

# ARTICLES

## A HUB-AND-SPOKE MODEL OF MULTIDISTRICT LITIGATION

D. THEODORE RAVE\* & FRANCIS E. MCGOVERN\*\*

### I INTRODUCTION

Decades ago, Francis McGovern developed the idea of “maturity” in mass torts.<sup>1</sup> Mass controversies need time to develop—time for the parties to learn the contours of the litigation; the answers to contested legal, scientific, or evidentiary questions; and the strengths and weaknesses of the various claims—before any lasting comprehensive resolution can be reached.<sup>2</sup> In other words, mass tort litigation matures with age. But litigation is not like a twelve-year old Connemara single malt or a 1949 Cos d’Estournel.<sup>3</sup> We don’t have to sit around and wait for nature to run its course. Procedure can help speed the process by which mass torts mature. Multidistrict litigation (MDL) is one of those procedures.<sup>4</sup>

Consolidating mass tort cases in front of a single MDL judge for pretrial proceedings can contribute to maturation.<sup>5</sup> The MDL judge can oversee common discovery, avoid wasteful duplication of effort or counterproductive races to judgment, and create conditions for the development and exchange of information that can help the parties value their cases.<sup>6</sup> The judge can conduct bellwether trials to establish data points based on real jury outcomes that help

---

Copyright © 2021 by D. Theodore Rave.

This Article is also available online at <http://lcp.law.duke.edu/>.

\* Professor of Law, University of Texas School of Law. Thanks to Lynn Baker, Andrew Bradt, Zach Clopton, Maggie Gardner, Tracey George, Maggie Lemos, and participants in the Duke Judicial Administration/Judicial Process Roundtable for helpful comments.

\*\* Professor of Law, Duke University School of Law. Francis passed away before this article was written, but the original idea was his, and he was deeply involved in constructing the central argument. I consider him to be a full coauthor, even though he could not see the project through to fruition. -DTR.

1. Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 659 (1989).
2. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843–45 (1995).
3. Francis had excellent taste. His coauthor has been known to drink Lone Star.
4. 28 U.S.C. § 1407.
5. Aggregation for pretrial proceedings is often appropriate at a much earlier stage of maturity than aggregation for settlement or trial. See ADVISORY COMM. ON CIVIL RULES, REPORT ON MASS TORT LITIGATION 21 (Feb. 15, 1999) (“In some cases, multidistrict consolidation for pretrial purposes may be appropriate even if the litigation has not matured to the point of supporting aggregation for settlement or trial by class action or other means.”).
6. See Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1290–91 (2017).

inform settlement negotiations. All of this can accelerate the point at which the parties know enough about the litigation to be able to craft some resolution that will stick. And having all (or nearly all) of the players together in a single forum can set the stage for a global resolution, which may benefit all involved.<sup>7</sup>

Indeed, MDL consolidation has been an enormously successful strategy for efficiently managing and resolving many mass tort cases. This has been particularly true for cases involving single-event mass disasters or defective products sold by a single defendant, even when thousands of plaintiffs are involved. Large controversies, such as the BP oil spill, the NFL concussion litigation, the Volkswagen “clean” diesel scandal, the Vioxx litigation, and numerous product liability, pharmaceutical, and medical device cases have been successfully resolved through comprehensive settlements negotiated while the cases were pending in MDLs.<sup>8</sup>

But in “mega mass torts”—those involving multiple defendants and multiple products and activities over extended periods of time (for example, asbestos, silicone gel breast implants, opioids)—comprehensive resolution has proven elusive.<sup>9</sup> The single MDL judge handling these mega mass tort cases can become a bottleneck. There are only so many motions one judge can decide, so many discovery disputes one judge can resolve, and so many bellwether trials one judge can conduct. Delays can stretch out as other cases languish in the queue. In the asbestos litigation, for example, aggregating the cases into an MDL for pretrial discovery, conducting individual trials, and seeking global settlement resulted in a twenty-year hiatus from which no comprehensive resolution emerged.<sup>10</sup>

Here, we propose a “hub-and-spoke” model of MDL case management for these sorts of mega mass torts that takes advantage of the nationwide scope of the federal judiciary to relieve pressure at the bottleneck. The idea is to initially consolidate all related cases in a single MDL (the hub) for common discovery and pretrial management, during which the MDL judge will identify sensible groupings of parties and claims for strategic disaggregation as test cases. Those test cases will then be remanded to other federal judges (the spokes) to allow the

---

7. See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183 (2013) (examining conditions under which global resolution can create a peace premium); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760–63 (1997).

8. The structure of these settlements varies. Sometimes the parties use the class action device to try to fold as many potential claimants as possible into the deal. Other times they craft non-class global settlement programs that are offered to all plaintiffs on the same terms. Most commonly the defendant will enter into a series of confidential inventory settlements with various plaintiffs’ lawyers. But the goal is generally the same—to wrap up the litigation comprehensively. See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944–46 (2017) (distinguishing global and inventory settlements).

9. See, e.g., McGovern, *Mass Torts for Judges*, *supra* note 2, at 1836–38 (discussing characteristics of “mega mass torts”).

10. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013) (surveying the twenty-plus year history of the asbestos litigation).

litigation to move forward through further pretrial development, bellwether trials, and potential piecemeal settlements. The test cases can then proceed in parallel with the cases still in the hub MDL to speed the process of maturation, much in the same way that a computer can handle complex tasks faster through parallel processing than through serial processing.<sup>11</sup> The hub MDL judge may also retain jurisdiction over a common issue or party, such as punitive damages or, in the opioid litigation, a “negotiation class,”<sup>12</sup> to provide a ready forum for a potential global resolution should the information generated in the spokes make one possible.

The theory behind the hub-and-spoke model is that this type of mega mass tort MDL is too varied for either a simultaneous trial or a single, simultaneous global settlement. At the same time, without aggregation in an MDL, the unconsolidated mass tort would result in massive duplication of discovery and other litigation costs, the potential for inconsistent judgments, and reduced chances for comprehensive settlements. Without giving up the benefits of aggregation, the hub-and-spoke model seeks to transform a single unmanageable litigation into multiple manageable litigations, but to do so strategically, in much the same way that a trial judge might sever parties or issues in a single case into more digestible components.

One key to the model is to put the MDL transferee judge—not the Judicial Panel on Multidistrict Litigation (JPML)—in charge of quarterbacking the strategic disaggregation. The multidistrict litigation statute assigns the formal power to transfer and remand cases into and out of an MDL to the seven federal judges appointed by the Chief Justice to the JPML.<sup>13</sup> But, having overseen the initial common discovery, decided motions, potentially tried some bellwether cases, and gotten a handle on the contours of the litigation, the MDL judge is best positioned to identify rational groupings of cases to recommend to the JPML for remand. The MDL judge will have a better sense of which bellwether cases will generate the most useful information and be the most likely to drive the litigation towards resolution. The JPML should thus play a secondary, supervisory role and not attempt to slice and dice the litigation on its own.<sup>14</sup>

This process of systematic aggregation followed by strategic disaggregation can speed the maturation of mega mass torts. The hub-and-spoke model offers advantages over both total aggregation and no aggregation, and it can increase

---

11. See Suggestion of Remand at 3 & n.3, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Nov. 19, 2019) (“‘Parallel processing’ is a mode of operation in which a process is split into parts, which are executed simultaneously by different processors. In contrast, ‘serial processing’ employs a single processor, which executes the entire process in a linear sequence. Parallel processing is usually far more efficient. Applied here, parallel processing of the Opiate MDL calls for more than one trial judge working at the same time on different parts of the case.”).

12. See Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73 (2020).

13. 28 U.S.C. § 1407.

14. This is consistent with the JPML’s usual practice of remanding cases only at the suggestion of the MDL transferee judge. See J.P.M.L. R. P. 10.1(b); 10.3(a).

the chances for finality in mega mass tort cases through a variety of settlement structures.

We begin in Part II by describing the bottleneck that can develop in mega mass torts and discuss the different approaches taken by the judges handling the asbestos and silicone gel breast implant MDLs. In Part III, we describe the hub-and-spoke model of MDL case management and some of the advantages it holds over other approaches to mega mass tort litigation. Finally, in Part IV we examine the hub-and-spoke model in action in the *National Prescription Opiates* MDL. Francis served as a special master in the opioids litigation, and at his suggestion, Judge Dan Aaron Polster has expressly adopted and begun to implement a hub-and-spoke approach.

## II

### BOTTLENECKS IN MEGA-MASS TORTS

Complex litigation scholars vigorously debate whether an MDL more closely resembles a black hole or a roach motel because very few cases are ever actually remanded out of an MDL.<sup>15</sup> But it is not a problem that cases check in to an MDL and never check out if they are being satisfactorily resolved in the MDL. And for certain types of mass torts where the universe of cases is relatively well defined, MDL aggregation has been largely successful at resolving cases. Sometimes large swaths of cases can be resolved through dispositive motions on common issues.<sup>16</sup> Other times, simply gathering all of the important players in a single courtroom can lay the groundwork for a global settlement or a comprehensive series of inventory settlements, which can leave all parties better off.<sup>17</sup> To be sure, there are important questions about whether particular settlements are fair to all plaintiffs and whether agency costs siphon off too much of the surplus.<sup>18</sup> But the model largely works for cases involving a small number of defendants, a single defective product, or a single-event mass disaster—even when the number of plaintiffs may be very large.

The gravitational force of an MDL becomes much more problematic when many cases in the MDL are left in a perpetual state of suspended animation. And in mega mass torts—those involving multiple defendants and multiple products or incidents over an extended period of time—the MDL judge can sometimes become a bottleneck.<sup>19</sup> This is no knock on MDL judges. There are only so many

---

15. Fewer than 3% as of 2013, according to one study. Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 400–01 (2014).

16. See, e.g., Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, 221 (2017).

17. See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 224 (2007).

18. See generally ELIZABETH CHAMBLEE BURCH, *MASS TORT DEALS* (2019); see also Bradt & Rave, *Information-Forcing*, *supra* note 6; Linda Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129 (2018).

19. For an exploration of bottlenecks in a very different context, see JOSEPH FISHKIN, *BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY* (2014).

motions, discovery disputes, and bellwether trials one human being can decide, even with the help of capable magistrate judges, law clerks, and special masters.

Even if we had superhuman MDL judges, however, legal constraints on the MDL judge's authority contribute to the bottleneck. MDL consolidation is for pretrial proceedings only.<sup>20</sup> As the Supreme Court made clear in *Lexecon v. Milberg Weiss*,<sup>21</sup> the MDL judge does not have the power to try transferred cases.<sup>22</sup> The *Lexecon* rule thus limits the pool of cases from which the MDL judge can draw in choosing bellwether trials. The MDL judge can only preside over trials of cases filed directly in the MDL court. But those cases might not be the ones where trial will yield the most useful information. They might not be a representative sample of the whole.<sup>23</sup> And, particularly in a mega mass tort with multiple defendants and products at issue, they might not include the full range of parties or types of claims. Without the parties' consent to a *Lexecon* waiver or the creative use of inter-district assignments (like when Judge Eldon Fallon sat by designation in the Southern District of Texas to try remanded *Vioxx* cases<sup>24</sup>), the MDL judge may not be able to use bellwether trials to generate all of the information the parties need to reach a broader settlement. *Lexecon*, in short, can limit the MDL's ability to help the tort mature.

In mega mass torts, there may be too many moving pieces for an MDL judge to manage all alone. And in cases with such a variety of defendants, activities, and theories of liability, simply gathering all of the major players in one place may not be enough to yield a lasting comprehensive resolution. Many plaintiffs and defendants may languish in the queue while the judge and lead lawyers work on other pieces of the litigation or strive for an ephemeral global settlement. The asbestos litigation is a poster child for these types of cases and shows what can happen when the MDL judge becomes a bottleneck. The bottleneck is not inevitable, however. In the silicone gel breast implants litigation, the MDL judge adopted an approach to mega mass tort litigation that presaged the hub-and-spoke model we describe here.

#### A. Asbestos as a Warning

The asbestos litigation is the ur-mega mass tort. Recognizing the variety and complexity of the litigation involving numerous manufacturers and products and countless permutations of exposure and injury over an extended period of time,

---

20. 28 U.S.C. § 1407(a).

21. *Lexecon v. Milberg Weiss*, 523 U.S. 26 (1998).

22. *Id.*

23. On the challenges of choosing the right cases for bellwether trials, see, e.g., Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 606–10 (2008).

24. See Alex Berenson, *A Mistrial is Declared in 3rd Suit over Vioxx*, N.Y. TIMES (Dec. 13, 2005), <https://www.nytimes.com/2005/12/13/business/a-mistrial-is-declared-in-3rd-suit-over-vioxx.html> [<https://perma.cc/VHK8-P3XQ>].

the JPML several times declined to create an asbestos MDL.<sup>25</sup> But the litigation metastasized, and despite several district judges' experimentation with creative forms of case management during the 1980s, it was clogging the federal court system. By the beginning of the 1990s, the litigation had largely matured. The contours of the dispute were well understood and claim values had become predictable, but the sheer volume of cases was overwhelming.<sup>26</sup> In 1991, at the behest of eight federal judges handling asbestos litigation, the JPML transferred all asbestos cases pending in federal courts to Judge Charles R. Weiner in the Eastern District of Pennsylvania.<sup>27</sup>

The eight asbestos litigation judges who wrote to the JPML envisioned something along the lines of a hub-and-spoke model.<sup>28</sup> Their assumption was that there were too many asbestos litigation defendants with too many different products and activities to be managed effectively by one judge. But, at the same time, they viewed a concerted and national approach to the litigation as essential.<sup>29</sup> These judges recommended that the JPML transfer all of the cases into a single MDL under the auspices of a "presiding judge," and that the Panel also designate multiple additional judges (preferably themselves) as MDL

---

25. Asbestos and Asbestos Insulation Materials Prods. Liab. Litig., 431 F. Supp. 906, 910 (J.P.M.L. 1977) (declining to create asbestos MDL); *see also In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991) (noting additional refusals to transfer asbestos cases in 1980, 1985, 1986, and 1987).

26. *See* Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 266 (2005) ("[A]chieving a comprehensive settlement of asbestos litigation appeared to be a daunting task, for asbestos litigation, unlike any other mass tort, involved scores of defendants.").

27. *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415 (J.P.M.L. 1991).

28. The judges explained:

We are persuaded that the problem is so large and the effort to solve it so onerous that the asbestos crisis should not be visited on one judge. It is clear, moreover, that any attempt at complete fair resolution requires a concerted and national approach. We therefore request that the Panel on Multidistrict Litigation on its own initiative revisit the question of transferring all asbestos personal injury cases to a single district judge for coordinated or consolidated pretrial proceedings under 28 United States Code section 1407 and assign those cases to a group of judges with a presiding judge, with further provision being made to add additional judges in the future.

Letter from Hons. Walter J. Gex, III, Thomas D. Lambros, Alan H. Nevas, Richard A. Schell, Charles Schwartz, Jr., Charles R. Weiner, Charles R. Wolle & Rya Zobel to Judicial Panel on Multidistrict Litigation (Nov. 21, 1990) (on file with author) [hereinafter *Asbestos Judges' Letter*]. They also noted that negotiations for a potential nationwide settlement were taking place "under the supervision of Special Master Francis McGovern." *Id.*; *see also* Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. REV. 1851, 1861-63 (1997) (recounting background of letter).

29. *See Asbestos Judges' Letter*, *supra* note 28; *cf. In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 423 (J.P.M.L. 1991) ("Many parties have suggested that the dynamics of this litigation make it impractical, if not impossible, for one single judge to discharge the responsibilities of transferee judge . . . . Varying suggestions have been made that the Panel appoint additional transferee judges to handle specific issues . . . to deal with separate types of claims or defendants . . . or to divide the litigation along regional or circuit lines. Each of these suggestions has merit, as long as one judge has the opportunity to maintain overall control.").

transferee judges to work with the presiding MDL judge.<sup>30</sup> Their thinking was that transfer into the MDL would stay the bulk of the litigation while the presiding MDL judge assimilated common discovery and figured out which defendants were solvent. Then the presiding MDL judge could strategically farm work out to the additional transferee judges, who could each work on separate “common issues or claims.”<sup>31</sup> Or the presiding MDL judge could remand representative cases against individual defendants for case-specific discovery and bellwether trials.<sup>32</sup> In this manner, the traditional legal process could operate on disaggregated units without all the noise of mass litigation. And the results of these representative cases would inform the negotiations among the parties and potentially lay the groundwork for a comprehensive resolution. The JPML was amenable to such an approach; it just wanted to hear Judge Weiner’s assessment of the situation first.<sup>33</sup>

Judge Weiner, however, decided to keep all of the cases centralized in the MDL in an attempt to orchestrate a global settlement.<sup>34</sup> But it was not to be. In 1994, Judge Weiner certified a settlement class action for claims against twenty or so defendants.<sup>35</sup> And contemporaneously a separate class action settlement was reached with another manufacturer.<sup>36</sup> But the Supreme Court nixed both

---

30. Asbestos Judges’ Letter, *supra* note 28 (“[I]t may be helpful for each of the undersigned judges to be designated as transferee judges sitting in each of the 94 districts for this litigation.”).

31. The judges elaborated on the thinking behind this model:

In our judgment, transfer of these cases will assist the courts in addressing the following goals:

1. It will permit a coordinated effort to determine which defendants, if any, have limited funds.
2. It will facilitate global settlements.
3. It will provide a mechanism for uniform case management.
4. It will permit us to fully explore other national disposition techniques such as classes and subclasses under Rule 23.
5. It will permit the workload to be spread among judges so that individual judges may separately direct their efforts to consolidated common issues or claims.
6. It will avoid the potential for inconsistent decisions from courts of appeals.
7. It will avoid inconsistent pretrial rulings.

*Id.*

32. *Cf. In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 422 (J.P.M.L. 1991) (“It may well be that on further refinement of the issues and close scrutiny by the transferee court, some claims or actions can be remanded in advance of the other actions in the transferee district.”). The JPML also contemplated enlisting additional spoke judges who could travel with the remanded cases to relieve docket congestion in overburdened districts. *See id.* (“We add that . . . § 1407 transfer may serve as a mechanism enabling the transferee court to develop a nationwide roster of senior district and other judges available to follow actions remanded back to heavily impacted districts, for trials in advance of when such districts’ overburdened judges may have otherwise been able to schedule them.”).

33. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415, 423-24 (J.P.M.L. 1991) (“We emphasize our intention to do everything within our power to provide such assistance in this docket. Before making any specific appointments, however, we deem it advisable to allow the transferee judge to make his own assessment of the needs of this docket and communicate his preferences to us.”).

34. Robreno, *supra* note 10, at 112 (“Immediately after MDL-875 was transferred, Judge Weiner undertook an effort to achieve such a global resolution.”).

35. *Georgine v. Amchem Prod., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994).

36. *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995).

deals in *Amchem Products v. Windsor*<sup>37</sup> and *Ortiz v. Fibreboard*.<sup>38</sup> During the time the class action settlements were working their way up on appeal, the federal cases in the MDL largely remained at a standstill.<sup>39</sup> As a result, the primary action shifted to state courts, which continued to set cases for trial, and thousands of claims were resolved through piecemeal inventory settlements, often negotiated between consortiums of defendants and specialized plaintiffs' firms.<sup>40</sup> Eventually, most of the major asbestos manufacturers sought protection in bankruptcy, relegating many plaintiffs to recovery through asbestos trusts.<sup>41</sup>

The federal MDL, in other words, had become a bottleneck. It wasn't until a new MDL judge, Eduardo Robreno, took over in 2008 that the federal cases began moving again. As Judge Robreno explained:

After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective. Aggregation stopped progress on individual cases while the parties and the court worked on global solutions. Once the global solutions proved unfeasible, the parties did not return to the task of processing the cases individually. Ultimately, neither the court nor the parties were ready, willing, or able to move cases to trial and settlement. This stage of litigation led some litigants to refer to MDL-875 as a 'black hole,' where cases disappeared forever from the active dockets of the court.<sup>42</sup>

Judge Robreno gave up on any attempt at global resolution and began a process of systematic disaggregation and remand. He severed punitive damages claims across the board for retention in the MDL.<sup>43</sup> And he further severed cases down to the lowest common denominator until each case consisted of one plaintiff with one claim.<sup>44</sup> He then placed the deconstructed cases on an accelerated schedule towards trial—either in front of himself, if the parties waived *Lexecon*, or in front of a cadre of senior judges who agreed to expeditiously try asbestos cases on remand.<sup>45</sup> Judge Robreno remanded more than 750 cases, and by 2013 had largely resolved the vast majority of the more than 185,000 cases then remaining in the asbestos MDL.<sup>46</sup>

---

37. 521 U.S. 591 (1997).

38. 527 U.S. 815 (1999).

39. Hensler, *supra* note 26, at 269 ("The long effort to achieve a class action settlement in the multidistrict litigation stayed litigation against CCR in the federal courts. Federal cases against other defendants also remained at a stand-still as Judge Weiner declined motions to remand cases for trial to the district courts in which they had been filed.").

40. *Id.* at 269–70; *see also id.* at 263–64 (describing practices of top plaintiffs' firms and defendants' formation of the Center for Claims Resolution (CCR)); Paul D. Carrington, *Asbestos Litigation: The Unattended Consequences of Asbestos Litigation*, 26 REV. LITIG. 583, 593–95 (2007).

41. Hensler, *supra* note 26, at 271–75.

42. Robreno, *supra* note 34, at 126.

43. *Id.* at 145–46.

44. *Id.* at 127.

45. *Id.* at 146–47.

46. *Id.* at 156, 180.



## B. Breast Implants

In the silicone gel breast implants MDL, Judge Sam Pointer took a different approach to handling a mega mass tort. Like the asbestos cases, the silicone gel breast implants litigation involved several manufacturers and dozens of products marketed over an extended period of time.<sup>47</sup> The defendants had different involvement with the development of silicone gel breast implants and had different financial situations. The JPML transferred all of the federal breast implant cases to Judge Pointer in the Northern District of Alabama in 1992.<sup>48</sup> And, as in the asbestos litigation, Judge Pointer initially sought to orchestrate a global settlement. In 1994, he conditionally certified a \$4.25 billion class action settlement with four of the major defendants. But the deal collapsed after far more plaintiffs than anticipated registered claims in the settlement, and one of the defendants sought protection in bankruptcy.<sup>49</sup> Recognizing that he could not resolve the entire controversy in a global settlement, Judge Pointer began the process of disaggregating the litigation.<sup>50</sup>

In July 1995, Judge Pointer started to remand groups of cases back to their transferor courts. In one group of cases remanded to the District of Oregon, Judge Robert Jones appointed a panel of advisors to assist him in evaluating the parties' scientific evidence.<sup>51</sup> Acting on the advice of the science panel, Judge Jones excluded the plaintiffs' causation evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>52</sup> and entered summary judgment on more than 70 cases.<sup>53</sup> Learning from this process, Judge Pointer later appointed a national science panel whose findings informed many other cases that had been remanded.<sup>54</sup>

Judge Pointer also worked closely with state court judges handling parallel breast implant litigation to farm some work out to the state courts. As Judge Pointer described it:

In the breast implant litigation, for example, we have found opportunities for state judges to accept primary responsibility for particular portions of the common discovery program—such as development of standard interrogatories—or to take the lead in resolving difficult issues of state law that federal courts will face in diversity cases. While these efforts have not been totally successful, we are learning how judges from different

---

47. See generally MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996).

48. *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992).

49. See David E. Bernstein, *The Breast Implant Fiasco*, 87 CALIF. L. REV. 457, 480 (1999) (“One reason the parties were unable to agree to a new settlement is that thousands of women, often those with the best cases to present to a jury, and including all of O’Quinn’s clients, chose to forego settlement and sue individually. Dow Corning declared bankruptcy, throwing the settlement talks into limbo.”)

50. See Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 MICH. L. REV. 2077, 2088 (1997) (“Judge Pointer has practiced judicial devolution, or subsidiarity, in sending cases back to other courts for orderly trials and disposition.”).

51. *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1392–93 (D. Or. 1996).

52. 509 U.S. 579 (1993).

53. *Hall*, 947 F. Supp. at 1414–15.

54. See *id.* at 1394 & n.18.

courts can work together as a team, complementing each other and sharing the burdens such litigation imposes on the judiciary.<sup>55</sup>

Ultimately, the disaggregated breast implants MDL resulted in class action settlements for two defendants, inventory settlements for three defendants, bankruptcy for one defendant, and remands for several thousand individual cases. By strategically disaggregating the litigation once it became clear that global resolution was not possible, Judge Pointer avoided becoming a bottleneck.

### III

#### THE HUB-AND-SPOKE MODEL OF CASE MANAGEMENT

Our hub-and-spoke model for MDL case management in mega mass torts draws on the lessons of the asbestos and breast implants litigation. More so than simply aggregating cases, the hub-and-spoke model takes full advantage of the national scope of the federal court system to handle our largest controversies. Bringing more judges into the process can alleviate pressure at the bottleneck. But by keeping coordination in the hub, the benefits of aggregation are not lost.

#### A. How it Works

The hub-and-spoke model of MDL case management is one of systematic aggregation followed by strategic disaggregation. It proceeds in five basic steps:

1. Aggregate mass tort cases into a single MDL (the hub).
2. Commence common discovery and pretrial case management.
3. Identify similarities and differences among plaintiffs, defendants, causes of action, and remedies.
4. Strategically disaggregate the mass tort by remanding test cases or groups of cases to transferor courts (the spokes).
5. Maintain the hub MDL as a forum for potential global or partial settlements.

We consider these steps in turn.

#### 1. Aggregate Mass Torts Into a Single MDL (the Hub)

Once a mega mass tort is identified, the JPML should consolidate all of the cases pending in federal courts into a single MDL, which will become the hub. Later-filed cases should be transferred into the MDL as tagalong actions. State courts should be encouraged to consolidate related cases as well through any MDL-like procedures they have at the state-level.<sup>56</sup> And the federal MDL judge should attempt to coordinate with state judges handling related cases. All of this is standard practice for mass tort MDLs.<sup>57</sup> The scope of the consolidation can be broad, as the end game need not be a single global settlement. The primary goal

---

55. Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569, 1571 (1995).

56. Approximately half the states have some form of state MDL procedure. Zachary D. Clopton & D. Theodore Rave, *MDL in the States*, 115 NW. L. REV. 1649, 1658–59 (2021).

57. See generally MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004).

at this point is to corral the potentially unruly litigation and shift it into a more orderly process where conscious case management can help it mature without costly duplicative discovery or counterproductive races to judgment. Aggregation, at this point, can be maximalist.<sup>58</sup>

## 2. Commence Common Discovery and Pretrial Case Management

After aggregation, the MDL transferee judge should start managing the litigation to figure out what it is all about. The judge should commence common discovery and use all of the case management tools at his or her disposal to learn the contours of the litigation and to help the parties develop and exchange the kinds of information that drive cases toward resolution. Plaintiff and defendant fact sheets may be helpful.<sup>59</sup> Working with magistrate judges or special masters may be helpful. The judge may wish to have the parties work up and try one or more bellwether cases. Again, this is the bread and butter of what MDL judges do in big cases, though in a mega mass tort, the task may be daunting and the judge unable to devote full attention to every party or issue.<sup>60</sup> The important point is that active case management puts the hub MDL judge in a good position to figure out whether and how to disaggregate the litigation.

## 3. Identify Similarities and Differences Among Plaintiffs, Defendants, Causes of Action, and Remedies

In the course of pretrial management, the hub MDL judge should analyze the litigation as a whole to determine whether it is too large for one judge to handle alone. If so, the judge should identify similarities and differences among the cases to try to figure out how to strategically break up the litigation. There will be no one-size-fits all formula for how to do this. But the judge should try to identify logical groupings of plaintiffs, defendants, causes of action, theories of recovery, and the like, that could be broken off from the main litigation into manageable pieces. Working with the lawyers on both sides, the hub MDL judge will be in a good position to identify the major fault lines in the litigation and the sets of issues that need to be decided before any sort of resolution is possible. From there the judge can determine which groupings of cases and issues would make the most sense for further development as a unit and what sorts of bellwether trials would yield the best information. The hub MDL judge can further streamline the

---

58. See Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2249–50 (2008).

59. For recent guidance on fact sheets, see MARGARET S. WILLIAMS, JASON A. CANTONE & EMERY G. LEE III, PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES (FJC 2019); see also Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 1, 56–60 (2019) (“Plaintiff fact sheets, in the words of leading defense lawyer Sheila Birnbaum, offer ‘a relatively clear and objective snapshot of the merits underlying each claim,’ making them an efficient vehicle to obtain this valuable information.”).

60. The shift toward managerial judging began decades ago, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982), and modern MDL judges are some of its most enthusiastic practitioners.

cases in these groupings by severing parties or claims to craft test cases that will provide the most useful information for the parties in settlement negotiations.<sup>61</sup>

#### 4. Strategically Disaggregate the Mass Tort by Remanding Test Cases or Groups of Cases to Transferor Courts (the Spokes)

The hub MDL judge should recommend to the JPML that the test cases from the identified groupings be remanded back to their transferor districts for further development and bellwether trials. The JPML has tremendous flexibility in structuring the litigation that it transfers into and out of an MDL.<sup>62</sup> And it should take full advantage of its power to strategically separate and remand the claims identified by the hub MDL judge to various spokes.

By strategically remanding test cases, the JPML can unclog the bottleneck created when all the cases in a mega mass tort are run through a single MDL judge. The spoke judges can then proceed in parallel with each other and the hub judge to oversee case-specific discovery and motions and to try the test cases. The results of these cases can serve as bellwethers for the rest of the litigation, sending valuable signals to the parties about the strength, weaknesses, and valuations of different categories of cases. The hub-and-spoke model thus takes full advantage of the national scope of the federal judiciary to address nationwide mass tort litigation. And the sort of parallel processing that the hub-and-spoke model enables can speed up the time it takes for the mass tort to reach maturity.

The hub-and-spoke model puts the MDL transferee judge—not the JPML—in charge of figuring out how best to disaggregate the litigation. Of course, only the JPML has the power to remand cases back to their transferor courts.<sup>63</sup> But the MDL judge will typically be in a far better position than the JPML to figure out which cases should be remanded and when. The JPML already recognizes the MDL judge’s informational advantages, and it should continue to follow its general practice of not remanding cases without first receiving a “suggestion of

---

61. Federal Rule of Civil Procedure 21 gives district courts broad discretion to sever even properly joined claims or parties. *See* 7 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1689 (3d ed. 2019). District courts may also “order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.” FED. R. CIV. P. 42(b). Streamlining test cases by separating out claims under Rule 42(b) may, however, create complications if only some of the claims are remanded while others remain pending in the MDL, as there is some question whether resolution of either separated claim would yield a final appealable judgment. *See, e.g.,* Rollins v. Mortgage Electronic Registration Systems, Inc., 737 F.3d 1250 (9th Cir. 2013); DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 5:58 (2019). Formal severance under Rule 21 avoids any such ambiguity. *See In re* Brand Name Prescription Drugs Antitrust Litig., 264 F. Supp. 2d 1372, 1376 (J.P.M.L. 2003). The MDL judge may also be able to streamline test cases by persuading plaintiffs eager for a remand to dismiss peripheral claims or defendants voluntarily.

62. The MDL statute expressly gives the JPML the power to “separate any claim, cross-claim, counterclaim, or third-party claim and remand any of such claims before the remainder of the action is remanded.” 28 U.S.C. § 1407(a). This power has been interpreted broadly to give the JPML the power to carve up and shape multidistrict litigation claim-by-claim in whatever manner best serves the just and efficient conduct of the litigation. *See, e.g., In re* Collins, 233 F.3d 809, 811 (3d Cir. 2000) (upholding JPML’s decision in asbestos litigation to separate and keep in MDL claims for punitive damages while remanding claims for compensatory damages).

63. 28 U.S.C. § 1407(a).

remand” from the transferee judge.<sup>64</sup> But while the JPML should generally defer to the hub MDL judge’s considered choices, it should not be a rubber stamp. The hub-and-spoke model concentrates additional power in the hands of an already powerful figure whose pretrial rulings are subject to limited appellate oversight.<sup>65</sup> By playing a secondary, supervisory role, the JPML can provide an important backstop against the hub MDL judge going rogue.

In strategically disaggregating the litigation, the JPML should work with the hub judge and the chief judge of the transferor court to identify suitable judges to act as spokes. Because the idea is to generate useful information to facilitate settlement in the larger litigation, it is critical that the spoke judges be willing and able to move the cases forward expeditiously. We don’t want to recreate additional bottlenecks. This may strike some as an alarming departure from the ordinary practice of randomly assigning cases to judges.<sup>66</sup> But the entire MDL system departs radically from the random case assignment norm.<sup>67</sup> It is, however, another reason to have the JPML—the entity statutorily tasked with moving cases around the federal court system in a nonrandom manner—retain ultimate responsibility for which cases go where.

#### 5. Maintain the Hub MDL as a Forum for Potential Global or Partial Settlements

The hub MDL should be maintained as a potential forum for settlement. Mega mass torts, by definition, have so many moving parts that a truly global settlement may be unlikely. But should one become possible after the parties have internalized the information generated in the spokes, the hub MDL may prove useful to effectuate it. Ideally, in strategically disaggregating the litigation, the MDL judge would retain control over some vehicle to bring the parties back to the hub for settlement. The hub MDL might retain jurisdiction over a key issue common to all parties, such as punitive damages. This was the approach in the asbestos MDL. Or the hub might hang on to a key defendant, such as a major

---

64. See J.P.M.L. R. 10.1(b); *id.* 10.3(a) (“the Panel is reluctant to order a remand absent the suggestion of the transferee judge”); see also *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (“In considering the question of remand, the Panel has consistently given great weight to the transferee judge’s determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings.”). The JPML has seldom, if ever, remanded cases without the suggestion of the MDL judge. See Burch, *supra* note 15, at 418.

65. See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1706 (2017) (“The fact that pretrial orders are not routinely appealable under 28 U.S.C § 1291 is clearly an enormous factor, with a variety of implications.”).

66. Of course, not all case assignments in the federal courts are random, but randomness is the prevailing norm for most cases. See generally Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015).

67. See Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1333 (2020) (“[W]hen the Panel selects a judge to handle an MDL, it abandons the typical mode of judicial assignment, i.e., random assignment within a district.”). Indeed, nonrandom case assignment is a defining feature of institutional MDL systems in state courts as well. See Clopton & Rave, *supra* note 56 at 1705.

distributor or insurer involved in nearly all of the claims. Or the MDL judge might create a procedural vehicle, like the negotiation class in the opioid litigation, to bring parties back to the hub.<sup>68</sup> Any of these options might lay the groundwork for a global deal.

But achieving a truly global settlement in the hub is not essential to the hub-and-spoke model; often it may not even be a realistic goal. If the hub judge has done a good job identifying similarities and differences among parties and issues and choosing test cases, however, then information generated in the spokes may make it possible to resolve substantial portions of the litigation. A variety of settlement structures are possible. Individual cases or groups of cases might settle in the spokes on remand. And even those settlements may yield useful information for the parties remaining in the hub.<sup>69</sup> One or more defendants may wish to resolve their liability as to all plaintiffs, or just some groups of plaintiffs with cases still pending in the hub. And they may do so through aggregate inventory settlements (plaintiffs' firm by plaintiffs' firm), class action settlements, or master settlements offers open to all plaintiffs. Whether settlements proceed defendant-by-defendant or inventory-by-inventory, keeping the hub MDL up and running provides a ready forum for such negotiations. And if no settlements are forthcoming, the hub judge can, of course, remand more cases to the spokes for additional trials.

## B. Advantages Over Other Models

The hub-and-spoke model will not be needed in every mass tort MDL. Mass torts come in all shapes and sizes that call for different case management strategies. But for mega mass torts, the hub-and-spoke model of systematic aggregation and strategic disaggregation holds several advantages over alternatives, including total aggregation, no aggregation, and aggregation followed by automatic disaggregation.

### 1. Advantages Over Total Aggregation

Aggregation maximalists insist that total aggregation is the only option for mass torts.<sup>70</sup> But we developed the hub-and-spoke model primarily in response to problems we've observed with total (or near total) aggregation in some cases. As the asbestos litigation demonstrated, some mega mass torts are simply too varied for a single, global resolution and too large for a single judge to manage without becoming a bottleneck. Even if a "control freak" judge manages to cajole the parties into a global settlement by, for example, withholding adjudication as transaction costs mount, the deal is unlikely to stick.<sup>71</sup> By strategically breaking

---

68. See *infra* notes 103–105 and accompanying text (discussing opioids negotiation class).

69. See Adam S. Zimmerman, *The Bellwether Settlement*, 85 *FORDHAM L. REV.* 2275, 2292 (2017) ("When the endgame is a global settlement, a focused sampling of arm's-length negotiations may help counsel better identify solutions from the ground up.").

70. See, e.g., David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 *HARV. L. REV.* 831 (2002).

71. McGovern, *Mass Torts for Judges*, *supra* note 2, at 1844–45.

these mega cases up into multiple manageable pieces, the hub-and-spoke model can help open the bottleneck and prevent them from becoming black holes.

The hub-and-spoke model also offers some specific advantages over total aggregation. Enlisting the help of spoke judges to conduct bellwether trials in transferor districts can increase the pool of cases eligible for bellwether treatment. The transferor judges in the spokes are not constrained by *Lexecon*, so bellwether cases can be selected for their informational value not simply because they were directly filed in the MDL or because the parties are willing to consent to trial there.<sup>72</sup> There can also be value in trying bellwether cases in front of several different judges with a diversity of perspectives.<sup>73</sup> Those judges may be more familiar with relevant state law applicable in diversity suits than the distant MDL judge, and the cases would be tried in front of juries from different parts of the country.<sup>74</sup> As a result, trying bellwether cases in the spokes might, in some situations, provide the parties with better data points to inform their settlement negotiations. Finally, strategic disaggregation of the litigation into discrete, manageable pieces may set the stage for multiple smaller settlements of substantial portions of the litigation in lieu of an ephemeral global resolution.

## 2. Advantages Over No Aggregation

If aggregation causes a bottleneck in mega mass torts, why use judicial mechanisms like MDL to aggregate at all? Why not just leave it to the marketplace of litigation where parties have access to disaggregated decisionmakers?

The arguments in favor of aggregation are well-rehearsed.<sup>75</sup> To name a few: it avoids wasteful duplication of discovery; it avoids the potential for inconsistent judgments; it creates economies of scale for plaintiffs, defendants, and courts alike; and it may set the stage for comprehensive settlements that leave all parties better off. Indeed, the pressures toward aggregation within or outside the formal procedural system may be inexorable.<sup>76</sup>

---

72. On some of the complications presented by directly filed cases, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759 (2012).

73. See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008); cf. 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 LAW 3 (2012).

74. See Burch, *Remanding*, *supra* note 15, at 407–09.

75. For an earlier analysis by one of us, see Rave, *supra* note 7. For a classic treatment, see Silver & Baker, *supra* note 7, at 744–49, (observing that plaintiffs can gain important advantages by suing collectively including economies of scale litigation costs, increased leverage in settlement negotiations, equalization of plaintiffs' and defendants' risks, and the conservation of defendants' assets).

76. See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (describing pressures to resolve tort claims through “bureaucratized, aggregate settlement structures” dating back to the Nineteenth Century).

Here we highlight two additional arguments for initial aggregation of mega mass torts in MDLs, even if later disaggregation is expected. In other words, we explain why the hub-and-spoke model is superior to no aggregation or a laissez-faire approach to the mass tort litigation market.

First, MDL consolidation facilitates collective action. While plaintiffs' lawyers have been known to complain bitterly when their cases are swept up into a distant MDL, being forced to work with other plaintiffs' lawyers in the MDL helps solve a collective action problem.<sup>77</sup> By setting up a leadership structure and a common benefit fund, the MDL judge can reduce freeriding and better incentivize lead lawyers to invest in work that will benefit all of the plaintiffs.<sup>78</sup> MDLs attract sophisticated lawyers with the means to invest in the litigation on something approaching the same scale as the defendants, which is particularly important in mega mass torts where it may be years before plaintiffs see any recoveries and their lawyers see any return on investment.<sup>79</sup> And those lawyers will often be repeat players with the experience and wherewithal to play for rules and maximize the value of whole series of cases.<sup>80</sup>

Contrast that with a world of no MDL aggregation where many plaintiffs may be represented by lawyers who cannot match the defendants' resources and repeat-player advantages. While the defendants play the odds and play for rules, one-shot lawyers may settle strong cases or push weak ones to trial without taking into account the effects those decisions would have on the rest of the plaintiffs' cases.<sup>81</sup> And the lawyers who have the resources to go toe-to-toe with the defendants will lack the proper incentive to invest in common benefit work because other lawyers will freeride on their efforts.<sup>82</sup> Substantive outcomes will surely be skewed by this mismatch.

---

77. 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, 1312–14 (2018) (describing how centralization facilitates collective action).

78. See generally Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371 (2014) (describing how plaintiffs' fees are structured in MDL to encourage attorneys to effectively lead the litigation).

79. See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952 (2017) (noting that it may take years and cost more than \$250,000 to litigate a science-heavy tort claim).

80. Andrew D. Bradt & D. Theodore Rave, *It's Good to Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73, 93–98 (2019). Repeat players come with dangers too, of course. See *id.* at 78, 100–01 (acknowledging that repeat players can exacerbate agency costs in the client-lawyer relationship); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2017); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017). But we suspect that, on balance, they add more value than they siphon off in agency costs.

81. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 100–04 (1974).

82. See Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDL*, 70 DEPAUL L. REV. (forthcoming 2021) (manuscript at 16), <https://papers.ssrn.com/abstract=3680074> [<https://perma.cc/2R9C-HRGT>].



Second, the hub-and-spoke MDL model can avoid some of the inequities of disaggregated litigation. Judicial resources are finite and can easily be overwhelmed by a mega mass tort. But mass tort litigation is not an efficient market where the price mechanism sorts cases such that the highest value users of the judicial system have first access to court procedures. The asbestos litigation is replete with nightmare stories of plaintiffs litigating nonmalignant pleural thickening claims while other plaintiffs die of mesothelioma with their cases still languishing in the queue. And there is a real risk in many mega mass torts that the defendants' assets will be exhausted before many plaintiffs' claims are heard.<sup>83</sup>

Systematic initial aggregation in an MDL can help rationalize—and ration—the process of adjudication in a mega mass tort. Consolidating all of the cases in an MDL effectively stays the bulk of the litigation. Instead of plaintiffs racing each other to courthouses all over the country, the hub MDL judge can make a conscious decision about which cases to focus on first—whether it's those with the most severe injuries, those with the strongest claims, or those that will yield the most useful information to help the parties reach a broader settlement. Once the hub MDL judge has identified rational groupings of parties and claims, remand to the spokes can recapture many of the benefits of disaggregated litigation and drive the tort toward maturity more quickly and equitably. And if, as the tort matures, global or partial settlements become feasible and attractive to the parties, the hub MDL remains available as a forum to assist with consummating the deal or deals.

### 3. Advantages Over Aggregation Followed by Automatic Disaggregation

A superficial reading of the MDL statute might suggest that the JPML should automatically remand the cases en masse once common discovery is complete or at some other moment when pretrial proceedings are deemed to have reached their “conclusion.”<sup>84</sup> That was never the intent of the statute's drafters, who fully expected most cases to be resolved within the MDL forum and who crafted the statute to give the JPML and MDL judge maximum flexibility to manage the litigation toward efficient resolution.<sup>85</sup> But legislative intent aside, the hub-and-spoke model is superior to mass or automatic remands once cases have reached a certain point of pretrial development in the MDL.

The whole point of the hub-and-spoke model is to disaggregate the litigation strategically, not mindlessly. Automatic mass remand would just be a return to chaos. Though initial consolidation would have succeeded in avoiding the costs

---

83. See, e.g., Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1726 (2002) (discussing how defendants' assets affect litigation strategy).

84. 28 U.S.C. § 1407(a).

85. See Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 839 (2017). A close reading of § 1407(a) makes it clear that the cases can be remanded at any time during the pretrial process, that not all cases need to be remanded at the same time, and that the JPML can even carve off portions of cases for early remand.

of duplicative discovery, mass remand would recreate the inequities and inconsistencies of disaggregated litigation and frustrate efforts at settlement.

Professor Elizabeth Chamblee Burch has offered a more thoughtful alternative for disaggregating multidistrict litigation.<sup>86</sup> She argues that MDL judges should set benchmarks for episodic remands. Burch suggest three key intervals at which presumptive remands might be appropriate: (1) at the beginning of the MDL for plaintiffs whose claims fall outside the categories that the lead lawyers plan to develop, (2) after the close of common discovery but before case-specific summary judgment motions, and (3) in the wake of a global settlement for those plaintiffs who do not wish to settle.<sup>87</sup> While we agree that episodic remands may be useful in some cases, we think that the hub-and-spoke model of strategic remands will be preferable at least in some mega mass tort cases.

In mega mass torts, at least, remands at the outset of the MDL, once the lead lawyers have been appointed and identified the initial claims and theories they will pursue, will often be premature. Flooding these cases back into the federal courts sacrifices equity and risks recreating a race to the courthouse, particularly in mega mass torts where total claims might exhaust the defendant's assets. And disaggregating before it is clear whether a global resolution is possible could be a missed opportunity. As we explained above, one advantage to consolidating mega mass tort litigation in an MDL in the first place is that, as a practical matter, it temporarily stays the bulk of the litigation, giving the parties and the judge an opportunity to analyze the litigation as a whole and figure out the best way to move forward. The threat of exit is, of course, an important tool to ensure the loyalty of lead lawyers.<sup>88</sup> And it would be unfair to hold hostage plaintiffs whose claims the lead lawyers never plan to pursue. But the plaintiffs are stronger together, and premature disaggregation could defeat the purpose of the collective venture to begin with.

Presumptive remands at the end of common discovery may be more appropriate, but again we suspect that a more strategic approach will often be superior. In large part, our preference stems from a desire to facilitate settlement. MDL, like the U.S. legal system as a whole, leaves ample opportunity for and provides significant assistance to negotiated, rather than adjudicated, outcomes.<sup>89</sup>

---

86. Burch, *Remanding*, *supra* note 1515, at 422–23; Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 690–93 (2013).

87. BURCH, *supra* note 18, at 210–14; *see also* Burch, *Remanding*, *supra* note 15, at 422–23 (advocating measures to make remand more common in multidistrict litigation).

88. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 378–78 (2000) (describing “exit” as a governance tool to reduce agency costs in class action representation); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 366–67 (same); *see also* Burch, *Disaggregating*, *supra* note 86, at 681 (arguing for exit’s importance to procedural justice, federalism, participation, and accuracy).

89. *See, e.g.*, Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1190–99 (2009) (arguing that the ability of a legal system to resolve mass harms through settlement is “an important justice value”); Lynn A. Baker & Charles Silver, *In Defense of Private Claims*

One of the purposes of the Federal Rules of Civil Procedure, the discovery process, and, indeed, judicial case management is to encourage parties to take advantage of the unlimited potential solutions in negotiation rather than the limited recourse inherent in the legal process. Adjudication allows for only a certain number of outcomes, whereas the end game for negotiation has few restrictions.

Strategic, rather than automatic or presumptive episodic remand, strikes us as more likely to facilitate settlement. Retaining the bulk of the cases in the hub MDL while test cases are tried in the spokes preserves opportunities for the parties to reach a variety of different settlement structures, whether global or partial. By contrast, remanding mega mass tort cases en masse at the close of common discovery could recreate the queue and arbitrary trial order in transferor courts. If they are consigned to waiting, plaintiffs might as well wait in the MDL, where settlement seems more likely.

Of course, if it becomes clear that settlement will not be forthcoming even after information is developed in the spokes, the hub MDL judge should shift gears and accelerate the rate of remands, just like Judge Robreno did in the asbestos litigation. But even so, the disaggregation should follow a thoughtful strategy, considering effects on plaintiff equity. Judge Robreno, for example, held onto claims for punitive damages in the MDL so that they wouldn't drain the defendants' resources before other plaintiffs had a chance at compensation.<sup>90</sup>

We have no quarrel, however, with Burch's suggestion of post-settlement remands. It is possible that the ready availability of remand for plaintiffs who decline a settlement offer in the MDL might make it harder to achieve global peace because more plaintiffs opt for remand over settlement. But the negotiating parties should ensure peace through attractive settlement terms, not by leaving non-settling parties in limbo in the MDL.<sup>91</sup>

#### IV

##### THE PRESCRIPTION OPIATE LITIGATION AS A TEST CASE

The massive litigation stemming from the opioid crisis provides an excellent test case for the hub-and-spoke model of MDL case management. Francis served as a special master in *In re National Prescription Opiate Litigation*,<sup>92</sup> and he convinced Judge Dan Aaron Polster to put the hub-and-spoke idea into practice—a decision that was later ratified by the JPML.

The opioid litigation surely fits the definition of a mega mass tort. It involves claims by more than 2,800 cities, counties, and Indian tribes from across the

---

*Resolution Facilities*, 84 LAW & CONTEMP. PROBS., no. 3, 2021, at 45, (arguing that as long as the parties retain the option to go to court, a negotiated “alternative to the standard litigation model” is likely to make them better off).

90. Robreno, *supra* note 10, at 145–46.

91. See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2176–77 (2017) (describing settlement terms that MDL lawyers use to ensure closure).

92. MDL No. 2804 (N.D. Ohio).

country along with a smattering of hospitals, third-party payors, and putative classes of individuals against more than one hundred defendants ranging from manufacturers and distributors to pharmacies and administrators of prescription drug programs to doctors and individuals.<sup>93</sup> The various defendants are alleged to have engaged in different conduct with respect to different drugs over the course of decades. And the plaintiffs assert various theories of liability under RICO, the Controlled Substances Act, state consumer protection laws, and public nuisance, among others. The matter is made even more complex by the overlapping jurisdiction of many of the public entity plaintiffs (for example, cities, counties, and states may share jurisdiction over certain areas) and by the presence of parallel state-court litigation. Forty-nine state attorneys general have sued the same set of defendants in their own state courts, as have various cities, counties and other plaintiffs.<sup>94</sup> And several of the state attorneys general have gotten into public turf fights with the plaintiff cities and counties that lie within their borders and are represented by private lawyers in the MDL.

On December 5, 2017, the JPML transferred all of the opioid cases pending in federal courts to Judge Polster in the Northern District of Ohio for coordinated pretrial proceedings. Despite the complexity of the litigation, Judge Polster was initially bullish on the prospects of a comprehensive resolution. At the initial pretrial conference, he told the parties:

People aren't interested in depositions, and discovery, and trials. People aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories. So my objective is to do something meaningful to abate the crisis and to do it in 2018. And we have here—we've got all the lawyers. I can get the parties, and I can involve the states. So we'll have everyone who is in a position to do it. And with all these smart people here and their clients, I'm confident we can do something to dramatically reduce the number of opioids that are being disseminated, manufactured, and distributed.<sup>95</sup>

But reality soon set in. Judge Polster quickly realized that he could not simply strong arm the parties into settlement, and he changed tacks.<sup>96</sup>

Although the parties had no appetite for a single, all-encompassing global settlement, Judge Polster wanted to lay the groundwork for potential defendant-by-defendant settlements.<sup>97</sup> And with help from Francis and the other special masters, he adopted a hub-and-spoke model of case management. Judge Polster oversaw common discovery and began to divide the litigation into separate tracks for further case development. He scheduled a bellwether trial of claims by two

---

93. For a comprehensive summary of the current state of the opioid litigation, see generally Elizabeth Chamblee Burch & Abbe R. Gluck, *MDL Revolution*, 96 N.Y.U. L. REV. 1 (2021).

94. State court litigation has been consolidated into state MDL proceedings in nine states. Clopton & Rave, *Opioid Cases*, *supra* note 82.

95. Transcript of Proceedings at 4–5, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Jan. 9, 2018).

96. See Minutes of 3/6/2018 Conference and Order at 1, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio Mar. 6, 2018).

97. Transcript of Status Conference at 4–5, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (N.D. Ohio, Nov. 7, 2019).

Ohio counties against three distributors, a manufacturer and a pharmacy, over which he planned to preside. The two counties settled with all but one of the defendants on the first day of trial.

It was clear that Judge Polster would become a bottleneck if he attempted to try all of the necessary bellwether cases himself. So, after analyzing the aggregated cases as a whole, Judge Polster worked with the parties and the special masters to identify representative test cases for strategic remand to the spokes. As Judge Polster explained:

What the Court has learned is that, if it proceeds with the bellwether trial process as it has so far, it will simply take too long to reach each *category* of plaintiff and defendant, much less each *individual* plaintiff and defendant. Meanwhile, the Opioid Crisis shows no sign of ending. Accordingly, the Court asked the parties to submit proposals regarding limited, strategic remands of specific cases, in order to allow other federal judges to help resolve specific portions of the Opiate MDL in parallel. The Court suggested, for example, that there could be a remand of: (1) a case focused on manufacturers; (2) a case focused on distributors; (3) a case focused on pharmacies; (4) a case brought by an Indian Tribe; and so on.<sup>98</sup>

Judge Polster kept the pharmacy bellwether for himself (with the same two Ohio counties as plaintiffs). And he suggested to the JPML that it remand cases focused on distributors, manufacturers, tribal claims, and RICO claims to federal courts in West Virginia, Illinois, Oklahoma, and California.<sup>99</sup> Before remand, however, Judge Polster attempted to streamline the cases by severing defendants and conditioning remand on the plaintiffs voluntarily dismissing peripheral claims so that the test cases would be triable in short order in the spokes and focused on yielding the most useful data points for settlement.<sup>100</sup> The JPML endorsed the hub-and-spoke model and, over the objection of some of the defendants, remanded the cases.<sup>101</sup> While the test cases are proceeding in the spokes, Judge Polster continues to work in parallel in the hub, conducting common discovery on the remaining portions of the litigation in manageable stages to design similar strategic remand processes for other categories of defendants and claims.

Judge Polster's shift toward strategic disaggregation has hardly been an abandonment of his pursuit of settlement. Quite the contrary. As Judge Polster explained:

[T]he Court believes that strategic remand of certain cases is the best way to advance resolution of various aspects of the Opiate MDL. The undersigned will remain as the 'hub' of the MDL litigation and also the locus for global settlement, while the selected transferor courts will act as 'spokes,' supporting this global effort.<sup>102</sup>

---

98. Suggestion of Remand, at 5, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Nov. 19, 2019).

99. See *id.*; Suggestion of Remand, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Jan. 6, 2020) (Track 2 cases).

100. See Order Regarding Track Two Cases, *In re Nat'l Prescription Opiate MDL No. 2804* (N.D. Ohio Nov. 21, 2019).

101. Remand Order, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Feb. 5, 2020).

102. Suggestion of Remand, *supra* note 98. Given the complexity of the litigation, Judge Polster likely envisioned a series of defendant-by-defendant or defendant-category-by-defendant-category (that is,

To serve as a vehicle for settlement, Judge Polster certified a novel “negotiation class” in the hub—yet another one of Francis’s innovations, this time in collaboration with Professor William Rubenstein.<sup>103</sup> The idea behind the negotiation class is to make settlement attractive to a defendant by offering peace in exchange for a premium. If, perhaps based on information developed in the spokes, one of the opioid defendants wishes to settle with all of the plaintiffs in the MDL, it would still leave itself open to suit by the more than 30,000 other localities that have not filed cases in the MDL. Worse still, the plaintiffs with the strongest claims will be the ones most likely to opt out of any settlement once its terms are known. Both factors mean the defendant must hold back money to deal with continued litigation against the strongest claims.<sup>104</sup> The negotiation class by contrast binds the plaintiffs together before any settlement is on the table. If the class members do not opt out at the outset, they agree to be bound by a class-wide vote on whether to accept a lump sum settlement with the proceeds to be distributed according to a predetermined formula. The negotiation class thus allows plaintiffs to credibly guarantee the scope of the peace they are offering the defendant and to extract a premium in exchange.<sup>105</sup> And its certification in the hub gives the parties a vehicle to return there for settlement should any defendant and the plaintiff localities desire it.

It has not all been smooth sailing, however. The Sixth Circuit, in a 2-1 ruling, reversed Judge Polster’s certification of the negotiation class, saying that the device goes beyond the authority granted by the text of Rule 23.<sup>106</sup> But even if the negotiation class is dead (or goes unused if revived), the hub-and-spoke model remains in effect in the opioids litigation. And it may yet lay the groundwork for settlements using other structures. Even without the negotiation class, the bulk of the cases against the major defendants are pending in the MDL, so the hub remains a forum in which the parties can negotiate and consummate deals using a variety of settlement structures.

## V

### CONCLUSION

Mass torts come in all shapes and sizes, and no single model of case management will fit them all. But for mega mass torts, the hub-and-spoke model shows considerable promise. And it fits well with the vision of the federal courts as a unified national system that underlies MDL.

---

manufacturers, dispensers, etc.) comprehensive settlements, not a single all-encompassing deal among all parties. In other words, the settlements would be “global” with respect to the plaintiffs included, not necessarily the defendants.

103. *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532 (N.D. Ohio 2019); McGovern & Rubenstein, *supra* note 12.

104. For discussion of a similar dynamic, see Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397 (2014).

105. McGovern & Rubenstein, *supra* note 12.

106. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 677 (6th Cir. 2020).

The architects of the MDL statute saw the advantages of treating “the federal district courts [as] parts of one court rather than many courts,” and they saw MDL as a way to “make fuller use of the potential unity of the federal judicial system.”<sup>107</sup> Indeed, the statute expressly contemplates the possibility of transferring cases to multiple MDL judges in the same litigation.<sup>108</sup> But the predominant model of aggregation used in mass tort MDLs today does not take full advantage of this potential. The hub-and-spoke model does. Rather than allowing one judge to become a bottleneck, the hub-and-spoke model draws in other judges from around the federal court system to work together to advance the litigation.

The hub-and-spoke model is also a terrific example of what Francis did his entire career. He was a firm believer that the great advantage of negotiated settlement is that it allows parties to reject the binary choices imposed by adjudication in favor of some other solution entirely. So too, the hub-and-spoke model of MDL rejects the binary choice between aggregation and disaggregation. We can use the flexibility of the MDL statute and the national scope of the federal judiciary to simultaneously have both the advantages of aggregation in hub and disaggregation in the spokes.

---

107. Bradt, *Radical Proposal*, *supra* note 85, at 864 (quoting Phillip Neal, one of the main drafters of the MDL statute).

108. 28 U.S.C. § 1407(b).