**Some Questions About Lead Counsels' Appointment, Duties, and Compensation**

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This brief paper focuses on certain aspects of MDL procedure that, in my judgment, should be rethought and reformed. The topics include the appointment, compensation, and duties of lead attorneys, and the use of bellwether trials. To provoke discussion, I have framed the presentation as a series of questions to which I offer brief answers. My hope is not to convince readers to agree with me, but to show that the questions are important and deserve careful thought.

1. Who should select lead attorneys?

Presumably, plaintiffs should appoint lead attorneys, for the same reasons that plaintiffs select their representatives in other contexts. The right to choose one's attorney increases the likelihood of being served well. It also enables one to take advantage of the mechanisms that the market and the common law have deployed to encourage good service, including contingent fee arrangements, reputational interests, referral fee arrangements, voluntary membership in litigation groups, and causes of action for legal malpractice, breach of fiduciary duty, and disobedience. If plaintiffs cannot hire appoint lead attorneys directly, their lawyers can do so for them. Their lawyers are both responsible to them and incentivized to do right by them. Their lawyers also hire agents of other types and work with other lawyers voluntarily in joint venture groups.

In MDLs, however, neither plaintiffs nor their attorneys choose the lawyers who hold lead counsel positions. Judges do. This nullifies the structures that the market and the law have put in place to encourage lawyers to serve plaintiffs well. It also institutionalizes a conflict of interests by making lead attorneys beholden to MDL judges. This conflict is strengthened by judicial control of lead lawyers' fees, and it is insulated from attack by judicial disempowerment of non-lead lawyers, by judicial control of non-lead lawyers' fees, and by judges' use of procedures that punish non-lead lawyers and claimants who rock the boat. In practical effect, lead lawyers put judges' interests first, and there is nothing that non-lead lawyers or claimants can do about it.

Judicial control of appointments has significant potential to corrupt judges too, because it creates long-term, repeat play relationships between judges and the lawyers who belong to the lead counsel coalition. Professor Elizabeth Burch's research shows that the same lawyers are appointed to lead positions repeatedly. This enables these repeat-playing lawyers to collude with their defense counterparts and judges to extract wealth from non-lead lawyers and claimants by delivering cheap global settlements and receiving lavish common benefit fees. MDL judges like these settlements, which demonstrate their ability to manage big controversies and encourage the JPML to assign them more MDLs. They therefore protect the lead lawyers they appoint by holding onto cases that are ready for remand, by refusing to dismiss cases over which they lack subject matter jurisdiction, by ignoring and even approving of lead lawyers' ethical conflicts, by delaying decisions on dispositive motions until after settlements are negotiated, and by showering lead attorneys with common benefit fees.

2. What duties do lead attorneys owe claimants and non-lead lawyers?

Even though the MDL process has existed for decades, even simple questions about lead lawyers' responsibilities to claimants and other lawyers remain unaddressed. Perhaps the most

basic question is whether lead attorneys are fiduciaries and, if so, to whom their loyalty is owed. Ordinarily, lawyers are subject to a duty of loyalty that requires them to act solely for their dependents' benefit—even to the point of sacrificing their own interests, when need be—and to steer clear of conflicts. Lead attorneys engage in a variety of behaviors that protect their own interests, and they sometimes incur significant conflicts. If they owe fiduciary duties to claimants or non-lead attorneys, these behaviors are improper and should be actionable. But lead lawyers' duties are so poorly developed that it is impossible to know.

An interesting conflict of recent vintage involved a lawyer who negotiated an aggregate settlement of his firm's inventory of cases while serving as lead counsel in an MDL.[1] The negotiations created an opportunity for the lawyer to benefit his signed clients and to enhance the fees he earned on their cases by selling out other claimants in the MDL whose cases remained alive. This is a classic triangular structure in which the parties who are at the negotiating table can extract wealth from other parties who are not.[2] Adding to the perversity, the lawyer continued to serve as lead counsel after his inventory of signed clients settled. At that point, his only interest lay in collecting common benefit fees, which he could do by settling the non-clients' cases cheaply and extracting wealth from non-lead attorneys. He had no financial interest in maximizing the non-clients' recoveries.

If lead lawyers are fiduciaries, then it is also improper for them to use their control of settlement negotiations to benefit themselves. Yet, they do so routinely. In the Vioxx MDL, the lead lawyers negotiated an aggregate settlement with provisions that increased the amount of money held back to pay common benefit fees and expenses, and that required claimants and non-lead lawyers to waive all objections to the settlement—including objections to the fee- and cost-related provisions—as a condition for participating. There was no need for the lead attorneys to have made their fees an issue when negotiating with the defendant. They could have filed a motion for an increase with the MDL judge. Worse, by letting the defendant know that they wanted its help on fees, they can only have harmed the claimants and the non-lead attorneys. In return for helping out, the defendant would naturally have wanted a concession.

In a normal contingent fee matter, a lawyer negotiating a settlement has only one object: Getting the largest possible recovery for the client. Once that is done, the lawyer's fee falls out automatically because the compensation terms are set out in the retainer contract. But in MDLs, lead lawyers bargain with defendants over fee awards routinely. The NFL Concussion MDL provides a recent example. There, the negotiations produced a class-based settlement that included a separate fund of $112.5 million to cover common benefit fees. Why did the lawyers negotiate for a separate fee fund instead of bargaining for the largest possible recovery for the players and then applying to the court for a fee award? They might even have asked the MDL judge to set their fee terms before negotiations commenced. Then, their compensation too would have been fallen out automatically. Either way, they need not have put fees on the table when bargaining with the defendant.

There is also a settlement whipsaw worth mentioning, because it sheds light on the lengths to which lead attorneys are willing to go to protect their work from appellate review. When the

[1] I provided an expert report on the conflict described in this paragraph.

[2] The Supreme Court has taken note of the conflicts that are built into this structure. It did so in *Ortiz v. Fibreboard, Corp*., 27 U.S. 815 (1999), where a lawyer who served as class counsel negotiated one settlement for the class and a different one for his signed clients. It also did so in *Martin v Wilks*, 490 U.S. 75 (1989), where it allowed white firefighters to challenge a consent decree that gave black firefighters preferential access to promotions.

lead lawyers negotiated the Vioxx settlement, they cleverly required all lawyers who enrolled even one client in the aggregate settlement to waive all objections to any of its provisions, including provisions that increased the holdback to cover the lead attorneys' fees and cost reimbursements. Because non-lead lawyers were obligated to do what was best for their clients, they had to enroll clients in the settlement when that was best for them. This left them powerless to challenge these settlement provisions. And had non-lead lawyers declined to enroll their clients, they would have been powerless to attack those provisions still, because courts typically allow only persons who participate in settlements to challenge them. Non-participants lack standing because they aren't harmed. One might have hoped that the MDL judge and the judges on the court of appeals would have excoriated the lead attorneys for using this tactic, but they actually approved it.

3. Why are lead attorneys paid common benefit fees?

MDL judges have awarded lead attorneys billions of dollars in common benefit fees. Initially, they took these funds out of claimants' recoveries. More recently, they have carved them out of non-lead attorneys' contingent fees. Both practices alter the substantive legal rights of the people whose funds are transferred.

The federal rules of civil procedure do not empower MDL judges award common benefit fees. The MDL statute doesn't either. MDL judges have confected this power in the absence of statutory authority by drawing on the law of restitution and unjust enrichment, the same body of law that supports the practice of awarding common benefit fees in class actions. But the US Supreme Court has never held that the law of restitution warrants fee awards in MDLs, and the analogy to class actions is poor. Restitution supports coerced wealth transfers only from passive beneficiaries and only when service providers cannot bargain with beneficiaries directly. In class actions, both conditions are met; in MDLs, neither is. Neither claimants nor non-lead lawyers qualify as passive beneficiaries because both are actively litigating the claimants' cases. (If non-lead attorneys are passive, it is only because MDL judges force them to be.) Direct bargaining over compensation is possible too, because the identities of all lawyers and claimants are known. In fact, before judges took control of MDLs, lawyers did regulate the financial side of joint litigation efforts consensually. Paul Rheingold described an example in his famous article on the MER/29 litigation.

The RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT provides no support for the practice of compensating lead attorneys in MDLs. Its section on fee awards from common funds makes the following points.

> By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation cannot be explained entirely by restitution principles, since litigants may have no choice but to accept and pay for certain legal services as directed by the court. The fact that such fees may not be authorized by § 29 is probably irrelevant, however, since their predominant rationale is not unjust enrichment but administrative convenience.

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 (2011). The first sentence correctly states that the analogy MDL judges have drawn to class actions is flawed. However, the second sentence is wide of the mark. It is highly relevant that the common fund doctrine does not support fee awards in MDLs. *There is no other body of substantive law upon which MDL judges can rely.* "[A]dministrative convenience" is not, and never has been, a legally recognized basis for forcing people to pay lawyers' fees. One hopes it never will be.

4. How much should lead attorneys be paid?

Markets set most lawyers' fees. In class actions, markets cannot operate directly, but judges can mimic the market by basing common fund fee awards on the amounts that sophisticated clients pay when hiring lawyers to handle complex lawsuits on straight contingency. The practice of taking guidance from market rates also comports with the law of restitution, according to which the remedy for unjust enrichment is a service provider's usual and customary fee.

When transferring fees to lead attorneys, MDL judges do not purport to mimic any market and, in fact, there is no "usual and customary fee" for them to reproduce. No market exists for the services of lead attorneys. Judges and lead lawyers have tried to create one by promulgating form fee-sharing contracts and offering them on terms that non-lead lawyers cannot refuse. The contracts are shams. (Hat tip to Richard Nagareda, who first brought *The Godfather* to the jurisprudence of aggregate litigation.)

Figuring out how much lead attorneys should be paid is difficult too. Since the law of restitution is being relied upon, the first task is to figure out the amount by which claimants or non-lead lawyers are unjustly enriched. For claimants, the answer is zero. They agreed to pay their chosen lawyers fully compensatory fees for all of the services their lawsuits require. Lead attorneys have no basis for demanding that claimants pay more. The assertion must therefore be that non-lead lawyers are unjustly enriched. This is impossible. MDL judges prevent non-lead lawyers from acting by transferring all authority to lead attorneys. Any enrichment non-lead lawyers enjoy is forced upon them and cannot be unjust. But even if the assertion made sense, the extent of non-lead lawyers' enrichment cannot be measured. There is no objective way to know how much better off they are. The percentages that judges apply when transferring dollars from them to lead attorneys are plucked out of the air.

Finally, in class actions one can argue that fee awards are needed to incentivize lawyers to deliver services they would not otherwise find it financially advantageous to perform. But in MDLs, even this argument fails. When mass torts are consolidated, there are usually individual lawyers or groups of cooperating lawyers with signed clients who have large claims or with tens, hundreds, or even thousands of signed clients who have some ones. These lawyers have strong incentives to perform common benefit work. If appointed to lead counsel roles, they might deliver all the services that are required—either by themselves or by sharing the work with other attorneys—for nothing more than reimbursement of their expenses. The increase in fees to be earned by maximizing the value of their signed clients' claims might be the only spur they need.

In reality, MDL judges may have recognized a need that does not exist. By appointing lawyers with few signed clients to lead counsel positions, they may also have created a need for fee transfers that could have been avoided. They may have chosen these lawyers for reasons they thought were good, but their decisions forced them to confect a legal basis for paying these lawyers and to invent compensation numbers. They also put claimants at the mercy of lawyers who stood to make money by only settling their cases and whose profits depended more on the time they expended than the results they obtained.

5. Why do MDL judges hold bellwether trials?

Judges are convinced that bellwether trials benefit the MDL process by generating information about claim values that facilitate global settlements. One can accept the proposition that bellwether trials generate information and still have serious concerns about their role in MDLs.

One concern is that judges violate the plain language of the MDL statute by holding onto other cases while conducting bellwether trials, which occur after discovery on common factual matters is complete and after pretrial motions have been decided. In substance, the start of a bellwether trial marks the end of pretrial proceedings. But the MDL statute says that transferred cases "shall be remanded" to their original fora when pretrial proceedings are complete. It does not give judges discretion to hold onto cases any longer.

Many judges, lawyers, and commentators have criticized the MDL process on the ground that "the centralized forum can resemble a 'black hole,' into which cases are transferred never to be heard from again." Judge Eldon Fallon characterized this as "the strongest criticism of the traditional MDL process." Yet he and others defend the practice of holding onto other cases while bellwether trials take place on the ground that "judicial economy is undoubtedly well-served" by the practice. That may be true or false. Personally, I am a doubter. But either way, the desire for judicial economy provides no basis for holding onto cases that, according to the plain language of the statute, must be sent back. To put the point another way, if the fact that a global settlement hasn't yet occurred provides a reason for holding onto cases that are otherwise ready to be remanded, then the pretrial process really lasts as long as MDL judges say it does and the statutory requirement to remand cases when pretrial proceedings are finished is a dead letter.

MDL judges' unwillingness to remand cases also limits the value of the information that bellwether trials produce and distorts settlement values. As the Supreme Court recognized in Amchem Products, Inc. v. Windsor and as many commentators have observed, a plaintiffs' lawyer who cannot force a defendant to go to trial cannot obtain fair value for claims in settlement. Such a lawyer is "disarmed." In MDLs, lead attorneys' weapons are also limited. MDL judges' policy of holding onto cases until global settlements occur tells defendants that they face no real risk of losing at trial, except in the small number of bellwether trials that will occur. Lead attorneys' leverage in settlement negotiations therefore derives mainly from their ability to threaten defendants with endless litigation and mounting defense costs in the MDL forum. That skews settlement values, usually to defendants' advantage but sometimes in plaintiffs' favor when claims are weak and defense costs are high.

I have argued elsewhere that a procedure that deprives a plaintiff or a defendant of an opportunity to vindicate its position at trial in a reasonable amount of time denies that party due process of law. Professor Milton Handler made the same point in a famous article where he lamented the class action's *in terrorem* effect.

> Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.

In MDLs, the due process rights of plaintiffs and defendants are sacrificed on the altar of judicial economy because, for the vast majority of claimants, judges' desire for global settlements delays trials indefinitely. This puts MDL settlements into Handler's blackmail category. From a due process perspective, MDL judges should want to remand cases as quickly as possible so that trials can begin. In reality, they see remands as failures and do all they can to avoid them. The priority that MDL judges place on global resolutions puts due process at risk.

6. Do MDLs deprive claimants of zealous representation?

As explained, MDL judges free up money to pay lead attorneys by reducing non-lead lawyers' contingent fees. Some go even farther. They cap non-lead lawyers' fees at levels below those needed to cover the cost of common benefit awards. For example, in the litigation arising out of the Deepwater Horizon disaster, Judge Carl Barbier reduced all lawyers' contingent fees to a maximum of 25 percent, even though there was a separate fund from which common benefit fees would be paid.[3]

Serious questions exist concerning the legality of these fee caps. Neither the MDL statute nor any other substantive law—state or federal—authorizes them. The federal class action rule doesn't either, no matter what MDL judges may say.[4] And the argument that aggregate settlement agreements empower MDL judges to cut non-lead lawyers' fees is the worst one of all, because it gives the repeat players who control MDLs unlimited power to threaten non-lead lawyers with dire consequences, should they put up a fuss.[5] If one were designing a system with the object of cowing lawyers into submission, one could hardly do better than this.

Judges' use of fee caps is, then, ironic. The impulse to prevent contingent fee lawyers from over-charging comes from the ethics rules that permit only reasonable fees. But the consequence of MDL judges' use of this ethical mandate is to deprive claimants of zealous representation, the right to which is far more fundamental. Readers surely need no reminding that a lawyer's first and foremost duty is to represent a client zealously, up to the limits of the law, come what may.

Yet, the MDL process often prevents lawyers from providing zealous representation and punishes them for doing so. It hamstrings many lawyers by relegating them to non-lead positions in which they are disempowered and in which they and their clients are at the mercy of repeat players whose sole object is to negotiate global settlements. It then adds injury to insult by forcing non-lead lawyers to pay their overlords and by threatening those who refuse to do so voluntarily with having to pay more. Finally, it motivates non-lead lawyers to keep MDL judges happy by giving the latter discretion to cut the formers' fees.

As if the threat to zealous representation was not already dire enough, the process by means of which lead lawyers compensate other lawyers for common benefit work has yet to be considered. In large MDLs, lead attorneys preside over fee funds that contain tens or even hundreds of millions of dollars. By deploying these funds skillfully, they can reward lawyers who are loyal to them and punish lawyers who are not. They can also buy off lawyers whose challenges pose serious threats. Although their allocation decisions are formally subject to procedural requirements and judicial review, MDL judges are naturally inclined to protect lead attorneys' discretion, so as a practical matter disfavored lawyers are powerless.

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[3] *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010*, 2012 WL 2236737, at *1 (E.D. La. June 15, 2012).

[4] Per the Rules Enabling Act, 28 U.S.C. § 2072(b), procedural rules must "not abridge, enlarge or modify any substantive right." Lawyers' rights to fees are substantive rights grounded in contracts. Consequently, the federal class action rule cannot empower judges to abridge them. Nor can fee caps be cast as procedural because they bear no connection to the fairness, efficiency, or administration of the litigation process. Lawyers' contingent fees only become matters to be litigated when MDL judges focus their sights on them.

[5] See *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010*, 2012 WL 2236737, at *2 (E.D. La. June 15, 2012); and *In re Vioxx Products Liability Litigation*, 650 F.Supp.2d 549, 561-562 (E.D.La.2009).

To my eyes, this structure bears little resemblance to the ordinary one in which plaintiffs' attorneys are strongly incentivized to go to war for their clients. The conflicts are many and varied. I am not even certain that I know about all of them, for so much of what happens in MDLs, especially during settlement negotiations, takes place behind closed doors. But the conflicts I do know about are troubling.