

The Information-Forcing Role of the Judge in Multidistrict Litigation

Andrew D. Bradt* & D. Theodore Rave**

In this Article, we address one of the most controversial and current questions in federal civil procedure: What is the proper role of the judge in the settlement of mass-tort multidistrict litigation, or MDL? Due to the Supreme Court's hostility to class actions, MDL proceedings have begun to dominate the federal civil docket. To wit, more than one third of the federal civil caseload is MDL. Although MDL is structurally different from a class action, the procedure replicates—and in many ways complicates—the principal-agent problems that have plagued the class action. Like class actions, nearly all MDL cases are resolved by a comprehensive global settlement agreement. But, unlike class actions, in MDL cases the judge has no authority to reject a settlement agreement as unfair to the potentially thousands of parties ensnared in the litigation. Here, we argue that, given this limitation, the judge should act as an “information-forcing intermediary.” The judge should reserve the right to offer a non-binding opinion about the fairness of the settlement to send an easy-to-understand signal directly to the parties about their lawyers' performance. Such a signal will mitigate many of the agency problems inherent to MDL and allow parties to exercise informed consent when choosing whether to accept a settlement. More generally, this Article is a call for judges to embrace an information-forcing role at the head of consolidated MDL proceedings.

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* Assistant Professor, University of California, Berkeley School of Law (Boalt Hall)

** Assistant Professor, University of Houston Law Center. Thanks to Emily Berman, Robert Bone, Pamela Bookman, Stephen Bundy, Elizabeth Chamblee Burch, Sergio Campos, Seth Chandler, Zachary Clopton, Brooke Coleman, Peyton Craig, Andrew Coan, David Fagundes, Richard Freer, Brian Fitzpatrick, Maggie Gardner, Russell Gold, Lonny Hoffman, Bert Huang, Samuel Issacharoff, David Marcus, Robert Merges, Roger Michalski, Jonathan Nash, David Noll, Alexander Reinert, Judith Resnik, Jessica Roberts, Lee Rosenthal, Andrea Roth, Joseph Sanders, Rachel Stern, Joanna Schwartz, Shirin Sinnar, Mila Sohoni, Avani Mehta Sood, Norman Spaulding, Adam Steinman, Roger Trangsrud, Amanda Tyler, John Yoo, Kellen Zale, Adam Zimmerman, Evan Zoldan, and participants in the Second Annual Civil Procedure Workshop, the Federal Courts Junior Scholars Workshop, and the Texas Legal Scholars Workshop for helpful comments. Ellen Hense and Ariel Rogers provided invaluable research assistance.

INTRODUCTION

It was not long ago that one could accurately say that federal multidistrict litigation, or MDL, was an obscure subject.¹ But thanks to the Supreme Court's decades-long hostility toward class actions, MDL has replaced the class action as the foremost mechanism for resolving mass-tort disputes in the federal courts.² In MDL, similar cases filed in courts all over the country are transferred to a single federal district judge for coordinated pretrial proceedings, after which, at least in theory, they will be remanded back to their original courts for trial.³ Over the past decade, the growth in the number of cases that have been consolidated into MDLs has been astounding. Indeed, currently more than a third of the civil cases pending in the federal courts are part of an MDL.⁴ In short, any tort controversy of national scope is likely to wind up in an MDL.⁵

Despite its transfer-and-remand structure, judges, lawyers, and scholars all recognize that the goal of MDL is not merely centralized discovery followed by thousands of trials scattered around the country. The goal is mass settlement. By centralizing nationwide proceedings in mass-tort cases—essentially gathering all of the relevant players into the same forum before the same judge—MDL creates a perfect environment for the parties to negotiate a global resolution of the defendant's liability to potentially thousands of claimants in one fell swoop.⁶

1. Linda S. Mullenix, *Reflections of a Recovering Aggregationist*, 15 NEV. L.J. 1455, 1466 (2015) (referring to MDL as a “statutory stepchild of the more prominent class action rule”); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 47 (1991) (describing MDL as a “‘sleeper’—having enormous effect on the world of contemporary litigation but attracting relatively few critical comments”); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1350 (2014) (noting that MDL “remains one of the least studied types of federal litigation, receiving scant attention from scholars or the Supreme Court, even as it has become the federal procedural ‘work horse’ in resolving mass torts”).

2. Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 36, 41 (2015) (explaining that MDL is “in fact dominated by mass-tort cases at a remarkable level”).

3. 28 U.S.C. § 1407(a) (2012).

4. Actions pending in MDLs accounted for 36 percent of all pending civil actions in the federal court as of June 2014. DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS x-xi (2014), https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf [<https://perma.cc/6YAL-YNRM>]. That percentage jumps to 45.6 percent if you exclude prisoner and Social Security cases. *Id.*

5. Examples from just the last year include litigation involving Volkswagen's purportedly “clean diesel” automobiles, daily fantasy sports, Viagra, the Ashley Madison data-security breach, and the 2015 Amtrak train derailment outside Philadelphia. See *MDL Statistics Report—Docket Summary Listing*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. (July 15, 2016), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_MD_L_Number-July-15-2016.pdf [<https://perma.cc/M4KS-TPUR>].

6. See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT at 224 (2007) (“Consolidation by the MDL Panel often serves as the springboard for negotiations aimed at comprehensive peace”); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270 (2011) (explaining that MDL “creates the perfect conditions for an aggregate settlement”); 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, 2272 (2008) (describing how MDL produces settlement “out of the chaos”); Edward F. Sherman, *The MDL Model*

And, as MDL has begun to take center stage both in the federal courts and in procedure scholarship,⁷ perhaps the most controversial issue is clarifying the proper role of the judge in achieving these mass settlements—in particular, whether the MDL judge should review settlements and reject them if they are unfair.⁸ In class actions, judges are already obliged to do so under Federal Rule of Civil Procedure 23(e), and the Civil Rules Advisory Committee has even proposed expanding this responsibility.⁹

In class actions, there are good reasons why judges are required to review settlements. Because a single lawyer prosecutes the case on behalf of a group of absent class members who will be bound by the result, the judge must play a central—some courts say “fiduciary”—role looking out for those absentees.¹⁰ While the ability to litigate as a class gives the claimants strength in numbers, absent class members have virtually no ability to control class counsel. And so the central challenge is one of governance: that is, how to ensure that the class-action lawyer focuses his efforts on benefiting the class instead of lining his own pockets, perhaps by cutting a sweetheart deal with the defendant. Thus, Rule 23

for Resolving Complex Litigation if a Class Action is Not Possible, 82 TUL. L. REV. 2205, 2208 (2008) (“MDL can serve as a catalyst for global settlement.”).

7. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 73 (2015); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 552 (2013); Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015). Of course, a number of procedure scholars have long paid attention to MDL, even when it was an aggregate-litigation second banana. See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1471 (1987) (describing MDL as one of several “dubious packaging strategies that are supposedly provisional but that in substantive terms may be irremediable”); Howard M. Erichson, *Symposium: Multidistrict Litigation and Aggregation Alternatives*, 31 SETON HALL L. REV. 877 (2000); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 887 (2000) (suggesting that the focus on class actions might be “misplaced” and that MDL might be more important as an aggregation mechanism); Resnik, *supra* note 1, at 29–35.

8. See e.g., Burch, *supra* note 7, at 74; Howard M. Erichson, *The Role of the Judge in Non-Class Settlements*, 90 WASH. U. L. REV. 1015, 1026 (2013); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 391 (2011); Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial “Approval” and “Rejection” Out of Non-Class Mass Settlement*, 80 FORDHAM L. REV. 319 (2011).

9. FED. R. CIV. P. 23(e); see also COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 212–17 (Aug. 12, 2016), http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf [https://perma.cc/PH2K-AC7J] (discussing proposed expansion of approval responsibility).

10. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (Posner, J.) (“We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”).

requires the judge to review any class-action settlement for fairness and adequacy before it can take effect.¹¹

MDLs are structurally different from class actions in two important ways: (1) in an MDL, there are typically no absentees because each claimant has hired a lawyer and filed her own lawsuit, and (2) the consolidation is only for pretrial proceedings. Nevertheless, MDL presents similar challenges.¹² Although centralization and aggregation create the necessary conditions for settlement and give the claimants leverage in settlement negotiations, they inevitably come with a loss of control.¹³ As a practical matter, in an MDL, only a small number of court-appointed lawyers on the “plaintiffs’ steering committee” will make the key strategic decisions and lead the negotiations with the defendant, with little to no input from the claimants or even from lawyers on the periphery. The problem, again, is one of governance: how to ensure that these central lawyers advance the interests of the relatively powerless claimants when the lawyers negotiate a global settlement that will resolve the litigants’ claims. So even as the mass-tort class action has faded away, its core challenges remain (and have arguably become even more complicated) as MDL has emerged to fill the gap.

Several prominent MDL judges have recognized this problem and tried to solve it by asserting the authority to review and formally approve or reject even non-class aggregate settlements in MDLs. High-profile examples include Judge Fallon in the *Vioxx* litigation, Judge Weinstein in the *Zyprexa* litigation, and Judge Hellerstein in the *World Trade Center* litigation.¹⁴ These judges say that MDLs are really “quasi-class actions” that demand formal judicial oversight in order to protect claimants who have had little involvement in the actual litigation of the aggregated proceeding, but whose rights may be profoundly affected.¹⁵

But these judges have come in for intense criticism.¹⁶ The snag is that MDLs are typically *not* class actions.¹⁷ And unlike class actions, no statute or rule grants MDL judges the power to formally approve or reject a proposed global settlement. Critics have argued that, without an explicit enabling rule, judges simply do not have the authority to review private settlements reached in

11. FED. R. CIV. P. 23(e).

12. Of course, MDLs may include or overlap with class actions, as we discuss, *infra* Part III, but they do not require class treatment. Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 523–25 (2003); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1986 (2011) (“Lead attorneys enjoy plenary and, in many respects, exclusive control of the litigation.”); 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, 804 (2011).

13. See Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3077 (2013).

14. *Infra* Part II.B.

15. See, e.g., *In re Zyprexa*, 233 F.R.D. 122, 123 (E.D.N.Y. 2006).

16. See *supra* text accompanying note 9.

17. Elizabeth Chamblee Burch, *Aggregation, Community, and the Line Between*, 58 U. KAN. L. REV. 889, 898 (2010) (describing MDL as a “procedural no man’s land”).

MDLs.¹⁸ The result may be the worst of all worlds: what critics call a “Wild West,” in which plaintiffs with substantial monetary claims but little influence over the litigation are vulnerable to scheming lawyers making sweetheart deals at their expense as they could in a class action, but without the protections the class-action rules provide.¹⁹ Put it all together and the MDL judge is damned if she does and damned if she doesn’t: if she formally reviews the settlement, she is an imperialist, but if she doesn’t, she’s an enabler.

Other critics take a different tack. They contend that this sort of judicial meddling improperly interferes with the parties’ autonomy to decide to settle a case. In these critics’ view, not only are judges doctrinally prohibited from reviewing MDL settlements, but their doing so distorts settlement negotiations, perhaps increasing litigation and leading to worse results than if the parties and lawyers were left to their own devices.²⁰

So, the question that motivates this Article is straightforward: What is the appropriate role for the judge in MDL settlement proceedings?

Our answer is that judges in MDLs ought to conceive of their role as acting in an “information-forcing” capacity; that is, the judges should use the MDL process to force the disclosure of information to allow the parties in MDL cases to make informed decisions about whether to accept proposed settlements. And often, the single most useful piece of information that the MDL judge can communicate to claimants will be a simple and frank assessment of the fairness of deal, even if that assessment will have no binding force.

This role, which is both within accepted boundaries of judicial power and consistent with the structure and history of MDL, provides an organizing theory of governance for MDL case management more generally. Ultimately, the principal task of the MDL judge ought to be to generate information to help ensure that the litigants can better monitor and evaluate the performance of their lawyers, not to take it upon herself to formally prohibit litigants from entering a settlement that she deems unfair.

The central insight motivating our view is that any solution to the particular agency problems in an MDL must take account of MDL’s unique features. At its core, MDL has a split personality, oscillating between being a set of temporarily consolidated individual cases and a solid aggregate litigated much like a class action. While MDL is a powerful aggregating force, unlike a class action, it is ultimately grounded on premises of individual claimant autonomy. In this essentially hybrid proceeding, the governance mechanism for ensuring that the central lawyers act on the claimants’ behalf is not formal judicial protection; it is the individual’s ultimate control over her claim. In the end, each individual

18. Mullenix, *supra* note 9, at 391.

19. Redish & Karaba, *supra* note 7, at 111 (describing MDL as “something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies”).

20. *See, e.g.*, Erichson, *supra* note 9, at 1024; Grabill, *supra* note 9, at 163–64.

claimant decides whether the lawyers have done a good enough job and negotiated a global settlement that she is willing to affirmatively opt in.

But for individual consent to work as a governance mechanism, claimants need information—about things like how the settlement will work, the strength of their claims, and their likelihood of success—in order to make good decisions. And the central lawyers—the ones who have that information—may not be entirely forthcoming once they have negotiated a deal that they must close in order to get paid. Recognizing claimants' vulnerability and lack of information, but also the fundamentally individual nature and positive value of their claims, the MDL judge's assumption of an information-forcing role strikes an appropriate balance. By expressing a view on the fairness of the settlement, the judge can act as an intermediary, providing critical information to individual plaintiffs in the form of an easy-to-understand signal that allows them to monitor their lawyers—much like political parties give rationally ignorant voters the information they need to monitor elected officials.

Indeed, this information-forcing intermediary function grows naturally out of the MDL judge's position at the head of coordinated and consolidated pretrial proceedings. The MDL judge must choreograph an elaborate exchange of information on a national scale, dictating the scheduling of events, coordinating nationwide discovery, deciding crucial, information-rich, and often-dispositive motions, and selecting and trying bellwether cases.²¹ To educate themselves about the facts of the cases, MDL judges also have at their disposal special masters and mediators. The MDL judge is, in a real sense, in charge of a centralized process designed to develop and disseminate the information necessary for the parties to reach a reasonable agreement. By the settlement phase, the MDL judge has often spent years facilitating the development of this information and is well positioned to express a view on the fairness of any proposed global settlement. In this Article, we encourage judges to embrace this information-forcing role, which is central not only to the settlement of MDLs, but to the very idea of consolidating cases before a single judge in an MDL to begin with.

We begin in Part I by explaining the particular governance problem in MDL, how judges have responded by positing that an MDL is really a quasi-class action, and some of the trenchant criticisms of this approach. In Part II, we develop the theory of the MDL judge as an information-forcing intermediary. Then in Part III, we present a picture of how this might work in practice. We analyze three models of settlements. In the first two of those models, the negotiating lawyers may recognize the value of a judicial imprimatur in selling the deal to claimants and defendants and actively seek judicial approval. Thus in the first model, they may, in an appropriate case, structure the settlement as a class action within the MDL and allow the formal processes of Rule 23 to take

21. See generally DUKE LAW CTR. FOR JUDICIAL STUDIES, *supra* note 4.

over. Similarly, in the second model, the lawyers may expressly delegate the power to review a non-class settlement to the MDL judge as part of the global settlement agreement itself, as they did in *Vioxx*. In the third model, by contrast, the judge may unilaterally review the settlement without the parties' invitation, as Judge Hellerstein did in the *World Trade Center* litigation. In all three models, we argue that the critical function of the MDL judge is to process and disseminate information about the settlement, and that this function is fully within the judge's power. Part IV considers some potential objections.

I.

THE GOVERNANCE PROBLEM IN MDLS

A. *Aggregate Litigation as a Governance Problem*

Analyzing litigation as a governance problem begins from the insight that all litigation presents principal-agent problems and that any form of aggregate litigation exacerbates those problems.²² It follows that a central goal of procedural law should be to keep agents acting in their principals' interests while still retaining the benefits of aggregation.²³

In individual litigation, the principal-agent problem is simple: there is one principal (the client) represented by one agent (the lawyer).²⁴ The governance mechanism is correspondingly simple: consent and control. The client consents to the representation, defines its ends, and monitors the actions of the lawyer throughout. And if the lawyers reach a settlement, the client retains ultimate control over the decision to accept or reject the deal.²⁵ Little judicial meddling is needed, and the court will typically dismiss a settled case without further inquiry.²⁶

Aggregate litigation, on the other hand, presents a more complicated set of problems because it entails the separation of ownership of, and control over, a case. To oversimplify, when a large number of claimants are represented by a small number of lawyers, any single claimant becomes just one of many, and her

22. See, e.g., NAGAREDA, *supra* note 6, at 219–23; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337; Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65 (2004).

23. See Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3166–68 (2013).

24. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 458 (5th ed. 2008).

25. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 1980). This remains true under the so-called "aggregate settlement" rule, even if the lawyer represents multiple clients in related matters. See *id.* R. 1.8(g). Ex post malpractice and breach of fiduciary duty suits are also available if things go very badly, though plaintiffs often face significant obstacles to recovering in such suits. See Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV. 2003, 2034–36 (2017).

26. See FED. R. CIV. P. 41(a)(1)(A)(ii).

ability to control the course of the litigation is correspondingly diminished. Consider the difference between the sole proprietor of a small business and a shareholder of a publicly traded corporation: a claimant in mass litigation is much more like a shareholder.²⁷

Without a doubt aggregating claims can yield tremendous benefits. Particularly when the defendant is a much larger and better resourced adversary, claimants can find strength in numbers. They benefit from economies of scale, the ability to pool resources and share risk, and the increased leverage that comes from negotiating as a united front.²⁸ Although defendants might ultimately prefer a world in which plaintiffs can't aggregate their claims and litigate together, defendants also benefit from the chance to achieve closure by settling all of the related claims against them in one fell swoop. This prospect may work to claimants' advantage as well, if they can secure a premium from the defendant for delivering peace.²⁹ Beyond the parties, the judicial system benefits from the increased efficiency of handling similar cases on a consolidated basis, rather than piecemeal in thousands of individual lawsuits.³⁰ And society benefits from increased deterrence when meritorious claims are pressed instead of dropped because they are too expensive to bring individually.³¹

But the centralization of control that makes these gains possible creates new problems. When claimants yield control over their claims to lawyers acting on behalf of the group, they leave themselves vulnerable to exploitation at the hands of their agents. Claimants within a group frequently lack the ability to sufficiently monitor their lawyers or control the course of the litigation.³² And because their claims are only one of many, claimants may not have sufficient incentives even to try.³³ Plus, the interests of claimants within the group may diverge on certain issues, such as the relative value of their claims and their

27. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 712–13 (1986); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998). This is, of course, a matter of degree. Clients in small groups of informally aggregated cases will have more control than absent class members in large-scale class actions. But in any form of aggregation, decisions will have to be made on behalf of the group and individual claimants' control over those decisions will be limited. See PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. a & Reporters' Note (AM. LAW INST. 2009 & SUPP. 2016) [hereinafter ALI PRINCIPLES]; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 429–31 (2000).

28. See, e.g., Erichson, *supra* note 12, at 545–50; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–48 (1997).

29. See D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1192–201 (2013).

30. See, e.g., Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might be Part 1: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. REV. 717, 718–19 (1995).

31. See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1087 (2012) (arguing that “law enforcement in mass tort litigation is a ‘public good’”).

32. See Coffee, *supra* note 22, at 371.

33. See ALI PRINCIPLES, *supra* note 27 § 1.05 cmt. a & Reporters' Note.

tolerance for risk.³⁴ Finally, the interests of the claimants' lawyers may align more with the defendant in getting a deal done (and collecting their fee) than with the claimants in maximizing the value of their claims.³⁵

So the central question for any form of aggregate litigation has become: How do we achieve the benefits of aggregation, while also protecting the relatively powerless individual claimants from the lawyers (on both sides of the litigation) who control their claims—particularly at the moment of settlement, which is how the vast majority of mass litigation is resolved?

In class actions—the most familiar form of aggregate litigation—class members have practically no direct control over class counsel, and they do not affirmatively consent to the representation. Indeed, when a court appoints class counsel, it effectively gives that lawyer monopoly control over all class members' claims.³⁶ Absent class members do retain some ability to indirectly police class counsel under Rule 23(b)(3), which allows them to opt out of the class if they are dissatisfied.³⁷ If enough class members threaten to exit, that may keep class counsel in line by bringing competitive pressures to bear.³⁸ Alternatively, class members can make their voices heard by intervening in the action or objecting to any settlement.³⁹

But both courts and rulemakers have recognized that these indirect means of influencing class counsel's conduct are alone insufficient to guarantee that class counsel will remain loyal to the absent class members. As a result, the Federal Rules of Civil Procedure assign a central role to the judge to look out for absent class members. Indeed, some courts have described the judge as a "fiduciary of the class."⁴⁰ In certifying a class action, the judge must make sure that the chosen lawyer will adequately represent the class, and that there are no

34. See, e.g., Erichson, *supra* note 12, at 551–53.

35. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 511–30 (2012) (describing agency costs in aggregate litigation).

36. See NAGAREDA, *supra* note 6, at 71.

37. Procedure scholars often group the governance mechanisms for controlling class counsel into the categories of "exit," "voice," and "loyalty," drawing on Albert O. Hirschman's classic book, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970), though Hirschman had in mind a different conception of "loyalty" than is commonly used in the literature on aggregate litigation. Procedure scholars typically use loyalty as a shorthand for duties that oblige the agent to advance the interests of the principal instead of the agent's own interests. See, e.g., ALI PRINCIPLES, *supra* note 28, § 2.07 cmt. c; Coffee, *supra* note 22, 376–78. Hirschman used the term to refer to individuals' tendencies to continue their relationships with an organization (i.e., to not "exit") despite their dissatisfaction with it.

38. FED. R. CIV. P. 23(c)(2)(B)(v); see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 168–74 (2003).

39. FED. R. CIV. P. 23(c)(2)(B), (e)(5).

40. See, e.g., *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

structural conflicts of interest among class members, or between class counsel and the class, that might undermine the lawyer's ability to do so.⁴¹ And Rule 23(e) requires the judge to review all class action settlements for fairness, reasonableness, and adequacy.

There are at least two reasons for this. First, class members have almost no ability to influence the terms of the settlement by which they will be bound if they do not opt out. And, second, there is an ever-present risk that class counsel may collude with the defendant in a sweetheart deal that underpays class members in exchange for generous attorneys' fees.⁴² A class action therefore cannot be settled without the judge's approval.⁴³ And the Supreme Court has stressed that when the parties ask the court to certify a class for settlement purposes, those requirements of Rule 23 designed to protect absentees deserve "heightened . . . attention."⁴⁴ In short, judicial supervision and solicitude for absentees are essential to making the class-action device legitimate.

Despite these built-in protections, the Supreme Court has expressed serious skepticism about the class action's capacity to paper over the differences among class members in the name of efficiency, particularly when the claims involved are large enough to make individual or smaller-group litigation cost-justified. Ever since *Amchem v. Windsor* and *Ortiz v. Fibreboard* rejected attempts to use class-action settlements to achieve comprehensive resolution of the asbestos litigation crisis, the mass-tort class action has appeared to be a bridge too far.⁴⁵ And the Court's opinion in *Wal-Mart v. Dukes* suggests that the bar may be higher than ever for claimants to demonstrate sufficient cohesion to warrant class treatment.⁴⁶ The result has been what numerous commentators have described as the end of the mass-tort class action.⁴⁷ But the demise of the mass-tort class action did not spell the demise of mass torts, which continue to dominate the American litigation scene. The fact that the class action has become untenable means only that something must take its place.⁴⁸ Enter MDL.

B. MDL's Split Personality

MDL has emerged to fill the gap created by the fade-out of the mass-tort class action. One reason for this is that, at least formally, MDL avoids many of the due process stumbling blocks that make class actions so difficult in mass

41. FED. R. CIV. P. 23(a)(4); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1997); see also ALI PRINCIPLES, *supra* note 27, § 2.07 cmt. d.

42. See, e.g., *Reynolds*, 288 F.3d at 282–83.

43. FED. R. CIV. P. 23(e).

44. *Amchem*, 521 U.S. at 620.

45. See *id.*; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

46. See 564 U.S. 338, 345–60 (2011).

47. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 790–92 (2013); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 153–59 (2011).

48. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1632–34 (2004).

torts. Unlike a class action, an MDL is not representative litigation. At least in theory, an MDL is a collection of individually filed cases that are consolidated only temporarily for pretrial proceedings, after which they are sent back to the courts from whence they came. But the reality is different. MDL functions as an exceptionally strong aggregation device, and very few cases are ever actually remanded for trial. That's because most mass-tort MDLs are resolved just as class actions were: by global settlement agreement.⁴⁹

That any of these developments would come as a surprise is due only to the decades-long prominence of the class action. To the small group of judges who conceived of MDL in the 1960s, all of this was very much by design. When they drafted the MDL statute, these judges intended it to be the primary procedural mechanism for resolving the “explosion” of mass-tort litigation they predicted was coming.⁵⁰ And they believed that the only way to effectively handle mass-tort litigation was to consolidate all of the cases in front of a single judge with the power to control the litigation. In their view, lawyers and litigants could not be trusted to run cases; mass litigation needed centralized and active judicial management.⁵¹ Thus, the drafters of the statute felt it critical to bar parties from opting out of consolidated pretrial proceedings.⁵² While the MDL process may appear modest because the transfer is only temporary and because the MDL judge must remand the cases when pretrial proceedings are complete, the drafters only included those features to make it easier to push the statute through Congress.⁵³ The drafters’ goal was always for the cases to be managed firmly by the judge, who could innovate depending on the needs of the particular

49. See Burch, *supra* note 7, at 116; Marcus, *supra* note 6, at 2277.

50. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 890 (2017). This was a supposition shared by the Civil Rules Committee that drafted the 1966 amendments to Rule 23 that spawned the class-action revolution; that committee believed that MDL would dominate in mass-tort cases. David Marcus, *The History of the Modern Class Action, Part I: Sturm und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 604 (2013) (contending that the rulemakers’ primary “job was to craft a cleaner, more flexible rule that better reflected how some courts had begun to use the class action device”); David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–07 (2011) (describing centrality of desegregation cases to amended Rule 23). Indeed, in late 1963, after the only meeting between representatives of the Civil Rules Committee and the Coordinating Committee on Multiple Litigation, both groups explicitly disclaimed that the rulemakers intended Rule 23 to handle so-called “mass accident” cases. Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, Dec. 2, 1963, at 4, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, *microformed on* CIS No. CI-7104 (Cong. Info Serv). For a detailed description of the committees’ interaction, see Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 166 U. PA. L. REV. (forthcoming 2017).

51. Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, *supra* note 50, at 6 (describing the importance of not allowing individuals to opt out of the litigation based only on their “say-so”).

52. *Id.*

53. See Bradt, *supra* note 50, at 839.

lawsuit.⁵⁴ Though the premise of MDL is a “limited transfer,” in practice, the consolidating effect of MDL is not very limited at all.

Because MDL is, by design, such a powerful aggregation device, it is tempting to think of it as simply recreating the agency problems of the class action. And, in certain ways, the comparison is apt. But in important ways, MDL is a different animal, and those differences add significant nuance to the governance problems MDL presents. What sets MDL apart is its split personality—the fact that it simultaneously combines features of both aggregate and individual litigation. This was the MDL creators’ most brilliant insight: that preserving the traditional trope of litigant autonomy was a necessary prerequisite for parties to accept litigating cases as a group. Any nuanced analysis of MDL must place its hybrid character front and center.

So, despite its aggregative power, MDL is structurally different from a class action. It is not litigation brought and prosecuted by a single representative plaintiff on behalf of an absent group; the cases are individually filed and the claimants are formally “present” as parties. Nor does any lawyer have judicially conferred monopoly control over all of the group’s claims; individual claimants are represented by lawyers of their own choosing. And although most cases are never actually remanded, MDL consolidation is by definition temporally limited because the MDL judge has no power to hold on to transferred cases after pretrial proceedings have concluded.⁵⁵ Finally, in a typical MDL, claimants make the ultimate decision whether to opt in and participate in a proposed settlement, unlike a class-action settlement, where the default is participation unless a claimant opts out.

Given these structural differences, it might be tempting to say that MDL avoids the most serious governance problems inherent to the class action, but this, too, would miss the mark.⁵⁶ Although individual control is what makes MDL more palatable than the mass-tort class action from a due-process perspective, many of the core problems recur, just with a different gloss.⁵⁷ Like a class action, actual individual control of the litigation by claimants is limited. From the beginning, MDL litigation has been controlled on the plaintiffs’ side by a steering committee—a small group of lawyers appointed by the MDL judge. These lawyers make most of the important strategic decisions in the litigation. They are the ones who decide what coordinated discovery to pursue, which pretrial motions to file, whom to hire as experts, and how to sequence the cases

54. Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, *supra* note 51, at 6; Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COMM. L. REV. 497, 499–500 (1969); FED. R. CIV. P. 23 advisory committee note.

55. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 29 (1998).

56. See Erichson & Zipursky, *supra* note 6, at 313; Deborah R. Hensler, *Bringing Shutts into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC L. REV. 585, 601 (2006) (contending that judicial oversight is necessary in non-class aggregate proceedings).

57. Burch, *supra* note 13, at 3077; Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and Lawyers’ Powers*, 79 GEO. WASH. L. REV. 628, 657 (2011).

that they push toward bellwether trials. And it is the steering committee that will typically negotiate a global settlement with the defendant.

All of these decisions can have profound effects on individual claimants' cases, as they are bound by the MDL court's pretrial rulings. But individual claimants—and the lawyers they have retained to represent them—have very little input into the steering committee's choices. And claimants cannot escape the effects of the steering committee's decisions on pretrial matters (or the obligation to pay the lawyers on the steering committee for their so-called "common-benefit work"⁵⁸) by opting out as they might in a class action. They are stuck in the MDL until the judge deems the pretrial period over and lets them go.

Further, even though plaintiffs in an MDL have retained lawyers and filed claims, many lawyers in MDLs represent large inventories of plaintiffs, meaning that their connection with any individual claimant may be quite limited. Indeed, mass-torts victims are often solicited aggressively by firms that specialize in advertising and client intake, but with no intention of ever taking their claims to trial. Through a complex web of referral networks, these lawyers informally aggregate plaintiffs' claims into inventories, using them to gain leverage with the defendant and to jockey for a position in the MDL.⁵⁹ And, at least according to some accounts, pressures toward cooperation and cartelization among repeat-player lawyers with (or aspiring to) leadership positions in other MDLs may limit the effectiveness of competition at keeping the steering committee in check.⁶⁰

Often, the only real control that MDL claimants may have is over the ultimate decision whether to consent to participate in a global settlement or to wait for remand and press forward with a trial. But claimants remain dependent on distant lawyers for the information they need to make an intelligent choice. Indeed, many claimants lack crucial information about their cases, particularly given that they may have been transferred to a far-flung forum not of their choosing and that, for all intents and purposes, their claims are being prosecuted by lawyers chosen by the MDL judge. As in a class action, those lawyers may be more interested in closing the deal and getting paid than in securing the maximum possible payout for every claimant within the aggregate. Once we recognize the practical implications of massive pretrial consolidation and the interests of the lawyers involved, it becomes clear that MDL's patina of party control and autonomy has the potential to mask the kinds of collective-action and agency problems that give people heartburn about class actions.⁶¹ Unless the

58. See Burch, *supra* note 7, at 102–09; Charles Silver & Geoffrey P. Miller, *The Quasi-Class-Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–35 (2010).

59. See Erichson, *supra* note 12, at 534–39; Erichson, *supra* note 27, at 386–99.

60. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 81–85 (2017).

61. See Willging & Lee, *supra* note 12, at 803–04.

ultimate decision to opt in to a settlement is a well-informed one, the claimant might not be any better off than a class-action absentee.

In fact, without the formal protections built into Rule 23, inadequately informed MDL claimants may very well end up worse off than absent class members. Unlike a class-action judge, the MDL judge does not possess any explicitly stated authority to either approve or reject a global settlement agreement. As a result, MDL judges find themselves both more and less powerful than judges in class actions in important ways. They are more powerful because they control a captive audience of transferred cases until they conclude that pretrial proceedings have ended.⁶² But they are less powerful because they don't possess the authority granted by Rule 23(e) to pass official and binding judgment on any settlement proposal. This puts the MDL judge in a very difficult position when it comes to proposed settlements.

C. Judicial Response: The Quasi-Class Action Model

That MDL runs the risk of replicating the governance problems of the class action has not been lost on many MDL judges, who have long tried to foster fair deals.⁶³ Even in the prototype MDL, the early-'60s electrical-equipment antitrust litigation that presaged the MDL statute, the presiding judges held hearings to ensure those agreements were fair despite having no formal authority to do so.⁶⁴ In the recent era of MDL ascendancy—in which certification of settlement classes within MDL proceedings has become more challenging⁶⁵—judges have likewise found themselves in the position of trying to facilitate aggregate settlement while also protecting the many claimants who are not participating in the management of the litigation in any meaningful sense.⁶⁶

62. See, e.g., Troy A. McKenzie, *Toward A Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994–95 (2012) (“[A] plaintiff drawn into MDL proceedings has little power to opt out in any meaningful sense.”); Redish & Karaba, *supra* note 7, at 111 (“all MDLs are mandatory”).

63. See, e.g., JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* 116 (2015) (“The term ‘quasi-class action’ has developed to describe this new form of group litigation, and a few courts have sought to exercise close scrutiny over the process.”); Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 65 (2013) (describing development of practices by MDL judges to supervise litigation); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 489, 550 (1993) (“In asbestos, Agent Orange, Dalkon Shield, and many other mass tort litigations, judges have found themselves involved in settlement discussions in a manner that would be unusual in an ordinary tort case or commercial dispute.”).

64. Bradt, *supra* note 50, at 859 (noting the judges’ early and continuing engagement in brokering settlements and the parties’ attribution of the successful resolution of the litigation to “your Honor’s efforts”).

65. William B. Rubenstein, *Procedure and Society: An Essay for Steve Yeazell*, 61 UCLA L. REV. DISC. 136, 144 n.40 (2013).

66. Alvin K. Hellerstein, *Democratization of Mass Tort Litigation: Presiding over Mass Tort Litigation to Enhance Participation and Control by the People Whose Claims Are Being Asserted*, 45 COLUM. J.L. & SOC. PROBS. 473, 477 (2012) (describing necessity of judicial involvement because “the court is the only participant to the proceedings that is truly neutral, and only the court can ensure that

Some judges have responded aggressively by essentially recreating the class-action fiduciary role imposed on them by Rule 23(e). Judges have taken it upon themselves to treat MDL cases and other large non-class aggregations like quasi-class actions, in which they assert the authority to review proposed settlement agreements and to cap and reallocate the attorneys' fees within those settlements.⁶⁷ Prominent examples include Judge Weinstein (who coined the quasi-class action term)⁶⁸ in the *Zyprexa* case, in which he asserted the authority to adjust the attorneys' fees agreed to by the parties,⁶⁹ and Judge Fallon in the *Vioxx* litigation, in which he invoked the quasi-class action doctrine to review fee awards and modify the settlement agreement.⁷⁰

Although it was not part of an MDL, another prominent example of a judge's engagement in the settlement process was in the enormous non-class aggregate litigation of first responders' claims in the *World Trade Center Disaster Site Litigation*.⁷¹ Approximately 10,000 rescue and cleanup workers brought individual suits against various defendants for respiratory illnesses they developed after working in the ruins of the World Trade Center.⁷² All of their claims were consolidated in front of Judge Alvin K. Hellerstein in the Southern District of New York. With the help of two special masters, who developed a comprehensive, searchable database containing information about each claim from which the parties and the court could choose cases for bellwether trials, Judge Hellerstein shepherded the parties toward a global settlement.⁷³ Although

conflicts arising in the representation do not unfairly harm plaintiffs"); see also Redish & Karaba, *supra* note 7, at 129 ("Transferee courts tend to take an active role in settlement negotiations.").

67. Mullenix, *supra* note 7, at 541–42 ("it was only a matter of time before judicial invention of the 'quasi-class action.' Indeed, the quasi-class action may almost be viewed as the logical extension of, and corollary to, the contractual nonclass aggregate settlement.").

68. *Id.* at 542 ("Judge Jack Weinstein invented the quasi-class action in his judicial management of the *Zyprexa* litigation."); see also Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 215 (2008) ("The quasi-class occupies an interesting midpoint between public and private ordering, one that draws heavily on the equitable powers of courts in an area bereft of formal rules of procedure.").

69. *In re Zyprexa*, 233 F.R.D. 122, 123 (E.D.N.Y. 2006) (arguing that the mass settlement procedure demands "a degree of control requiring exercise by the court of fiduciary standards to ensure fair treatment to all parties and counsel regarding fees"); see Ratner, *supra* note 63, at 68 (describing the *Vioxx*, *Zyprexa*, and *Guidant* settlements).

70. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d 549, 554–58 (E.D. La. 2009).

71. See Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1029 (2013) ("In confronting the task of adjudicating these claims, Judge Hellerstein concluded that the proceeding before him required that he enforce a standard of fairness and adequacy in assessing the relief available to claimants, rather than simply treating the action before him as a standard-issue claims-processing mechanism for unconnected individuals, and he aggressively managed the litigation in order to supervise the proposed compensation.").

72. See Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653, 657 (2013); Alvin K. Hellerstein, James A. Henderson, Jr. & Aaron D. Twerski, *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127, 132 (2012) [hereinafter *Managerial Judging*] ("No other tort litigation . . . has ever presented so many different injuries caused by such varying degrees of exposure to such indeterminate toxins.").

73. Hellerstein et al., *Managerial Judging*, *supra* note 72, at 141.

the parties structured the deal as a non-class aggregate settlement, Judge Hellerstein relied on Judge Weinstein's quasi-class action theory from *Zypprexa* to assert the authority to "reject" the settlement.⁷⁴ He held a hearing at which he expressed his view that the "settlement is not enough," that the agreed-upon fee for plaintiffs' counsel was too high, and that additional negotiations would be necessary "to come up with what is a better and fair settlement."⁷⁵

The quasi-class action approach has appeal. Once one recognizes that MDL presents many of the agency problems of the class action, the prospect of a judge taking it upon herself to formally reject a settlement she considers unfair may seem appropriate. After all, although there are no "absentees" in a non-class MDL, one amenable to the quasi-class action approach might be equally amenable to the idea that most of the claimants are essentially "quasi absentees" who need a fiduciary judge to protect them. This, however, may be one of those roads to hell paved with good intentions.

Judges' exercise of this authority has been met with harsh criticism. To begin, MDL judges may simply not have the authority to review settlement agreements or interfere with the fees allocated within them.⁷⁶ Unlike a class action, there is no rule granting this authority or mandating its exercise.⁷⁷ Indeed, Rule 41 provides that under most circumstances the parties may voluntarily dismiss a case "without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared."⁷⁸ Thus, no judicial approval is required, and judicial rejection is not available.⁷⁹ Nor is there anything in the text of the MDL statute that would seem to give judges any such formal review power.⁸⁰ And to assert such power as a matter of inherent authority is a tenuous proposition.⁸¹ As a result, judges undertaking such reviews seem engaged in well-meaning grasping at best and an imperialistic power grab at worst.

74. Transcript of Status Conference at 54, 60, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010), ECF No. 2037.

75. *Id.*; see also Hellerstein et al., *Managerial Judging*, *supra* note 72, at 158 ("In a sharply worded statement delivered at a highly publicized hearing, Judge Hellerstein held that the settlement was unfair to the plaintiffs, giving them too little and giving the lawyers too much.")

76. Erichson, *supra* note 9, at 1026; Mullenix, *supra* note 9, at 391.

77. Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1292 (2012) (noting that "[n]onclass aggregation . . . lacks these monitoring options" and that "the judge has far less authority to police the agency relationship and the settlement"); Mullenix, *supra* note 7, at 552 ("[T]here is no constitutional, statutory, doctrinal, or other basis for the quasi-class action."); Mullenix, *supra* note 9, at 416 (arguing that "there is no such thing as a quasi-class action," and that such treatment is unauthorized) *cf.* FED. R. CIV. P. 23(e).

78. FED. R. CIV. P. 41(a)(1)(A)(ii).

79. See *id.*; Grabill, *supra* note 9, at 180–81.

80. With respect to the powers of the MDL judge, 28 U.S.C. § 1407(b) provides simply that "[t]he judge . . . to whom such actions are assigned . . . may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." There is no mention of settlement or voluntary dismissal in the statute. See *id.* § 1407.

81. See Burch, *supra* note 77, at 1294 ("Class actions contain built-in protections that help to guard against collusion Nonclass aggregation, on the other hand, lacks these safeguards.")

Separate from the question of whether judges have the power to approve or reject settlement agreements is the question of whether they ought to. Some critics argue that judges engaging in this sort of review are improperly interfering with private ordering to the detriment of the parties and at the cost of litigant autonomy.⁸² As Professor Howard Erichson put it: “Claims belong to claimants, not to the judge. If a claimant chooses to dismiss her claim in exchange for compensation offered by the defendant, that is the claimant’s prerogative.”⁸³ According to these critics, if a judge rejects a private settlement that was acceptable to the parties, the judge not only divests the parties of control over their claims, but risks depriving the parties of the opportunity for *any* negotiated resolution, as it may be impossible to renegotiate on terms acceptable to the judge.⁸⁴

But by keeping their noses out of MDL settlements, judges are leaving primary responsibility for policing the settlement process to self-interested lawyers and potentially ill-informed claimants. Essentially, the judges are damned if they do and damned if they don’t.⁸⁵ If they call the cases quasi-class actions and assert the power to formally review the settlement, they are overreaching and acting beyond the scope of their power. But if they stay out of the process entirely on the ground that private deals should be left to the parties (subject only to the regular voluntary-dismissal provisions of Rule 41), they are arguably allowing the parties to make an end run around the stringent requirements for settlements under Rule 23.⁸⁶

Setting aside the debate over the formal limits of the judge’s power, the main problem with the quasi-class action approach is that it is too simplistic a translation from one context to another. Treating MDLs as if they were class actions misses the fundamental differences between the two: the “individual control” pole of MDL’s split personality. Although MDLs recreate many of the principal-agent problems of the class action, resolution of an MDL through a global settlement will ultimately depend on real people, who have filed real cases, deciding that the settlement is a better deal than continuing to litigate. In our view, the judge’s role is thus not to be a fiduciary protecting absentees, but

82. See Grabill, *supra* note 9, at 163–64 (arguing that “individual plaintiffs’ rights cannot be sacrificed in the pursuit of an ‘efficient’ resolution of complex litigation”); Rothman, *supra* note 9, at 353.

83. Erichson, *supra* note 9, at 1024.

84. *Id.*

85. Burch, *supra* note 77, at 1300 (arguing that in MDL Rule 23’s “protective layer disappears altogether” and the “problems metastasize”); Burch, *supra* note 17, at 898 (describing MDL as a “procedural no-man’s land”).

86. Mullenix, *supra* note 9, at 391 (arguing MDL has “stripped away” the protections afforded by the class action); Redish & Karaba, *supra* note 7, at 110 (“the current practice of MDL actually makes the modern class action appear [like] the pinnacle of procedural due process by comparison”); Silver & Miller, *supra* note 58, at 111 (describing MDL: “judges have compromised their independence, created unnecessary conflicts of interest, intimidated attorneys, turned a blind eye to ethically dubious behavior, and weakened plaintiffs’ lawyers’ incentives to serve clients well”).

rather to be an intermediary providing information to parties so they can best make that decision.

II.

THE MDL JUDGE AS AN INFORMATION-FORCING INTERMEDIARY

It turns out that Judge Hellerstein didn't need to exercise any formal authority to reject the settlement in the *World Trade Center Disaster Site Litigation*. After he declared that the settlement was not "fair" because it did not give the plaintiffs "enough,"⁸⁷ the parties did not run to the Second Circuit for a mandamus to put this imperialist judge in his place. Instead, they renegotiated the deal to increase payments to the claimants and decrease the fees for the lawyers.⁸⁸

Why didn't anyone challenge Judge Hellerstein's assertion of authority? Because even if they had succeeded, it wouldn't have mattered. The judge's declaration in open court that he thought the deal was unfair made it nearly impossible for the lawyers to sell the deal to their clients. And without significant buy-in from those clients, the parties would not clear the defendant's walkaway threshold, and the deal would fall apart.⁸⁹ The information that Judge Hellerstein communicated to the claimants by "rejecting" the settlement was far more important than his formal authority, because ultimately the success of the deal hinged on their decision to opt in.

We think Judge Hellerstein's example suggests a new view of the role of the MDL judge, at least when it comes to settlement. Successful settlement of an MDL requires individual consent by the claimants. Without the consent of the vast majority of the claimants, the deal will fall apart, as the defendant almost always reserves the right to walk away from the settlement if participation is too low.⁹⁰ In other words, the governance mechanism, or what keeps lawyers' conduct aligned with claimants' interests, is the claimants' ultimate power to

87. Transcript of Status Conference at 54–64, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010), ECF No. 2037; *see also* Hellerstein et al., *Managerial Judging*, *supra* note 72, at 157–60 (describing how Judge Hellerstein rejected the settlement).

88. *See* Statement of Judge Alvin K. Hellerstein About the *In re World Trade Center Disaster Site Litigation* Amended Settlement Process Agreement, *excerpted from* Transcript of Status Conference, Nos. 21 MC 100 (AKH) & 21 MC 102 (AKH), *In re World Trade Ctr. Disaster Site Litig.* (S.D.N.Y. June 10, 2010). The defendant did file a notice of appeal from one of Judge Hellerstein's scheduling orders for a subsequent hearing on the settlement, but they never pursued that appeal in the Second Circuit. Notice of Appeal, *In re World Trade Ctr. Disaster Site Litig.*, No. 21 MC 100 (AKH) (S.D.N.Y. Apr. 14, 2010) ECF No. 2050.

89. The settlement agreement allowed the defendant to walk away from the deal if fewer than 95 percent of the plaintiffs opted in. *See In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011); *World Trade Ctr. Litig. Settlement Process Agreement, As Amended* §§ I.A., IV, V.I.E. (Jun. 10, 2010), www.nysd.uscourts.gov/cases/show.php?db=911&id=540 [<https://perma.cc/J8BL-MLJ8>].

90. *See* David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1964–66 (2008); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1813–15 (2006).

refuse the deal in sufficient numbers. But they need quality information in an easily digestible format in order to make this consent-based model work. We think that the judge should strive to get that information into claimants' hands in a useable form to assist claimants in effectively monitoring and disciplining the lawyers who control the litigation. In our view, this "information intermediary" role should be the primary function of the MDL judge at settlement.⁹¹

A. *Information Intermediaries Generally*

People are often quite rationally ignorant about many decisions they have to make, even important ones. Gathering information can be costly and is often tedious. The sources that have the information may not always be forthcoming. And even if they are, once people have collected the information, it may be difficult to analyze and understand; just try reading all of the disclosures on a mortgage application, for instance. Indeed, there may be *too much* information. In the digital age people are frequently subjected to information overload. Figuring out which information to pay attention to may be more challenging than acquiring the information in the first place. It is no surprise, then, that people look for shortcuts and rely on signals to make decisions.⁹²

Information intermediaries help to generate those signals. An information intermediary is an actor or institution that helps people process information.⁹³ Intermediaries can collect large amounts of information and package it into a more useful form that is delivered to the end user. The news media is a classic example, but information intermediaries come in all shapes and sizes, from financial advisors to Consumer Reports to internet search engines.⁹⁴

Importantly, intermediaries can help people deal with information overload by filtering, translating, and distilling vast amounts of (sometimes complicated) information into easily digestible signals for people who are, quite

91. For an interesting exploration of how judges can use information about mass settlements in contexts ranging from civil litigation to criminal plea bargaining to agency adjudication in order to prod external institutional actors such as interest groups and prosecutors' offices to engage in reform, see David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. 545 (2017).

92. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (describing heuristics and cognitive biases).

93. Frank Rose defines information intermediaries as "economic agents supporting the production, exchange, and utilization of information in order to increase the value of the information for its end-user or to reduce the costs of information acquisition." FRANK ROSE, THE ECONOMICS, CONCEPT, AND DESIGN OF INFORMATION INTERMEDIARIES 76 (1999). Unlike Rose, we do not limit our definition of information intermediaries to profit-maximizing economic agents, but include actors and institutions that may process information for other motivations; indeed, they need not even be human, as an internet search engine can perform the functions of an information intermediary. See, e.g., Jinkook Lee & Jinsook Cho, *Consumers' Use of Information Intermediaries and the Impact on Their Information Search Behavior in the Financial Market*, 39 J. CONSUMER AFF. 95, 96 (2005) (broadening Rose's definition); Ryan Womack, *Information Intermediaries and Optimal Information Distribution*, 24 LIBR. & INFO. SCI. RES. 129, 133 (2002) (same).

94. See Lee & Cho, *supra* note 93, at 96.

understandably, too busy getting on with their daily lives to figure it out for themselves. So, for example, an Underwriters Laboratory stamp or a Good Housekeeping Seal of Approval gives consumers valuable information about the safety and quality of a product that they could not glean from a simple inspection. Similarly the health inspection grades that some cities require restaurants to post on their windows provide diners who wish to avoid salmonella with an easily digestible cue, obviating the need to search the public records for past health-code violations and then figure out whether a few mice and a misplaced “wash hands” sign are dangerous enough to forgo the legendary “cronut.”⁹⁵ In short, information intermediaries give rationally ignorant people the signals they need to make better decisions.

When agents represent large groups of principals, the information problem is more acute and intermediaries become even more important. Simply put, it is difficult for principals to effectively monitor their agents when the principals don’t know what the agents are doing. And when the principals are numerous and diffuse, they face a collective-action problem. No individual has sufficient incentive to collect information on the agents’ activities, analyze their behavior to figure out whether they are faithfully serving the principals, or punish or reward them accordingly.⁹⁶ Indeed, the principals may not even be capable of effectively evaluating the agents’ behavior; after all, one of the reasons we hire agents is for their expertise. Intermediaries can help with all of these tasks.⁹⁷

Consider voting in state or congressional elections, which, like aggregate litigation, presents a governance problem. Political parties are essential information intermediaries.⁹⁸ Most voters are (quite rationally) ignorant about the backgrounds and the policy positions of candidates who run for office.⁹⁹ Pop quiz: Name the candidates in the last election for your representative in the lower house of your state legislature. Where do they stand on tort reform? But political

95. A cronut is a hybrid of a croissant and a donut, invented and trademarked by Dominique Ansel Bakery in New York City, which was shut down temporarily for health code violations at the height of the cronut craze in 2014. To our shame, neither of us knows whether the cronut is worth the risk or the wait in the famously long lines. Restaurant grades have also had the salutary effect of encouraging restaurants to clean up their acts, and the number of As that NYC gives out has risen sharply while the number of Bs and Cs has fallen in the years since the grading system started. See Kaiser Fung, *How Data Made Me a Believer in New York City’s Restaurant Grades*, FIVETHIRTYEIGHT (Sept. 2, 2014), <http://fivethirtyeight.com/features/how-data-made-me-a-believer-in-new-york-citys-restaurant-grades> [<https://perma.cc/AL2V-2BQZ>]. Intermediaries, it turns out, can also serve a disciplining function that will be discussed in more detail below.

96. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 172 (1991).

97. See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

98. Independent directors and institutional investors may play a similar role in corporate governance, as they possess both expertise and the incentives to overcome the collective action problem that shareholders face in monitoring corporate managers. See, e.g., Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520 (1990).

99. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* at 244–46 (1957).

parties serve as intermediaries that give rationally ignorant voters the signals they need to monitor their elected officials and hold them accountable in elections.¹⁰⁰ Party labels provide a simple and reliable signal that candidates are tied to a particular ideology and bundle of policy positions.¹⁰¹ The party organization monitors elected agents to keep them faithful to the party brand and can punish them if they stray too far from the party line, or even repudiate them, sending a powerful signal to voters.¹⁰² And the organization of the legislature along party lines allows voters to identify the party in charge and hold its candidates retrospectively accountable if they are dissatisfied with the status quo.¹⁰³

Of course the need for, and effectiveness of, the intermediary's signal varies depending on context. A party label is far less important in a high-profile election, such as a presidential election, where candidates have extensive media exposure and their personalities are well known, than in a low-profile legislative election where the only thing voters might know about a candidate is her party affiliation.¹⁰⁴

But all in all, political parties act as intermediaries that can distill vast amounts of complex information down into an easily digestible signal, allowing voters to pull the lever based on party label alone, without doing damage to their interests. And in doing so, intermediaries can actually reduce the agency costs in the complex principal-agent problem that is political representation, helping a large and diffuse group of principals better choose, monitor, and control its agents.¹⁰⁵

B. *The Need for Information Intermediaries in MDLs*

Information intermediaries can play an essential role in multidistrict litigation. Claimants in MDLs generally lack important information about their claims and the ability to process that information. Most MDL claimants are laypeople, not lawyers. Most don't have a wealth of experience with the legal

100. Issacharoff & Ortiz, *supra* note 97, at 1629–30. See generally JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA* (1995) (describing political parties as “intermediaries that connect the public and the government”).

101. See Issacharoff & Ortiz, *supra* note 97, at 1629–30; ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 206–07 (1998); see also *Tashjian v. Republican Party*, 479 U.S. 208, 220 (1986) (“To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.”).

102. Issacharoff & Ortiz, *supra* note 97, at 1650.

103. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 366 (2013). For an argument that legal constraints on the parties' ability to spend money, control nominations, and award patronage have eroded the parties' power to discipline elected officials and contributed to dysfunctional governance in recent years, see Samuel Issacharoff, *Outsourcing Politics: The Hostile Takeover of Our Hollowed-Out Political Parties*, 54 HOUSTON L. REV. 845 (2017).

104. See Trump, Donald J.; see also Elmendorf & Schleicher, *supra* note 103, at 393.

105. Issacharoff & Ortiz, *supra* note 97, at 1629.

system, let alone with the types of claims at issue in the MDL. In other words, they are single-shot players.¹⁰⁶ Consequently, although claimants in these kinds of cases often have claims of substantial value, they will typically have a hard time gauging the strength and value of their claims without legal assistance.

Indeed, that is why claimants in all cases—even the simple ones—hire lawyers. And ordinarily we rely on lawyers to help claimants gather, filter, and process information about the causes of action available, their probability of success, and the likely settlement value of their claims. In other words, lawyers serve as information intermediaries. This is one of their central functions in any case. A lawyer can sit down with a client and explain the terms of a complicated settlement offer and give an informed opinion on whether it is a good deal. And the client can decide for herself whether to take her attorney's advice.

But the realities of MDL get in the way of this simple lawyer-as-information-intermediary model. There are multiple points at which the flow of information to claimants can break down, and the lawyers in an MDL may not always have the proper incentives to accurately process information for their clients, particularly when it comes to settlement. This creates an opening—and a need—for the MDL judge to act as an information intermediary by distilling complex information about the settlement down into a usable signal for claimants.

1. MDL Lawyers Are Not Sufficient Information Intermediaries

The lawyers who make the important decisions in MDLs don't sit down with all of the individual clients and explain what they are doing. The important decisions in MDLs are made by the lawyers on the steering committee. Those lawyers make strategic and tactical decisions that will affect everyone in the MDL without consulting with either the claimants themselves or the individual lawyers those claimants may have retained. And the steering committee typically negotiates any global settlement with the defendants. This is a necessity. It is the centralization of control that gives the plaintiffs the leverage they need to negotiate on equal terms with the defendant. But, in doing so, the interests of these central lawyers may diverge from the interests of the claimants over whose cases they have effective control.

Individual claimants, and the lawyers they have retained to represent them, face a significant collective-action problem in monitoring the central lawyers in the MDL. Like shareholders in a publicly traded corporation or voters in a democracy, no individual claimant has sufficient incentive to invest in monitoring the activities of the steering committee, because doing so would be

106. See Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network* (Univ. of Ga. Sch. of Law Research Paper Series, Paper No. 2016-04, 2016), <http://ssrn.com/abstract=2724637> [<https://perma.cc/9QMD-4GB5>]; Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

costly and the benefits of monitoring would be widely shared.¹⁰⁷ Each may prefer to free ride on the monitoring efforts of others, and the predictable result is that little effective monitoring occurs. Indeed, even peripheral lawyers who build up substantial inventories of claims lack the proper incentives to invest in sufficient monitoring of the central lawyers.¹⁰⁸

And even if claimants tried to monitor the central lawyers, formal obstacles would get in their way. The lawyers on the steering committee lack a direct attorney-client relationship with most of the claimants in the MDL. The mechanisms for claimants to affect the steering committee's conduct are few and far between, and the steering committee's negotiations may be shrouded in secrecy by a formal gag order on the attorneys.¹⁰⁹

The central lawyers' strategic decisions can profoundly affect claimants—as the claimants are bound by the pretrial rulings of the MDL judge—even if those claimants had little opportunity to provide input to the steering committee or to be heard individually in the MDL court.¹¹⁰ At the same time, the claimants have no ability to exit the MDL, at least until the judge sees fit to let them go at the conclusion of pretrial proceedings.¹¹¹

It is not until the steering committee and the defendant have negotiated a global settlement that the bulk of the claimants have any real say over the fate of their claims. At that point, individual claimants must decide whether or not to opt into the settlement. And information—about the progress of the litigation, the strengths and weaknesses of various claims, the prospects of success, the terms of the settlement—is critical to those decisions. But the central lawyers who control the litigation—the ones who have the information—lack the incentives to fully explain it to the claimants once they have negotiated a settlement that they desperately want to close. The steering committee's ability

107. EASTERBROOK & FISCHER, *supra* note 96, at 172.

108. Aside from claimants' inability to capture all of the benefits of their monitoring efforts (thus reducing their incentives to monitor), some peripheral lawyers may be aspiring to join the leadership ranks in future MDLs, which, some scholars have argued, requires that they demonstrate their ability to get along and suppress the urge to make a fuss over the PSC's activities. Burch, *supra* note 60, at 12–13. The risk that repeat-player intermediaries will find ways to influence institutional arrangements to benefit themselves at the expense of the principals and market efficiency is not limited to aggregate litigation. Professor Kathryn Judge explores a similar problem among financial intermediaries, who often favor institutional arrangements that pay them higher transaction fees. Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 629–30 (2015). And repeat-player political parties manipulating the machinery of democracy to favor themselves or their allies is, of course, a perennial problem of public law. See, e.g., D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 685–87 (2013).

109. See, e.g., Stipulation and Order Regarding Confidentiality of Settlement Documents and Discussions, *In re Volkswagen “Clean Diesel” Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2672 (N.D. Cal. Apr. 22, 2016), ECF No. 1444.

110. See, e.g., Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 668–69 (1987).

111. See Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 617 (2011) (noting that “there is no sharp distinction between being a party with little actual control and being an absentee with none”).

to get paid for their common-benefit work—the work of consolidated discovery, motion practice, and settlement negotiations on behalf of all claimants—depends on enough claimants opting in to the global settlement to make the settlement attractive to the defendant. That’s why most of these settlement agreements contain walkaway provisions that blow up the deal if enough of the plaintiffs don’t sign on.¹¹² As a result, in their dealings with individual claimants, the central lawyers may be in sales-pitch mode, not counseling mode.

But what about the peripheral lawyers that claimants have retained directly to handle their claims? Can’t they play the intermediary role and give their clients the information they need to evaluate the settlement?¹¹³ Too often, the answer is no. Peripheral lawyers in MDLs frequently handle large inventories of claims that they assembled either through advertising campaigns or referral networks. These inventories give them some degree of leverage to push for their clients’ collective interests within the MDL, but create the risk that the lawyers will treat the clients as a collective and not as individuals.¹¹⁴

Indeed, global settlements in MDLs are often structured to encourage peripheral lawyers to do just that. In order to be able to offer the defendant a sufficient degree of closure to make a global settlement possible (and potentially secure a premium for delivering peace), the steering committee has to be able to prevent peripheral lawyers from funneling the weakest cases in their inventories into the global settlement while cherry-picking their strongest cases to hold out for a better deal under threat of trial.¹¹⁵ So, MDL settlements frequently include various closure provisions designed to make continuing to litigate less attractive.¹¹⁶ Indeed, many MDL settlements are actually structured as agreements between the defendant and the plaintiffs’ lawyers (not the claimants themselves).¹¹⁷ These agreements frequently require a lawyer who wishes to participate as to any of her clients to recommend the settlement to *all* of her clients—and in some cases, to even withdraw from representing clients who don’t want to sign on.¹¹⁸ In other words, a lawyer must commit to settling all of the claims in her inventory or none. In for a penny, in for a pound.

112. For an explanation of walkaway provisions, see D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 *FORDHAM L. REV.* 2175, 2179–81 (2017).

113. See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 *N.Y.U. L. REV.* 296, 316–20 (1996) (suggesting that individually retained plaintiffs’ attorneys (IRPAs) can sometimes help claimants evaluate the steering committee’s performance).

114. See Erichson, *supra* note 11, at 558–64; Erichson & Zipursky, *supra* note 6, at 282–83.

115. See Rave, *supra* note 29, at 1193–94.

116. See Rave, *supra* note 111, at 2177.

117. Burch, *supra* note 60, at 90.

118. *Id.* at 98. The *Vioxx* settlement, for example, required lawyers who wished to sign up any clients in the settlement to withdraw from representing clients who did not wish to participate. Master Settlement Agreement § 1.2.8.1, *In re Vioxx Prod. Liab. Litig.*, MDL No. 1657 (E.D. La. Nov. 9, 2007) [hereinafter *Vioxx Master Settlement Agreement*]. Several other settlements have included similar requirements. See Rave, *supra* note 112, at 2191–97; Burch, *supra* note 60, at 99–101.

Once the peripheral lawyer has bought in completely, the risk that she will treat her clients as an aggregate and not as individuals is exacerbated.¹¹⁹ The lawyer's incentives to fully explain the deal—including its downsides—are weakened. And even a lawyer acting in good faith may be influenced by the fact that she can collect contingency fees for participating clients, but may not be able to get paid at all for work done on behalf of clients who do not opt in.¹²⁰ In short, the peripheral lawyers may also be in sales-pitch mode, just as much as the central lawyers.

Thus in MDLs, there are at least two potential points where the flow of information can break down: (1) between the lawyers on the steering committee and the claimants and lawyers on the periphery, and (2) between the peripheral lawyers and the claimants. Neither group of lawyers will have the right incentives to fully explain the settlement—which must be consummated for them to get paid—to the claimants individually. In short, claimants remain at an informational disadvantage, which limits both their ability to monitor and control their agents and the meaningfulness of their consent to a global settlement.

2. *The MDL Judge Could Serve as an Adequate Information Intermediary*

MDL therefore creates circumstances in which lawyers may either be unable or unwilling to protect their clients from bad deals. Even lawyers acting in good faith may conclude that closing the deal may create a net good even if it is less than optimal for some claimants. Fortunately, the judge-centric MDL structure can help. By reviewing and expressing an opinion on the fairness of the settlement, the MDL judge can provide critical information to individual claimants in an easily digestible form at the moment they most need it. The MDL judge can, in other words, serve as an information intermediary, helping claimants monitor and control their legal agents, much like political parties serve as intermediaries, helping voters control their political agents by providing easily digestible signals that voters can use on election day.

Although MDL cases come in all shapes and sizes, large-scale mass-tort MDLs are typically heavily litigated over several years. During this time, the MDL judge will have overseen the exchange of discovery, decided numerous fact-intensive motions, often including *Daubert* motions and motions for summary judgment, and perhaps even tried some bellwether cases or had the benefit of some trials in the state courts. The judge will thus have a deep base of knowledge about the litigation as a whole and have leverage to extract additional information from the lawyers for the defendant and from the steering committee.

119. See Erichson & Zipursky, *supra* note 6, at 283–85.

120. The *Vioxx* settlement, for example, required participating lawyers to disavow any financial interest in claims that did not participate in the settlement. *Vioxx Master Settlement Agreement*, *supra* note 118, §§ 1.2.8.2, 17.1.35. Lawyers could not even take a referral fee for sending a nonparticipating client to another lawyer. See Rave, *supra* note 112, at 2198–99.

Having developed a degree of expertise in the litigation, the judge is in a better position to process that information—to assess the strengths and weaknesses of various claims and the benefits and risks of settling—than the average claimant. In other words, the MDL judge is well situated to gather and process information about the settlement for individual claimants.

A judicial assessment of the fairness of the settlement is a powerful piece of information. When the judge reviews a settlement and publicly opines on whether it is a good deal, that gives the claimants an easy-to-understand signal about the performance and faithfulness of their agents. In this sense, the judge's endorsement or criticism of the settlement can function like a political party label. Just as a rationally ignorant voter can vote intelligently based on party label alone, an information-starved claimant can more intelligently decide whether to opt into a global settlement based on the judge's assessment of the deal.

Also like a political party, the judge as intermediary can help claimants monitor and discipline their primary agents—the lawyers in the MDL.¹²¹ If the lawyers on the steering committee attempt to collude with the defendant to craft a lowball settlement that rewards them with generous fees, the judge can send a signal to the claimants that they should not opt into the deal. And if a substantial number of claimants listen to that signal, the central lawyers will be forced back to the negotiating table, as most defendants condition aggregate settlements on the participation of a very high threshold percentage of claimants. Indeed, the mere threat of judicial review may encourage the lawyers to negotiate a better deal in the first place.

The prospect of the judge weighing in on the settlement may also empower and encourage the peripheral lawyers to be better intermediaries for the claimants and to act as a counterweight to the steering committee. A peripheral lawyer with a midsize inventory of claims may have very little leverage in an MDL. With no seat on the steering committee, the lawyer cannot do much to influence the settlement negotiations directly. And without control over a sufficient number of claims to trigger the defendant's walkaway threshold, the lawyer cannot threaten to blow up the entire deal if his clients' concerns are not addressed. But if that lawyer can threaten to go to the judge with an argument that the settlement is unfair in some way, knowing that the judge is planning to review the settlement and that a judicial thumbs down might sink the entire deal, all of a sudden that lawyer has leverage to push for changes. In other words, the mere availability of judicial review may inject some healthy competition into the plaintiffs' side by empowering peripheral lawyers to express dissenting views, when they otherwise might have found it in their interest to just go along with the steering committee.¹²²

121. See Issacharoff & Ortiz, *supra* note 97, 1649–50.

122. Cf. Burch, *supra* note 60, at 73–74, 83–84 (arguing that cartels of repeat players among MDL leadership stifle competition and that aspiring repeat players have incentives to go along). Of course, creating avenues for peripheral lawyers to object to settlement terms might enable strategic

Finally, the expectation of judicial review may work directly on the steering-committee lawyers themselves to create pressure to negotiate fair deals. Repeat players must jealously protect their reputations if they hope to secure positions on steering committees in future MDLs. And a judge's public declaration in one MDL that the lead lawyers negotiated an unfair settlement may jeopardize the prospects of other MDL judges appointing them to steering committees in the future.¹²³

The signal that the judge sends can be—and should be—tailored to the needs of the case and the particularities of the settlement. It need not be limited to an up-or-down call on the entire deal. If there are particular parts of the settlement that appear problematic, the judge can point those out. For example, if the settlement results in “damages averaging” and underpays a particular category of claims (e.g., those with the most severe injuries) while overpaying others,¹²⁴ the judge can send a signal to those claimants who are shortchanged, even if the amount of the total recovery looks pretty good.

There is, of course, a trade-off in how specific the judge's assessment can be. The more granular the judge gets in evaluating how the settlement will affect different claimants, the less easily digestible the judge's signal will be. But judges mindful of this tradeoff can still generate useful signals. And the judge's assessment is not supposed to be a complete substitute for the claimants' lawyers' advice. Rather, it is a complement—an additional piece of information for claimants when weighing their options—and a factor that a self-dealing lawyer would have to explain away in selling a bad settlement.

It is important, of course, that the judge's signal reach the claimants. In many cases, the disputes in the MDL are high profile and attract significant media coverage—examples include the BP oil spill litigation, the NFL concussion litigation, the Volkswagen diesel emissions litigation, and the 9/11

players to hold up the entire deal unless they are paid off, just as professional objectors in class action settlements are often accused of “blackmail.” See, e.g., Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1633–37 (2009). But, as the debate on this point in the class action context has revealed, sometimes enabling extortion artists is the price we pay for injecting some form of adversarial process into what might otherwise be a very cozy review of a settlement favored by the negotiators on both sides. See, e.g., Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 438–42; ALI PRINCIPLES, *supra* note 27 § 3.08, cmt. (b) & Reporters' Notes. And ultimately, the MDL judge is a backstop, as strategic holdouts who come forward with meritless objections to the global settlement are unlikely to persuade the judge to publicly criticize the deal.

123. We are grateful to Peyton Craig for suggesting this point.

124. Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 790 (2007) (describing damages-averaging proposals as a “contravention of the precepts of liberal theory”); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 791 (2002) (describing how damages averaging increases the risk of “class settlements that serve the economic interests of class counsel and defendants but not necessarily the interests of absent class members”).

first-responders' litigation.¹²⁵ In these cases, a simple statement about the settlement on the record by the judge in a public hearing should be enough to get the word out. Even in lower-profile cases of less interest to the general public, MDL judges can communicate their assessments of the settlements to claimants by posting them on court websites (most MDL judges already establish dedicated websites as a clearinghouse for case-related information) or even on social media, such as a mass-tort victims' Facebook page.¹²⁶

Unlike absent class members in a small-claims class action, most MDL claimants have sizable claims. Accordingly, they are likely to pay attention to what is going on in their cases and monitor such channels for new information, even when the judge is geographically distant. Judges, or special masters acting on their behalf, could even hold "town hall"-style meetings to speak directly to claimants about the settlement, as some judges have done in the past.¹²⁷ And the

125. See, e.g., Ken Belson, *Judge Rejects N.F.L. Settlement, For Now*, N.Y. TIMES (Jan. 14, 2014), <https://www.nytimes.com/2014/01/15/sports/football/judge-questions-whether-sum-of-nfl-settlement-is-enough.html> [https://perma.cc/KC9P-FRWN]; Ken Belson, *Judge Approves Deal in N.F.L. Concussion Suit*, N.Y. TIMES (Apr. 22, 2015), <https://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html> [https://perma.cc/S48N-4JLH]; Mireya Navarro, *Federal Judge Orders More Talks on 9/11 Deal*, N.Y. TIMES (Mar. 19, 2010), <http://www.nytimes.com/2010/03/20/nyregion/20zero.html> [https://perma.cc/RJ94-UBJV]; Mireya Navarro, *U.S. District Court Approves Ground Zero Health Settlement*, N.Y. TIMES (June 23, 2010), <http://www.nytimes.com/2010/06/24/nyregion/24zero.html> [https://perma.cc/57VC-BD4G]; Reuters, *Judge Gives Final Approval to BP's Oil Spill Settlement*, N.Y. TIMES (Dec. 22, 2012), <http://www.nytimes.com/2012/12/22/business/judge-gives-final-approval-to-bps-oil-spill-settlement.html> [https://perma.cc/T5N3-XKC6]; John Schwartz, *Accord Reached Settling Lawsuit Over BP Oil Spill*, N.Y. TIMES (Mar. 2, 2012), <http://www.nytimes.com/2012/03/03/us/accord-reached-settling-lawsuit-over-bp-oil-spill.html> [https://perma.cc/KGP4-2VQJ]; Sudhin Thanawala, *\$15 Billion Volkswagen Emissions Deal Clears 1st Hurdle*, ASSOCIATED PRESS (July 26, 2016), <https://apnews.com/45d7b6d9934c4e3cab4e81c873f87f65/judge-set-decide-15b-volkswagen-settlement> [https://perma.cc/3K8P-J8LF].

126. See, e.g., Barbara J. Rothstein & Catherine R. Borden, Fed. Judicial Ctr., *Judicial Panel on Multidistrict Litig., Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide For Transferee Judges* 8 (2011) (advising MDL judges to set up case websites), <http://www2.fjc.gov/sites/default/files/2012/MDLGdePL.pdf>; [https://perma.cc/2MX2-XKAN]; Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 117–20 (2011) (discussing how plaintiffs communicate through social media). Nearly all MDLs of any size now have an accompanying website hosted by the transferee court. Although these websites vary in quality, the best ones are easy to navigate, include straightforward links to all case-management orders and opinions, and provide a means to contact the court. One good example is the website in *In re Actos (Pioglitazone) Products Liability Litigation*, MDL No. 2299 (W.D. La.), which can be found at <http://www.lawd.uscourts.gov/welcome-mdl-no2299> [https://perma.cc/BL32-DTTA].

127. Judge Hellerstein held a series of town hall meetings in the 9/11 first responders' litigation to explain the settlement to claimants and give them an opportunity to ask questions. See *In re World Trade Ctr. Disaster Site Litig.*, 83 F. Supp. 2d 519, 521 (S.D.N.Y. 2015) (describing "town-hall meetings in Staten Island and in Queens to address the concerns of plaintiffs eligible to opt [in]"). Other judges and special masters have conducted similar public meetings, among them Judge Weinstein in the *Agent Orange* litigation. See also Kenneth R. Feinberg, *Democratization of Mass Litigation: Empowering the Beneficiaries*, 45 COLUM. J.L. & SOC. PROBS. 481, 489 (2012) (describing how Weinstein "traveled to Houston, Chicago, Atlanta, and San Francisco, and held public hearings in his own courtroom in Brooklyn, publicizing the settlement and inviting Vietnam veterans throughout the nation to choose the most convenient forum to testify and offer evidence, pro and con, about the settlement").

lawyers may have an ethical obligation to communicate the judge's view of the settlement to their clients when they try to get the claimants to sign on.¹²⁸ In short, as mass-communication grows ever easier, and interaction on the Internet becomes more commonplace, we expect that there will be continued innovation along these lines.¹²⁹ Lead counsel Elizabeth Cabraser's recent online "ask-me-anything" session with claimants in the Volkswagen clean-diesel cases provides only one example of the possibilities.¹³⁰

However it gets to them, the judge's signal about the settlement can be an invaluable piece of information for claimants. Informed decision-making allows individual consent to work as the governance mechanism in MDL; in other words, it enables claimants to effectively monitor their lawyers. And by giving a clear and easily digestible signal on the fairness of a global settlement, the MDL judge can enable individual claimants to make informed decisions about whether to opt in. The role of the judge in multidistrict litigation, therefore, should be to get information to the clients in a usable form so they can make informed decisions about their claims.

C. *Information Forcing Is Central to the Judicial Role in MDL*

Whether a judge ought to act as an information intermediary, and whether she is authorized to do so as a matter of doctrine, are two separate questions. Fortunately, we believe that this role is fully within the MDL judge's power. Indeed, the entire structure of MDL is a good fit with the concept of judicial information forcing. Even if it is true that the judge has no formal authority to approve or reject a global MDL settlement pursuant to Rules 23 and 41, the judge is far from powerless.¹³¹ No rule prevents the judge from publicly opining on the

128. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (AM. BAR ASS'N 2016); *Rizzo v. Haines*, 555 A.2d 58, 64 (Pa. 1989) (affirming malpractice liability where lawyer did not properly inform his client of the trial judge's recommendation that the client's tort suit be settled for \$550,000 or of opposing counsel's reaction); Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 858 (1990) (reading *Rizzo* to mean that "the right of clients to be informed of settlement offers [includes] the right to be informed of the judge's settlement recommendation").

129. See, e.g., Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2906890> [<https://perma.cc/AP73-9USC>]. A joint project of the National Center for State Courts, the JPML, and the Federal Judicial Center has begun to examine this question, even providing some examples of how better communications technology, such as websites and video conferencing, can enhance participation by parties scattered around the country. See *Technology, MULTIJURISDICTION LITIG.*, <https://multijurisdictionlitigation.wordpress.com/technology> [<https://perma.cc/7E49-QHUB>].

130. David Tracy, *Got Diesel Volkswagen Settlement Questions? Ask the Lead Plaintiffs' Lawyer Anything Tomorrow Morning*, JALOPNIK (Mar. 21, 2017, 2:16 PM), <http://jalopnik.com/got-diesel-volkswagen-settlement-questions-ask-the-lea-1793486723> [<https://perma.cc/R83A-AQLD>].

131. Rule 23(e)'s requirement of judicial settlement approval applies only to class actions. And while Rule 41(a)(1)(A)(ii) allows the parties to dismiss a case by mutual stipulation without any judicial action, nothing prevents the judge from speaking her mind before the deal is fully consummated. Although it will not bind anyone, the judge's assessment of the settlement is not an

fairness of a proposed settlement, and doing so is fully consistent with the broader judicial role in an MDL. An MDL judge is well positioned to make her views of a settlement known—in fact, better positioned than a judge in a less complex case.¹³² And because of the governance problems outlined above, the judge is better justified in serving this purpose.

To begin with, judicial involvement in settlement proceedings generally is a horse that has left the barn.¹³³ Although criticisms of both managerial judging and settlement remain prominent in the academic literature, it would be difficult to turn back the clock on either of these developments.¹³⁴ This is particularly true in the MDL model, whose goal is settlement, and whose outcome is nearly always settlement.¹³⁵

“advisory opinion” in the Article III sense. It is not an abstract judicial declaration of what the law is outside the context of any concrete dispute, nor does it give advice to the legislature or executive. Cf. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.2 (5th ed. 2007) (describing policies underlying prohibition on advisory opinions). The parties before the court in an MDL typically have hotly contested disputes about liability, causation, damages and any number of other concrete issues. It doesn’t even go as far as a declaratory judgment in that regard, because in a declaratory-relief case the underlying basis for the dispute may in fact be contingent on events that have not yet occurred. Cf. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937) (confirming constitutionality of declaratory judgments). Instead it is much more akin to the kind of ordinary and accepted promotion of settlement that judges engage in all the time under Rule 16. Indeed, if weighing in on the fairness of a settlement was an advisory opinion, then Rule 23(e) would be open to the same attack, as a Federal Rule of Civil Procedure cannot expand the judicial power under Article III. Cf. *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1803) (holding that Congress cannot expand Article III by statute).

132. Cf. Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 65 (1992) (describing difficulty in mine-run cases of judges’ obtaining information about merits of cases).

133. See, e.g., FED. R. CIV. P. 16(a)(5), (c)(2)(H); FED. R. CIV. P. 16 advisory committee note to 1983 amendments; see also FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* § 22.91 (4th ed. 2004) (noting that “some judges participate actively in settlement negotiations”). Judicial involvement with settlement is part of a larger trend of moving away from the adversary system when thinking about procedure. See Norman W. Spaulding, *Due Process Without Judicial Process?: Antiadversarialism in American Legal Culture*, 85 FORDHAM L. REV. 2249, 2251, 2257–58 (2017). There is, however, some residual angst among academics, judges, and practitioners. See Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1368–70 (2013).

134. Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 671 (2011) (describing how “judges now take control of their cases from the start”); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1983 (1989) (describing how over the course of the second half of the twentieth century “[j]udges began to see themselves less as neutral adjudicators . . . and more as managers of a costly and complicated process.”). For classic critiques see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). For a contrary view emphasizing the public benefits of settlements, see Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177 (2009).

135. See Burch, *supra* note 7, at 73 (noting that only 2.9 percent of MDL cases have ever been remanded to their home districts); Marcus, *supra* note 6, at 2272 (describing how MDL produces settlement “out of the chaos that could engulf dispersed litigation”); Sherman, *supra* note 6, at 2223 (“The MDL model, applied creatively, can be an effective alternative in certain situations to class treatment for accomplishing an aggregate or global settlement.”).

Indeed, settlement is part of MDL's DNA, and judges have played an active role in facilitating it—including weighing in on the fairness of deals—since the very beginning. The electrical-equipment litigation that led to the MDL statute was settled in a series of large-scale multiparty settlements, all of which were facilitated by judges in both private and public meetings.¹³⁶ At these conferences, the judges frankly assessed the strengths and weaknesses of the parties' cases and the acceptability of their settlement positions. For instance, upon hearing one of the plaintiffs' early settlement offers to General Electric, Judge Sylvester Ryan of the Southern District of New York made clear that he considered it a nonstarter because “what the utility executive was asking for would break General Electric and put it out of business.”¹³⁷ In those cases, in fact, the judges of the Coordinating Committee on Multiple Litigation formally approved the settlements as though they were class actions.¹³⁸ Their reason for doing so was, at least in part, to send a signal to the litigants: judicial imprimatur helped ensure that the private and public directors of the parties on both sides of the litigation would have grounds to approve the deals without angering shareholders.¹³⁹ And those judges were congratulated for their achievement in saving the federal courts from the deluge of trials that would have been needed had settlement failed.¹⁴⁰

The information-intermediary function that we envision is fully consistent with the broader information-generating role that the MDL judge plays at the head of consolidated nationwide litigation. These roles are analytically distinct, but complementary. MDL judges already play an important role in forcing the parties to develop and exchange the information necessary for them to reach a settlement. It is only natural for the judge to take the next step to act as an intermediary to help the claimants process that information effectively.

136. CHARLES A. BANE, *THE ELECTRICAL EQUIPMENT CONSPIRACIES: THE TREBLE DAMAGE ACTIONS* 239–44 (1973) (describing the series of public and private meetings held by prominent judges in the electrical-equipment cases).

137. *Id.* at 239.

138. *See id.* at 250; *see also* Proceedings of the Twenty-Eighth Judicial Conference of the Third Judicial Circuit of the United States, *The Impact of the Electrical Anti-Trust Cases Upon Federal Civil Procedure*, 39 F.R.D. 375, 519 (1965) (statement of Harold Kohn) (“[T]he judges in effect, being practical men, not scholars, did for us what we wouldn't do ourselves by having a de facto class suit pending throughout the entire United States, and, as I say, under the existing rules.”).

139. BANE, *supra* note 136, at 250. Judicial approval also helped ensure that the settlement proceeds would receive favorable tax treatment. It was important to the parties that the proceeds of the settlement not be treated as treble damages for this reason. *See id.* at 251.

140. *See, e.g.*, Earl Warren, Address to the Annual Meeting of the American Law Institute, May 16, 1967, *quoted in* FED. JUDICIAL CTR., *MANUAL FOR COMPLEX AND MULTI-DISTRICT LITIGATION*, at 6 (1969); Resnik, *supra* note 1, at 32 (“Much legal commentary describes the work of the Committee as successful.”). Defense attorneys saw things differently. They believed that their interests were sacrificed in the judges' desire to settle the litigation and they opposed the MDL legislation vigorously. *See, e.g.*, William M. Sayre, *Developments in Multiple Treble Damage Act Litigation*, in 1966 NEW YORK STATE BAR ASSOCIATION ANTITRUST LAW SYMPOSIUM 51–52 (1966) (describing the pressure “put upon the defendants to force them to settle” by the judges through a “series of new and unprecedented rules” that “greatly accelerated the discovery and trial timetables”).

From the beginning, the creators of the MDL statute viewed the MDL judge as a developer of centralized information.¹⁴¹ One major selling point of the MDL statute was the ability of a single judge to develop nationwide document depositories, preside over centralized depositions, and develop expertise in the litigation.¹⁴² The judges who pushed the statute through the Judicial Conference and the Congress were avowed disciples of the active-judicial-management movement, particularly in widely dispersed nationwide tort litigation. They believed that the MDL judge had to be far more than a passive steward, but rather someone in a position to exercise rigid nationwide control over the way the parties developed and exchanged information.¹⁴³ To put a finer point on it, the MDL statute's drafters did not trust the parties to generate the information needed to bring a complex case to a resolution without orchestration by the MDL judge. In particular, the drafters believed that comparatively well-resourced defendants would drag their feet because delay inured to their benefit. So they sought to place the MDL judge at the center of the litigation and saw the judge's information-generation role as key to MDL's success.

MDL has, in fact, become a superb vehicle for the development of information in modern mass litigation. And MDL judges are right in the thick of it. Through the use of tools like case-census orders, monthly status conferences, centralized databases of documents and claims, special masters, mediators, and bellwether trials, MDL judges force the parties to generate and exchange information. That information helps the parties determine (and come to some agreement on) what the various claims within the MDL are worth, allowing them to craft a global settlement, rather than waiting for a judge or jury to set the value of each claim in thousands of individual trials. In short, the actively supervised exchange of information between all interested parties is what the framers of the statute had in mind, and it is what makes MDL such a marvelous tool for settlement.

Since the MDL judge plays such an active role in developing the information that facilitates settlement, reviewing the resulting settlement is only a natural outgrowth. Orchestrating this elaborate information exchange gives the MDL judge some expertise in the substance of the litigation. Beyond simply forcing the parties to generate and exchange information until they reach a settlement, the MDL judge can help process and distill that information into a usable signal for claimants who must decide whether or not to opt into that

141. BANE, *supra* note 136, at 625–27 (describing national document depositories located in Chicago and New York and nationwide depositions of key witnesses presided over by district judges).

142. *Multidistrict Litigation: Hearings Before Subcomm. on Improvements of Judicial Machinery of the Comm. on the Judiciary*, 89th Cong. 9 (1966). In selling the statute to his colleagues, Judge William H. Becker of Kansas City emphasized the “extreme need for central management” and explained the status quo could not work because “litigants would run cases.” Bradt, *supra* note 50, at 878.

143. Bradt, *supra* note 50, at 865.

settlement. This role—as an information intermediary—fits hand in glove with the MDL judge’s broader information-forcing function.

Judges ought to embrace this role. The reason MDL succeeds as an aggregation mechanism where the class action failed is that it facilitates collective proceedings while retaining the individual identities of the component cases. Because of the governance problems outlined above, however, when MDL oscillates too much in the direction of consolidation, the risks of aggregation become too great. For MDL to remain viable, it must retain space for individual consent; if it does not, then it is just an ersatz class action vulnerable to all of the due-process attacks that doomed the mass-tort class action. Judges therefore must both facilitate global settlement and make individual consent to those settlements meaningful. The way to do this is to function as an information intermediary, emphasizing the right of the individual plaintiffs to choose to opt in to a settlement or wait for remand and go to trial.

III.

THE INFORMATION-FORCING ROLE OF THE JUDGE IN THREE MODELS OF SETTLEMENT

In this Part, we lay out three models for how an MDL judge could play an information-forcing-intermediary role in settlement and discuss some archetypal examples for each model. Frequently, the negotiating lawyers recognize the value of judicial imprimatur in selling the deal to claimants and defendants, and actively seek judicial approval of the settlement. Thus in the first model, they may, in appropriate cases, structure the settlement as a class action and let Rule 23 take over. Similarly, in the second model, the negotiating lawyers may expressly delegate the power to review the settlement to the MDL judge as part of the settlement agreement itself without seeking class certification. In the third model, by contrast, the judge may take the lead and unilaterally review the settlement when the lawyers are reluctant. This is the most controversial model, but it may also be the model in which a judicial embrace of an information-forcing role is most necessary.

A. *Model 1: Class Action Settlement*

In the first model, the lawyers could decide to seek certification of a settlement class before the MDL judge, triggering the judge’s formal obligations under Rule 23(e) to review the settlement for fairness and adequacy. Both the framers of the MDL statute and the drafters of the 1966 amendments to Rule 23 intended that there be class actions within MDL proceedings when the circumstances warranted it.¹⁴⁴ In the intervening decades, the combination of

144. Bradt, *supra* note 50, at 867 (citing Memorandum to the Chairman and Members of the Advisory Committee on Civil Rules, *supra* note 50, at 4 (reporting the need for “a good deal of play in the joints” in handling mass-tort litigation)).

class-action and MDL treatment to achieve a global settlement has been a common exercise.¹⁴⁵ If the steering committee chooses to combine the cases transferred into a MDL in a single, consolidated class-action complaint, the judge may certify it under Rule 23.

Of course this approach is only available in cases amenable to class certification under Rule 23 as interpreted by the increasingly stringent requirements of *Amchem*, *Ortiz*, and *Wal-Mart*, but it has not been unusual throughout the history of MDL. In a litigation universe in which class certification is more difficult to achieve, particularly in mass-tort cases, the opportunities to take advantage of this approach are more limited. But in cases where it is available, it offers the most straightforward and doctrinally grounded mechanism for a judge to review the settlement.¹⁴⁶

When the negotiating lawyers structure the global settlement as a class action, Rule 23 kicks in and provides both the formal authorization and the procedural framework for the judicial review. The requirements for certification and approval are unchanged from the typical class-action settlement, and the judge would review a proposed settlement in the traditional manner, by holding fairness hearings and listening to objectors.¹⁴⁷ And such a settlement, if approved, would be binding on all class members who do not opt out.¹⁴⁸

The decision to structure the settlement as a class action does not, however, significantly change the dynamics of the claimants' decision whether to participate in the deal. In a settlement-class situation, plaintiffs who have already filed cases that have been transferred into the MDL are in essentially the same position as if the lawyers chose to pursue a non-class aggregate settlement. A decision to opt out of the class settlement places them in essentially the same place as a decision not to opt in to a non-class settlement. Their cases will be remanded to their original forum of choice for trial—but the plaintiffs opting out of a settlement class will have the benefit of the coordinated discovery accomplished during the MDL. In this sense, an MDL plaintiff who chooses to opt out of a settlement class is actually better off than the typical absent class member who receives notice of a settlement and chooses to opt out but must start from square one.

On both sides of a litigation, counsel who are confident that their settlement agreement passes Rule 23 muster will find this approach attractive because, if successful, it places a judicial imprimatur on the deal, which sends a signal to plaintiffs that they ought to accept. Moreover, because the judge's decision to

145. See 3 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 10.31 (5th ed. 2016).

146. 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3863 (4th ed. 2016 update) (“Pretrial MDL proceedings may be especially appropriate class actions. . . . Matters related to class action certification should be . . . left to the overall management of the transferee judge to prevent inconsistent rulings and to promote efficiency.”).

147. See *id.* § 1797.

148. *Id.* § 4455.

approve the settlement is appealable as a final judgment, this is not a good strategy for counsel trying to put one over on the judge.¹⁴⁹ The lawyers must be confident that the terms of the agreement will survive review not only by the MDL judge, but also by an appellate panel. If the settlement is rejected—either by the district judge or the court of appeals—it requires the parties to go back to the bargaining table to hammer out something better. And it may jeopardize the lawyers' credibility with the claimants, whose buy-in will be critical to the ultimate success of the deal.

One recent example of this approach and its benefits is the MDL involving retired National Football League players alleging that the league failed to inform them about, and protect them from, concussion-related injuries. Beginning in 2011, retired players began filing suits in federal courts around the country, and those cases were eventually transferred to an MDL before Judge Anita Brody of the Eastern District of Pennsylvania in Philadelphia.¹⁵⁰ Following the creation of the MDL, some 5,000 additional players joined over 300 tagalong lawsuits.¹⁵¹ While the parties awaited a ruling on a motion to dismiss the players' claims as preempted by the Labor Management Relations Act, Judge Brody ordered the parties to mediation.¹⁵² This mediation resulted in a proposed settlement agreement, and the steering committee filed a class-action complaint and simultaneously sought class certification and judicial approval of the settlement under Rule 23. To assist her in assessing the fairness of the proposed agreement, Judge Brody appointed a special master to engage in "financial analysis of any agreements reached by counsel to the parties" and to "make formal or informal recommendations and reports to counsel for the parties and to [her]."¹⁵³

Judge Brody, however, rejected the proposed settlement, primarily on the ground that she believed the \$765 million set aside for medical diagnosis and treatments would prove inadequate.¹⁵⁴ To remedy the inadequacy, she sent the parties back to the bargaining table. When the parties returned five months later,

149. *Id.*

150. *In re Nat'l Football League Players' Concussion Injury Litig.*, 842 F. Supp. 2d 1378 (J.P.M.L. 2012).

151. *In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 421 (3d Cir. 2016). For an explanation of tagalong suits, see Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 787–88 (2012).

152. *In re Nat'l Football League Players' Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa. July 8, 2013), ECF No. 5128 (order requiring parties to "engage in mediation to determine if consensual resolution is possible" before retired U.S. District Judge Layn Phillips). The judge also placed a gag order on the parties' discussing the mediation. *Id.* ("I order the parties and their counsel; to refrain from publicly discussing the mediation process or disclosing any discussions they may have as part of that process, without further order of the Court").

153. *In re Nat'l Football League Players' Concussion Injury Litig.*, MDL No. 2323 (E.D. Pa. Dec. 16, 2013), ECF No. 5607 (order appointing Perry Golkin as special master pursuant to FED. R. CIV. P. 53).

154. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708, 715 (E.D. Pa. 2014) ("I am primarily concerned that not all Retired NFL Football Players who ultimately receive a Qualifying Diagnosis or their related claimants will be paid.").

they presented a settlement in which the fund for compensating retired players was uncapped. After subsequent review, Judge Brody preliminarily approved the settlement, and potential class members were notified and given ninety days to opt out or object.¹⁵⁵ The court and counsel also publicized the settlement by using a website and allowing retired players to sign up to receive additional information about the settlement. The website included the settlement agreement, an explanation of why the parties agreed to it, and, at several points, a statement that the settlement had been approved by the court.¹⁵⁶ It also included a copy of Judge Brody's well-written and accessible opinion preliminarily approving the settlement.¹⁵⁷ Mainstream and sports media outlets also covered the settlement extensively.¹⁵⁸ Ultimately, only around 1 percent of class members opted out and 1 percent filed objections prior to the fairness hearing, despite a high-profile campaign by some objectors to urge claimants to opt out.¹⁵⁹

In reviewing the NFL concussion settlement under Rule 23, Judge Brody did not only play the role of fiduciary judge looking out for the interests of absent class members. She also played an important information-forcing-intermediary role. While her initial rejection of the settlement under Rule 23(e) was itself

155. *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191, 203 (E.D. Pa. 2014). Recognizing the information-forcing role of the judge may require rethinking the role of preliminary approval of class action settlements. Some judges treat preliminary approval as just that—preliminary—and not all that predictive of the chances of final approval after objections are heard at a full-scale fairness hearing. But because class members may view the judge's preliminary assessment as an important signal as to the ultimate fairness of the settlement, the judge should be careful not to send the wrong information. This is particularly true if the opt-out period closes before the final fairness hearing and if the number of opt outs is going to factor into the judge's ultimate assessment of the fairness and adequacy of the settlement under Rule 23(e). Whether and precisely how to modify the procedures for preliminary approval of class-action settlements to account for the information-forcing role of the judge is beyond the scope of this Article. But, at the very least, judges should be mindful of the powerful signal that preliminary approval will send to class members and should put some real thought into the decision. One district judge has recently moved in that direction. *See* Order Granting Motion for Preliminary Approval of Class Action Settlement at 7, *Cotter v. Lyft, Inc.*, No. 13-cv-04065 (N.D. Cal. June 23, 2016), ECF No. 246. For a discussion of the signals that judges send with the pretrial rulings more generally, see Huang, *supra* note 133, at 1333.

156. *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 389–90 (E.D. Pa. 2015). The Third Circuit also cited the website in its opinion approving the settlement. *In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 438 (3d Cir. 2016) (noting that the “64,000 unique visitors” in the period leading up to the fairness hearing “weigh in favor of settlement approval”).

157. *See* NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com/> [<https://perma.cc/JD4P-74SD>]. Judge Brody's short opinion rejecting the settlement was admirably straightforward—it simply expressed the position that, given the proposed settlement awards for various injuries, there was not enough money to ensure that the class would be adequately compensated. *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F. Supp. 2d 708 (E.D. Pa. 2015). The accessibility of a straightforward up-or-down opinion such as this could be easily transferred to a non-class settlement and would make a judge an effective information intermediary.

158. *See, e.g.,* Belson, *Judge Rejects N.F.L. Settlement, For Now*, *supra* note 125; ESPN.com News Services, *Judge Fears \$765 Million Not Enough*, ABC NEWS (Jan. 14, 2014), <http://abcnews.go.com/Sports/judge-fears-765-million/story?id=21529634> [<https://perma.cc/YA2M-Q4KF>].

159. *In re National Football Players' Concussion Injury Litig.*, 307 F.R.D. at 389.

enough to send the parties back to the negotiating table, her preliminary approval of the revised deal was not enough to ensure its success. But Judge Brody's stamp of approval provided a powerful signal to the claimants—on whose buy-in the success of the deal turned—that the revised settlement was a good deal.

B. Model 2: Enlist the Judge Contractually

Even in cases where a Rule 23 class action is not available (or questionable enough that it is not worth the effort to litigate the appropriateness of certification), the negotiating lawyers may recognize the value of a judicial imprimatur and actively seek judicial review of the settlement. The lawyers may accomplish this by delegating that role to the judge in the settlement agreement itself.

In this model, the source of the MDL judge's authority to review the fairness of the settlement is contractual, much in the same way that an arbitrator or claims administrator's authority is contractual. The MDL judge need not lean heavily on any sort of quasi-class action justification for asserting authority, particularly in light of the fact that participation by claimants in any settlement that results will be by virtue of opting in. That is, unlike the class-action model, there are no true absentees bound by the terms of the agreement.

There is a long pedigree of parties seeking judicial review of private settlement agreements in mass-tort and aggregate litigation. Indeed, the lawyers in MDL's progenitor, the electrical-equipment antitrust litigation, sought and obtained judicial approval of their settlements after extensive fairness hearings. Similarly the lawyers in the *Zyprexa Product Liability Litigation*, sought and obtained Judge Jack Weinstein's formal approval of their non-class aggregate settlement.¹⁶⁰ And the lawyers in the *Guidant Products Liability Litigation* sought and obtained Judge Donovan Frank's approval of their non-class aggregate settlement.¹⁶¹ But the controversial settlement in the *Vioxx Products Liability Litigation* provides perhaps the best example of this model.

160. See *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596, 2005 WL 3117302, at *1 (E.D.N.Y. Nov. 22, 2005). *Zyprexa* is, of course, also the case in which Judge Weinstein first asserted the quasi-class action theory to justify his adjustment of private attorneys' fees. See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006). But unlike his modification of the private-fee arrangements, the parties actively sought his approval of the global settlement. See Grabill, *supra* note 8, at 129 n.20 (noting that "the parties sought and obtained Judge Weinstein's formal approval of the final settlement protocol").

161. Transcript of Status Conference at 15–17, *In re Guidant Corp. Implantable Defibrillator Prods. Liab. Litig.*, MDL No. 1708 (D. Minn. Dec. 17, 2007). After reviewing the terms of the confidential settlement *in camera*, Judge Frank explained in open court:

[I]t is without any reservations that I recommend this 25-page settlement agreement and the options that it gives to individual Plaintiffs . . . I am confident that it is not only fair, globally, but it is fair individually to individuals [sic] Plaintiffs . . . I know more about the case than I would if it was more from the old days, so to speak, a class action approach . . . So, I can say honestly, and I would to each of the Plaintiffs if they were here, that not only do I believe that they will receive fair treatment if they opt in and participate in this agreement, but I would make the observation that they might get more fair treatment than if they stood alone.

In *Vioxx*, the settlement agreement between the lawyers on the steering committee and the defendant appointed the MDL judge, Judge Eldon Fallon, as the “chief administrator” and authorized him to oversee and review the settlement.¹⁶² In this capacity, Judge Fallon approved the terms of settlement. And, sitting jointly in a special proceeding with the two state-court judges handling *Vioxx* claims in parallel state-court litigation, Judge Fallon made it clear that he thought the settlement was a good deal.¹⁶³

The *Vioxx* agreement has spawned a significant amount of literature, some of which is quite critical of the particular terms of the agreement and of Judge Fallon’s conduct in dealing with attorneys’ fees.¹⁶⁴ That debate continues to be well ventilated, and it is beyond the scope of this Article to weigh in on every aspect of the settlement. We share concerns that some aspects of the actual agreement may have been coercive.¹⁶⁵

Nevertheless, *Vioxx* presents an important example of the lawyers delegating to the judge the authority to assess the terms of the settlement, and of the judge engaging in scrutiny without violating Rule 41’s limits on judicial involvement in voluntary dismissals. There are some risks to such an arrangement, but, in our view, it is preferable to an arrangement in which the judge remains entirely hands off. Even if one ultimately disagrees with Judge Fallon’s approval of particular aspects of the *Vioxx* agreement, given the formidable closure provisions included, it is difficult to argue that the claimants would have been better off had the lawyers entered into the agreement without the court’s involvement.

In delegating authority to the MDL judge to review the settlement, the lawyers hope to gain the judge’s imprimatur, which will make it easier to sell the deal to the claimants on whose buy-in it ultimately depends. But, by inviting judicial scrutiny, they also run the risk that the judge will find problems with the settlement, sending a powerful signal to the claimants that they should not opt in, even if the judge does not formally reject it. Therefore, the negotiating lawyers have to be fairly confident that the deal will receive judicial approval to try this strategy.

Id.; see also *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litig.*, 578 F. Supp. 2d 519 (S.D.N.Y. 2008) (reviewing MDL settlement for good faith on defendant’s motion to protect settling defendants against contribution claims by nonsettling defendants).

162. *Vioxx* Master Settlement Agreement, *supra* note 118, §§ 6.1.1, 8.1, 16.4.2.

163. Grabill, *supra* note 9, at 145.

164. Compare Erichson & Zipursky, *supra* note 6, at 301 (arguing that the claimants’ consent to the *Vioxx* settlement was coerced), with Issacharoff, *supra* note 68, at 219, and Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952–57, 1962–65 (2017) (arguing that attorney recommendation and withdrawal provisions should not raise ethical concerns).

165. For one of our views on the attorney-withdrawal provisions, see Rave, *supra* note 29, at 1208–10 and Rave *supra* note 112, at 2190–95.

C. Model 3: Unilateral Judicial Review

In the third model, the lawyers do not seek out judicial review by either structuring the deal as a class-action settlement or delegating authority to the judge in the settlement agreement. Instead, they structure the settlement as a private agreement, and all of the claimants who opt in stipulate to the voluntary dismissal of their claims under Rule 41. It is in this situation where the MDL judge's authority to review the settlement is most questionable and, we contend, where the judge's information-forcing role may be the most needed.

As we have explained, judicial imprimatur has value. It makes it easier to sell the deal to the claimants who must ultimately opt in for the global settlement to be successful. The negotiating lawyers know this. So their decision not to seek judicial approval should raise red flags. There may indeed be legitimate reasons why the lawyers would not seek out a judicial endorsement; for example, the defendant may value—and be willing to pay claimants a premium for—privacy.¹⁶⁶ But the desire to avoid judicial scrutiny may also stem from the fact that the central lawyers have colluded with the defendant in a sweetheart deal that keeps the total settlement costs down in exchange for generous attorneys' fees. And the lawyers may be using other tools, such as potentially coercive opt-out deterrents, to drive participation without a judge to evaluate the merits of the deal for claimants.¹⁶⁷

It is because of this risk of collusion that we believe judges should review global settlements in MDLs and publicly weigh in on the fairness of those settlements, even when the parties have not structured the deal as a class action or otherwise sought judicial approval. We do not contend that MDL judges have the formal authority to reject a global settlement (like a judge in a class action has under Rule 23(e)) or to enjoin a settlement from taking effect. But the MDL judge does not need such formal authority to play a critical role as an information-forcing intermediary in protecting claimants from their potentially self-dealing lawyers.¹⁶⁸ The MDL judge just needs to force the disclosure of enough information so that the individual claimants can decide for themselves

166. Even this concern may be surmountable. In *Guidant*, for example, the parties wished to keep the terms of the settlement confidential, so the judge reviewed the settlement agreement *in camera*, but pronounced on the record that he thought the settlement was fair and recommended that claimants participate. See *supra* text accompanying note 161.

167. See, e.g., Rave, *supra* note 112, at 2199–2201; Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141, 153–54 (2003).

168. One alternative might be to amend the MDL statute to require formal judicial approval of the settlement, in a fashion similar to the requirements of Rule 23(e). We don't believe such an amendment is necessary and would be cautious about pursuing this approach for both substantive and political reasons. Substantively, in MDL the ultimate choice to opt into the settlement remains with the claimants, meaning that requiring judicial approval might swing the pendulum too far toward judicial paternalism. On the political side, opening the MDL statute up for possible amendment may be akin to opening the lid on Pandora's Box. One need only look at the numerous half-baked changes in the proposal currently pending in Congress as an example. See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017) (passed by House of Representatives on Mar. 9, 2017).

whether their lawyers are doing a good job at protecting the claimants' interests. And perhaps the single most valuable piece of information that the MDL judge can provide to the claimants is the judge's own view on the fairness and adequacy of the settlement. Just as judicial endorsement can be a powerful selling point, judicial condemnation of a global settlement can be a powerful, easily digestible signal that claimants should refuse to opt in. Even without the power to formally reject a settlement, the MDL judge could issue a public statement that the deal is unfair, which will likely be enough to derail any global settlement in which the defendant is insisting on a substantial participation threshold.

Judge Hellerstein's comments on the proposed settlement in the *World Trade Center Disaster Site Litigation* are a prime example. Judge Hellerstein embraced the information-forcing role that we advocate here. While commentators—including the judge himself—have since characterized what he did as “rejecting” the settlement and argued over whether or not he had the authority to do so,¹⁶⁹ examination of the transcript of the judge's remarks reveals that the reality is more nuanced.¹⁷⁰ Judge Hellerstein expressed straightforwardly his views that “[the] settlement is not enough” and that more negotiations would be necessary “to come up with what is a better and fair settlement,” but his additional remarks suggest something more complicated than the kind of approval or rejection required in a class action.¹⁷¹ Rather, speaking directly to plaintiffs, he made clear that “it will be your decision. No one is going to twist your arms and no one is going to add to the complexities and no one's going to make you feel afraid to exercise the right choice.”¹⁷² But in explaining his intention to supervise meetings with plaintiffs to attempt to “take this very complicated settlement and present it in a way that that people can understand,” Judge Hellerstein added, “There has to be judicial supervision of the communications issue because it has to be fair. If it's not fair, it doesn't deserve a judicial imprimatur.”¹⁷³

Regardless of his formal power to reject a settlement, Judge Hellerstein understood that the success of the settlement depended on the individual claimants' decisions whether or not to opt in. By clearly stating from the bench and on the record that he thought the settlement was not fair and not enough, and explaining the reasons why, Judge Hellerstein gave the claimants an extraordinarily valuable piece of information to weigh in making that decision. And by acting as an information-forcing intermediary, Judge Hellerstein actually

169. Hellerstein et al., *Managerial Judging*, *supra* note 72, at 157–59 (characterizing Judge Hellerstein's act as “rejecting the settlement as inadequate”); Hellerstein, *supra* note 66, at 476 (“I declined to approve the settlement, rejecting objections that I lacked authority to review settlements agreed to by counsel in individual lawsuits.”).

170. See Transcript of Status Conference, *In re World Trade Ctr. Disaster Site Litig.*, 21 MC 100 (AKH) (S.D.N.Y. Mar. 19, 2010), ECF No. 2037.

171. *Id.* at 54, 60.

172. *Id.* at 61–62.

173. *Id.*

helped claimants monitor their lawyers and reduce agency costs in the primary principal-agent relationship.¹⁷⁴ He sent a signal to the claimants that the negotiating lawyers had not done a good enough job pursuing their interests. And those lawyers reacted to that signal, quickly renegotiating the deal to pay the claimants more and the lawyers less. In short, Judge Hellerstein helped make the individual consent model of MDL governance work.

If MDL judges are going to play an information-forcing role in reviewing settlements to reduce the agency costs between claimants and the central lawyers, they may face some pushback from those lawyers. Having negotiated a deal that they don't want the judge to review, the lawyers may simply refuse to show the judge the terms of the settlement. It might be difficult to keep the terms of a mass settlement secret when the deal needs to be sold to a large number of plaintiffs, but it is not impossible.

But even if the lawyers are reluctant to show the MDL judge the settlement terms, the judge has several tools at her disposal to get recalcitrant lawyers to come around—or to provide a substitute signal to claimants. First, the judge can make a lot of noise. The judge can hold pretrial conferences or hearings to publicly demand to see the settlement terms, and express skepticism as to the lawyers' motives and the quality of the deal if they refuse. If the judge generates enough attention, that alone may send a signal to the claimants that the deal may be rotten.

Second, the MDL judge can exploit divisions among lawyers on the plaintiffs' side. The judge's sound and fury at not having been shown the settlement agreement may make at least some lawyers with sizeable inventories, but with no seat on the steering committee, balk at the settlement, threatening the claimants' ability to clear the defendant's walkaway threshold and jeopardizing the deal. Even if that is not enough to get the negotiating lawyers to show the settlement to the judge, it will have at least provoked some dissent and deliberation on the plaintiffs' side. Indeed, rival lawyers on the periphery may bring flaws with the settlement to the judge's attention as a way of obtaining leverage over the lawyers on the steering committee. And judges might further reward lawyers who point out real flaws in the deal with a share of the common benefit funds or even be more inclined to appoint them to seats on future PSCs.

Finally, the judge may engage in good old-fashioned case management to bring recalcitrant lawyers to heel. The judge may condition the issuance of *Lone Pine* orders, or the use of similar case-management techniques to deal with claimants who don't opt in, on the parties disclosing the terms of the settlement agreement.¹⁷⁵ Alternatively, as Professor Elizabeth Chamblee Burch has suggested, the judge may base the lead lawyers' common-benefit fees on a

174. Cf. Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1630 (1999) ("Intermediaries take up some slack and help us to better monitor our representatives' actions, evaluate their behavior, and reward or punish them appropriately.")

175. See Grabill, *supra* note 9, at 179. A *Lone Pine* order typically requires nonsettling claimants to come forward with evidence in support of their claims on pain of dismissal. See *id.* at 155.

demonstration that the settlement conferred actual benefits on the claimants, which would, of course, require the lawyers to show the judge the settlement terms.¹⁷⁶ Or the judge may exercise something of a “pocket veto” by delaying decisions on motions whose outcomes are necessary to advancing the litigation—and to the lawyers getting paid.

It is important to stress that the ultimate decision whether the settlement is “good enough” remains with the individual claimants. The MDL judge’s role in this model is to provide claimants with information to assist them in making that decision. And when the judge acts as an information-forcing intermediary, she does not cut the lawyers out of the picture. If, after reviewing the settlement, the judge says that it is not fair and adequate, the lawyers will still have the opportunity to persuade the claimants that the judge is mistaken and that it really is a good deal. If, after all that, the claimants were persuaded to opt in, the judge would have no choice but to enter their stipulations of dismissal under Rule 41. But the claimants would at least have had the benefit of the considered opinion of a neutral party who is intimately familiar with the litigation, as a counterweight to their lawyers’ potentially self-serving sales pitch.

IV.

SOME POTENTIAL OBJECTIONS

Our suggestion is not a cure-all, and it may not ensure the fairest deal in all cases. As in class-action fairness hearings, the notion of the judge as the arbiter of the acceptability of a deal is open to skepticism. For instance, a well-intentioned judge may simply not possess adequate information to make a competent judgment about a proposed settlement, and any attempt to do so may impose costs on all involved.¹⁷⁷ And some scholars have taken a negative view of any judicial involvement in these cases at all, suggesting that judges are motivated more by the benefits to themselves of getting a deal done than by ensuring that the parties get a fair deal. In other words, judges may have a vested interest in seeing the settlement succeed.¹⁷⁸

Although we tend toward a more optimistic view, these are legitimate concerns. It is not sufficient to say merely that some judicial oversight is better than nothing at all. But it does go a long way. As always in comparing procedural options, the operative question is “compared to what?”¹⁷⁹ More positively,

176. Burch, *supra* note 7, at 136–38 (arguing that common-benefit fees should be based on *quantum meruit* principles).

177. See, e.g., William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (arguing that judges “suffer from a remarkable informational deficit in the fairness-hearing process”).

178. Mullenix, *supra* note 9, at 391 (“What the class action bar could not achieve through decades of judicial decisions . . . has effectively been achieved through adroit manipulation of MDL procedure and the ministrations of selected heroic judges and their special masters.”).

179. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 838 (1992) (explaining

though, we think that MDL judges are well situated to add particular value as information intermediaries and are likely to do more good than harm. And to suggest that the judge ought to conceive of her role as developing and communicating the information necessary for the plaintiffs to make an informed decision is not to say that many of the specific reforms recommended by other scholars to ensure fairness should not be adopted.¹⁸⁰ To the contrary, our approach, like the open-ended MDL statute generally, is amenable to experimentation.

In short, the MDL process was never designed for judges to serve as passive umpires. By design, MDL makes the judge the driving force of the litigation, and, in our view, she should embrace that role, especially at the most critical moment: the settlement. Two objections warrant further elaboration.

A. *Judicial Competence*

If the judge is going to be weighing in on the fairness of the settlement, what makes us think the judge is going to be any good at figuring out whether it is a good deal? Similar questions have been raised about judges reviewing class-action settlements.¹⁸¹ Judges may lack the information necessary to determine whether the settlement is fair, and the lawyers, having reached agreement that settling is in all their interests, are not likely to highlight the deal's weaknesses for the judge.¹⁸² Despite these risks, judicial review of settlements is considered essential in class action practice. Indeed the Civil Rules Committee's proposed amendments for Rule 23 would further bolster the judicial role in reviewing settlements by codifying factors that judges should consider.¹⁸³ Aside from the retort that some review is better than no review, we think there are several reasons why MDL judges are likely to be at least as competent—and frequently more so—to review global settlements than judges overseeing class actions.

First, by the time a global settlement is reached, the MDL judge will typically have a wealth of knowledge about the litigation from her experience managing the exchange of information throughout the consolidated pretrial proceedings, up to and including bellwether trials that can give the judge (as well

the need to ask: "Compared to what?" when discussing alternative aggregation techniques); *see also* Resnik, *supra* note 57, at 629–30 (arguing that reforms must be compared to alternatives).

180. *See, e.g.*, Burch, *supra* note 7, at 75.

181. *See, e.g.*, Rubenstein, *supra* note 177; Chris Brummer, Note, *Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits*, 104 COLUM. L. REV. 1042, 1048–53 (2004).

182. Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (1997) ("No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket.")

183. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, Rule 23(e) and Committee Note, 211–31 (Aug. 2016).

as the parties) a sense of what the claims are worth.¹⁸⁴ MDL judges can ensure that they are well informed by enlisting the help of magistrates and special masters in a variety of roles. These judicial adjuncts might be involved in mediating the actual settlement negotiations, giving the MDL judge a window into the process while also allowing the judge to retain some distance and perspective when it comes time to evaluate the fairness of the deal. Or they might be experts in the subject matter of the litigation asked to provide a neutral assessment of the settlement terms. Either way, they can generate a wealth of high-quality information for the MDL judge.

Second, it is challenging for the lawyers to pull the wool over an MDL judge's eyes. In important ways, an MDL judge has more power than a class-action judge. The MDL judge has ample tools at her disposal to extract information from the lawyers. And, perhaps more importantly, the lawyers cannot "shop" for a pliable judge by filing in a friendly district—the Judicial Panel on Multidistrict Litigation (JPML) chooses the MDL judge with only limited input from the parties.¹⁸⁵ And once the MDL is underway, the lawyer cannot exit unless and until the JPML (with input from the MDL judge) determines that pretrial proceedings have concluded. There is, therefore, little opportunity for a "reverse auction" where the defendant cuts a deal with the class-action lawyer willing to take the smallest settlement, which they then shop around for an inattentive judge willing to approve a collusive settlement.¹⁸⁶ All of the litigation is consolidated in the MDL court, and the MDL judge is the only option.

And third, MDLs are different from class actions in the sense that if the judge rejects a settlement, that does not mean that the settlement necessarily fails. Rather, if the lawyers think the judge is out to lunch, they will have the opportunity to nevertheless persuade their clients that the settlement is a good deal, the judge's skepticism notwithstanding. There is often an information asymmetry between lawyers and their clients, and under these circumstances, it is possible that enough clients will accept deals that the judges consider lackluster (and this problem may be enhanced when there are relatively few plaintiff-side firms representing most of the claimants). But under our model the attorney will at least have to explain away the judge's skepticism about the deal. Of course, the same does not hold true if the MDL judge blesses a bad deal. The lawyers pushing the settlement have no incentive to point out the judge's error, and it may leave plaintiffs in a worse position than no judicial oversight at all.

184. Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2337 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 592 (2008).

185. See, e.g., *In re Silicone Gel Breast Implants Prod. Liab. Litig.*, 793 F. Supp. 1098 (J.P.M.L. 1992) (transferring to N.D. Ala. when parties had requested either N.D. Cal., D. Kan., or S.D. Ohio).

186. See *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282–83 (7th Cir. 2002) (Posner, J.); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995).

Overall, though, we expect that judges will act conscientiously and not systematically err in favor of approving bad deals.

B. Judicial Interest

Perhaps a more serious objection is that the judge might not be disinterested in the settlement's success or failure. This is not to say that the judge is malevolent or biased in favor of one side or the other. Rather, the argument is only that the judge has a strong interest in seeing the settlement succeed, perhaps selfishly to clear her own docket or for the laudatory reason that she wants to fulfill her responsibility of concluding the litigation and relieving the other federal courts of the burden of trying thousands of cases.¹⁸⁷ If this is so, then MDL judges may be biased in favor of resolution and reluctant to exercise any meaningful supervisory role.¹⁸⁸ Moreover, the judge may be well disposed toward blessing settlement agreements with coercive provisions, as some have argued was the case in *Vioxx*, in order to ensure that the litigation is wrapped up completely.¹⁸⁹

Judicial interest is a legitimate risk, even granting that there may be ways to mitigate it, such as the robust judicial employment of special masters and experts. Calls for inclusion of diverse voices in the management committees of the litigation are also well taken.¹⁹⁰ And it may suggest an additional responsibility on the part of the Judicial Panel on Multidistrict Litigation to engage in its own oversight of its handpicked judges' conduct of their cases. But we believe that several factors justify running this risk.

First, it cannot be true that all judges are pro-settlement all of the time because there are at least several instances when MDL judges have rejected global settlements as unfair. Judge Hellerstein, after all, made waves by rejecting the settlement in the *World Trade Center* case. And judges frequently reject class action settlements both inside and outside of MDLs, as Judge Brody's rejection of the *NFL Concussion* settlement demonstrates.¹⁹¹

Second, docket-clearing pressures may be overstated in the MDL context. MDL judges are not involuntarily saddled with thousands of cases by the JPML. They must agree to take on the cases that are transferred to them; judges are not stuck with MDLs unless they want them. And by all accounts, the

187. See, e.g., Silver, *supra* note 12, at 1998 (noting, though deprioritizing, "the judiciary's legitimate interest in avoiding duplication").

188. See, e.g., Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 361–62 (1986) (arguing that judges who invest heavily in making settlement happen are unlikely to remain indifferent to its consummation).

189. Erichson & Zipursky, *supra* note 6, at 269.

190. Burch, *supra* note 7, at 120–28.

191. *Supra* Part III.A; see, e.g., Pearson v. NBTY, Inc., 772 F.3d 778 (2014) (Posner, J.); *In re High-Tech Emp. Antitrust Litig.*, No. 11-CV-02509-LHK, 2014 WL 3917126 (N.D. Cal. Aug. 8, 2014); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292 (S.D. Fla. 2007).

judges who volunteer to manage an MDL enjoy doing so, often viewing the cases as interesting challenges, not unwanted burdens.¹⁹²

Another reason one might be willing to accept the risk of judicial interest is that the alternative is no oversight. Arguably, the imprimatur of a judge hell-bent on settlement makes matters worse because it may induce approval of a bad deal by claimants swayed by the judicial seal of approval. This risk is perhaps most troubling when MDL judges endorse settlements that contain strong opt-out deterrents, such as the much-maligned lawyer-withdrawal requirements of the *Vioxx* settlement. In this situation, judicial imprimatur is lent to a settlement that limits instead of facilitates claimant choice. A settlement-friendly judge, therefore, may be enabling self-dealing lawyers to offer the defendant closure in exchange for a tidy fee.

But opt-out deterrents are a double-edged sword because closure can have value for both sides. Defendants are sometimes willing to pay a “peace premium” for a settlement that can resolve practically all of the pending cases.¹⁹³ Opt-out deterrents can be valuable tools for the claimants to secure a peace premium, but they also exacerbate the risk that the lawyers will foist an unattractive deal on captive claimants.¹⁹⁴ How that tradeoff plays out in any individual settlement is an empirical question. But we are more comfortable with having an experienced MDL judge, familiar with the contours of the litigation, make that judgment call than with leaving it entirely to the information-starved claimants and their conflicted lawyers. In short, a world in which judges are able to engage in meaningful oversight and improve poor settlements is preferable to one in which no oversight is available at all.

In the end, we emphasize that we are suggesting a normative approach for judges to follow. MDL judges may have a strong interest seeing that parties resolve the litigation the judges have been assigned to manage. Indeed, there is at least some evidence that MDL judges view remand as failure.¹⁹⁵ But judges are supposed to ensure that these cases are not simply resolved, but resolved *fairly*. And their reputations depend on that perception. If judges sometimes fail to live up to these aspirations, we must accept that. MDL judges are vested with

192. See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. __ (forthcoming 2017) manuscript at 31 (quoting an anonymous federal district judge describing MDLs: “This is our dessert. This is why we eat our diet. This is our reward for the prisoner cases. Academics are wrong to think we just want to settle and get rid of these cases.”). Given their enthusiasm, there is no reason to think that the judges who volunteer for these cases don’t take seriously their responsibility to manage them fairly, even if resolution of the cases is their ultimate goal.

193. Rave, *supra* note 29, at 1194; see also Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 403 (2014) (arguing that BP was willing to pay a peace premium for a class action settlement that offered more closure than non-class resolution).

194. Rave, *supra* note 112, at 2195–96.

195. See *DeLaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 152 (D. Mass. 2006) (Young, J.) (“[I]t is almost a point of honor among transferee judges acting pursuant to Section 1407(a) that cases so transferred shall be settled rather than sent back to their home courts for trial.”).

tremendous discretion. They cannot be fired, and avenues for appellate review are severely limited. There is not much we can do except tell them what they are supposed to do and hope that they will do it because it is their job—something that observers from the academy, bar, and media have begun to do. As MDL evolves, clear-eyed assessment of MDL judges' performance will be an important driver of improvement—whether it comes from within the judiciary under the auspices of the JPML or without.¹⁹⁶ Our goal here is to provide a lens through which to analyze how a judge oversees an MDL. And we think that when it comes to settlement, what MDL judges should do is strive to get information into the hands of claimants so that the claimants can intelligently evaluate their options.

CONCLUSION

In 2018, multidistrict litigation will be fifty years old. It has been a bit of a late bloomer, but it has fulfilled its creators' ambition in becoming the central procedural mechanism for aggregating mass-tort litigation nationwide. As the mass-tort class action has faded, MDL, whose mainspring is formal individual litigant autonomy, has ascended. But even as the Judicial Panel on Multidistrict Litigation enlists a new cadre of MDL judges to handle the ever-growing influx of cases, there remains significant disagreement about the proper role of the judge, particularly when it comes to the seemingly inevitable endgame of global settlement.

Settlement is good. Indeed, in a world of mass harms and scarce resources, it is probably the only way to resolve disputes on a national scale. And the beauty of MDL is that, by gathering all of the players into a single forum under the watchful eye of a coordinating judge with substantial procedural flexibility, it creates a fertile environment to facilitate a comprehensive resolution. But the goal cannot be resolution alone. Like any case, the goal must be to achieve a resolution that is not only speedy and inexpensive, but also just.¹⁹⁷ And it must be a resolution that responds to the particularities of the litigation and ensures that the plaintiffs are not materially worse off for litigating as part of a group. To be sure, MDL, with its complex web of principal-agent relationships, has its pathologies. With little control over the conduct of the litigation and no opportunity to exit, individual plaintiffs remain vulnerable to lawyers who have strong incentives to get a deal done. What is a judge to do?

In this Article, we have elaborated a particular role for the judge in MDL, that of an information-forcing intermediary. That is, at the settlement stage the

196. Apparently, the JPML is engaged in some such efforts at oversight, including “close[] review” of “annual status updates from transferee judges,” “exit surveys” of transferee judges who have closed MDLs, and an annual review of “longstanding” MDLs that have been pending for six or more years. Tommie Duncan, Panel Executive, Judicial Panel on Multidistrict Litigation 2016 Year-End Report (Feb. 3 2017). The scope of the JPML's efforts at review warrant further study, but their current activities suggest that the JPML is paying attention.

197. FED. R. CIV. P. 1.

judge should reserve the right to present a view of whether the agreement is fair. Such a view would send a signal directly to litigants about whether they ought to opt into the agreement. This signal is critical, digestible information that cuts through the complexities of the litigation and ensures that there is some check in the process against all of the incentives pointing the lawyers toward closing a deal. Moreover, the prospect of such a signal casts a long shadow over settlement negotiations. The knowledge that the judge in the case may publicly weigh in on the terms of the settlement creates a strong impetus for the central lawyers to reach a fair deal in the first place, and creates an avenue for the peripheral lawyers to protest if they don't.

The information-forcing role is both a comfortable fit with the MDL structure and a potentially powerful guiding normative principle for MDL judges. The MDL statute was developed as a judge-centric model—its framers intended that judges would wrest control of cases from the litigants and guide the litigation to a conclusion that would relieve the federal courts of potentially crushing caseloads. And the statute was intentionally designed to provide judges with maximal flexibility to manage cases of different shapes and sizes. As MDL procedure has developed, it has become clear that the judge has numerous opportunities to generate information about the case—from motion practice, to supervising discovery, to holding status and settlement conferences, to presiding over bellwether trials. This information will, of course, help the parties to converge on their valuations of the claims to the point where settlement becomes possible. But in overseeing and managing this process, the judge should also develop a base of information that she can ultimately use to assess the settlement and send a signal to claimants about its fairness. As the MDL judge comes to embrace this role as an information intermediary at the settlement stage, her appropriate role in managing the conduct of the litigation up to that point comes into clearer focus. In short, the guiding principle is that the judge should manage the litigation from day one with the last day in sight.

Although we believe our suggestion presents a workable lodestar for MDL judges, we also recognize that it is not a panacea. Any form of aggregation requires tradeoffs. When cases are not all tried individually, some smoothing out necessarily occurs. What parties lose in specifics, they gain in economies of scale, level playing fields, and more efficient resolution. But to the extent deficiencies can be mitigated, they should be, and the judge must play a central role in doing so. Scholars have suggested a host of procedural reforms to ensure fairness in MDL. None of these are inconsistent with a central information-forcing role for the judge. But no reform of MDL can work without the judge at the center of the process.

The title of this Article is an explicit homage to Professor Abram Chayes's famous article on the role of the judge in public-law litigation.¹⁹⁸ Chayes's great insight was that the role of the judge needed to be adjusted for a new era in which judges would be called upon to resolve major policy controversies. MDL cases are in many ways public-law cases—they are the mechanism for resolution of some of our largest controversies, particularly in an era in which Congressional action is unlikely.¹⁹⁹ In many respects, in the forty years since Chayes's article was published, his conception of the active judge has been assimilated into our legal culture. This is certainly true when it comes to the need for active case management in civil litigation—a notion recently echoed enthusiastically by Chief Justice Roberts.²⁰⁰

Nowhere is the managerial role of the judge more called for than in MDL. The question we have sought to address is management “to what end?”²⁰¹ What the conception of information forcing does is put front and center the idea that the judge is uniquely well positioned to require the parties to generate and exchange information that leads to a reasonable valuation of claims. By looming in the background to assess the overall fairness of the settlement, the judge can ensure that the process works fairly and that litigants can process this information both to evaluate the performance of their lawyers and to decide for themselves what to do.

198. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

199. See Issacharoff & Rave, *supra* note 193, at 401 (“These mass harms take on the quality of public law litigation, even if played out in thousands of claims for private recompense.”); Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 273 (2005) (describing Congress's repeated failure to solve mass torts legislatively).

200. JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10–11 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf> [https://perma.cc/KTS7-7DS3].

201. Professor Molot's questions ring true: “The central dilemma in contemporary civil procedure is not whether judges should cling to their traditional role or else abandon it for a completely new one, but how judges should respond to new challenges and whether judges can do so without losing sight of their core institutional competence and constitutional role.” Jonathan T. Molot, *An Old Judicial Role for a New Judicial Era*, 113 YALE L.J. 29, 74 (2003).