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Comment

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A Comment on Williams, Lee, and Borden, Repeat Players in Multidistrict Litigation

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I read with great interest any paper that offers a glimpse into the structure and happenings of the elite plaintiffs' bar, because, as the authors of the paper *Repeat Players in Multidistrict Litigation* recognize, "the structure of the plaintiff's bar is often difficult to observe."[1] This paper seeks to examine a fascinating sub-sub-group within that bar: repeat, elite lawyers appearing in multiple MDL proceedings over the past decade or so. While much has been written about MDLs,[2] empirical studies of attorneys appearing in MDLs are scarce. The goal of this paper is to fill that gap by examining the specialization, relationships, and timing of appearances of attorneys who have become regulars in MDL cases. I share the authors' instincts that the relationships between these elite lawyers are central to understanding how contemporary complex litigation is organized and administered.[3] I also concur with their focus on MDL proceedings, which offer an accessible data set of complex claims.

But I was left to wonder what precisely the authors were seeking to prove or expose through their network analysis and mapping of "the relationships among plaintiff attorneys" appearing before transferee courts. In other words, we already know, or think we do, that a few very powerful and experienced lawyers

1 Williams, Lee, & Borden, *Repeat Players in Multidistrict Litigation*, 5 J. Tort Law 141–172 (2012), Doi 10.1515/jtl-2014-0011.

2 *See, e.g.*, Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107 (2010); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 Tul. L. Rev. 2245 (2008).

3 Hon. John G. Heyburn II & Francis McGovern, *Evaluating and Improving the MDL Process*, Litigation Magazine at 26 (noting that the Panel administers nearly 15% of the cases on the entire federal civil docket, making its work "quite consequential for the administration of civil justice in this country").

and small firms control the lion's share of "mass litigation"—*i.e.* the sorts of antitrust, products liability, shareholder, and employment cases that are often subject to a §1407 motion for consolidation.[4] We also know (or should, by now) that these veterans of big, complex, messy cases have developed an arsenal of strategies to corral, convince, and coerce other lawyers to come together for purposes of organizing and settling cases en masse.[5] What we *do not* know—and what the authors' analysis does not shed much light upon—is whether these elite, well-connected lawyers are able to achieve "better" results for their clients than would otherwise be possible. In short: does being a repeat player in MDL cases, or further yet, being a subject-area-specialist-repeat-player portend higher damages, quicker settlements, more efficient resolutions, and better returns in the form of greater attorneys' fees?

Building on the work of Marc Galanter, and others, the authors suggest that it does—*i.e.* that if repeat players are generally advantaged in the law,[6] then it must follow that repeat plaintiffs' lawyers in MDLs may be "best able to influence the outcome of litigation (and perhaps influence the development of more favorable rules for future litigation)."[7] This assertion makes some intuitive sense: after all, expertise and access to experts may well explain the pattern the authors observe wherein repeat players tend to appear most frequently in antitrust, securities, and products liability cases.[8] These are highly technical fields requiring a good deal of both legal knowledge and economic expertise; the plaintiff-side experts in these areas are themselves a fairly clubby group of regulars. So, it would seem to follow that a certain cadre of lawyers skilled in these practice areas will continually control lawsuits within their area of expertise, leveraging the knowledge and relationships obtained from past cases.

But expertise and access to known-quantity experts cannot entirely explain the frequency with which a small group of plaintiffs' lawyers appear in MDL

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4 *Repeat Players* at 1, n. 5, *citing* Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 163 (2003) (pointing to monopolistic tendencies among class counsel). This is not to suggest that there is no significantcompetition between these lawyers. *See* Silver & Miller, *supra* note 2, at 138 (describing competition among plaintiffs' lawyers in products/pharmaceuticals cases).

5 *See* text accompanying notes 19–24.

6 *Repeat Players* at 4–5 ("Many lines of evidence point to higher success rates for attorneys with more experience, and theoretical work links such success with the ability to influence development of the law."); *id.* at 5 ("Expertise, ready access to experts, low start-up costs for litigation, and economies of scale are all advantages of well-connected, experienced lawyers."), citing Marc R. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

7 *Id.*

8 *Id.* at 16.

cases; if it did, how would one make sense of the authors' finding that MDL specialists "are *not* making many appearances in intellectual-property proceedings and are only slightly more active in employment-practices" cases?[9] After all, IP and employment are just as specialized and technical as antitrust or securities—some might even say more so—so that experience and expert contacts are just as requisite. That few MDL repeat players specialize in these areas indicates that something else may be going on.

Moreover, we have no data to suggest that the presumed experience of the repeat player MDL lawyers in their particular areas and their presumed access to a cohort of experts waiting in the wings translates into better outcomes. Unlike the work of David Engstrom in the *qui tam* context or Michael Perino in the securities class action context—both of whom found that repeat players lawyers had higher win rates and were able to achieve superior results for relators and funds[10]—*Repeat Players* doesn't seek to measure ultimate results, only the interconnectedness of a small group of plaintiffs' lawyers. Nor does the network analysis establish whether these repeat players more persistently rose to leadership positions on plaintiffs' executive or steering committees in the transferee court,[11] or whether they were able to settle their inventories at higher rates or otherwise benefit their clients in discernible ways.[12]

This is significant, because critics of MDL procedure like to envisage a cabal of well-connected lawyers, able to operate outside the strictures of Rule 23 and with little judicial oversight, settling massive inventories of claims in ways that do not benefit individual clients but do result in high attorneys' fees.[13] For example,

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9 *Id.*

10 See David Freeman Engstrom, Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of *Qui Tam* Litigation Under the False Claims Act, 107 Northwestern University Law Review 1689 (2013); Michael Perino, *Institutional Activism through Litigation: An Empirical Assessment of Public Pension Fund Participation in Securities Class Actions*, 9 Journal of Empirical Legal Studies 363 (2012).

11 I would assume that repeat players are appointed to leadership positions with greater frequency, as an MDL court will, in its own self-interest, "typically appoint[] certain lawyers who have proved their mettle in the case particulars to executive positions." Fred S. Longer, *The Federal Judiciary's Supermagnet*, 45-Jul. Trial at 7 (July 2009).

12 This is susceptible to empirical study, though it would require delving deeper into each consolidated case via ECF to locate the 23(g) order appointing lead or co-lead counsel or the public order announcing plaintiffs' steering committee.

13 *See, e.g.*, Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* 4 (FJC, 2011) ("Experience shows that MDL cases often settle in the transferee court. One of the values of MDL proceedings is that they bring before a single judge all of the federal cases, parties, and counsel making up the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement.")

Linda Mullenix has argued that the fact that nearly 90% of all consolidated claims settle before remand "resonates in back-room dealmaking, blanketed with an aura of judicial legitimacy and largely liberated from due process concerns."[14] As MDL proceedings become an even more active venue for aggregating and resolving mass litigation in the "post-class action" era,[15] the immense power wielded by a mere handful of lawyers will continue to raise important questions about governance structures, accountability, and transparency.

I would like to suggest that there are a host of informal practices and customs shared by this set of elite lawyers that may complement the authors' quantitative analyses. I call these "tribal rituals" to underscore my almost-anthropological interest in these attorney arrangements, and my sense that intense observation of and focused interviews with these lawyers, along with objective, empirical work, can help round out the portrait of this segment of the plaintiffs' bar.

I Repeat players functioning as lawyers: case filing, coalition-building, and dealmaking

The persistence of and relationships between repeat players in MDL is at least partly explained by case filing practices that have arisen among allied firms,[16] which takes place long before (but in clear anticipation of) a §1407 motion. Elite lawyers and firms engage in tremendous amounts of research and investigation prior to filing

14 Linda Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 Nw. U. L. Rev. 511, 539 (2013) ("In this setting, attorneys representing thousands or hundreds of thousands of claimants are at liberty to bargain and negotiate aggregate claims and then to cobble together a class settlement with defendants to be presented to the MDL judge. At this juncture, MDL judges, motivated by the inertial pressures to clear dockets of massive litigation, routinely bless the settlements.")

15 *See, e.g.*, J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. Tort Law 3–46 (2012), Doi 10.1515/jtl-2014-0015. For discussions of increased use of MDL proceedings, *see generally* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 Tul. L. Rev. 2205 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation after* Ortiz, 58 U. Kan. L. Rev. 775 (2010). The authors themselves observe a spike in MDL activity beginning in 2004. *See Repeat Players* at 10–13 (finding overall MDL activity has increased significantly in the past decade, with a marked spike beginning in 2004 and continuing onto the present).

16 *See also* T. Rave, *Settlement, ADR and Class Action Superiority*, 5 J. Tort Law 91–126 (2012), Doi 10.1515/jtl-2014-0012 ("Plaintiffs' lawyers in mass litigation tend to be sophisticated repeat players who are often able to obtain many of the advantages of aggregation informally by collecting inventories of clients.")

a case that they predict will end up before the Panel. These lawyers, who are deeply knowledgeable and experienced in case and forum selection, will typically examine the substantive law, reputation of the judges, and comparable attorneys' fee awards of their chosen venue, among other factors. A "leader" firm's filing is generally accompanied by a network of "friendly" firms filing near-identical claims across the country; when the cases become the subject of a §1407 motion, these friendly firms then line up behind the leader firm's motion to transfer to an advantageous venue (generally, where the leader firm originally filed).

These allegiances are vital and inevitable: firms with strong connections across time, where the partners have worked with one another and developed some trust, are bound to support one another's transfer motions. Further, loyalty will ensure friendly firms get plenty of work (and lodestar) on the case—and that their future motions for transfer will be reciprocally supported by other, powerful lawyers. This process is repeated in case after case, creating ad hoc coalitions that coordinate and divvy up leadership and power across time.[17]

Things get interesting when multiple firms have created hub-and-spoke networks of supporting firms, and then must compete against one another on §1407 transfer motions.[18] Organizational meetings of leader firms and some of their more significant consiglieri are often called—either in advance of or at the MDL hearing—so that competing leader firms can reach out to outliers or uncommitted firms to lobby for support before the Panel.[19] Leader firms may

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17 *See, e.g.*, Richard A. Epstein, *One Stop Law Shop*, Legal Affairs, Mar.–Apr. 2006, at 34, 37 ("Many large class-actions involving antitrust and consumer-fraud issues ... are handled by ad hoc alliances among multiple firms that split their labor and share the rewards of litigation.").

18 Longer, *supra* note 11 ("In a less formal process, lawyers often attempt to organize themselves before the initial conference in an effort to present an agreed-on slate to the MDL court. Because leadership roles are highly coveted and often highly remunerated through assessments imposed on each individual case in the MDL, the stakes are great and these meetings can be tense, if not contentious.")

19 Indeed, the rules promulgated by the JPML encourage such coordination. For example, because the Panel typically schedules oral arguments on 15–20 motions at each two-and-a-half-hour hearing, the JPML rules strongly urge parties sharing a common position to designate a single spokesperson. Oral argument guidelines, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Oral%20Argument%20Guidelines-April-2012.pdf. In addition, veteran lawyers all tell me that, in advance of the hearing on a particular case, the Panel's clerks call the lawyers forward to discuss the procedure—namely, to ensure that a single representative for each position has been chosen and to allot small increments of time to each. *See also* Hon. John G. Heyburn, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2236 (2007) ("the Panel generally must accommodate fifty to seventy lawyers"). And that single representative may have only a minute or two to make her best pitch to transfer the cases to a particular venue. *Id.* at 2235, n. 53.

also reach out to one another to determine whether some deal can be struck.[20] For example, leader firms may try to buy off opposition to their transfer motion with promises that, once the case is consolidated in their preferred jurisdiction, attorneys who have supported that transfer venue will receive substantial work and investment opportunities in the case (and, therefore, be eligible for substantial fees once the cases settle)[21]; there may even be promises of leadership positions on the eventual plaintiffs' steering committee.[22]

On this model, a principal reason why some lawyers recurrently appear in MDLs is that they've managed to form, or join, fluid networks that are held together through mutually beneficial arrangements that are only possible among repeat players, where there is always a "next time"—a next MDL—in which a favor can be repaid, or a threat can be carried out. The skills necessary to join such a network are not necessarily the skills that will best serve clients or class members. Indeed, the most common response I've encountered among "in-the-know" lawyers to whom I showed the authors' list of repeat players is that it contains many "superb schmoozers" who "know *everyone*"—qualities that, along with a dealmakers' mentality, may fare them well in the leadership scrum of an MDL.[23]

It is also quite possible that the repeat "schmoozer" set is over-represented to the extent that the study focuses solely on MDLs but excludes other complex (and equally important) litigations. By definition, MDLs emerge from MDL hearings. And the primary activity at MDL confabs, I've gleaned, is schmoozing. The veteran lawyers I spoke with invariably describe the bi-monthly MDL as a roving convention, where cocktail parties, rounds of golf and steak dinners

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20 Interestingly, one lawyer opined that the plaintiffs' bar was becoming more competitive and less collegial in the midst of an economic recession and concerns that class/mass litigation is drying up. She perceived an increase in hotly-contested §1407 motions, revealing a lack of consensus about where a case should be transferred, and more critically, an unwillingness to make the pre-MDL deals that were once *de rigeur*. Predictably, it must be difficult to make the "if you back me today, I'll back you tomorrow" promise if tomorrow feels far less certain than it once did. Telephone conversation with Linda Nussbaum, August 15, 2013.

21 *See* text accompanying notes 26–30.

22 It may not be possible for these warring factions to come to terms before the Panel issues is order; indeed, one possible explanation for the authors' findings relating to the timing of attorney appearances is that deals could not be struck prior to consolidation.

23 In short, I don't concur with the authors that it is "somewhat surprising to encounter so many attorneys who had appeared in such a wide variety of proceeding types" in the MDL because my sense is these are the "leader lawyers" who have, time and again, proven deft at organizing and managing disparate groups in fairly efficient ways. *Repeat Players* at 14.

providing the venue at which alliances are made and case leadership is determined.[24]

II Repeat players functioning as entrepreneurs: investment strategies within MDL

In addition to functioning as lawyers, these repeat players are also legal entrepreneurs who—once they obtain a leadership position in a consolidated case—must generate sufficient returns to offset the significant risks and financial outlays.[25] In the class action context, as I've described in prior work, this comes down to lodestar accretion. Tricks of the trade abound, but revolve in large part around staffing document reviewers at low hourly rates, and later seeking far higher fees "commensurate with the rates prevailing in the community" for similar services.[26] These financial investment opportunities to "sponsor" a document reviewer can be allocated by the leadership among the various lawyers in the case. Given that this model "presents extraordinary investment opportunities ... [where] the odds pay off handsomely,"[27] leader lawyers will dole out these prizes selectively to allied firms, further reinforcing their

24 Like any convention, the MDL is also part trade show, where receptions and events are hosted by service vendors such as e-discovery providers, economists, expert witness shops, legal software firms, notice providers, claims administrators, and others. And further like any other convention, the MDL is viewed by attendees as a boondoggle. The locations are warm in the winter (Orlando, Jan., 2013; Savannah, Dec. 2011; Charleston, Nov. 2008), cool in the summer (Portland, July 2013; Seattle, July 2009), making them perfect respites for golf, tennis (San Diego, March 2012; Santa Fe, May 2003), and other types of games (Las Vegas, Dec. 2013). Sometimes the hearings are conveniently held in cities that many elite, repeat player lawyers call home—such as Dallas (Nov. 2012), New York (Sept. 2012), and Washington (May 2012). And sometimes the hearings converge with other events of interest to lawyers, such as the ABA Annual Meeting (San Francisco, Nov. 2007) or the Kentucky Derby (Louisville, May 2011). The Panel generally meets in federal courthouses, but also convenes at fancy law schools like Harvard.

25 Lead, managerial lawyers in MDL proceedings may be awarded an additional fee payable out of the fees derived from the representation of the individual litigants whose cases are subject to coordinated pretrial proceedings in the MDL transferee court. *See* Longer, *supra* note 11, at n. 15 (internal citations omitted). But the real value of being in the leadership group is not this marginal fee, but rather, the power to divvy up responsibilities, oversee assignments, and bestow favors and opportunities on friendly firms.

26 Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 147–49 (2007).

27 *Id.* at 150–51.

association. Thus, some lawyers will receive plum opportunities and enhanced financial positions in the case, others will be given tremendous volumes of work to maximize their lodestar,[28] and still others will be left in the unprofitable position of receiving little common benefit work, and left to "tend to matters focused on their clients' specific needs."[29]

This practice may help explain the web of relationships the authors observe and may call into further doubt the idea that repeat players achieve better results for their inventories of claims. Specifically, the model of lodestar generation may signify that lawyers who are most sure-footed in this investment structure are not necessarily the best lawyers for maximizing plaintiff outcomes. Again, these repeat players are experienced and knowledgeable in specific skills that may be critical to coordinating an MDL, but may not correlate to ultimate outcomes.

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28 Longer, *supra* note 11 (within this group are multiple striations: "counsel with extraordinary litigation experience and scientific knowledge are ideally appointed to an expert committee; counsel with superior organizing skills are appointed to discovery committees; and counsel with judicially recognized talents in administering, managing, and organizing the variety of lawyers are appointed to administrative and law and briefing committees"). Further, there is no end of work that can be distributed among willing and able lawyer groups. *Id.* ("this organizational structure [is] best equipped to filter the millions of documents produced by defendants, obtain deposition testimony, retain proper expert witnesses, and conduct bellwether trials when necessary—and then to assemble the enormous amount of information that is generated into a 'trial package.'").

29 *Id.* ("Individual counsel's role is limited, as their traditional role of developing liability has been delegated to the MDL committees. While their clients' cases remain in the MDL court, their role typically is restricted to maintaining client relations, monitoring activity in the MDL, and ensuring that case-specific discovery is obtained and produced while waiting for the trial package to be completed.").