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Multidistrict Litigation: A Surprising Bonus for Pro Se Plaintiffs and a Possible Boon for Consumers

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MULTIDISTRICT LITIGATION: A SURPRISING BONUS FOR *PRO SE* PLAINTIFFS AND A POSSIBLE BOON FOR CONSUMERS

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I. INTRODUCTION

Conventional wisdom says that *pro se* plaintiffs almost invariably fare worse than represented plaintiffs.[1] Since finding an attorney is as much a function of income as it is a function of the merits of the claim,[2] this gap suggests that our adversary legal system under-enforces the rights of *pro se* litigants. However, there exists in federal court a procedural regime under which *pro se* plaintiffs effectively receive attorneys and therefore experience success rates similar to their represented peers: multidistrict litigation. Multidistrict litigation is a procedure for consolidating multiple federal civil cases sharing common questions of fact into a single proceeding in one federal district court for coordinated pre-trial proceedings and discovery. When Congress established the multidistrict litigation procedure in 1968,[3] it created the Judicial Panel on Multidistrict Litigation (JPML), a body of judges that is responsible for determining which cases to consolidate into multidistrict litigation proceedings (MDL's).[4] When the JPML consolidates a case, it removes each related case from its original district (the transferor court), and moves them into a single district (the transferee court) for coordinated proceedings. Early on in an MDL proceeding, the judge appoints counsel to represent all of the plaintiffs in the coordinated proceeding. Although multidistrict litigation is not without its critics,[5] several factors—a

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[1] See e.g., Michael Milleman, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 Md. L. REV. 18, 27 (1990).

[2] Rosalie R. Young, *The Search for Counsel: Perceptions of Applicants for Subsidized Legal Assistance*, 36 J. FAM. L. 551, 559 (1997-1998) (describing how the inability to afford counsel may lead to under-enforcement of rights).

[3] 28 U.S.C. § 1407. For a comprehensive history of multidistrict litigation see, Phil C. Neal and Perry Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A. J. 621 (1964).

[4] *Id.*

[5] Critics of multidistrict litigation have focused on how it balances its mandated efficiency with the rights of litigants to individualized decision-making. Anecdotal reports from defendant-side practitioners suggest that they see it as a boon to plaintiffs since it hides weak claims under strong ones and pro-

nationalized economy,[6] an overburdened court system,[7] and an increasingly unavailable class action system[8]—has made multidistrict litigation more important than ever due to the high number of cases consolidated each year.

On its face, multidistrict litigation is a kind of "quasi-class action"—the entire pretrial phase proceeds as one consolidated claim until trial is about to begin, at which point the JPML remands the cases back to the transferor courts. By the time a trial occurs, the hard work of discovery and determining whether a plaintiff has a viable claim is done. Consolidated cases that reach the remand phase should in effect be prepackaged cases for the transferor courts to hear.[9] Data from all civil cases terminating between 2006 and 2008 prove what commentators have long suspected; multidistrict litigation is about more than pre-trial and discovery.[10] Instead, multidistrict litigation is about settlement. Slightly more than half of the cases that left the multidistrict litigation process between 2006 and 2008 settled rather than being resolved through a trial in the transferor court.[11]

By itself, a settlement rate over fifty percent—even if one defines settlement narrowly as a proxy for plaintiff success—is old news.[12] What

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vides plaintiffs with better attorneys than they would have otherwise had. E.g., Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIGATION 43, 45 (1998) [hereinafter Herrmann, *To MDL*]. Anecdotal reports from plaintiff-side practitioners suggests that they generally approve of the process although they worry that consolidation causes them to lose control over their case. Susan M. Olson, *Federal Multidistrict Litigation: Its Impact on Litigants*, 13 JUST. SYS. J. 341, 354 (1988-1989). Others complain that multidistrict litigation is a "black hole." See DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 149-51 (2006) (cataloguing complaints that multidistrict litigation's claim to facilitate justice is illusory). DAVID F. HERR, MULTIDISTRICT LITIGATION : HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION vii (Little Brown, 1996 supplement) (noting that the Panel has been publishing fewer of its decisions which may lend to its air of opacity).

[6] 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 TULANE L. REV. 2245, 2245 (2008).

[7] The heavy dockets of the federal court system have inspired a quest for efficiency, oftentimes by finding new ways to aggregate many cases into a single proceeding. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2009) [hereinafter PRINCIPLES] (see especially § 2.02 favoring aggregation for efficiency purposes); Judith Resnik, *From "Cases" to "Litigation,"* 54 J. LAW & CONTEMP. PROBS. 5, 6-7 (1991) (describing how aggregate litigation moved from the exception to the norm between 1960 and 1990).

[8] *See generally,* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not Possible*, 82 TULANE L. REV. 2205 (2008) (describing how multidistrict litigation is filling in where judges have become increasingly reluctant to grant class certification).

[9] See Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2338 (2008). 2338.

[10] E.g., Note, *The Judicial Panel and the Conduct of Multidistrict Litigation*, 87 HARV. L. REV. 1001, 1029-1030 (1974) (observing the Panel remanded very few cases back to their original district for trial); Carter G. Phillips et al, *Rescuing Multidistrict Litigation from the Altar of Expediency,* 1997 B.Y.U. L. REV. 821 (arguing that transferee districts were unlawfully using §1404 to retain control over cases beyond the pre-trial phase); Fallon, *supra* note 9, at 2330 (arguing that bellwether trials present an opportunity to regain some of the efficiencies lost when the Supreme Court barred transferee courts from using §1404 to conduct trials).

[11] See *infra* Part IV.A.

[12] Theodore Eisenberg and Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 128 (2009) [hereinafter Eisenberg, *Settlement*] (arguing that the settle-

makes the settlement rate in multidistrict litigation interesting is what it tells us about *pro se* plaintiffs. Outside of multidistrict litigation, there is a wide gap between the settlement rates of *pro se* plaintiffs and those of represented plaintiffs.[13] In multidistrict litigation, there is no statistically significant gap between the two settlement rates. This finding suggests that multidistrict litigation may be more like class action than commentators commonly recognize. Like class action, it insulates plaintiffs from the pitfalls of proceeding alone. Critics of class actions have long argued that class actions make non-meritorious claims viable and thus lead to over-enforcement of rights.[14] The data below show that multidistrict litigation has the potential to enable as much litigation as it expedites.[15] Looking at the structure of multidistrict litigation, we can discern why it benefits some plaintiffs:[16] in an MDL, every plaintiff, including every *pro se* plaintiff, gets an attorney. The same is true of class actions but as discussed in Part V.C. below, there may be more screens in multidistrict litigation to prevent frivolous claims from reaching settlement.

There are many kinds of *pro se* plaintiffs in federal court. Some undoubtedly have no attorney because they do not have a claim that any ethical attorney could take. Others cannot find attorneys either because their potential recovery does not justify the cost of bringing the case on a contingency fee basis, or because their primary remedy is non-monetary (e.g., rescission of a contract) and they do not have the funds with which to pay for an attorney out of pocket. Many consumers are likely in this category, especially since many people suing their mortgage companies bring their claims under federal statutes, which make their cases removable to federal court. Many individual plaintiffs who cannot obtain contingency fee arrangements but who do hire an attorney are unable to afford particularly good ones. In an MDL, all of the plaintiffs share the same attorney or attorneys because the transferee judge chooses a lead attorney or committee of attorneys to represent all of the plaintiffs. As long as the attorney representing the consolidated plaintiffs is better than the attorney that any one plain-

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ment rate hovers around 66.9% using a definition of settlement that is a proxy for plaintiff success and listing other commentators approximations of settlement rates).

[13] See *infra* Appendix A.

[14] See Arthur R. Miller, Comment, *Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem,"* 92 HARVARD L. REV. 664 (1979) (arguing against the notion that Federal Rule of Civil Procedure 23 somehow created the onslaught of consumer and civil rights litigation that the previous decade saw).

[15] See Resnik, *supra* note 7, at 6 (explaining that while aggregation to expedite is less controversial than aggregation to enable, that the two are not distinct in practice); PRINCIPLES, *supra* note 7, at 2 (2009) (suggesting that aggregation makes justice under law more affordable and therefore is a means for avoiding under-enforcement).

[16] For a highly detailed description of how consolidated proceedings alter the rights of litigants see, Joan Steinman, *The Effect of Case Consolidation on the Procedural Rights of Litigants*, 42 UCLA L. Rev. (1995).

tiff could afford or his or her own, the multidistrict litigation process may offer them some of the same benefits that it offers *pro se* plaintiffs.

Providing every plaintiff with an attorney does not change substantive rights; it merely changes the way those substantive rights are enforced. By giving plaintiffs representation more similar in quality to that of the defendant, multidistrict litigation encourages more accurate enforcement of rights with respect to *pro se* plaintiffs or those whose rights would otherwise have been compromised not by the merits but by their lack of representation This is not to say that consolidation has no impact on the litigants' substantive rights but rather that when it comes to determining how the case will come out in the end, giving everyone an attorney matters more. If changes in substantive rights explained why the dispositions of MDL's differ from the dispositions of non-MDL's,[17] we would expect *pro se* plaintiffs to fare just as poorly in multidistrict litigation as they do everywhere else, since the changes caused by consolidation do not suddenly make them capable of navigating the federal court system where they were not previously able to do so. The risk of over-enforcement is lower in multidistrict litigation than in class actions because there are still individual cases in multidistrict litigation. Potential plaintiffs must file their own claim in federal court—that is, they must opt-in to the litigation process—whereas in class actions, individuals must opt-out if they do not want to be in the plaintiff class. Next, they must convince the JPML that it should consolidate their claim. At all phases, the defendant can move to dismiss an individual claim if it believes it to be meritless.[18] Defendants in class action do not have this same power to weed out weak claims. Multidistrict litigation then provides a low-cost process for giving plaintiffs more effective representation and in doing so leads to more accurate enforcing of their rights.

This Article proceeds in six parts. Section II explains the MDL process and the composition of the MDL docket. Section III describes the study's data and methodology. Section IV presents the empirical results, first generally in subsection A then focusing on *pro se* plaintiffs in subsection B. Section V discusses multidistrict litigation's potential in consumer law and proposes expanding its use. Section VI concludes.

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[17] See *infra* Appendix B.

[18] Some weak claims undoubtedly settle in multidistrict litigation that would not have otherwise resulted in a plaintiff victory. Where the defendant decides not to weed out the weak claims, it is difficult to argue that the multidistrict litigation over-enforces rights since it was their decision not to exercise their rights. Were the cases not consolidated, they would have the obligation to defeat each claim. This obligation does not disappear in multidistrict litigation. This may be less true in other contexts but the defendants in multidistrict litigation are by and large the most sophisticated litigants in the federal court system. They are national companies who business reached many. The ease of procedure undoubtedly correlated with the rate of filings but it does not follow that a low procedural barrier to entry entails a pro-plaintiff change in substantive rights.

II. THE MULTIDISTRICT LITIGATION PROCESS

The MDL process was born in the early 1960's when consumers filed 1,880 cases, many of them class actions, in 30 different districts against electrical equipment manufacturers for antitrust violations under the Clayton Act.[19] Facing the possibility of 1,880 rounds of discovery and pretrial proceedings, in 1961 the Federal Judicial Conference created a subcommittee for "considering discovery with common witnesses and exhibits."[20] The district judges in the electrical products cases stayed their proceedings and, working with the new subcommittee, devised a plan for national depositions and document discovery.[21] The plan was so successful that at its 1964 meeting, the Judicial Conference voted to form a committee to explore the possibility of creating a system to accommodate disputes where many plaintiffs filed similar claims in many different district courts.[22] In March 1965, the Judicial Conference approved a draft of § 1407, which Congress then enacted in 1968.[23] At the same time as he directed the formation of the JPML, Chief Justice Warren directed a committee to begin the Manual for Complex Litigation, which remains highly influential in multidistrict litigation proceedings.[24]

In its present form, the JPML consists of seven federal district (and circuit?) judges appointed for seven-year terms by the Chief Justice of the United States.[25] The JPML's primary job is to decide which cases to consolidate,[26] and then to decide which "tag-along" cases to allow to join the MDL.[27] Multidistrict litigation has grown steadily since its birth; approxi-

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[19] Neal, *supra* note 3, at 624.

[20] Letter of Chief Justice Warren, January 26, 1962, to Judge Edwin A. Robson (quoted in Neal, *supra* note 3, at 624.).

[21] Neal, *supra* note 3, at 624..

[22] *Id*. at 628.

[23] *In re* Plumbing Fixtures Cases, 298 F. Supp. 484, 493 (J.P.M.L. 1968) (the concern was that there could be competing classes which would hurt the interests of all parties involved). Of course, since multidistrict litigation is not exempt from the Anti-Injunction act which prohibits federal judges from enjoining state-court proceedings except where there are questions of jurisdiction, the multidistrict litigation system can neither reduce forum shopping between state and federal court not the prospect that a newly filed state action could throw a wrench in months worth of settlement negotiations. 28 U.S.C. § 2283; Sherman, *supra* note 8, at 2219.

[24] DAVID F. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION §9:11 (2009)

[25] John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2227. The statute does not provide for any term limits but Chief Justice Rehnquist implemented this system in 2000 and thus far, Chief Justice Roberts has followed it. *Id.*

[26] An intractable vocabulary problem has arisen between the terms "transfer," "centralize," "coordinate," and "consolidate." I am going to follow Judge Heyburn of the JPML and leave this problem "to the bloggers." John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, n. 12. (2008) For my purposes, "to consolidate" is to turn several independent cases into one MDL under § 1407(a) and "to transfer" is to move a case from its original district court (the transferor court) to the court conducting the MDL (the transferee court).

[27] After several cases have been consolidated into an MDL, when the JPML learns of other cases with common questions of fact, the JPML may issue a conditional transfer order (CTO) bringing the case into

mately one hundred petitions for consolidation in a new MDL are submitted per year.[28] To be eligible for consolidation, cases must share "one or more common questions of fact."[29] The JPML consolidates and transfers cases upon a "determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[30] The purposes of transfer are "to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts."[31] The JPML has broad discretion in its authority to consolidate cases. Parties objecting to consolidation may only appeal the decision by extraordinary writ.[32]

The American Law Institute (ALI) suggests that judges consider the "viability" and "variation" of the claims when deciding which cases to consolidate.[33] "Viability" asks whether "claimants would obtain representation in the market for legal services in the absence of aggregate treatment."[34] "Variation" looks at the extent to which common issues determine the core question of liability.[35] ALI suggests that personal injury cases are likely to be in the high viability and high variation category and therefore least suitable for aggregate litigation because there are "realistic procedural alternatives" that render unnecessary the risk that the court will wrongly determine an issue by looking at it acontextually.[36] Despite these considerations, the AO data shows that tort cases comprise the vast majority, over 97%, of the MDL pool.[37] Personal injury claims arising out of products liability are the most common kind of case in multidistrict litigation,[38] accounting for over 85% of the cases.[39] Appendix A shows kinds of cases that terminated be-

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the MDL as a so-called "tag-along" case. Provided that there are no objections, the CTO becomes final 15 days after filing with the transferee court.

[28] JUDICIAL PANEL ON MULTI DISTRICT LITIGATION, ANNUAL STATISTICS OF THE JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION (December 2008), [hereinafter JUDICIAL PANEL 2008] http://www.jpml.uscourts.gov/General_Info/Statistics/JPML_Annual_Statistics-CY_2008.pdf.

[29] 28 U.S.C. § 1407(a).

[30] *Id.*

[31] MANUAL FOR COMPLEX LITIGATION, ANNOTATED (Fourth) §20.13 (2009) [hereinafter MANUAL]. The MANUAL in many ways responds to the same concerns as multidistrict litigation itself since they were both born out of the Electrical Products boondoggle in the 1960's. HERR, *supra* note 24, at § 9.7.2.

[32] 28 U.S.C. §1407(e).

[33] PRINCIPLES, *supra* note 7, at § 2.02 cmt. b.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] See also Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. (2001) (finding that number of mass tort cases on the JPML's docket has increased more rapidly than other kinds of cases, especially in the 1990's).

[38] These are cases with the Nature of Suit code (NOS) 365.

[39] Many of these cases are precisely the kinds of cases for which judges refuse to certify a class. E.g., In re Fosamax Prods. Liab. Litig., 248 F.R.D. 389, 396 (2008) (finding class actions "not very useful" in mass tort cases where issues of liability and defenses to liability tend to vary by plaintiff thereby making a proper Rule 23 class difficult to identify); Indeed Fosamax Products Liability MDL-1789 was one of

tween 2006 and 2008. For these cases, the MDL process helps ensure that there are not competing federal class actions.[40]

After consolidating cases under §1407, the JPML may transfer the new MDL to any district court because the usual venue considerations do not apply.[41] In choosing a transferee court, the JPML is supposed to consider a variety of factors aimed at minimizing the cost and inconvenience of the transfer as well as the availability of a skilled judge or judges to handle the case.[42] Since 2000, the JPML has granted between 67% and 87% of petitions.[43] Although the JPML has the authority to centralize cases on its own, it rarely exercises this power and almost always centralized in response to a request for centralization.[44] One party objects to transfer in only about 10% of all requests for transfer.[45]

The number of cases involved in multidistrict litigation under § 1407 is stunning.[46] As of December 2008, the JPML had centralized 301,255 civil actions consisting of millions of claims.[47] In a heavy year such as 2007, which saw both asbestos and Vioxx cases, the JPML considered whether to transfer over 6,000 tag-along cases.[48] Because each case filed in the transferor district likely had several plaintiffs, the total number of plaintiffs is

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the largest cases pending on the MDL docket in 2009. JUDICIAL PANEL ON MULTI DISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION 2009 (October 2009) [hereinafter JPML 2009]. More of the controversy surrounding class actions is likely to fall on multidistrict litigation if personal injury cases continue to dominate its docket without a clear explanation of what safeguards are in place to ensure that multidistrict litigation's procedural changes do not change substantive rights. Introducing such controversy into the multidistrict litigation process, and with it, the chance that defendants will oppose transfer more frequently, may reduce the ability of small-claim and unsophisticated plaintiffs with meritorious claims to receive compensation.

[40] There is nothing to prevent a plaintiff from filing a competing class action in state court.

[41] See, e.g., In re FMC Corp. Patent Litig., 422 F.Supp. 1163 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue.").

[42] MANUAL, *supra* note 31, at §20.131 (2009); for a highly detailed discussion of factors considered by the JPML in choosing a transferee district along with a catalogue of cases applying these considerations see HERR, *supra* note 24, at § 6.3; for an empirical analysis of the JPML's selection of a transferee judge see Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2009).

[43] JUDICIAL PANEL 2008, *supa* note 28.

[44] Heyburn, *supra* note 26, at 2232. For a thorough description of the procedure for initiating multidistrict litigation see Yvette Ostolaza & Michelle Hartman, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47 (2007).

[45] Heyburn, *supra* note 26, at 2233.

[46] While this paper is only concerned with multidistrict litigation in the federal court system, it is worth noting that 16 states now have some form of multidistrict litigation. Sherman, *supra* note 8, at 2209. For a description of the multidistrict-litigation like processes available in 15 of these states see Ostolaza, *supra* note 44, at 70-74. Most of the considerations in this paper apply to state-level consolidation as well.

[47] JUDICIAL PANEL 2008., *supra* note 28. The number of cases pending in MDL's at any time varies considerably. As of September 30, 2007 there were 76,860 cases pending; as of September 30, 2008 there were 102,545 cases pending; and as of September 30 2009 there were 88,000 cases pending. 2009) JPML 2009, *supra* note 39.

[48] Heyburn, *supra* note 26, at 2233.

much greater than the number of cases.[49] Looking at the AO data for cases terminating from 2006 to 2008, 24,316 or 3.26% of all civil cases were from MDL's. There is no minimum number of cases that must be filed before a party can move for consolidation, however where there are only a few cases the party moving for transfer may have a heavier burden of persuasion.[50]

When the JPML files the transfer order in the office of the clerk of the transferee court, the transfer becomes effective and the transferee court has exclusive jurisdiction over the cases.[51] The JPML does not retain any supervisory power over the transferee judge.[52] One of the transferee judge's first and most important duties is to determine how to structure plaintiffs' representation. [53] In almost all cases, the transferee judge selects a lead attorney or attorneys; where there are many plaintiffs, the judge may form a plaintiffs' committee.[54] Ideally, the plaintiffs' committee is composed of competent attorneys with experience in complex or multidistrict litigation who are "willing to subordinate their individual approach to litigation to the needs of the committee and to cooperate with the other members of the committee in order to advance the common good of all the plaintiffs."[55] In practice, there is no limit to the transferee judge's discretion in choosing plaintiffs' counsel and no mechanism for appealing his or her choice.[56] There is no set rule for how to compensate the attorney selected to lead the case; however, the *Manual for Complex Litigation* suggests that transferee

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[49] Consider that the *In re Diet Drugs Products Liability Litigation* (MDL 1203) contained somewhere between 30,000 and 35,000 plaintiffs, the Third Circuit could not know exactly how many. *In re*: Yuvonne B. Wilson, 451 F.3d 161, 163 (3d cir. 2006).

[50] *In re* Scotch Wiskey, 299 F. Supp. 543 (J.P.M.L. 1969) ("If this litigation involved the number of cases generally associated with multidistrict civil treble damage antitrust litigation, the common questions of fact might be sufficient to invoke § 1407, but where, as here, there are a minimal number of cases involved in the litigation the moving party bears a strong burden to show that the common questions of fact are so complex and the accompanying common discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses.").

[51] *In re* Plumbing Fixtures Cases, 298 F. Supp. at 493.

[52] 28 U.S.C. § 1407(b).

[53] Desmond T. Barry, Jr., *A Practical Guide to the Ins and Outs of Multidistrict Litigation*, DEFENSE COUNSEL J. 58, 63 (January 1997).

[54] E.g. *In re* Showa Denko K.K. L-Tryptophan Products Liability Litigation-II, 935 F. 2d 162, 165 (4th Cir. 1992) ("The multiplicity of suits requires that the district court be allowed to combine procedures, appoint lead counsel, recognize steering committees of lawyers, limit and manage discovery, etc. to minimize expense to all litigants and to provide judicial efficiency."); MANUAL, *supra* note 31, at 10.221; John T. McDermott, *The Transferee Judge—The Unsung Hero of Multidistrict Litigation*, 35 MONT. L. REV. 15, 16-19 (1974) (describing merits and difficulties of the various approaches available to transferee judges to ensure adequate but manageable representation of the MDL).

[55] Barry, *supra* note 53, at 63.

[56] For a comprehensive discussion of how transferee judges choose and compensate plaintiffs' counsel see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal,* 9-12 (Draft as of March 3, 2009) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352646. The data in Part IV.B, *infa*, shows that appointing plaintiffs' an attorney has a dramatic effect on the outcome of their cases suggesting that a more rational approach to appointing plaintiffs' counsel may be in order.

judges order defendants who settle their cases to pay a percentage of the settlement into a general fund to compensate the lead attorney or attorneys for their work that benefits all of the plaintiffs.[57]

Once the pretrial proceedings are complete, or on the motion of one of the parties, the JPML may remand the case back to the transferor court for trial. The JPML may remand any part of a case, such as a counterclaim, at any point; but this has rarely happened.[58] As early as 1974, commentators noted that most cases subject to the multidistrict litigation process terminated in their transferee court.[59] Indeed as discussed in Part IV below, the JPML remands very few cases; over 96% of the cases consolidated in MDL's terminate there.

We can better understand multidistrict litigation by comparing it to class actions. Both its purpose and standards for transfer mirror those of Federal Rule of Civil Procedure 23, which permits class actions where there are, among other things, "common questions of fact" and a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class."[60] According to Benjamin Kaplan, who helped revise the Rule, its purpose was to " to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."[61]

We can think of class action and multidistrict litigation as sitting on a spectrum with informal inter-case collaboration and traditional individual

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[57] MANUAL, *supra* note 31, at §20.312. See also, Silver, *supra* note 56, at 12-21 (describing the quasi-class action approach used to compensate plaintiffs' attorneys in three recent cases and proposing an ex-ante system of compensation); William B Rubenstein, *On What A "Common Benefit Fee Is, Is Not, and Should Be*, CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009) (describing the economics of common fund used to compensate lead counsel for work that benefits all plaintiffs).

[58] *Id.* at §20.133 ("[T]he Panel has rejected most requests to exclude portion of a case from transfer under section 1407").

[59] *The Judicial Panel and the Conduct of Multidistrict Litigation*, *supra* note 10 (finding that in 1973, transferee judges remanded no more than 100 of the 1,189 MDL's that terminated that year).

[60] David Herr claims that "[t]ransfer of multiple actions under 28 U.S.C. §1407 for coordination or consolidated pretrial proceedings is significantly different from certification of an action or actions to proceed as a class or classes under Fed. R. Civ. P. 23" but he offers little explanation of how the two processes differ beyond noting that Rule 23 provides a system of "permissive joinder" which may stand in contrast to mandatory transfer at the Panel's discretion (although this difference is perhaps irrelevant in the 90% of cases voluntarily transferred). DAVID F. HERR, MULTIDISTRICT LITIGATION: HANDLING CASES BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION § 5.3.3 (Little Brown, 1986).

[61] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendment of the Federal Rules of Civil Procedure (I)*, 81 HARVARD L. REV. 356, 390 (1967). Also suggesting that our current MDL system follows much of the (or at least Kaplan's) intent behind the Rule 23 is Kaplan's suggestion that "when numerous persons stood in the same position toward an adversary so that there was potentially a large number of essentially identical lawsuits, equity might in effect allow a consolidation of the expected actions and clear up the entire situation through a bill of peace." *Id.* at 376.

litigation.[62] At the one end of this spectrum is party autonomy and at the other end is efficiency.[63] In multidistrict litigation, the plaintiffs in consolidated cases coordinate their discovery efforts against the defendant. Ideally, the result is that the defendant must produce—and a court must review—its documents only once. Similarly in class action, treating the class members' claims as a single action reduces the burdens of discovery on the defendant. In both class action and in multidistrict litigation, a successful motion for summary judgment may terminate all of the pending claims. Were the claims not aggregated, the defendant would have to produce the same information for each plaintiff; one victory on summary judgment would not dispose of any other claims.

Class action and multidistrict litigation differ in their treatment of individual claims. Multidistrict litigation retains some room for individual treatment of cases even if the cases are no longer discrete.[64] A defendant may choose to file motions to dismiss or motions for summary judgment against only a few of the cases or defendant may choose to settle some but not all cases. Then, if some plaintiffs like the settlement offer, they may accept it without affecting the rights of those plaintiffs who do not like it. By contrast, one or a few plaintiffs in a class action represent all plaintiffs thus whatever happens in their case is dispositive of the rest of the claims in the class.

III. THE DATA

Data for this study come from the Administrative Office of the U.S. Courts (the AO) as compiled by the Federal Judicial Center then compiles

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[62] Joan Steinman conceptualizes consolidation as moving from multiple civil actions to a single civil action. She does not view consolidations under §1407 as creating a single civil action. Instead, they are an intermediary form of consolidation. Steinman, *supra* note 16, at 718-719.

[63] Whether aggregation is efficient in practice is an unanswerable empirical question unless we define efficiency. The findings in Section IV, below, offer a series of partial answers. Whether or not the push for efficiency is a good thing, depends on who you ask. Compare Carter G. Phillips et al, *Rescuing Multidistrict Litigation from the Alter of Expediency*, 1997 BYU L. REV. 821 (arguing against "the notion that judicial process must be compromised because of the perceived exigencies of expansive litigation" in the context of the practice of self-transfer which the Supreme Court later outlawed in *Lexecon* in 1998) and Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008) (defending the merits of multi-centered decision making over the push for efficiency) to Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711 (1991) (arguing that Congress should expand § 1407 to allow the JPML to consolidate cases for trial, not just the pre-trial proceedings).

[64] A common critique of multidistrict litigation is that the focus on the common questions of fact has a "blending effect" which obscures the ways in which the cases are different, even where those differences may raise core questions of liability. See e.g., Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879, 893.

into databases.[65] To compile this data, personnel from the court clerk's office record over 40 different pieces of information about every case as it closes including: how the case came to the district court, what kind of representation the parties had, and how the case terminated.[66] This study uses the data for all civil cases terminating between 2006 and 2008. Although the AO originally prepared this data for internal use, the Federal Judicial Center has generously made it easily available to researchers via the Interuniversity Consortium for Policy and Social Research. This data has proven to be an invaluable resource for studying federal civil litigation.[67] Despite weaknesses in specific variables,[68] audits show the data to be generally reliable.[69]

To audit individual variables researchers usually compare the database to court dockets available on PACER.[70] As others have noted before, the risk in this kind of audit is that the same people generally prepare both the dockets and this database meaning that the same error may appear in both the sample and the control.[71] Gillian Hadfield has audited disposition codes in the AO database extensively.[72] I am rely on her work to correct for known errors in the data. Her audits reveal that the coding for case disposition undercounts settlements.[73] While each case received only one disposition

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[65] This study relies on FEDERAL COURT CASES: INTEGRATED DATABASE 2006, FEDERAL COURT CASES: INTEGRATED DATABASE 2007, and FEDERAL COURT CASES: INTEGRATED DATABASE 2008. The databases are available at Available through the Interuniversity Consortium for Policy and Social Research, http://www.icpsr.umich.edu/icpsrweb/ICPSR/.

[66] For a comprehensive description of how the Administrative Office collects this data see, Kevin M. Clermont and Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119 127-29 (2002); Theodore Eisenberg and Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis,* 78 NOTRE DAME L. REV. 1455 (2003) [hereinafter Eisenberg, *Reliability*].

[67] Frank B. Cross, *Comparative Judicial Databases*, 83 Judicature 248, 248 (2000) (calling the AO Database "by far the most prominent" database for legal researchers).

[68] *See* Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMPIRICAL LEGAL STUDIES, 571, 572 (2004) (discussing the strengths and weaknesses of the AO data); Eisenberg, *Reliability, supra* note 68, at 1459.

[69] For a survey of audits of individual variables see, *Id*. at n. 21 (bankruptcy, class action and award amount data appear to be relatively unreliable); Kevin M. Clermont and Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 585 (1998) ("Many different people entered the data over an extended period of time, although this dispersion at least would neutralize mistakes and biases.").

[70] Available at http://pacer.psc.uscourts.gov. PACER stands for Public Access to Court Electronic Records.

[71] Eisenberg, *Reliability, supra* note 68, at 1459.

[72] Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275 (2008) [hereinafter Hadfield, *Exploring*]; Gillian K Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) [hereinafter Hadfield, *Settlements*].

[73] I have used Two-Sample Means Tests to compare data from the AO database to the disposition frequencies reported by Eisenberg and Lanvers in their study of 3,328 dockets of cases in the Eastern District of Pennsylvania and the Northern District of Georgia that terminated between July 8, 2001 and

code, not all of the codes are mutually exclusive in practice. For example, audits reveal that "Dismissed: Voluntary," "Dismissed: Other" and "Judgment on: other" all contain a large number of settlements.[74] Oftentimes parties only mention that a case settled on the document effectuating dismissal such as a voluntary motion to dismiss under Federal Rule of Civil Procedure 41(a). If the clerk did not know that the parties were pursuing settlement and did not read each document closely while coding, such a case would likely appear to belong in the "Dismissed: Voluntary" category. Without auditing the MDL disposition codes applied to MDL cases against dockets it is impossible to know whether they suffer from the same kinds of coding errors as other cases. However, I am assuming that the AO data on MDL cases accurately reflects how these cases terminated for two reasons. First, an MDL requires careful management on the part of the court; to aid in that, transferee courts keep a master docket that lists what is happening in each of the claims in the MDL in great detail.[75] The JPML recommends that the transferee court assign one experienced docket clerk to manage all aspects of the MDL, and to assign additional support staff including CM/ECF programmer/administrator who is familiar with the MDL process.[76] Second, when a settlement or other disposition occurs within an MDL, it likely effects several cases and especially in the case of settlement, reflects significant involvement on the part of the court to coordinate.[77]

To determine which cases were in an MDL, I looked at the variable in the database indicating the origin of the case, that is whether it was originally filed in the district in which it terminated or whether it came to that district by another process.[78] For the purposes of this study, an MDL case is one where the origin variable is "6: multidistrict litigation." When a case becomes part of an MDL, it receives a new docket number in the transferee district and does not retain any link to its old docket in the AO data. By looking at the origin variable in the data, I am able to study individual cases within the MDL system but not whole MDL proceedings.

January 7, 2002. Eisenberg, *Settlement*, *supra* note 12, at 128. Where their results differ from the AO databases in a statistically significant way, I am reporting this difference as I discuss the variable in question. Because their data only cover two districts and the differences between those districts were statistically significant, its usefulness as a control is limited. For more detailed audits of specific disposition codes see, Hadfield, *Exploring, supra* note 72, at 1308-10; Hadfield, *Settlements, supra* note 72, at 724-727 (2004) (finding that most coding errors arise where the categories are not clearly exclusive).

[74] *Id.*

[75] These master dockets are available through PACER.

[76] Judicial Panel on Multidistrict Litigation & The Federal Judicial Center, TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE COURT CLERKS 1 (2008).

[77] The CM/ECF system used to create and manage dockets allows clerks to update several dockets simultaneously so I am assuming that where the clerk marks a settlement on the master docket, it appears on the individual dockets associated with each case within the MDL. *Id*. at 6.

[78] The categories for this variable are: 1: Original Proceeding; 2: Removed; 3: Remanded; 4: Reinstated/Reopened 5: Transfer from Other District; 6: Multidistrict Litigation; 7: Appeal to District Judge; 8: Second Reopen; 9: Third Reopen; 10: Fourth Reopen; 11: Fifth Reopen; 12: Sixth Reopen.

The AO databases also include a variable for Nature of Suit ("NOS"), the information for which comes from civil cover sheets provided by plaintiffs and later dockets. As of 2008, there were 100 different NOS codes for plaintiffs to select, not all of which appear exclusive. For example, 371 is "Truth in Lending" and 480 is "Consumer Credit." The civil cover sheets on which attorneys select an NOS offer little guidance for which to choose. To reduce the impact of inconsistent classification, I have used the NOS codes to group the cases into categories by kind as described in Appendix A.

IV. FINDINGS AND ANALYSIS

A. Dispositions in General

The data unsurprisingly reveals that there is a statistically significant difference in how MDL and non-MDL cases terminate. The raw AO data on the settlement rate outside of multidistrict litigation is unreliable due to widespread categorization errors. However, for the reasons discussed in Part III above I am assuming that these errors are not present in the MDL pool. Gillian Hadfield has corrected the disposition rates for 2000 based on her audits of the disposition codes. She then further broke this data down and provided disposition rates for each combination of individual or organizational plaintiff and defendant.[79] Because most MDL's are cases where and individual plaintiff sues an organization defendant (I. v. O. cases),[80] it is more accurate to compare MDL's to the disposition frequencies of individual verses organization cases than to compare MDL's to all kinds of cases. I am relying the data from 2000 that Hadfield adjusted for known coding errors to make this comparison. Relying on Hadfield's categories, Table 1 shows how the dispositions of MDL's differs from the dispositions of non-MDL cases brought by individuals against organizations. Appendix B shows the frequency of each kind of disposition as recorded in the AO data.

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[79] Hadfield, *Settlements*, *supra* note 72, at 1297.

[80] Of the 24,316 cases in the MDL sample, my most generous estimate of the number of cases that are Organization v. Organization (O. v. O.) is 600 based on a survey of the NOS codes in which there are MDL's. I would expect the O. v. O. cases to include all of the patent and trademark cases, most of the antitrust cases and the other statutory act cases (since this is where Hatch-Waxman cases often fall) and the occasional securities or property case. 600 cases is only 2.4% of the MDL pool. Further suggesting that most MDL cases are I. v. O. is that within the MDL pool, nearly 94% of claims are torts which are also likely to be I v. O cases. Hadfield's study suggests that O. v. O. cases are 22.3% of all civil cases. *Id*. at 1298. Because it is unlikely that there are any MDL's with an individual defendant, it may be distorting to compare MDL's to all kinds of cases. Nonetheless, we should note that the frequency of all outcomes in I. v. O and O. v. O. cases differ in a statistically significant way. *Id*. at n. 108.

TABLE 1: FREQUENCY OF NON-MDL DISPOSITIONS COMPARED TO FREQUENCY OF MDL DISPOSITIONS

Case Disposition	Non-MDL[81] (I. v. O. only)	MDL [82] (all cases)	Difference
Non-final	28.9%	21.0%	7.9%
Abandonment	2.4%	1.6%	0.8%
Default	1.0%	0.0%	1.0%
Settlement	36.0%	50.6%	14.6%
Non-Trial Adjudication	23.3%	26.7%	3.5%
Bench Decision[83]	4.9%	0.0%	4.9%
Jury or Directed Verdict	1.7%	>0.1%	>1.7%
Total	**100%**	**100%**	-

Two-Sample Proportions Test $p<0.001$ for all rows

While the difference in the kinds of cases on the MDL docket as compared to the kinds of cases tried individually may explain part of this difference,[84] the multidistrict litigation process itself changes how the parties interact with each other and in doing so, changes how cases terminate. The subsections below suggest what role the multidistrict litigation process may have in causing the difference in the distribution of dispositions.

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[81] All data in this column are from *Id*. Her data is from the Federal Court Cases: Integrated Database, 2000. I have no reason to think that there has been any change in disposition frequency between 2000 and 2008.

[82] To make the data comparable, I recoded disposition data to match Hadfield's categories as closely as possible. Appendix B shows which dispositions are in which category.

[83] Under § 1407, bench decisions and trials can only occur in an MDL in antitrust cases and where the judge conducts a bellwether trial.

[84] Appendix A, *infra* compares the kinds of cases that comprise the MDL docket to those that proceed individually.

1. Transfers and Remands

Although § 1407 limits the transferee court's power to the "pretrial phase" with just one small exception,[85] it is difficult to overstate the importance of consolidation. Both courts[86] and commentators[87] have understood "pretrial" to mean literally everything that happens before trial, even if the order would preclude a trial.[88] Transferee courts' power thus includes not only discovery but also motions to dismiss and motions for summary judgment.[89] Because transferee courts only transfer or remand 3.5% of all cases for further proceedings in another venue, the pretrial phase is often dispositive.[90] The data confirm that even after the Supreme Court's ruling in *Lexecon*, which barred transferee judges from conducting trials,[91] transferee judges remand less than 1% of MDL cases back the transferor district. Indeed, the AO data show that a case is four times likely to be transferred to another district if it is not part of an MDL than if it is part of an MDL. Many commentators view this low remand rate as a good thing, indicating that MDL's are an effective means for reaching final disposition, usually settlement, as efficiently as possible.[92] Of course, whether a high settlement rate is a good thing remains an open question.[93]

That most cases terminate in their transferee court raises questions about what becomes of the state-law claims that follow so many of these cases into federal court. Although as much as 19% of the MDL docket involves cases that began in state court, transferee judges remanded only 366 or 1.51% of MDL cases to state court between 2006 and 2008.[94] Since just

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[85] 28 U.S.C. § 1407(a). Section 1407(h) grants the transferee court jurisdiction over both the pre-trial and trial phases of cases brought under section 4C of the Clayton Act, 15 U.S.C. § 15(c).

[86] *Lexecon Inc. v. Milberg Weiss Bershad Hynes and Lerach,* 523 U.S. 26, 34-35 (1998).

[87] Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D 575, n.21 (1978) (interpreting the legislative history of § 1407 as giving transferee judges "complete control" over all pretrial motions).

[88] In re Factor VIII or IX Concentrate Blood Prods. Litig., 169 F.R.D. 632, 636 (N.D. Ill. 1996) (On limiting the number of witnesses designated for trial: "The pretrial and the trial are not, as defendants imply, two unrelated phases of the case. Rather, they are part of a continuum that results in resolution of the case, and the relationship between them is intimate.").

[89] Fallon, *supra* note 9, at 2328.

[90] See *infra* Appendix B.

[91] 523 U.S. at 34-35 (1998) (holding that the work "shall" in § 1407(a) creates an obligation, "impervious to judicial discretion," to remand the case to the transferor court and bars the transferee court from assigning the case to itself under § 1404). Judge Fallon has called the bar on self-transfer the only limitation on a transferee court's power, *supra* note 9, at 2328.

[92] E.g., Marcus, *supra* note 6, at 2265.

[93] *Compare* Owen Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073 (1984) (decrying the rise in settlement), with Eisenberg, *Settlement supra* note 73, at 145-146 (suggesting that settlement is a measure of success).

[94] A remand rate of 1.51% for MDL's differs from the remand rate of 3.06% found by Eisenberg and Lavan at a 99% confidence level. Their remand rate of 3.06% differs from the AO data's rate of 2.28% at a 99% confidence level. *Id*.

over half of all MDL cases settle,[95] without knowing what individual settlements look like it is impossible to know whether differences in state law receive any consideration. State law claims involving tort and commercial law dominate the MDL docket.[96] If plaintiffs drop the state-law claims in the MDL process or if global settlements do not reflect the differences in the state-law rights of plaintiffs, the MDL process may compromise the efficacy of state-law regulation. While there is no way to measure which state-law rights the multidistrict litigation process ignores and whether these would have mattered much in a stand-alone federal case, we should keep this potential loss in mind as we consider the merits of the MDL process.

2. Settlement

Settlement occurs when the parties negotiate an agreement in exchange for the plaintiffs discontinuing their cases in court. Settlement need not take the form of the defendant paying the plaintiff some sum as compensation but that is the archetypal form. Settlement so defined is a kind of plaintiffs' victory since, although a jury may have awarded a greater sum or the compensation may be symbolic, they ultimately received some form of redress for their grievance.[97]

As shown in Table 2 below, MDL cases are more likely to settle than non-MDL cases, even when controlling for differences in the kinds of cases consolidated into MDL proceedings.[98]

The AO data shows that slightly more than 13% of the cases terminating in federal court between 2006 and 2008 were removed from state court. Of these removed cases, 4.82% or 4,727 cases were later consolidated for multidistrict litigation. Of the MDL cases that originated in state court, 4,125 or 87.26% were in federal court under diversity jurisdiction which may suggest that they involve significant state-law claims.

[95] See *infra* Part IV.A.2.

[96] See *infra* Appendix A.

[97] Several recent commentators have defined settlement "by distinction from contested judgment." Under this definition, settlement is not a marker for plaintiffs' success. Kevin Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 121 (2009). Clermont and Schwab's definition of settlement includes cases dismissed for lack of prosecution, which I am calling "abandoned," cases decided on default or consent, all cases dismissed voluntarily or coded as "dismissed: other" and cases that were statistically closed. *Id*. This definition of settlement shows a settlement rate around 70%. *Id* at 22. I find this definition unhelpful, especially in the context of multidistrict litigation where even the possibility for contested judgment is remote. When a court dismisses a case on default because the plaintiff failed to file an answer to a motion to dismiss in the proper format, something very different has happened from when the defendant agrees to compensate the plaintiffs for their losses. The notion that plaintiffs whose cases were dismissed for abandonment or on default made a merits-based choice leading to that disposition fails to appreciate wherewithal gaps between many plaintiffs and defendants.

[98] See *infra* Appendix A for explanation of how I have categorized the cases by kind.

TABLE 2: SETTLEMENT RATE FOR MDL CASES

Case Kind (independent variables)	B	Probability of Settling if in an MDL
MDL	.864 (.014)***	—
Benefits	-.166 (.178)	.258
Civil Rights	1.021 (.177)***	.533
Commercial	1.040 (.177)***	.537
Criminal/Prisoner[99]	-1.674 (.177)***	.071
Employment	1.277 (.177)***	.596
Federal Rights	.587 (.177)**	.425
Immigration	-.113 (.200)	.268
Property	.149 (.178)	.323
Regulation	.413 (.181)*	.383
Tax and Revenue	-.779 (.180)***	.159
Tort	.820 (.177)***	.483
Constant	-1.666 (.177)	
Log Liklihood	-366264.91	
Pseudo R^2	0.112	
Number of Cases	746992	

Notes: Coefficients are logistic regression coefficients. Standard errors are in parenthesis. *** p<0.001, **p<0.01, *p<0.5.

There are four explanations for why cases in multidistrict litigation settle so much more frequently than stand-alone cases. First, the average claim in multidistrict litigation is more likely meritorious than the average claim in a stand-alone case. There are multiple screens to keep frivolous cases out of the multidistrict litigation process. Before a motion for consolidation is filed, the defendant may move to dismiss the case for failure to state a claim on which relief can be granted,[100] or if the plaintiff filed *in forma pauperis*, the judge may determine that the case is frivolous and dismiss it.[101] Once both sides have filed their pleadings, the defendant may also be able to obtain dismissal of frivolous claims with a motion for summary judgment.[102] Section 1407(a) directs the JPML to consolidate only those claims that contain a common question of fact and where the transfer serves the goal of ef-

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[99] These are primarily cases of inmates disputing prison conditions. All of the claim in this category are technically civil claims.

[100] Fed. R. Civ. R. 12(b)(6).

[101] 28 U.S.C. 1915(e)(2) ("Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that…the action or appeal is frivolous or malicious.") *But see*, Herrmann, *To MDL, supra* note **Error! Bookmark not defined.**, at 45 (suggesting that the JPML does indeed transfer non-meritorious cases and that only the most diligent transferee judges screen these cases out).

[102] Fed. R. Civ. P. 56.

ficiency. It is difficult to imagine that the JPML would find that a plainly frivolous case would meet these criteria.[103]

Second, the structure of the plaintiffs' representation after consolidation may insulate claims from dismissal and encourage settlement. One of the first things that the transferee judge does is appoint a lead attorney or a plaintiffs committee. As discussed in Part IV.B below, plaintiffs without representation effectively get an attorney. Plaintiffs who did have representation may receive legal counsel of a higher quality, because the transferee judge is likely to appoint experienced and capable counsel.[104]

Third, and most important, by bringing all of the parties and counsel disputing liabilities within a certain set of facts before a single judge, multidistrict litigation may provide an opportunity for negotiating a global settlement, one that is not otherwise found outside of the class action process.[105] The Federal Rules of Civil Procedure command all judges to "facilitat[e] settlement" in the interest of disposing of a case quickly and inexpensively.[106] This incentive may be particularly strong for a transferee judge since a settlement is necessary "to avoid the inefficiency and lack of uniformity of returning all cases to their originating courts."[107] Judith Resnik argues that the discovery procedures imposed by the Federal Rules of Civil Procedure forced judges to become enmeshed in the facts of the case during the pretrial phase and ultimately leads to judges having a more "managerial" role over the case.[108] Judges may take an even more managerial role in multidistrict litigation. Discovery is the focus of the proceedings in the transferee court and one of the purposes of transfer is to coordinate the discovery process.[109] Having a single judge manage the flow of information between the parties may make finding the point at which to settle easier.[110]

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[103] But see, Sherman *supra* note 8, at 2211 (suggesting that the MDL process insulates weak claims from review on their merits which implies that some frivolous cases to make it through the screens).

[104] Barry, *supra* note 53, at 63.

[105] Indeed the Manual for Complex Litigation tells transferee judges that "it is advisable to make the most of this opportunity [having all of the parties in one place] and facilitate the settlement of the federal and any related state cases." MANUAL, *supra* note 31, at §20.132.

[106] Fed. R. Civ. P. 16.

[107] Sherman, *supra* note 8, at 2211.

[108] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391-393 (1982).

[109] See Alfred M. Wolin, *Comment*, 31 SETON HALL L. REV. 907 (2001) (describing his initial conference in *In re The Prudential Insurance Company of America Sales Practice Litigation* as a "touchy feely" "learning experience" and calling "cooperation and communication between counsel and the court" the "*sine qua non* of the successful handling of aggregated claims").

[110] Herr, *supra* note 24, at §9:12; *The Judicial Panel and the Conduct of Multidistrict Litigation*, *supra* note 10, at 1014 ("multidistrict litigation serves chiefly to bring all the parties together and thus to facilitate the resolution of what is frequently the only real issue—negotiation of damages."); MANUAL, *supra* note 31, at §20.132 (bringing all of the parties before a single judge "afford[s] a unique opportunity for the negotiation of a global settlement").

Fourth, early commentators suggested that the cost of transfer could coerce litigants into settling their cases.[111] Anecdotal evidence from practitioners suggests that is not an unreasonable proposition. Attorneys complain that litigating outside of their "home" district is highly inconvenient.[112] For litigants paying their attorneys at an hourly rate, an MDL may drive up costs and thus induce that litigant to settle for a less favorable sum. Similarly, parties who suddenly see their discovery costs balloon beyond what they anticipated may also be inclined to settle for less favorable sums, regardless of what they think about the merits of the case.[113]

The high settlement rate in MDL's paired with their growing popularity make all the more urgent the American Law Institute's claim that "a fresh look needs to be taken at how non-class aggregate settlements should be regulated."[114] Part of the ALI's concern is that non-class aggregate settlements, such as settlements in multidistrict litigation, may occur without any judicial oversight and therefore without court review for fairness. The high degree of judicial involvement in the MDL process mitigates this concern to a certain degree but the question of fairness remains strong particularly in the case of *pro se* and inadequately represented plaintiffs. In a class action, the attorneys for the representative plaintiffs have a fiduciary duty to the entire class. The relationship between lead attorneys and non-client MDL members is less clear.[115] Of course, in multidistrict litigation, unlike in class actions, individual plaintiffs must choose to accept any settlement offer. But the ability to reject an offer may be cold comfort to *pro se* or inadequately represented plaintiffs who have little hope of prevailing later down the line.[116] Among the ALI's proposals is that there be a non-waivable right to challenge a settlement as unfair in order to provide a strong incentive for counsel to make sure that "the allocation of the settlement to each claimant are fair."[117]

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[111] *The Judicial Panel and the Conduct of Multidistrict Litigation*, *supra* note 10, at 1014.
[112] Olson, *supra* note , at 350.
[113] *Id.* (citing complaints from attorneys who have seen their discovery costs skyrocket when multidistrict litigation lumps their clear-cut claims in with other claims for discovery hearings).
[114] PRINCIPLES, *supa* note 7, at § 3.15 cmt. a (2009).
[115] The easiest example of the complexity here lies in the issue of how to compensate the attorneys who serve on plaintiffs committees. The Manual for Complex Litigation merely suggests that where fees cannot appropriately be charged to clients, that the court should define the arrangement for compensation early in the case. MANUAL, *supra* note 31, at 14.215. What should be done when there are many *pro se* and *in forma pauperis* plaintiffs and just a few represented plaintiffs or when the primary remedy does not take the form of damages? Indigent plaintiffs may feel a greater urgency to settle; how should their rights and interests be accommodated?
[116] See Fiss, *supra* note 93, at 1076 (arguing that poor plaintiffs feel additional pressure to settle because they cannot amass the information they need for trial, need relief as soon as possible and cannot afford to continue litigating their claims).
[117] *Id*. at § 3.17 cmt. b.

3. Non-final Adjudication

These are the cases coded as statistically closed,[118] stayed pending bankruptcy, transferred or remanded to another district, state court, an agency or to another MDL docket. The number of cases subject to non-final adjudication is over-inclusive insofar as it counts cases that were dismissed with leave to re-file for which the period for re-filing has expired. Assuming *arugendo* that the goal of MDLs is to maximize efficiency, the fact that nearly 27% of cases subject to the multidistrict litigation process do not reach final adjudication in their transferee district is troubling. It suggests that after all of the costs of the MDL, additional litigation costs remain.[119] To lessen the inefficiencies of putting a case through the multidistrict litigation process but not reaching a final decision there, commentators have suggested using bellwether trials so that those cases that do not reach final adjudication within an MDL have a clear model wherever they may end up.[120]

B. Pro Se *Plaintiffs*

Many scholars have noted that *pro se* litigation has grown rapidly in recent years, particularly among the poor.[121] According to the AO data, nearly 27% of all civil cases terminating in federal court between 2006 and 2008 were brought by *pro se* plaintiffs against represented defendants.[122] Conventional wisdom suggests that a *pro se* party will almost always lose to a represented party.[123] As one commentator described it, "while law without lawyers is an increasing possibility for many Americans, it is frequently law without justice."[124] As Table 3 shows, *pro se* plaintiffs have different outcomes in federal court than their represented peers.

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[118] Statistical closing is a docket management tool subject to different rules by district.

[119] These costs are both temporal and financial. If a case does not settle in the transferee court, then it has added delay from the consolidation process and from planning how to proceed in the transferee court but without having any guarantee that discovery in the multidistrict litigation process is any faster than outside of it. See Heyburn, *supra* note26, at 2243 ("the most frustrating delay for everyone may occur after the JPML has finished its work…the transferee court may require anywhere from three weeks to eight weeks to obtain and docket the records of the transferred actions…and schedule counsel for an initial conference"). Insofar as the attorneys involved are paid by the hour, the costs are financial as well.

[120] MANUAL, *supra* note 31, at §20.132 (2009); Fallon, *supra* note 9.

[121] Deborah J. Cantrell, *Justice for Interest of the Poor: the Problem of Navigating the System without Counsel*, 70 FORDHAM L. REV. 1573, 1582 (2002); Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 475, 479-81 (2002).

[122] In courts dealing with traffic, family and housing courts the number of *pro se* plaintiffs can reach nearly 90%. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047, n. 399 (1999).

[123] See e.g., Michael Milleman, *supra* note 1; Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. POVERTY LAW & POL'Y 1 (2003).

[124] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 404 (2004).

TABLE 3: UNADJUSTED FREQUENCY OF NON-MDL DISPOSITIONS FOR REPRESENTED PLAINTIFFS COMPARED TO PRO-SE PLAINTIFFS[125]

Case Disposition	Represented Plaintiffs		*Pro Se* Plaintiffs	
Non-final	152,765	29.2%	30,987	15.5%
Abandonment	7,359	1.4%	15,032	7.5%
Default	23,985	4.6%	310	0.2%
Settlement	158,725	30.4%	8,892	4.4%
Non-Trial Adjudication	165,195	31.6%	144,018	71.9%
Bench Decision	2,712	0.5%	290	0.1%
Jury or Directed Verdict	11,705	2.2%	700	0.4%
Totals	**522,447**	**100.00%**	**200,229**	**100.00%**

Two-Sample Proportions Test $p<0.001$ for all rows

For represented plaintiffs, settlement may be an incomplete victory.[126] For *pro se* plaintiffs, settlement may be their only chance at victory. Many *pro se* plaintiffs lose on technicalities because they are unable to navigate the complexity of the legal system.[127] While judges often construe the pleadings of *pro se* plaintiffs more liberally than those of represented plaintiffs, everywhere else, courts hold *pro se* plaintiffs to the same procedural and substantive rules as represented plaintiffs.[128] Moreover, simple requirements like deadlines often prove fatal for *pro se* litigants.[129] As Table 3 shows, *pro se* plaintiffs experience much a much higher rate of non-trial adjudication.[130] Within the cases that terminate on non-trial adjudication,

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[125] This data is unadjusted for the known coding errors described in section II.A.2, *supra*. I have no reason to suspect that any coding errors would be systematically different between the two columns as presented. See Table 1, *supra*, most of the error is in counting cases that actually settled as having terminated in some other kind of non-trial adjudication.

[126] Theoretically the price the settle for should include a discount for the cost of the litigation, the convenience of not going to trial, and the chance that they may not succeed. If a plaintiff has a slam-dunk claim but can only afford a limited amount of litigation they may settle for much less than justice require that they receive.

[127] Tiffany Buxton, *Foreign Solutions to the U.S.* Pro Se *Phenomenon*, 34 CASE W. RES. J. INT'L. L. 106 (2002) (summarizing studies that suggest that many *pro se* plaintiffs never reach trial solely because they cannot survive the procedural motions).

[128] *Id.* at 114.

[129] Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L. J. 821, 821 (1997).

[130] I have categorized judgments on a motion before trial as a kind of non-trial adjudication. They comprise 30.9% of this category. The codes "14: Dismissals: other" and "17: Judgment on: other" account for 68.2% if this category. While the AO data does include a variable for which party won, it codes too many cases as "Unknown" to make it useful. Plaintiffs can win outside of trial by settling or winning a motion for summary judgment but there are many more ways for them to lose. Except when miscoded, neither settlement nor summary judgment should appear as "14: Dismissals: other" and "17: Judgment on: other." It is difficult to imagine that many *pro se* plaintiffs have the procedural wherewithal to win

summary judgment offers the only chance for plaintiff success.[131] Yet even if it is possible for *pro se* plaintiffs to win motions for summary judgment, it is difficult to imagine that many of them have the procedural wherewithal to do so.[132] It is more likely that when a *pro se* plaintiff's case terminates on non-trial adjudication, the plaintiff has lost. We know nothing about the cases that terminate on non-final adjudication except that there is a chance that the plaintiff needs to do something else before the case can reach final adjudication. Outside of settlement then, *pro se* plaintiff victories may lie in cases terminating on Default, Bench Decisions, or Jury or Directed Verdicts, which together total only 0.7% of all *pro se* cases. In other words, settlement is how *pro se* plaintiffs win.

Multidistrict litigation eliminates the difference in the settlement rates for *pro se* and represented plaintiffs.

TABLE 4: COMPARING SETTLEMENT RATES OF REPRESENTED AND *PRO SE* PLAINTIFFS

	Represented Plaintiffs			***Pro Se* Plaintiffs**			**Difference**
	Total Cases	Total Settled	%	Total Cases	Total Settled	%	
Non-MDL	522,447	158,725	30.4%	200,229	8,892	4.4%	26.0%
MDL	23,605	11,956	50.7%	711	354	49.8%	0.9%

Two-Sample Proportions Test $p<0.001$ for Non-MDL cases, the difference for MDL cases is not statistically significant.[133]

Insofar as multidistrict litigation enables claims as much as it "expedites" them, it resembles its more controversial cousin, the class action.[134] A number of factors may explain why there is no difference in the settlement rate between represented and *pro se* plaintiffs in multidistrict litigation, not the least of which is that the MDL process effectively gives *pro se* plaintiffs representation. A defendant has little incentive to settle with a plaintiff whom the defendant knows will in all likelihood not be able to prevail. But

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motions for summary judgment. Therefore, I am assuming that nearly all of the cases that I have categorized under "Non-Trial Adjudication" are defendant victories.

[131] See Hadfield, *Settlement*, *supra* note , at 726 (describing the results of her audit of the "6: Judgment: Motion Before Trial" code in the AO data which includes motions for summary judgment).

[132] Plaintiffs would first have to know that it exists. Next, they would need to understand what it is well enough to make the requisite legal arguments. Then, they would need to know that summary judgment requires a motion and how to file a motion and respond to the defendant's opposition to or even cross-motion for summary judgment.

[133] Due to know errors in coding for settlements, discussed in section II *supra*, I am unable to compare the data with a single column.

[134] See Resnik, *supra* note 7, at 6.

under the shared resources approach of MDL's, *pro se* plaintiffs' lack of resources does not exclude them from inclusion in a global settlement. This suggests that *pro se* plaintiffs do indeed have meritorious claims prevents them from vindicating those claims.[135]

The lead attorney plaintiff's committee appointed by the JPML handles most motions in the transferee court, meaning that *pro se* plaintiffs have fewer opportunities to make fatal procedural missteps. Furthermore, when in an MDL, the defendant's focus is not on how to resolve an individual plaintiff's claim but rather on how to resolve the entire controversy. If the claims are meritorious (or appear meritorious enough that they are unlikely to be dismissed quickly), all incentives point to global settlement.[136] Settlement is the best shot that a *pro se* plaintiff has at justice since if they do get to trial, they will almost certainly face rules of procedure, rules of evidence, and substantive law that they are unable to handle.[137] This does not mean settlement is perfect. Indeed, Owen Fiss' observation that indigent plaintiffs may feel additional pressure to settle because they need the money as soon as possible may be especially true in multidistrict litigation because MDL's lengthen the litigation process and increase its complexity.[138]

Despite the promising figures regarding settlement, Table 5 shows that moving a *pro se* plaintiff's case into an MDL has little effect on the likelihood that that plaintiff will abandon the case.[139]

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[135] See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092-94 (1988) (Arguing that lawyers should consider the relative merit of cases in determining who to represent since most people are unable to enforce their rights due to a lack of resources, the most important of which is professional assistance).

[136] Of course, any individual plaintiff in an MDL, unlike an individual plaintiff in a class, may reject the settlement offer at which point the JPML is likely to remand their case to the transferor district for trial.

[137] Buxton, *supra* note 127, at 114-15. Once in trial, the *pro se* plaintiff may compromise the neutrality of the judge with their constant need for assistant and delay the trial process thereby increasing the chance that the defendants' substantive rights will be compromised. *Id*. at 115.; Rhode, supra note 124, at 403 (describing how some judges fear that they will encourage parties to appear *pro se* if they appear to lend a hand to *pro se* litigants).

[138] Fiss, *supra* note 93, at 1076.

[139] Audits have not shown any significant problems in the AO data for disposition by abandonment or default. Hadfield, *Exploring, supra* note 72; Hadfield, *Settlements*, *supra* note 72.

TABLE 5: COMPARING ABANDONMENT RATES OF REPRESENTED AND *PRO SE* *PLAINTIFFS*

	Represented Plaintiffd			***Pro Se* Plaintiffs**			**Difference**
	Total Cases	Total Aban-doned	%	Total Cases	Total Aban-doned	%	
Non-MDL	522,447	7,359	1.4%	200,229	15,032	7.5%	6.1%
MDL	23,605	332	1.4%	711	62	8.7%	7.3%

Two-Sample Proportions Test $p<0.001$ for all rows and the "Pro-se" column.

If we believe that many *pro se* plaintiffs' claims are so frivolous that no ethical attorney would bring them, it is unsurprising *pro se* plaintiffs abandon their cases six times as frequently as represented plaintiffs. But given that the JPML only transfers cases that share common questions of fact with other claims that would benefit from coordinated pre-trial proceedings,[140] we might expect that the JPML would never transfer a claim so frivolous that no attorney would take it. Two explanations remain for why the rate of abandonment in *pro se* MDL cases is higher than instead of lower than the rate of abandonment for *pro se* non-MDL cases: first, abandonment for all cases may have little to do with the merits of the case and/or the added complexity of joining; second, MDL effectively scares off a certain number of *pro se* plaintiffs with potentially meritorious claims. As discussed below in Part V, both may be true for a number of the same reasons.

V. DISCUSSION: MULTI-DISTRICT LITIGATION AS A VEHICLE FOR BRINGING JUSTICE TO *PRO SE* AND INADEQUATELY REPRESENTED PLAINTIFFS

President Carter famously lamented the plight of the *pro se* litigant saying: "[N]inety percent of our lawyers serve 10 percent of our people. We are over-lawyered and underrepresented." Even middle-income families lack the resources necessary to obtain counsel to pursue their legal rights.[141]

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[140] 28 U.S.C. §1407(a).

[141] Rhode, *supra* note 124, at 371 ("According to most estimates, about four-fifths of the civil legal needs of low income individuals, and two- to three-fifths of the needs of middle-income individuals, remain unmet."); See also, Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Landscape for Ordinary Americans*, 37 FORDHAM URB. L. J. 129, 139 (2010) (comparing access to legal advice in the united states to access in several other countries).

The budget of the Legal Services Corporation has been cut over the last 30 years as demand increased.[142] *Pro Bono* work has filled some of the gap but there remains a "large divide between rhetoric and practice" when it comes to providing meaningful services on a large scale.[143] Further reducing the possibility that legal services will become more widely accessible is the lack of public support for publicly funded programs providing social services to the poor.[144] Multidistrict litigation, like class action, creates a framework in which every plaintiff is provided with an attorney. It thereby fill some of the gap left by society's inability, or unwillingness, to make attorneys available to plaintiffs from all socio-economic classes.

A. Consumer Cases

The rise in consumer cases,[145] especially coming out of the recent economic meltdown, presents a compelling opportunity to expand the use of multidistrict litigation and with it expand access to justice, that is, to expand the ability of legitimately wronged plaintiffs to receive redress for their injuries whether through settlement or through trial. Consumer claims track the ALI's two criteria for consolidation: low "variation" and low "viability."[146] Where consumer claims arise out of the use of form disclosures and form contracts[147] or from a standard company practice,[148] these cases are unlikely to exhibit variation in relevant facts significant enough to complicate the MDL process.[149]

Consumer cases also present low "viability"—the likelihood that the plaintiff will find adequate representation in the market.[150] Adequacy of representation is much more difficult to study since there is no objective measure of attorney quality available in the data. Two factors suggest that consumers are among the groups most likely to have inadequate representation. First, the two parties have different interests when they hire attorneys. It is economically irrational for a consumer to pay more in attorney fees that he or she expects to recover unless redress has idiosyncratic value to them. On the other hand, the defendant company is protecting against bad press and bad precedent. The defendant may be willing to pay more to defend a

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[142] Cantrell, *supra* note 121, at 1575 (describing cuts in public funding for attorneys in civil cases).
[143] *Id*. at 1577-78.
[144] *Id*. at 1578; Young, *supra* note 2, at 558-59 (1997-1998) (summarizing Regan era opposition to government provided legal services).
[145] Heyburn, *supra* note 26, at 2230 (describing recent changes in the kinds of cases on the MDL docket).
[146] PRINCIPLES, *supra* note 7, at § 2.02 cmt. b.
[147] *Id.*
[148] E.g., *In re* Farmers Insurance Co., Inc., FCRA Litigation, MDL no. 1564.
[149] PRINCIPLES, *supra* note 7, at § 2.02 cmt. b (describing the kinds of cases best suited to aggregation).
[150] *Id.*

suit than the claim itself is worth, because a verdict finding that the defendant's product is dangerous can lead to increased liability and negatively impacts the company's image. Second, consumers may not have the money to purchase the same quality representation as their opponent.[151] In claims with non-monetary[152] or statutorily limited damages or no possibility for a large pay-out, the consumers' budget may limit the quality of the attorney they can hire, if they are able to hire one at all.

For a plaintiff facing represented defendants, simply having an attorney is not enough to ensure that the merits of his or her claim will determine success. To ensure that the merits are dispositive, the plaintiff needs an attorney capable of arguing the case persuasively and fighting the rhetorical and procedural maneuvering of the adverse party. If a plaintiff has a claim fit for a contingency fee arrangement, then it is up to the plaintiff to research attorneys and find a high-quality attorney to take their case.[153] If the plaintiffs' claim is unfit for a contingency fee arrangement (such as when damages are unlikely to cover the cost of pursing the case), then the plaintiff must also consider the kind of attorney that they can afford. This is a question of attorney quality. Unless the market for attorneys is a complete sham, there should be some correlation between attorney quality and attorney fees. Looking at attorney quality as a spectrum, we can view proceeding *pro se* as an extreme version of having inadequate counsel although *pro se* plaintiffs face the additional disadvantage of not knowing the language of the law. Nonetheless, if the attorney does not have the skills needed to even have a chance at winning, it matters little how badly they lose. Reasons for a difference in attorney quality are apparent if we consider who the parties might be. On the defendants' side, there may be a national company who is fighting to preserve both their business model and their brand. Such a defendant has the funds to hire a leading law firm with experience defending this particular kind of claim in federal court. On the plaintiffs' side, there may be a solo practitioner who has neither federal court before nor have they any experience in the kind of case at hand.[154] This example is extreme, but for many consumer claims outside of products liability, it is not unimaginable.

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[151] Those consumers who do have sufficient funds for hiring representation face a risk of attorney fraud in addition to the risk of attorney incompetence. There has been so much fraud on the part of attorneys and others working on loan modifications that California recently barred individuals working on loan modifications from taking fees upfront, including retainer fees. California Senate Bill 94 (2009).

[152] E.g., *In re* Ameriquest Mortgage Co. Mortgage Lending Practices Litigation, MDL no. 1715 (where many plaintiffs seek rescission of their mortgages)

[153] If the possibility of a contingency fee leads attorneys to pursue the potential plaintiff, that plaintiff still has the burden of selecting a high-quality attorney.

[154] At least one study has shown that non-lawyers provided consistently better results for their clients than solicitors even when controlling for the kinds of cases each worked on and the hours spent on each case, because "specialization is usually more important than legal qualification in determining the quality of advocacy." Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOCIETY REV. 765, 784-796 (2003). The studies authors suggest that the poorer quality attorneys tend to serve the as legal aid attorneys due to the lower salaries and lower pres-

As discussed in Part IV.B above, *pro se* plaintiffs—whose only viable opportunity for redress is through settlement—are much more likely to settle their cases in multidistrict litigation than *pro se* plaintiffs outside of multidistrict litigation. Since the multidistrict litigation process places all transferred cases under the care of the plaintiffs' committee, underrepresented plaintiffs should experience all of the same gains as *pro se* plaintiffs.
As long as transferee judges select competent experienced counsel to represent the MDL plaintiffs, multidistrict litigation gives plaintiffs the benefit of a higher quality attorney than they can afford. Inferring from the data about *pro se* plaintiffs then, multidistrict litigation may also lessen the gap in the quality of representation between plaintiffs and defendants and in turn make the merits of the case more likely dispositive.[155]

B. Improving the Multidistrict Litigation Process for Pro-Se Plaintiffs

Where multidistrict litigation is possible, the data shows that it is a procedural regime under which *pro se* plaintiffs are more likely to recover than they would otherwise. That said, it is only beneficial to plaintiffs to the extent that it does not create new problems for them. *Pro se* plaintiffs often decide that other priorities, like families and inflexible work schedules, trump their desire for justice and they cease to pursue their claims.[156] Aside from a wholesale reform of our social safety net, no change in the *pro se* litigation process is likely to mitigate this variable. Similarly, at any point, *pro se* plaintiffs may look at the complexity of the task of bringing their claim to court and be discouraged from spending more time on what looks like (and may well be) a fruitless effort. Although the multidistrict litigation process in many respects simplifies the process for *pro se* plaintiffs by appointing them the temporary representation of the plaintiffs' committee, the whole multidistrict litigation scheme certainly appears more confusing. There is a reason why multidistrict litigation is called complex litigation. The plaintiff's claim may be resolved not by their local court but by a court

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tige of the work. *Id*. at 795-96. Other commentators have noted that corporate counsel is generally specialized while only "small town" lawyers and "the most marginal urban practitioners" still acting as generalists, suggesting that wherever possible, professionals have embraced "the quality and efficiency gains" of specialization." Herbert M. Kritzer, *The Professions are Dead, Long Live the Professions: Legal Practice in a Postprofressional World*, 33 LAW & SOCIETY REV. 713, 727 (1999). This is not to suggest that most attorneys serving consumers are deficient or somehow unfit to practice but rather that when faced with specialized corporate counsel, they are likely outgunned.

[155] Olson, *supra* note , at 365 (in an anecdotal study of the impact of multidistrict litigation on litigants, one defense attorney admitted that he "objects to MDL because he would get an opponent who 'knows what he is doing; and the other plaintiffs would get a 'free ride.'").

[156] Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1558 ("Pro se litigants are further hampered by family or work commitments that restrict the amount of time they may have to prepare their case").

on the other side of the country where the plaintiff cannot approach the court clerk for a quick explanation of what is going on. To ensure that the multidistrict litigation process does not scare *pro se* plaintiffs into abandoning their case, transferor judges should make sure that the transferred plaintiff understands the process. To accommodate the loss of direct access to the court in which their case proceeds, whatever help was available for *pro se* plaintiffs at the transferor district court should remain available to them after transfer. This may be as simple as reading letters and indicating whether or not it requires a response or as complicated as explaining what form that response needs to take. Many commentators have noted that providing assistance short of legal advice is insufficient[157] but this may not be the case in MDL litigation since the attorneys in the plaintiffs committees handle the substantive law. It may be that most of the plaintiffs' needs can be met by making available explanations of the procedures with which they are expected to comply.

C. Expanding the Use of Multidistrict Litigation

1. Costs and Benefits to Increasing the Use of Multidistrict Litigation in Cases with Many Pro-se Plaintiffs

One concern with *pro se* plaintiffs is that they need such assistance from the court and opposing counsel that they compromise the court's neutrality and the adversarial process.[158] Consolidating *pro se* complaints into multidistrict litigation wherever possible would alleviate this burden by effectively giving them counsel. In many MDL's, most of the action is in the discovery process which is likely to include issues of privilege, confidentiality, protective orders, and a whole host of issues about which the average *pro se* plaintiff has no knowledge or expertise. If a *pro se* plaintiff got to the discovery phase, he or she would undoubtedly need some sort of remedial tutoring, whether from the court clerk, the judge, or even from the attorney for the other party as they deal with deficient discovery requests. In an MDL, the plaintiffs' committee coordinates the discovery efforts for all plaintiffs, meaning that the party charged with communicating with, and in all likelihood educating, *pro se* plaintiffs has at least similar interests at stake. This is not to say that only the plaintiffs' counsel will bear the burden of explaining to the *pro se* litigants what is going on but rather that the issue is removed, at least temporarily, from the courtroom. These positive effects

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[157] *Id*. at 1559-71 (summarizing the various kinds of reform proposed to level the playing field for *pro se* litigants).

[158] See Swank, *supra* note 156, at 1559 (categorizing calls for greater assistance and accommodation into changing the rules when *pro se* litigants come before the court and changing the roles of the people who interact with *pro se* litigants).

of consolidating *pro se* cases into MDL's suggest that justice may be served by increasing the use of the multidistrict litigation system.

When the alternative is a class action, there are other benefits to the defendant of running *pro se* plaintiffs' cases through multidistrict litigation. First, becoming part of an MDL requires greater initiative on the part of a consumer than joining a class and recovery is limited to those who take this initiative. To become part of an MDL, the plaintiff must first file an independent case. The defendant's liability is limited to those who file cases.[159] If a case is meritless, the defendant can move to dismiss it at any stage. Second, unlike in a class, the defendants can choose to settle with some plaintiffs and not with others. In a class action, verifying the claims of non-named plaintiffs only occurs after the parties settle or the plaintiff wins at trial. Verification may be as simple as filling out a form. We might imagine then a set of plaintiffs whose claims were too weak to find an attorney to take them nonetheless being able to recover on a class action settlement.

There are of course costs to increasing the use of multidistrict litigation. In an MDL, a *pro se* plaintiff is a free-rider to the legal services that his or her more fortunate peers have procured.[160] We may also want to be concerned that adding *pro se* plaintiffs to the cases of represented plaintiffs forces those with representation to unfairly shoulder some of the burden of interacting with the uninitiated.[161] If the *pro se* plaintiff cannot afford to contribute to the compensation of the lead attorney or plaintiffs' committee, this is a kind of forced subsidization that potentially has real costs to those paying for the legal representation.[162] There is also a possibility that consolidating more *pro se* plaintiffs into multidistrict litigation will increase the burden that these plaintiffs impose on courts, which already struggle with

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[159] This limitation may end if one or more of the complaints is a class action.

[160] See Olson, *supra* note 5, at 365 (citing defense attorneys who complain that plaintiffs in multidistrict litigation get a free-ride on attorneys that they could not otherwise afford).

[161] Special attention must be paid to how to compensate the plaintiff's attorney whose fees cannot be fairly charged to his or her original client. Who should pay for the time they spend interacting with an indigent plaintiff when there is no guarantee that a settlement will provide a source of payment? We may perhaps say that donating some time to the indigent plaintiffs, making them full-blown clients, is the price of becoming lead attorney or part of the plaintiffs' counsel. After all, appointment as lead or to the counsel is a windfall as compared to the reduced work and thereby reduced fees of all of the attorneys not chosen for the job. See *Id.* at 364 (describing anecdotal evidence of plaintiffs attorneys disliking the multidistrict litigation process where they have to relinquish control over their case).

[162] The plaintiffs whose attorneys form the plaintiffs committee do not typically pay for all of the legal services that their attorneys provide for the group. Barry, *supra* note 53, at 63. Nonetheless, there remains the issue of how a *pro se* plaintiff should pay for his or her share of the legal services received. One solution is not to compensate the lead attorneys or attorneys for this time as long as the indigent plaintiffs are only a small proportion of the case. Attorneys appointed to lead the case receive a windfall whereas other attorneys' fees fall where there are fewer hours for them to put in. Part of the price of receiving appointment as lead counsel then could be that they donate their time to the truly indigent plaintiffs.

their "rambling, illogical pleadings, motions and briefs."[163] Because *pro se* litigants do arguably burden the courts more than represented plaintiffs, it is important not to create incentives for plaintiffs to proceed *pro se*. Expanding the use of multidistrict litigation for *pro se* plaintiffs is about accommodating the reality that not every plaintiff with a meritorious claim can get an attorney, not about encouraging plaintiffs to proceed *pro se*. Also cautioning against creating incentives to proceed *pro se* is that there remains a chance, albeit a slim one, that the transferee court will remand the case back to the transferor district, or to state court, for trial. Of course, plaintiffs could acquire counsel at this stage, but they run the risk of making a procedural mistake after coming so far and losing their case.[164] Whatever pressure these plaintiffs felt to settle before they entered the MDL process can only be greater once they are in it since failing to settle and having to go back to the transferor court both delays and makes less likely any possible recovery. Lastly, increasing the number of cases consolidated means increasing the number of cases subject to delay,[165] which may mean that some plaintiffs never see justice or that when it comes, it is too late. The burden of delay may weigh heavier on *pro se* plaintiffs if their financial situation requires that they recover quickly.

2. Amend 28 U.S.C. § 1407 to Give District Judges the Ability to Invoke JPML Review for Consolidation and Transfer

At present, § 1407(c) only permits proceedings for transfer to be initiated by the JPML or one of the parties. One possible means to increase the number of cases consolidated into MDL's is to allow judges to refer cases to the JPML for review. Federal district judges may be in a better position than *pro se* plaintiffs and some attorneys, to recognize that a case is ripe for consolidation. They may have other cases pending that concern the same facts or may know that the facts before them are likely to be at issue in other pending cases. Under the current law, it is an open question whether a judge would violate neutrality should he or she recommend to plaintiffs that they apply to have their claims transferred. This issue would not exist if it were within a judge's power to recommend that the JPML consider the case for consolidation since this would be an act of docket management, not un-

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[163] See Swank, *supra* note 156, at 1545 (describing the negative impressions held about *pro se* plaintiffs).

[164] This is another argument for using bellwether trials to ensure that when cases that do not settle leave the multidistrict litigation process they really pre-packaged trials going back to their transferor district. The fewer issues at stake for the *pro se* plaintiff, the more likely they probably are to have their case decided on its merits.

[165] The process of consolidation can add an additional 5-6 months to a case. Herrmann, *To MDL*, *supra* note **Error! Bookmark not defined.**, at 43; Heyburn, *supra* note 26, at 2243. Delay is however a feature of any kind of mass tort litigation. See Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1469 (2005).

like referring a case to a magistrate judge. The JPML may exercise its consolidation powers sua sponte.[166] There can be little harm from allowing federal district judges to suggest that it exercise this power, it must, after all, learn of these cases somehow.

3. Strengthen the Affirmative Obligation on Defendants to Notify the JPML when they Face Multiple Claims with Common Questions of Fact

Although we expect defendants to prefer the efficiencies of multidistrict litigation, this is not always the case.[167] They may have incentives to avoid multidistrict litigation if many of the plaintiffs are *pro se* or represented by unsophisticated attorneys.[168] Panel Rules 7.2(i) and 7.5(e) already require the parties to notify the Clerk of the JPML of any potential tag-along cases pending in district court.[169] These rules help ensure that multidistrict litigation does not become another venue for forum shopping but there is room for greater protection.

First, we can expand the obligations of Panel Rules 7.2(i) and 7.5(e) to any case removable to district court and impose an obligation on the defendant to try to remove the case to federal court. Mandatory removal would promote the efficiency function of multidistrict litigation by reducing the number of duplicative actions. Along with rules 7.2(i) and 7.5(e), this would have the effect of making the multidistrict litigation process mandatory once initiated. We cannot impose this burden on plaintiffs as well as defendants because the plaintiffs, even represented plaintiffs, may not have reasonable notice that there is an MDL proceeding on their facts. The defendant however is necessarily aware of all cases pending against them with common questions of fact. At the present, a defendant is under no obligation to remove potential tag-along cases pending in state court to federal court so that the JPML may consolidate or transfer them. This allows a kind of forum shopping at the expense of the less-informed plaintiff, who may not know what multi-district litigation is. As the data in Part IV.B above show, these plaintiffs have much to gain by pursuing their cases through multidistrict litigation. While it is not the role of the courts to eliminate the information

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[166] 28 U.S.C. § 1407(c)(i).

[167] See generally, Herrmann, *To MDL, supra* note **Error! Bookmark not defined.** (discussing the merits and disadvantages of the MDL process from the perspective of the defendant).

[168] *Id*. at 45 ("[M]ismatch of information sometimes helped the defense; when an MDL proceeding was created, this edge was lost.").

[169] Panel Rule 7.2(i) reads as follow, "Any party or counsel in a new group of actions under consideration by the Panel for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any potential tag-along action in which that party is also named or in which that counsel appears." Panel Rule 7.5(e) reads "Any party or counsel in actions previously transferred under Section 1407 or under consideration by the Panel for transfer under Section 1407 shall promptly notify the Clerk of the Panel of any potential "tag-along actions" in which that party is also named or in which that counsel appears." According to Panel Rule 1.1, a "tag along action" is a case "pending in a district court and involving common questions of fact with actions previously transferred under Section 1407."

gaps between parties, procedure should not be the source of that gap. When it is, procedure becomes a tool for obscuring merits.

Second, we can further fight forum shopping by requiring defendants to notify the JPML once they have a set number of cases with common questions of fact pending against them in federal courts. This number should be low enough to ensure that consolidation occurs as soon as possible in order to minimize the waste of duplicative actions. Deciding when to impose this notification obligation is the trickiest piece of this proposal. Because MDL's have different outcomes than non-MDL's,[170] and because the transfer process inevitably consumes resources, this burden should not be imposed lightly. The principles of "viability" and "variation" set out by the ALI provide good guideposts.[171] Such an obligation would pose the fewest difficulties in consumer law cases where the defendant used a form contract or disclosure statement that plaintiffs now challenge as being non-compliant with federal law such as the Truth in Lending Act.[172] In the case of form documents or company-wide practices, the question is binary: does the document comply with the law or not? By contrast, cases where liability hangs on the issue of causation, as in personal injury cases, are much more difficult. There, even admitting that one case has similar questions of fact to another case could affect the adjudication of the merits of the case.[173] For this reason, this additional obligation should not be mandatory for kinds of torts. Because multidistrict litigation holds such promise for making legal remedies available to more people, it is important that we experiment with ways to grow the system while at the same time keeping an eye out for the ways in which it may compromise the parties' rights.

VI. CONCLUSION

If we accept that an increase in the settlement rate accompanied by a decrease in the rates of non-final and non-trial adjudication indicated an increase in favorable outcomes from the plaintiff, then multidistrict litigation has been wildly successful at improving *pro se* plaintiffs' access to justice. This data on *pro se* plaintiffs reveals two things: first, having an attorney is critical for success in litigation and second, multidistrict litigation may help level the playing field for inadequately represented plaintiffs. These findings suggest that multidistrict litigation is ripe for expansion in the area of

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[170] See *supra* Part IV.A.

[171] PRINCIPLES, *supra* note 7, at § 2.02 cmt. b.

[172] 15 U.S.C. 1601.

[173] Saying that several cases pose the same question of causation invites perception to influence reality. As Herrmann notes, "If one crazy plaintiff insists that bubble gum causes brain cancer, then there's something wrong with the plaintiff. A court will realize this and dismiss the case. On the other hand, if ten thousand crazy plaintiffs simultaneously insist that bubble gum causes brain cancer, then there's something wrong with the bubble gum." *To MDL, supra* note **Error! Bookmark not defined.**, at 45.

consumer law. Plaintiffs in consumer cases are unlikely to have representation comparable to that of their opponents. More importantly, consumer cases meet the ALI's criteria of "viability" and "variation" perfectly suggesting that these cases are ideal for aggregate proceeding.

To truly understand how consolidation and transfer in the multidistrict affects how plaintiffs fare, we need more information about the details of the settlements. Nonetheless, in cases where the alternative to settlement is dismissal, an increase in the settlement rate suggests that more plaintiffs are finding justice. There are more consumer law cases pending on the multidistrict litigation docket now than ever before.[174] As these cases begin closing we will be able to study whether theory matches practice. For now, we have every reason to be optimistic. Multidistrict litigation presents a unique opportunity for consumers injured by form disclosures and contracts to recover what they have lost.

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[174] Heyburn, *supra* note 26, at 2230

APPENDIX A: KINDS OF CIVIL CASES CLOSING BETWEEN 2006-2008

Case Kind[175]	Non-MDL		MDL	
Benefits[176]	71076	9.8%	15	0.1%
Civil Rights[177]	95230	13.2%	65	0.3%
Commercial[178]	153206	21.2%	1015	4.2%
Criminal/Prisoner[179]	170286	23.6%	7	0.0%
Employment[180]	30153	4.2%	103	0.4%
Federal Rights[181]	39107	5.4%	298	1.2%
Immigration[182]	921	0.1%	0	0.0%
Property[183]	16366	2.3%	17	0.1%
Regulation[184]	3738	0.5%	0	0.0%
Tax and Revenue[185]	13596	1.9%	9	0.0%
Tort[186]	128758	17.8%	22787	93.7%
Other[187]	239	0.0%	0	0.0%
Total:	**722676**	**100%**	**24316**	**100%**

[175] These categories are based on Hadfield's in *Exploring*, *supra* note 72, at 1323-1325.
[176] Includes NOS: 791, 861, 863, 864, and 865.
[177] Includes NOS: 440, 441, 442, 443, and 444.
[178] Includes NOS: 110, 120, 130, 140, 160, 190, 195, 196, 370, 371, 410, 422, 423, 430, 450, 480, 490, 820, 830, 840, and 850.
[179] Includes NOS: 460, 510, 530, 535, 540, 550, 555, 625, and 690.
[180] Includes NOS: 330, 445, 446, 710, 720, 730, 740, and 790.
[181] Includes NOS: 400, 470, 810, 875, 890, 895, 900, and 950.
[182] Includes NOS: 462, 463, and 465.
[183] Includes NOS: 210, 22, 230, 290, and 380.
[184] Includes NOS: 610, 620, 630, 640, 650, 660, 891, 892, 893, and 894.
[185] Includes NOS: 150, 151, 152, 153, 870, and 871.
[186] Includes NOS: 240, 245, 310, 315, 320, 340, 345, 350, 355, 360, 362, 365, 368, 385, and 862.
[187] Includes NOS: 990.

APPENDIX B: DISPOSITIONS IN THE AO DATA

Disposition	Non MDL		MDL		Category
0. Transfer/remand: transfer to another district	28,998	4.0%	228	0.9%	Non-final
1. Transfer/remand: remand to state court	16,488	2.3%	366	1.5%	Non-final
2. Dismissals: want of prosecution	22,391	3.1%	393	1.6%	Abandonment
3. Dismissals: lack of jurisdiction	9,242	1.3%	75	0.3%	Non-final
4. Judgment: default	24,295	3.4%	1	0.0%	Default
5. Judgment: consent	9,468	1.3%	7	<0.1%	Non-trial
6. Judgment: motion before trial	91,830	12.7%	823	3.4%	Non-trial
7. Judgment: jury verdict	12,089	1.7%	3	<0.1%	Jury or Directed Verdict
8. Judgment: directed verdict	316	1.7%	0	0.0%	Jury or Directed Verdict
9. Judgment: court trial	3,002	0.4%	0	0.0%	Bench Decision
10. Transfer/ remand: multidistrict litigation[188]	18,050	2.5%	247	1.0%	Non-final
11. Transfer/ remand: remand to U.S. Agency	13,777	1.9%	5	<0.1%	Non-final
12. Dismissals: voluntary	75,756	10.5%	3,373	13.9%	Non-final
13. Dismissals: settled	167,617	23.3%	12,310	50.6%	Settled
14. Dismissals: other	150,392	23.2%	5,541	22.8%	Non-trial
15. Judgment on: award of arbitrator	540	0.1%	6	<0.1%	Non-trial

[188] The JPML may separate claims into separate MDL proceedings in which case instead of remanding that claim back to the transferor district, it may transfer it to a second transferee docket. For a more detailed discussion of the jurisdiction and transfer powers of the JPML see, MANUAL, *supra* note 31, at §20.131 (2009).

III

16. Judgment on: stayed pending bankruptcy	959	0.1%	0	0.0%	Non-final
17. Judgment on: other	42,949	5.9%	116	0.5%	Non-trial
18. Judgment on: statistical closing	20,482	2.8%	821	3.4%	Non-final
19. Judgment on: appeal aff'd (magistrate)[189]	8,841	1.2%	0	0.0%	Non-trial
20. Judgment on: appeal denied (magistrate)	5,194	0.7%	1	0.0%	Non-trial
Total	**722,676**	**100%**	**24,316**	**100%**	

Pearsons χ^2 P<0.001

[189] Appeals are where the district court is acting as an appellate court on a decision by a magistrate judge.