The MDL as De Facto Opt-In Class Action

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The original concept underpinning the MDL statute was to provide a mechanism to coordinate discovery—through such means as common discovery orders, national depositions conducted for use in individual cases on remand, and centralized document depositories.\(^1\) Over the past fifty years, the MDL process has morphed into something quite different. During its first thirty years the MDL process moved from a discovery-coordination technique to a mechanism by which a single transferee judge resolved the entire dispute without remand to the transferor forums. Often the transferee judge accomplished this task by means of self-transfer, a practice that *Lexecon*\(^2\) abolished in 1998. By then, however, the die had been cast. Long before 1998, case management had evolved from its original principal purpose of narrowing issues in advance of trial to its present principal goal of achieving settlement without trial.\(^3\) Post-*Lexecon*, MDL transferee judges have applied their considerable case-management powers to resolve on pretrial motion—or to induce the parties to settle—most transferred MDL cases. Although remand of cases to their transferor fora is theoretically possible, the final disposition of transferred cases in the MDL forum is the norm.

At the same time, the importance of the MDL process has increased dramatically. 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.\(^4\) An overwhelming number of the present MDL cases are 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.\(^5\) The MDL process has stepped into the void left by the disappearance of large-stakes class actions as the go-to mechanism to avoid repetitive litigation of similar issues and claims.

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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).
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 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 now acts in lieu of class actions. With some justification, the MDL process has been called the “quasi class action.”\(^6\) Between the Judicial Panel on Multidistrict Litigation and the transfferee 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. To be sure, important differences from the class-action process—including the lack of a requirement of adequate representation and of a textual authority for a judge to approve an MDL settlement (including attorneys’ fees) as fair, reasonable, and adequate—also exist. But these differences are less than they appear. As a practical matter, an MDL judge is unlikely to choose a lead counsel or a steering committee that is inadequate, and the MDL judge’s influence during settlement negotiations can help to prevent a truly one-sided deal. In the 9/11 responders litigation, Judge Hellerstein even took the step of rejecting the first proposed settlement. 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 development that would further close the gap between the class-action and MDL processes.

Other important differences in the class-action and MDL processes are more difficult to bridge. For instance, the standard under which certification or transfer occurs varies. 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

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\(^7\) See, e.g., PRINCIPLES OF AGGREGATE LITIGATION (Am. L. Inst. 2010). For a critical appraisal of an MDL judge’s present power to approve an MDL settlement, see Howard M. Erichson, The Role of the Judge in Non-Class Settlements, 90 WASH. U. L. REV. 1015 (2013).
• 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.

Both sets of requirements are often translated into 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 rare middle case is the place for argument. Many of the proxy rules are negative, specifying circumstances when a class action is inapposite. 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 a camel passing through the eye of the needle. Conflicts of interests among class members make class certification very difficult. In the MDL context, the Judicial Panel has been (rightly) criticized for the brevity and opacity of its boilerplate opinions implementing the § 1407 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.9 To the extent that the Panel’s 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). Conflicts of interest do not spell doom for an MDL transfer.

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. 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, as well as the justification for extending the class action into damages claims far beyond the traditional scope of an equitable bill of peace. The expense of giving the notice

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8 For simplicity, I do not include the arguable implicit requirement of ascertainability or the four factors, including manageability, that govern the predominance and superiority inquiries.

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).
necessary to make an opt-out right effective also influences the lawyer’s initial 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 sometimes 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 all the cases to the transferee judge to sort out. In either event, exclusion from an MDL process is a matter of grace and circumstance, not of right. Because all litigants affected by a transfer order are known, giving notice of a possible transfer is a much less cumbersome venture.

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 who have sued in other courts and those who have filed no suit at all. 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. An MDL proceeding can expand its influence to other cases by establishing a settlement process open to non–MDL plaintiffs, but any broader preclusive effect requires an MDL judge to certify a litigation or settlement class action.

The sum of these observations, similarities, and differences suggests that the MDL process today is not the process envisioned by Congress in 1968 or the one reflected in the language of § 1407. The MDL has in effect become a form of 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.” Like an opt-in class action, the members of an MDL have no right to exclude themselves from the proceeding. Like an opt-in class action, the outcome of an MDL proceeding, whether settlement or judgment, legally affects only those who are parties to the case.

Admittedly, the analogy to an opt-in class action is not perfect. For instance, unlike a class action, an MDL proceeding has no representative parties. 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. Similarly, unlike a class action, MDL transfer contains no requirement of

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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.

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.”

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
adequate representation. Although this distinction does no credit to the MDL process, as a practical matter the MDL judge is unlikely to appoint an evidently inadequate counsel or steering committee. Next, 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) perform the same task. Finally, unlike an opt-in class action, 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.

In short, the realities and practicalities of the modern MDL diminish the effective differences between an MDL process and an opt-in class action. 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 at best consent to bring their cases in federal court, aware (assuming knowledge of the law) of the powers of the Panel to consolidate their cases with other like cases. They need not, however, consent to the consolidation in the MDL process 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 any 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 an opt-in, as opposed to opt-out, approach to class actions. The lack of any formal consideration by the Panel of the conflicts of interest that an MDL aggregation can generate adds to the burden of justification for the modern MDL.

If the modern MDL functions essentially as a mandatory opt-in provision, the question is what to do about this fact. One possible answer is to use this reality as a

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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”).


15 For a similar characterization of the MDL process as an opt-n procedure, though not characterizing it as an opt-in class action, see Jaime Dodge, Privatizing Mass Settlement, 90 NOTRE DAME L. REV. 335, 394 n.222 (2014).
cogent reason to invest MDL judges with the authorities for which commentators have argued: the power to ensure that the representation in MDL litigation is adequate and the power to approve (or not) an aggregate settlement. A different answer is to argue that the modern MDL process has strayed too far beyond its statutory purpose—and thus to argue for a return of the MDL process to its original roots of accomplishing common discovery on an economical, nationwide basis. A third, and more radical, answer is to admit frankly that we have both an opt-out (Rule 23) and opt-in (§ 1407) model at work in modern federal litigation, and to work out its logical implications. Perhaps a single centralized judicial body, like the Judicial Panel, should determine whether an opt-out or an opt-in approach makes more sense under the circumstances. A unified approach would also require the development of explicitly coordinated criteria or proxy rules to guide the choice between an opt-out and an opt-in procedure. Developing these criteria would require Congress, rulemakers, and courts to cash out such concerns as full deterrence, litigant autonomy and the role of consent, conflicts of interest within a group, agency costs, personal jurisdiction, and implementation of remedies in a more robust way than the present parallel play between Rule 23 and § 1407 accomplishes.

I look forward to the discussion at the conference.

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