the governor.<sup>53</sup> Finally, in Virginia, the supreme court selects panel members. Virginia supreme court justices are selected by the state legislature.<sup>54</sup> Interestingly, the Virginia supreme court appoints a new panel for every consolidation decision.<sup>55</sup> Thus, New York, Colorado, and Virginia emulate the federal courts' model of double insulation, while Texas and West Virginia are not as far removed from electoral politics.

A second way in which states vary is in panel membership. In the federal system, the panel is comprised of seven judges from district and circuit courts, no two of whom may be from the same circuit.<sup>56</sup> At the state level, there is substantial variation in the size of the panel, the types of judges eligible to serve, and whether geographic diversity is required. More specifically, according to the rules or statutes in these panel states:

---

<sup>48</sup> COLO. R. CIV. P. 42.1(a)(1); TEX. GOV'T CODE ANN. § 74.161(a) (West 2019).

<sup>49</sup> Information on judicial selection in the states is maintained by the National Center for State Courts. *Judicial Selection in the States*, NAT'L CTR. FOR STATE CTS., <http://www.judicialselection.us> [<https://perma.cc/2RT5-KJNC>]. There are three basic models of judicial elections: (1) partisan elections, in which candidates run as nominees of a political party; (2) nonpartisan elections, in which candidates' political affiliation does not appear on the ballot; and (3) retention elections, in which judges who were initially appointed face no opponent but must garner a certain percentage of the votes to retain their offices. See Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 211, 211–12 (2010).

<sup>50</sup> W. VA. TRIAL CT. R. 26.02.

<sup>51</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69(b)(1) (2020).

<sup>52</sup> N.Y. JUD. LAW § 210(3) (McKinney 2020).

<sup>53</sup> NAT'L CTR. FOR STATE CTS., *supra* note 49.

<sup>54</sup> VA. CODE ANN. § 8.01-267.4 (2020).

<sup>55</sup> See VA. CODE ANN. § 8.01-267.4(A) (2020) (stating that, when appropriate, “any party may apply to a panel of circuit court judges designated by the Supreme Court for an order of transfer”).

<sup>56</sup> 28 U.S.C. § 1407(d). Today, the panel is made up of seven district judges. Historically, about 85% of panel judges have been district judges. See *Roster of Current and Former Judges of the United States Judicial Panel on Multidistrict Litigation*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., [https://www.jpml.uscourts.gov/sites/jpml/files/Panel%20Judges%20Roster-10-16-2018\\_0.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Panel%20Judges%20Roster-10-16-2018_0.pdf) [<https://perma.cc/8F62-46QR>].

- Colorado’s panel includes “not less than three nor more than seven district judges . . . no two of whom shall be from the same judicial district.”<sup>57</sup>
- New York’s panel must include one justice from the supreme court of each judicial department.<sup>58</sup> (New York’s supreme court is its trial court of general jurisdiction.)<sup>59</sup>
- Texas’s panel is made up of active appellate judges or administrative judges.<sup>60</sup>
- Virginia’s panels are made up of trial judges selected for each consolidation decision.<sup>61</sup>
- West Virginia’s panel is made up of seven active or senior trial judges, appointed to three-year terms on a rotating basis with a new chair every year.<sup>62</sup>

*b. Highest court*

In Illinois, Kansas, New Jersey, and Oregon, the state’s highest court makes the decision whether to consolidate and transfer related cases.<sup>63</sup> In Kansas, Illinois, and New Jersey, the high court also chooses the transferee judge. In Oregon, the chief justice alone chooses the transferee judge.<sup>64</sup> Illinois and Oregon elect their supreme court justices. In Kansas and New Jersey, they are appointed.<sup>65</sup>

*c. Chief justice*

In California, Minnesota, and North Carolina, the chief justice of the state’s highest court decides whether and where to consolidate cases.<sup>66</sup> In Minnesota and North Carolina, the chief justice alone makes the consolidation and choice-of-transferee decisions.<sup>67</sup> The chief justice is elected in nonpartisan elections in Minnesota and partisan elections in North Carolina. In California, the gubernatorially appointed chief justice has

<sup>57</sup> COLO. R. CIV. P. 42.1(a)(1).

<sup>58</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 202.69(b)(1) (2020).

<sup>59</sup> *History*, N.Y. STATE UNIFIED CT. SYS., [http://ww2.nycourts.gov/courts/1jd/supctmanh/A\\_Brief\\_history\\_of\\_the\\_Court.shtml](http://ww2.nycourts.gov/courts/1jd/supctmanh/A_Brief_history_of_the_Court.shtml) [<https://perma.cc/LS2S-PRCV>].

<sup>60</sup> TEX. GOV’T CODE § 74.161(a) (West 2019).

<sup>61</sup> VA. CODE ANN. § 8.01-267.4 (2020).

<sup>62</sup> W. VA. TRIAL CT. R. 26.02.

<sup>63</sup> ILL. SUP. CT. R. 384(a); KAN. STAT. ANN. § 60-242(c)(1) (2014); N.J. CT. R. 4:38A; OR. R. CIV. P. 32K.

<sup>64</sup> Or. R. Civ. P. 32K(2).

<sup>65</sup> Information on judicial selection in the states is maintained by the National Center for State Courts. NAT’L CTR. FOR STATE CTS., *supra* note 49.

<sup>66</sup> See CAL. CIV. PROC. CODE § 404 (West 2021); COLO. R. CIV. P. 42.1(a)(1); MINN. GEN. R. PRAC. 113.03(a); N.C. GEN. R. PRAC. SUPER. & DIST. CTS. 2.1(a)–(b).

<sup>67</sup> MINN. GEN. R. PRAC. 113.03(a); N.C. GEN. R. PRAC. SUPER. & DIST. CTS. 2.1(a)–(b).

ultimate authority on consolidation and transfer, but California has an elaborate system by which other judges provide advice on the consolidation decision and selection of the transferee judge. This system is discussed in greater detail in Section II.A.

*d. Hybrid*

Finally, Connecticut has adopted a hybrid system. Connecticut assigns transfer authority to the chief court administrator along with the trial judges and the parties.<sup>68</sup> The state's chief justice has the authority to select the judge who will serve as the chief court administrator.<sup>69</sup> Judges and justices in Connecticut are appointed by the governor.<sup>70</sup>

*2. Peer States*

Peer MDL states vest the authority to consolidate cases in the hands of trial court judges with pending cases. But there is variation in which trial court judge gets to make that decision and in how those judges are put on the bench.

*a. First-filed judge*

In Indiana, Massachusetts, and Pennsylvania, the judge in the earliest filed action can order other cases filed around the state to be transferred to that judge's court.<sup>71</sup> Massachusetts and Pennsylvania also give the judge in the first-filed case the discretion to transfer all of the cases to a court where later filed cases are pending,<sup>72</sup> though in Massachusetts there is a presumption that the cases will be consolidated in the court with the first-filed case.<sup>73</sup> Trial judges in Indiana and Pennsylvania are elected in local partisan elections, and in Massachusetts are appointed by the governor.<sup>74</sup>

*b. Any judge*

In New Hampshire, any judge receiving a motion to consolidate can decide on consolidation and transfer.<sup>75</sup> Similarly, in Maine and Rhode Island, the rules provide that any judge with a pending case can order a joint hearing

---

<sup>68</sup> CONN. GEN. STAT. § 51-347b (2019).

<sup>69</sup> *Id.*

<sup>70</sup> NAT'L CTR. FOR STATE CTS., *supra* note 49.

<sup>71</sup> IND. R. TRIAL P. 42(D); MASS. SUPER. CT. R. 31; PA. R. CIV. P. 213.1.

<sup>72</sup> *See* MASS. SUPER. CT. R. 31; PA. R. CIV. P. 213.1(e).

<sup>73</sup> *See* MASS. SUPER. CT. R. 31.

<sup>74</sup> NAT'L CTR. FOR STATE CTS., *supra* note 49.

<sup>75</sup> N.H. SUPER. CT. R. 12(b).

or trial.<sup>76</sup> Trial judges are appointed by the governor in Maine, New Hampshire, and Rhode Island.<sup>77</sup>

*c. Joint decision*

Finally, in Wisconsin, the transferee and transferor judges must issue a joint order for consolidation.<sup>78</sup> Trial judges in Wisconsin are elected in local nonpartisan elections.<sup>79</sup>

3. *Summary*

Table 2 summarizes the institutional design adopted by states with institutional and peer MDL systems. It also includes information on the four ad hoc states described above.

TABLE 2: STATE MDL INSTITUTIONAL DESIGN

Model	Decider	State
Institutional	Panel	Colorado, New York, Texas, Virginia (new each time), West Virginia
	Supreme court	Kansas, Illinois, New Jersey, Oregon
	Chief justice	Minnesota (chief alone), North Carolina (chief alone), California (advice from coordination motion judge)
	Hybrid	Connecticut (chief court administrator or trial judge)
Peer	First-filed judge	Indiana, Massachusetts, Pennsylvania
	Any judge	Maine, New Hampshire, Rhode Island
	Joint decision	Wisconsin
Ad Hoc	Supreme court	Michigan (breast implants and Microsoft antitrust), Oklahoma (breast implants and others), South Carolina (breast implants)
	District judges en banc	Tennessee (one county by local rule)

<sup>76</sup> This power goes beyond the usual consolidation rule exemplified by Federal Rule 42 because the rules in Maine and Rhode Island expressly provide for consolidation across different counties. *See* ME. R. CIV. P. 42; R.I. SUPER. CT. R. CIV. P. 42(a). Kansas and Massachusetts have this rule as well, but they also have other consolidation mechanisms described in the text. *See* KAN. STAT. ANN. § 60-242(a) (2014); MASS. R. CIV. P. 42(a).

<sup>77</sup> Information on judicial selection in the states is maintained by the National Center for State Courts. NAT'L CTR. FOR STATE CTS., <http://www.judicialselection.us> [https://perma.cc/HY75-YLGX].

<sup>78</sup> WIS. STAT. § 805.05(1)(b) (2020).

<sup>79</sup> Information on judicial selection in the states is maintained by the National Center for State Courts. NAT'L CTR. FOR STATE CTS., <http://www.judicialselection.us> [https://perma.cc/HY75-YLGX].

### C. Consolidation Rules

Institutional design is not the only way that state MDLs can vary. For example, regardless of which entity or individual has the power to consolidate, states have to make choices about the standard for consolidation to be applied and the extent of that consolidation.<sup>80</sup>

#### 1. Standards for Consolidation

The standard for consolidation is important because it regulates which cases are candidates for the special venue and assignment rules that define MDL.<sup>81</sup> The standard for consolidation in a federal MDL is broad. The federal MDL statute requires only that cases share “one or more common questions of fact” and that the JPML determines that transfer “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>82</sup>

Some states, like Illinois and Texas, track the federal standard quite closely, while others diverge in both directions. Some states focus only on the relatedness of the cases,<sup>83</sup> while others apply a stricter transactional test<sup>84</sup> or (echoing class action law) ask whether common questions predominate over individual ones.<sup>85</sup> Some states spell out specialized standards, while others are quite vague. New York and New Jersey include the presence of consolidated proceedings elsewhere as a factor weighing in favor of consolidation in those states’ courts. New Jersey and West Virginia limit consolidation to certain subject matters; Oregon limits consolidation to class actions; and Virginia specifies a minimum number of plaintiffs. We provide citations and the relevant language for all of these standards in Table A2. But one thing they all have in common is that their broad language vests substantial discretion in the official or institution authorized to decide when consolidation is appropriate.

---

<sup>80</sup> As above, for readability, we rely primarily on Tables A1 and A2 in Appendix A for the citations to these statutes and rules.

<sup>81</sup> *Cf.* Clopton, *MDL as Category*, *supra* note 2, at 1311–14, 1325–41 (discussing the significance of being in or out of an MDL).

<sup>82</sup> 28 U.S.C. § 1407(a).

<sup>83</sup> *See infra* Table A2. Indiana, Maine, Massachusetts, Minnesota, and Rhode Island require only a common question of law or fact. Maryland does as well, but we do not consider Maryland to have a true MDL procedure.

<sup>84</sup> *See infra* Table A2. Kansas and Wisconsin require the cases to arise out of the same transaction or occurrence. New Hampshire allows consolidation if the cases either arise out of the same transaction or event *or* share common issues of law or fact.

<sup>85</sup> *See infra* Table A2. California, Colorado, Oregon, Pennsylvania, and Virginia consider, among other factors, whether common questions predominate.

## 2. *Extent of Consolidation*

A related issue for any MDL system is the extent to which cases are consolidated. The federal system is notable because it permits consolidations for *pretrial* proceedings only.<sup>86</sup> Cases must be remanded to the districts where they were originally filed for trial. In practice, however, this rule is not as limiting as it appears; less than 3% of cases are ever actually remanded out of an MDL as of 2013, usually because they are resolved in the MDL court by settlement or dispositive motion.<sup>87</sup> This formally limited nature of the transfer, though, has been key to making federal MDL work, allowing it to avoid many of the due process, personal jurisdiction, and choice of law challenges that largely prevent the use of class actions in mass tort cases.<sup>88</sup>

Limited transfer does not appear to be an essential feature of state MDL systems. Only three states—Kansas, New York, and Texas—formally limit consolidation to pretrial only.<sup>89</sup>

The rest of the states with institutional and peer MDL systems appear to allow consolidation for all purposes including trial (though they may permit or require remand in certain circumstances). The MDL rules or statutes expressly permit consolidation for trial in California, Connecticut, Illinois, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wisconsin.<sup>90</sup> Indiana's statute presumptively limits consolidations to pretrial only, but it permits transferee judges to oversee trials if "the court finds that the action involves unusual or complicated issues of fact or law or involves a substantial question of law of great public importance."<sup>91</sup>

---

<sup>86</sup> Although reformers have often sought to allow federal MDL judges to try transferred cases, in 1998 the U.S. Supreme Court made the temporary nature of the transfer clear in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34–40 (1998).

<sup>87</sup> See Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400–01 (2014).

<sup>88</sup> See Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1296–99 (2018) [hereinafter Bradt & Rave, *Aggregation on Defendants' Terms*] (describing federal MDL's "split personality" and its implications); Bradt & Rave, *The Information-Forcing Role*, *supra* note 3, at 1269–73 (same); Bradt & Rave, *It's Good to Have the "Haves," supra* note 3, at 103–04 (same).

<sup>89</sup> Technically, Kansas and New York expressly permit consolidation for trial with consent, but we are discussing here the extent to which the MDL systems consolidate cases.

<sup>90</sup> See *infra* Table A2. Had we included Maryland as a peer state, it would appear on this list as well. See *supra* note 22 and accompanying text.

<sup>91</sup> IND. R. TRIAL P. 42(d). See *infra* Section II.C.2.

In sum, in most states, MDL consolidation is for all purposes.<sup>92</sup> And even in the three states for which MDL is limited to pretrial proceedings, the federal experience suggests that most cases will be resolved in the MDL court. In other words, it is likely the case that MDL judges in all states have substantial authority to guide most consolidated cases to final resolution.

#### D. Management

State MDL rules also vary on many issues of MDL management. We address a selection of these issues here, focusing on those that have been of interest to MDL scholars and reformers. Indeed, for scholarship on federal MDL, these issues of MDL management have been of primary concern.<sup>93</sup> As the following descriptions make clear, MDL rules often do not specify exactly how MDLs should be handled, and even when they do, they vest substantial discretion in MDL judges.

##### 1. Transferee Court

A central choice in the MDL process is the selection of the transferee court. The federal statute does not include any limits on the choice of transferee district. And the JPML has generally felt free to create an MDL in whatever district it sees fit—even districts where no cases are pending.<sup>94</sup>

Some state rules, however, are more restrictive. In at least Kansas, Massachusetts, New Hampshire, Pennsylvania, and Virginia, the transferee court must be a court in which at least one of the consolidated actions is

---

<sup>92</sup> We do not have a good theory for why so many states eschew the federal model and allow transfer for trial purposes. Nor do we have a good theory for why Kansas, New York, and Texas in particular chose to limit consolidation to pretrial only. One possibility (which we cannot prove) is that both New York and Texas adopted their institutional MDL procedures after the U.S. Supreme Court made it clear in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), that remand was mandatory in the federal system. (The Kansas MDL rule was adopted before *Lexecon*, but it appears to have been rarely used. See HERRMANN ET AL., *supra* note 6, at 283–85.) Many of the states that allow consolidation for trial purposes adopted their MDL procedures before this decision, when the federal JPML took the position that MDL transferee judges were permitted to transfer consolidated cases to themselves for trial. Massachusetts (2015), Minnesota (2000), and New Jersey (2003) are exceptions. See *infra* Table A1. Another potential explanation stems from the Class Action Fairness Act (CAFA). According to recent decisions, consolidation for trial purposes on plaintiffs' request may result in these cases becoming removable as "mass actions" under CAFA. See, e.g., *Atwell v. Bos. Sci. Corp.*, 740 F.3d 1160, 1161–62 (8th Cir. 2013). But the availability of CAFA removal does not appear to be a driver in state MDL design, as most of the MDL systems were adopted before 2005, when CAFA was enacted.

<sup>93</sup> See Clopton, *MDL as Category*, *supra* note 2, at 1305–11 (collecting sources discussing potential changes to MDL case management).

<sup>94</sup> See, e.g., *In re Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.*, 844 F. Supp. 2d 1371, 1373–74 (J.P.M.L. 2012) (consolidating cases in the Northern District of Georgia even though none of the actions pending at the time of the consolidation were pending in that district).

pending.<sup>95</sup> Massachusetts starts with a presumption that cases should be consolidated in the court where the earliest filed action is pending.<sup>96</sup> Indiana appears to allow consolidation only in the first-filed court.<sup>97</sup> And Colorado places special limits on consolidation for jury cases.<sup>98</sup> California and New Jersey do not limit the transferee court, but their rules specify factors that could affect the choice of transferee court.<sup>99</sup>

## 2. *Tag-Along Cases*

Often, after a consolidated proceeding is established, additional cases are filed or identified that seemingly fit in the consolidated proceeding. In the federal system, the clerk of the JPML can conditionally transfer so-called “tag-along” actions; if a party objects, the JPML itself has the option to vacate the order.<sup>100</sup>

The states take many different approaches to these sorts of tag-along cases.<sup>101</sup> The transferee judge, upon a motion, can consolidate tag-alongs in California, Oregon, Virginia, and (with advice and consent of the panel) West Virginia. In Colorado, the court clerk can effect the transfer. In New York, unopposed tag-along motions are granted automatically, while opposed motions go to the panel. In New Jersey, the supreme court’s initial order can specify when tag-alongs may be transferred automatically. And in Texas, tag-alongs are transferred upon a notice of filing, but then any party can ask the transferee court to remand the action. That decision is appealable to the panel.

---

<sup>95</sup> See *infra* Table A1.

<sup>96</sup> MASS. SUPER. CT. R. 31.

<sup>97</sup> IND. R. TRIAL P. 42(d).

<sup>98</sup> COLO. R. CIV. P. 42.1(b)(1) (only allowing jury trials in consolidated cases in venues proper under Colorado Rule 98).

<sup>99</sup> In California, the chief justice selects the transferee court upon a recommendation of the coordination motion judge. That judge is asked to consider:

- (1) The number of included actions in particular locations;
- (2) Whether the litigation is at an advanced stage in a particular court;
- (3) The efficient use of court facilities and judicial resources;
- (4) The locations of witnesses and evidence;
- (5) The convenience of the parties and witnesses;
- (6) The parties’ principal places of business;
- (7) The office locations of counsel for the parties;
- and (8) The ease of travel to and availability of accommodations in particular locations.

CAL. R. CT. 3.530. In New Jersey, the supreme court is to consider “[i]ssues of fairness, geographical location of parties and attorneys, and the existing civil and multicounty litigation caseload in the vicinage.” N.J. CTS., ADMIN. OFF. OF THE CTS., MULTICOUNTY LITIGATION GUIDELINES DIRECTIVE # 08-12 (2012).

<sup>100</sup> R. PROC. J.P.M.L. 7.1.

<sup>101</sup> For all relevant provisions, see *infra* Table A1.



### 3. *Lead or Liaison Counsel*

In federal MDL, the appointment of lead or liaison counsel is a contentious issue.<sup>102</sup> The federal statute does not expressly authorize the transferee judge to appoint lawyers, but the practice is well established and recommended by the *Manual for Complex Litigation*.

At least five states (California, New York, Texas, Virginia, and West Virginia) specify the authority to select lead or liaison counsel in their consolidation rules, though these states' rules say little about the criteria for selection.<sup>103</sup> New Jersey also advises but does not require the appointment of liaison counsel.<sup>104</sup> Other states are largely silent, though none denies the MDL judge the authority to appoint lawyers.

### 4. *Remand*

Another issue arising in federal MDL that has received considerable attention is remand.<sup>105</sup> In the federal system, the JPML is empowered to remand cases to transferor courts, though the panel's near-universal practice is not to remand unless and until the transferee judge suggests it.<sup>106</sup>

There is variation in the states regarding which institution decides when remand is appropriate. In at least California, Kansas, Minnesota, New Jersey, New York, Oregon, Texas, and Virginia, the transferee judge has the power to remand without any action on the part of the panel, high court, or other institution.<sup>107</sup> In Illinois, the supreme court can separate and remand any claim at any time.<sup>108</sup> In West Virginia, the panel has special authority to

<sup>102</sup> See generally, e.g., Bradt & Rave, *It's Good to Have the "Haves,"* *supra* note 3 (arguing that repeat-player attorneys appointed to MDL leadership positions add value for plaintiffs); Burch, *Monopolies,* *supra* note 3 (arguing that MDL leadership-appointment practices favor repeat-player attorneys who may feel more loyalty to each other than to their clients); Burch & Williams, *supra* note 3 (demonstrating extent to which repeat players are appointed to MDL leadership positions); Silver & Miller, *supra* note 3 (arguing that MDL lead lawyers may feel more loyal to judges than clients because judges have so much control over attorney compensation).

<sup>103</sup> See *infra* Table A1 for relevant statutes.

<sup>104</sup> See N.J. CTS., NEW JERSEY MULTICOUNTY LITIGATION (NON-ASBESTOS) RESOURCE BOOK 12 (4th ed. 2014), <https://www.njcourts.gov/attorneys/assets/mcl/nonasbestosmanual.pdf?c=7ir> [<https://perma.cc/PJ4U-MMSL>]. Though not addressing lead or liaison counsel per se, we also note that Massachusetts's rules require the transferee judge to hold an early conference among the parties "to establish a Tracking Order for the consolidated cases and to address other matters raised by the consolidation." MASS. SUPER. CT. R. 31. This presumably may include counsel appointments.

<sup>105</sup> See generally, e.g., Symposium, *The Rest of the Story: Resolving the Cases Remanded by the MDL*, 75 LA. L. REV. 341 (2014) (featuring articles and comments that focus on remand in MDL).

<sup>106</sup> See Burch, *supra* note 87, at 402.

<sup>107</sup> See *infra* Table A1. In Kansas, the transferee judge must notify the supreme court when it remands cases, but no action appears to be required of the supreme court. KAN. STAT. ANN. § 60-242(c)(3) (2014).

<sup>108</sup> Ill. Sup. Ct. R. 384(b).

remand cases if they are certified as class actions.<sup>109</sup> And, interestingly, under Michigan’s ad hoc order for the breast-implant litigation, cases were automatically remanded following the close of discovery and required settlement conferences.<sup>110</sup>

### 5. *Appellate Review*

The federal MDL statute provides that any review of the JPML’s decisions to consolidate shall be conducted on a petition for a writ of mandamus.<sup>111</sup> Decisions not to consolidate are not reviewable.<sup>112</sup>

A handful of states’ rules provide for special procedures for review.<sup>113</sup> Texas provides that the supreme court has jurisdiction to review orders to consolidate or to decline consolidation—but only by extraordinary writ (i.e., mandamus) in an original proceeding. The California rule provides that any court with jurisdiction under the usual statutes may review a coordination decision. Pennsylvania and Virginia expressly provide for review of decisions to consolidate, but not decisions to decline consolidation. New York prohibits review of the consolidation decision altogether.

Although a recent proposal has sought to expand interlocutory review, the federal MDL statute does not currently provide any special mechanism for reviewing the transferee judge’s decisions.<sup>114</sup> State MDL systems do not appear to be any more enamored of expanded interlocutory review of an MDL judge’s decisions. Most state MDL procedures say nothing about appeals. Virginia’s MDL statute expressly authorizes interlocutory review in consolidated cases, but only in situations where it would be appropriate in any case.<sup>115</sup> Interlocutory review in Virginia is permitted in any case when the trial judge certifies that the decision “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate

---

<sup>109</sup> See W. VA. TRIAL CT. R. 26.10.

<sup>110</sup> See *In re Silicone Gel Implant Prod. Liab. Litig.*, Admin. Order No. 1993-2 (Mich. 1993). Federal MDL judges are sometimes criticized for holding onto trial-ready cases in an attempt to orchestrate a global settlement, and some scholars have suggested a similar approach of automatically remanding nonsettling cases in federal MDLs. See, e.g., Burch, *Monopolies*, *supra* note 3, at 152–54.

<sup>111</sup> 28 U.S.C. § 1407(e).

<sup>112</sup> *Id.*

<sup>113</sup> For all relevant provisions, see *infra* Table A1.

<sup>114</sup> See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. § 105 (2017). For trenchant criticism of this proposal, see Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 88 *FORDHAM L. REV.* 87 (2018).

<sup>115</sup> VA. CODE ANN. § 8.01-267.8(A) (2020).

termination of the litigation.”<sup>116</sup> The California and Texas MDL rules specify which appellate court will have jurisdiction over decisions of the transferor and transferee courts, but do not alter the ordinary rules for interlocutory appeals.<sup>117</sup> Notably, however, Texas’s MDL rules provide that the transferee court can overrule the transferor court’s orders, while the transferee court’s orders are generally binding after the case is remanded for trial.<sup>118</sup>

### E. Source of Law

Finally, we want to pause for a moment on the sources of relevant laws governing state MDLs. The federal MDL system is a creature of statute, though the JPML has been given the authority to develop its own rules of procedure, “not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.”<sup>119</sup>

In the states, MDL was created by statute in California, Connecticut, Kansas, Texas, Virginia, and Wisconsin.<sup>120</sup> Of these states, California, Connecticut, and Kansas are “code states,” meaning that they typically rely on the legislature to adopt major rules of procedure.<sup>121</sup>

MDL was created by court rule in Colorado, Illinois, Indiana, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and West Virginia.<sup>122</sup> (Tennessee’s local rule is also judge-made, as were the ad hoc orders in Michigan, Oklahoma, and South Carolina.) Note that Illinois, New York, and North Carolina typically rely on their legislatures to make rules of civil

<sup>116</sup> *Id.* § 8.01-267.8(B); *cf. id.* § 8.01-670.1 (providing for interlocutory review in the normal course for “a question of law as to which (i) there is substantial ground for difference of opinion, (ii) there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, (iii) determination of the issues will be dispositive of a material aspect of the proceeding currently pending before the court, and (iv) it is in the parties’ best interest to seek an interlocutory appeal”). Virginia MDL provisions (i) and (iii) track the language in the federal interlocutory appeal statute. *See* 28 U.S.C. § 1292(b).

<sup>117</sup> In Texas, the appellate court with jurisdiction over the court where the case is pending at the time of appeal can review orders of both the transferor and transferee courts. *See* TEX. R. JUD. ADMIN. 13.9(b). In California, the coordination order must specify which appellate court will have jurisdiction over appeals if the coordinated actions fall within the jurisdiction of more than one reviewing court. CAL. R. CT. 3.505(a).

<sup>118</sup> TEX. R. JUD. ADMIN. 13.8.

<sup>119</sup> 28 U.S.C. § 1407(f). *See generally* Bradt, *supra* note 2, at 871–72, 880–81 (explaining why proponents of federal MDL pursued statutory reform rather than seeking to amend the Federal Rules).

<sup>120</sup> *See infra* Table A1.

<sup>121</sup> *See generally* Zachary D. Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 9–11 (2018) [hereinafter Clopton, *Making State Civil Procedure*] (discussing “code states” and “rules states”).

<sup>122</sup> *See infra* Table A1. Had we included Maryland, it would be listed among those states relying on court rule. *See supra* note 22.

procedure,<sup>123</sup> but their consolidation rules were included in other judge-made rule sources.<sup>124</sup>

#### F. *A Brief Comment on Variation*

This Part has summarized our survey of state MDLs. In so doing, it has revealed wide variation in the details of state MDL systems around the core notion of intercourt coordination—with substantial discretion vested in MDL judges and in those officials or institutions that select the MDL judge.

We have more to say about the state-to-state variation below, but at this point, two preliminary comments are in order. First, we want to express caution about reaching firm normative conclusions about the variations we described. As discussed in more detail below, there is reasonable disagreement about the goals and priorities of state MDL systems, so even if we had measurable results of state choices, it would be impossible to offer a single answer about which system is “best.”

That said, a second observation is that the variation in decisional authority, consolidation standards, and other features suggests that there may be fewer “essential” aspects of an MDL system than some might think. We should not, therefore, feel compelled to support every aspect of the current federal MDL structure just because a group of federal judges fifty years ago thought it would work. Instead, a better approach is to think clearly about MDL design and its consequences—a task that we take up below.

## II. CASE STUDIES

To expand on our survey, in this Part we take a deep dive into the origins and operation of three states’ MDL systems: California, Texas, and Indiana. We chose California and Texas because they are two of the largest legal markets in the nation and both have well-developed institutional MDL systems. We chose Indiana because it is an excellent example of a peer MDL system in a state with elected judges.

In these case studies, we examine the history of these states’ adoption of an MDL system and the law governing coordinated proceedings. We also report some data on how these procedures are used and in which types of cases. Additional data are included in the Appendices. We conclude this Part

---

<sup>123</sup> See Clopton, *Making State Civil Procedure*, *supra* note 121, at 10.

<sup>124</sup> In Illinois, the MDL procedure was adopted as a supreme court rule. See *infra* Table A1. Illinois’s supreme court rules are typically adopted by the court. See ILL. SUP. CT. R. 3. The Illinois legislature handles trial court procedure only. See Clopton, *Making State Civil Procedure*, *supra* note 121, at 10. For New York, the MDL rule is included in the uniform trial court rules, which are judge-made. See *infra* Table A1. For North Carolina, the MDL rule is included in the judge-made General Rules of Practice. *Infra* Table A1.

with some data about the use of MDL procedures in other states with MDL systems.

## A. California

### I. History

In 1968, Congress adopted the federal Multi-District Litigation Act.<sup>125</sup> Just four years later, in the midst of a perceived litigation crisis and the rise of judicial case management, California adopted its MDL statute. The state legislature added a new chapter to the Code of Civil Procedure called “Coordination,” to be effective on January 1, 1974.<sup>126</sup> Elaborating on the new code sections were a set of rules of court adopted by the judiciary, also effective on January 1, 1974.<sup>127</sup> Taken together, these code provisions and court rules govern California’s version of MDL, referred to as “Judicial Council Coordination Proceedings” or a “Civil Case Coordination Proceeding.”<sup>128</sup>

The legislative history of the procedure is fairly plain. Charles Hugh Warren introduced the proposed coordination procedure in the state assembly on March 13, 1972.<sup>129</sup> After amendments in the judiciary committee,<sup>130</sup> the bill passed the assembly on the consent calendar by a vote of seventy-six to zero.<sup>131</sup> The bill was minimally amended in the state senate,<sup>132</sup> and the assembly quickly and unanimously concurred in the amendments.<sup>133</sup> The Governor signed the bill on December 7, 1972.<sup>134</sup>

As its origins suggest, the California procedure emphasized efficiency and case management. Consistent with broader trends toward managerial

---

<sup>125</sup> 28 U.S.C. § 1407; *see generally* Bradt, *supra* note 2 (examining the origins of the federal-MDL statute).

<sup>126</sup> CAL. CODE CIV. PROC. § 404 *et seq.* (2021); 1972 CAL. STAT. 2286, 2287.

<sup>127</sup> *See* CAL. R. OF CT. 3.501 *et seq.* (formerly Cal. Rules of Court, rule 1501 *et seq.*).

<sup>128</sup> *See, e.g., Civil Case Coordination*, JUD. BRANCH OF CAL., <https://www.courts.ca.gov/27922.htm> [<https://perma.cc/6MBU-QQRP>]; JUD. COUNCIL OF CAL., CIVIL CASE COORDINATION PROCEEDING (JCCP) LOG, [https://www.courts.ca.gov/documents/CivilCaseCoord\\_2015toPresent\\_JCCPLog.pdf](https://www.courts.ca.gov/documents/CivilCaseCoord_2015toPresent_JCCPLog.pdf) [<https://perma.cc/JW9P-LU55>].

<sup>129</sup> CAL. ASSEMB. J. 802 (Mar. 18, 1972).

<sup>130</sup> CAL. ASSEMB. J. 5022 (June 19, 1972). The bill was re-referred to the Ways and Means Committee, and that committee recommended passage without amendment. *Id.* at 5249 (June 22, 1972); *id.* at 5542 (June 29, 1972).

<sup>131</sup> CAL. ASSEMB. J. 5846 (July 5, 1972).

<sup>132</sup> *Compare* A.B. 930, 1972 Leg. (Cal. 1972), *with* CAL. ASSEMB. J. 7711 (Nov. 17, 1972); *id.* at 7743–44 (Nov. 20, 1972) (reflecting only minimal changes).

<sup>133</sup> CAL. ASSEMB. J. 7744 (Nov. 20, 1972).

<sup>134</sup> 1972 CAL. STAT. 2286, 2286.

judging,<sup>135</sup> the code provisions expressly linked coordination to the prospects of settlement,<sup>136</sup> and the rules suggested that the judge overseeing the coordination should “assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay.”<sup>137</sup> According to one early decision, the purpose of the coordination procedure was “to promote judicial efficiency and economy.”<sup>138</sup>

A major innovation in the coordination procedure came with the 1996 amendments, introduced by State Senator Cathie Wright and passed unanimously by the assembly and senate.<sup>139</sup> The 1996 amendments linked the coordination procedure to a designation in California law for “complex cases.”<sup>140</sup> The new provisions specified that formal coordination would be available only for complex cases, to be defined by the state’s judicial council.<sup>141</sup>

The history of the “complex” designation is revealing. Although the judicial council had considered complex cases at least since the early 1980s,<sup>142</sup> important developments coincided with the 1996 reforms. In that year, the California judiciary was considering a proposal to establish a special court for business and commercial cases.<sup>143</sup> Business courts were becoming more popular around the country,<sup>144</sup> but after studying the issue,

---

<sup>135</sup> See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (describing and analyzing those trends).

<sup>136</sup> CAL. CODE CIV. PROC. § 404.1 (2021).

<sup>137</sup> CAL. R. CT. 1541(b) (West 1974).

<sup>138</sup> *Citicorp v. Super. Ct.*, 261 Cal. Rptr. 668, 669 n.3 (Ct. App. 1989).

<sup>139</sup> 1996 Cal. Legis. Serv. 3875 (West). Records of the votes are on file with authors.

<sup>140</sup> The 1996 amendments also addressed noncomplex cases in response to a flood of requests to the judicial council to coordinate noncomplex cases for which no special expertise was required. See S. JUDICIARY COMM., CAL. BILL ANALYSIS, S.B. 1726 (1996). The amendments called for trial judges to handle noncomplex coordination on their own. *Id.*; CAL. CIV. PROC. CODE § 403 (West 2020). For noncomplex cases, therefore, California is a “peer MDL” state.

<sup>141</sup> 1996 Cal. Stat. 3875. The Senate Bill Analysis noted: “It is unknown whether the Judicial Council has adopted its rules and definition of a ‘complex’ case for purposes of implementing the bill.” S. JUDICIARY COMM., CAL. BILL ANALYSIS, S.B. 1726 (1996).

<sup>142</sup> The category was originally dealt with in Section 19 of the Standards of Judicial Administration (effective 1982), which is now CAL. R. CT. Standard 3.10.

<sup>143</sup> See PAULA L. HANNAFORD-AGOR, NICOLE L. MOTT & TIMOTHY F. FAUTSKO, NAT’L CTR. FOR STATE CTS., CAL. ADMIN. OFF. OF THE CTS., EVALUATION OF THE CENTERS FOR COMPLEX CIVIL LITIGATION PILOT PROGRAM (2003) (describing the genesis of the specialty business and commercial courts in a 1997 task force report); Minutes, Judicial Council Meeting, May 16, 1997, Item 16 (on file with journal).

<sup>144</sup> For a discussion of “business courts” and interstate competition, see *infra* Section III.A.

the task force decided not to recommend them for California.<sup>145</sup> Instead, it suggested creating a new task force on complex case management.<sup>146</sup> The task force was charged with defining “complex cases”<sup>147</sup> and preparing guidance for their active management.<sup>148</sup> Later, the judicial council created a complex litigation program with special courts in certain jurisdictions.<sup>149</sup> The linking of the state’s coordination procedure to this new “complex case” designation and later to the complex case program developed by the judicial council further emphasized active case management and settlement in coordinated proceedings.<sup>150</sup>

## 2. Coordinated Proceeding Procedure

A California civil case coordination proceeding<sup>151</sup> begins with a petition for coordination submitted to the chair of the judicial council, who is the chief justice of California.<sup>152</sup> Coordination is only available when complex cases are pending in different courts.<sup>153</sup> Judges have the ultimate authority to determine whether a case is complex.<sup>154</sup>

---

<sup>145</sup> See HANNAFORD-AGOR ET AL., *supra* note 143, at 1; Minutes, Judicial Council Meeting, May 16, 1997, Item 16 (on file with journal).

<sup>146</sup> HANNAFORD-AGOR ET AL., *supra* note 143, at 1.

<sup>147</sup> See CAL. R. CT. 3.400 *et seq.*

<sup>148</sup> This guidance later became the *California Deskbook on Complex Civil Litigation Management* (LexisNexis, Matthew Bender 2005). HANNAFORD-AGOR ET AL., *supra* note 143, at 2.

<sup>149</sup> More specifically, in 2000, the judicial council established a pilot program for complex cases in six counties. Today, there are at least eight courts with complex litigation programs. See Nathaniel Wood, Greg Call & Van Nguyen, *California’s Complex Court Program*, CROWELL & MORING LLP (Jan. 2016), <https://www.crowell.com/NewsEvents/Publications/Articles/Californias-Complex-Court-Program>, [<https://perma.cc/5D3S-QMGR>]. In these complex programs, case management is emphasized and a single judge is assigned to handle the entire proceeding. See CAL. R. CT. Standard 3.10(b); *id.* r. 3.734; *id.* r. 10.950. Only select judges are authorized to hear complex cases. *Id.* r. 3.10(c).

<sup>150</sup> See *supra* notes 140, 149 and accompanying text (discussing complex cases). For another history of the California procedure, see Scott Paetty, *Classless Not Clueless: A Comparison of Case Management Mechanisms for Non-Class-Based Complex Litigation in California and Federal Courts*, 41 LOY. L.A. L. REV. 845, 847–51 (2008).

<sup>151</sup> Note that we focus here on the formal coordination procedure for complex cases; the California code also uses the term coordination for a trial-judge procedure for noncomplex cases, but we do not address it here. CAL. CIV. PROC. CODE § 403 (West 2020).

<sup>152</sup> *Id.* § 404; CAL. R. CT. 10.1(a)(1). Petitions may be submitted by the presiding judge in any court in which a case is pending, by all plaintiffs or all defendants jointly, or by any party with the permission of the presiding judge. *Id.* r. 3.544. Petitions also specify the preferred site for coordination. See *id.* r. 3.521.

<sup>153</sup> CIV. PROC. § 404. Prior to the merging of trial courts (i.e., municipal, justice, and superior), the coordination procedure also was available for cases in different courts in the same county. See 1980 CAL. STAT. 654; 1982 CAL. STAT. 798.

<sup>154</sup> CIV. PROC. § 404; CAL. R. CT. 3.502. The definition of complex cases is provided at CAL. R. CT. 3.400(a).

Upon receipt of a petition, the chief justice designates a “coordination motion judge” or authorizes a presiding judge of a court to assign the matter to a judge in that court in the usual manner,<sup>155</sup> which can vary, but it is not necessarily random assignment.<sup>156</sup> The coordination motion judge advises the chief justice on the coordination decision. According to the statute, coordination is appropriate when there is a common question of fact or law and coordination would serve the ends of justice.<sup>157</sup>

If the coordination motion judge decides that coordination is appropriate, the coordination motion judge must suggest a court for the coordinated proceeding.<sup>158</sup> The chief justice is ultimately responsible for selecting a trial court and either selecting a “coordination trial judge” or authorizing the presiding judge of the selected trial court to assign the matter to a judge in that court in the usual manner.<sup>159</sup>

---

<sup>155</sup> CAL. R. CT. 3.501(7); CIV. PROC. § 404.

<sup>156</sup> CAL. R. CT. 3.10(c) (“In selecting judges for complex litigation assignments, the presiding judge should consider the needs of the court and the judge’s ability, interest, training, experience (including experience with complex civil cases), and willingness to participate in educational programs related to the management of complex cases.”); *id.* r. 3.734 (“The presiding judge may, on the noticed motion of a party or on the court’s own motion, order the assignment of any case to one judge for all or such limited purposes as will promote the efficient administration of justice.”); *id.* r. 10.950 (“The presiding judge . . . retains final authority over all criminal and civil case assignments.”); *id.* r. 10.603(c)(1) (“The presiding judge has ultimate authority to make judicial assignments.”); E-mail from Judge Carolyn Kuhl to authors (July 4, 2019, 12:15 CST) (on file with journal). Note, also, that parties can seek to overturn the assignment with a peremptory challenge. *See* CAL. R. CT. 3.516; *see also* Philip Morris Inc. v. Superior Ct., 83 Cal. Rptr. 2d 671, 672 (Ct. App. 1999) (holding that plaintiffs’ peremptory challenge motion was properly granted).

<sup>157</sup> CIV. PROC. § 404.1; *see also* Keenan v. Superior Ct., 168 Cal. Rptr. 561, 562 (Ct. App. 1980) (interpreting CIV. PROC. § 404.1 in a conflict between an order for coordination of five cases and an order from another judge regarding three of those same cases). In so deciding, the coordination motion judge is asked to consider

whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

CIV. PROC. § 404.1.

<sup>158</sup> CAL. R. CT. 3.530. The Rule specifies that the motion judge should consider:

“(1) The number of included actions in particular locations; (2) Whether the litigation is at an advanced stage in a particular court; (3) The efficient use of court facilities and judicial resources; (4) The locations of witnesses and evidence; (5) The convenience of the parties and witnesses; (6) The parties’ principal places of business; (7) The office locations of counsel for the parties; and (8) The ease of travel to and availability of accommodations in particular locations.”

*Id.*

<sup>159</sup> CIV. PROC. § 404.3; CAL. R. CT. 3.540(a). For a discussion of the “usual manner,” *see supra* notes 155–156 and accompanying text.



Unlike federal MDL, which is for pretrial proceedings only, California cases are coordinated for both pretrial proceedings and trial.<sup>160</sup> The coordination trial judge is granted the powers of any judge hearing a civil case.<sup>161</sup> But the rules also specifically call upon the coordination trial judge to “assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay.”<sup>162</sup> And the rules provide a sort of checklist of case-management techniques that the coordination trial judge may wish to use, including appointing liaison counsel.<sup>163</sup> According to one decision, the coordination trial judge is provided “whatever great breadth of discretion may be necessary and appropriate to ease the transition through the judicial system of the logjam of cases which gives rise to coordination.”<sup>164</sup>

The California rules do not mention cooperation with other courts, but trial judges have facilitated cooperation with federal MDLs and cases in other states. For example, in the vitamin antitrust cases, a coordination trial judge in San Francisco oversaw a settlement of state indirect-purchaser antitrust cases in parallel with a settlement of direct-purchaser suits in a federal MDL.<sup>165</sup> Similarly, in the *Vioxx* litigation, the federal MDL judge coordinated with the California state MDL judge throughout the

---

<sup>160</sup> See *supra* Section I.C.

<sup>161</sup> CAL. R. CT. 3.540.

<sup>162</sup> *Id.* r. 3.541(b). Judge Kuhl agreed that, especially in coordinated cases, California judges were active case managers. See Telephone Interview with Judge Carolyn Kuhl (May 8, 2019) [hereinafter Kuhl Interview] (interview notes on file with journal).

<sup>163</sup> See CAL. R. CT. 3.541, 3.506.

<sup>164</sup> *McGhan Med. Corp. v. Superior Ct.*, 14 Cal. Rptr. 2d 264, 269–70 (Ct. App. 1992). For an example of case management in a coordinated proceeding, consider the Lockheed Litigation Cases, No. B262820, 2017 WL 3187676 (Cal. Ct. App. July 27, 2017). More than 600 current and former employees of Lockheed sued the company in California state court for personal injuries from chemical exposure. *Id.* at \*1. The cases were coordinated, and the coordination trial judge created a group of “pilot” claims to be resolved first. *Id.* The case management order provided that the results of those cases would bind the other cases via collateral estoppel. *Id.* Bellwether trials were held, but, for various reasons, most cases remained unresolved after eight years in the trial court—a state of affairs the judge referred to as “scandalous.” *Id.* at \*2. In response, the judge took even more aggressive steps, attempting to resolve many outstanding evidentiary issues (including general causation) and to apply those decisions to all unresolved cases. After decades in court, and relying heavily on these all-case determinations, the coordination trial court was able to resolve all coordinated claims. *Id.* at \*2–3.

<sup>165</sup> See *In re Vitamin Cases*, 2 Cal. Rptr. 3d 358 (Ct. App. 2003); *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251 (D.D.C. 2002). Indirect purchasers may not recover under federal antitrust law, but they may recover under California law. See *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977); CAL. BUS. & PROF. CODE § 16750(a) (West 2020).

proceeding.<sup>166</sup> And it is only a matter time before the newly selected California opioid judge is coordinating with the federal MDL judge in Ohio.

### 3. *The Data*

The Judicial Council of California collects data on civil case coordination proceedings, and the office generously provided a selection of those data for purposes of this study.<sup>167</sup> We analyze below petitions disposed of from January 1, 2014 through May 22, 2019, a period of roughly five-and-a-half years.

#### a. *Petitions and dispositions*

During our period of study, California received at least 223 petitions for civil case coordination. The state granted 163 of those petitions,<sup>168</sup> denied or dismissed at least 47 petitions, and at least 13 petitions were withdrawn before disposition.<sup>169</sup> These numbers suggest a grant rate of about 78%, on par with the grant rate in federal MDL for most of its history, but higher than the federal rate in recent years.<sup>170</sup>

#### b. *Case type*

We attempted to categorize the subject matter of the 163 granted petitions, relying on case names and secondary sources.<sup>171</sup> By far the largest category was wage-and-hour (employment) petitions, which numbered at least 79 (48%). There were at least 29 (18%) products liability petitions, and at least 14 (9%) mass-accident or tort petitions, totaling at least 26% of petitions sounding in tort. We also found at least 13 (8%) consumer law petitions and 9 (6%) investor or corporate law petitions. The remaining 19 petitions dealt with privacy, probate, environmental, and contract law, among other subjects. This information is displayed in Figure 2.

These results depart from the early history of California procedure: a study of the first 100 petitions for civil case coordination found that almost 40% were personal-injury petitions, with little if any employment

---

<sup>166</sup> *In re Vioxx Prods. Liab. Litig.*, No. CIV. 05-4578, 2010 WL 724084, at \*2 (E.D. La. Feb. 18, 2010). For more on *Vioxx*, see *infra* note 366 and accompanying text.

<sup>167</sup> Full dataset is on file with the authors.

<sup>168</sup> Although we do not have data on this point, one experienced judge estimated that parties agreed to coordination in 80% of cases in which coordination petitions were granted. See Kuhl Interview, *supra* note 162.

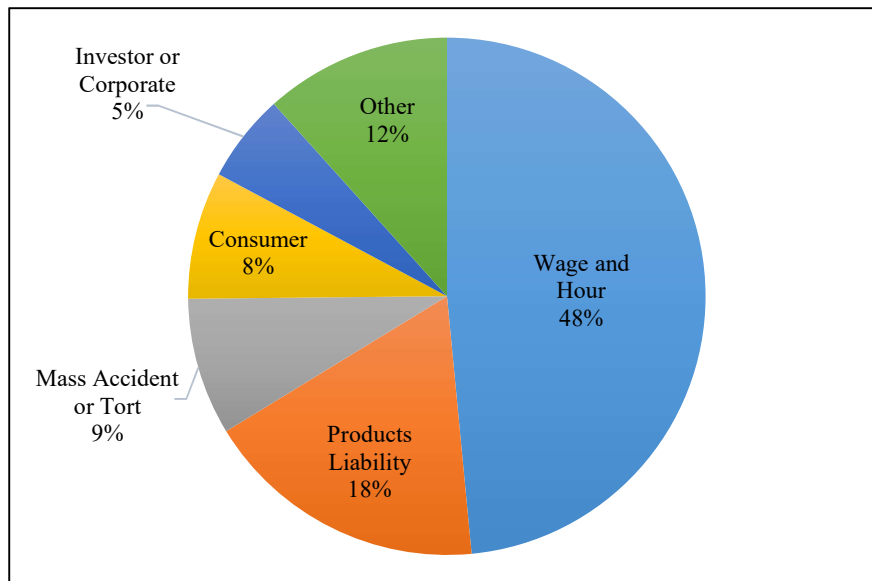
<sup>169</sup> There were more ambiguities in the not-granted category, which is why we use the “at least” construction.

<sup>170</sup> See Clopton & Bradt, *Party Preferences*, *supra* note 3, at 1724 & n.56; Williams & George, *supra* note 3, at 433 fig.1.

<sup>171</sup> For more detail, see *infra* Appendix B.

litigation.<sup>172</sup> Further, while the federal JPML almost never consolidates public law cases, California has coordinated public law cases on multiple occasions, including cases challenging California's treatment of same-sex marriage.<sup>173</sup>

FIGURE 2: CALIFORNIA COORDINATED PROCEEDINGS BY TYPE



To help compare the subject matter of California cases to federal MDL, Figure 3 below reflects the compiled category data for federal MDLs pending in February 2021.<sup>174</sup> While California's coordinated proceedings are dominated by wage-and-hour cases, employment comprises only a small fraction of federal MDLs. Products liability cases, which are thought of as the engine of federal MDL, represent a substantially smaller share of California coordinated proceedings.<sup>175</sup>

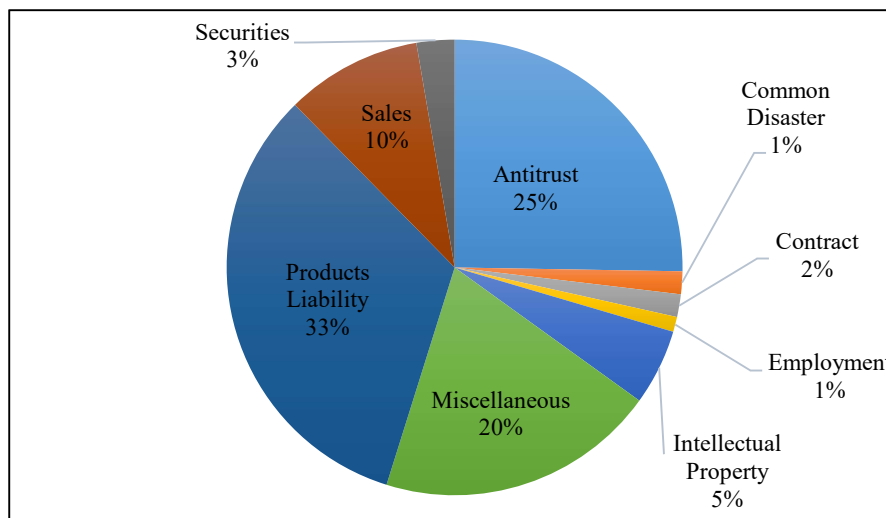
<sup>172</sup> Alexander B. Yakutis, *Multicourt Litigation Coordination: The First 100 Petitions*, 10 J. BEVERLY HILLS BAR ASSOC. 12, 12–15 (1976).

<sup>173</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). For a discussion of the absence of public law cases in federal MDL, see Bradt & Clopton, *MDL v. Trump*, *supra* note 4, at 924–27.

<sup>174</sup> U.S. JUD. PANEL ON MULTIDISTRICT LITIG., MDL STATISTICS REPORT - DOCKET TYPE SUMMARY (2021), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_By\\_MD\\_L\\_Type-February-17-2021.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_MD_L_Type-February-17-2021.pdf) [<https://perma.cc/7AED-X4BV>].

<sup>175</sup> Note that these results treat each coordinated case or MDL as a unit, but of course not all coordinated cases or MDLs are created equal. Some MDLs contain many more consolidated actions and parties than others. For more on this point on the federal side, see Clopton, *MDL as Category*, *supra* note 2, at 1316–20.

FIGURE 3: FEDERAL MDLS BY TYPE



*c. Courts and judges*

We then turned our attention to the courts and judges selected to participate in California MDL. These choices have been a point of interest in the study of federal MDL, so we provide substantial additional detail in Appendix B.

Briefly, California coordinated proceedings were frequently, though not always, created in large population centers. Los Angeles County led the way with 63 (39%). The chief justice appeared to make appointments directly in about one-quarter of cases, relying on the motion judge or the local district in three-quarters. There were some “repeat players” among coordination motion and trial judges but also some new blood among appointees. For example, 55 different judges served as trial judges, with no judge handling more than 11 coordinated proceedings.

Of the trial judge assignments, 55 (36%) were to female judges and 99 (64%) were to male judges.<sup>176</sup> These results are roughly on par with a recent study of federal judges selected to handle MDLs.<sup>177</sup> They are almost perfectly

<sup>176</sup> Among the cases assigned directly by the chief justice, though, female coordination trial judges were assigned in 58% of cases (14 of 24). *Infra* Appendix B.

<sup>177</sup> See Clopton & Bradt, *Party Preferences*, *supra* note 3, at 1739 tbl.5 (finding that, from 2012 to 2016, about 30% of MDL judges were female and almost 40% of first-time MDL judges were female).

on par with the overall pool of California trial judges, which, according to a 2018 report, was 36.1% female.<sup>178</sup>

One dimension worthy of comment is partisan affiliation. Unlike in Texas and Indiana (addressed below), where trial judges are elected in partisan elections, California trial judges are elected in nonpartisan elections.<sup>179</sup> However, it turns out that many judges first joined the bench as gubernatorial appointees filling vacancies. Looking only at judges previously appointed by governors, we found that slightly more than two-thirds of coordinated proceedings were assigned to judges appointed by Republican governors.<sup>180</sup>

*d. Parallel federal MDLs*

Finally, we tried to determine whether the California coordinated proceedings had corresponding federal MDLs. We did so by hand-checking California cases against the JPML's lists of federal MDLs, as well as searching the federal Panel's orders on Westlaw. We were able to identify 17 California proceedings with parallel federal MDLs,<sup>181</sup> meaning that at least 10% of California proceedings had federal analogs.<sup>182</sup> Notably, all 17 were products liability cases, representing more than half of California's products liability proceedings in this period. We also found 5 California cases in which the federal Panel had denied motions for consolidation.<sup>183</sup>

---

<sup>178</sup> JUD. COUNCIL OF CAL., DEMOGRAPHIC DATA PROVIDED BY JUSTICES AND JUDGES RELATIVE TO GENDER, RACE/ETHNICITY, AND GENDER IDENTITY/SEXUAL ORIENTATION (GOV. CODE § 12011.5(N)) 1 (2018), <https://www.courts.ca.gov/documents/2019-JO-Demographic-Data.pdf> [<https://perma.cc/X7Y6-2T8>] [hereinafter DEMOGRAPHIC DATA]. Race and ethnicity are more difficult to assess without access to judicial records. Using publicly available sources that identify the judges' race or ethnicity we were able to find only eight appointments to nonwhite judges. While our methodology is necessarily imprecise, this is lower than the percentage of nonwhite judges assigned federal MDLs in the prior study, *see* Clopton & Bradt, *Party Preferences*, *supra* note 3 at 1737 tbl.3, and much lower than the percentage of nonwhite California trial judges (34%), *see* DEMOGRAPHIC DATA, *supra*, at 1.

<sup>179</sup> Information on judicial selection in the states is maintained by the National Center for State Courts. *See Judicial Selection in the States*, NAT'L CTR. FOR STATE CTS., <http://www.judicialselection.us> [<https://perma.cc/X4GV-P4UU>].

<sup>180</sup> We found 102 cases assigned to trial judges appointed by Republican governors and 50 cases assigned to trial judges appointed by Democratic governors. For cases assigned by the chief justice directly, we found 40% assigned to judges appointed by Democratic governors and 60% assigned to judges appointed by Republican governors. The chief justice during the entire period was an appointee of a Democratic governor.

<sup>181</sup> Of the 17 federal MDLs with California analogs, 4 were consolidated in California district courts. Results on file with authors.

<sup>182</sup> Results on file with authors. We say "at least" because it is possible that other California proceedings have federal equivalents that were not discovered by our method.

<sup>183</sup> Results on file with authors.

Four of those 5 were products liability cases; the fifth was a wage-and-hour case.

## B. Texas

### 1. History

Texas's MDL procedure is much newer than California's. It was adopted in 2003 as part of a major tort reform bill, though its origins go back at least several years earlier.<sup>184</sup>

In 1997, the Texas supreme court adopted Rule 11 of the Texas Rules of Judicial Administration,<sup>185</sup> which allowed the presiding judge of each of the state's nine administrative judicial regions to assign cases from across the region to a single judge for pretrial proceedings.<sup>186</sup> But because the rule relied on the administrative judicial regions, statewide disputes could not be coordinated in a single court; at best, they could be consolidated in front of nine judges from the nine different administrative regions.<sup>187</sup>

In light of these limits, in 2001, the Texas supreme court enlisted Houston trial lawyer Joe Jamail to chair a committee to look into mass litigation, among other issues.<sup>188</sup> One of the committee's recommendations was an MDL procedure that allowed for statewide consolidation for pretrial proceedings and trial,<sup>189</sup> though only in courts where venue would have been proper for all of the cases.<sup>190</sup>

---

<sup>184</sup> For an excellent summary of the drafting history and early functioning of the Texas MDL procedure, see Stephen G. Tipps, *MDL Comes to Texas*, 46 S. TEX. L. REV. 829 (2005). And for our more detailed analysis of Texas MDL, see Rave & Clopton, *Texas MDL*, *supra* note 10, at 369.

<sup>185</sup> Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, 24 ADVOCATE 74, 74 (2003).

<sup>186</sup> TEX. R. JUD. ADMIN. 11. At the time Texas had nine administrative judicial regions. Today it has eleven. TEX. GOV'T CODE ANN. § 74.042 (West 2019).

<sup>187</sup> Technically the rule allowed for further consolidation, but Chief Justice Tom Phillips was reluctant to use this mechanism. See Hoffman, *supra* note 185, at 80; see also *Hearing of the Supreme Court Advisory Committee* 8875–76 (Tex. 2003) (statement of Chief Justice Phillips), [https://www.txcourts.gov/All\\_Archived\\_Documents/SupremeCourtAdvisoryCommittee/Meetings/2003/transcripts/sc06212003.pdf](https://www.txcourts.gov/All_Archived_Documents/SupremeCourtAdvisoryCommittee/Meetings/2003/transcripts/sc06212003.pdf) [<https://perma.cc/H65S-WMVW>].

<sup>188</sup> Order Creating the Sup. Ct. Task Force on Civ. Litig. Improvements, Misc. Doc. No. 01-9149 (Tex. 2001), [https://www.txcourts.gov/All\\_Archived\\_Documents/SupremeCourt/AdministrativeOrders/miscdocket/01/01-9149.pdf](https://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/01/01-9149.pdf) [<https://perma.cc/27JJ-P6YP>].

<sup>189</sup> Letter from Joseph Jamail to Justice Nathan Hecht (Mar. 25, 2003) (draft of Rule 42b.1) [hereinafter Jamail Committee Report] (on file with journal); see also Memorandum from Paul Schlaud to Supreme Court Task Force (Mar. 15, 2002) (comparing proposed changes to Rule 11 and Rule 42, noting that both apply to pretrial and trial MDL coordination) (on file with journal); Memorandum from Paul Schlaud to Supreme Court Task Force (Mar. 4, 2002) (on file with journal).

<sup>190</sup> Jamail Committee Report, *supra* note 189.

Before the Texas supreme court could act on the committee's recommendations, a new Republican majority in the Texas House of Representatives introduced House Bill 4 (HB4), a piece of tort reform legislation that included MDL provisions. HB4's MDL provisions had the support of defense-side interest groups and were opposed by prominent plaintiffs' lawyers.<sup>191</sup> The bill, as amended, provided for an MDL panel, appointed by the chief justice, with the power to transfer cases anywhere in the state for pretrial proceedings only.<sup>192</sup> HB4 passed the Texas house and senate, and Governor Rick Perry signed it into law on June 11, 2003.<sup>193</sup>

HB4 left most of the details of MDL proceedings to the Texas supreme court, so the court's advisory committee worked quickly to develop MDL rules. The advisory committee relied on the statute, the Jamail report, and MDL models from the federal courts, California, and Colorado.<sup>194</sup> One driving concern was that no money had been appropriated to the MDL panel,<sup>195</sup> so the proposed rules sought to shift burdens from the panel to parties and trial courts.<sup>196</sup> On August 29, 2003, the Texas supreme court adopted MDL procedures in a new Rule 13, and thus began Texas's MDL system.<sup>197</sup>

## 2. MDL Procedure

A Texas MDL begins when a party or a judge makes a request with the MDL panel, appointed by the chief justice. The panel's standard for creating an MDL is broad. Mirroring the federal standard, the cases must share "one or more common questions of fact" and the transfer must be "for the convenience of the parties and witnesses" and must "promote the just and efficient conduct" of the related cases.<sup>198</sup> Common questions need not

---

<sup>191</sup> See HOUSE RSCH. ORG., BILL ANALYSIS, HB4, MEDICAL MALPRACTICE AND TORT LIABILITY REVISIONS 51–52 (2003), <https://hro.house.texas.gov/pdf/ba78R/HB0004.PDF> [<https://perma.cc/63GZ-2FEW>].

<sup>192</sup> TEX. GOV'T CODE ANN. § 74.162 (West 2019).

<sup>193</sup> H.R. 4, 2003 Leg., 78th Reg. Sess. (Tex. 2003), <https://capitol.texas.gov/tlodocs/78R/billtext/pdf/HB00004F.pdf#navpanes=0> [<https://perma.cc/6SHC-W2GG>].

<sup>194</sup> *Hearing of the Supreme Court Advisory Committee*, *supra* note 187, at 8876–77, 8902–03.

<sup>195</sup> See, e.g., *id.* at 9000–01.

<sup>196</sup> *Id.* at 9320–21.

<sup>197</sup> Amendments to the Texas Rules of Civil Procedure, the Texas Rules of Appellate Procedure, the Texas Rules of Evidence, and the Texas Rules of Judicial Administration, Misc. Docket No. 03-9145 (Tex. 2003).

<sup>198</sup> TEX. GOV'T CODE ANN. § 74.162 (West 2019); TEX. R. JUD. ADMIN. 13.3(l). The Texas MDL panel asks two questions: (1) are the cases sufficiently "related" and (2) would transfer and consolidation in front of a pretrial judge serve the goals of convenience and efficiency? See, e.g., *In re Tex. Opioid Litig.*, MDL No. 18-0358, slip op. at 4–10 (Tex. J.P.M.L. 2018). The panel has explained that, "[w]hile the number of common fact questions necessary to cause cases to be related is not capable of a bright-

predominate.<sup>199</sup> The MDL panel is also responsible for assigning coordinated cases: MDLs may be assigned to any active district judge in the state or any former or retired district or appellate court judge who has been approved by the chief justice.<sup>200</sup>

Like the federal MDL system, transfer into a Texas MDL is for pretrial purposes only.<sup>201</sup> For this reason, in Texas, the MDL transferee court is referred to as the “pretrial court,” and the transferor court is referred to as the “trial court.”<sup>202</sup> The pretrial court is authorized to set aside or modify rulings made by the trial court before the transfer occurred.<sup>203</sup> And the pretrial judge is encouraged to engage in active case management.<sup>204</sup> Pretrial judges may not try transferred cases on the merits,<sup>205</sup> but they are given considerable authority to influence proceedings in the trial court after remand.<sup>206</sup> Most importantly, a trial judge “cannot, over objection, vacate, set aside, or modify pretrial court orders”—including those related to the admissibility of expert testimony—without the written concurrence of the pretrial judge.<sup>207</sup>

The MDL panel also has the power to retransfer pending cases from one pretrial court to another.<sup>208</sup> This rule is primarily aimed at situations where the pretrial judge is no longer available (e.g., because the judge was voted out of office),<sup>209</sup> but the rule also gives the MDL panel discretion to retransfer

---

line rule, cases involving complicated, numerous, or significant common fact questions are more likely to be considered related.” *In re State Farm Lloyds Hidalgo Cnty. Hail Storm Litig.*, 434 S.W.3d 350, 353 (Tex. J.P.M.L. 2014).

<sup>199</sup> *Tex. Opioids Litig.*, *supra* note 198, at 4; *see also In re Volkswagen Clean Diesel Litig.*, 516 S.W.3d 704, 708 (Tex. J.P.M.L. 2016) (holding that the relatedness inquiry of Texas Rule of Judicial Administration 13 does not require that common questions of fact predominate).

<sup>200</sup> TEX. R. JUD. ADMIN. 13.6(a). Ordinarily when former, senior, or retired judges are assigned to cases in trial court, each party is allowed one objection, which, if exercised, bars that judge from hearing the case. *See* TEX. GOV'T CODE ANN. § 74.053(b) (West 2019). But no such objections are allowed when the MDL panel transfers cases to a former or retired pretrial judge that has been approved by the chief justice. *See* TEX. R. JUD. ADMIN. 13.6(a). The rules also permit the Panel to assign an MDL to multiple judges, which it has done on three occasions. *See In re Farmers Ins. Co. Wind/Hail Storm Litig.*, 481 S.W.3d 422, 425 & n.4 (Tex. J.P.M.L. 2015); *In re Farmers Ins. Co. Wind/Hail Storm Litig.* 2, 506 S.W.3d 803, 804 (Tex. J.P.M.L. 2016); *In re Chesapeake Barnett Royalty Litig.*, Admin. Order No. 15-0113, 2015 BL 107413, at 1 (Tex. J.P.M.L. Apr. 8, 2015).

<sup>201</sup> TEX. GOV'T CODE ANN. § 74.162 (West 2019); TEX. R. JUD. ADMIN. 13.6(b).

<sup>202</sup> TEX. R. JUD. ADMIN. 13.2(d)–(e).

<sup>203</sup> *Id.* r. 13.6(b).

<sup>204</sup> *Id.* r. 13.6(c).

<sup>205</sup> TEX. GOV'T CODE ANN. § 74.162 (West 2019).

<sup>206</sup> *See* TEX. R. JUD. ADMIN. 13.8(a)–(b).

<sup>207</sup> *Id.* r. 13.8(b).

<sup>208</sup> *Id.* r. 13.3(o).

<sup>209</sup> *See Hearing of the Supreme Court Advisory Committee*, *supra* note 187, at 9230.



cases in service of justice and efficiency.<sup>210</sup> Regarding this discretion, the first chair of the Texas MDL panel remarked that retransfer would allow the panel to take an MDL away from a judge “who is not getting the job done.”<sup>211</sup>

### 3. *The Data*

The Texas judicial branch does not produce MDL-specific data, so we examined the dockets of all MDL cases listed on the Texas panel’s website.<sup>212</sup> This website appears to offer a comprehensive list of all cases in which any party has sought state MDL treatment in Texas.<sup>213</sup> The results presented below are based on our coding of these docket sheets, with some reference to other publicly available information about the cases and the judges assigned to handle them.

#### a. *Petitions and dispositions*

From its inception in 2003 until October 2019, the Texas MDL panel received 98 requests to consolidate cases into an MDL. The Panel granted 61 motions and denied 32 motions, with 5 not ruled upon.<sup>214</sup> Among decided motions, Texas has a 66% grant rate, which is lower than the federal MDL grant rate for most of its history but somewhat higher than the federal grant rate in recent years.<sup>215</sup>

#### b. *Case type*

We next categorized the subject matter of the 61 granted petitions, relying on case names, descriptions in the motion or transfer order, and secondary sources. Our results are presented in Figure 4 below.

Almost one-third of Texas MDLs addressed weather-related insurance litigation (20 of 61). Although Texas does not provide data on the number of cases within MDLs, we have reason to believe that weather-related insurance

---

<sup>210</sup> TEX. R. JUD. ADMIN. 13.3(o).

<sup>211</sup> See *Hearing of the Supreme Court Advisory Committee*, *supra* note 187, at 9223 (statement of Judge David Peeples); see also *id.* at 9228 (characterizing retransfer as potentially helpful to justice and efficiency).

<sup>212</sup> See *Available Multidistrict Litigation Cases*, TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/available-multidistrict-litigation-cases> [<https://perma.cc/4ULA-GVDY>].

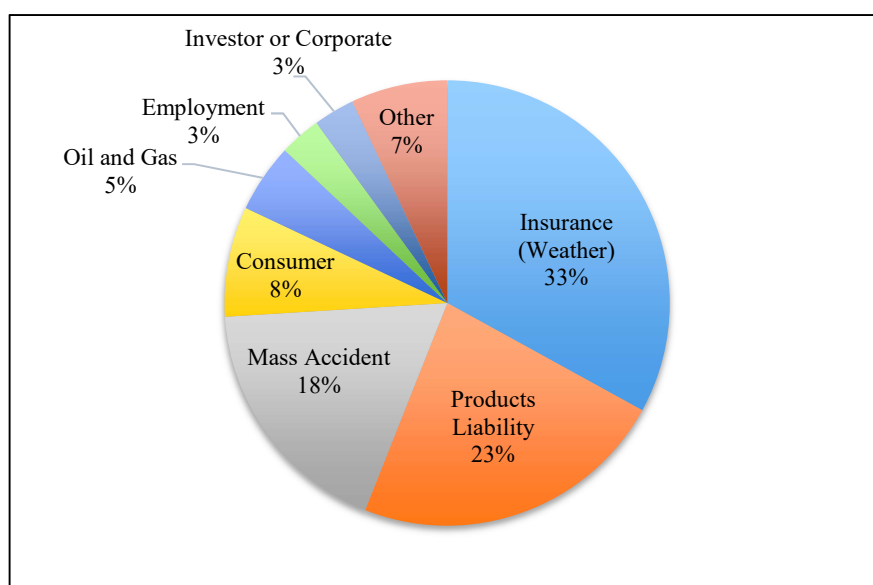
<sup>213</sup> See E-mail from Claudia Jenks, Chief Deputy Clerk of the Supreme Court of Texas, to Ashley Arrington (Aug. 26, 2019, 4:04 PM CDT) (on file with journal).

<sup>214</sup> Full dataset on file with authors. Of those 5 undecided motions, 3 are pending at the time of writing, 1 was removed to federal court, and 1 was stayed by a federal bankruptcy court.

<sup>215</sup> See Clopton & Bradt, *Party Preferences*, *supra* note 3, at 1723–24 (finding the federal grant rate from 2012 to 2016 to be 57.7%); Williams & George, *supra* note 3, at 433 (finding the federal grant rate from 1968 to 2012 to be roughly 70%–80%).

claims also make up a substantial share of Texas MDL measured by cases.<sup>216</sup> Additionally, the Panel granted 14 (23%) products liability petitions, 11 (18%) mass-accident petitions, and another 3 (5%) miscellaneous tort petitions (medical malpractice, defamation, and barratry), for a total of 46% of granted petitions sounding in tort law. Other granted petitions addressed consumer law, oil and gas law, employment law, investor or corporate law, and life insurance. Texas does not appear to have consolidated any public law cases,<sup>217</sup> though it has consolidated suits brought by the state attorney general together with private claims over the state's objections.<sup>218</sup>

FIGURE 4: TEXAS MDLS BY CASE TYPE



We also compared Texas MDLs to federal MDLs pending in February 2021 (and displayed in Figure 3 above).<sup>219</sup> About one-third of federal MDLs are products liability cases, while those types of MDLs are less than one-quarter of Texas's. Weather-related insurance claims are rare in federal MDL

<sup>216</sup> For more, see Rave & Clopton, *Texas MDL*, *supra* note 10, at 380–83.

<sup>217</sup> *Cf. supra* note 173 and accompanying text (discussing California and citing a source on federal MDL). The Texas panel has rebuffed several efforts to consolidate challenges to various local governments' tax appraisal practices.

<sup>218</sup> For examples, see the *Volkswagen Clean Diesel Litigation* and the *Texas Opioid Litigation*. See *In re Volkswagen Clean Diesel Litig.*, 516 S.W.3d 704, 708 (Tex. J.P.M.L. 2016); *In re Tex. Opioid Litig.*, No. 18-0358, 2018 BL 211039, at \*2 (Tex. J.P.M.L. June 13, 2018).

<sup>219</sup> See Rave & Clopton, *Texas MDL*, *supra* note 10, at 382.

but account for one-third of Texas MDLs. Mass-accident cases make up a substantially larger share of Texas MDL proceedings than federal MDLs, 18% versus 1%.<sup>220</sup>

*c. Districts and judges*

As with California, we analyzed the districts and judges handling Texas MDLs, and we provide many of the results in Appendix C.

Like California, Texas MDL is largely, though not exclusively, a creature of large population centers, with a mix of repeat players and new MDL judges. The county with the most MDLs by far was the state's most populous county, Harris County (home to Houston), but MDLs were also created in small counties. And while four judges have handled four or more MDLs, many MDLs are assigned to first-time pretrial judges.<sup>221</sup> Texas appoints a smaller proportion of female MDL pretrial judges (28%) than the proportion of female Texas trial judges overall (37%), though we hasten to add that Texas trial judges are substantially more likely to be women than federal district judges (37% in Texas to 28% in the federal courts).<sup>222</sup>

Party affiliation is salient in Texas, where judges are elected in partisan elections. The five members of the MDL panel are appointed by the chief justice of Texas, who is elected in a statewide partisan election. Since the Texas MDL procedure began, the chief justice has always been a Republican. In that time, the chief justice has always selected a panel with a majority of Republican judges, including recent panels with all five members being Republican.<sup>223</sup>

Party label does not, however, appear to be a major driver in the selection of pretrial judges, whose political parties are about evenly split. In fact, the Panel has appointed slightly more Democrats than Republicans as pretrial judges. These results hold even during recent years when Texas has had an all-Republican panel.<sup>224</sup>

---

<sup>220</sup> Clopton, *MDL as Category*, *supra* note 2, at 1317.

<sup>221</sup> See *infra* Appendix C.

<sup>222</sup> For more information on the Texas results and methods, see *infra* Appendix C. For demographic data on federal judges, see *Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/search/advanced-search> [<https://perma.cc/2C2C-CPTL>].

<sup>223</sup> Rave & Clopton, *Texas MDL*, *supra* note 10, at 387–88.

<sup>224</sup> This also tracks the federal experience, where a skewed panel appointed roughly even numbers of Democratic- and Republican-appointed transferee judges. See Clopton & Bradt, *supra* note 3, at 1718, 1737.

*d. Retransfer*

One particularly notable feature of Texas MDL is Rule 13.3(o), which allows the MDL panel to retransfer cases from one pretrial judge to another pretrial judge. The rule contemplates several reasons for retransfer, such as when the original pretrial judge has resigned or been defeated in an election, but it also allows the panel to act “in other circumstances when retransfer will promote the just and efficient conduct of the cases.”<sup>225</sup>

There were 17 MDLs where the Panel has retransferred cases, including 5 in which the MDL was retransferred twice.<sup>226</sup> Although the rule allows the panel to retransfer cases away from an active judge, the panel does not seem to have used its ability to remove an MDL from a pretrial judge “who is not getting the job done.”<sup>227</sup> Instead, 12 of the 22 retransfers appear to have been prompted by the pretrial judge’s retirement, resignation, recusal, or ascendance to higher office. The other 10 retransfers occurred after the pretrial judge lost an election.<sup>228</sup>

Because retransfer after election presents unique considerations, we examined those 10 retransfers separately. Although one might expect these MDLs to be assigned to the electoral victor, the panel did not assign any of these cases to the newly elected judge. Texas law permits approved former judges to handle MDLs,<sup>229</sup> and in 6 of the 10 cases in which a pretrial judge lost an election, the panel retransferred the MDL back to the pretrial judge who was voted out. On the 4 other occasions, the panel retransferred cases to other judges in the same county.<sup>230</sup>

*e. Parallel federal MDLs*

Finally, we looked at whether Texas state MDLs had parallel federal MDLs. The Texas MDL panel has noted on several occasions that the existence of federal MDL supports creating a state MDL.<sup>231</sup> We searched the

<sup>225</sup> TEX. R. JUD. ADMIN. 13.3(o).

<sup>226</sup> Results on file with authors. Rave & Clopton, *Texas MDL*, *supra* note 10, at 388.

<sup>227</sup> *Cf. supra* note 211 and accompanying text (noting Judge Peebles’s concern with the ability of the panel to remove judges who are “not getting the job done”).

<sup>228</sup> Results on file with authors. Rave & Clopton, *Texas MDL*, *supra* note 10, at 388.

<sup>229</sup> *See* TEX. R. JUD. ADMIN. 13.6(a).

<sup>230</sup> Results on file with authors. Rave & Clopton, *Texas MDL*, *supra* note 10, at 389.

<sup>231</sup> *See, e.g., In re Ocwen Loan Servicing, LLC Mortg. Servicing Litig.*, 286 S.W.3d 669, 673 (Tex. J.P.M.L. 2007) (finding the federal JPML’s reasoning for centralizing cases with similar facts to be “informative”); *In re Ford Motor Co. Speed Control Deactivation Switch Litig.*, 285 S.W.3d 185, 192 (Tex. J.P.M.L. 2008) (noting that the cases “share similar common fact issues” with the federal cases and that “[t]he reasoning of the federal panel is consistent with ours”); *In re Texas Opioid Litig.*, No. 18-0358, 2018 BL 211039, at \*1, \*3 (Tex. J.P.M.L. June 13, 2018) (explaining that centralizing would “make it easier to coordinate with the federal MDL”).

federal JPML database on Westlaw for key words and parties in the Texas MDL captions and tried to match the cases as best we could, relying on the transfer orders and other publicly available sources.

At least 13 Texas MDLs (21%) had parallel federal MDLs.<sup>232</sup> Twelve of the 13 parallel MDLs (92%) involved products liability claims. The 1 non-products liability Texas MDL with a parallel federal MDL involved consumer claims.<sup>233</sup>

### C. Indiana

#### I. History

Indiana civil procedure has a peculiar history.<sup>234</sup> The Indiana constitution empowered the Indiana Supreme Court to make rules of procedure, and the legislature echoed this authorization in a 1937 statute.<sup>235</sup> Yet for decades, the Indiana Supreme Court simply did not promulgate a complete set of civil rules.<sup>236</sup> That was the case until 1969, when the legislature enacted rules of civil procedure by statute to go into effect on January 1, 1970.<sup>237</sup> This apparently motivated the Indiana Supreme Court; and on July 29, 1969, the court promulgated its own “similar but not identical” rules, also to be effective January 1, 1970.<sup>238</sup> The legislature later codified the judge-made rules in what has been called “wholly superfluous legislation.”<sup>239</sup>

The original 1970 court rules included the common provisions for consolidation modeled on Federal Rule 42 but did not include any MDL-like rule.<sup>240</sup> Sometime thereafter, it seems that demand for some sort of consolidation procedure grew. As the Indiana Supreme Court would later explain, Indiana’s MDL rule “was designed to resolve conflicts that arise

---

<sup>232</sup> One of the thirteen parallel federal MDLs was consolidated in a federal district court in Texas.

<sup>233</sup> Rave & Clopton, *Texas MDL*, *supra* note 10, at 383–84. For three idiosyncratic cases in which the Texas Panel declined to consolidate state cases despite a federal MDL, see *id.* at 383–84, 383 n.112.

<sup>234</sup> See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1395 (1986); Charles Alan Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 98 (1959); Clopton, *Making State Civil Procedure*, *supra* note 121, at 50.

<sup>235</sup> Oakley & Coon, *supra* note 234, at 1395 n.141; Wright, *supra* note 234, at 98.

<sup>236</sup> Oakley & Coon, *supra* note 234, at 1395 n.141; Wright, *supra* note 234, at 98.

<sup>237</sup> Oakley & Coon, *supra* note 234, at 1395 n.141.

<sup>238</sup> *Id.*

<sup>239</sup> *See id.*

<sup>240</sup> *See id.* at 1395.

‘[w]hen civil actions involving a common question of law or fact are pending in different courts.’”<sup>241</sup>

Although records are scarce—not uncommon for judicial rulemaking in the states<sup>242</sup>—it appears that the Indiana Supreme Court was considering creating a peer MDL system in 1989, if not earlier.<sup>243</sup> The initial proposal was to add a rule that would permit the consolidation of actions involving common questions of law or fact pending in different courts. This proposal was forwarded to the Indiana Supreme Court Committee on Rules of Practice and Procedure, which offered two meaningful changes. First, the original proposal provided for sua sponte consolidation, but the committee recommended that parties should be required to request consolidation.<sup>244</sup> The committee explained that “[t]he purpose of the revision is to prevent a court from acting on its own to effect consolidation.”<sup>245</sup> The supreme court accepted this recommendation.<sup>246</sup> Second, the committee recommended adding language to the rule, providing that cases were to be remanded to the original courts unless the consolidating court concluded that they involved unusual or complicated issues—in other words, a presumption of consolidation for pretrial purposes only, but an option for the MDL court to exercise discretion to keep cases for trial.<sup>247</sup> The supreme court accepted this recommendation as well.<sup>248</sup>

On November 13, 1989, the Indiana Supreme Court adopted Rule 42(D), making it effective on January 1, 1990.<sup>249</sup> The rule today is, for all practical purposes, the same as in 1990.<sup>250</sup>

---

<sup>241</sup> *State ex rel. Curley v. Lake Cir. Ct.*, 899 N.E.2d 1271, 1272 (Ind. 2008) (quoting IND. R. TRIAL P. 42(D)).

<sup>242</sup> Clopton, *Making State Civil Procedure*, *supra* note 121, at 35–36.

<sup>243</sup> See IND. SUP. CT. COMM. ON R. PRAC. & PROC., COMMITTEE MINUTES (Aug. 25, 1989) [hereinafter MINUTES] (on file with journal).

<sup>244</sup> *See id.*

<sup>245</sup> *Id.* But see Appellant’s Brief at 7, *Farno v. Ansure Mortuaries of Ind., LLC*, 953 N.E.2d 1253 (Ind. Ct. App. 2011) (No. 41A05-1002-PL-00104) (suggesting that the trial court had consolidated cases sua sponte).

<sup>246</sup> Order Amending Rules of Trial Procedure (Ind. 1989) [hereinafter Order] (on file with journal).

<sup>247</sup> MINUTES, *supra* note 243. It is unclear whether the original proposal did not provide for remand at all or provided for remand without this option. All we can tell from the scant minutes is that the Committee recommend the remand-with-option language.

<sup>248</sup> Order, *supra* note 246.

<sup>249</sup> *Id.*

<sup>250</sup> Compare IND. R. TRIAL P. 42(D), with Order, *supra* note 246 (reflecting minimal differences).

## 2. Consolidation Procedure

Indiana's peer MDL procedure begins with a Rule 42(D) motion to consolidate.<sup>251</sup> When civil actions in different courts share common issues of law or fact, any party to any of the actions may request consolidation.<sup>252</sup> The moving party must file the motion in the court with the first-filed action.<sup>253</sup> Although the rule specifies that parties must request consolidation, there is at least some evidence that Indiana trial courts have consolidated cases *sua sponte*,<sup>254</sup> directly contradicting the intent of the committee's revision.<sup>255</sup>

The court receiving the motion has the discretion to decide whether consolidation is appropriate. Technically, the rule provides that the court “*shall* enter an order . . . unless good cause to the contrary is shown and found by the court to exist,”<sup>256</sup> but the Indiana Court of Appeals has remarked that “the decision to consolidate is purely discretionary and will not be overturned absent a manifest abuse of discretion.”<sup>257</sup> The first-filed court, though, retains its ability to stay or dismiss its case, which then hands consolidation authority over to the court with the next-earliest-filed action.<sup>258</sup>

Like federal MDL, Indiana Rule 42(D) specifies that consolidation is for “discovery and any pre-trial proceedings.”<sup>259</sup> However, unlike federal MDL, Indiana Rule 42(D) also specifies an escape hatch. The consolidated court may enter an order consolidating cases *for trial* if “the action involves unusual or complicated issues of fact or law or involves a substantial question of law of great public importance.”<sup>260</sup> This determination is left to the court hearing the consolidated proceeding.<sup>261</sup> Further empowering the first-filed court, Rule 42(D) also formally suspends the normal ability of a party to seek a change of venue during the consolidated proceeding.<sup>262</sup> So,

---

<sup>251</sup> IND. R. TRIAL P. 42(D); *see also* Stern v. Gresk, 583 N.E.2d 178, 179 (Ind. Ct. App. 1991).

<sup>252</sup> IND. R. TRIAL P. 42(D).

<sup>253</sup> *Id.* The rule also specifies how to determine which action is filed first. *See id.*

<sup>254</sup> *See, e.g.*, Appellant's Brief, *supra* note 245, at 7 (“On June 30, 2009, the Johnson Circuit Court *sua sponte* ordered the Class Action consolidated for trial purposes with the other three actions . . .”).

<sup>255</sup> *See supra* note 245 and accompanying text.

<sup>256</sup> IND. R. TRIAL P. 42(D) (emphasis added).

<sup>257</sup> City of New Haven v. Allen Cnty. Bd. of Zoning Appeals, 694 N.E.2d 306, 313 (Ind. Ct. App. 1998).

<sup>258</sup> IND. R. TRIAL P. 42(D); *see also* Est. of Hamblen v. Jewell, 772 N.E.2d 1003, 1006 (Ind. Ct. App. 2002).

<sup>259</sup> IND. R. TRIAL P. 42(D).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; *see also* Stern v. Gresk, 583 N.E.2d 178, 180 (Ind. Ct. App. 1991) (holding that a litigant could not seek change of venue during consolidation period).

unlike a federal MDL judge, it is possible for an Indiana judge to preside over all consolidated cases through trial.

### 3. *The “Data”*

As with California and Texas, we endeavored to collect data on the use of state MDL in Indiana. However, after substantial conversations with various state officials, we determined that Indiana does not keep any statewide records on the use of the Rule 42(D) consolidation procedure. As discussed in more detail below, this is consistent with our impressions of peer MDL overall.

Westlaw includes fewer than twenty decisions discussing Rule 42(D) since its adoption,<sup>263</sup> but this likely understates the frequency with which the rule is invoked. Rule 42(D) is implemented by trial court order, and such orders are not routinely published. This suggests to us that peer MDL procedures will tend to be less transparent than institutional ones.

In any event, in the absence of “big data,” we report here on some illuminating “anecdota.” The Rule 42(D) cases address many different subjects, including family law, securities law, corporate and business law, property law, election law, and insurance law.<sup>264</sup> Among these, Indiana courts consolidated public law cases related to early voting in the 2008 election<sup>265</sup> as well as public and private securities claims.<sup>266</sup>

In addition, the following exemplary case highlights some salient features of Rule 42(D).<sup>267</sup> Warren Buchanan filed a class action in Parke Circuit Court against Penn Central Corporation and U.S. Railroad Vest Corporation, seeking “to quiet title to [an] abandoned railroad right-of-way” on behalf of all affected landowners throughout the state.<sup>268</sup> A couple months later, Fern Firestone filed a similar class action in Hamilton County, but also included additional claims of conversion, fraud, and racketeering.<sup>269</sup> Two months after that, Buchanan filed a motion to amend his complaint to include the same additional claims, and on the same day the trial court preliminarily

---

<sup>263</sup> Results on file with authors.

<sup>264</sup> Results on file with authors.

<sup>265</sup> State *ex rel.* Curley v. Lake Cir. Ct., 899 N.E.2d 1271 (Ind. 2008); *cf. supra* notes 173, 217 and accompanying text (discussing public law cases in California and lack thereof in Texas and federal MDL).

<sup>266</sup> Farno v. Ansure Mortuaries of Ind., LLC, 953 N.E.2d 1253, 1263 (Ind. Ct. App. 2011).

<sup>267</sup> The following is drawn from a series of published decisions on the litigation, including State *ex rel.* Firestone v. Parke Cir. Ct., 621 N.E.2d 1113 (Ind. 1993); Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843 (Ind. 1997).

<sup>268</sup> *See Firestone*, 621 N.E.2d at 1114.

<sup>269</sup> *See id.* at 1114 & n.1.



approved a class action settlement with Buchanan as class counsel.<sup>270</sup> Upon learning of the settlement, Firestone unsuccessfully sought to intervene in the Buchanan action and, at the same time, obtained certification of his separate statewide class in the Hamilton action.<sup>271</sup> Buchanan then went back to the first-filed court and obtained an order under Rule 42(D) consolidating the actions in Parke and dissolving the Hamilton certification order.<sup>272</sup> The Rule 42(D) consolidation was appealed all the way up to the Indiana Supreme Court, which eventually approved of the first-filed judge's use of the rule.<sup>273</sup>

The parties continued to litigate the merits of the settlements,<sup>274</sup> but the role of Rule 42(D) was clear. On the one hand, Rule 42(D) helped avoid inconsistent rulings and dueling class actions by consolidating the lawsuit into a single proceeding. On the other hand, Rule 42(D) essentially chose winners and losers—it empowered the first-filed judge in the Parke Circuit Court to decide whether to absorb the Hamilton County action, and in so doing, to reward Buchanan at the expense of Firestone. And it gave the first-filed judge the exclusive power to approve and enforce a class action settlement that would resolve a statewide dispute and essentially wipe out the other consolidated claims.

#### D. Other States

Finally, although we have not worked up full case studies on all states' MDL procedures, we report here our best efforts to determine the frequency with which states have used them. This information is drawn from all thirteen institutional MDL states (as of fall 2020). The information provided was not always in the same form, making apples-to-apples comparisons difficult. But the brief sketch below provides some context:

- California's MDL is the most frequently used, hearing at least 223 motions (and granting 163) in the last five and a half years.<sup>275</sup>
- Colorado received about 224 petitions during the last ten years.<sup>276</sup>

---

<sup>270</sup> *Id.*

<sup>271</sup> *See Hefty*, 680 N.E.2d at 847.

<sup>272</sup> *See Firestone*, 621 N.E.2d at 1114–15.

<sup>273</sup> *See id.* at 1115.

<sup>274</sup> *Hefty*, 680 N.E.2d at 851–57.

<sup>275</sup> *See supra* Section II.A.3 (describing sources and data).

<sup>276</sup> COLO. JUD. BRANCH, COLORADO JUDICIAL BRANCH ANNUAL STATISTICAL REPORT FISCAL YEAR 2019, at 5, [https://www.courts.state.co.us/userfiles/file/Administration/Planning\\_and\\_Analysis/](https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/)

- Illinois granted 50 petitions since 2014.<sup>277</sup>
- Texas received 98 petitions and granted 61 since 2003.<sup>278</sup>
- Minnesota received 62 petitions and granted 32 since 2003.<sup>279</sup>
- Kansas received 15 petitions and granted 9 since 2009.<sup>280</sup>
- New York consolidated at least 24 cases since 2002.<sup>281</sup>
- New Jersey has 23 pending MDLs.<sup>282</sup>
- West Virginia had 11 pending MDLs as of 2018.<sup>283</sup>
- The Virginia supreme court has only formed a panel to decide on MDL four times in its history.<sup>284</sup>
- In North Carolina, the chief justice has created 2 pending MDLs (comprising 11 and 2 cases respectively).<sup>285</sup>
- Representatives of the Connecticut and Oregon judiciaries indicate that their systems are rarely if ever used. In the fall of 2019, the Connecticut courts reported that the current chief court administrator had never used the authority,<sup>286</sup> and the Oregon Supreme Court reported that it had not used its power since at least 2006.<sup>287</sup>

---

Annual\_Statistical\_Reports/2019/FY2019AnnualReportFINAL.pdf [https://perma.cc/3YLE-UMVG]. We say “about” because we are relying on reports from ten fiscal years, rather than calendar years.

<sup>277</sup> These data were provided by the Illinois Supreme Court Clerk’s Office. On file with authors.

<sup>278</sup> See *supra* Section II.B.3 (describing sources and data).

<sup>279</sup> These data are based on a report provided to authors by the Minnesota State Law Library, cross-referenced with the *Case Management System*, MINN. APP. CTS., <http://macsnc.courts.state.mn.us/ctrack/publicLogin.jsp> [https://perma.cc/JM3S-5KGT].

<sup>280</sup> These data are based on information provided by the Kansas Clerk of the Appellate Courts. On file with authors.

<sup>281</sup> We compiled these results from *Decisions of the Litigation Coordinating Panel*, N.Y. STATE UNIFIED CT. SYS., <http://ww2.nycourts.gov/courts/1jd/suptctmanh/LCP/Decisionslist.shtml> [https://perma.cc/NF3G-K53Z], and underlying documents in each of the listed cases. We also confirmed with the First Judicial District that this list was comprehensive and up-to-date.

<sup>282</sup> See *Multicounty Litigation*, N.J. CTS., <https://www.njcourts.gov/attorneys/mcl/index.html> [https://perma.cc/F4Q5-9RBZ].

<sup>283</sup> See W. VA. JUDICIARY, 2018 ANNUAL REPORT OF THE MASS LITIGATION PANEL, <http://www.courtswwv.gov/lower-courts/mlp/2018AnnualReport-MassLitigation.pdf> [https://perma.cc/ANA3-TCXV].

<sup>284</sup> This result was provided to authors by the Virginia State Law Library, Supreme Court of Virginia. On file with journal.

<sup>285</sup> This information was provided to authors by the Supreme Court of North Carolina; see also N.C. ADMIN. OFF. CTS., REPORT ON NORTH CAROLINA BUSINESS COURT, N.C.G.S. 7A-343(8A) (2020) (on file with journal) (providing general information on the court’s business). It is possible that other cases were consolidated automatically (i.e., without chief justice intervention) under other North Carolina procedures, but we were unable to gather any relevant data on such cases.

<sup>286</sup> On file with journal.

<sup>287</sup> On file with journal.

We also tried to gather this sort of data for peer MDL states using similar methods, though we were not able to obtain any meaningful results. The most common response was that the statewide authorities that typically house state court data do not collect this local court information. Perhaps not surprisingly, decentralizing the consolidation decisions to local courts also makes it more difficult to get a clear picture of what is happening across the state. Systemic transparency, in other words, may be lost in peer MDL.

Finally, we also studied the role of state MDLs in a single large dispute: the opioid litigation. (We report these results in full in a separate article.<sup>288</sup>) While the federal opioid MDL has garnered most of the headlines,<sup>289</sup> our findings further highlight the important role of state MDLs in nationwide disputes. When Purdue Pharma declared bankruptcy during the pendency of the litigation, it asked a federal bankruptcy court to stay pending lawsuits against it.<sup>290</sup> Although the majority of such suits were in the federal MDL, more than 400 cases were pending in state courts in almost every state.<sup>291</sup> And of those cases, more than three-quarters were consolidated in state MDLs in a mix of institutional and peer states.<sup>292</sup>

### III. ASSESSMENT

The previous Parts created a taxonomy of state MDLs and delved more deeply into some examples. This Part is a first cut at making something of those findings.

We resist the temptation, though, to reach normative conclusions such as “Texas good, California bad.” Such assessments are simply not possible at this point: we lack comparable data among states, and there are no consensus metrics that could guide comparisons even if we had those data. Indeed, it would not be unreasonable for lawmakers to weigh the potential purposes of consolidation differently such that different MDL procedures would be better for different states.<sup>293</sup>

---

<sup>288</sup> See generally Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14, at 4–22 (collecting information on state-court opioid cases and analyzing those results).

<sup>289</sup> See, e.g., Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html> [<https://perma.cc/6TSY-TDEY>] (describing federal MDL judge Dan Aaron Polster).

<sup>290</sup> See Complaint for Injunctive Relief at 25–26, *In re Purdue Pharma L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. Sept. 18, 2019).

<sup>291</sup> See Clopton & Rave, *Opioid Cases and State MDLs* *supra* note 14, at 4–5.

<sup>292</sup> See *id.* (collecting data and sources).

<sup>293</sup> Even with respect to normatively charged concepts such as “forum shopping,” there is no agreement about optimal levels. See, e.g., Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, 579 (2016) (discussing the unappreciated functions of forum shopping).

If we think about our survey as a menu of options, however, then it is valuable to assess the tradeoffs inherent in these different institutional-design choices. On first glance, the proliferation of state MDLs brings to mind other innovations in court design through which jurisdictions compete for judicial business. In Section A, we explain why interjurisdictional competition is a surprisingly poor fit for state MDLs. Upon reflection, it makes more sense to think about state MDLs primarily within the context of *intrastate* political economy and political authority—and to think about the choices among state MDL designs along these dimensions. In Section B, we explore state choices about MDLs in the context of competition between plaintiff and defendant interests. In Section C, we consider the impact of state MDLs on judicial authority and political accountability. Although we think that state MDLs are products of these intrastate dynamics, they also have potential effects for cases that have state–federal or state–state components. In Section D, we consider the role of state MDL in the potential competition between federal and state actors within disputes. Finally, in Section E we explain how state MDLs can be fertile ground for cooperation across state lines and among federal and state judges when resolving large controversies.

#### A. *Interstate Political Economy?*

With fifty state judiciaries and the federal courts as candidates for complex litigation, there would seem to be ample opportunity for jurisdictional competition, or so-called “forum selling.”<sup>294</sup> In a leading article, Professors Daniel Klerman and Greg Reilly observe: “For diverse motives, such as prestige, local benefits, or re-election, some judges want to hear more of certain types of cases. When plaintiffs have a wide choice of forum, such judges have incentives to make the law more pro-plaintiff because plaintiffs choose the court with the most pro-plaintiff law and procedures.”<sup>295</sup> From common law claims in early modern England to patent cases in the Eastern District of Texas, Klerman and Reilly (and others)

---

<sup>294</sup> Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 245, 299–300 (2016); see also Todd J. Zywicki, *Is Forum Shopping Corrupting America’s Bankruptcy Courts?*, 94 GEO. L.J. 1141, 1146 (2006); LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 138 (2005); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 634 (2015); Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 469 (2015); John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915, 1959 (2012); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007) (emphasizing that the English common law system incentivized jurisdictional competition).

<sup>295</sup> Klerman & Reilly, *supra* note 294, at 242.

observe jurisdictional competition across a range of areas.<sup>296</sup> And many scholars and policymakers have explained the rise of “business courts” by reference to this form of competition.<sup>297</sup>

One might think that the sorts of complex disputes that make up many MDL proceedings would be prime candidates for forum selling. Complex cases can generate revenue for local lawyers and service providers. And federal judges, at least, tend to view MDL assignments as prestigious and desirable for a variety of reasons.<sup>298</sup> Could states, therefore, be competing with each other for the kind of complex litigation that ends up in MDL?

We don’t think so. First, our study of the legislative history of MDL in California, Texas, and Indiana, is consistent with the view that jurisdictional competition was not a primary driver.<sup>299</sup> We also observe, though without scientific rigor, that the most well-developed consolidation procedures mostly have arisen in states that seemingly have the most cases to consolidate, consistent with the idea that consolidation serves other goals.<sup>300</sup>

Conceptually, we also think it is unlikely that interstate competition drives the adoption or design of state MDL. The primary concern of forum-selling critics is that courts will try to attract business by appealing to plaintiffs and their attorneys.<sup>301</sup> The current rules of federal jurisdiction, however, mean that most cases worth competing over—cases with some interstate elements and large possible recoveries—are also going to be candidates for federal jurisdiction, especially since the Class Action Fairness Act was adopted in 2005.<sup>302</sup> So even if a state were to make its MDL process extremely friendly to plaintiffs, attempts to forum shop into that state would

---

<sup>296</sup> See *supra* note 294 (collecting sources).

<sup>297</sup> See generally Coyle, *supra* note 294 (evaluating the design of business courts).

<sup>298</sup> See Gluck, *supra* note 3, at 1698.

<sup>299</sup> See *supra* Sections II.A.1, II.B.1, II.C.1.

<sup>300</sup> See *supra* Section I.A. As a very rough proxy, states with larger populations are more likely to have MDL systems. Among states in the top quartile by population, only Florida, Ohio, and Georgia have no form of MDL (and Ohio has actively considered one). Among the bottom quartile by population, only Maine, New Hampshire, Rhode Island, and West Virginia have state MDLs (and only West Virginia’s is an institutional MDL). Compare *supra* Section I.A (listing states by MDL form), with *Vintage 2019 Population Estimates*, U.S. CENSUS BUREAU (2019), [https://www.census.gov/search-results.html?q=2020+population+estimates+by+state&page=1&stateGeo=none&searchtype=web&cssp=SERP&\\_chars\\_et=UTF-8](https://www.census.gov/search-results.html?q=2020+population+estimates+by+state&page=1&stateGeo=none&searchtype=web&cssp=SERP&_chars_et=UTF-8) [<https://perma.cc/N8HB-QE56>] (consolidating tables of state population estimates).

<sup>301</sup> See *supra* note 294 (collecting sources).

<sup>302</sup> See 28 U.S.C. § 1331 (arising under jurisdiction); 28 U.S.C. § 1332 (diversity of citizenship jurisdiction); 28 U.S.C. § 1369 (multiparty, multiforum jurisdiction); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.) (CAFA). This is especially true given recent decisions finding that some state MDLs are “mass actions” removable under CAFA. See *supra* note 92 and accompanying text.

likely be met with a defendant's notice of removal to federal court.<sup>303</sup> To be sure, there will be cases amenable to jurisdiction in multiple states and for which removal would be unavailable,<sup>304</sup> but we suspect this group of cases is small enough that it would be unlikely to drive competition-based law reform.<sup>305</sup> And that group of cases may be getting even smaller in the wake of the U.S. Supreme Court's recent cases constricting personal jurisdiction.<sup>306</sup>

We also do not think that states are likely competing with each other for MDL's repeat players. Critics of federal MDL worry that consolidation favors institutional defendants and the most powerful plaintiffs' attorneys over small-time players.<sup>307</sup> Regardless of whether this account of federal MDL is correct, there are at least two reasons to doubt that there is interstate competition for these repeat players. First, the institutional players at the center of this narrative prefer centralization, so federal MDL—which offers nationwide, not just statewide, consolidation—is almost always going to win out.<sup>308</sup> Second, even if a state could develop a repeat-player-friendly MDL, that state could not pull in cases filed in other states, which is exactly where nonrepeat players would file suit in this hypothetical world.<sup>309</sup> In other words, the lack of a 28 U.S.C. § 1407 equivalent for coordinating state court cases

---

<sup>303</sup> 28 U.S.C. §§ 1441, 1446.

<sup>304</sup> See *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 741–46 (2014) (holding that state *parens patriae* actions are not “mass actions” for purposes of CAFA).

<sup>305</sup> For example, even though state attorney general (AG) suits might avoid CAFA, *see id.*, and even though state AGs may sue in other states' courts, *see Zachary D. Clopton, Diagonal Public Enforcement*, 70 STAN. L. REV. 1077, 1096–1101 (2018), we expect that most AGs prefer to sue in their home courts.

<sup>306</sup> See, e.g., *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780–82 (2017) (limiting specific personal jurisdiction); *Daimler AG v. Bauman*, 571 U.S. 117, 125–33 (2014) (limiting general personal jurisdiction); Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 88, at 1272–74 (arguing that the Court's attempts to limit personal jurisdiction will drive more cases into federal MDL). Personal jurisdiction is not a limit for federal MDL in any given state because MDL courts can rely on personal jurisdiction from the transferor court. *Id.* at 1296; *see also* Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1172 (2018) (explaining the JPML's view that the transferor court's personal jurisdiction reach is controlling).

<sup>307</sup> See generally, e.g., Burch, *Monopolies*, *supra* note 3 (arguing that repeat players, including defendants and lead plaintiffs' lawyers, may prioritize positive outcomes for each other to the detriment of plaintiffs); Mullenix, *supra* note 3 (arguing that plaintiffs' counsel and defense counsel have a shared interest in exploiting the MDL structure to resolve disputes outside class action restraints). *But see generally* Bradt & Rave, *It's Good to Have the "Haves," supra* note 3, (arguing that repeat-player plaintiffs' lawyers can serve as a valuable counterweight to repeat players on the defense side).

<sup>308</sup> This preference for centralized federal MDL is the point of the criticisms just mentioned.

<sup>309</sup> Nonrepeat players might face additional transaction costs in filing in a different court, but we suspect that those costs would not typically be so large that they would deter nonrepeat players from fleeing a jurisdiction that overtly caters to repeat players.

across state lines means that states would be less successful at centralizing disputes than the federal courts, even if they tried.<sup>310</sup>

In short, therefore, interstate competition does not seem all that relevant to state MDL. Instead, we think that more important effects are likely within each state (where we turn next) or between state and federal courts (where we turn thereafter).

### B. *Intrastate Forum Shopping*

States' choices about their MDL systems can have consequences for intrastate political economy. In particular, state MDLs may affect the competition between plaintiffs and defendants. While we do not observe state MDLs applying specialized rules of procedure that overtly favor plaintiffs or defendants,<sup>311</sup> seemingly neutral design choices can have the effect of tilting the balance between them.

Most importantly, state MDL rules have consequences for the ability of plaintiffs and defendants to shop for judges. Especially given the degree of discretion that trial judges typically have in handling pretrial matters and managing attorney appointments in complex cases, the identity of the MDL judge may swamp many of the differences in procedure that we have observed.<sup>312</sup> This is all the more so because most complex cases settle before any of the judge's pretrial rulings can be appealed. From the litigants' perspective, the big question will typically be, "Who is the judge that will be handling this mass of cases?"<sup>313</sup>

Going back to our initial taxonomy, there is a big difference between states that have peer MDLs and states that have institutional MDLs. In short, the peer MDL models often give plaintiffs more leeway to shop for a favorable forum and judge than when no MDL is available. The institutional

---

<sup>310</sup> We have explained why states are unlikely to compete by favoring plaintiffs or by favoring big players. If a state competed by creating a dispute resolution system that maximized everyone's preferences, then all we could do is applaud.

<sup>311</sup> Cf. Clopton, *MDL as Category*, *supra* note 2, at 1311–14, 1325–32 (discussing and criticizing proposals for federal MDL-specific rules of procedure).

<sup>312</sup> Parties may also care about the venue to the extent that it affects the jury pool in cases for which a jury would be available. We focus on the selection of judges here in part because the selection of judge implies a selection of venue.

<sup>313</sup> In recounting Representative John Dingell's famous quote, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time," to his students, Professor Oscar Chase used to add the proviso, "Sure, as long as you let me pick the judges." (author's personal recollection).

MDL models, by contrast, generally give plaintiffs less leeway to forum shop.<sup>314</sup>

In the seven states with peer MDL procedures,<sup>315</sup> trial judges with pending cases are the ones who decide whether and where cases will be consolidated. Thus, the decider on the consolidation question will always be a judge in a court where some plaintiff has chosen to file a case. And seemingly in all of the peer states, cases may only be transferred to courts in which a case is pending—again, a set of courts over which plaintiffs have some say.

We assume that plaintiffs and their lawyers will behave strategically in light of these features. If plaintiffs' lawyers coordinate with each other (or just think ahead), they can file cases in venues with friendly judges, and then ask the friendliest of those judges to consolidate cases from around the state either in their own court or in front of another friendly judge. Careful plaintiffs' lawyers could also delay filing in less favorable venues until after the consolidation decision is made, and then argue that their later filed cases should tag along with the earlier transferred cases. Some peer MDL states give plaintiffs the option for even more control. In states where the judge in the earliest filed action decides whether and where to consolidate (Indiana, Massachusetts, and Pennsylvania),<sup>316</sup> plaintiffs' lawyers can make sure to file the first case in the friendliest venue, and then ask that judge to vacuum up later filed cases from around the state.

There are limits, of course, to plaintiffs' ability to forum shop in these peer states. Venue rules and random judicial case assignments within courts provide important constraints. Plaintiffs with similar claims are not always careful or coordinated enough to make sure early cases are filed in friendly forums. And in jurisdictions in which a consolidation motion may be filed in any pending case, defendants might request consolidation in the most defendant-friendly venue. But the important point for our purposes is that the peer MDL model gives plaintiffs some greater degree of control over who will decide whether to consolidate the cases and, if so, in front of which judge.

In the institutional MDL model, by contrast, the decider on the critical question of whether and where to consolidate cases is some institution other than a trial judge with pending cases.<sup>317</sup> Some states follow the federal model

---

<sup>314</sup> To the extent that ad hoc MDL is the product of state high court decision-making, ad hoc states will behave like institutional states, though other ad hoc approaches are possible. *See supra* Section I.A.

<sup>315</sup> *See supra* Section I.A (describing these states).

<sup>316</sup> *See infra* Table 4.

<sup>317</sup> *See supra* Section I.A (describing these states).



and give the panel the authority to handpick a specific judge.<sup>318</sup> Other states disaggregate the forum and judge choices.<sup>319</sup> But no matter the details, all of these institutional MDL states depart from random assignment<sup>320</sup> and empower some external institution to handpick the judge who will handle the consolidated actions. And that means that plaintiffs lose some of their ability to shop for a friendly judge to handle the consolidated actions or a friendly judge to decide who that judge will be.<sup>321</sup> Indeed, opponents of Texas’s institutional MDL provision argued that it “would allow defendants to ‘forum shop,’ which [MDL’s] supporters say plaintiffs should not be allowed to do.”<sup>322</sup>

One can see the consequences of the peer–institutional choice most starkly in geographically polarized states with elected judges.<sup>323</sup> Assume that Democratic judges are more plaintiff-friendly than Republican judges, in at least some types of aggregate cases.<sup>324</sup> While this is a gross oversimplification, it helps illustrate the dynamics that could be at play with elected judiciaries and the various interests that appear before them.<sup>325</sup> Now

---

<sup>318</sup> See *supra* Section I.B. Indeed, in the federal system, identifying a transferee judge with the experience and wherewithal to handle a massive litigation is often the most important consideration for the JPML. See Williams & George, *supra* note 3, at 439–40 (cataloging reasons for forum and judge selection); Bradt, *supra* note 306, at 1168 (“It’s not so much a where question, but a who question.” (quoting Elizabeth Cabraser, MDL Problems, Proceedings of the Section on Litigation, Annual Meeting of the Association of American Law Schools (Jan. 6, 2017) (recording on file with the Association of American Law Schools))). Cabraser is a prominent MDL practitioner.

<sup>319</sup> In New York, the panel picks a transferee court, and then the chief judge of that court chooses a specific judge to handle the consolidated actions. In California, the chief justice may pick the transferee judge or delegate that decision to the chief judge of the transferee court. See *supra* Part I.

<sup>320</sup> For a proposal to integrate random assignment into federal MDL, see Clopton, *MDL as Category*, *supra* note 2, at 1340–41 (recommending randomization of transferee judges where no compelling reason or need for expertise regarding cases exists). For an argument why conscious selection of MDL judges is attractive in some types of cases, see Francis E. McGovern & D. Theodore Rave, *A Hub-and-Spoke Model of Multidistrict Litigation*, 84 LAW & CONTEMP. PROBS. (forthcoming 2021) (manuscript at 13–16) (on file with journal).

<sup>321</sup> The descriptions of the California and Texas models and the circuitous path of many cases demonstrated by this data illustrate the attenuated links between plaintiffs’ forum choice and the consolidated proceeding. See *supra* Part II (describing case studies and data).

<sup>322</sup> See HOUSE RSCH. ORG., BILL ANALYSIS, HB4, MEDICAL MALPRACTICE AND TORT LIABILITY REVISIONS 52 (2003), <https://hro.house.texas.gov/pdf/ba78R/HB0004.PDF> [<https://perma.cc/63GZ-2FEW>].

<sup>323</sup> Certainly, these effects might be visible in other states as well, but these states present particularly clear contrasts—and, for reasons taken up in the next Section, they also suggest potential tensions with respect to political control and accountability.

<sup>324</sup> Cf. Burbank & Farhang, *supra* note 40, at 246–47 (finding that a circuit panel’s ideological composition has a strong influence on the certification outcome in federal cases).

<sup>325</sup> No one doubts that some judges have plaintiff-friendly or defendant-friendly reputations, so if you prefer, substitute “plaintiff-friendly” and “defendant-friendly” for “Democratic” and “Republican.”

consider Indiana and Texas. Both states are solidly Republican at the statewide level but have geographic pockets that are heavily Democratic. Both states elect their trial judges in local partisan elections. Texas also elects its supreme court justices in statewide partisan elections.<sup>326</sup>

In a hypothetical Indiana litigation, plaintiffs might strategically file their first case in heavily Democratic Monroe County, and then file a number of similar cases throughout the state. Under Indiana's peer MDL rules, the plaintiffs can ask the elected trial judge in Monroe County to consolidate all of the later filed cases statewide in her own court.<sup>327</sup> Thus, putative Indiana plaintiffs can shop for plaintiff-friendly consolidation venues by selecting where to file the first case. And unless the plaintiff-friendly judge voluntarily relinquishes the cases, the plaintiffs' choice will stick.

Compare this result with an analogous case in Texas. Plaintiffs in Texas might elect to file as many of their cases as possible in the heavily Democratic Starr County in South Texas.<sup>328</sup> But as long as at least one related case is filed elsewhere in the state, then defendants can ask a panel of judges appointed by the Republican chief justice to take those cases away from the Democratic Starr County judges and give them to another judge somewhere else in the state. Plaintiffs' ability to select forums and judges is significantly reduced once a formal panel gets involved.<sup>329</sup> And while defendants are not guaranteed an alternative judge of their choice, an institutional MDL at least affords them an opportunity to get out of the plaintiff's chosen forum.

In sum, choices about MDL design have direct consequences for the perennial competition between plaintiffs and defendants. Peer MDLs facilitate plaintiff forum shopping and tend to shift power from defendants to plaintiffs. Conversely, institutional MDLs inhibit plaintiff forum shopping and tend to shift some power away from plaintiffs toward defendants.

---

<sup>326</sup> Though not a part of peer coordination in Indiana, we note that Indiana's supreme court justices are appointed by the governor from a commission-generated list and are subject to retention elections. *See About the Court*, COURTS.IN.GOV, <https://www.in.gov/courts/supreme/about> [<https://perma.cc/JB5B-ZR42>].

<sup>327</sup> *See* IND. R. TRIAL P. 42(D). An MDL consolidation under Indiana's Rule of Trial Procedure 42(D) suspends the parties' right to move for an ordinary venue transfer for as long as the cases are consolidated. *See supra* note 262 and accompanying text.

<sup>328</sup> Starr County and the surrounding counties in the Rio Grande Valley have been perennial favorites on the American Tort Reform Association's list of "Judicial Hellholes." Texas lawyer Tony Buzbee is reported to have said, "That venue probably adds about 75% to the value of the case . . . [W]hen you're in Starr County, traditionally you need to just show that the guy was working, and he was hurt. And that's the hurdle . . ." *See* AM. TORT REFORM FOUND., JUDICIAL HELLHOLES (2008), <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2008.pdf> [<https://perma.cc/CR5X-76EN>].

<sup>329</sup> Note also that both states depart from the normal allocation of judicial business, which would involve cases remaining in the courts in which they were filed (subject to an individual motion to transfer venue).

### C. Intrastate Judicial Politics

The previous section explored the consequences of MDL design for forum and judge shopping. MDL design also has consequences for the allocation of judicial authority within a state, and again, the institutional–peer division is helpful in interrogating these consequences. As we explain, institutional MDL systems reallocate judicial power within a state vertically, and peer MDL systems reallocate judicial power within a state horizontally.

Turning first to institutional MDL states, Table 3 below describes the methods of selecting the MDL decider and trial judges in institutional states. In every institutional MDL scheme, state-level actors—a panel, the supreme court, or the chief justice—decide whether and where to consolidate cases. And those state-level actors often pick the judge who will handle the consolidated cases. The institutional MDL approach thus reallocates power vertically from local judges to state-level ones.<sup>330</sup>

TABLE 3: JUDICIAL SELECTION METHOD IN INSTITUTIONAL MDL STATES<sup>331</sup>

State	MDL Decider	MDL Decider Selection	Trial Judge Selection
California	Chief justice (with advice from designees)	Appointed by governor (with retention election)	Nonpartisan election
Colorado	Panel	Selected by appointed chief justice	Appointed by governor (with local retention election)
Connecticut (hybrid)	Chief court administrator (or trial judge or consent)	Selected by appointed chief justice	Appointed by governor
Illinois	Supreme court	Partisan districted election	Partisan election

<sup>330</sup> An important caveat is to be noted. It is, of course, true that states have hierarchical judicial systems where state-level appellate courts can overrule the decisions of local trial courts. But not all decisions can or will be subjected to appellate review. This is particularly true in aggregate litigation, where many of the most important decisions are ones of fact or case management that are committed firmly to the trial court's discretion and where most cases settle before any appeal is taken. We assume that the identity of the trial judge matters and that states that elect trial judges in local elections have made a conscious choice to devolve the kind of discretion and authority that trial judges wield to the local level.

<sup>331</sup> See *supra* Section I.B; NAT'L CTR. FOR STATE CTS., *supra* note 49 (maintaining information on MDL decider and trial judge selection in the states).

NORTHWESTERN UNIVERSITY LAW REVIEW

State	MDL Decider	MDL Decider Selection	Trial Judge Selection
Kansas	Supreme court	Appointed (with retention election)	Mix of partisan elections and locally appointed with retention elections
Minnesota	Chief justice	Nonpartisan election	Nonpartisan election
New Jersey	Supreme court	Appointed by governor	Appointed by governor
New York	Panel	Selected by chief administrative judge appointed by appointed chief judge	Partisan election
North Carolina	Chief justice	Partisan election	Partisan election
Oregon	Supreme court (chief justice assigns judge)	Nonpartisan election	Nonpartisan election
Texas	Panel	Selected by elected chief justice	Partisan election
Virginia	Panel	Selected by legislatively selected supreme court	Legislative selection
West Virginia	Panel	Selected by elected supreme court	Nonpartisan election

This vertical reallocation of power to state-level institutions is most pronounced in the states in which the trial judges who are losing power are themselves tied to local constituencies. As displayed in Table 3, at least ten institutional states subject trial judges to some form of local election.<sup>332</sup> These states have chosen a system that makes judges accountable to local constituencies and thus they permit variation among judges across the state. Locally elected state trial judges are not “fungible” in the same way that we

---

<sup>332</sup> To the extent that appointed trial judges are thought to “represent” local constituencies, then the same comments apply to them. For example, Colorado and Virginia (among others) require their trial court appointees to be residents of the relevant jurisdiction. *See* NAT’L CTR. FOR STATE CTS., *supra* note 49.

might think of federal district court judges, who are, by design, not accountable to any geographic constituency.<sup>333</sup> When a state supreme court, or a panel that it selects, transfers cases from one elected trial judge to another, it is not simply reallocating judicial business among more-or-less fungible judges, like in a federal MDL. Instead, institutional state MDL procedures can stamp out the intrastate variation that is part of the state system, and they do so only for the subset of cases that qualify for consolidation.

Particularly in states where judges at all levels are chosen through partisan elections, it is possible that institutional MDL may become a site of contestation between state and local political factions. Those instances are not necessarily limited to situations in which one side is engaged in aggressive forum shopping.

Returning to our opening case, imagine that there is a major storm in an institutional MDL state such as Texas, where trial judges are elected locally and the supreme court chief justice, who selects the MDL panel, is elected statewide. Now imagine that a mass of lawsuits over insurance claims from the hardest hit city is pending in front of a moderate Republican (or a moderately pro-defendant) judge in that city. The judge rules for the insurance companies, and the public is outraged. In the next election, the judge is defeated and replaced by a Democratic former plaintiffs' attorney who ran on holding insurance companies accountable. A few years later, there is another storm and another wave of insurance lawsuits. The voters in that city seem to want the new round of litigation to come out a different way. But the Texas MDL panel—appointed by the Texas chief justice, a Republican who was elected statewide—can take those cases away from the newly elected Democratic judge and assign them to some other solidly Republican judge elsewhere in the state. (Indeed, at least in Texas, the MDL panel can do this even in the middle of a case. If an MDL judge is voted out of office, the panel can retransfer the consolidated cases away from that judge's elected successor—and even back to the defeated incumbent!)<sup>334</sup> In

---

<sup>333</sup> *But see Hearing of the Sup. Ct. Advisory Comm.* 9305 (Tex. 2003) (statement of Chief Justice Phillips) (Texas Advisory Committee member and Judge Scott Brister observing that “the concept behind MDL is that [state] trial judges are fungible, too”).

<sup>334</sup> *See* TEX. R. JUD. ADMIN. 13.3(o), 13.6(a) (allowing former judges approved by the chief justice to serve as MDL judges); *supra* Section II.B.3. This situation is hardly hypothetical. The insurance litigation following Hurricane Harvey, for example, was initially assigned to a Republican judge in Houston. When that judge lost her next election to a Democratic former plaintiffs' attorney, the Texas MDL panel retransferred the cases back to the defeated incumbent, who had been approved by the chief justice to handle MDLs. For a more detailed account, see Rave & Clopton, *Texas MDL*, *supra* note 10, at 391–92, 391 n.143. Indeed, when judges handling MDLs in Texas lose elections, the Texas MDL panel

such instances, local constituencies might justifiably object to the state panel interfering with their electoral choices—though MDL defenders might say that statewide disputes should not be subjected to the whims of one-off local elections.

More generally, an institutional MDL system may empower statewide actors to overrule the wishes of locally responsive actors. Sometimes that may be a valuable check on local impulses run amok; other times it may reflect a power play by a political faction that is more powerful statewide. Hopefully, the statewide actors neutrally apply the criteria for deciding when to consolidate and where;<sup>335</sup> however, our cynical sides acknowledge that such discretionary choices at least create opportunities for other factors to come into play. Our point here is not to say that local responsiveness and control are more important than efficiency and statewide uniformity or vice versa. The point is that those different values are implicated by the states' institutional choices.<sup>336</sup>

While the potential conflict in institutional MDL states is vertical, in peer states, it is horizontal. Recall that peer states empower trial judges with pending cases to make consolidation decisions. The ability to consolidate cases from other courts means that trial judges exercise “extraterritorial” control by reaching outside their districts to grab cases from around the state.<sup>337</sup> This, too, departs from the background distribution of authority in these state systems. Here, some local actors are empowered at the expense

---

has uniformly transferred the MDLs away from their elected successors, and often back to the defeated incumbent. *See id.*

<sup>335</sup> Our study of Texas's MDL system found little evidence that party label was a major driver in the MDL panel's assignment of cases to pretrial judges, but our sample size was small and factors other than crass partisanship may, of course, be at play. For more on this issue, see Rave & Clopton, *Texas MDL*, *supra* note 10, at 392.

<sup>336</sup> Indeed, most voters may not even be aware that their state has an institutional MDL that could undermine their local judicial choice in some cases. The low salience of state MDL might make it a sort of procedural backdoor limitation on voters' rights to elect local judges to hear local cases.

<sup>337</sup> This argument has parallels to various arguments in federal law, including arguments in favor of CAFA and arguments against nationwide injunctions. *See, e.g.*, Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1415–17 (2006) (connecting CAFA to extraterritoriality); Memorandum from Attorney Gen. Jefferson Sessions III to Heads of Civ. Litigating Components & U.S. Attorneys at 6 (Sept. 13, 2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/T2JZ-XR3Q>] (“A lower court issuing a nationwide injunction effectively takes away from the other courts any opportunity they might have had to resolve similar issues pending or soon to come before them.”).

of other local actors. And notably, the same local actors get to decide which cases qualify for consolidation in the first place.<sup>338</sup>

Table 4 summarizes judicial selection methods in states with peer MDL systems. The potential concern with extraterritorial control seems more acute in those peer states in which trial judges are elected by local constituencies. In these states, trial judges are supposed to represent particular jurisdictions, but the peer MDL systems allow a locally elected judge to exercise control over cases in other judges' purviews. The concern seems less acute in states where trial judges are appointed by statewide actors. In these states, trial judges may not be designed to be responsive to local interests (and could not be voted out for going against local sentiment). In that sense they look more like federal judges.

TABLE 4: JUDICIAL SELECTION METHODS IN PEER MDL STATES<sup>339</sup>

State	MDL Decider	Trial Judge Selection
Indiana	First-filed judge	Partisan election
Maine	Any judge with pending case	Appointed by governor
Massachusetts	First-filed judge	Appointed by governor
New Hampshire	Any judge with pending case	Appointed by governor
Pennsylvania	First-filed judge	Partisan election
Rhode Island	Any judge with pending case	Appointed by governor
Wisconsin	Transferor–transferee joint decision	Nonpartisan election

Both institutional and peer models of MDL, therefore, are exceptions to the normal allocation of judicial business in a state. Or, to put it another way, the model that most closely tracks the background distribution of judicial authority throughout the state appears to be the states that have no MDL procedure. If local judges keep control over their cases, then the designed intrastate variation is preserved. Of course, that model gives up the

<sup>338</sup> Wisconsin's requirement of a joint order blunts this concern by empowering both the sending and receiving judges, though it seemingly does so at a cost to efficiency. *See supra* notes 78–79 and accompanying text.

<sup>339</sup> *See supra* Section I.B; NAT'L CTR. FOR STATE CTS., *supra* note 49 (maintaining information on MDL decider and trial judge selection in the states).

efficiency gains of aggregated proceedings. States must decide what degree of local control and geographic variance they want in their judicial systems and how much they are willing to trade that off against values like efficiency and statewide uniformity.

We do not mean to suggest that any particular combination of policies on local control and MDL design is better than any other. Instead, we want to emphasize that these are choices and that policymakers should make them consciously—something that our review of legislative histories suggests that they do not always do.

#### *D. Federal–State Competition*

The foregoing sections suggest that intrastate dynamics are central to state MDL design choices. And, again, it is worth noting that many state MDL proceedings involve disputes that are primarily or exclusively within a state.

But, of course, many large disputes spill over state lines, and although federal MDLs tend to vacuum up most cases in a mass-tort proceeding, there continue to be cases with federal and state components.<sup>340</sup> As noted above, we have not found evidence of states adopting or designing MDL procedures in order to capture a share of these cases.<sup>341</sup> Yet even if they were created for other reasons, we find that the presence of state MDLs can lead to competition between federal and state proceedings. And, as federal MDL continues to increase in importance, we suspect that these federal–state dynamics will become even more important to the complex litigation landscape.

More precisely, the existence of state MDLs operating alongside a federal MDL has consequences for the distribution of power within disputes. When state or federal courts consolidate disputes, there is an accompanying tendency to consolidate representation. In the typical mass tort, this will mean consolidating representation on the plaintiffs' side.<sup>342</sup> This could take the form of formal appointments (e.g., “lead counsel”) or informal efforts among plaintiffs' counsel to work together on joint filings.<sup>343</sup> Though MDL does not require such consolidation<sup>344</sup>—and such consolidation is possible

---

<sup>340</sup> See, e.g., Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 88, at 1299–1306 (discussing MDL's implications and the increased federalization of litigation).

<sup>341</sup> See *supra* Section III.A.

<sup>342</sup> See Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 88, at 1260.

<sup>343</sup> See, e.g., FED. JUD. CTR., *MANUAL FOR COMPLEX LITIGATION*, FOURTH § 10.22–221 (2004).

<sup>344</sup> See 28 U.S.C. § 1407 (providing no rules for consolidating representation).



outside of MDL<sup>345</sup>—we think that the choice to create MDL procedures in a state will almost certainly increase the frequency with which this happens.

The costs and benefits of representational consolidation within a single proceeding are well known and often debated, so we need not rehash them here.<sup>346</sup> But where things get more interesting is when the opportunities for consolidation exist across multiple court systems addressing the same dispute. Here, the most striking effects will be when there is a federal MDL with satellite cases in the states. In a world without state MDLs, those satellite cases may be scattered across thousands of state courthouses, with collective-action problems weakening their ability to affect the wider litigation. But when those disputes may be consolidated in state MDLs, then the state proceedings have the capacity to become competing power centers vis-à-vis the federal litigation.<sup>347</sup>

These competing power centers may help check the considerable power of lead counsel in the federal MDL if different lawyers take the lead in state proceedings.<sup>348</sup> Indeed, in other work, we find evidence of this dynamic in

---

<sup>345</sup> See, e.g., Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 383–86 (2000) (providing examples of informal aggregation and analyzing the implications); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1029–30 (1993) (highlighting the courts’ initial use of “ad hoc, informal aggregative procedures” to manage mass tort litigation before accepting the use of MDL); see also 15 U.S.C. § 78u–4(a)(3) (discussing the appointment of lead plaintiffs under the Private Securities Litigation Reform Act).

<sup>346</sup> Among the many, many potential sources discussing these costs and benefits, see generally Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642 (1981); Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 484–87 (1986) [hereinafter McGovern, *Toward a Functional Approach*]; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 671–75 (1989) [hereinafter McGovern, *Resolving Mature Mass Tort Litigation*]; Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000); RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008); J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-removable State Actions in Multi-district Litigation*, 5 J. TORT L. 1 (2014); Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016).

<sup>347</sup> See Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14, at 10–19 (documenting competing power centers in state opioid MDLs).

<sup>348</sup> See generally, e.g., BURCH, *MASS TORT DEALS*, *supra* note 3, at 18–19 (discussing the appointment of “lead lawyers”); Burch, *Monopolies*, *supra* note 3, at 70–79 (proposing more competition among MDL lead lawyers in order to balance out their monopolistic control); Burch & Williams, *supra* note 3, at 1459 (explaining why “lead lawyers” in MDL are often repeat players). As an intermediate form of consolidation outside of the federal MDL, state MDLs may also serve as a (limited) backstop against the powerful federal transferee judge. If, for example, a federal MDL judge favors defendants too much, later filing plaintiffs may attempt to plead their cases in ways that avoid federal jurisdiction. Or, if the federal MDL judge makes both sides uncomfortable, the parties might even dismiss and refile cases

the opioid litigation—with many lawyers from outside the federal MDL leadership playing important roles in state opioid MDL proceedings.<sup>349</sup> On this issue, the variation in state MDL designs described above has an unintended consequence. Because the methods of consolidating and assigning state MDLs vary, it becomes challenging for the same group of lawyers to win leadership contests in all of the proceedings.<sup>350</sup> Or to put it another way, enterprising plaintiffs' firms that might not have the national reputation to be selected to federal MDL leadership can maneuver into leadership positions in one or more states. Once there, and armed with effective control over an inventory of state cases, these lawyers can exert real influence on the course of the overall litigation and potential settlement.<sup>351</sup>

To be sure, the more cases that flow into state courts and away from federal MDLs, the more collective-action problems plaintiffs may encounter. In that sense, state MDLs are no panacea. State MDLs may sometimes help limit the agency problem in federal MDLs, but doing so may exacerbate collective-action problems in litigation and may make it harder to obtain global peace.<sup>352</sup>

#### *E. Interjurisdictional Cooperation*

Finally, alongside the potential for interjurisdictional *competition*, we find that state MDLs may be sites for increased interjurisdictional *cooperation*.

Some of this cooperation might be indirect. Because different states employ different MDL procedures, there may be opportunities for policymakers and judges to learn from each other. Indeed, we have found evidence of state policymakers learning from each other and from the federal

---

in state court, with the defendants eschewing removal. Once there, the ability to use state MDL means that the parties still may obtain some benefits of consolidation outside of the control of the federal MDL judge. See Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14, at 20.

<sup>349</sup> See Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14, at 8–10, 18–19.

<sup>350</sup> We find this effect in opioids, too. See *id.* at 8–10, 14.

<sup>351</sup> That said, competition between state and federal leadership runs counter to the cooperation we describe *infra*.

<sup>352</sup> We explore these tradeoffs in the opioid litigation in Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14, at 11–17.

system,<sup>353</sup> and we have been told that state judges handling complex cases are in communication about best practices.<sup>354</sup>

More directly, state MDLs can facilitate intercourt cooperation on actual cases. In particular, we think that state MDLs can play an important role when parties and courts want the benefits of consolidation while also preferring or needing to be in state court.<sup>355</sup>

Imagine that a defective product leads to a federal MDL of 10,000 cases plus 20 cases in each of ten states.<sup>356</sup> Parties in those state cases may be content to be in state court or may be stuck there because federal jurisdiction is lacking, but they also would benefit from some coordination with the federal cases and with each other. In simpler terms, coordination problems are much easier to overcome when dealing with 11 proceedings than when dealing with 201 proceedings. Consolidation of the state proceedings in state MDLs reduces the nodes for coordination. More generally, if every state consolidated all of their cases related to a federal MDL, no federal MDL would face more than 50 satellite proceedings. Consolidation maximalists

---

<sup>353</sup> See, e.g., *supra* Section II.A (recounting Texas legislative history referencing California and Colorado MDL systems as potential models); ILL. SUP. CT. R. 384, Committee Comment (“This rule is new and is based upon Title 28, section 1407, of the United States Code, which establishes the procedure in the Federal courts for the transfer of civil actions involving one or more common questions of fact, pending in different districts, to one district for coordination or consolidated pretrial proceedings.”).

<sup>354</sup> See Kuhl Interview, *supra* note 162. Another type of learning might be within the same litigation. For decades, scholars and judges have observed that serial proceedings in mass tort cases—the process of “maturation”—can help inform a global resolution. See McGovern, *Toward a Functional Approach*, *supra* note 346, at 482–83; McGovern, *Resolving Mature Mass Tort Litigation*, *supra* note 346; NAGAREDA, *supra* note 346, at viii. Spreading those across multiple courts or court systems may have added benefits in this process. See, e.g., McGovern & Rave, *supra* note 320 (manuscript at 1–2, 16) (disaggregating MDL proceedings into “spoke” jurisdictions “can increase the pool of cases eligible for bellwether treatment”); Glover, *supra* note 346, at 25–42 (arguing that state court proceedings alongside federal MDLs can produce “real-world data” relevant to the resolution of the federal cases); Lahav, *supra* note 346, at 2387 (discussing the benefits and drawbacks of informal discussions between judges in aggregated cases and how such communication can make a global peace possible without class certification); Cover, *supra* note 346, at 673–74, 678 (explaining the increase in innovation that is possible with interjurisdictional communication).

<sup>355</sup> We do not, for example, go as far as George Conway in his pre-Twitter days, who advocated for amendments to § 1407 to allow the federal MDL Panel to consolidate cases in state courts if it so chose. See George T. Conway III, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1107–12 (1987) (proposing that the federal MDL Panel should be authorized to transfer consolidated cases to a single state court). Conway is more well known for his views on other topics. See George Conway (@gtconway3d), TWITTER, <https://twitter.com/gtconway3d> [<https://perma.cc/3VZ2-P4K8>]. Nor do we advocate for (or against) the adoption of an interstate transfer rule for related cases. See UNIF. TRANSFER OF LITIG. ACT (NAT’L CONF. OF COMM’NRS ON UNIF. STATE LAWS 1991) (providing, among other things, for transfer between state court systems of related cases).

<sup>356</sup> For the uninitiated, a federal MDL of 10,000 is unusual but not so rare. See *Statistical Information*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/statistics-info> [<https://perma.cc/A8G3-FFW8>].

might think that 50 satellite proceedings are 50 proceedings too many, but it is a marked change from a world in which there could be satellite cases in every state trial court around the country.

The opportunity for intermediate levels of consolidation may have positive effects for parties and courts. State MDLs mean that parties may obtain some of the benefits of coordination even when cases remain in state courts. Indeed, states adopting MDL systems frequently did so in order to obtain the benefits of coordination and case management.<sup>357</sup> State court coordination also allows state judges to remain active players in cases involving state law without sacrificing all of the benefits of consolidation.<sup>358</sup> And perhaps federal courts might be more willing to remand removed cases that belong in state court because not all benefits of coordination will be lost.<sup>359</sup>

Assuming that judicial cooperation is a good thing, then our analysis of state MDLs suggests at least two things. First, if state MDLs improve cooperation, then states adopting and amending MDL procedures could realize those benefits by expressly providing that the existence of coordinated proceedings in other jurisdictions should counsel in favor of consolidation. And, indeed, New Jersey and New York currently do so.<sup>360</sup> We also found that there are federal MDL counterparts to more than half of the California consolidated products liability proceedings,<sup>361</sup> and in 86% of the products liability cases in Texas.<sup>362</sup>

Second, state and federal judges handling coordinated proceedings could be encouraged to coordinate with one another. Federal MDL judges routinely coordinate with state court cases, either by communicating directly

<sup>357</sup> See *supra* Sections II.A, II.B. (describing the goals of the California and Texas systems).

<sup>358</sup> Note that one criticism of federal MDL is that it thwarts the development of state law by imposing flattened-out standards on multistate cases. See Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600 (2020); cf. Bradt & Rave, *Aggregation on Defendants' Terms*, *supra* note 88, at 1308–11 (observing that MDL can result in smoothing out differences in state law).

<sup>359</sup> Note, too, that another criticism of federal MDL is that MDL judges sometimes sit on remand motions in hopes of global resolution. See Clopton & Rave, *supra* note 14, at 20 (discussing this issue in the opioid MDL).

<sup>360</sup> See *supra* Section I.C.

<sup>361</sup> Results on file with authors. Examples of pairs of overlapping California proceedings and federal MDLs include: Abilify Prod. Cases, JCCP No. 4998, and *In re* Abilify (Aripiprazole) Prods. Liab. Litig., 232 F. Supp. 3d 1342 (J.P.M.L. 2016); Zostavax Prod. Cases, JCCP No. 4962, and *In re* Zostavax (Zoster Vaccine Live) Prods. Liab. Litig., 330 F. Supp. 3d 1378 (J.P.M.L. 2018); Roundup Prods. Cases, JCCP No. 4953, and *In re* Roundup Prods. Liab. Litig., MDL No. 2741, 2020 WL 5865873 (J.P.M.L. Oct. 1, 2020); Onglyza Prod. Cases, JCCP No. 4909, and *In re* Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig., 289 F. Supp. 3d 1357 (J.P.M.L. 2018).

<sup>362</sup> Rave & Clopton, *Texas MDL*, *supra* note 10, at 381–84.

with state judges or by instructing counsel to coordinate with their state court counterparts.<sup>363</sup> This is a project worth encouraging, and state MDLs can help do that. Simply by reducing the number of proceedings to coordinate, state MDLs can facilitate these court-to-court efforts.<sup>364</sup> In addition, because institutional state MDLs can funnel cases to handpicked judges who might have special experience in complex litigation, we might expect those court-to-court efforts to be even more welcome.<sup>365</sup>

To take just one example, in the *Vioxx* litigation, Judge Eldon Fallon, who was handling the federal MDL, worked closely with well-respected state judges Victoria Chaney and Carol Higbee. Judges Chaney and Higbee, respectively, were handling the state MDL proceedings in California and New Jersey.<sup>366</sup> While we cannot say that state MDL procedures were necessary for this coordination, it certainly helped that Judges Chaney and Higbee had substantial masses of claims in front of them.

Or consider the opioid litigation.<sup>367</sup> Nine states have consolidated hundreds of state court opioid claims in state MDLs: California,<sup>368</sup>

---

<sup>363</sup> For example, the JPML has a link on its website for “Multijurisdiction Litigation Guide -- Federal and State Coordination,” see *Legal Resources*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/legal-resources> [<https://perma.cc/8UQZ-849X>], and the *Manual for Complex Litigation* takes up federal–state coordination as well. See *infra* note 364. For an example from another area, the U.S. Bankruptcy Code (under the influence of the UNCITRAL Model Law) empowers bankruptcy judges “to communicate directly with, or to request information or assistance directly from, a foreign court.” 11 U.S.C. § 1525; see UNCITRAL MODEL L. ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT, art. 25, para. 1 (U.N. COMM’N ON INT’L TRADE L. (UNCITRAL) 1997), enacted by G.A. Res. 52/158 (Dec. 15, 1997).

<sup>364</sup> For example, state and federal MDL judges can even appoint the same lawyers to leadership positions in both proceedings, as the *Manual for Complex Litigation* suggests. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.225 (2004). But as we noted above, there are costs to overlapping appointments as well. See *supra* Section III.D.

<sup>365</sup> We do not mean to suggest that handpicking judges is all upside, but only that there may be something to be gained from repeated interactions among state and federal judges handling complex cases.

<sup>366</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2010 WL 724084, at \*2 (E.D. La. Feb. 18, 2010); Susan Todd, *Inside the Vioxx Litigation*, NJ.COM (Apr. 2, 2019), [https://www.nj.com/business/2007/11/inside\\_the\\_vioxx\\_litigation.html](https://www.nj.com/business/2007/11/inside_the_vioxx_litigation.html) [<https://perma.cc/G88H-DRNV>].

<sup>367</sup> For more detail on opioid cases in state MDLs, see Clopton & Rave, *Opioid Cases and State MDLs*, *supra* note 14.

<sup>368</sup> See Cal. Jud. Council Coordination Proc. Log (on file with journal).

Connecticut,<sup>369</sup> Illinois,<sup>370</sup> Massachusetts,<sup>371</sup> New York,<sup>372</sup> Pennsylvania,<sup>373</sup> Texas,<sup>374</sup> South Carolina,<sup>375</sup> and West Virginia.<sup>376</sup> These state-level consolidations may be particularly important in dealing with the opioid crisis because many of the plaintiffs are public entities. State MDLs create opportunities for cooperation among courts and litigants without requiring public-entity plaintiffs and state attorneys general, who might have a special interest in remaining in state court, to submit to federal jurisdiction.<sup>377</sup> And we have reason to believe that many of the judges handling these state MDLs have been in contact with and are coordinating with the federal MDL judge.

We hasten to remind readers that state MDLs are more than just adjuncts to federal MDL. Although many large products liability disputes have state and federal court components, there are many examples of complex litigation that reside exclusively within the jurisdiction of a single state court system. Our review of the California and Texas data confirms this intuition. And especially in large states such as those, intercourt coordination is important even when no other judicial system is involved. So, again, state MDLs can be important sites of interjurisdictional cooperation, but they also are important intrajurisdictionally as well.

#### CONCLUSION

In the decades since Congress adopted the federal MDL statute, more and more states have adopted procedures to coordinate cases across state courts. And there is some evidence that even more states might join their ranks soon.

---

<sup>369</sup> See, e.g., *City of New Haven v. Purdue Pharma, L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019).

<sup>370</sup> See *People v. Purdue Pharma L.P.*, Order No. 123090 (Ill. Jan. 29, 2018) (on file with journal).

<sup>371</sup> See, e.g., *City of Bos. v. Purdue Pharma L.P.*, No. 1884-CV-02860, 2020 WL 2198026 (Mass. Super. Ct. Feb. 10, 2020).

<sup>372</sup> See Order Granting Defendants' Application to Coordinate Cases and for Partial Stay Pursuant to 22 NYCRR 202.69, *County of Suffolk v. Purdue Pharma L.P.*, No. 613760/2016, 2017 WL 11421786 (N.Y. Sup. Ct. July 19, 2017).

<sup>373</sup> See *Delaware County v. Purdue Pharma L.P.*, No. 17-8095 (Pa. Ct. C.P. Mar. 26, 2018) (on file with journal).

<sup>374</sup> See MDL Pretrial Cause No. 2018-77098, Master File No. 2018-63587 (Tex. Dist. Ct. June 6, 2019) (on file with journal).

<sup>375</sup> See Am. Order RE: Opioid Litig. (S.C. Aug. 23, 2018), <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2018-08-23-01> [<https://perma.cc/QHJ4-QAUU>].

<sup>376</sup> See *Opioid Litigation*, W. VA. JUDICIARY (Nov. 19, 2020), <http://www.courtsww.gov/lower-courts/mlp/opioid.html> [<https://perma.cc/489Q-UQQF>] (collecting documents).

<sup>377</sup> See, e.g., Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 235–46 (2019) (arguing for an exemption from MDL consolidation for cases brought by or against public litigants).

This Article is not meant to be a paean to state MDLs, but rather an acknowledgment that they play an important role in American complex litigation and will continue to do so. Detailed and critical study of their design and operation, therefore, will play an important role too.

#### APPENDIX A: STATE MDL RULES, STATUTES, AND STANDARDS

Table A1 provides citations to the statutes and rules creating MDL procedures in the states. Table A2 provides the standards that institutional and peer MDL states use to decide whether to consolidate cases.

TABLE A1: STATE MDL RULES AND STATUTES

State	Category	Citation
Alabama	None	N/A
Alaska	None	N/A
Arizona	None	N/A
Arkansas	None	N/A
California	Institutional	CAL. CIV. PROC. CODE §§ 404–404.9 (West 2020); CAL. R. CT. 3.501–3.545
Colorado	Institutional	COLO. R. CIV. P. 42.1
Connecticut	Institutional	CONN. GEN. STAT. § 51-347b (2019)
Delaware	None	N/A
Florida	None	N/A
Georgia	None	N/A
Hawaii	None	N/A
Idaho	None	N/A
Illinois	Institutional	ILL. SUP. CT. R. 384
Indiana	Peer	IND. R. TRIAL P. 42(D)
Iowa	None	N/A
Kansas	Institutional	KAN. STAT. ANN. § 60-242(c) (2014)
Kentucky	None	N/A
Louisiana	None	N/A
Maine	Peer	ME. R. CIV. P. 42; ME. STAT. tit. 14, § 508 (2019)
Maryland	None	N/A
Massachusetts	Peer	MASS. SUPER. CT. R. 31
Michigan	Ad hoc	<i>In re</i> Microsoft Antitrust Litig., Admin. Order No. 2000-5 (Mich. 2000); <i>In re</i> Silicone Gel

NORTHWESTERN UNIVERSITY LAW REVIEW

State	Category	Citation
		Breast Implants Litig., Admin Order No. 1993-2 (Mich. 1993)
Minnesota	Institutional	MINN. GEN. R. PRAC. 113.03
Mississippi	None	N/A
Missouri	None	N/A
Montana	None	N/A
Nebraska	None	N/A
Nevada	None	N/A
New Hampshire	Peer	N.H. SUPER. CT. R. 12(b)
New Jersey	Institutional	N.J. CT. R. 4:38A
New Mexico	None	N/A
New York	Institutional	UNIF. R. N.Y. STATE TRIAL CTS. § 202.69
North Carolina	Institutional	N.C. GEN. R. PRAC. SUPER. & DIST. CTS. 2.1
North Dakota	None	N/A
Ohio	None	N/A
Oklahoma	Ad hoc	<i>In re</i> Okla. Breast Implant Cases, 847 P.2d 772 (Okla. 1993)
Oregon	Institutional	OR. R. CIV. P. 32K; OR. R. APP. P. 12.15
Pennsylvania	Peer	PA. R. CIV. P. 213, 213.1
Rhode Island	Peer	R.I. SUPER. CT. R. CIV. P. 42(a)
South Carolina	Ad hoc	<i>See In re</i> Breast Implant Prod. Liab. Litig., 503 S.E.2d 445 (S.C. 1998)
South Dakota	None	N/A
Tennessee	Ad hoc	TENN. SHELBY CNTY. CT. R. 28
Texas	Institutional	TEX. GOV'T. CODE ANN. § 74.161 <i>et seq.</i> (West 2019); TEX. R. JUD. ADMIN. 13
Utah	None	N/A
Vermont	None	N/A
Virginia	Institutional	VA. CODE. ANN. §§ 8.01-267.1 to 267.9 (2020)
Washington	None	N/A
West Virginia	Institutional	W. VA. R. CIV. P. 42(b); W. VA. TRIAL CT. R. 26
Wisconsin	Peer	WIS. STAT. § 805.05(1)(b) (2020)
Wyoming	None	N/A



TABLE A2: STANDARDS FOR CONSOLIDATION IN INSTITUTIONAL AND PEER STATE MDL

State	Standard for Consolidation
California	<p>“Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.” CAL. CIV. PROC. CODE § 404.1 (West 2020).</p>
Colorado	<p>“Transfer of civil actions sharing a common question of law or fact is appropriate if one judge hearing all of the actions will promote the ends of justice and the just and efficient conduct of such actions. The factors to be considered shall include, but shall not be limited to, the following: (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of the parties, witnesses and counsel; (3) the relative development of the action and the work product of counsel; (4) the efficient utilization of judicial facilities and manpower; (5) the calendar of the courts; (6) the disadvantages of duplicative and inconsistent rulings, orders or judgments; and (7) the likelihood of settlement of the actions without further litigation should transfer be denied.” COLO. R. CIV. P. 42.1(g).</p>
Connecticut	<p>“[W]hen required for the efficient operation of the courts and to insure the prompt and proper administration of justice.” CONN. GEN. STAT. § 51-347b(a) (2019).</p>
Illinois	<p>“When civil actions involving one or more common questions of fact or law are pending in different judicial circuits, and the Supreme Court determines that consolidation would serve the convenience of the parties and witnesses and would promote the just and efficient conduct of such actions.” ILL. SUP. CT. R. 384(a).</p>

NORTHWESTERN UNIVERSITY LAW REVIEW

State	Standard for Consolidation
Indiana	“When civil actions involving a common question of law or fact are pending in different courts, a party to any of the actions may, by motion, request consolidation of those actions for the purpose of discovery and any pre-trial proceedings.” IND. R. TRIAL P. 42(D).
Kansas	“When civil actions arising out of the same transaction or occurrence or series of transactions or occurrences are pending in different judicial districts, the supreme court, on request of a party or of any court in which one of the actions is pending and upon finding that a transfer and consolidation will promote the just and efficient conduct of the actions, may order transfer of the pending actions to one of the counties in which an action is pending.” KAN. STAT. ANN. 60-242(c)(1) (2014).
Maine	“When actions involving a common question of law or fact are pending before the court, in the same county or division or a different county or division, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay . . . . In making any order under this rule, the court shall give due regard to the convenience of parties and witnesses and the interests of justice.” ME. R. CIV. P. 42(a), (c); <i>see also</i> ME. STAT. tit. 14, § 508 (2019) (“A presiding Justice of the Superior Court may, in the interests of justice and to secure the speedy trial of an action, or for other good cause, transfer any civil action or proceeding from the Superior Court in one county to another county. The Chief Justice of the Superior Court may, in the interests of justice and to secure the speedy trial of actions and the efficient scheduling of trials, or for other good cause, transfer any number of civil actions or proceedings from the Superior Court in one county to another county. Transfer may also be by consent of all parties to any civil action or proceeding, provided that the prior approval of the Chief Justice of the Superior Court is obtained.”).
Massachusetts	“When actions involving a common question of law or fact are pending before the court, in the same county or different counties, it may order a joint hearing or trial of

State	Standard for Consolidation
	any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” MASS. R. CIV. P. 42(a); <i>see also</i> MASS. SUPER. CT. R. 31 (incorporating Rule 41(a)’s standard by reference).
Minnesota	“When two or more cases pending in more than one judicial district involve one or more common questions of fact or are otherwise related cases in which there is a special need for or desirability of central or coordinated judicial management, a motion by a party or a court’s request for assignment of the cases to a single judge may be made to the chief justice of the Supreme Court.” MINN. GEN. R. PRAC. 113.03(a).
New Hampshire	“Whenever a Motion is filed in any county requesting the transfer of an action there pending to another county for trial with an action there pending, arising out of the same transaction or event or involving common issues of law, and/or fact, the court may, after notice to all parties in all such pending actions and hearing, make such order for consolidation in any one of such counties in which such actions are pending, as justice and convenience require.” N.H. SUPER. CT. R. 12(b).
New Jersey	“In determining whether designation as multicounty litigation is warranted, the following factors, among others, will be considered: whether the case(s) possess(es) the following characteristics: it involves large numbers of parties; it involves many claims with common, recurrent issues of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort; there is geographical dispersment of parties; there is a high degree of commonality of injury or damages among plaintiffs; there is a value interdependence between different claims, that is, the perceived strength or weakness of the causation and liability aspects of the case(s) are often

State	Standard for Consolidation
	<p>dependent upon the success or failure of similar lawsuits in other jurisdictions; and</p> <p style="padding-left: 40px;">there is a degree of remoteness between the court and actual decisionmakers in the litigation, that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general and house counsel.</p> <p style="padding-left: 40px;">whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party;</p> <p style="padding-left: 40px;">whether centralized management is fair and convenient to the parties, witnesses and counsel;</p> <p style="padding-left: 40px;">whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion;</p> <p style="padding-left: 40px;">whether coordinated discovery would be advantageous;</p> <p style="padding-left: 40px;">whether the cases require specialized expertise and case processing as provided by the dedicated multicounty litigation judge and staff;</p> <p style="padding-left: 40px;">whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;</p> <p style="padding-left: 40px;">whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and</p> <p style="padding-left: 40px;">whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge.” GLENN A. GRANT, MULTICOUNTY LITIGATION GUIDELINES AND CRITERIA FOR DESIGNATION (REVISED) 1–2 (2019); <i>see also</i> N.J. CT. R. 4:38-1 (providing for consolidation of actions).</p>
New York	<p>“In determining whether to issue an administrative order of coordination, the Panel shall consider, among other things, the complexity of the actions; whether common questions of fact or law exist, and the importance of such questions to the determination of the issues; the risk that coordination may unreasonably delay the progress, increase the expense,</p>

State	Standard for Consolidation
	<p>or complicate the processing of any action or otherwise prejudice a party; the risk of duplicative or inconsistent rulings, orders or judgments; the convenience of the parties, witnesses and counsel; whether coordinated discovery would be advantageous; efficient utilization of judicial resources and the facilities and personnel of the court; the manageability of a coordinated litigation; whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and the pendency of related matters in the Federal courts and in the courts of other states. The Panel may exclude particular actions from an otherwise applicable order of coordination when necessary to protect the rights of parties.” UNIF. R. N.Y. STATE TRIAL CTS. § 202.69(b)(3).</p>
North Carolina	<p>“Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.” N.C. GEN. R. PRAC. SUPER. &amp; DIST. CTS. 2.1(d).</p>
Oregon	<p>“Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.” OR. R. CIV. P. 32K(1)(b).</p>

NORTHWESTERN UNIVERSITY LAW REVIEW

State	Standard for Consolidation
Pennsylvania	<p>“In actions pending in different counties which involve a common question of law or fact or which arise from the same transaction or occurrence, any party, with notice to all other parties, may file a motion requesting the court in which a complaint was first filed to order coordination of the actions. Any party may file an answer to the motion and the court may hold a hearing.” PA. R. CIV. P. 213.1(a).</p> <p>“In determining whether to order coordination and which location is appropriate for the coordinated proceedings, the court shall consider, among other matters: (1) whether the common question of fact or law is predominating and significant to the litigation; (2) the convenience of the parties, witnesses and counsel; (3) whether coordination will result in unreasonable delay or expense to a party or otherwise prejudice a party in an action which would be subject to coordination; (4) the efficient utilization of judicial facilities and personnel and the just and efficient conduct of the actions; (5) the disadvantages of duplicative and inconsistent rulings, orders or judgments; (6) the likelihood of settlement of the actions without further litigation should coordination be denied.” <i>Id.</i> 213.1(c).</p>
Rhode Island	<p>“When actions involving a common question of law or fact are pending before the court, in the same county or different counties, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” R.I. SUPER. CT. R. CIV. P. 42(a).</p>
Texas	<p>“[T]he judicial panel on multidistrict litigation may transfer civil actions involving one or more common questions of fact pending in the same or different constitutional courts, county courts at law, probate courts, or district courts to any district court for consolidated or coordinated pretrial proceedings, including summary judgment or other dispositive motions, but not for trial on the merits. A transfer may be made by the judicial panel on multidistrict litigation on its determination that the transfer will: (1) be for the convenience of the parties and witnesses; and (2) promote the just and efficient conduct of</p>

State	Standard for Consolidation
	the actions.” TEX. GOV’T CODE ANN. § 74.162 (West 2019)
Virginia	<p>“On motion of any party, a circuit court may enter an order joining, coordinating, consolidating or transferring civil actions as provided in this chapter upon finding that:</p> <ol style="list-style-type: none"> <li>1. Separate civil actions brought by six or more plaintiffs involve common questions of law or fact and arise out of the same transaction, occurrence or series of transactions or occurrences;</li> <li>2. The common questions of law or fact predominate and are significant to the actions; and</li> <li>3. The order (i) will promote the ends of justice and the just and efficient conduct and disposition of the actions, and (ii) is consistent with each party’s right to due process of law, and (iii) does not prejudice each individual party’s right to a fair and impartial resolution of each action.</li> </ol> <p>Factors to be considered by the court include, but are not limited to, (i) the nature of the common questions of law or fact; (ii) the convenience of the parties, witnesses and counsel; (iii) the relative stages of the actions and the work of counsel; (iv) the efficient utilization of judicial facilities and personnel; (v) the calendar of the courts; (vi) the likelihood and disadvantages of duplicative and inconsistent rulings, orders or judgments; (vii) the likelihood of prompt settlement of the actions without the entry of the order; and (viii) as to joint trials by jury, the likelihood of prejudice or confusion.” VA. CODE ANN. § 8.01-267.1 (2020).</p>
West Virginia	<p>“Two (2) or more civil actions pending in one or more circuit courts: (1) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (2) involving common questions of law or fact in ‘personal injury mass torts’ implicating numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (3) involving common questions of law or fact in ‘property damage mass torts’ implicating numerous claimants in connection with claims for replacement or</p>

NORTHWESTERN UNIVERSITY LAW REVIEW

State	Standard for Consolidation
	<p>repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (4) involving common questions of law or fact in ‘economic loss’ cases implicating numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury; or (5) involving common questions of law or fact regarding harm or injury allegedly caused to numerous claimants by multiple defendants as a result of alleged nuisances or similar property damage causes of action.” W. VA. TR. CT. R. 26.04(a).</p>
Wisconsin	<p>“When actions which might have been brought as a single action under s. 803.04 are pending before different courts, any such action may be transferred upon motion of any party or of the court to another court where the related action is pending.” WIS. STAT. § 805.05(1)(b) (2020); <i>see also id.</i> § 803.04(1) (“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.”).</p>

APPENDIX B: CALIFORNIA COORDINATED PROCEEDINGS DATA

As described in the main text, we collected and analyzed data on petitions for civil case coordination disposed of between January 1, 2014 and May 22, 2019. We report here our findings on the selection of judges and courts.



**Coordination Motion Judges**

During the five-and-a-half-year period covered by our dataset, 49 different motions judges granted 163 motions to coordinate.<sup>378</sup> Table B1 lists the coordination motion judges who granted 2 or more motions:

TABLE B1: COORDINATION MOTIONS GRANTED BY JUDGES

<b>Coordination Motion Judge</b>	<b>Motions Granted</b>	<b>Coordination Motion Judge</b>	<b>Motions Granted</b>
Emilie H. Elias	38	Marie S. Weiner	4
Carolyn B. Kuhl	14	William D. Claster	3
Ann I. Jones	10	Kevin R. Culhane	3
Curtis E.A. Karnow	9	Kenneth R. Freeman	3
David S. Cohn	6	George C. Hernandez	3
Thierry P. Colaw	5	Craig G. Riemer	3
Gail A. Andler	4	Glenda Sanders	3
Peter R. Kirwan	4	Mary E. Wiss	3
Eddie C. Sturgeon	4		

Of the coordination motion decisions, 91 (56%) were made by female judges and 72 (44%) by male judges. In 80 cases (49%), the chief justice authorized another judicial officer to select the motion judge. In 37 cases (23%), the chief justice selected a presumptive coordination motion judge, unless otherwise directed by the court's presiding judge.<sup>379</sup> In the remaining 46 cases (28%), it appears that the chief justice assigned the motion judge directly.<sup>380</sup>

<sup>378</sup> One could study coordination motion judges who denied motions. Data for granted motions were more easily collated, so we rely on this subset for our study here.

<sup>379</sup> Data on file with authors. It is our understanding that this practice of judicial deference has developed in conjunction with Los Angeles's Complex Litigation Program. See Kuhl Interview, *supra* note 162. The lead judge in Complex Litigation Program presumptively was the coordination motion judge for Los Angeles cases. See Kuhl Interview, *supra* note 162; see also *Complex Litigation Program (Spring Street Courthouse)*, SUPER. CT. OF CAL., CNTY. OF L.A., <http://www.lacourt.org/division/civil/CI0042.aspx> [https://perma.cc/ERR5-HHEB] (last visited Nov. 18, 2020) (describing the responsibilities of the Complex Litigation Program judges).

<sup>380</sup> Data on file with authors. Of the motion judges selected by the chief justice, more than 80% were female (67 of 83). Three-quarters of those appointments (62 of 83) went to three judges: Elias (38), Kuhl

***Transferee Counties***

Coordinated cases during our period were assigned to seventeen different counties. About 80% of cases were assigned to courts with specialized complex litigation programs to handle complex civil cases.<sup>381</sup> We also inquired into the relationship between the county selected to hear the coordination motion and the county selected to hear the consolidated action. One judge reported the impression that the chief justice selected coordination motion judges with an eye toward the coordination trial court.<sup>382</sup> And, indeed, in more than 80% of cases (133 of 163), the county selected for trial was also the county selected for the coordination motion. In 30 cases (18%), the motion was handled in a different county than the trial court.<sup>383</sup> Table B2 lists the counties that handled one or more coordinated proceedings:

TABLE B2: PROCEEDINGS COORDINATED IN TRANSFEREE COUNTIES

<b>Transferee County</b>	<b>Coordinated Proceedings</b>	<b>Transferee County</b>	<b>Coordinated Proceedings</b>
Los Angeles	63	San Mateo	4
Orange	22	Monterey	3
San Francisco	19	Fresno	2
Alameda	10	Contra Costa	1
Santa Clara	9	San Joaquin	1
Sacramento	8	Santa Barbara	1
San Diego	8	Solano	1
Riverside	6	Yolo	1
San Bernardino	4		

---

(14), and Jones (10). Recall that the other appointments were made by presiding judges in the usual manner in which cases were assigned.

<sup>381</sup> Data on file with authors. *See generally* Wood et al., *supra* note 149 (providing an overview of California's complex court program).

<sup>382</sup> *See* Kuhl Interview, *supra* note 162.

<sup>383</sup> Data on file with authors.

### ***Trial Judges***

During our period, 154 coordinated cases were assigned to 55 different California judges.<sup>384</sup> We also asked three questions about these judges (in addition to partisanship, which is addressed in the main text). First, we looked at whether the chief justice selected the trial judge directly or delegated the task to the presiding judge to assign in the usual manner. Assignment to the presiding judge was by far the dominant mode; in fewer than 15% of cases was the trial judge selected directly.<sup>385</sup> Second, we looked at the relationship between motion and trial judges. Of the 154 trial judge appointments, 62 (40%) were made to the judge who also served as the coordination motion judge. Third, we looked at gender. Of the trial judge assignments, 55 (36%) were to female judges and 99 (64%) were to male judges.<sup>386</sup> These results are almost perfectly on par with the overall pool of California trial judges, which, according to a 2018 report, was 36.1% female.<sup>387</sup> Table B3 lists the judges who handled more than 2 coordinated proceedings:

---

<sup>384</sup> Data on file with authors. In the other nine cases where a coordination motion was granted, the trial judge had not yet been selected or the information was otherwise unavailable.

<sup>385</sup> We have data on this question for all 163 cases. In 139 cases, the presiding judge selected the trial judge. In the remaining 24 cases, it appears that the chief justice selected the trial judge.

<sup>386</sup> Data on file with authors. Among the cases assigned directly by the chief justice, though, female coordination trial judges were assigned in 58% of cases (14 of 24).

<sup>387</sup> DEMOGRAPHIC DATA, *supra* note 178. Race and ethnicity are more difficult to assess without access to judicial records. Using publicly available sources, we were able to identify only eight appointments to nonwhite judges, or about 5%. This is much lower than the percentage of nonwhite California trial judges (31.6%). *See id.*

NORTHWESTERN UNIVERSITY LAW REVIEW

TABLE B3: PROCEEDINGS COORDINATED BEFORE TRIAL JUDGES

Trial Judge	Coordinated Proceedings	Trial Judge	Coordinated Proceedings
Curtis E.A. Karnow	11	Mary E. Wiss	5
Elihu M. Berle	10	William D. Claster	4
Carolyn B. Kuhl	9	David S. Cohn	4
William F. Highberger	8	Kim G. Dunning	4
Jane L. Johnson	7	George C. Hernandez	4
Kenneth R. Freeman	6	Eddie C. Sturgeon	4
Amy D. Hogue	6	Gail A. Andler	3
John Shepard Wiley, Jr.	6	Ann I. Jones	3
Thierry P. Colaw	5	Maren E. Nelson	3
Peter H. Kirwan	5		

APPENDIX C: TEXAS MDL DATA

As described in the main text, we collected and analyzed data on all Texas MDL proceedings. Our period spanned from the inception of the Texas MDL system in September 2003 to October 2019. We report here our findings on the selection of judges and courts. In addition, we reported in the text our findings on partisanship and retransfer. The Tables and descriptions in this Appendix are adapted from our article *Texas MDL*.<sup>388</sup>

***Transferee Counties***

Unsurprisingly, the Texas MDL panel has tended to create MDLs in major population centers, like Harris, Dallas, and Tarrant Counties. But the panel has also transferred MDLs to small counties like Orange County and San Patricio County, each with fewer than 90,000 residents. Table C1 lists the counties that were assigned 1 or more MDLs:

---

<sup>388</sup> Rave & Clopton, *Texas MDL*, *supra* note 10, at 380–89.

TABLE C1: MDLS IN TRANSFEREE COUNTIES

<b>Transferee County</b>	<b>MDLs</b>	<b>Transferee County</b>	<b>MDLs</b>
Harris	23	Jefferson	2
Dallas	7	Webb	2
Hidalgo	7	Fort Bend	1
Tarrant	7	Montgomery	1
Travis	5	Orange	1
Bexar	3	Potter & Randall (jointly)	1
Galveston	2	San Patricio	1

***Pretrial Judges***

The Texas MDL panel has assigned 61 MDLs to 38 different pretrial judges. The panel also retransferred MDLs to 5 additional judges. Table C2 shows judges who were assigned 2 or more MDLs (including retransfers):

TABLE C2: JUDGES ASSIGNED TWO OR MORE MDLS

<b>Pretrial Judge</b>	<b>MDLs</b>	<b>Pretrial Judge</b>	<b>MDLs</b>
Mike Miller	8	Dana Womack	3
Rose Guerra Reyna	5	Tracy Christopher	2
David Evans	4	Lonnie Cox	2
Sylvia Matthews	4	Mark Davidson	2
Daryl Moore	3	Jim Jordan	2
Robert Schaffer	3	Emily Tobolowsky	2
John Specia	3	Jeff Walker	2
Randy Wilson	3	R.H. Wallace	2

These numbers may overstate the degree to which the Texas MDL Panel favors repeat players. Seven of Judge Mike Miller's 8 MDLs were related insurance claims stemming from Hurricanes Ike and Dolly. Four of Judge Rose Guerra Reyna's 5 MDLs arose out of severe hailstorms in South Texas. Two of Judge David Evans's and Judge Sylvia Matthews's 4 MDLs

apiece were related wind and hailstorm claims against State Farm, and another 1 of Judge Sylvia Matthews's MDLs involved claims against a different insurer for the same wind and hailstorm events.

Texas law allows former or retired judges to continue to serve in a judicial capacity under some circumstances.<sup>389</sup> And Rule 13.6 of the Texas Rules of Judicial Administration allows the MDL panel to appoint a senior, former, or retired judge as an MDL pretrial judge, if that judge has been approved by the chief justice of the Texas supreme court.<sup>390</sup> The panel has initially transferred MDLs to senior, former, or retired judges on at least eight occasions. It has also retransferred MDLs to such judges an additional seven times (sometimes, but not always, back to the same pretrial judge who was handling the MDL before ceasing active judicial service).

We also considered the gender balance of transferee appointments.<sup>391</sup> Roughly 28% of the pretrial judges the Texas MDL panel selected were female and 72% were male. This represents a slightly smaller proportion of female MDL judges than the current proportion of Texas district judges who are women (37% as of September 2019).<sup>392</sup>

Finally, we observed that on three occasions, the Texas MDL Panel has appointed multiple pretrial judges to hear related claims in a single MDL. First, in *In re Farmers Insurance Company Wind/Hail Storm Litigation (Farmers I)*, the Panel transferred related cases against a single insurer stemming from eight major storms over a two-year period to three pretrial judges in three different districts around the state (Webb County, Tarrant County, and Harris County).<sup>393</sup> The three pretrial judges were tasked with deciding all common issues together as a panel and all case-specific pretrial questions as individual pretrial courts.<sup>394</sup> The Texas MDL panel subsequently

<sup>389</sup> See TEX. GOV'T CODE ANN. § 74.003(b) (West 2019).

<sup>390</sup> TEX. R. JUD. ADMIN. 13.6(a).

<sup>391</sup> We were able to identify gender based on publicly available sources. Race and ethnicity are more difficult to assess without access to judicial records. Using publicly available sources, we were able to identify only 10 appointments to nonwhite judges, or about 15%. This is roughly equal to the percentage of nonwhite judges assigned federal MDLs in the prior study, see Clopton & Bradt, *supra* note 3, at 1737, and much lower than the percentage of nonwhite Texas district judges (29%), see *Profile of Appellate and Trial Judges*, TEX. JUD. BRANCH (Sept. 1, 2019), <https://www.txcourts.gov/media/1444865/judge-profile-sept-2019.pdf> [<https://perma.cc/GYZ3-KJDW>].

<sup>392</sup> See *id.*

<sup>393</sup> See *In re Farmers Ins. Co. Wind/Hail Storm Litig.*, 481 S.W.3d 422, 424, 425 n.4 (Tex. J.P.M.L. 2015); Order of Multidistrict Litig. Panel, *In re Farmers Ins. Co. Wind/Hail Storm Litig.*, Admin. Order No. 14-0882 (Tex. Apr. 7, 2015), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=062b7dcb-44b3-4408-848c-59a953fc99f8&coa=cossup&DT=DISPOSITION&MediaID=2d4080ad-d78a-43a3-b2f9-b9b0f424a3b8> [<https://perma.cc/G9XQ-P4LX>].

<sup>394</sup> *Id.*

created a second *Farmers* MDL, *Farmers II*, for claims arising from storms in the two-year period after *Farmers I* and transferred the cases to the same three pretrial judges.<sup>395</sup> In the third case, the panel transferred related oil and gas royalty litigation to two different pretrial judges in the same county.<sup>396</sup>

---

<sup>395</sup> *In re Farmers Ins. Co. Wind/Hail Storm Litig.* 2, 506 S.W.3d 803, 804, 807 (Tex. J.P.M.L. 2016).

<sup>396</sup> Order of Multidistrict Litig. Panel, *In re Chesapeake Barnett Royalty Litig.*, Admin. Order No. 15-0113 (Tex. Feb. 14, 2019), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=7d358a5c-d139-4f4d-9573-d7c7198e7f9c&coa=cossup&DT=OTHER&MediaID=276a7687-73a1-4595-894a-c1b664dc9eef> [https://perma.cc/93L2-Y62X].

