COMPARED TO WHAT?: A QUALIFIED DEFENSE OF THE MDL

By

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[Please Note: This is not a formal paper and does not present a rigorous analysis. It’s a collection of preliminary thoughts offered solely for roundtable discussion purposes.]

For many decades, multidistrict litigation (MDL) remained in the shadows while courts and commentators focused on the class action. But no more. As class actions have become more difficult to certify, lawyers and judges have turned to the MDL for case aggregation. Since the 1990s, MDL litigation has mushroomed. Today MDLs encompass roughly 39% of the entire federal court caseload—even as much as 45% when social security and prisoner suits are excluded.¹ In recent years, scholars have begun to focus critical attention on the MDL. There are now empirical studies that shed light on the JPML’s transfer decisions, the players in the MDL proceeding, and the types of cases transferred to and remanded from MDLs. Moreover, commentators have focused critical attention on different aspects of the MDL process, including the dominance of plaintiff steering committees, the use of bellwether trials to facilitate settlement, the adjustment of fee agreements to compensate for common benefit work, and the judicial reluctance to remand transferred cases.² There is much about the MDL that needs to be improved and this work is extremely helpful in guiding reform efforts.

In this brief essay, however, I want to push back against some of the sharper criticisms of the MDL. The MDL has many shortcomings, but so do all aggregation devices. This means that criticism of the MDL must be “compared-to-what,” which makes the choice of comparative baseline critical. In this regard, it important not to idealize the baseline—for example, by comparing the MDL to individual suits vigorously litigated by loyal attorney-agents, or to class actions conducted with careful judicial oversight and opt-out rights that benefit class members. The MDL fares poorly compared to these ideals, but so does all litigation. Part I develops this point.

Part II explores the comparative analysis at a higher level of generality. One of the most significant aspects of the MDL, as it is practiced today, is that it implements what I will call a bargaining model of procedure. A bargaining model focuses on settlement. It views procedural rules as devices to structure and regulate the negotiation process, or more technically, to shape the settlement bargaining game to achieve a good settlement equilibrium. Trial procedures are needed to support credible trial threats, but the core focus is on facilitating successful settlement, with trial as the no-settlement default.

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¹ Elizabeth Chamblee Burch, Monopolies in Multidistrict Litigation, 70 VAND. L. REV. 67, 72 (2017).
This model contrasts sharply with what I call the trial model of procedure. The trial model captures the way most people think about civil procedure. It assumes that procedure is about producing good trial outcomes, and it calls for procedural rules that serve that goal. Settlements on this view are just byproducts of the trial process, not ends to be pursued. Part II briefly discusses this broader comparative perspective and some of its implications.

I. On Baselines

Most of the MDL docket consists of products liability suits—93% of all MDL-consolidated cases according to one empirical study.\(^3\) It is probably safe to assume that most products liability MDLs involve individual suits for personal injury from use of a mass-marketed product where the suits share common questions and each plaintiff seeks substantial damages.

As experience shows, products liability suits of this sort are inevitably processed in some form of aggregation. The economy-of-scale benefits, the cost of litigating individually, the feasibility of valuing suits collectively, and the benefit to defendants of a comprehensive, even global, resolution push toward aggregative processing and disposition. Moreover, aggregate treatment can be optimal from a social point of view. It achieves judicial economy gains, produces better outcomes by giving plaintiffs comparable economy-of-scale advantages to defendants, improves individual recovery by reducing delay costs, and promotes outcome equality.

If aggregation is inevitable, it follows that the MDL must be compared to other kinds of aggregation rather than to individual suits litigated and tried separately. I consider two alternatives here: informal aggregation through attorneys amassing large portfolios of cases, and formal aggregation through a class action (assuming a class action can be certified\(^4\)). The key point is that all the aggregation alternatives suffer from the same kind of collective action problems that plague MDLs: agency costs, adverse selection, free-riding, holdout, and the like.

A. Informal Aggregation

In large-scale products liability litigation without a class action or MDL, it is common for a few lawyer-specialists to amass large portfolios of clients through word of mouth and referrals.\(^5\) These lawyers might litigate some cases in order to force the defendant to the bargaining table and establish baseline valuations, but eventually they work out an aggregate settlement that disposes of their case portfolio en masse.

This collective litigation process is vulnerable to principal-agent, claim averaging, and adverse selection problems similar to those in the MDL. Inventory clients cannot realistically monitor their attorney and know little about what is happening in the litigation. This creates fertile ground for attorneys to pursue their own self-interest at the expense of their clients.

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\(^4\) Today, class actions are very difficult to certify for products liability mass torts.
\(^5\) Alternatively, a large number of individual lawyers with smaller collections of cases might cooperate in pooling resources, planning a common strategy, sharing information, and coordinating aggregate settlements.
Contingency fees help somewhat to align attorney incentives with collective (though not individual) client interests, but contingency fees create their own agency problems. To be sure, MDLs are dominated by repeat players and repeat-player interaction can exacerbate agency costs. But repeat players are also involved in large-scale non-MDL litigation.

It is true that fees for common benefit work create special problems in the MDL setting. But common benefit fees must be shared somehow; otherwise, free-riding will lead to underinvestment in common benefit work. In this regard, the MDL offers some advantages over decentralized litigation. Consolidating all the cases in a single forum makes cost-sharing easier to manage (assuming authority in the MDL judge to tax for common benefit work). And with some changes in the MDL procedure, common benefit fees can be reviewed by the MDL judge.

Moreover, claim averaging is not unique to MDLs. Plaintiffs with strong cases face the same averaging effects in inventory settlements. In fact, all aggregate settlements produce average recoveries. Adverse selection, too, is a factor in inventory settlements as well as MDLs. Attorneys have incentives to expand the size of their portfolios by adding weak cases, and the presence of weak cases reduces the average recovery for strong cases.

One might think that individual cases transferred to an MDL would be litigated individually if they were not transferred. But this is not necessarily so. When rational attorneys file individual suits as part of mass litigation today, they likely anticipate MDL transfer and a comprehensive settlement. Thus, they know that there is no need to invest in informal aggregation, since the MDL will do it for them—and probably at lower cost. It follows that those same attorneys are likely to revert to inventory settlements in the absence of the MDL option.

In addition, a plaintiff’s relationship with her lawyer and her personal experience as a party are not likely to differ significantly between non-MDL portfolio litigation and an MDL. To be sure, many plaintiffs in MDLs are dependent on lead counsel and steering committee lawyers to protect their interests. But I can’t see how this makes a meaningful difference. In any large aggregation, be it an MDL or a large case portfolio, plaintiffs have little personal contact with the lawyers in charge and no meaningful control over the litigation.

Finally, some commentators object to the way MDLs homogenize state substantive law and frustrate horizontal choice-of-law policies. If cases remained where they are filed (or if they were remanded), these critics argue, case outcomes would better match the heterogeneity of state substantive law and respect state regulatory policies. I do not find this argument terribly persuasive. For one thing, inventory settlements are likely to homogenize in roughly the same way MDL settlements do, at least where large case portfolios include plaintiffs with claims subject to different states’ laws. Moreover, there are strong policy reasons to ignore state law distinctions and embrace a more uniform approach when the defendant markets nationally on a

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6 For an excellent empirical study of repeat players in MDLs, see Elizabeth Chamblee Burch & Margaret S. Williams, Repeat Players in Multidistrict Litigation: The Social Network, 102 CORNELL L. REV. (forthcoming 2017). For an important analysis of MDL repeat play, see Burch, supra, note 1.

7 Although possibly indexed by easily observable case characteristics.
uniform basis and the plaintiffs all suffer injury in the same general way regardless of their geographic location.\textsuperscript{8}

B. Class Action Aggregation

Many critics compare MDLs unfavorably to class actions, pointing out that MDL judges lack the full scope of a class action judge’s power to control the litigation process and review settlements. This is an important point. But it is also important not to exaggerate the differences.\textsuperscript{9} The fact is that class action judges do not always police class litigation vigorously. There are structural obstacles to their doing so, such as informational constraints, and also incentives that favor settlement approval when it avoids lots of future litigation. And on the MDL side, judges might not have the power to review settlements, but they still have informal ways to influence settlement outcomes, such as by making their views known and exercising leverage over repeat players.\textsuperscript{10}

II. Bargaining Versus Trial Models of Civil Procedure

When Congress adopted the Multidistrict Litigation Act in 1968, it clearly had a trial model of procedure in mind. The idea was to transfer cases to the MDL solely for coordinated pretrial proceedings on common questions and then to remand those cases to their home forums for trial. But as mass litigation became more burdensome, federal judges transformed the MDL into a device for comprehensive settlement. And in keeping with this settlement focus, they developed a common law of MDL procedure designed to facilitate settlement bargaining. The result is an MDL device the implements a bargaining model of procedure.

At the outset, it is important to understand that a bargaining model can call for different procedural rules than a trial model. In my previous writing, I have described the difference between focusing procedural rules on settlement bargaining and focusing them on trial.\textsuperscript{11} Procedures designed to produce good trial outcomes do not necessarily produce optimal settlements—and vice versa. Thus, the common assumption that good settlements will emerge from a litigation process designed for trial is simply wrong.\textsuperscript{12}

\textsuperscript{8} Neither deterrence nor compensation clearly favors tracking state law differences in this kind of situation. In fact, it is quite possible that states would choose a roughly average substantive law to apply to mass tort cases in a hypothetical bargaining situation in which they know the range of possible policy choices but do not know their own actual policy choices.

\textsuperscript{9} For a discussion, see Howard M. Erichson, \textit{What MDL and Class Actions Have in Common}, 70 VAND. L. REV. \textbf{En Banc} 29 (2017). For example, when class-action judges choose class attorneys, they focus on many of the same factors that an MDL judge considers when appointing lead, liaison, and steering committee lawyers—experience, litigation resources, cooperative attitude, and so on.

\textsuperscript{10} See, e.g., Andrew D. Bradt & D. Theodore Rave, \textit{The Information-Forcing Role of the Judge in Multidistrict Litigation}, 105 CALIF. L. REV. (forthcoming 2017). And because an MDL settlement binds a plaintiff only with her consent, lawyers not in leadership positions might be able to serve as checks, albeit imperfect ones, on the settlement process.


\textsuperscript{12} To take just one example, discovery rules are likely to be different under a bargaining model than under a trial model. Broad discovery makes sense in a trial model because it can be used to uncover all the relevant evidence for trial. However, broad discovery makes much less sense when the aim is to secure good settlements. Parties do not
The emergence of an MDL process modeled on settlement bargaining reflects a major departure from conventional and deeply entrenched views of civil procedure. The original Federal Rules of Civil Procedure, for example, implemented a trial model of procedure. Over the past thirty years, federal civil procedure has become more settlement-oriented, with amendments to Rule 16, new uses for Rule 68, the addition of court-connected ADR, and more active involvement by federal judges in settlement promotion. Even so, most formal procedural rules today continue to focus mainly on trial. Summary judgment, for example, assumes a trial default, and discovery is designed and managed mostly with an eye to uncovering information useful to prove a case at trial.

The MDL breaks from this trial model and in so doing raises serious questions of judicial competence and adjudicative legitimacy. Are federal judges in a good position to fashion common law procedures that optimally regulate MDL bargaining? Should the formal rulemaking process take on more of the job? Is it legitimate for federal judges to be involved in a process that aims to guide and shape settlement? Or should judges instead focus on trying cases and leave the parties to work out settlements on their own?

These questions are difficult and complex. As for the question of judicial competence, I have expressed in other writing my concerns about the informational, strategic, and bounded rationality constraints that can limit the effectiveness of procedure-making through trial judge discretion. I have also expressed doubts about the efficacy of case-by-case, common-law-type rulemaking. These concerns apply to the MDL and counsel in favor of greater reliance on the formal rulemaking process to craft MDL procedure.

The legitimacy question is more difficult. The legitimacy of a settlement-oriented process has been debated in the settlement class action context, but the issues are even more complex for MDLs because the MDL judge is involved in creating a settlement not just reviewing one. Judicial involvement of this sort raises serious questions of normative legitimacy (as well as Article III concerns). My tentative opinion is that a bargaining model is normatively appropriate for mass litigation very likely to end in some type of aggregate settlement no matter how it is processed. If settlement is the ultimate endgame, it is better to enlist judges to regulate the settlement process than leave lawyers to bargain for settlements unchecked.

Viewing MDL procedure through the lens of a bargaining model has several major implications. For one, it underscores the importance of designing a bellwether trial process properly, including randomly selecting the sample of cases to be tried. Bellwether trials not only facilitate settlement, but they also provide information to the judge useful for managing the

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13 Bone, supra note 11.
15 I do not mean to discount the efforts of MDL judges in working out procedural best practices for MDLs. In fact, I suspect that the Advisory Committee would end up recommending general rules that incorporate many of these practices. I simply want a detached review by a rulemaking body capable of viewing the issues globally and systemically. Of course, there have already been some attempts to state general principles and guidelines, such as the Manual for Complex Litigation and the ALI’s Principles of the Law of Aggregate Litigation.
MDL. And if judicial settlement review is added to the MDL process—as I believe it should be—then bellwether trials will also provide valuable information to aid the judge in evaluating a proposed settlement.

A bargaining model also has implications for MDL remands. Many critics today call for a more liberal remand policy and this proposal seems to be gaining traction. I wish to sound a note of caution. Many of the purported benefits of remanding cases back to their transferor courts presume a trial model of procedure. Proponents argue that more generous remands will break the stranglehold of the MDL court and increase the chances of trial, with all the benefits trial is supposed to create—jury decision making, party participation, improved choice of law, alignment of recovery with case strength, and so on.

However, the case for more remands looks quite different under a bargaining model. Even if more cases are actually remanded, those cases are not likely to be tried. I suspect that lawyers would work out inventory settlements after remand if remand became commonplace—or possibly even settle before an MDL transfer. Thus, from the perspective of a bargaining model, the question is not whether more trials are desirable, but whether MDL or transferor courts produce better settlements.

Indeed, a liberal remand policy might not even lead to more remanded cases if MDL lawyers use remand threats as bargaining chips to secure a larger share of a comprehensive settlement. It is true that equipping lawyers with stronger remand threats might have a beneficial effect in reducing the monopoly power of lead, liaison, and steering committee lawyers. But there is no guarantee that weakening monopoly power will benefit plaintiffs; that depends on whether lawyers serve plaintiffs’ interests or their own self-interest. And empowering lawyers not in leadership roles might make settlement more difficult by creating opportunities for strategic holdout.

Some argue that remands are necessary to give plaintiffs a credible trial threat in MDL settlement negotiations. While credible threats are important, it is unclear whether more remands are necessary. After all, remands are rare today—only about 2.9% of MDL-transferred cases are remanded—yet MDLs still settle. Indeed, if remand was totally hopeless, defendants would balk at settling and one would expect few MDL settlements. I imagine that even the most settlement-oriented MDL judge would remand cases if successful bargaining was clearly out of the question—and defendants probably assume as much. Maybe a more generous remand policy will improve the balance of bargaining power, but it’s not clear to me how much.

16 In fact, the available data on remands show, not surprisingly, that most of the (few) remanded cases end in settlement. Catherine R. Borden, Emery G. Lee III, & Margaret S. Williams, Centripetal Forces: Multidistrict Litigation and Its Parts, 75 LA. L. REV. 425, 448-50 (2014).
17 Of course, settlement is more difficult to achieve the larger the number of players in the bargaining game, so arming lawyers with bargaining leverage through a more liberal remand policy might lead to fewer MDL settlements and more actual remands. But if this happens, then the result is likely to be more inventory settlements, not more trials.
18 But not zero. In some MDLs, the possibility of a global settlement concluding state court litigation and minimizing future liability exposure might be enough to interest the defendants in settling.
For these reasons, I tend to prefer adding safeguards to the MDL process, such as enabling judicial review of MDL settlements and improving the use of bellwether trials, than making it easier to break up MDLs. My main point, though, is that any proposal should be evaluated through a bargaining model, not a trial model.

III. Conclusion

When deciding how MDLs should be improved, it is important to compare the MDL to realistic baselines not unrealistic ideals. It is also important to view potential reforms from the perspective of a bargaining model and focus on how a reform might affect settlement incentives and settlement quality.

From a bargaining model perspective, there is much to commend the MDL. Centralizing cases in an MDL is more conducive to managing the settlement process than dealing with decentralized inventory settlements dispersed over different courts. And the MDL, by raising the stakes, incentivizes judges to engage actively in the process. The MDL can and should be improved, but improvements should promote the MDL’s primary settlement function.