The original idea underpinning the MDL statute was to provide for the coordination of discovery—by such means as common discovery orders, conducting national depositions for use in individual cases on remand, and centralized document depositories. Over the past fifty years, the MDL process has morphed into something quite different. During its first thirty years the MDL process developed into a mechanism by which a single judge resolved the entire dispute without remand of the cases to their transferor forums. Often the transferee judge accomplished this task by means of self-transfer, a practice that Lexecon finally abolished in 1998. But the die had been cast. By 1998, case management had evolved from its original purpose of narrowing issues in advance of trial to its present goal of achieving settlement without trial. Over the past twenty years, once a case was transferred into an MDL proceeding, transferee judges have applied their considerable case-management powers to resolve or induce the parties to settle most of the transferred MDL cases. Although remand of cases to their transferor fora is theoretically possible, the final disposition of transferred cases in the MDL forum, not in the transferor fora, is the norm.

At the same time, the importance of the MDL process has increased significantly. In recent years, MDL litigation has constituted thirty-five to nearly forty percent of the federal civil docket, and requests for MDL treatment have risen substantially in the past twenty years. Most of those cases have been products-liability claims. The large increase in this segment of the MDL docket coincides with the decline in the use of Rule 23 as a means to resolve mass torts. The MDL process has stepped into the void in order to avoid repetitive litigation of similar issues and claims.

Of course, the choice between a class action and an MDL consolidation is not binary. It is not unusual for one or more of the cases transferred by the Panel to be seeking class certification before transfer, and MDL counsel sometimes seeks class certification after transfer. To the extent that the MDL process avoids inconsistency

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1 These techniques—and only these techniques—were mentioned in both the House and Senate reports on the legislation that became 28 U.S.C. § 1407. They merited mention because the difficulties posed a group of electrical-equipment antitrust lawsuits had driven the Judicial Conference to request congress to enact a multidistrict consolidation statute; and these techniques were the ones that the coordinated efforts of the thirty-odd federal judges handling the cases has used successfully to resolve the disputes. See H.R. Rep. No. 1130, 90th Cong. (1968); S. Rep. No. 454, 90th Cong. (1967).


5 See e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999); In re Rhone–Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
in the certification or scope of a class action, the MDL process can aid in the efficient 
management of class litigation.

In other situations, such as products-liability claims, the MDL process has 
acted in lieu of class treatment. Indeed, with some justification, the MDL process has 
been called the “quasi class action.”6 Between the Judicial Panel on Multidistrict 
Litigation and the transferee judge, the powers available in the MDL process are in 
some ways equivalent to the powers of a judge presiding over a class action, including 
the power to determine whether to aggregate related cases, the power to select 
counsel for a group, the power to terminate a case on a motion to dismiss or for 
summary judgment, and even the power to try bellwether cases to forge a settlement. 
But there are also important differences in the class-action process, including the 
requirement of adequate representation and the necessity that a judge approve any 
settlement reached as fair, reasonable, and adequate. Of course, these distinctions 
can be overdrawn: as a practical matter, an MDL judge is unlikely to choose a lead 
counsel or a steering committee that is inadequate, and the judge’s influence during 
settlement negotiations can help to prevent a truly one-sided deal. To avoid any 
doubt, commentators have urged (and courts have begun to accept) that principles of 
adequate representation and approval of the fairness of settlements be imported 
formally into the MDL process,7 a result that further closes the gap between the class-
action and MDL processes.

Important differences in the class-action and MDL processes remain. The first 
is the standard under which certification or transfer occurs. Certification of a (b)(3) 
class requires proof of eight elements:

• The existence of a class
• Membership of the representative(s) in the class
• Numerosity
• Commonality
• Typicality
• Adequacy (of the class representative(s) and class counsel)
• Predominance of common questions
• Superiority.8

The elements for MDL transfer are simpler and more flexible:

• One or more common questions of fact
• Convenience of the parties and witnesses
• Promotion of the just and efficient conduct of the action.

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6 See, e.g., Charles Silver & Geoffrey P. Miller, The Quasi-Class Action Method of Managing Multi-

7 See, e.g., PRINCIPLES OF AGGREGATE LITIGATION (Am. L. Inst. 2010).

8 For simplicity, I do not include the arguable implicit requirement of ascertainability or the four 
factors, including manageability, that govern the predominance and especially superiority inquiries.
Both sets of requirements are often cashed out through more specific proxy rules. In the (b)(3) context, the proxy rules have accreted through years of judicial gloss. For instance, numerosity is almost automatically satisfied when more than fifty class members exist, and it is never satisfied when fewer than twenty-five exist; in the middle is the place for argument. Many of the proxy rules are negative, specifying circumstances when a class action is inappropriate. Thus, a (b)(3) class that either requires proof of individual reliance or involves the application of multiple state laws is almost never certified; likewise, certification of a positive-value class action is as common as the camel passing through the eye of the needle. Conflicts of interests among class members are hugely problematic. In the MDL context, the Judicial Panel has been (rightly) criticized for the brevity and opacity of its opinions implementing its standard; the Panel acts more as a civilian court, returning always to the first principles of the statute, than as a common-law court relying on precedent. To the extent that its opinions develop proxy rules, the rules seem to be a blend of both negative and positive considerations. For instance, the existence of multiple overlapping class actions, the consent of all (or most) of the parties to transfer, or the broad geographical dispersion of numerous cases works in favor of MDL consolidation. Conversely, a limited number of cases or the capacity of lawyers to coordinate informally works against, although even here the flexibility of the process has resulted in the Judicial Panel on occasion consolidating the minimum number of cases (two).

A second critical difference is the ability to opt out. Virtually all mass-tort cases would be certified (if they could be certified at all) under Rule 23(b)(3), which provides for an opt-out right that can be exercised after notice. Although few class members exercise the right, opting out is important structurally; among other things, it provides the justification for a class-action court to exercise personal jurisdiction over the class members and the notice that must be provided to class members entails significant expense that can influence the decision to bring a class action for damages. In an MDL proceeding, no opt-out right exists. Litigants swept up in a hearing before the Judicial Panel have on occasion argued that they ought not to be included in an MDL proceeding because of the uniqueness of their claims or defenses, and on rare occasion the Panel will excise some claims or parties from the transfer order. More typically, the Panel sends the case along to the transeree judge to sort out. In either event, exclusion from an MDL process is a matter of grace and circumstance, not of right.

A third difference between a class action and an MDL process is the scope of the preclusive effect of a judgment or the reach of a settlement. Assuming adequate representation, a class judgment or settlement binds all class members, even those

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9 See generally Margaret S. Williams & Tracey E. George, Who Will Manage Complex Civil Litigation? The Decision to Transfer and Consolidate Multidistrict Litigation, 10 J. EMPIRICAL LEGAL STUD. 424 (2013) (stating that the justifications given by the Panel for its consolidation decisions showed little variation).
who have filed suit in other court systems or those who have not filed suit at all.\textsuperscript{10} Resolution of an MDL case covers only those who are parties to the case, so that the scope of any preclusive effect of a judgment or the reach of a settlement is limited to those parties.

The sum total of these observations, similarities, and differences suggest to me that the MDL process today (which is not the process envisioned by Congress in 1968 or the one reflected in the language of § 1407) has in effect become a form of an opt-in class action. Opt-in class actions usually permit certification under a standard of commonality, not unlike § 1407(a)’s requirement of “one or more common questions of fact.”\textsuperscript{11} And like an MDL proceeding, its determination, whether settlement or judgment, legally affects only those who are parties to the case.

The analogy is not perfect as a legal matter. For instance, unlike a class action there is no representative party. But as a practical matter, the court’s ability to appoint lead counsel and to select certain cases for bellwether trial lead to much the same form of representativeness as a class action.\textsuperscript{12} Likewise, unlike a class action, there is no requirement of adequate representation. This distinction does no credit to the MDL process, but as a practical matter, the MDL judge is unlikely to appoint an evidently inadequate counsel or steering committee. Unlike a class action, the MDL statute contains an explicit requirement that consolidation achieve a just and efficient outcome, but as a practical matter, the commonality, typicality, and adequacy requirements of Rule 23(a) do the same.\textsuperscript{13} Finally, an MDL proceeding will in theory result in separate trials of each case in the transferor fora, but as a practical matter most MDL proceedings no longer return to their original fora.

\textsuperscript{10} There are important limits on the capacity of a class action to resolve the claims of “future plaintiffs”: those individuals whose lawsuit has not yet matured at the time that the class action is filed. See Amchem, supra; Ortiz, supra.

\textsuperscript{11} The 1938 version of Rule 23 included an opt-in class action, whose sole requirements were numerosity, adequacy of representation, a right sought to be enforced on behalf of the class that was “several,” “a common question of law or fact affecting the several rights,” and a “common relief.”

\textsuperscript{12} Class representatives have long been described as figureheads; although they bear certain responsibilities during the litigation, the real control of the lawsuit—and a significant cause of agency-cost concerns—lies in the class counsel. See Jean Wegman Burns, Decorative Figureheads: Eliminating Class Representatives in Class Actions, 42 HASTINGS L.J. 165 (1990) (contending that named class plaintiffs have no legal authority and serve no useful purpose); cf. Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendation for Reform, 58 U. CHI. L. REV. 1 (1991) (arguing that discovery into the characteristics of the named plaintiffs should be prohibited since they are mere figureheads). The same is true of lead counsel or the steering committee of counsel in an MDL proceeding, in which the individual MDL plaintiffs have similarly little incentive to monitor the work of counsel.

\textsuperscript{13} See Ge. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982) (noting that these requirements blend into each other and together ensure that “maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence”).
The practicalities of the modern MDL diminish the legal differences between an MDL process and an opt-in class action significantly. Of course, opt-in class actions have one remaining, and highly critical, difference from the MDL process. Opt-in class actions traditionally rely on the consent of the members of the class to join together. With the MDL, the consent is more attenuated: the plaintiffs consent to bring their cases in federal court, aware (assuming knowledge of the law) of the existence of the MDL process and of the powers of the Panel to consolidate their cases with other like cases. They need not, however, consent to the consolidation in the quasi-class action itself. The responsibility for construction of the class is instead undertaken by the Judicial Panel—an undertaking that can occur either at the request of a party or on its own initiative. The Judicial Panel’s *sua sponte* power to establish something much akin to a mandatory opt-in class action—and to do so in the court of its, and not the class members’ choice—is a substantial inroad on the litigant autonomy that is often used as an argument for opt-in, as opposed to opt-out, approach to class actions.¹⁴

The question is what to do about this observation. One approach is to use this reality as a reason to complete the process of giving MDL judges the authority that commentators have argued for: a power to ensure that the representation in such aggregate litigation is adequate and that the judge have the power to examine an aggregate settlement for fairness. A very different use of this observation would be to argue that the modern MDL process has gone too far beyond its statutory purpose, and should be returned to its original aim of handling discovery on an economical basis but no more. A third, and more radical, approach would be to recognize that we have both an opt-out (Rule 23) and opt-in (§ 1407) model at work in modern federal litigation, and perhaps a centralized agency, like the Judicial Panel, should determine which approach makes more sense under the circumstances. This unified approach would require the development of explicit criteria about how to cash out such concerns as full deterrence, litigant autonomy, agency costs, personal jurisdiction, and implementation of remedies in a more robust way than the present system of parallel play between Rule 23 and § 1407 countenances.

Thank you. I look forward to the discussion at the conference.