No Need to Panic:
The Multi-District Litigation Process Needs Improvement Not Demolition

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I. Background

After decades of playing second-fiddle to Rule 23 class actions in legal scholarship and civil justice policy debate,[1] multi-district litigation authorized under 28 U.S.C. §1707 is having its moment in the sun. And as we all know from the story of *Icarus*, flying too close to the sun can be dangerous. From being overshadowed by class actions, multidistrict litigation has moved quickly to being a topic worthy of academic discussion and best practice manuals for judges,[2] to being a new litigation monster needing to be put down.

It appears that multidistrict litigation was thrust to the forefront by the Duke Law Center for Judicial Studies 2014 Conference on Multidistrict Litigation. The Center's publication of data showing that 45 percent of pending civil cases (excluding social security, prisoner petitions and asbestos) had been transferred under the MDL statute[3] – and that the number had surged in the past few years – suggested that the federal courts were being overwhelmed by this litigation. Just what these data indicate however is open to debate. First, the Duke Center's numbers are for *pending* cases. Assuming, as seems likely, that cases in MDLs take longer to terminate than typical civil claims, we would expect that the fraction of pending cases associated with MDLs is larger than the fraction of all *claims filings* that are associated with MDLs.[4] Second, the number of motions for MDL status filed over the past 5 years (from 2011-2016) has dropped steadily,

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[1] The 2001 Seton Hall Law School Symposium on Multi-District Litigation organized by Prof. Howard Erichson seems to have been the first academic conference on MDL litigation dynamics. *See* Howard Erichson, "Foreword: Multidistrict Litigation and Aggregation Alternatives Symposium," 31 Seton Hall L. Rev. 877 (2001). My contribution to that volume presented statistical data on JPML grants and denials of consolidation from 1990-1999 and the ultimate mode of disposition of the cases which came before the panel during that decade. Deborah Hensler, "The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation, 31 Seton Hall L. Rev. 883 (2001).

[2] Duke LAW Center for Judicial Studies, STATNDARDS AND BEST PRACTICES FOR LARGE AND MASS TORT MDLS, EXECUTIVE SUMMARY, available at https://law.duke.edu/sites/default/files/centers/judicialstudies/standards-best_practices-exec_summary-final.pdf

[3] https://law.duke.edu/sites/default/files/centers/judicialstudies/Graphs_and_MDL_Statistics.pdf Chart 1, September 11, 2014.

[4] I am grateful to Prof. Herbert Kritzer for pointing this out to me.

from 109 to 73.[5] Moreover, the percentage of motions granted by the JPML dropped from 57 percent to 47 percent.[6] To put this in context, the last year the JPML granted so few motions was in 1993.[7]

II. H.R. 985, Sec. 105: Taking a Sledgehammer to Personal Injury Multidistrict Litigation

The growth in the number of pending cases associated with MDLs observed in the Duke Center's data seems to reflect significant growth in the *number of cases associated with MDLs* rather than dramatic growth in the number of motions for MDL status or an increase in the propensity of the JPML to grant those. Whether this growth is a consequence of changes in the *scope of injury* associated with the types of lawsuits that beget MDLs (which could reflect growth in the markets for pharmaceutical products, financial services, etc.); a higher claiming rate when injuries occur (which could be associated with the increase of information-sharing that the Internet and social media have produced); or claims-facilitation by the MDL procedure itself is unclear. My suspicion is that all of these and perhaps other factors are at work. However, the corporate lobbyists responsible for Sec. 105 of H.R. 985 seem to view the MDL procedure as the culprit.

H.R. 985, the *Fairness in Class Action Litigation Act of 2017,* passed the House on March 9th and was referred to the Senate Judiciary Committee on March 13th. Taking direct aim at personal injury multidistrict litigation, Sec. 105 would add language to 28 USC § 1407 to require that within 45 days of a personal injury suit being transferred or the suit being filed directly in the transferee court (no extensions permitted!) the plaintiff submit information including medical records "regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury." Within 90 days the MDL judge must review this information, apparently on a case by case basis, for sufficiency, and dismiss those

[5] United States Judicial Panel on Multidistrict Litigation, Calendar Year Statistics, January through December 2016, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2016.pdf at 4. The largest number of motions filed in the past decade was 121, in 2009.

[6] *Id., at 5.* The JPML reports raw numbers; I calculated the percentages. At the beginning of the last decade (2007-2009) the rate of motions granted averaged 82 percent.

[7] In 2016, the JPML granted 26 motions; in 1993 it granted 25. In 2015 it granted 33, the same number it granted (last) in 1994.

that do not pass the screen. [8] The bill does not address how this is to be accomplished without additional judicial resources and without extending the time to manage the litigation nor the seeming inconsistency between authorizing a consolidation procedure and specifying individualized claim processing at the initial stage of the consolidated proceedings. Sec. 105 further requires that in those personal injury claims that survive the pretrial process plaintiffs themselves must receive at least 80 percent of any monetary recovery, placing a cap on plaintiff attorney fees in complex litigation that is below the conventional recovery for plaintiff attorneys in ordinary tort lawsuits and makes no allowance for attorney effort or risk or lack thereof. I believe judges should exercise their authority under equitable fee doctrine to set parameters for plaintiff attorney fees in multidistrict litigation. But the goal should be to assure that fees are commensurate with attorney effort as well as outcome, not to dis-incentivize attorneys from representing plaintiffs in meritorious personal injury lawsuits.

A reasonable person may infer that Sec. 105 is intended to eliminate, to the greatest extent possible, mass personal injury litigation and return to the days when a large corporation could successfully fend off meritorious individual lawsuits by dint of their superior financial resources. Those with principled objections to 28 U.S.C. § 1407 should note that product liability cases (the category that comprises personal injury claims) accounted for only 29 percent of pending MDLs in 2016.[9] Sec. 105 has nothing to say about these cases.[10] I conclude that H.R. 985 Sec. 105 is an attempt to deny access to the court for personal injury claims against multinational corporations, masquerading as procedural reform. No one should look to it to improve the implementation of the multidistrict litigation statute.

III. Improving Multidistrict Litigation By Opening Up the Settlement Process

Multidistrict litigation, like all forms of aggregate litigation, poses challenges for courts. Efficiently managing large caseloads of diverse claims, often with multiple defendants, and dozens or more law firms, is demanding. The cases require hands-on case management, of the

[8] The plaintiff then has 30 days to remedy the insufficiency but if she fails to satisfy the judge on the second round the suit is to be dismissed with prejudice.

[9] United States Judicial Panel on Multidistrict Litigation, Calendar Year Statistics, January through December 2016, available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Calendar_Year_Statistics-2016.pdf at 9.

[10] Except perhaps with regard to prohibiting trials without consent of the parties. Sec. 305 (j), which unlike other Sec. 305 provisions does not specify that it applies to personal injury claims [only].

sort that federal judges with experience managing multidistrict litigation have honed over the past few decades. Given recent calls for the JPML to more widely disperse MDLs among federal judges there is a need for experienced MDL judges to share the strategies they have developed for managing MDL litigation to newcomers to the process. I think this sort of education is best undertaken by the Federal Judicial Center and documented in the Manual for Complex Litigation, rather than in privately sponsored sessions.

In my view, however, the key challenges associated with multidistrict litigation relate to outcome fairness, not efficient management. Simply put, the same agency problems that bedevil class actions are inherent in multidistrict litigation. Although in theory the fact that multidistrict cases are individually represented mitigates agency problems, in practice, individual representation often is provided by plaintiff law firms on a mass basis, with little attention to individual clients. Plaintiffs have insufficient information and understanding to monitor effectively the course of the litigation and insufficient knowledge to assess independently the outcomes that are proposed for their approval if and when a time for settlement arrives. It seems useful therefore to consider how practices mandated by Rule 23 might be adapted to apply to multidistrict litigation.

I applaud judges who have claimed authority to play a fiduciary role in multidistrict litigation by reviewing the terms of global settlements and announcing their approval or disapproval. Although when plaintiffs have filed individual lawsuits, the decision as to whether to accept or reject a settlement offer remains theirs, I think it is useful for them to learn the judge's view on the settlement's fairness before making their own decisions. And knowing the judge will announce her view publicly should incentivize their attorneys to assure the settlement is fair. But before the judge announces her view, it would be useful for her to have an opportunity to hear what the plaintiffs themselves have to say about the proposed terms, as a judge presiding over a Rule 23 class action would, at a fairness hearing.

Under Rule 23(g), class action judges now appoint class counsel; multidistrict transferee judges appoint lead counsel and plaintiff steering committees. Under Rule 23 (h), class action judges award class counsel fees; applying equitable fee doctrine, some transferee judges have set parameters for attorney fees, notwithstanding concerns about interfering with contractual agreements between represented plaintiffs and their attorneys. Opening up the settlement review

process to plaintiffs – for example, by holding a settlement hearing and inviting objectors to come forward as in Rule 23 class actions – would be a more radical step, in the absence of any current rule requiring this. But global settlements often require publicity campaigns to assure that a threshold agreement percent specified in the settlement is met. Creating a formal procedure for informing plaintiffs of a proposed settlement and seeking their feedback before the process moves forward, could facilitate the ultimate approval of the settlement. Notices could be provided to plaintiffs in multidistrict litigation when a settlement has been negotiated between plaintiff attorneys and defendants, directing plaintiffs to information on a court website about the settlement provisions, along with examples of how the settlement would apply to different categories of plaintiffs, and the procedures plaintiffs would have to follow for claiming compensation. How fees will be calculated should be included in this information. Plaintiffs could be encouraged to share their reactions to the settlement, not just with their attorneys and the court, but with each other. Videoconference technology could be used to engage plaintiffs in Q & A sessions on the proposed settlement. The judge could acknowledge differing views on and concerns about the settlement when she announced her own view of the fairness of the settlement.