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## ARTICLES

### MDL REVOLUTION

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*Over the past 50 years, multidistrict litigation (MDL) has quietly revolutionized civil procedure. MDLs include the largest tort cases in U.S. history, but without the authority of the class-action rule, MDL judges—who formally have only pretrial jurisdiction over individual cases—have resorted to extraordinary procedural exceptionalism to settle cases on a national scale. Substantive state laws, personal jurisdiction, transparency, impartiality, reviewability, federalism, and adequate representation must all yield if doing so fulfills that one goal.*

*Somehow, until now, this has remained below the surface to everyone but MDL insiders. Thanks to the sprawling MDL over the opioid crisis—and unprecedented opposition to it—MDL is finally in public view. State attorneys general have resisted the opioid MDL's intense nationalism, its relentless drive to global settlement, its wild procedural innovation, its blurring of differences across state law, and its dramatic assertions of jurisdictional authority. Opiates is the most extraordinary MDL yet, but most big MDLs share many of its features, and Opiates is already the roadmap for the next mega-cases. Moreover, even as resistance to Opiates has dispersed some of the MDL's early power, that resistance itself has come in the form of unusual procedural mechanisms.*

*MDL is designed for individual cases—giving similar suits filed in different districts an efficient pretrial process before sending them home for trial. In reality, that is pure fiction. Few cases ever return. And the MDL's mode of coordination—from its anti-*

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*federalism stance to its insistence that each proceeding is too unique to be confined by the Federal Rules—chafes at almost every aspect of procedure’s traditional rules and values. MDL is not-so-secretly changing the face of civil procedure.*

*This Article weaves together for the first time these exceptional features of MDL and their disruption of procedure’s core assumptions. Is MDL a revolution? Or simply a symptom of a larger set of modern procedural tensions manifesting in many forms? Either way, it begs the question: What do we expect of litigation on this scale?*

*We recognize that MDL fills important gaps by providing access to courts but argue for some return to regular order to safeguard due process, federalism, and sovereignty. We suggest specific shifts—from more pretrial motions to new paths for appellate review, attorney selection, and jurisdictional redundancy—where the normative balance seems particularly out of whack; shifts we believe are in line with the spirit of Federal Rule 1’s own inherent paradox—the ideal of “just, speedy and inexpensive procedure.”*

*We also offer the first comprehensive analysis of the historic suits over the opioid crisis. Opiates is the first MDL that pits localities against their own state attorneys general in a struggle for litigation control. Its judge has publicly stated that solving a national health crisis that Congress dumped in his lap is different from ordinary litigation. Opiates has even invented a new form of class action. It is hyper-dialectical, jurisdictionally competitive, outcome-oriented, repeat-player-rich, fiercely creative procedure.*

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INTRODUCTION

*“MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance.”*

—Sixth Circuit to the *Opiates* MDL Judge, April 15, 2020<sup>1</sup>

Multidistrict litigation (MDL) has entered the mainstream. Only a few years ago, it was the best-kept not-so-secret revolution in civil procedure. Even as MDL proceedings—federal cases with similar facts that are aggregated from around the country before a single judge for coordinated pretrial handling—steadily grew to comprise a whopping *twenty-one* percent of all newly filed federal civil cases and, by some estimates, nearly forty percent of the pending civil caseload,<sup>2</sup> the bar remained specialized, academic scholarship remained limited to a few key experts, and MDL largely remained absent from law school casebooks and teaching.<sup>3</sup>

<sup>1</sup> *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020).

<sup>2</sup> Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1246, 1271 n.87, 1272 (2019). For a detailed explanation of why new filings is a better comparator than pending cases, see *id.* at 1271. MDLs do make up a substantial percentage of pending cases, at one point comprising almost forty percent of the federal civil caseload. Judith Resnik, “*Vital*” *State Interests: From Representative Actions for Fair Labor Standards to Pooled Trusts, Class Actions, and MDLs in the Federal Courts*, 165 U. PA. L. REV. 1765, 1767 (2017).

<sup>3</sup> See, e.g., *Past Conferences*, BOLCH JUD. INST., <https://judicialstudies.duke.edu/conferences/past-conferences> (last visited Nov. 9, 2020) (listing an April 2017 conference on “Increasing the Number of Women and Minority Lawyers Appointed to Leadership Positions in Class Actions and Mass-Tort MDLs” and a May 2013 conference on the “Future of Multidistrict Litigation”). For MDLs occupying few pages in casebooks see, for example, OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* 593–94, 596–98 (2003); JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, *CIVIL PROCEDURE* 380–82 (11th ed. 2013); GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, *PLEADING AND PROCEDURE* 320–21 (11th ed. 2015); LINDA J.

The last few years have changed that, thanks largely to the salience of the *Opiates* MDL—the 2,800 cases against some two dozen companies that comprise the bulk of the litigation arising out of America’s opioid crisis.<sup>4</sup> The unusual constellation of actors in *Opiates* has brought to the surface what only insiders were debating before. Outsiders to the MDL—including state attorneys general (AGs) shouting “federalism!”—have opposed the MDL’s intense nationalism, its relentless drive to global settlement, its wild procedural innovation, and its dramatic assertions of jurisdictional authority. *Opiates* is the most exceptional MDL yet, in a world in which MDL exceptionalism is the norm. It shines a light on these unorthodoxies of modern MDLs and calls on mainstream proceduralists to pay attention to how the MDL revolution, and the opposing procedural form to which it is giving rise, disrupts procedure’s core norms.

*Opiates* also makes clear what we call the “MDL Paradox.” MDL is a procedural animal that, by the terms of its own statute and as a matter of its constitutional authority, is designed for *individual* cases. It ostensibly aims to give individuals whose suits are unamenable to class-action treatment an efficient pretrial process before sending them home to their own lawyers, courts, state laws, and appellate processes. And it supposedly does not have anything to do with the state courts themselves.

None of this has been further from the truth. The on-the-ground reality is that MDL’s essence—and its power—is centralization. Once centralized, few cases ever return home, and the MDL’s gravitational pull over often thousands of cases demolishes all of the normal expectations of individual process and federalism. The MDL Paradox is that the individual case justifies and necessitates the MDL, but centralization is what has defined, empowered, and emboldened it—at least until *Opiates*, when it was met with unprecedented resistance. And the MDL’s particular mode of centralization—from its anti-federalist

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SILBERMAN, ALLAN R. STEIN & TOBIAS BARRINGTON WOLF, *CIVIL PROCEDURE* 311, 979, 1111–12 (4th ed. 2013); and STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN, THOMAS O. MAIN & ALEXANDRA D. LAHAV, *CIVIL PROCEDURE* 1074 (5th ed. 2016). One of us focused early on some of the procedural issues in MDL, as compared to mass torts more generally. See, e.g., Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015).

<sup>4</sup> More recent scholarship includes, for example, Andrew D. Bradt, *Something Less and Something More: MDL’s Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017); Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017); Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017); Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185 (2018); and Adam S. Zimmerman, *The Bellwether Settlement*, 85 FORDHAM L. REV. 2275 (2017).

stance to its insistence that each proceeding is too unique to be confined by the transsubstantive Federal Rules—chafes at almost every aspect of procedure’s traditional rules and values.

Fewer than three percent of MDL cases return for disposition in the home jurisdiction where the plaintiff originally chose to sue.<sup>5</sup> A plaintiff is effectively under the jurisdiction of a transferee judge, often located across the country, who may lack formal legal authority over her. She is typically represented by a lawyer she most likely did not select, has little contact with, and who was not appointed using Rule 23’s due process protections. The particulars of her state’s substantive law are often overlooked or sometimes even conceptualized as one part of a generalized—and nonexistent—“national tort law” that MDL judges apply in the aggregate with an eye toward settlement. At times, MDL judges assert jurisdiction they do not have over state actors. They invent new mechanisms of procedure. They are largely shielded from appellate review.

This Article weaves together all of these exceptional features of MDL to thrust their analysis into the mainstream of civil procedure theory and doctrine, taking a long overdue step toward a more inclusive debate. When it comes to mega-suits on a national scale, MDL places in tension the individual and the collective, centralization and decentralization, and nationalism and federalism. Some of these tensions have been there from the start and have long been noticed by scholars, like the tension between the individual and the collective.<sup>6</sup> Others, especially how MDL’s relentless nationalism treats federalism—including state courts, state attorneys, and even state substantive law—as a threat, have been brought to the fore by *Opiates*. *Opiates* has likewise elevated the question of how far we are willing to

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<sup>5</sup> As of 2019, the Judicial Panel on Multidistrict Litigation (JPML) has, since its inception, centralized 722,146 civil actions for pretrial proceedings and remanded a total of 16,918 (or 2.3%) of those. See *Judicial Panel on Multidistrict Litigation—Judicial Business 2019*, ADMIN. OFF. OF THE U.S. CTS., <https://www.uscourts.gov/judicial-panel-multidistrict-litigation-judicial-business-2019> (last visited Nov. 13, 2020).

<sup>6</sup> See, e.g., Bradt, *supra* note 4, at 1714 (“[T]he notion that the cases do not lose their individual character by being transferred into the collective . . . demands reconsideration.”); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519 (discussing the tensions lawyers face in balancing loyalty to individual clients and the collective in non-class aggregate litigation); Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1184–86 (2009) (suggesting that even though “individual autonomy is inevitably compromised in aggregate litigation,” without those compromises, “many cases could not credibly be pursued”); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109 (2015) (raising the tension between the individual and the collective and arguing that current MDL practice violates individual claimants’ due process rights).

let judges' creative procedural innovations go in the face of national crises. It is only when we see the full scale of these tensions together that we realize how much is at stake.

We also offer the first comprehensive analysis of the historic opioid suits. *Opiates* is the first MDL that pits localities against their own state AGs and legislatures in a struggle for control. Its judge, from the start, has been surprisingly frank in his position that intense case management and centralization—and not individual, legalistic determinations of blame or truth finding—will solve the public health crisis that he has chided legislatures for “punt[ing]” to the courts.<sup>7</sup> *Opiates* has state AGs claiming sovereignty, challenging the MDL judge via mandamus, and racing to their own courthouses to “beat” the MDL. It has some of the same lawyers representing actors on multiple sides of the litigation. It is hyper-dialectical, jurisdictionally competitive, outcome-oriented, repeat-player-rich, fiercely creative, constantly evolving procedure. Most mega-MDLs share many of these features; *Opiates* is a defiantly extraordinary version of an already extraordinary procedural animal.

At the very first public hearing, the *Opiates* MDL judge declared: “People aren’t interested in depositions, and discovery, and trials”; his objective was to “do something meaningful to abate this crisis” within the calendar year.<sup>8</sup> He resisted pretrial motion practice, even though some of the legal claims were novel and differed across states. Instead, he said from the beginning that *everyone* was accountable and the only issue was closure.<sup>9</sup> To provoke a global settlement, he focused on preclusion—a central concern of defendants interested in the finality that any settlement could bring. This eventually led to a *new form of class action invented for this MDL*, designed in part to bully the AGs into settling, which was successfully challenged in a rare instance of appellate review.<sup>10</sup>

As notable as *Opiates*’s momentum has been the resistance. The Sixth Circuit has already warned the *Opiates* judge that “MDLs are not some kind of judicial border country, where the rules are few and

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<sup>7</sup> Transcript of Proceedings at 4, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

<sup>8</sup> *Id.*

<sup>9</sup> *See id.* (“[I]n my humble opinion, everyone shares some of the responsibility . . . . That includes the manufacturers, the distributors, the pharmacies . . . .”); *see also* Howard M. Erichson, *MDL and the Allure of Sidestepping Litigation*, 53 GA. L. REV. 1287 (2019) (taking issue with Judge Polster’s settlement-oriented approach in *Opiates*).

<sup>10</sup> After the Sixth Circuit reversed, class counsel petitioned for an en banc rehearing, which is currently pending. *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020); Petition for Rehearing En Banc, *In re Nat’l Prescription Opiate Litig.*, Nos. 19-4097/19-4099 (6th Cir. Oct. 8, 2020).

the law rarely makes an appearance.”<sup>11</sup> Yet the opposition itself is marked by creative uses of bankruptcy in the name of centralization and unprecedented use of mandamus, alongside more traditional, power-dispersing tools of federalism.

Procedural innovation has long been common across MDLs: Customized procedural creations like special evidentiary orders,<sup>12</sup> common-benefit attorneys’ fees orders, and bellwether trials date back to 1990s mass-tort litigation.<sup>13</sup> And Judge Weinstein famously created the “quasi-class action” in *Zyprexa*, in part to get control over state AGs.<sup>14</sup>

MDL does not sit easily in our federalist, decentralized system of civil procedure. It is not what Robert Cover and T. Alexander Aleinikoff famously extolled as “dialectical federalism”—federal and state courts in productive, overlapping conversations, each with unique roles to play. Federal MDL judges are not Cover and Aleinikoff’s envisioned “utopian” norm-setters in dialogue with more pragmatic state courts.<sup>15</sup> Instead, federal judges themselves are the pragmatic problem solvers; state courts are mostly left out. And the evolution of law comes in the form of *procedural* creativity in the interest of global settlement, not substantive norm articulation in conversation with state courts via jurisdictional redundancy.

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<sup>11</sup> *In re Nat’l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020).

<sup>12</sup> For example, so-called *Lone Pine* orders are a common tool in MDLs and require a plaintiff to make an early evidentiary showing regarding their exposure to the defendant’s product, the injury, and causation. See generally Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019).

<sup>13</sup> See Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (“Because the work that the [Plaintiffs’ Steering Committee] performs inures to the common benefit of all plaintiffs and their primary counsel . . . MDL transferee courts usually establish . . . a common benefit fee to compensate the members of the [committee] . . .”); MARGARET S. WILLIAMS, JASON A. CANTONE & EMERY G. LEE III, FED. JUD. CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFeree JUDGES 2–4 (2019), [https://www.fjc.gov/sites/default/files/materials/14/Plaintiff%20Fact%20Sheets%20in%20Multidistrict%20Litigation%20Proceedings\\_First%20Edition\\_2019.pdf](https://www.fjc.gov/sites/default/files/materials/14/Plaintiff%20Fact%20Sheets%20in%20Multidistrict%20Litigation%20Proceedings_First%20Edition_2019.pdf) (discussing the benefits of plaintiff fact sheets, including gathering information to aid in selecting bellwether cases); see also Nora Freeman Engstrom & Amos Espeland, *Lone Pine Orders: A Critical Examination and Empirical Analysis*, 168 U. PA. L. REV. ONLINE 91, 94–96 (2020) (discussing the 1986 origin of *Lone Pine* orders and a 1991 case in which a federal judge used them on six “test” plaintiffs in mass-tort litigation before dismissing the plaintiffs’ claims).

<sup>14</sup> *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006); see also *infra* notes 61–62 and accompanying text (discussing the tension between federal and state control in *Zyprexa*).

<sup>15</sup> See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1051 (1977) (“[T]he utopian perspective has characterized the efforts of lower federal courts.”).

It is interesting that just at the moment when some cracks in the MDL power structure have begun to develop in *Opiates*, yet another federal court—bankruptcy court—has emerged to centralize anew. Bankruptcy court has a unique set of powers: It can halt state litigation against a defendant and bring all claimants to the table, regardless of where cases are filed. *Opiates* reveals the relentless force of centralization as judges try to resolve the nationalism-versus-federalism pulls of a massive public litigation.

The big question, of course, is: What do we expect large-scale suits aimed at national policy problems to accomplish? Are they primarily vehicles for closure, some accountability, and financial relief? Or are they also supposed to fulfill traditional litigation goals of due process, one's day in court, information production, legitimacy, authority, equality, and so on?

MDLs do fill an important void created by the decentralized structure of American civil procedure. They respond to the modern problem of harms that occur horizontally in a national economy within a system grounded in federalist conceptions of jurisdiction, where aggregation is not always possible. But to do this, MDL operates outside the normal boundaries of the Federal Rules, implicating not only federalism issues but also procedure's other core values of transsubstantivity, impartiality, transparency, reviewability, representation, and due process. In *Opiates*, the unusual resistance to the MDL has produced more information, occasioned more appellate review, and developed more substantive law than is typical in MDL. Then again, without MDL at all, the cases might never have existed—and might never be resolved.

Part I briefly overviews the current culture and history of MDL. Part II introduces the opioid litigation. Part III uses the *Opiates* MDL to reveal the tensions between centralization and individualization, nationalism and federalism, and cooperation and competition that characterize MDL. Part IV considers the modern MDL in light of procedure's core norms, including the individual's day in court, transsubstantivity, reviewability, impartiality, transparency, dignity, due process, federalism, sovereignty, finality, and, of course, justice.

We also attempt to chart a path to some reform. Those unsettled by various aspects of the landscape tend to argue that MDL can be improved by *more* centralization and control.<sup>16</sup> We look outward

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<sup>16</sup> See, e.g., Bradt & Rave, *supra* note 4 (encouraging MDL judges to offer nonbinding opinions about the fairness of settlements); Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129 (2018) (encouraging MDL judges to invoke the All Writs Act in order to review settlements); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero*

instead. Federal Rule 1 is famously something of a paradox itself: It tells us that the Rules aspire to the “just, speedy, and inexpensive” resolution of all cases.<sup>17</sup> It implicitly tells us, with its own self-contradiction, that “just” procedure may have to strike a *balance*. We offer several improvements in this spirit—suggestions that recognize the benefits of some MDL centralization but do more to put the MDL on surer constitutional footing. Among these are more pretrial motion practice, more appellate review, more remands to the home forum, more attention to differences in state substantive law, adequate representation in selection of counsel, and respect for federalism boundaries.

The precedents set by *Opiates* will be woven into MDL common law only to become a building block for further experimentation by future MDLs; the *Juul* MDL currently underway is already looking to *Opiates* for inspiration. That’s how MDL common law develops, exceptional case by exceptional case until the exception becomes the norm.<sup>18</sup> The question is in which direction it will go.

## I

### THE EXTRAORDINARY WORLD OF ORDINARY MDL

MDLs were born a half-century ago, in 1968, as the quieter sibling of class actions.<sup>19</sup> Initially conceived to accommodate a rash of antitrust litigation against electrical equipment manufacturers,<sup>20</sup> MDLs have evolved into a more prominent procedural mechanism than ever imagined. As noted, since 1992, new MDL filings have

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*Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1361 (2000) (suggesting that if parallel litigation exists in state and federal court, the federal court should be required to either stay its proceedings or enjoin the parties from continuing their state court action); William W. Schwarzer, Alan Hirsch & Edward Sussman, *Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute to Permit Discovery Coordination of Large-Scale Litigation Pending in State and Federal Courts*, 73 TEX. L. REV. 1529 (1995) (arguing for the expansion of federal jurisdiction to curb duplicative litigation).

<sup>17</sup> FED. R. CIV. P. 1.

<sup>18</sup> See *In re Juul Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 19-md-02913, 2020 WL 6271173, at \*59 (N.D. Cal. Oct. 23, 2020) (“Decisions from the opioid multidistrict litigation before the Northern District of Ohio are instructive.”); cf. Jeff Overley & Emily Field, *What Attys Should Know as Juul Battles Blaze of Litigation*, LAW360 (Feb. 14, 2020, 7:15 PM), <https://www.law360.com/articles/1213895/what-attys-should-know-as-juul-battles-blaze-of-litigation> (noting that at least nine state attorneys general have sued Juul).

<sup>19</sup> 28 U.S.C. § 1407.

<sup>20</sup> Blake M. Rhodes, Comment, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711, 713–14 (1991).

steadily climbed from a low of five percent of the federal civil docket to a high of twenty-one percent.<sup>21</sup>

One of us has labeled MDLs an instantiation of modern, “unorthodox civil procedure”; both of us have detailed how they deviate from traditional procedural norms and rules.<sup>22</sup> MDLs are the nationalist animals in procedure’s federalist system—a system organized, even at the federal level, by state-centered notions of jurisdiction. There are no special rules for these mega-cases. Instead, MDL norms and innovations develop case by case, creating their own common law of MDL procedure separate from, and at times in tension with, the transsubstantivity of the uniform Federal Rules.

MDLs also depend almost entirely on thin notions of consent, rather than formal allocations of power, and so disrupt traditional adversarial and hierarchical relationships among their players, turning judges and lawyers into deeply collaborative partners in “practical problem solving.”<sup>23</sup> These cases are characterized by aggressive case management and judicial innovation. Yet, in another deviation from the norm, because most critical MDL rulings are pretrial orders, they are rarely treated as precedential and few are subject to customary appellate review.<sup>24</sup>

Even though these unorthodoxies are standard fare to insiders who know how the game is played, they surprise even most legal experts. And *Opiates* pushes MDL even further, making the extraordinary-turned-ordinary extraordinary once again. In this Part we introduce the “ordinary” MDL basics, including its significant differences from class actions. We turn to *Opiates* in the next Part.

### A. MDL Formation

The types of cases centralized in MDLs run the gamut from securities, employment, and antitrust to products liability, sales practices, and common disasters.<sup>25</sup> While class actions are sometimes certified within MDLs, especially in antitrust and securities cases, Supreme Court opinions beginning in the late 1990s, combined with federal legislation, have rendered class actions increasingly scarce in products

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<sup>21</sup> Williams, *supra* note 2, at 1272.

<sup>22</sup> Gluck, *supra* note 4; ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019).

<sup>23</sup> Gluck, *supra* note 4, at 1673 (quoting a noted MDL judge).

<sup>24</sup> See *infra* Section I.E.

<sup>25</sup> See *MDL Statistics Report - Docket Type Summary*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 15, 2020), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDLDockets\\_By\\_MDLT\\_Type-December-15-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDLDockets_By_MDLT_Type-December-15-2020.pdf) (identifying active MDLs).

liability and common disasters.<sup>26</sup> But those cases haven't gone away—MDL has filled the aggregation void. Products liability makes up around one-third of all MDL *proceedings* and ninety-seven percent of all currently pending *cases* centralized through MDL.<sup>27</sup> Mega-proceedings with 1,000 or more cases are increasingly common and can feature a mix of personal-injury allegations alongside economic or more public-facing claims like public nuisance.<sup>28</sup> Our focus here is on mega-MDLs because they are the ones exerting pressure on the system, but the ways in which they do so can likewise impact smaller proceedings.

MDLs begin when the Judicial Panel on Multidistrict Litigation (JPML) decides that centralizing factually related cases before a single judge (the “transferee” or “MDL” judge) will serve “the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”<sup>29</sup> The JPML’s choice of forum can have major significance for the parties, affecting everything from which lawyers will control the proceeding to what common law will apply to matters of federal law and procedure.<sup>30</sup> Similar cases filed and removed after

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<sup>26</sup> See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–52 (2011) (strengthening the commonality requirement for class certification under Rule 23(a)(2)); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624–26 (1997) (holding that a settlement class of asbestos claimants did not meet Rule 23(b)(3)’s predominance requirement or Rule 23(a)(4)’s adequacy requirement because of claimants’ disparate levels of exposure, injury, and potential for future injury); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.) (expanding federal jurisdiction over class actions); Resnik, *supra* note 2, at 1769 n.5, 1775–77 (noting that, although data on class actions are limited, interventions by Congress and the Supreme Court have had the effect of curbing class actions).

<sup>27</sup> *MDL Statistics Report - Docket Type Summary*, *supra* note 25 (listing 59 of 178 pending MDLs as products liability proceedings); see *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 15, 2020), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MD\\_L\\_Dockets\\_By\\_Actions\\_Pending-December-15-2020.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MD_L_Dockets_By_Actions_Pending-December-15-2020.pdf) (adding the total actions in the 59 pending MDLs equals 322,443 cases out of a total of 330,816 cases pending on the MDL docket). One MDL alone, *In re 3M Combat Arms Earplug Products Liability Litigation*, accounts for sixty-two percent of all pending MDL cases with 207,702 current cases. *Id.*

<sup>28</sup> Ninety-two percent of all proceedings with 1,000 or more cases are products liability proceedings. Williams, *supra* note 2, at 1274–75.

<sup>29</sup> 28 U.S.C. § 1407(a). The JPML comprises seven federal judges selected by the Chief Justice. *Id.* § 1407(d).

<sup>30</sup> Choice of state substantive law in diversity cases is still governed by *Klaxon*, which requires a federal district court to apply the choice of law rules of the state in which it sits. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding that a transferee court must apply the choice of law rules of the state in which the transferor court sits). Courts have split over how to treat the filing of cases directly in the MDL that could not have been filed there without the defendant’s consent. Compare *In re Trasyol Prods. Liab. Litig.*, No. 08-md-01928, 2011 WL 1033650, at \*3 (S.D. Fla. Jan. 18, 2011) (applying the choice of law rules of the state in which the MDL court sits in cases filed directly in the MDL), with *In re Yasmin & Yaz (Drosiprenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 09-md-02100, 2011

the initial order, dubbed “tag-along” cases, likewise find themselves before the same judge—who might be across the country—either through the circuitous route of JPML transfer or by filing directly in the MDL.<sup>31</sup>

Unlike the more demanding prerequisites for certifying a class action under Rule 23, the MDL statute requires only that there be “one or more common questions of fact . . . pending in different districts.”<sup>32</sup> Its drafters considered and rejected a predominance requirement like that of Rule 23(b)(3), relying instead on the idea that these were individual cases that would eventually return home, thereby clearing the way for MDLs to host a variety of loosely related cases whose parties’ aims and desires might align on some matters and differ on others.<sup>33</sup>

### B. MDL Representation

Adequate representation, the class action’s due process linchpin, also was not a major concern to the MDL statute’s drafters.<sup>34</sup> Most plaintiffs had their own attorneys and the statute’s built-in limit—pre-trial proceedings only—seemed to ensure that their lawyers could try their cases on their home turf and preserve their chosen law.

That view proved idealistic. Instead, the MDL Paradox—its formal grounding in individual actions but de facto practice of centralization—is the reality. Although most plaintiffs enter the MDL proceeding with their own attorney, the decisional control that representation usually implies is typically illusory. Most mass-tort plaintiffs find their lawyers through social media and Internet searches (an entire “lead generation” industry has emerged to sell potential client leads to lawyers).<sup>35</sup> And even those who hire law firms directly

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WL 1375011, at \*4–6 (S.D. Ill. Apr. 12, 2011) (applying the choice of law rules of the state in which a claim accrued in cases filed directly in the MDL).

<sup>31</sup> See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 787–88, 794–95 (2012) (discussing how “tag-along” plaintiffs are transferred to the MDL judge and how many litigants file directly in the MDL court).

<sup>32</sup> 28 U.S.C. § 1407(a).

<sup>33</sup> See Bradt, *supra* note 4, at 1731–37 (discussing the MDL statute’s legislative history, culminating in its rejection of a predominance requirement).

<sup>34</sup> See *id.* at 1716 (“[J]udgments made by the MDL court do not formally bind any absentees, because presumably there are none. . . . [So] no provision is made for adequate representation.”).

<sup>35</sup> See, e.g., Sara Randazzo & Jacob Bunge, *Inside the Mass-Tort Machine that Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019, 11:48 AM), <https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480> (discussing the use of social media, television advertisement, and lead generation companies to recruit plaintiffs in mass-tort cases).

typically find that those attorneys refer their cases to specialists who have the expertise and finances to fuel claims against industry giants.<sup>36</sup> The end result is a client who may find herself represented by multiple lawyers and law firms, most of whom she has limited or no interaction with.

A second layer of lawyers further complicates representational questions. Cases transferred into the MDL often come from around the country, and then MDL judges appoint plaintiffs' leadership. From lead counsel to steering and executive committees, judges select only a handful of plaintiffs' attorneys to do the pretrial tasks that individual lawyers would typically perform, including conducting discovery, filing motions, and negotiating settlements.<sup>37</sup> Plaintiffs themselves have no say in who the judge chooses. They cannot fire leaders even when they feel their interests are being ignored, and they regain control only in the unlikely event of remand to their home jurisdictions. Departing again from the class-action model in selecting MDL leadership, most MDL judges focus on attorneys' previous experiences, financial resources, and cooperative tendencies rather than indicia of adequate representation.<sup>38</sup> But, as we detail in Part IV, it is constitutionally suspect to bind a plaintiff to a settlement if she is not adequately represented by counsel purporting to speak for the whole.

The selected lead lawyers receive a "common-benefit fee," which can be considerable—if *Opiates's* twenty-one leaders were to get their requested seven percent common-benefit fee based on an initial \$50 billion settlement offer, they would split \$3.5 billion.<sup>39</sup> Unlike their class-action kin, however, no federal rules formalize any process for

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<sup>36</sup> BURCH, *supra* note 22, at 15–16.

<sup>37</sup> One study of all MDLs (not just those involving products liability) suggested that "many" orders left leadership duties undefined. David L. Noll, *What Do MDL Leaders Do? Evidence from Leadership Appointment Orders*, 24 LEWIS & CLARK L. REV. 433, 464 (2020).

<sup>38</sup> See Hon. Stanwood R. Duval, Jr., *Considerations in Choosing Counsel for Multidistrict Litigation Cases and Mass Tort Cases*, 74 LA. L. REV. 391 (2014) (listing the factors mentioned but nowhere mentioning adequate representation). If there is a class certified within the MDL, Rule 23 applies for selection of class counsel; there may or may not still be lead MDL counsel in that situation.

<sup>39</sup> See Motion for Entry of Order Establishing Common Benefit Fund at 5, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 28, 2020), ECF No. 3111 (proposing a seven percent common-benefit fee); Sari Horwitz, Debbie Cenziper & Steven Rich, *As Opioids Flooded Tribal Lands Across the U.S., Overdose Deaths Skyrocketed*, WASH. POST (June 29, 2020), <https://www.washingtonpost.com/graphics/2020/national/investigations/native-american-opioid-overdose-deaths> (noting that states rejected opioid distributors' settlement offer of \$18 billion and have suggested a nationwide payout of \$25 billion to \$50 billion). Judge Polster has denied the request for common-benefit fees without prejudice. Order Denying Without Prejudice the PEC's Motion for Common

objecting to, or even authorizing judges to award, common-benefit fees.<sup>40</sup> Rather, the practice has evolved through MDL common law and equitable powers.<sup>41</sup> In another deviation, widely used but controversial and often coercive participation agreements often cover not only plaintiffs *in* the MDL but plaintiffs *outside* of its jurisdiction, in state court cases, who might have benefitted from coordinated discovery.<sup>42</sup> Common-benefit fees have caused tensions with parallel state court systems, with state court judges and attorneys often bullied into acquiescing to the federal MDL attorneys' fees as a precondition of settlement.<sup>43</sup>

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Benefit Fee Order at 2, 6, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 27, 2020), ECF No. 3397.

<sup>40</sup> See Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 131–32 (2010) (analyzing the emergence of common-benefit fees in terms of strategic action by MDL lead attorneys). See generally Fallon, *supra* note 13, at 375 (“The [common-benefit fund] is created by taxing persons other than a particular client for legal services beneficial to such persons thus spreading the cost of the litigation to all beneficiaries of these services.”).

<sup>41</sup> E.g., *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 770–71 (E.D. La. 2011) (grounding the court's authority to establish a common-benefit fund in equity, quantum meruit, inherent managerial authority, and the terms of the settlement agreement); *In re Genetically Modified Rice Litig.*, No. 06-md-01811, 2010 WL 716190, at \*4 (E.D. Mo. Feb. 24, 2010) (deriving the court's authority to establish a trust to compensate counsel from its managerial power over the MDL and its inherent equitable power).

<sup>42</sup> E.g., *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 617 F. App'x 136, 139, 143–44 (3d Cir. 2015) (holding, based in part on a participation agreement, that the MDL court's order assessing a seven percent common-benefit fee applied to all related claims against the defendant, including claims filed in state court).

<sup>43</sup> See, e.g., ATE Master Settlement Agreement, § 4.01(B)–(C), *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 09-md-02100 (S.D. Ill. Aug. 3, 2015), ECF No. 3786-1 (stipulating that nine percent of designated settlement funds will be reserved for common-benefit fees and expenses); Settlement Agreement, § 1.03, *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 09-md-02100 (S.D. Ill. Mar. 15, 2013), ECF No. 2739 (Exhibit A) (requiring that claimants opting into the settlement agreement who have pending state court claims agree to the MDL court's jurisdiction and, presumably, its fee awards); Master Settlement Agreement, § 10.04, *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 11-md-02299 (W.D. La. Apr. 28, 2015), available at <https://www.actosofficialsettlement.com/Documents.aspx> (imposing a common-benefit-fee assessment and requiring litigants opting into the settlement to waive their right to appeal “any order entered by the MDL court associated with the settlement”); Settlement Agreement, § 4.1.8, *In re DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig.*, No. 10-md-02197 (N.D. Ohio Nov. 19, 2013), available at [https://www.usashipsettlement.com/Un-Secure/Docs/FINAL\\_ASR\\_SETTLEMENT.pdf](https://www.usashipsettlement.com/Un-Secure/Docs/FINAL_ASR_SETTLEMENT.pdf) (requiring that all settlement claimants and their attorneys, whether their cases are pending before the MDL or elsewhere, consent to be bound by the MDL court's order imposing a six percent common-benefit-fee assessment); 2015 ASR Settlement Agreement, § 4.1.8, *In re DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig.*, No. 10-md-02197 (N.D. Ohio Mar. 2, 2015), available at [https://www.usashipsettlement.com/Un-Secure/Docs/Final\\_2015\\_ASR\\_Settlement\\_Agreement.pdf](https://www.usashipsettlement.com/Un-Secure/Docs/Final_2015_ASR_Settlement_Agreement.pdf) (same).

MDLs likewise differ from most class actions in that litigants are not given the ability to opt *out*. Without a plaintiff's consent, a transfer order can move her case across the country to a foreign federal court led by different counsel than the one she chose. Because so few cases ever return, the MDL is often likened to a "black hole."<sup>44</sup> Civil procedure tends to be preoccupied with the due process rights of *defendants* in geographically dispersed actions; instead, these cases raise due process concerns for *plaintiffs*. Due process concerns arise from forced aggregation into what is usually a dispositive, preclusive action, as well as from the questionable assumption that the MDL judge has nationwide jurisdiction over the entire plaintiff population.<sup>45</sup>

Importantly, the MDL statute does not confer nationwide jurisdiction on transferee judges, even as those judges attempt to exert control over the whole.<sup>46</sup> Instead, what makes the MDL court's exercise of power constitutional is that the *transferor* court (the court from which the action came) can properly exercise personal jurisdiction over both the plaintiff and the defendant.<sup>47</sup> Because the suit will supposedly return for trial, all's well that ends well. But a remand is no longer a convenient fiction; it's a virtual impossibility. That reality raises questions about MDL judges' constitutional authority over the parties.

### C. *The Fiction of MDL Remand*

The MDL statute states that any action transferred to an MDL "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred."<sup>48</sup> In reality—and despite the fact that the constitutionality of MDL is

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<sup>44</sup> Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 126 (2013).

<sup>45</sup> In contrast, in the class-action context, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812–14 (1985) held that absent class members did not need to have minimum contacts with the forum state if they could opt out—that is, the choice to stay equates to consent.

<sup>46</sup> See 28 U.S.C. § 1407(a) (providing that transferred actions shall be remanded to their original district courts after pretrial proceedings end, unless they have already been terminated).

<sup>47</sup> See *In re FMC Corp. Pat. Litig.*, 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) ("Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. A transfer under Section 1407 is, in essence, a change of venue for pretrial purposes." (citations omitted)); Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms: Bristol-Myers Squibb and the Federalization of Mass-Tort Litigation*, 59 B.C. L. REV. 1251, 1296–97 (2018) ("So long as the cases were originally filed in (or removed to) a district court that has personal jurisdiction . . . the MDL transferee court does not need an independent basis for personal jurisdiction over the temporarily transferred cases.").

<sup>48</sup> 28 U.S.C. § 1407(a) (emphasis added).

grounded in this idea of returning home—most MDLs are understood by all involved to be unamenable to remand at the outset. The promise of individual trials at home creates the MDL, but once created, the MDL becomes an aggregator “on steroids.”<sup>49</sup> That is the MDL Paradox. As one MDL judge has put it, “It’s the culture of transferee courts. You have failed if you transfer it back.”<sup>50</sup> Said another, “I view my job in this MDL [a]s . . . bring[ing] every single one of the cases that was transferred here to a resolution.”<sup>51</sup>

More than ninety-seven percent of cases centralized through MDLs are resolved there, either via settlement or dispositive action.<sup>52</sup> Early on, MDL judges attempted to expand their authority by transferring cases to themselves for trial too, but the Supreme Court held that they have “no such authority.”<sup>53</sup> Regardless, most MDL judges do not manage cases with an eye toward trial or the possibility of trial—they are intensely focused on settlement. Even bellwether trials—a handful of trials aimed at giving the parties more insight into the strengths and weakness of the claims—occur in only around forty-four percent of products liability MDLs.<sup>54</sup>

Because so few cases of any kind ever reach trial—in 2018, less than one percent of all federal civil cases did—any given case’s entire lifecycle typically plays out before the transferee judge in the MDL, making the events that occur within it of paramount importance.<sup>55</sup>

#### D. MDL Nationalism

MDLs fill important gaps in our modern civil litigation system—gaps for litigants seeking access to court but whose cases are not amenable to class action and gaps due to our state-centered system of procedure. As Justice Kennedy noted in one of the last major specific personal-jurisdiction cases, there is no such thing yet as nationwide jurisdiction—except, we would argue, when MDLs assert something

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<sup>49</sup> Cf. Gluck, *supra* note 4, at 1688 (“As one judge put it: ‘It’s like Rule 16 on steroids.’”).

<sup>50</sup> *Id.* at 1673 (compiling interviews of twenty seasoned MDL judges).

<sup>51</sup> Transcript of Proceedings at 7, *In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, No. 07-md-01842 (D.R.I. July 29, 2011), ECF No. 3608.

<sup>52</sup> See BURCH, *supra* note 22, at 24 (noting that approximately three percent of MDL cases are remanded).

<sup>53</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 28 (1998).

<sup>54</sup> See BURCH, *supra* note 22, at 256 tbl.A.5 (percentage based on products liability proceedings ending in non-class settlements).

<sup>55</sup> Across all federal civil cases in 2018 there were only 2,453 trials (bench and jury) out of 275,879 cases terminated in the federal system. *Table C-4, U.S. District Courts-Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2018*, ADMIN. OFF. OF THE U.S. CTS. (2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c4\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf).

similar to it.<sup>56</sup> But the famous *Erie* doctrine tells federal courts to apply the law of the state in which they sit;<sup>57</sup> there is no actual, national common law of tort—except when MDL judges proceed as if there is. This is another feature of the MDL Paradox: MDLs are supposed to fill the gaps caused by jurisdictional barriers and differences across governing state laws that inhibit such cases from becoming class actions—in that sense, MDLs serve federalism principles. Yet, once centralized, MDLs are highly nationalist animals.

Managing cases to settlement produces difficulties when not all of the suits are in federal court. State courts often have parallel suits, some brought by state AGs who want to remain in state court and some brought by individual plaintiffs. MDLs typically make efforts to coordinate with—or pressure—those state cases.<sup>58</sup> As noted, complicated issues have arisen with respect to questions like the common-benefit fund<sup>59</sup>—for example, whether lawyers in the parallel state action should have to contribute to the lead attorneys’ fees in the MDL as a precondition for global peace, an ask that often rankles state AGs.<sup>60</sup> In the MDL over the anti-psychotic medicine Zyprexa, for instance, Judge Weinstein forced twenty-seven states who refused to pay common-benefit fees to do so, citing his equitable power, dubbing the proceeding a “quasi-class action,” and rationalizing that “[a] federal court cannot allow variations in state law to interfere with the fair and efficient administration of a federally-controlled national litigation.”<sup>61</sup> One commentator wrote: “[W]e get the sense that MDL judges think they have a little extra jurisdictional power because they’re handling complex national disputes.”<sup>62</sup>

Previous MDLs have also raised federalism concerns about the propensity to obfuscate and smooth over differences across state

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<sup>56</sup> See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885–86 (2011) (suggesting the possibility that Congress could enact such a statute).

<sup>57</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>58</sup> *E.g.*, Pretrial Order No. 14 on State-Federal Coordination, *In re Propulsid Prods. Liab. Litig.*, No. 00-md-01355 (E.D. La. Dec. 4, 2001), ECF No. 444 (reserving the right to consult with state judges to resolve certain disputes that might arise out of the settlement agreement, “in an effort to provide a resolution satisfactory to both courts”).

<sup>59</sup> See *Silver & Miller*, *supra* note 40, at 129 (“Because many hands contribute to the success of MDLs, doling out shares in common fund fee awards is unavoidably messy.”).

<sup>60</sup> See FED. JUD. CTR. ET AL., COORDINATING MULTIJURISDICTION LITIGATION 7 (2013), <https://www.fjc.gov/sites/default/files/2014/Coordinating-Multijurisdiction-Litigation-FJC-2013.pdf> (describing how “the common benefit approach can create conflict with state practices”).

<sup>61</sup> *In re Zyprexa Prods. Liab. Litig.*, 451 F. Supp. 2d 458, 477 (E.D.N.Y. 2006).

<sup>62</sup> James M. Beck, *Federal Jurisdiction over Attorney General Cases (Zyprexa)*, DRUG & DEVICE L. (Feb. 18, 2008), <https://www.druganddevicelawblog.com/2008/02/federal-jurisdiction-over-attorney.html>.

laws.<sup>63</sup> The drive to settle from the beginning in many cases mutes motion practice around the specifics of state law, even as state law differences are sometimes dispositive for defendants. One federal judge described MDLs as “mush[ing]” fifty state laws together.<sup>64</sup> In the *Agent Orange* MDL, in which Vietnam War veterans sued over injuries allegedly caused by the Agent Orange chemical defoliant, Judge Weinstein simply declared there was a tort “law of national consensus”<sup>65</sup> because, as one scholar described it, he needed the concept of a “unitary law to govern a multistate mass tort dispute.”<sup>66</sup> The tendency to brush aside differences in state law in the interest of global settlement has also prevented the development of the substantive tort law that is the impetus for these cases in the first place. For instance, the tobacco cases in the 1990s raised public-nuisance theories similar to those raised in *Opiates*,<sup>67</sup> but they were novel then and remain so now because the Master Settlement Agreement was executed before exploring their parameters.

Joint coordination orders between courts overseeing parallel state and federal cases are common fare and often include agreements to conduct joint discovery, hold joint status conferences and “science days,” and sometimes even issue joint opinions or settlements.<sup>68</sup> The MDL over BP’s Deepwater Horizon oil spill, for instance, eventually comprised more than 100,000 private-party plaintiffs, plus the five Gulf Coast states and some localities. Alabama’s AG formally served

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<sup>63</sup> *But see* Opinion and Order Regarding Application of the Court’s Prior Rulings on Manifestation, Incidental Damages (Lost Time), and Unjust Enrichment to All Remaining Jurisdictions in Dispute (MDL Order No. 131 Issues), *In re* Gen. Motors LLC Ignition Switch Litig., No. 14-md-02543 (S.D.N.Y. Sept. 12, 2018), ECF No. 6028 (reviewing differences in the law across forty-seven states and reversing prior orders after finding that twenty-three states’ laws allow various consumer-protection claims even if the product’s defect has not manifested).

<sup>64</sup> Gluck, *supra* note 4, at 1704.

<sup>65</sup> *In re* “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690, 701 (E.D.N.Y. 1984).

<sup>66</sup> Howard M. Erichson, *Judge Jack Weinstein and the Allure of Antiproceduralism*, 64 DEPAUL L. REV. 393, 405 (2015); *see also* Hall v. E.I. DuPont de Nemours & Co., 345 F. Supp. 353, 360 (E.D.N.Y. 1972) (“[W]e have, for the purposes of this memorandum, assumed the existence of a national body of state tort law.”).

<sup>67</sup> *E.g.*, Complaint at 36, *Moore ex rel. Mississippi v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. May 23, 1994).

<sup>68</sup> *E.g.*, Transcript of Day One of Daubert Hearing at 125, *In re* Fresenius Granuflo/Naturalyte Dialysate Prods. Liab. Litig., No. 13-md-02428 (D. Mass. Oct. 21, 2015), ECF No. 1517 (conducting joint proceedings before District Judge Douglas P. Woodlock and Superior Court Judge Maynard Kirpalani); Transcript of Proceedings, *In re* Vioxx Prods. Liab. Litig., No. 05-md-01657 (E.D. La. Nov. 9, 2007) (announcing settlement alongside state court Judges Carol Higbee and Victoria Chaney).

as coordinating counsel for the state interests,<sup>69</sup> and the cases eventually settled through the MDL, with the state AGs agreeing not to oppose private parties' common-benefit fees.<sup>70</sup>

State court judges occasionally fight for control. One judge, in a previous interview study, reported: "If I get the case first I hit the ground running to get out in front of the MDL. We want to cooperate and coordinate but we don't want to cooperate and coordinate ourselves out of the system."<sup>71</sup> Some federal judges likewise have emphasized the need to issue their own joint coordination orders early to "be sure the MDL case gets out front . . . . This is one place the plaintiff's and defendant's interest in the MDL are aligned, both wanted me to get state judges under control, and to ignore objections of state plaintiffs' counsel."<sup>72</sup> Many states have their own MDL statutes, so sometimes coordination and competition occur between state MDLs and federal MDLs.<sup>73</sup>

### *E. MDL Judge "Cowboy" Mentality and Lack of Appellate Review*

Being selected as an MDL judge confers elite status on the judge in the ranks of the federal judiciary.<sup>74</sup> The MDL judge in many ways acts more like a modern administrator than the judge envisioned by the Federal Rules, not least because MDL judges are chosen specifically for their expertise in practical administration.<sup>75</sup>

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<sup>69</sup> See Pretrial Order No. 26 [Announcing Appointment of Government Coordinating Counsel] at 1, *In re Oil Spill*, No. 10-md-02179 (E.D. La. Jan. 27, 2011), ECF No. 1074 (establishing coordinating counsel for the government parties).

<sup>70</sup> See Order & Reasons [Aggregate Common Benefit Fee and Costs Award] at 1, 13–15, 42, *In re Oil Spill*, No. 10-md-02179 (E.D. La. Oct. 25, 2016), ECF No. 21849 (establishing "a common benefit fee and cost award of \$600,000,000.00" and describing how a deal was reached between BP and others for the court to approve the motion for a common-benefit fund); Order [Regarding Payment of the Gulf States' Attorneys' Fees and Costs] at 4–7, *In re Oil Spill*, No. 10-md-02719 (E.D. La. Oct. 5, 2015), ECF No. 15441 (barring several states AGs from later contesting the common-benefit fees after accepting money from the litigation's Settlement Agreement and Consent Decree).

<sup>71</sup> Gluck, *supra* note 4, at 1705 (quoting an unnamed state court judge).

<sup>72</sup> *Id.* (quoting an unnamed federal court judge).

<sup>73</sup> Zachary D. Clopton & D. Theodore Rave, *Opioid Cases and State MDLs*, DEPAUL L. REV. (forthcoming 2021) (manuscript at 2), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3680074](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680074).

<sup>74</sup> See RICHARD A. POSNER, HOW JUDGES THINK 132–47 (2008) (describing ways that federal judges try to attain elite status within their ranks).

<sup>75</sup> See generally Judge Sarah S. Vance, Chair, Jud. Panel on Multidistrict Litig., Remarks at the Duke Law Mass Tort MDL Program for Judicial Conference Committees (Oct. 8, 2015), in ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 179, 190–91 (Apr. 2018) ("In choosing judges to preside over these mass tort MDLs, the Panel looked for judges who had the experience, ability, and willingness to handle these cases . . . . All of the judges we chose had substantial judicial experience, and all but one had prior MDL experience.").

Practical administration can lead to heavy-handed and highly creative case management and nearly inescapable pro-settlement stances. This, in turn, sets up a conflict with the Federal Rules and their embrace of transsubstantivity. MDL judges insist that each case is too unique to be managed by a cramped interpretation of the Federal Rules or by a uniform set of procedures.<sup>76</sup> Instead, they develop their own special procedures, often in collaboration with specialist lawyers, which build on previous MDLs or analogous actions. As a result, what has emerged is essentially a federal common law of MDL procedure, with many judges adopting a discernible “cowboy-on-the-frontier” mentality that is not as apparent in other contexts but has become an accepted norm in MDLs.<sup>77</sup>

This tension between substantive aims and transsubstantivity plays out in real time, with high stakes, in nearly every MDL. Anywhere else, these tensions would eventually be smoothed out through the appellate process. But few MDL issues ever reach the appellate courts. In part, this is because MDL judges preside over pretrial litigation, meaning that there are fewer final orders that are appealable pursuant to 28 U.S.C. § 1291, which limits appealable orders to final orders except in special circumstances.<sup>78</sup> It is also because, as one judge put it, “[W]e try to do everything by consensus. This also means there is not much to appeal. You are operating outside the rules so you need consensus or else you are getting mandamus and interlocutory appeals. Consensus works to everyone’s advantage.”<sup>79</sup> The lack of appellate review also means that little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across districts. In the *General Motors* MDL, for instance, the presiding judge expressed surprise at the degree to which so much MDL procedural law remains unsettled.<sup>80</sup>

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<sup>76</sup> See Civ. Rules Advisory Comm., Draft Minutes of the April 2–3, 2019 Meeting, in ADVISORY COMM. ON CIV. RULES, AGENDA BOOK 29, 87, 103 (Oct. 2019) (“[I]t seems clear that any rules must take care to preserve the creative flexibility that has generated sound procedures for the often unique circumstances of particular MDL proceedings.”); Gluck, *supra* note 4, at 1674 (“MDLs exemplify procedural exceptionalism.”).

<sup>77</sup> Gluck, *supra* note 4, at 1675; cf. Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017) (discussing procedural legislation that arises, in ad hoc fashion, to meet the new needs of particular cases).

<sup>78</sup> 28 U.S.C. § 1291 (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”).

<sup>79</sup> Gluck, *supra* note 4, at 1706 (quoting an unnamed judge). There have been a handful of interlocutory appeals via 28 U.S.C. § 1292 concerning MDLs, but mandamus is even rarer. *Id.* at 1707.

<sup>80</sup> See *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-02543, 2015 WL 3619584, at \*1, \*7–8 (S.D.N.Y. June 10, 2015) (analyzing competing views on the proper treatment of consolidated complaints in MDLs).

## II

*OPIATES: ORDINARY MDL “ON STEROIDS”*<sup>81</sup>

Wild procedural innovation. Aggregation on aggregation. Dialectical litigation and competition. State AGs against the MDL, their own localities, and their own legislatures. Bankruptcy court as salve for—or silencer of—cross-jurisdictional litigation competition. MDL, thanks to *Opiates*, is extraordinary again.

Just when an unconventional but stable equilibrium among the MDL regulars had begun to accept the modern MDL’s unorthodoxies that we have described, *Opiates* arrived to challenge those unorthodoxies across every dimension. Much of the pressure comes from the outside, in the form of state AG suits and other MDL newcomers. But some comes from the inside. The unprecedented number of localities in *Opiates* is precisely what sets up the conflict with the AGs and makes global peace, centralization, and preclusion more difficult. The *Opiates* judge’s own view that “this is not a traditional MDL,” but rather the solution to an ongoing public health crisis, also changed the dynamic from the beginning.<sup>82</sup> These pressures have brought tensions to the surface and have exposed the MDL revolution in ways that were largely kept behind the scenes in earlier MDLs.

*Opiates* pushes us to ask whether centralization-at-all-costs should be the goal. It reveals the price for it too—from federalism to due process. And it reveals gaps in procedural protections that could benefit all MDLs, ordinary or extraordinary.

A. *Opiates is Formed*

Opioid litigation dates back to the early 2000s, shortly after Purdue Pharma began marketing OxyContin in 1996.<sup>83</sup> Targeting opioid manufacturers, as well as some individual physicians and physician-run “pill mills,” individual plaintiffs lodged an array of claims from strict liability to fraud and negligence.<sup>84</sup> Most of these first-wave suits failed. Exploiting stereotypes surrounding addiction, manufacturers deferred blame to individual plaintiffs for misusing their products and to doctors for either prescribing the medication

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<sup>81</sup> Gluck, *supra* note 4, at 1688 (quoting an MDL judge).

<sup>82</sup> Transcript of Proceedings at 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

<sup>83</sup> Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221 (2009).

<sup>84</sup> Abbe R. Gluck, Ashley Hall & Gregory Curfman, *Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L., MED. & ETHICS 351, 353–54 (2018).

improperly or despite knowing the risks.<sup>85</sup> A handful of state AGs sued individual companies,<sup>86</sup> and in 2007, federal prosecutors obtained an early settlement and plea agreement that resolved civil and criminal charges against Purdue Pharma for misbranding, resulting in a \$600 million fine against the company and \$34.5 million in fines against top executives.<sup>87</sup> Cardinal Health, one of the “Big Three” major distributors of OxyContin, settled suits in 2016 and 2017 with the Department of Justice (DOJ) and West Virginia, together totaling about \$64 million.<sup>88</sup> And the DOJ secured a \$150 million penalty in 2017 against McKesson for civil violations of the Controlled Substances Act.<sup>89</sup>

The real second wave, however, began in 2014 with a new litigation strategy led by local governments that targeted broad swaths of the industry. Casting a wider net, the second wave included not just manufacturers and pill-mill doctors, but also distributors like McKesson, Cardinal Health, and AmerisourceBergen as well as pharmacies like CVS and Walgreens.<sup>90</sup>

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<sup>85</sup> *Id.* at 353. For an extensive look at this first wave of lawsuits, see Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117 (2014).

<sup>86</sup> West Virginia settled its suit against Purdue for \$10 million in 2004. Landon Thomas, Jr., *Maker of OxyContin Reaches Settlement with West Virginia*, N.Y. TIMES (Nov. 6, 2004), <https://www.nytimes.com/2004/11/06/business/maker-of-oxycontin-reaches-settlement-with-west-virginia.html>. In 2007, Purdue paid \$20 million to settle civil claims brought by twenty-seven state AGs over its labeling of OxyContin. John O'Brien, *Purdue Pharma Settles Multi-State Marketing Claim*, L. NEWSLINE (May 8, 2007), <https://legalnewsline.com/stories/510518258-purdue-pharma-settles-multi-state-marketing-claim>. In 2015, Purdue settled a state case from Kentucky for \$24 million. Associated Press, *Kentucky Settles Lawsuit with OxyContin Maker for \$24 Million*, CBS NEWS (Dec. 23, 2015, 5:11 PM), <https://www.cbsnews.com/news/kentucky-settles-lawsuit-with-oxycontin-maker-for-24-million>.

<sup>87</sup> Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (May 10, 2007), <https://www.nytimes.com/2007/05/10/business/11drug-web.html>. That same year, Purdue and three top Purdue executives pled guilty to criminal charges of misleading doctors by intentionally misbranding OxyContin. Barry Meier, *3 Executives Spared Prison in OxyContin Case*, N.Y. TIMES (July 21, 2007), <https://www.nytimes.com/2007/07/21/business/21pharma.html>.

<sup>88</sup> *Cardinal Health Agrees to \$44 Million Settlement for Alleged Violations of Controlled Substances Act*, DEP'T OF JUST. (Dec. 23, 2016), <https://www.justice.gov/usao-md/pr/cardinal-health-agrees-44-million-settlement-alleged-violations-controlled-substances-act>; Carrie Ghose, *Cardinal Health to Pay West Virginia \$20M to Settle Opiates Lawsuit*, COLUMBUS BUS. FIRST (Jan. 9, 2017, 4:48 PM), <https://www.bizjournals.com/columbus/news/2017/01/09/cardinal-health-to-pay-west-virginia-20m-to-settle.html>.

<sup>89</sup> *McKesson Agrees to Pay Record \$150 Million Settlement for Failure to Report Suspicious Orders of Pharmaceutical Drugs*, DEP'T OF JUST. (Jan. 17, 2017), <https://www.justice.gov/opa/pr/mckesson-agrees-pay-record-150-million-settlement-failure-report-suspicious-orders>.

<sup>90</sup> Gluck et al., *supra* note 84, at 355–56; *supra* notes 88–89 and accompanying text.

By the fall of 2017, more than 150 suits had been filed in twenty-five federal districts across the country, and private counsel for forty-six local governments sought to have the JPML centralize all of the cases before the Southern District of Ohio.<sup>91</sup> On the plaintiffs' side, some states and localities, like the city of Chicago, opposed centralization until other courts decided pending motions for remand and document discovery was complete.<sup>92</sup> Some of the major defendants, including the Big Three distributors—Cardinal Health, McKesson, and AmerisourceBergen—wanted coordination in the Southern District of West Virginia, where Judge Faber had been presiding over sixteen related cases, including those that were the first filed against the distributors.<sup>93</sup> Other defendants opposed centralization entirely, arguing the cases were too different from one another. As Pfizer contended, “[a]ny common issues that may exist . . . are dwarfed by defendant-and/or product-specific issues that will undoubtedly predominate.”<sup>94</sup>

Nevertheless, on December 5, 2017, the JPML centralized all the actions before Judge Dan A. Polster in the Northern District of Ohio, reasoning that “[a]ll actions involve common factual questions about, *inter alia*, the manufacturing and distributor defendants' knowledge of and conduct regarding the alleged diversion of these prescription opiates, as well as the manufacturers' alleged improper marketing of such drugs.”<sup>95</sup> Moreover, “allowing the various cases to proceed inde-

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<sup>91</sup> Plaintiffs' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Sept. 25, 2017), ECF No. 1; Transcript of Oral Argument at 4, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Dec. 18, 2017), ECF No. 382.

<sup>92</sup> Transcript of Oral Argument at 35–40, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Dec. 18, 2017), ECF No. 382 (describing how the City of Chicago's position is that the case should be stayed for management issues).

<sup>93</sup> Joint Response of AmerisourceBergen Drug Corp., Cardinal Health 110, LLC, and McKesson Corp. to Motion for Transfer of Actions for Centralization of Pretrial Proceedings at 2, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Oct. 20, 2017), ECF No. 148. Manufacturers likewise wanted to avoid the Southern District of Ohio, preferring the Northern District of Illinois or the Southern District of New York. Manufacturer Defendants' Joint Response to Plaintiffs' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated Pretrial Proceedings at 1–2, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Oct. 20, 2017), ECF No. 158.

<sup>94</sup> Interested Party Response to Plaintiffs' Motion for Transfer of Actions Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings at 4, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Oct. 20, 2017), ECF No. 156; *see also*, e.g., Masters Pharmaceutical, LLC's Response in Opposition to Motion to Transfer Cases to Judicial Panel on Multi-district Litigation at 3–4, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Oct. 19, 2017), ECF No. 110 (opposing centralization on similar grounds).

<sup>95</sup> *In re Nat'l Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1378 (J.P.M.L. Dec. 5, 2017).

pendently across myriad districts raises a significant risk of inconsistent rulings and inefficient pretrial proceedings.”<sup>96</sup> The JPML concluded that “[c]entralization will also allow a single transferee judge to coordinate with numerous cases pending in state courts.”<sup>97</sup> Ohio was selected because of the acuteness of the crisis there and because Judge Polster had experience with previous mass-tort MDLs, providing him with “valuable insight into the management of complex, multidistrict litigation.”<sup>98</sup>

Today, the *Opiates* MDL includes approximately 2,900 suits with a potpourri of plaintiffs, defendants, and claims. Plaintiffs include Native American tribes, school districts, third-party payors (such as union health and welfare funds), insurance-benefit trusts, hospitals, and, most significantly, an unprecedented number of localities—cities, municipalities, and counties.<sup>99</sup> Defendants range from two dozen opioid manufacturers, distributors, and retailers to pain foundations and societies, pill-mill doctors, and individual defendants like members of the Sackler family (who own Purdue Pharma).<sup>100</sup> While the theories of liability vary, the suits generally allege that defendants “grossly misrepresented the risks of long-term use of those drugs for persons with chronic pain, and distributors failed to properly monitor suspicious orders of those prescription drugs—all of which contributed to the current opioid epidemic.”<sup>101</sup> Claims have been brought under the RICO statutes, the federal Controlled Substances Act (and state analogues), and various state consumer-protection laws.<sup>102</sup> Plaintiffs also allege common law claims such as negligence, negligent mis-

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<sup>96</sup> *Id.* at 1379.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Meryl Kornfield, Christopher Rowland, Lenny Bernstein & Devlin Barrett, *Purdue Pharma Agrees to Plead Guilty to Federal Criminal Charges in Settlement over Opioid Crisis*, WASH. POST (Oct. 21, 2020, 7:57 PM), <https://www.washingtonpost.com/national-security/2020/10/21/purdue-pharma-charges/>; *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending*, *supra* note 27 (noting 2,918 pending actions). In an interesting twist, some of the named defendants are now also plaintiffs. In early 2020, major drugstore chains sued doctors, “claiming that physicians are the real culprits in the nation’s deadly drug epidemic.” CVS, Walgreens, Walmart, and Rite Aid are among the group of “third party plaintiffs” that now find themselves on both sides of the litigation. Lenny Bernstein, *Major Drugstore Chains Sue Doctors in Sprawling Federal Opioid Case*, WASH. POST (Jan. 8, 2020, 11:30 AM), [https://www.washingtonpost.com/health/major-drugstore-chains-sue-doctors-in-sprawling-federal-opioid-case/2020/01/07/3ac9cd70-317d-11ea-9313-6c8a89b1b9fb\\_story.html](https://www.washingtonpost.com/health/major-drugstore-chains-sue-doctors-in-sprawling-federal-opioid-case/2020/01/07/3ac9cd70-317d-11ea-9313-6c8a89b1b9fb_story.html).

<sup>100</sup> Docket, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio).

<sup>101</sup> *National Prescription Opiate Litigation*, U.S. DIST. CT. FOR THE N. DIST. OF OHIO, <https://www.ohnd.uscourts.gov/mdl-2804> (last visited Oct. 31, 2020).

<sup>102</sup> *E.g.*, Second Amended Corrected Complaint at 275–93, 330–33, 338–43, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio May 29, 2018), ECF No. 508.

representation, fraud, unjust enrichment, and public nuisance.<sup>103</sup> Some statutory negligence and statutory nuisance claims have been brought as well.<sup>104</sup>

### *B. Ongoing Public Health Crisis and Procedural Exceptionalism*

Judge Polster's forthrightness combined with his strong and creative case management style has drawn attention even in a world where the unusual is usual.

During his very first teleconference he told the parties, with surprising candor, that he planned to seek an early settlement and did not want to preside over trials:

I have had two substantial MDLs, and I know that you can't try your way out of them, even though we have excellent lawyers. . . . I have used bellwethers, and it sounds good in concept, but they don't always work for various reasons. And this is a case where I think from both sides there is some good reasons to seriously explore some early resolution. . . . I don't think it is in anyone's interests to have this dragging on for five or ten years, which it will if we don't come to some resolution. . . . [Q]uite frankly, I think the best use of my time and my abilities will be to help see if there is some sort of resolution we can reach. I think that's why the MDL panel picked me.<sup>105</sup>

One month later, Judge Polster began the first in-person conference by emphasizing the uniqueness of the proceeding, saying, "[T]his is not a traditional MDL."<sup>106</sup> Unlike most MDLs, which focus "on something unfortunate that's happened in the past, and figuring out how it happened, why it happened, who might be responsible," he said, "the opioid crisis is present and ongoing."<sup>107</sup> As noted, Judge Polster was unusually frank about his views on the allocation of blame even before any motion practice had occurred: "[I]n my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payors, and individuals."<sup>108</sup>

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<sup>103</sup> *E.g.*, *id.* at 305–30, 334–35.

<sup>104</sup> *E.g.*, *id.* at 305–09, 318–24; *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018) (analyzing an exemplary list of claims).

<sup>105</sup> Transcript of Teleconference Proceedings at 37–38, 42, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 18, 2017), ECF No. 10.

<sup>106</sup> Transcript of Proceedings at 3, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

<sup>107</sup> *Id.* at 3–4.

<sup>108</sup> *Id.* at 4.

Judge Polster publicly chided the legislative branches of government, both federal and state, for “punt[ing]” the issue to the courts.<sup>109</sup> Like the sprawling asbestos litigation of the 1990s, courts were left to sort out the mess when legislative solutions failed.<sup>110</sup> For opioids, the judge said the answer wasn’t “just moving money around,” but fashioning injunctive relief.<sup>111</sup> He was unexpectedly direct: “People aren’t interested in depositions, and discovery, and trials.” His goal was to “do something meaningful to abate this crisis and to do it in 2018,” a shockingly ambitious timeline of a single calendar year.<sup>112</sup> Should he have to resort to trying cases the “traditional way,” he said, then, “I’ll admit failure and I’ll say, [a]ll right.”<sup>113</sup> After the hearing, a reporter overheard the lawyers complaining: “‘Grandstander.’ ‘Pollyanna.’ ‘Over his head.’” And, from several: “‘This is *not* how we do things!’”<sup>114</sup>

Even so, Judge Polster was eventually pushed by the parties into opening several litigation tracks. Litigants claimed that traditional adjudication was the quickest way to address barriers to global peace, but it was also a decentralizing and diffusing move, with litigants anxious to differentiate among plaintiffs, claims, applicable laws, and defendants.<sup>115</sup> Judge Polster, however, characterized the track structure as “an aid in settlement discussions. It’s not a substitute or replacement.”<sup>116</sup> Track One included three Ohio bellwether cases against a panoply of manufacturers and distributors.<sup>117</sup> Almost all of these settled with the Ohio counties—but not anyone else—before

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<sup>109</sup> *Id.*

<sup>110</sup> *E.g.*, Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 JUST. SYS. J. 157 (2007).

<sup>111</sup> Transcript of Proceedings at 9, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 9, 2018), ECF No. 58.

<sup>112</sup> *Id.* at 4.

<sup>113</sup> *Id.* at 5.

<sup>114</sup> Jan Hoffman, *Can This Judge Solve the Opioid Crisis?*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/health/opioid-crisis-judge-lawsuits.html>.

<sup>115</sup> *See* Minutes of 3/6/2018 Conference and Order at 1, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Mar. 7, 2018), ECF No. 170.

<sup>116</sup> Transcript of Status Conference at 9, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio May 14, 2018), ECF No. 418.

<sup>117</sup> Case Management Order One, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 11, 2018), ECF No. 232 (designating *County of Summit, Ohio v. Purdue Pharma L.P.*; *County of Cuyahoga v. Purdue Pharma L.P.*; and *City of Cleveland v. AmerisourceBergen Drug Corp.* as Track One bellwethers). MDL judges are constrained in selecting bellwether cases, even though they are supposed to be representative, because both § 1407 and Supreme Court precedent limit them to *pretrial* jurisdiction only, meaning that they can try only those cases over which they have original jurisdiction, like the *Summit* and *Cuyahoga County* cases from Ohio. 28 U.S.C. § 1407; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34 (1998).

the October 2019 trial date.<sup>118</sup> The sole remaining defendant, Walgreens, was then folded into a new track, Track One-B, alongside other pharmacy defendants (CVS, Rite Aid, HBC, and Discount Drug Market), with several trial postponements from COVID-19.<sup>119</sup>

Judge Polster refused to dismiss most of the Track One claims, including the public-nuisance claim,<sup>120</sup> which has been one of the more controversial claims because it expands the doctrine from classic tangible nuisance to the movement of goods through commerce.<sup>121</sup> He wrote: “[I]t is hard to find anyone in Ohio who does not have a family member, a friend, a parent . . . or a child of a friend who has . . . been affected. . . . While these allegations do not fit neatly into the legal theories chosen by Plaintiffs, they fit nevertheless.”<sup>122</sup>

He did eventually, however, follow an innovative “hub and spoke” remand plan created by the MDL’s special masters,<sup>123</sup> identifying several cases as bellwether trials that would take place in other federal jurisdictions where they were first filed.<sup>124</sup> Track Two com-

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<sup>118</sup> See Jan Hoffman, *Johnson & Johnson Reaches \$20.4 Million Settlement in Bellwether Opioids Case*, N.Y. TIMES, (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/health/opioids-settlement-johnson.html> (describing the settlement agreements between two of the Ohio counties and several manufacturers); Jeff Overley, *Opioid Trial Halted By Drug Cos.’ 11th Hour \$260M Deal*, LAW360 (Oct. 21, 2019, 8:27 AM), <https://www.law360.com/articles/1196365/opioid-trial-halted-by-drug-cos-11th-hour-260m-deal> (describing the last-minute settlement agreement between two of the Ohio counties, the Big Three distributors, and the remaining manufacturer but noting that the local government plaintiffs were not included in the settlement).

<sup>119</sup> Meryl Kornfield, *Coronavirus Stalls Long-Awaited Day in Court for Historic Opioid Lawsuit*, WASH. POST. (Dec. 26, 2020, 4:18 PM), <https://www.washingtonpost.com/health/2020/12/26/coronavirus-opioid-trials/>; Track One-B Case Management Order at 2, 5, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Nov. 19, 2019), ECF No. 2940.

<sup>120</sup> *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804, 2018 WL 6628898, at \*21 (N.D. Ohio Dec. 19, 2018). Judge Polster dismissed the City of Akron’s statutory public-nuisance claim for lack of standing and limited Summit County’s public-nuisance claim to injunctive relief. *Id.*

<sup>121</sup> See Jan Hoffman, *First Opioid Trial Takes Aim at Johnson & Johnson*, N.Y. TIMES (May 26, 2019), <https://www.nytimes.com/2019/05/26/health/opioid-trial-oklahoma-johnsonandjohnson.html> (discussing the controversial nature of these public-nuisance claims).

<sup>122</sup> *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804, 2018 WL 6628898, at \*21 (N.D. Ohio Dec. 19, 2018).

<sup>123</sup> Appointment Order at 1, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 11, 2018), ECF No. 69 (designating three special masters: David R. Cohen in Cleveland, Francis McGovern in Houston, and Cathy Yanni in San Francisco).

<sup>124</sup> See Track One-B Case Management Order at 1, 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Nov. 19, 2019), ECF No. 2940 (adopting the hub and spoke model). Only the Panel can remand MDL cases, but it does so at the suggestion of the transferee judge. Thus, Judge Polster’s orders are suggestions of remand. See, e.g., *Suggestions of Remand*, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Nov. 19, 2019), ECF No. 2941 (suggesting the “strategic remand” of three cases that

prises two West Virginia bellwether cases.<sup>125</sup> Later, Judge Polster designated as Track Three two Ohio cases involving public-nuisance claims against pharmacies in their role as distributors and dispensers.<sup>126</sup>

Throughout the proceedings, other groups have asked for their own special tracks—their own separation from the center—including Native American tribes and attorneys representing babies who developed neonatal abstinence syndrome (NAS) as a result of their mothers' opioid use.<sup>127</sup> Judge Polster granted third-party payors their own bellwether<sup>128</sup> and set aside a separate track each for hospitals<sup>129</sup> and the Native American tribes, which now includes 448 federally recognized tribes as either amici or litigants.<sup>130</sup> But he declined to create a separate track for NAS babies.<sup>131</sup> Finally, Judge Polster created another track in April 2020, composed of public-nuisance claims brought by two Ohio counties against pharmacy defendants in their role as distributors and dispensers, with a trial set for May 2021.<sup>132</sup>

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were representative of certain issues and had completed substantial discovery); Suggestions of Remand, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 6, 2020), ECF No. 3059 (suggesting that two cases be remanded to West Virginia as part of the hub and spoke model).

<sup>125</sup> Marginal Entry Order Granting Plaintiffs Cabell County Commission and City of Huntington's Motion to Sever, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 16, 2019), ECF No. 2990 (designating *Cabell County Commission v. AmerisourceBergen Drug Corp.* and *City of Huntington v. AmerisourceBergen Drug Corp.* as the West Virginia bellwethers). This left only three remaining defendants—AmerisourceBergen, Cardinal Health, and McKesson—and only one class of remaining claims: common law public nuisance. *Id.*

<sup>126</sup> Order Regarding Track Three, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 30, 2020), ECF No. 3282.

<sup>127</sup> See Suggestions of Remand at 6, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Nov. 19, 2019), ECF No. 2941 (identifying other cases where separate tracks were being considered).

<sup>128</sup> Emily Field, *Opioid Cos. Must Face Benefit Plans' Suit in MDL*, LAW360 (Feb. 21, 2020, 8:03 PM), <https://www.law360.com/articles/1246239/opioid-cos-must-face-benefit-plans-suit-in-mdl>.

<sup>129</sup> Case Management Order Number Four at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio May 22, 2018), ECF No. 485.

<sup>130</sup> Stacy L. Leeds, *Beyond an Emergency Declaration: Tribal Governments and the Opioid Crisis*, 67 U. KAN. L. REV. 1013, 1025 (2019).

<sup>131</sup> See Memorandum in Support of Motion to Vacate CTO-47 at 2, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Aug. 30, 2018), ECF No. 2398-1 (noting the MDL court's denial of a separate track for NAS babies).

<sup>132</sup> Order Regarding Track One-B and Track Three at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 16, 2020) ECF No. 3261; Order Regarding Track Three at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 30, 2020) ECF No. 3282. Several key trial dates have been rescheduled because of COVID-19 concerns. Meryl Kornfield, *Coronavirus Stalls Long-Awaited Day in Court for Historic Opioid Lawsuit*, WASH. POST (Dec. 26, 2020, 4:18 PM), <https://www.washingtonpost.com/health/2020/12/26/coronavirus-opioid-trials>.

There has been limited, but important, motion practice on some of the more novel claims. Several rulings in September 2019 rejected defendants' motions for summary judgment on the public-nuisance claim and on the issue of the chain of causation between drug sales and the opioid crisis, as well as plaintiffs' motion for partial summary judgment asking the judge to declare that no reasonable jury could find that the opioid epidemic does not constitute a public nuisance.<sup>133</sup>

*C. Extraordinary Procedural Innovation for Settlement: The Novel "Negotiation Class"*

Various obstacles to global settlement have presented themselves. One stems from the federalism tensions that permeate the litigation and resist centralization, which we discuss in Part III. Another comes from the challenge of binding absent parties without the preclusive benefits of a class action. The sheer number of localities in the *Opiates* MDL creates enormous uncertainty associated with the thousands of individual localities that have *not yet* sued: Reaching a settlement even with the current 2,000-plus entities that are parties to the MDL would not normally preclude the 30,000-plus additional nationwide localities from suing in the future and could simply serve to prime the pump for new lawsuits.<sup>134</sup> Defendants have steadfastly refused to settle without the promise of more complete closure.<sup>135</sup>

To solve the preclusion problem, and thereby make global peace possible, Judge Polster encouraged "novel solutions to a novel problem."<sup>136</sup> The first major innovation was the negotiation class, a new procedural form invented especially for *Opiates* by the late Duke Law professor Francis McGovern, who worked as a special master

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<sup>133</sup> Opinion and Order Denying Manufacturer Defendants' Motion for Summary Judgment on Plaintiffs' Public Nuisance Claims, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 9, 2019), ECF No. 2578 (declining to hold, as a matter of Ohio law, that the opioid epidemic does not constitute a public nuisance); Opinion and Order Denying Janssen's Motion for Summary Judgment at 1–4, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 4, 2019), ECF No. 2567 (finding genuine issues of material fact regarding causation for claims of fraudulent marketing and failure to maintain effective controls); Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 4, 2019), ECF No. 2569 (finding triable issues of fact regarding the adequacy of Walgreen's monitoring of opioid shipments to prevent diversion from proper medical use); Opinion and Order at 1–4, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 4, 2019), ECF No. 2572 (declining to hold, as matter of Ohio law, that the opioid epidemic constitutes a public nuisance).

<sup>134</sup> See Report on Negotiation Class at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 2, 2019), ECF No. 2959 (stating that there are 34,458 class members).

<sup>135</sup> Transcript of Status Conference Proceedings at 7, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 25, 2019), ECF No. 1732.

<sup>136</sup> *Id.*

overseeing negotiations in *Opiates*, and Harvard Law professor William Rubenstein, who worked as a court-appointed expert.<sup>137</sup> The idea of the negotiation class is to extend the class-action framework from Rule 23 to negotiations. The concept utilizes a voting mechanism—seventy-five percent of each voting pool must approve of any deal that class counsel negotiates for the class—which aims to protect both current individual plaintiffs and potential future plaintiffs who do not opt out because they will be bound to that deal. This would allow the class to bargain as a collective on the front end, prevent later infighting and splintering among plaintiffs, and give defendants a sense of the scope of peace they will obtain on the back end (without having to wait and see how many members opt out).<sup>138</sup> McGovern and Rubenstein argued that the “proposal is a novel use of Rule 23, but it is, in many ways, a less ambitious one than certification of a settlement class . . . . Settlement class certification was . . . quite controversial when developed . . . but . . . soon became a ‘stock device’ in class-action practice.”<sup>139</sup>

In June 2019, plaintiffs moved to certify an opt-out negotiation class under Rule 23(b)(3) and an issue class under Rule 23(c) to create “a voting arrangement” to allow all localities “to participate collectively, through their representatives, in any settlement discussions.”<sup>140</sup> The class corralled all localities—critically, including those who have

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<sup>137</sup> Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEX. L. REV. 73, 74 (2020).

<sup>138</sup> See *id.* (“By establishing the contours of the class prior to settlement discussions, negotiation class certification provides the defendant with a precise sense of the scope of finality a settlement will produce, hence encouraging a fulsome offer . . .”).

<sup>139</sup> *Id.* The negotiation class concept was a hybrid of a special bankruptcy procedure designed for asbestos claimants and an idea from the American Law Institute’s *Principles of the Law of Aggregate Litigation* that would allow multiple individual plaintiffs represented by the same attorney to agree in advance to be bound to any settlement that a supermajority of plaintiffs vote in favor of accepting. The *Principles* idea was to serve as an alternative to a legal ethics rule called the “aggregate settlement rule,” which requires lawyers who represent two or more plaintiffs with intertwined claims to obtain consent regarding settlement from each client, after informing them what their share of the award will be and what others will be getting. Only one state—West Virginia—has adopted the American Law Institute’s alternative concept since it was proposed a decade ago. W. VA. RULES OF PRO. CONDUCT r. 1.8 cmt. 17. The *Principles* are loosely modeled after section 524(g) of the Bankruptcy Code, which binds all present and future asbestos claimants covered by a debtor company’s bankruptcy trust so long as seventy-five percent of those claimants vote in favor of the plan. Compare 11 U.S.C. § 524(g)(2)(B)(ii)(IV), with PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 3.17 cmts. b–c (AM. L. INST. 2010) (describing this alternative to the aggregate settlement rule).

<sup>140</sup> Plaintiffs’ Notice of Motion and Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 2, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 14, 2019), ECF No. 1683.

not sued—with some of Rule 23’s structural protections: notice to the class, opt-out opportunities, and objections.<sup>141</sup>

The court authorized forty-nine counties and cities to serve as class representatives to negotiate with thirteen defendants.<sup>142</sup> In certifying this groundbreaking negotiation class in September 2019, Judge Polster noted:

Everyone knows that trying probably 2,500 [cases] now between the federal ones and the ones in State Court, is—first, it would sink the state and federal judiciaries, but also the amount of private resources would be staggering. And no one—no one would want to do that. So there has to be a vehicle to resolve them. There doesn’t have to be one vehicle alone. So I’ve—I’ve encouraged all settlement discussions, I’ve encouraged all ideas, I’m continuing to do so. And this is just one.<sup>143</sup>

After notice, fewer than two percent (551) of the 34,458-member class opted out—a relatively small number, except that opt-outs included cities and counties from forty-three states and the entire District of Columbia, totaling (in the aggregate) over ten percent of the U.S. population.<sup>144</sup>

There was strong opposition. Thirty-nine AGs raised concerns about state sovereignty, allocation of funds, and potentially excessive attorneys’ fees.<sup>145</sup> The manufacturing defendants took no position, but

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<sup>141</sup> All localities were provided a settlement allocation map illustrating each locality’s settlement portion. *Allocation Map*, OPIOIDS NEGOTIATION CLASS, <https://allocationmap.iclaimsonline.com> (last updated June 18, 2019, 12:53 PM). Those who do not opt out will have an opportunity to vote on any proposed settlement agreement, but if seventy-five percent of each voting pool approves it, it binds everyone who remains, including those who oppose the settlement. The class is divided into six voting pools based on population, weighted settlement allocations, and whether the locality sued before or after June 14, 2019. Plaintiffs’ Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 53–54, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 9, 2019), ECF No. 1820-1. The various voting pools were meant to equalize bargaining leverage so that those with bigger stakes cannot have “an inordinate role and apportion too much of the money towards themselves.” *The Negotiation Class*, JUDICATURE, Spring 2020, at 12, 15 (interviewing McGovern and Rubenstein).

<sup>142</sup> *Frequently Asked Questions*, OPIOIDS NEGOTIATION CLASS, <https://www.opioidsnegotiationclass.info/Home/FAQ> (last updated Sept. 28, 2020, 2:24 PM). The thirteen defendants are: Purdue, Cephalon, Endo, Mallinckrodt, Actavis, Janssen, McKesson, Cardinal, AmerisourceBergen, CVS Rx Services, Inc., Rite-Aid Corporation, Walgreens, and Wal-Mart. *Id.*

<sup>143</sup> Transcript of Proceedings at 72–73, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Aug. 7, 2019), ECF No. 2147.

<sup>144</sup> Request for Entry of Proposed Rule 23(c)(1)(B) Negotiation Class Membership Order, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 10, 2020), ECF No. 3073; *The Negotiation Class*, *supra* note 141, at 15–16.

<sup>145</sup> Amicus Letter by Attorneys General Regarding Settlement Negotiation Class, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No.

the Big Three distributors, CVS, Discount Drug Mart, Rite Aid, Walgreens, and Walmart all opposed the negotiation class, as did some Ohio localities.<sup>146</sup> Opponents appealed to the Sixth Circuit, objecting that the class was out of step with Supreme Court precedent on class actions, unauthorized by Rule 23, and failed to ensure adequate representation for all class members.

Focusing on the text of Rule 23 rather than the broader-ranging concerns raised by opponents, the Sixth Circuit reversed Judge Polster's order in September 2020.<sup>147</sup> It explained:

However innovative and effective the addition of negotiation classes would be to the resolution of mass tort claims—particularly those of grave social consequence—we are to be ‘mindful that the Rule as now composed sets the requirements [courts] are bound to enforce,’ and we ‘are not free to amend a rule outside the process Congress ordered.’<sup>148</sup>

### III

#### FEDERALISM AS MDL DISRUPTOR

Having established the basic contours of extraordinary MDL and the exceptional nature of *Opiates* even within that already extraordinary world, we now explore the MDL revolution in light of the foun-

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1951; Letter by Nevada Attorney General Regarding Settlement Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1955.

<sup>146</sup> Certain Plaintiffs' Memorandum in Opposition to Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1958 (offering the objections of Ohio localities); Memorandum of Certain Defendants in Opposition to Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1949 (offering the objections of defendant distributors and pharmacies); Manufacturer Defendants' Response to Plaintiffs' Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1952 (representing that defendant manufacturers take no position on certification).

<sup>147</sup> *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). Appellants were joined by two groups of amici curiae: (1) opted-out entities from eleven states and (2) state AGs who argued the class is unconstitutional. See Brief of Amici Curiae States of Michigan, Alaska, Arizona, Connecticut, Hawaii, Indiana, Kansas, Montana, Nebraska, North Dakota, South Dakota, Tennessee, Texas, and District of Columbia in Support of the State of Ohio's Petition for Writ of Mandamus at 3–4, *In re State of Ohio*, No. 19-3827 (6th Cir. Sept. 6, 2019) [hereinafter Brief of Amici Curiae States] (“The protection of these residents is the function of state, not local, government. The constitutional order depends on the States playing this role, and the Attorney General is the counsel for the States.”).

<sup>148</sup> *In re Nat'l Prescription Opiate Litig.*, 976 F.3d at 676 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The Sixth Circuit denied the petition for en banc rehearing. Order, *In re Nat'l Prescription Opiate Litig.*, No. 19-4097/19-4099 (6th Cir. Dec. 29, 2020).

dational values of civil procedure. This Part teases out one particular aspect: the relationship between federal and state actors and multiple court systems. One of the most striking things about *Opiates* is how new questions about federalism permeate and disrupt almost every aspect of the litigation. The opioid litigation's federalism frustrates MDL's tendencies toward coordination, procedural innovation, efficiency, and settlement. At the same time—indeed, *because* it disrupts the MDL—it generates many classic federalism benefits—including competition, information production, substantive law development, and dialectical engagement—that have not been as present in other MDLs.

To some extent, federalism's large shadow over the opioid litigation was foreseeable. Civil procedure's very structures set up a tension between the national and local, with our dual court system and our state-centered theories of jurisdiction. But until now, MDLs were mostly characterized by private actors, with state government actors riding MDL coattails or proceeding through the traditional, so-called "AG multistate" litigation—a horizontally-coordinated investigation, often with synchronized filings in separate state courts and coordinated settlement.<sup>149</sup> The AG multistate litigation model is a voluntary, federalist regime; the MDL is mandatory, centralized, and nationalist. Put together, the two compete, disrupt MDL norms, and make global peace more difficult to achieve.

In *Opiates*, the state AGs have cried "federalism!" over and over again. While AGs have been increasingly active in products-liability cases,<sup>150</sup> *Opiates* threatens to make their preferred model of horizontal, state-based litigation obsolete. And federalism does not just mean state versus national. It includes state versus local, and also the horizontal work that states often do together—and sometimes in conflict—in litigation of a national scale. Federalism reminds us that the fifty different states have fifty different legal systems and, with them, divergent substantive laws—unique attributes that nationwide settlements often blur, erase, or ignore.

Forty-nine state AGs have their own state court lawsuits against the MDL defendants, and the lone holdout—Nebraska—is investi-

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<sup>149</sup> There were exceptions, of course. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2009) (detailing Mississippi's structural class action, wherein the state coordinated conceptually separate claims related to Zyprexa costs).

<sup>150</sup> See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008) ("In less than a decade, litigation filed against product manufacturers by state attorneys general has changed the structure of product regulation in the United States.").

gating but has not yet filed.<sup>151</sup> Those cases are not within the MDL's federal-only jurisdiction.<sup>152</sup> At the same time, the more than 2,900 localities that have sued in federal court as part of the MDL are generally using private attorneys to represent them, while still claiming that the sovereign *parens patriae* power enables them to sue on behalf of their citizens—a claim to which some AGs strenuously object.

Some state AGs have been unwilling to coordinate with *Opiates* or have raced to their own courthouses to “beat” it. They have challenged the MDL's procedural innovations on constitutional grounds. Each move by the AGs exerts pressure on the MDL itself.

At the same time, the AGs are in tense contests with their own state legislatures, with stinging memories of tobacco recoveries being put to uses not directly related to tobacco.<sup>153</sup> Not incidentally, those same memories—including memories of state legislatures not directing tobacco awards to localities that needed it most—are part of the reason some localities are suing for themselves this time.<sup>154</sup>

Finally, in addition to the state cases and the MDL, a third method has emerged to try to centralize anew: Bankruptcy court, with its extraordinary power over both state and federal litigations, now appears to be a federalism salve, or maybe its executioner.

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<sup>151</sup> Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner State of Ohio at 10–11, *In re State of Ohio*, No. 19-3827 (6th Cir. Sept. 6, 2019) [hereinafter Brief of Chamber of Commerce] (“[A]ll of the states’ lawsuits . . . have been brought in their own state courts.”); David Eggert, *Michigan Sues Opioid Distributors Under Drug Dealer Law*, U.S. NEWS & WORLD REPORT (Dec. 17, 2019, 9:07 PM), <https://www.usnews.com/news/politics/articles/2019-12-17/michigan-sues-opioid-distributors-likens-to-drug-dealers> (“Michigan [is] the 49th state to have filed some kind of legal action against the opioid industry. Only Nebraska has not.”); Press Release, Neb. Att’y Gen. Doug Peterson, Attorney General Peterson Announces Ongoing Investigation to Help Address the Opioid Crisis (June 15, 2017), <https://ago.nebraska.gov/news/attorney-general-peterson-announces-ongoing-investigation-help-address-opioid-crisis>.

<sup>152</sup> See *Mississippi v. AU Optronics Corp.*, 571 U.S. 161 (2014) (holding that state AG lawsuits are not removable as “mass actions” under the Class Action Fairness Act).

<sup>153</sup> See, e.g., CAMPAIGN FOR TOBACCO-FREE KIDS ET AL., *BROKEN PROMISES TO OUR CHILDREN: A STATE-BY-STATE LOOK AT THE 1998 TOBACCO SETTLEMENT 20 YEARS LATER 1* (2018) (“Over the past 20 years, from FY2000 to FY2019, the states have spent just 2.6 percent of their total tobacco-generated revenue on tobacco prevention and cessation programs.”); Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later: Lessons for Physicians About Health Policy Making*, 137 CHEST 692, 695–97 (2010) (citing studies and concluding that “the states have, at best, a ‘mixed record’ when it comes to using the funds for originally intended purposes” as well as observing that “there is a growing consensus that ‘the public lost a golden opportunity to improve its health’ when the MSA was enacted”).

<sup>154</sup> See *infra* note 218 and accompanying text.

### A. *State Cases vs. the MDL*

Forty-nine state AGs have filed cases against at least one party involved in the MDL.<sup>155</sup> All of them are in state court.<sup>156</sup> Another five hundred non-AG cases have also been filed in the various state courts by localities and individuals who prefer not to be in the MDL;<sup>157</sup> some of these state cases are now centralized in state MDLs under state analogues to 28 U.S.C. § 1407.<sup>158</sup>

For the most part, only the localities that actually filed in federal court want to be there. The litigation has been punctuated by disputes over efforts to remand cases to state court or to keep them there in the face of a removal motion. Rather than rule on motions to remand, Judge Polster said:

My thought is to just leave them hanging for a while. The cases are in the MDL, and my objective is to get my hands around this and see if there is some—maybe some framework for some resolution, and if so, it is much more preferable to have more cases in the MDL, the more the better, rather than having them out there in individual state courts where there can't be any coordination.<sup>159</sup>

The Cherokee Nation, for instance, had initially sued in tribal court, but that suit was dismissed for lack of jurisdiction. It then sued in state court, was removed to federal court, centralized into the MDL, and eventually remanded back to the Oklahoma federal district court as a bellwether under Judge Polster's "hub and spoke" model.<sup>160</sup>

In July 2019, the Arizona AG even took the unusual step of petitioning the U.S. Supreme Court to take original jurisdiction of its fraudulent transfer case against the Sackler family, a move widely believed to be part of the AG power struggle with the MDL.<sup>161</sup> The Court denied certiorari in December 2019.<sup>162</sup>

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<sup>155</sup> See Eggert, *supra* note 151.

<sup>156</sup> Brief of Chamber of Commerce, *supra* note 151, at 10.

<sup>157</sup> *Id.* (“[A]pproximately 500 lawsuits by municipalities and states are proceeding outside the MDL.”).

<sup>158</sup> Professors Theodore Rave and Zach Clopton have suggested that state MDL “allows some plaintiffs (and some plaintiffs’ lawyers) to create competing power centers in the states.” Clopton & Rave, *supra* note 73, at 11. Thus far, however, those cases have not exerted the same kind of leverage against the MDL as have the state AG cases.

<sup>159</sup> Transcript of Teleconference Proceedings at 15, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 18, 2017), ECF No. 10.

<sup>160</sup> Remand Order, *In re Nat’l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Feb. 10, 2020) (ordering Judge Polster’s suggested remand of the Cherokee Nation action), ECF No. 3160; Leeds, *supra* note 130, at 1026 (noting the Cherokee Nation’s original filing in tribal court and its earlier, unsuccessful efforts in the MDL to have its claims remanded).

<sup>161</sup> Adam Liptak, *Arizona Files Novel Lawsuit in Supreme Court Over Opioid Crisis*, N.Y. TIMES (July 31, 2019), <https://www.nytimes.com/2019/07/31/us/politics/arizona-supreme-court-opioid-sackler.html>.

<sup>162</sup> *Arizona v. Sackler*, 140 S. Ct. 812 (2019).

All of this has been complicated by Judge Polster's clearly expressed intent to pursue a *complete* settlement of all current and all future potential claims between plaintiffs and defendants—both those in state and federal court, whether under his formal jurisdiction or not.<sup>163</sup> His actions, too, have led to atypical procedural moves, not only on his side, but also on the AGs' side, where there has been cross-jurisdictional disputes about information production, races to the courthouse, and unconventionally robust use of mandamus against Judge Polster.

### 1. *Conflicts over Discovery*

Information control and production is easier in a centralized and coordinated regime. Judge Polster included state AGs on the first teleconference and invited them to attend MDL status conferences and closed-door settlement discussions (he also invited the DOJ to participate as a friend of the court in nonmonetary settlement negotiations<sup>164</sup>).<sup>165</sup> He assigned a special master to coordinate with the state cases<sup>166</sup> and created a State-Federal Coordination Committee to coordinate discovery and case schedules across the jurisdictions and to “reduce costs and unnecessary duplication of effort.”<sup>167</sup>

But conflicts developed and, in the process, information that the MDL would normally not have disclosed was produced, arguably for the public good.<sup>168</sup> Judge Polster had imposed strict protective orders over information discovered from defendants in the MDL, controversially sealed pleadings that are typically open to the public,<sup>169</sup> and

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<sup>163</sup> See, e.g., Memorandum Opinion Certifying Negotiation Class at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 11, 2019), ECF No. 2590 (certifying the negotiation class because it paves the way to global settlement).

<sup>164</sup> Rachel Graf, *DOJ to Participate in Opioid MDL Settlement Talks*, LAW360 (June 19, 2018, 9:15 PM), <https://www.law360.com/articles/1055196/doj-to-participate-in-opioid-mdl-settlement-talks>.

<sup>165</sup> Transcript of Teleconference at 18, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 18, 2017), ECF No. 10 (including Lee Javins on behalf of the State of West Virginia); Scheduling Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 24, 2018), ECF No. 251 (stipulating that state AGs are permitted to join closed-door settlement conferences).

<sup>166</sup> Order at 1, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 13, 2018), ECF No. 616 (appointing Special Master Cathy Yanni).

<sup>167</sup> Protocol for State and Federal Court Coordination at 1–2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Oct. 9, 2018), ECF No. 1029.

<sup>168</sup> See generally Alexandra D. Lahav & Elizabeth Chamblee Burch, *Information for the Common Good in Mass Torts*, DEPAUL L. REV. (forthcoming 2021) (arguing that courts should prioritize their information-production role when cases have a significant bearing on public health and safety).

<sup>169</sup> See, e.g., Protective Order Re: DEA'S ARCOS/DADS Database, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Mar. 6, 2018), ECF No. 167 (entering a protective order regarding the disclosure of Drug Enforcement Administration

issued gag orders on the attorneys, presumably to allow for more fluid information sharing among the parties.<sup>170</sup>

In June 2018, the Massachusetts AG filed her own case in Massachusetts state court.<sup>171</sup> Later that year, she filed a heavily redacted amended complaint with further allegations concerning the Sackler family.<sup>172</sup> Media outlets pushed for disclosure of the information, and the AG ultimately supported the request, even though much of that information had been ruled confidential in the MDL.<sup>173</sup> At a hearing on Purdue's emergency motion to stop the Massachusetts AG from violating Judge Polster's protective order, Judge Polster said: "I'm not very happy with the Massachusetts AG either. All right? . . . Judge Sanders has a right to do what she wants to in her case. But, I don't see where the Massachusetts AG asked to hold off and let the MDL process take its course while it's being done."<sup>174</sup> But, moments later, he expressed a stronger view of his power, including the expectation that state courts will fall in line. Responding to the Massachusetts AG's suggestion that the issue was no longer in his hands after the Massachusetts state judge ruled, Judge Polster said:

Wait. It is before me. It is before me. It's my job to maintain the integrity of this process. . . . I can do it. And I'll do it, and I can order anyone to do anything I want. Maybe they can challenge it. Maybe they can appeal. But I can order you to do anything I want. I can order a State Court Judge to do anything. Whether it will be upheld or not, I don't know.<sup>175</sup>

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data); Order Granting Plaintiffs' Motion to Strike and Amended Motion for Leave to File Amended Complaints Under Seal, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Apr. 25, 2018), ECF No. 262 (granting a motion to file complaints under seal in order to comply with various protective and confidentiality orders); Benjamin Lesser, Dan Levine, Lisa Girion & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019, 1:00 PM), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges> ("Federal Judge Dan Polster is providing the same cover for multiple opioid makers, distributors and retailers. . . . Life-saving information contained in those cases, too, may remain under seal, as Polster has stuck to a strict secrecy playbook.").

<sup>170</sup> See, e.g., Order, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Feb. 6, 2018), ECF No. 116 (imposing a gag order regarding the contents of settlement discussions).

<sup>171</sup> Complaint, *Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Suffolk Cnty. June 12, 2018).

<sup>172</sup> First Amended Complaint and Jury Demand, *Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Suffolk Cnty. Jan. 31, 2019).

<sup>173</sup> See Memorandum of Decision and Order on Emergency Motion to Terminate Impoundment at 2, 5–9, *Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Suffolk Cnty. Jan. 28, 2019).

<sup>174</sup> Transcript of Proceedings at 8, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Feb. 8, 2019), ECF No. 1351.

<sup>175</sup> *Id.* at 9.

The state judge released the information, concluding that her “[c]ourt is not bound by the parties’ designation of information or documents as confidential [in the MDL].”<sup>176</sup>

## 2. *Races to the Courthouse and Dialectical Litigation*

Despite Judge Polster’s efforts to centralize all the action in his court, he was ultimately unable to persuade several state AGs and parallel state court judges from moving ahead with their own cases in home-state courts.<sup>177</sup> Oklahoma was the first state out of the gate. In June 2017, state AG Mike Hunter filed his complaint in state court.<sup>178</sup> Despite repeated efforts by the MDL court to coordinate with AG Hunter, including requests to delay the trial pending settlement negotiations, AG Hunter and the Oklahoma state judge refused to wait.

All but seven states’ AGs are elected, as are most state judges.<sup>179</sup> The Oklahoma suit revealed an elected AG eager to show himself responsive to his constituents and an elected state court judge presiding over a televised and intensely reported month-long trial.<sup>180</sup> These are political drivers that the MDL, despite its massive leverage, could not stop.

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<sup>176</sup> Memorandum of Decision and Order on Emergency Motion to Terminate Impoundment at 9, *Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Suffolk Cnty. Jan. 28, 2019). The extent of other state and federal coordination in discovery is difficult to ascertain. One reason, in addition to Judge Polster’s broad protective order, is that the special masters overseeing coordination do not always do so on the record and are permitted to have *ex parte* conversations. Appointment Order at 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 11, 2018), ECF No. 69 (“The Special Masters may communicate *ex parte* with any party or its attorney, as each Special Master deems appropriate . . .”).

<sup>177</sup> See Andrew Joseph, *Why Houston and Other Cities Want Nothing to Do with the Massive National Opioid Lawsuit*, STAT (Mar. 27, 2018), <https://www.statnews.com/2018/03/27/houston-national-opioid-lawsuit> (“[T]wo dozen counties, cities, and towns [are] pursuing cases in state court apart from the national litigation. . . . [S]ome officials think they might be able to get ahead of the national litigation . . . so they can either get a separate settlement or go to trial before a global settlement . . .”).

<sup>178</sup> Ken Miller, *1st Trial Date Set in State Lawsuit Over Opioid Epidemic*, U.S. NEWS & WORLD REPORT (Jan. 12, 2018, 6:29 PM), <https://www.usnews.com/news/business/articles/2018-01-12/1st-trial-date-set-in-state-lawsuit-over-opioid-epidemic>.

<sup>179</sup> *State Attorneys General*, KAISER FAM. FOUND., <https://www.kff.org/other/state-indicator/state-attorney-generals> (last visited Feb. 16, 2021) (attorneys general); *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> (state judges).

<sup>180</sup> See Christine Vestal, *Pay Attention to This Little-Noticed Opioid Lawsuit in Oklahoma*, PEW CHARITABLE TRS.: STATELINE (Feb. 14, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/02/14/pay-attention-to-this-little-noticed-opioid-lawsuit-in-oklahoma> (noting that the trial judge ruled to allow television cameras in the courtroom and speculating about the AG’s political motives).

The state court cases and their relation to the federal proceeding also paint a picture of multi-jurisdictional litigation that can be highly dialectical when the MDL's gravitational pull is even slightly dislodged. The systems interact and move one another. Each state case exerts pressure on the MDL to accelerate toward settlement—not least because of the informational disclosures at stake in public trials, concerns about limited pots of defendant money, and precedential levels of recovery set by each new trial verdict.

Oklahoma settled with manufacturers Purdue and Teva (for \$270 and \$85 million, respectively) on the eve of trial and won a \$465 million trial verdict against Johnson & Johnson.<sup>181</sup> After that, settlement negotiations heated up in the MDL, with an eye on a global deal before the next round of trials—the Track One bellwethers scheduled for October 2019.<sup>182</sup> Those negotiations were nearly successful, with four state AGs playing a key role in brokering a proposed \$48 billion deal right before the trial date.<sup>183</sup> However, one AG, Ohio's Dave Yost, publicly complained at the time that the four states “don't speak for Ohio,”<sup>184</sup> a reminder that horizontal federalism (state–state) tensions were also in the mix.

It was also after the Oklahoma verdict that Judge Polster encouraged the MDL lead counsel to devise a creative solution to the

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<sup>181</sup> Lenny Bernstein & Katie Zezima, *Purdue Pharma, State of Oklahoma Reach Settlement in Landmark Opioid Lawsuit*, WASH. POST (Mar. 26, 2019, 6:05 PM), [https://www.washingtonpost.com/national/health-science/purdue-pharma-state-of-oklahoma-reach-settlement-in-landmark-opioid-lawsuit/2019/03/26/69aa5cda-4f11-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/national/health-science/purdue-pharma-state-of-oklahoma-reach-settlement-in-landmark-opioid-lawsuit/2019/03/26/69aa5cda-4f11-11e9-a3f7-78b7525a8d5f_story.html) (Purdue settlement); Lenny Bernstein, *Oklahoma, Teva Pharmaceuticals Reach \$85 Million Settlement in Opioid Case*, WASH. POST (May 26, 2019, 9:51 PM), [https://www.washingtonpost.com/national/health-science/oklahoma-teva-pharmaceuticals-reach-85-million-settlement-in-opioid-case/2019/05/26/15a70278-7fd1-11e9-933d-7501070ee669\\_story.html](https://www.washingtonpost.com/national/health-science/oklahoma-teva-pharmaceuticals-reach-85-million-settlement-in-opioid-case/2019/05/26/15a70278-7fd1-11e9-933d-7501070ee669_story.html) (Teva settlement). The judge initially found Johnson & Johnson liable for \$572 million but later acknowledged that he made a \$107 million math error and reduced the figure accordingly. Colin Dwyer & Jackie Fortier, *Oklahoma Judge Shaves \$107 Million Off Opioid Decision Against Johnson & Johnson*, NPR (Nov. 21, 2019, 4:00 PM), <https://www.npr.org/2019/11/15/779439374/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson>.

<sup>182</sup> See Hoffman, *supra* note 118 (describing settlement activity in the run-up to the October 2019 trial date for the Ohio bellwethers).

<sup>183</sup> Melanie Schuman & Madeline Holcombe, *Four Attorneys General Propose Framework for a Global \$48 Billion Opioid Settlement*, CNN (Oct. 22, 2019, 4:53 AM), <https://www.cnn.com/2019/10/22/us/opioid-settlement-framework-attorney-generals/index.html>.

<sup>184</sup> Jeff Overly, *State AGs Reach \$48B Proposed Deal to End Opioid Cases*, LAW360 (Oct. 21, 2019, 5:52 PM), <https://www.law360.com/articles/1211876/state-ags-reach-48b-proposed-deal-to-end-opioid-cases>.

settlement challenges—a suggestion that ultimately led to the invention of the novel procedural mechanism of the negotiation class.<sup>185</sup>

The unsealing of the Massachusetts AG's complaint likewise contributed to changes in bargaining leverage, public pressure, and momentum in the MDL. In particular, the complaint's public disclosures about Purdue and the Sackler family's efforts to capitalize on the addictive properties of opioids attracted enormous media attention,<sup>186</sup> and may even have helped fuel the slew of criminal investigations that followed.<sup>187</sup> Massachusetts's suit was also the very first government case against members of the Sackler family. After Massachusetts, some states, like Connecticut and New York, expanded the scope of their complaints to add new defendants from the company using facts elicited from the disclosures in the Massachusetts litigation,<sup>188</sup> while other states, such as Delaware, filed entirely new suits against members of the Sackler family.<sup>189</sup> The Sacklers were then brought into the MDL as named individual defendants by droves of plaintiffs, including counties.<sup>190</sup>

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<sup>185</sup> Transcript of Status Conference Proceedings at 7, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 25, 2019), ECF No. 1732; *see also supra* Section II.C (discussing the negotiation class).

<sup>186</sup> First Amended Complaint and Jury Demand at 52–56, *Massachusetts v. Purdue Pharma L.P.*, No. 1884-cv-01808 (Mass. Super. Ct. Suffolk Cnty. Jan. 31, 2019); *see, e.g.*, Chris Villani, *Purdue Says Mass. Opioid Suit Sets Dangerous Precedent*, LAW360 (Aug. 2, 2019, 7:04 PM), <https://www.law360.com/articles/1184672/purdue-says-mass-opioid-suit-sets-dangerous-precedent> (noting the controversial inclusion of directors and officers in Massachusetts's Amended Complaint).

<sup>187</sup> *Cf.* German Lopez, *The Case for Prosecuting the Sacklers and Other Opioid Executives*, Vox (Oct. 10, 2019, 10:55 AM), <https://www.vox.com/policy-and-politics/2019/10/10/20881636/sacklers-purdue-opioid-epidemic-prison-prosecution-criminal-investigation> (calling for criminal prosecution of members of the Sackler family and other opioid executives as a result of the allegations in Massachusetts's Amended Complaint).

<sup>188</sup> Press Release, Off. of Att'y Gen. William Tong, Attorney General Tong Expands Lawsuit Against Purdue, Sacklers, Alleges Fraudulent Transfer of Funds to Evade Accountability to Connecticut Victims of Opioid Epidemic (Apr. 22, 2019), <https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-tong-expands-lawsuit-against-purdue-sacklers-alleges-fraudulent-transfer-of-funds>; Paul Schott, *Purdue Pharma Lawsuits from CT, Mass.: Similar, but Still Separate*, STAMFORD ADVOC. (Feb. 12, 2019, 7:40 PM), <https://www.stamfordadvocate.com/business/article/Purdue-Pharma-lawsuits-from-CT-Mass-Similar-13611591.php> (noting that the Connecticut suit appears to be “tracking” the “expanded complaint” in the Massachusetts case); Roni Caryn Rabin, *New York Sues Sackler Family Members and Drug Distributors*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/2019/03/28/health/new-york-lawsuit-opioids-sacklers-distributors.html>.

<sup>189</sup> Press Release, Del. Dep't of Just., AG Jennings Files Suit Against Sackler Family for Role in Opioid Crisis (Sept. 9, 2019), <https://news.delaware.gov/2019/09/09/ag-jennings-files-suit-against-sackler-family-for-role-in-opioid-crisis>.

<sup>190</sup> *See 17-2804 – In Re: National Prescription Opiate Litigation*, GOVINFO, [https://www.govinfo.gov/app/details/USCOURTS-ohnd-1\\_17-md-02804/USCOURTS-ohnd-1\\_17-md-02804-0/summary](https://www.govinfo.gov/app/details/USCOURTS-ohnd-1_17-md-02804/USCOURTS-ohnd-1_17-md-02804-0/summary) (last visited Nov. 8, 2020) (listing members of the Sackler family as

Important data released by the DOJ on Judge Polster's orders—from the Drug Enforcement Agency (DEA) Automated Records and Consolidated Orders System (ARCOS), which monitors controlled substances' whereabouts from point-of-origin to point-of-sale<sup>191</sup>—became the basis for a widely read *Washington Post* exposé.<sup>192</sup> Increased media attention attracted more public interest, incentivized new suits, and likely spurred at least some of the new wave of criminal filings during this period. The new media attention may also help to shift the public narrative surrounding the opioid crisis away from the stigma of addiction and toward industry practice.<sup>193</sup>

The next major pressure point would have been March 2020, the scheduled date of the New York AG's trial against all manufacturers and distributors (except Purdue Pharma and members of the Sackler family),<sup>194</sup> which was postponed due to COVID-19, along with bellwether trials in West Virginia and Ohio.<sup>195</sup> In a bid to avoid being swept into the MDL, the Oklahoma AG also recently refiled his state suit against three opioid distributors after a previous version of the case had been removed to federal court.<sup>196</sup>

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defendants on the MDL docket sheet); *see also, e.g.*, Short Form for Supplementing Complaint and Amending Defendants and Jury Demand at 3, *Harford Cnty. v. Purdue Pharma L.P.*, No. 18-op-45853 (N.D. Ohio Mar. 15, 2019), ECF No. 16 (moving the court to permit Harford County, Maryland to add members of the Sackler family as defendants).

<sup>191</sup> *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 923–24 (6th Cir. 2019) (describing the database). For a richly detailed account of these events, see Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 665–83 (2019).

<sup>192</sup> *Drilling into the DEA's Pain Pill Database*, WASH. POST (Jan. 17, 2020), <https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database>.

<sup>193</sup> *Cf.* Nicolas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 651–53 (2019) (discussing the ways in which the tort system adopts a “blame frame” rather than one oriented toward systemic reform and noting that “[t]he opioid litigation or—at least its rhetoric—is built on the same fundamental misunderstandings of the opioid overdose epidemic as calls for additional criminalization”).

<sup>194</sup> Press Release, N.Y. State Off. of the Att’y Gen., Opioid Manufacturers and Distributors Denied in Effort to Push Back Opioid Trial (Mar. 4, 2020), <https://ag.ny.gov/press-release/2020/opioid-manufacturers-and-distributors-denied-effort-push-back-opioid-trial>.

<sup>195</sup> Press Release, N.Y. State Off. of the Att’y Gen., Out of Abundance of Caution, Opioid Trial Delayed Due to Coronavirus (Mar. 10, 2020), <https://ag.ny.gov/press-release/2020/out-abundance-caution-opioid-trial-delayed-due-coronavirus>; Amanda Bronstad, *Opioid Trials in W.Va., Ohio Placed on Hold Due to COVID-19 Pandemic*, LAW.COM (Oct. 9, 2020), <https://www.law.com/2020/10/09/opioid-trials-in-w-va-ohio-placed-on-hold-due-to-covid-19-pandemic>.

<sup>196</sup> *See* Associated Press, *Oklahoma AG to Dismiss Federal Opioid Case, Refile in State*, ABC NEWS (Feb. 21, 2020, 4:43 PM), <https://abcnews.go.com/US/wireStory/oklahoma-ag-dismiss-federal-opioid-case-refile-state-69133273> (“[Attorney General] Hunter said he wants the case to be heard in Oklahoma and not consolidated with thousands of other opioid lawsuits that have been consolidated before a federal judge in Ohio.”).

### 3. *Fee Disputes*

The AGs have complained about the size of the proposed private attorneys' fees and about the possibility that any attorneys' fees (to cover the local governments' representation by private counsel) would cut into the rewards given to states. Judge Polster promised early on in the litigation that he "has no intention of imposing upon the States any common benefit fees,"<sup>197</sup> but plaintiffs' leaders moved for it nonetheless.<sup>198</sup> The state AGs filed a letter in the MDL arguing that the fee discussions could "disrupt—perhaps irreparably so—the substantial progress that has been made to negotiate a large national settlement" and that "[t]he proposed order violates state sovereignty, including by purporting to apply to some aspects of State Attorney General settlements and to other state court actions over which this Court lacks jurisdiction."<sup>199</sup>

Court-appointed expert William Rubenstein told the court shortly thereafter that the MDL's "truly unique" structure means the court should "proceed cautiously."<sup>200</sup> In July 2020, Judge Polster declined to rule on common-benefit fees, stating, "[I]t is more prudent to defer entry of a common benefit order than to attempt to re-write those generally-familiar terms to fit the specific, complex particulars of this unique MDL at this critical juncture."<sup>201</sup>

#### *B. Intrastate Disputes and More Diffusions of Power*

The unprecedented number of actions by localities in the MDL have occasioned novel intrastate federalism issues that further diffuse power within the MDL. And these issues of federalism appear to be here to stay; the locality action playbook has already been copied by litigants in the new *Juul* MDL, and states are currently fighting those developments there, too.<sup>202</sup>

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<sup>197</sup> Order Regarding State Court Coordination at 2, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Feb. 27, 2018), ECF No. 146.

<sup>198</sup> Amended Motion for Entry of Order Establishing Common Benefit Fund, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 28, 2020), ECF No. 3112.

<sup>199</sup> Letter by the National Association of Attorneys General Regarding PEC's Amended Motion for Entry of Order Establishing Common Benefit Fund at 1, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Feb. 24, 2020), ECF No. 3181.

<sup>200</sup> Report and Recommendation Addressing Motion for Common Benefit Fund at 5, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 3, 2020), ECF No. 3319.

<sup>201</sup> Order Denying Without Prejudice the PEC's Motion for Common Benefit Fee Order at 5, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 27, 2020), ECF No. 3397.

<sup>202</sup> See Plaintiffs' Position Statement at 9, *In re Juul Labs, Inc., Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 19-md-02913 (N.D. Cal. Oct. 23, 2019), ECF No. 175 (identifying

## 1. *Who Has the Right to Sue on Behalf of Citizens of the State*

State AGs have challenged local governments' rights to sue over opioids. Twenty-six AGs filed a letter with the district court in June 2019,<sup>203</sup> followed by another letter from thirty-nine state and territory AGs, all responding to the potential negotiation class. They argued that “[t]he amended [negotiation class] proposal inverts the relationship between each State and its own political subdivisions”<sup>204</sup> and that insofar as the “proposal treats any negotiated intra-state allocation as a settlement requiring federal court approval under Rule 23(e), the proposal improperly seeks to subject State enforcement actions to federal jurisdiction and strip state courts of the authority to settle cases properly before them. This violates the principles of federalism.”<sup>205</sup>

After the negotiation class was approved, Ohio’s AG Yost filed a petition for mandamus in the Sixth Circuit—supported by thirteen states, the District of Columbia, and the Chamber of Commerce as amici—calling on the court to throw out the scheduled October 2019 bellwether trial on state preemption grounds.<sup>206</sup> Ohio’s mandamus petition argued that “only a State Attorney General has *parens-patriae* standing to prosecute claims vindicating generalized harm to a State’s inhabitants.”<sup>207</sup> Certain amici called Judge Polster’s approach a “drastic-times-call-for-drastic-measures approach” and quoted him as stating that his “attention and time, candidly, is going to be on facilitating the settlement track.”<sup>208</sup>

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entities such as school districts and counties as plaintiffs); John Daley, *Governments Are Suing JUUL and It’s Starting to Feel More Like the Opioid and Big Tobacco Fights*, CPR NEWS (Dec. 19, 2019), <https://www.cpr.org/2019/12/19/governments-are-suing-juul-and-its-starting-to-feel-more-like-the-opioid-and-big-tobacco-fights> (describing how counties and school districts have joined the *Juul* MDL); Alison Kanski, *Lawsuits Against Juul Echo Opioid Cases*, MED. MKTG. & MEDIA (Nov. 20, 2019), <https://www.mmm-online.com/home/channel/regulatory/lawsuits-against-juul-echo-opioid-cases> (noting the similarities of the claims in the *Juul* and *Opiates* MDLs).

<sup>203</sup> Letter to Court from State Attorneys General, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio June 24, 2019), ECF No. 1726 (raising concerns regarding the proposed negotiation class).

<sup>204</sup> Amicus Letter by Attorneys General Regarding Settlement Negotiation Class at 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1951; Letter by Nevada Attorney General Regarding Settlement Negotiation Class, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 23, 2019), ECF No. 1955 (Nevada signing on).

<sup>205</sup> Amicus Letter by Attorneys General Regarding Settlement Negotiation Class, *supra* note 204, at 4.

<sup>206</sup> Petition for Writ of Mandamus of State of Ohio, *In re State of Ohio*, No. 19-3827 (6th Cir. Aug. 30, 2019); Brief of Amici Curiae States, *supra* note 147; Brief of Chamber of Commerce, *supra* note 151.

<sup>207</sup> Petition for Writ of Mandamus of State of Ohio, *supra* note 206, at 2.

<sup>208</sup> Brief of *Amici* States of Arizona, Alaska, Delaware, Idaho, Indiana, Kansas, Louisiana, Michigan, Nebraska, New Hampshire, North Dakota, South Dakota, and the

Former AGs also wrote a bipartisan op-ed in the *Wall Street Journal*. The piece emphasized the special statutory authority that state AGs have, which “relieves them of many of the normal burdens of litigation” that localities have to bear: Specifically, they “need only prove that unfair or deceptive conduct occurred—not that it caused their states specific financial damage.”<sup>209</sup> They continued:

A cottage industry of law professors has sprung up conjuring novel procedural vehicles never approved by courts to wrestle cities and counties into settlements. Don’t hold your breath. What would work is comprehensive settlements in which all relief flows to attorneys general and state public-health systems, best equipped to spend it most effectively.<sup>210</sup>

Defendants have leveraged these arguments, raising concerns about double recoveries. In West Virginia, defendants McKesson, Cardinal Health, and AmerisourceBergen objected to an MDL bellwether trial that Judge Polster scheduled on the grounds that their previous settlements with the state preclude federal suits brought by the localities. McKesson argued that the West Virginia Attorney General “adequately represented the [c]ounty and [c]ity [plaintiffs] and their interests in pursuing and settling such claims” and that the settlement agreement should therefore preclude the cities and counties from continuing to litigate.<sup>211</sup> AmerisourceBergen, which also finalized a deal with the State of West Virginia, likewise contended that “the State stepped into the shoes of its citizens and their local communities to recover significant damages on their behalf.”<sup>212</sup>

## 2. Allocation of State Settlement Funds

Related to the state AGs’ objections to the negotiation class, there have been intrastate disputes over which governmental actor has the right to allocate settlement funds. If the MDL enables localities to sue, it raises the question about who allocates any proceeds. In

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District of Columbia Supporting Appellants and Reversal at 1, *In re Nat’l Prescription Opiate Litig.*, Nos. 19-4097 and 19-4099 (6th Cir. Feb. 14, 2020).

<sup>209</sup> George Jepsen & Perry Zinn Rowthorn, Opinion, *Leave Opioid Lawsuits to State Attorneys General*, WALL ST. J. (Mar. 3, 2019, 4:44 PM), <https://www.wsj.com/articles/leave-opioid-lawsuits-to-state-attorneys-general-11551649471>.

<sup>210</sup> *Id.*

<sup>211</sup> Memorandum of Law in Support of McKesson Corporation’s Motion to Dismiss or for Summary Judgment on *Res Judicata* and Release Grounds at 1, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 17-cv-01362 (S.D. W. Va. Mar. 13, 2020), ECF No. 223.

<sup>212</sup> Memorandum of Law in Support of AmerisourceBergen Drug Corporation’s Motion for Summary Judgment Based on *Res Judicata* at 4, *City of Huntington v. AmerisourceBergen Drug Corp.*, No. 17-cv-01362 (S.D. W. Va. Mar. 13, 2020), ECF No. 227.

December 2019, Ohio AG Yost supported placing a state constitutional amendment on the ballot that would establish a foundation to distribute any opioid-related settlement funds.<sup>213</sup> The goal seemed to be both to avoid a precedent that allowed the localities to proceed without state AG involvement and to prevent the state legislature from diverting any settlement funds to uses not directly related to the opioid crisis (with the aftermath of the tobacco settlement in mind).

When the Ohio legislature did not hold a required vote to place the proposed constitutional amendment on the ballot,<sup>214</sup> the AG changed tactics and sought cooperation with intrastate actors. He unveiled a “One Ohio” plan, which—after setting aside eleven percent of any settlements for private attorneys’ fees—would allocate fifty-five percent of the remaining money toward a state foundation that would fund local projects to address the opioid epidemic; send thirty percent directly to local governments; and retain fifteen percent for the AG’s office.<sup>215</sup> Thus far, the proposal has garnered the support of local governments representing eighty percent of Ohio’s population.<sup>216</sup> The plan does not require localities to abandon their individual suits. Texas soon followed with a similar agreement of its own.<sup>217</sup>

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<sup>213</sup> See Memorandum from Jonathan Blanton, Deputy Att’y Gen. for Major Litig., to Dave Yost, Ohio Att’y Gen. 1–2 (Dec. 2, 2019), <https://assets.documentcloud.org/documents/6569123/Proposed-Constitutional-Amendment-On-Opioid.pdf> (advocating for a state constitutional amendment to establish a fund to distribute settlement proceeds); Karen Kasler, *House Leaders: Opioid Settlement Amendment Won’t Make Ballot*, STATEHOUSE NEWS BUREAU (Dec. 10, 2019), <https://www.stateneews.org/post/house-leaders-opioid-settlement-amendment-won-t-make-ballot> (noting AG Yost’s support for the proposed amendment).

<sup>214</sup> Kasler, *supra* note 213.

<sup>215</sup> Laura A. Bischoff, *Ohio Unites to Push for Settlement in Opioid Lawsuits*, DAYTON DAILY NEWS (Mar. 11, 2020), <https://www.daytondailynews.com/news/local/ohio-unites-push-for-settlement-opioid-lawsuits/pyyny06Y5Pg3sUMx7cBci6H>.

<sup>216</sup> *Id.* An earlier draft bill giving the legislature a role in determining how settlement funds would be spent was withdrawn. Eric Heisig, *Power Struggle Between Attorneys General, Local Governments on Display in Opioid Litigation*, CLEVELAND.COM (Aug. 6, 2019), <https://www.cleveland.com/court-justice/2019/08/power-struggle-between-attorneys-general-local-governments-on-display-in-opioid-litigation.html>.

<sup>217</sup> Texas AG Ken Paxton announced in May 2020 that he had reached a deal with all of Texas’s cities and counties to establish a plan governing the distribution of funds from any potential opioid settlement. Although the deal is not finalized, fifteen percent of any potential nationwide settlement would be allocated to the Texas legislature to appropriate, another fifteen percent would be given directly to the cities and counties to spend, and a newly-established Texas Opioid Council would be responsible for distributing the remaining seventy percent. Finally, “[I]aw firms representing Texas cities and counties agreed to accept contingency fees of less than 9.4%, a sharp reduction from the 35%” previously promised. Amanda Bronstad, *Texas AG Reaches Deal with 254 Counties Ahead of Global Opioid Settlement*, LAW.COM: TEXAS LAWYER (May 28, 2020), <https://www.law.com/texaslawyer/2020/05/28/texas-ag-reaches-deal-with-254-counties-ahead-of->

State legislatures are also stirring the pot. Just as harsh memories of how tobacco recoveries were spent motivated many localities to enter the MDL on their own behalf, the same memories have led both state AGs and local litigants to try to avoid remitting courtroom awards to state general treasuries.<sup>218</sup> This has moved legislatures to assert themselves.

The Oklahoma AG, for instance, specifically tied up almost all of the state's \$270 million settlement from Purdue in programs at Oklahoma State University, so they would not go to the state general treasury. This caused an intrastate ruckus, resulting in the Oklahoma legislature passing a new state law directing any new settlement funds to go to the state treasury.<sup>219</sup> The governor and legislature then

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global-opioid-settlement; *see also* Texas Opioid Abatement Fund Council and Settlement Allocation Term Sheet (May 13, 2020), [https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Texas%20Term%20Sheet%20\(incl%20Ex%20A-C\)\(Fully%20Executed\).pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Texas%20Term%20Sheet%20(incl%20Ex%20A-C)(Fully%20Executed).pdf) (setting forth the Texas agreement).

<sup>218</sup> *See, e.g.*, Jones & Silvestri, *supra* note 153, at 695 (collecting studies demonstrating that the “largest allocation of [tobacco settlement] funds did [not] go to . . . smoking-related treatment or youth antimoking education” and that more than a quarter of these funds were used to finance “non-health programs,” such as social services and infrastructure); Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 *NEW ENG. J. MED.* 293, 294–95 (2004) (detailing how funds from the master tobacco settlement have been used to “help address budget deficits and avert new taxes”); Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 *WIDENER L. REV.* 159, 214 (2011) (“[I]n 2002, 2005, and 2006 . . . on average[,] states allocated between three to five percent of [the tobacco settlement] to public tobacco control programs. Health spending constituted another thirty-two to thirty-seven percent.”); U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-851, *TOBACCO SETTLEMENT: STATES' USE OF MASTER SETTLEMENT AGREEMENT PAYMENTS 5–7* (2001) (finding the same); *see also Why This Lawyer Says He's Skeptical About a Global Settlement in Opioid Litigation*, *NAT'L PUB. RADIO: ALL THINGS CONSIDERED* (Oct. 23, 2019, 5:22 PM), <https://www.npr.org/2019/10/23/772775862/why-this-lawyer-says-hes-skeptical-about-a-global-settlement-in-opioid-litigation> (interviewing Paul Farrell, “a lead attorney representing local governments” in the MDL, who says that his clients “are [not] interested in replicating the tobacco settlement model, where the monies got sent to the state's attorney general, and then those monies got sent to the general treasury”); *Oklahoma Attorney General Mike Hunter Discusses the Johnson & Johnson Lawsuit Ruling*, *NAT'L PUB. RADIO: ALL THINGS CONSIDERED* (Aug. 27, 2019, 4:18 PM), <https://www.npr.org/2019/08/27/754811117/oklahoma-attorney-general-mike-hunter-discusses-the-johnson-johnson-lawsuit-ruling> (interviewing Oklahoma AG Mike Hunter, who suggests that his plan to allocate opioid settlement funds to Oklahoma State University's Health Science Center was devised in response to the misallocation of tobacco settlement funds).

<sup>219</sup> *See* Jackie Fortier, *Here's What Happened to \$829M Oklahoma Was Awarded to Treat Opioid Addiction*, *PUB. RADIO TULSA* (Jan. 16, 2020), <https://www.publicradiotulsa.org/post/heres-what-happened-829m-oklahoma-was-awarded-treat-opioid-addiction> (noting that AG Hunter directed about \$200 million of the Purdue settlement to a new research center and, in response, “[s]tate lawmakers quickly changed the law so that any future settlements would go to the state treasury, to be allocated by the legislature”); *OKLA. STAT. tit. 74, § 18b(A)(12)* (2019).

moved to intervene in the Teva case—then still pending in Oklahoma state court—to stop the AG from executing a settlement similar to Purdue’s.<sup>220</sup> Substantiating the AG’s fears, during the COVID-19 crisis, local papers reported that the state is now using some of the money from Teva and a subsequent settlement with Endo—but not the \$270 million settlement AG Hunter locked up with Oklahoma State University—to “plug budget holes” for fiscal year 2021.<sup>221</sup> In West Virginia, it was reported that then-governor Joe Manchin wanted to use early opioid recoveries to fund a gubernatorial helicopter.<sup>222</sup>

### C. Bankruptcy as Centralizer Anew

With federalism serving as an increasingly strong MDL disrupter, bankruptcy court has emerged as an alternative centralizing federal court. In the fall of 2019, Purdue Pharma filed for Chapter 11 bankruptcy in the Southern District of New York as part of a tentative deal struck with thousands of local governments, twenty-four states, U.S. territories, hospitals, and other parties involved in the MDL.<sup>223</sup> Under the terms of the deal, Purdue would continue operating as a business but would be converted into a public-beneficiary trust.<sup>224</sup> Purdue’s owners, members of the Sackler family, would relinquish ownership

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<sup>220</sup> See Amicus Brief or in the Alternative Motion for Intervention as a Matter of Right Pursuant to 12 O.S. 2011, Section 2024 at 2–3, Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Dist. Ct. Cleveland Cnty. June 14, 2019) (seeking to intervene in the Oklahoma AG’s litigation against Teva Pharmaceuticals). Shortly thereafter, the governor, legislature, and AG reached an agreement on how to distribute the Teva settlement funds, and the motion to intervene was withdrawn. John Sammon, *Oklahoma Governor, AG Resolve Dispute over Where \$85M from Opioid Settlement Should Go*, LEGAL NEWSLINE (June 25, 2019), <https://legalnewsline.com/stories/512661850-oklahoma-governor-ag-resolve-dispute-over-where-85m-from-opioid-settlement-should-go>.

<sup>221</sup> Kayla Branch & Carmen Forman, *Legislators Seek to Tap Opioid Settlement Funds to Plug Budget Holes*, OKLAHOMAN (May 8, 2020, 1:21 AM), <https://oklahoman.com/article/5661875/legislators-seek-to-tap-opioid-settlement-funds-to-plug-budget-holes>; see also S.B. 1922, 2020 Leg., Reg. Sess. (Okla. 2020) (including opioid settlement funds in budget allotments).

<sup>222</sup> Ramsey Touchberry, *Joe Manchin Wanted to Buy a \$3 Million Helicopter with Money Earmarked for Tackling Opioid Crisis: Report*, NEWSWEEK (Oct. 12, 2018, 3:52 PM), <https://www.newsweek.com/joe-manchin-million-dollar-helicopter-opioid-money-1167813>.

<sup>223</sup> Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES (Sept. 17, 2019), <https://www.nytimes.com/2019/09/15/health/purdue-pharma-bankruptcy-opioids-settlement.html>; Vince Sullivan, *Purdue Files Ch. 11 Suit Seeking Stay of Opioid Litigation*, LAW360 (Sept. 19, 2019, 6:17 PM), <https://www.law360.com/articles/1200806/purdue-files-ch-11-suit-seeking-stay-of-opioid-litigation>.

<sup>224</sup> See Notice of Filing of Term Sheet with Ad Hoc Committee at 4, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Oct. 8, 2019), ECF No. 257 (“Pursuant to the chapter 11 plan, 100% of the assets or equity of Purdue . . . will be placed under a trust or a similar post-emergence structure, for the benefit of claimants and the U.S. public . . .”).

over the company and pay \$3 billion from their own pockets into the trust.<sup>225</sup>

More than half of state AGs and some local governments opposed the deal, preferring to continue their own cases in other courts,<sup>226</sup> evincing political rifts across the horizontal body of state AGs. Purdue, in turn, filed a motion asking the bankruptcy court to use its vast powers under the Bankruptcy Code to stay all pending litigation—including the cases brought by the state AGs in state courts.<sup>227</sup>

An automatic stay of litigation typically attaches to a bankruptcy filing pursuant to the Bankruptcy Code.<sup>228</sup> However, the Code also provides a federalism exception for suits “by a governmental unit or any organization . . . to enforce such governmental unit’s or organization’s police and regulatory power.”<sup>229</sup> Purdue argued that the exceptions did not apply but, rather than litigate the issue, filed for a preliminary injunction.<sup>230</sup> In a filing, Purdue emphasized that “[p]rotection from uncontrolled litigation is the singular feature of bankruptcy that makes it an effective tool for the successful resolution of mass tort matters.”<sup>231</sup>

The bankruptcy court did not rule on the applicability of the government exception to the automatic stay under the law but granted a temporary stay to allow settlement negotiations to proceed. That stay has since been extended several times, at this point until March 2021.<sup>232</sup> In issuing the stay, the bankruptcy judge concluded: “[T]housands of ongoing litigations would severely disrupt the con-

<sup>225</sup> See *id.* at 9.

<sup>226</sup> Sullivan, *supra* note 223.

<sup>227</sup> Complaint for Injunctive Relief, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 18, 2019), ECF No. 74.

<sup>228</sup> 11 U.S.C. § 362. See generally Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REFORM 177 (1978) (discussing § 362(a) in detail).

<sup>229</sup> 11 U.S.C. § 362(b)(4).

<sup>230</sup> Complaint for Injunctive Relief, *supra* note 227, at 27 (arguing that, given the high stakes and the “tidal wave of litigation” confronting them, “the Debtors cannot risk a case-by-case or claim-by-claim litigation of the scope of the automatic stay”).

<sup>231</sup> Debtors’ Informational Brief at 6, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Sept. 16, 2019), ECF No. 17.

<sup>232</sup> Jonathan Randles, *Judge Extends Shield Protecting Purdue’s Sacklers from Opioid Lawsuits*, WALL ST. J. (Sept. 30, 2020, 5:48 PM), <https://www.wsj.com/articles/judge-extends-shield-protecting-purdue-sacklers-from-opioid-lawsuits-11601502526>; see Second Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 5, *Purdue Pharma L.P. v. Massachusetts*, No. 19-08289 (Bankr. S.D.N.Y. Nov. 6, 2019), ECF No. 105 (granting preliminary injunction until April 8, 2020); Fourteenth Amended Order Pursuant to 11 U.S.C. § 105(a) Granting Motion for a Preliminary Injunction at 7, *Purdue Pharma L.P. v. Massachusetts*, No. 19-08289 (Bankr. S.D.N.Y. Oct. 30, 2020), ECF No. 214 (extending preliminary injunction until March 1, 2021).

structive process that has ensued since the issuance of the injunction in October.”<sup>233</sup>

There is precedent for the use of bankruptcy in mega-MDLs. In the *Takata* MDL, which grew out of the thousands of lawsuits against the airbag manufacturing company,<sup>234</sup> even non-debtors—that is, industry defendants not in bankruptcy themselves—used the bankruptcy process to settle parts of the MDL case. For example, Honda settled its personal-injury and wrongful-death claims through a “channeling injunction” in the bankruptcy court and settled its economic loss claims in the MDL.<sup>235</sup> These injunctions have been authorized under the court’s general equitable authority under the Bankruptcy Code, which empowers it to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Code.<sup>236</sup> A court will establish a trust and issue an injunction that channels all current and future claims to be made against the trust’s assets.<sup>237</sup> Channeling injunctions also were used by doctors and distributors in connection with Dow Corning’s bankruptcy over breast implants.<sup>238</sup> It is no coincidence that the negotiation class itself took inspiration from aspects of bankruptcy procedure.

This use of bankruptcy highlights some interesting issues. First, the bankruptcy court’s power to stop any litigation to resolve all current *and* future pending claims against the debtor not only ends the race to the courthouse, but it also deals with federalism tensions and

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<sup>233</sup> Transcript of Hearing at 85, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Mar. 18, 2020), ECF No. 974.

<sup>234</sup> See generally Reuters, *Airbag Maker Takata Files for Bankruptcy in Japan and US, Seeking \$1.6B Aid from Key Safety Systems*, CNBC (June 26, 2017, 2:51 AM), <https://www.cnbc.com/2017/06/25/takata-files-for-us-chapter-11-bankruptcy-in-delaware-expected-to-file-in-japan-soon.html> (describing the Takata bankruptcy).

<sup>235</sup> See Gary Svirsky, Tancred Schiavoni, Andrew Sorkin & Gerard Savarrese, *A Field Guide to Channeling Injunctions and Litigation Trusts*, 260 N.Y. L.J., July 16, 2018 (describing the use of a channeling injunction to settle the tort claims); Plaintiffs’ Unopposed Motion for Preliminary Approval of Honda Class Settlement, Preliminary Certification of Settlement Class, and Approval of Class Notice and Incorporated Memorandum of Law at 1, 20, *In re* Takata Airbag Prods. Liab. Litig., No. 15-md-02599 (S.D. Fla. Sept. 1, 2017), ECF No. 2013 (seeking approval of a settlement of the economic loss claims).

<sup>236</sup> 11 U.S.C. § 105(a); see generally Eric D. Green, James L. Patton, Jr. & Edwin J. Harron, *Future Claimant Trusts and “Channeling Injunctions” to Resolve Mass Tort Environmental Liability in Bankruptcy: The Met-Coil Model*, 22 EMORY BANKR. DEVS. J. 157 (2005) (discussing potential uses of channeling injunctions in mass-tort litigation).

<sup>237</sup> See Svirsky et al., *supra* note 235 (“At the same time, the channeling injunction and trust insulate debtors, certain non-debtor defendants, and other participants from known current and future claims.”).

<sup>238</sup> *Id.* The protected non-debtor’s alleged liability derives from the debtor’s alleged liability, the non-debtor contributes to the settlement fund, and the non-debtor has a sufficient “unity of interest” with the debtor. *Id.*

the issue of future preclusion (even in the absence of a class action). The parties in *Opiates* are concerned not only with parallel-proceeding lawsuits, but also with the more than thirty thousand other localities that have not yet sued. Bankruptcy court provides one answer. What is more, it seems to be the only court with jurisdiction to stop both state and federal cases alike.<sup>239</sup> On the other hand, the Code's federalism exception<sup>240</sup> has been utilized before—in state AG antitrust cases and consumer-protection cases, as well as government-brought environmental cleanup cases and state workers' compensation cases—to leave state cases out of the process.<sup>241</sup>

It is fascinating that bankruptcy courts—Article I federal courts—could be the final resting place for so much authority in a polycentric litigation system. As we discuss in the next Part, bankruptcy courts lack the powers of Article III courts and the sovereign power and democratic bona fides of state courts, and yet they appear to be the only courts that have the power to overcome the boundary between state- and federal-court jurisdiction. It is odd enough to see the state and federal power structures come to a head in what feels like a proceeding ancillary to the main litigation, but it is odder still to recognize how much power Article I courts have over that struggle.

Further to that point, the Department of Justice also settled its investigations of Purdue through the bankruptcy court in fall 2020. But the settlement was highly unusual in that DOJ earmarked most of

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<sup>239</sup> See Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1003–04 (2012) (“[T]he bankruptcy case interrupts the usual allocation of venue . . . to centralize administration of the estate and avoid the ‘multiplicity of forums for the adjudication of parts of a bankruptcy case.’ . . . [V]enue for all trials in mass tort litigation involving the debtor-defendant can be drawn into a single district.”). Even the DOJ is participating in the bankruptcy court's claims process, seeking as much as \$18.1 billion. Sara Randazzo, *Justice Department Seeks as Much as \$18.1 Billion from Purdue Pharma*, WALL ST. J. (Aug. 4, 2020, 10:47 PM), <https://www.wsj.com/articles/justice-department-seeks-as-much-as-18-1-billion-from-purdue-pharma-11596595629>.

<sup>240</sup> 11 U.S.C. § 362(b)(4).

<sup>241</sup> See *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (state AG antitrust case); *In re Charter First Mortg., Inc.*, 42 B.R. 380, 382–84 (Bankr. D. Or. 1984) (Washington AG consumer-protection case); *In re First Alliance Mortg. Co.*, 263 B.R. 99 (B.A.P. 9th Cir. 2001) (Massachusetts consumer-protection action against Chapter 11 debtor-financial services company); Douglas P. DeMoss, *The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict*, 27 WM. & MARY L. REV. 165 (1985) (environmental cleanup litigation); PRACTICAL LAW PUB. SECTOR, RESOURCE ID NO. W-007-0085, UNDERSTANDING THE POLICE AND REGULATORY EXCEPTION TO THE AUTOMATIC STAY § 6, Westlaw (2020) (citing *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108, 1114 (6th Cir. 1981)) (state agency workers' compensation case).

its award for the state and local claimants, more evidence of the bankruptcy court's role in coordinating the parties to settlement.<sup>242</sup>

Using the threat of bankruptcy, it does not appear to be a coincidence that in February 2020 one defendant manufacturer, Mallinckrodt, almost reached a \$1.6 billion settlement with both the MDL plaintiffs and the state AGs.<sup>243</sup> Had it not filed bankruptcy shortly thereafter, it would have been the first defendant to achieve nearly global peace without that last resort as the AGs likely foresaw the decline of their leverage in the bankruptcy court.<sup>244</sup> Similarly, it was reported that “the possibility of bankruptcy exerted powerful leverage at the bargaining table in Oklahoma,” with AG Hunter eager to beat Purdue's bankruptcy and secure his piece of the pie.<sup>245</sup>

#### IV

#### MDL AND THE VALUES OF PROCEDURE

MDL is one response to the public problems of our time. Its evolution cannot be understood in isolation from external factors, whether they be other court systems, the Supreme Court's increasingly anti-class-action jurisprudence, or legislative inaction. Like the asbestos litigation, *Opiates* came to court when legislatures failed. Federalism exerts a competing force on federal courts tasked with “solving” problems on a national scale. Yet shepherding thousands of cases through the judicial system demands collaboration from judges and parties alike.

When formal rules fail to address the system's needs, organically constructed rules and norms take over. That evolution is not unique to procedure; one of us has compared this new “unorthodox civil proce-

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<sup>242</sup> Press Release, Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid>.

<sup>243</sup> Sheila Kaplan & Jan Hoffman, *Mallinckrodt Reaches \$1.6 Billion Deal to Settle Opioid Lawsuits*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/health/mallinckrodt-opioid-settlement.html>. The deal includes the MDL plaintiffs' executive committee and “is supported by a broad-based group of 47 state and U.S. Territory Attorneys General.” News Release, Mallinckrodt Pharm., *Mallinckrodt Announces Agreement in Principle for Global Opioid Settlement and Associated Debt Refinancing Activities* (Feb. 25, 2020), <https://www.mallinckrodt.com/about/news-and-media/news-detail/?id=26491>.

<sup>244</sup> Alexander Gladstone, *Opioid Crisis Pushes Drugmaker Mallinckrodt to File for Bankruptcy*, WALL ST. J. (Oct. 12, 2020, 10:14 AM), <https://www.wsj.com/articles/drugmaker-mallinckrodt-files-for-chapter-11-bankruptcy-11602500265>.

<sup>245</sup> Jan Hoffman, *Purdue Pharma and Sacklers Reach \$270 Million Settlement in Opioid Lawsuit*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2019/03/26/health/opioids-purdue-pharma-oklahoma.html>.

ture” to the documented phenomenon of “unorthodox lawmaking”—the series of new process norms that congressional actors have invented for themselves to get around historic gridlock.<sup>246</sup> MDL is the instantiation of this phenomenon on the litigation side. It *did* begin as something different; its creators envisioned MDL as grounded in horizontal resolution of individual claims.<sup>247</sup> But new practices emerge by necessity, based on past successes and failures. The MDL revolution—its transformation into a relentlessly centralizing and consolidating force—met the modern problems of the day. The opioid litigation uniquely disrupted this unorthodox equilibrium that the secret-but-not-so-secret MDL world had built.

So is it a revolution? At least some of the countervailing forces in *Opiates* that have diminished the MDL’s singular force are traditional procedural forces—most prominently federalism—but even so, a relentless drive to centralize and settle still seems to permeate the MDL system as a whole.

Other fields have robustly documented the innovation and productivity generated by interdependent and competitive regimes.<sup>248</sup> In the world of procedure, these observations are far from new. They echo Robert Cover’s classic argument that jurisdictional redundancy has utility in reducing error and judicial bias and in encouraging salutary development of the common law through multiple layers of independent judicial review.<sup>249</sup> In *Opiates*, as Cover’s view predicts, the unusually strong federalism dynamics have brought many benefits, even as they have made the MDL less efficient and effective.<sup>250</sup> That polycentricity produced information and pressure. It brought new kinds of plaintiffs to court. It led to creative settlement-allocation proposals and new forms of governmental cooperation, and it invented new aggregate-procedural forms. The MDL’s very existence across multiple legal systems commanded attention that captivated media, politics, and policy wonks.

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<sup>246</sup> Gluck, *supra* note 4, at 1696 (comparing “unorthodox civil procedure” to the phenomenon Barbara Sinclair labeled unorthodox lawmaking in her book of the same title).

<sup>247</sup> Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 882–83 (2017).

<sup>248</sup> See generally JOHN H. MILLER & SCOTT E. PAGE, *COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE* (2007) (discussing the challenges and possibilities of complex social systems consisting of agents embedded in feedback loops); J.B. Ruhl, *Law’s Complexity: A Primer*, 24 GA. ST. L. REV. 885 (2008) (analyzing the law as a complex adaptive system).

<sup>249</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646–75 (1981).

<sup>250</sup> See *supra* Part III.

But still, as in other mega-MDLs and quite different from Cover's vision, the long-term legal impact of MDL is mostly procedural, not substantive. There is no real declaration of law here, much less development of new norms. Just dispute resolution, payment, and closure. That is arguably a public good in and of itself, but it is not all that we look to the courts for. Almost forty years ago Owen Fiss called settlement:

the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society.<sup>251</sup>

He could have been talking about MDL. Litigation is about more than just the exchange of funds. Legitimacy, dignity, information production, representation, law development, impartiality, and even decentralization are core components of the system. Courts asked to solve national problems believe their task is to centralize and finalize. Lawyers and judges of all stripes see the courts' role this way; it is not clear that AG-led actions would have been any less focused on settlement. To say that the norms of the Federal Rules of Civil Procedure, which have the traditional litigation model in mind, do not snugly fit the model of a single court trying to resolve a national public health crisis should not shatter the earth; it would be more shocking if the Rules did fit.<sup>252</sup> We all know these things, but MDL exposes them in the raw and asks us what we really expect of courts when they are called to serve.

We do not believe that procedure's core values need to play as small a role in MDLs as they have. Here we depart from other scholars, some of whom identify similar tensions but seek to resolve them by further consolidating power in the MDL in various ways.<sup>253</sup> We recognize the value of MDL, the gaps it fills, and the difficulty of the tasks it has been asked to undertake, but we also would incorporate the following:

- 1) greater motion practice;
- 2) jurisdictional redundancy through episodic remands to home courts;
- 3) more access to appellate courts;

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<sup>251</sup> Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1075 (1984).

<sup>252</sup> Cf. J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 *N.Y.U. L. REV.* 1713, 1713 (2012) (arguing for a "new regime of civil procedure" that is suited "for the world of settlement").

<sup>253</sup> See *supra* note 16.

- 4) attention to state law differences;
- 5) adequate representation as a condition of selection of counsel; and
- 6) adherence to rules of jurisdiction—or a new national jurisdiction statute.

In the final discussion that follows, we highlight the competing procedural norms that MDL lays bare, tensions that fold into the perennial debate over what courts are for, especially in nationwide litigation of this nature. We suggest shifts in MDL practice in places where the normative balance seems particularly out of whack—shifts that we believe are in line with the spirit of Federal Rule 1’s own inherent paradox and that could be made without significantly undermining the benefits that MDLs generate.

In the class-action context, Professor John Coffee observed that “[o]nce bent, legal rules tend to stay bent.”<sup>254</sup> MDL has proceeded down that path, but *Opiates* is a moment of disruption. Is it temporary? What happens in *Opiates* will affect future proceedings in one way or another; that’s how the de facto common law of MDL works. Trains continue to leave the station—now may be the time to pull the track switch.

#### A. *Plaintiff’s Day in Court: Loss of Motion Practice, Individualized Claims, and Trial*

First, we suggest that a number of MDLs could benefit from more motion practice that would give the parties more information about the strength and weaknesses of their claims before settling. Even former MDL critics have credited MDLs with opening courthouse doors anew, as stingy modern jurisprudence on the availability of class actions has closed others.<sup>255</sup> MDLs have enabled aggregation in military veterans’ suits over hearing loss, women’s claims that asbestos-laced talcum powder causes cancer, and drivers’ claims that faulty ignition switches cause power failures while driving.<sup>256</sup> Without MDL, those plaintiffs might not have been able to afford a suit or have the kind of leverage they did once filed.

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<sup>254</sup> John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1463 (1995).

<sup>255</sup> See Resnik, *supra* note 2, at 1768 (noting that “significant proportions of pending cases [in the federal civil docket] are aggregated through multidistrict litigation”).

<sup>256</sup> *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 19-md-02885 (N.D. Fl. filed Apr. 3, 2019); *In re* Johnson & Johnson Talcum Powder Prods. Mktg. Sales Prac., & Prods. Liab. Litig., No. 16-md-02738 (D.N.J. filed Oct. 4, 2016); *In re* General Motors LLC Ignition Switch Litig., No. 14-md-02543 (S.D.N.Y. filed June 12, 2014).

But once centralized, as Judge William Young lamented upon watching his cases disappear into an MDL, “the ‘settlement culture’ . . . is nowhere more prevalent than in MDL practice. . . . Thus, it is almost a point of honor among transferee judges . . . that cases so transferred shall be settled rather than sent back to their home courts for trial.”<sup>257</sup> Settlements are a prominent feature in any court. Rule 16, which concerns case management, expressly authorizes judges to “facilitate settlement,” even as Rule 16’s original drafter, Judge Charles Clark, warned that “it is dangerous to the whole purpose of pre-trial to force settlement upon unwilling parties.”<sup>258</sup>

Are these values mutually exclusive? Is a goal of settlement necessarily at odds with having one’s day in court? Trials are rare everywhere.

But one particular problem with some MDLs is the lack of any robust pretrial motion practice that might offer some public airing of issues even if settlement is the end result. A previous study showed that nearly one-third of the MDL judges who presided over products-liability MDLs that ended in private settlement *had not ruled on a single merits-related motion* before the settlement occurred.<sup>259</sup>

A second problem is the inability to credibly threaten trial, given the naivety of the notion of remand. Some traditional trial lawyers want to have their well-screened cases returned, whereas lawyers who collect clients by the hundreds might not take on dubious cases if they ultimately had to litigate them all independently. For those plaintiffs represented by volume lawyers, a day in court may not come at all. The attraction of MDL, in a world in which a class-action version of these cases tends to be illusive or undesirable, is thus the promise of coordination and settlement itself. In other words, for many, court access may be tied inextricably to a goal of settlement.

Nevertheless, as the Third Circuit recognized in the *Fosamax* MDL, the way that summary judgment and other dispositive motions are handled in MDL presents a “deeper problem”<sup>260</sup> for individual plaintiffs. Andrew Bradt and Theodore Rave note that these motions are sometimes “decided in relation to so-called ‘consolidated complaints’ that make only cursory distinctions between . . . different

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<sup>257</sup> *Delaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 150–52 (D. Mass. 2006).

<sup>258</sup> FED. R. CIV. P. 16(a)(5); Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 167 (1956).

<sup>259</sup> BURCH, *supra* note 22, at 110 (counting motions for summary judgment, class certification, *Daubert* motions, and bellwether trials as being merits related and identifying which proceedings reported settlements before merits-related events occurred).

<sup>260</sup> *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, 852 F.3d 268, 302 (3d Cir. 2017), *vacated and remanded on other grounds sub nom.* Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019).

plaintiffs' claims."<sup>261</sup> Explaining its reservations, the Third Circuit wrote:

A mass tort MDL is not a class action. It is a collection of separate lawsuits that are coordinated for pretrial proceedings—and *only* pretrial proceedings . . . [M]erits questions that are predicated on the existence or nonexistence of historical facts unique to each Plaintiff . . . generally are not amenable to across-the-board resolution. *Each Plaintiff deserves the opportunity to develop those sort of facts separately* . . . .<sup>262</sup>

The Sixth Circuit—brought into *Opiates* by the outsiders' unusually aggressive use of mandamus against Judge Polster—has interjected additional scrutiny. When Judge Polster allowed a late amendment against a panoply of pharmacy defendants nineteen months after the court's deadline for amending complaints and ten months after discovery closed, the pharmacy defendants objected.<sup>263</sup> Judge Polster concluded that failing to allow the amendment would mean trying those dispensing claims “in front of some other Court that does not have the expertise I have developed over the past two years.”<sup>264</sup>

The Sixth Circuit pushed back on Judge Polster's deviation from normal procedural rules in the interest of centralizing all decisions in his court:

[A]n MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases . . . . Within the limits of those rules, of course, an MDL court has broad discretion to create efficiencies and avoid duplication—of both effort and expenditure—across cases within the MDL. What an MDL court may not do, however, is distort or disregard the rules of law applicable to each of those cases.<sup>265</sup>

The absence of jury trials is a different kind of “day in court” loss—and one suffered by most litigants, not just those in MDLs.<sup>266</sup> Judge Land, who presided over the *Mentor ObTape* MDL, has argued that the jury trial “not only helped establish ‘standards of conduct’ in

<sup>261</sup> Bradt & Rave, *supra* note 47, at 1307.

<sup>262</sup> *In re Fosamax*, 852 F.3d at 302 (second emphasis added).

<sup>263</sup> *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 842 (6th Cir. 2020).

<sup>264</sup> *Id.* at 845.

<sup>265</sup> *Id.* at 841.

<sup>266</sup> See Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918, 936–37 (1995) (“[W]e are witnessing the alteration of court-based individual adjudication—as it melds with ‘alternative dispute resolution,’ relocates in part to administrative agencies, and increasingly emphasizes settlements.”).

our tort system, but its ‘closeness’ to the people was designed to give it legitimacy.”<sup>267</sup> Land continued, focusing on the MDL:

I sense something is lost when Mrs. Smith, who is injured by ingesting a drug in Columbus, Georgia, does not have the opportunity to tell her story here at home but must be relegated to “Plaintiff number X” in some settlement grid in a faraway courthouse by a faceless judge.<sup>268</sup>

It’s a double loss: both to the community and to the plaintiff. Jerry Mashaw wrote long ago that dignity, including the right to tell one’s story in court, is sometimes as much a virtue of the litigation system as the specific resolution.<sup>269</sup> Tom Tyler observes that procedural legitimacy is about more than just outcomes: “When dealing with judicial authorities . . . people want to have an opportunity to . . . tell their side of the story . . . before decisions are made . . . .”<sup>270</sup> The big question is whether, without the promise of efficiency and cost savings that MDL holds out to lawyers, the stories would be told at all.

Let’s reach for the fruit where it is lower. A more robust commitment to encouraging and entertaining merits-related motions that parties would encounter along the path to trial in non-MDL cases (summary judgment, *Daubert*, among others) and conducting open hearings that plaintiffs could listen to by telephone or synchronous video technology is an important initial step both because it gives individuals access to the courtroom and because it may focus judges on differences between plaintiffs and the laws that apply to them.

### B. *Transsubstantive vs. Evolving, Unique Procedure*

Can MDL be cabined by rules? These tensions between individual and aggregate, and also between centralized and decentralized, surface in a different way when MDL is viewed against the backdrop of the Federal Rules of Civil Procedure. The Rules, even as they give judges flexibility, are themselves an effort to bring transsubstantivity, uniformity, and equality of treatment to all individual cases. There are many cracks in this effort; the diversity of local rules is an obvious example, and all judges manage cases differently. But it is widely agreed that MDL is a difference in kind, not merely degree. As one

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<sup>267</sup> Letter from Judge Clay D. Land, U.S. Dist. Ct. J. for the Middle Dist. of Ga., to Professor Francis E. McGovern, Duke Law Sch. (Oct. 29, 2010) (on file with authors).

<sup>268</sup> *Id.*

<sup>269</sup> Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 36 (1976) (“[A] lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.”).

<sup>270</sup> Tom R. Tyler, *The Psychology of Aggregation: Promise and Potential Pitfalls*, 64 DEPAUL L. REV. 711, 713 (2015).

judge put it, MDL is “like Rule 16 on steroids.”<sup>271</sup> Several judges interviewed for a previous study remarked that characterizing the creative case management that typifies the MDL as simply normal work occurring under Rule 16 would mean “that Rule 16 ‘means nothing,’ because it could accommodate virtually anything.”<sup>272</sup>

MDL’s hallmarks of unbridled creativity and innovation are highly prized among MDL judges. The JPML even awards an “MDL Spirit Award.”<sup>273</sup> The consistent message is that these mega-proceedings need different procedures than the Federal Rules currently offer, but that special MDL rules might not suffice because each case is so different.

There are two issues here. First, whether mega-cases need their own rules. It is interesting to note that both Justice Breyer and Justice Sotomayor have hinted that different personal-jurisdiction standards might apply for big versus small companies.<sup>274</sup> Similarly, in the context of mega-MDLs, the necessity of separate procedures might come from the scale of the litigation or the nature and complexity of the problem the judge is asked to resolve (e.g., a national health crisis), or both.

The second issue is whether mega-cases can be cabined by rules at all. We think they can, at least to a degree. We admire the engagement of MDL judges, but we will suggest rules of representation, reviewability, and federalism that could help guardrail even the biggest of MDLs, while leaving space for creative discovery management.

It is the Sixth Circuit, again in *Opiates*, that has offered the strongest rebuke by a federal court of MDL innovation in the interest of efficiency:

True, § 1407 provides for the transfer of certain actions to MDL courts to “promote the just and efficient conduct of such actions”; and true, Civil Rule 1 says that the Rules should be construed “to secure the just, speedy, and inexpensive determination of every action and proceeding.” But MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance. For neither § 1407 nor Rule 1 remotely suggests that,

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<sup>271</sup> Gluck, *supra* note 4, at 1688.

<sup>272</sup> *Id.*

<sup>273</sup> See, e.g., U.S. JUD. PANEL ON MULTIDISTRICT LITIG. AGENDA, 2017 TRANSFEREE JUDGES’ CONFERENCE 2 (2017) (on file with authors) (noting the awarding of the MDL Spirit Award).

<sup>274</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 891 (2011) (Breyer, J., concurring) (asking whether the standard should be the same for an “Appalachian potter” as for large corporations); *Daimler AG v. Bauman*, 571 U.S. 117, 158 (2014) (Sotomayor, J., concurring) (“[T]he proportionality approach will treat small businesses unfairly in comparison to national and multinational conglomerates.”).

whereas the Rules are law in individual cases, they are merely hortatory in MDL ones.<sup>275</sup>

### C. *Impartiality, Reviewability, and Decentralized Decisionmaking*

Next, we consider appellate review and other checks. Jurisdictional redundancy and the appellate process are both ways to ensure that no one dispute is dominated by a single judge or overly centralized. They also provide important avenues to display MDL's unorthodoxies before judges and other lawyers who may not be MDL insiders and may see reasons to resist.

The value of having multiple impartial decisionmakers is one of the bedrock norms of civil procedure.<sup>276</sup> We have already seen how the “no remand” culture of MDL is in tension with that because it relentlessly centralizes the proceeding before a single judge.<sup>277</sup> The limitations on appellate review in MDL pose another concern in the same vein. Appeals disrupt the culture of efficiency that justifies so many of MDL's pathologies. But they also can push to reevaluate norms that insiders take as given, as both the Sixth Circuit's unusually robust involvement in *Opiates* and the Third Circuit's opinion in *Fosamax* illustrate. We consider two potential interventions on this front: expanding the scope of appellate review and episodic remands to a case's home forum.

The demand for greater access to appellate courts has formed a cornerstone of corporate defendants' quest for MDL reform<sup>278</sup> and has also previously been suggested by one of us.<sup>279</sup> MDL disrupts traditional practices of appellate review not only because so much of MDL work is done in the pretrial context, but also because, as noted, judges try to do “everything by consensus.”<sup>280</sup> That pretrial orders are

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<sup>275</sup> *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020).

<sup>276</sup> See MICHAEL D. BAYLES, *PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS* 19 (1990) (“That procedural justice requires an impartial decisionmaker is almost universally recognized.”).

<sup>277</sup> See *supra* Section I.C.

<sup>278</sup> The Chamber of Commerce has made the need for easier access to appellate courts a centerpiece of its push to reform MDLs. See Letter from 48 Corporate General Counsel to Rebecca A. Womeldorf, Sec'y, Cmte. on Rules of Prac. and Proc., Admin. Off. of the U.S. Cts. 2 (Oct. 3, 2019), <https://images.law.com/contrib/content/uploads/documents/292/56032/Initial-Census-letter-from-48-GCs.pdf> (“Out of 14 attempts over a 10-year period to request § 1292(b) certification of a potentially dispositive motion in mass tort MDL cases, zero have been granted.”); Letter from John H. Beisner, Skadden, Arps, Slate, Meagher & Flom LLP, to Rebecca A. Womeldorf, Sec'y, Cmte. on Rules of Prac. and Proc., Admin. Off. of the U.S. Cts. (Nov. 21, 2018), [https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion\\_beisner\\_0.pdf](https://www.uscourts.gov/sites/default/files/18-cv-bb-suggestion_beisner_0.pdf) (describing the research cited by the general counsel).

<sup>279</sup> Gluck, *supra* note 4, at 1709.

<sup>280</sup> See *supra* note 79 and accompanying text.

not routinely appealable under 28 U.S.C. § 1291 is a key factor that limits MDL litigants' access to an appellate court (and, with it, different judges). Moreover, the final-order rule largely prevents error correction relating to pretrial rulings that can have enormous significance for many litigants.<sup>281</sup> And the lack of appellate review means that little decisional law on MDL procedure has developed to guide MDL judges and litigants or to standardize practices across jurisdictions.<sup>282</sup>

One way to address unorthodoxies in modern lawmaking is to bend modern legal frameworks to those new formats. One potential intervention might be to expand the opportunities for interlocutory appeal for MDL pretrial procedural decisions that have a substantial likelihood of affecting the outcome of the case. A similar rationale justified allowing litigants to appeal class-certification decisions under 28 U.S.C. § 1292(e), resulting in the addition of Rule 23(f) to the Federal Rules in 1998.<sup>283</sup> One downside, however, is that such a modification, unless cabined to the MDL context (which we recommend, despite violating principles of transsubstantivity), would have a ripple effect far beyond the MDL to all pretrial work and could threaten to overwhelm the appellate docket. Moreover, if the standard for appeal is not applied judiciously, it could overly favor defendants and drag out MDLs significantly, because presumably there would be appeals every step of the way.<sup>284</sup>

The appellate alternative is mandamus. Most circuits, like the Sixth Circuit, grant writs of mandamus only in “‘exceptional circumstances’ involving a ‘judicial usurpation of power’ or a ‘clear abuse of discretion.’”<sup>285</sup> The standard of review is different from ordinary appeals. *Opiates* demonstrates that this is a high bar—but not always impossibly so. There, the Sixth Circuit granted some mandamus petitions, but even the petitions that it denied allowed it to send a message. For example, in denying the motion to disqualify Judge Polster for its failure to meet the standard for mandamus, the Sixth Circuit

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<sup>281</sup> There are, of course, some notable exceptions. *E.g.*, *In re General Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374 (S.D.N.Y. 2019) (certifying an issue for appeal on § 1292(b)); *In re Blue Cross Blue Shield Antitrust Litig.*, No. 13-cv-20000, 2018 WL 3326850 (N.D. Ala. June 12, 2018) (certifying an issue for appeal under § 1292(b)).

<sup>282</sup> See *supra* note 80 and accompanying text.

<sup>283</sup> FED. R. CIV. P. 23(f) advisory committee's notes to 1998 amendments; see also Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 738 (2013) (“Most appellate courts were unwilling to invoke mandamus.”).

<sup>284</sup> See Klonoff, *supra* note 283, at 741 (finding that Rule 23(f) appeals largely favor defendants).

<sup>285</sup> *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 842 (6th Cir. 2020) (quoting *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004)).

warned: “[W]e may not have chosen to make the [settlement] statements, grant the [media] interviews, or participate in the programs that form the basis for this petition, particularly in a case of such enormous public interest and significance” and “we do not encourage Judge Polster to continue these actions.”<sup>286</sup>

A different way to decentralize power from a single judge, if not via appeal, might be the use of episodic remands—sending cases back to their original federal districts at key points during an MDL. As one of us has proposed, benchmarks would vary by proceeding but remands could come at three key intervals: At the beginning, for plaintiffs with claims that fall outside of those that the lead lawyers plan to develop; once coordinated discovery ends and before case-specific summary judgment motions occur; and after the negotiation of a global settlement, for those plaintiffs who do not wish to settle.<sup>287</sup>

Unwinding cases from an MDL through remand should no longer be seen as a judicial failure,<sup>288</sup> but rather as an important procedural guardrail. Remands could help ease the tension between centralizing cases from around the country and the fact that plaintiffs may be bound by different state laws. This move is not unprecedented—occasionally, transferee judges have sought remand when only case-specific discovery and motion practice remain,<sup>289</sup> after denying class certification,<sup>290</sup> for consideration of state-specific class actions,<sup>291</sup>

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<sup>286</sup> *In re Nat'l Prescription Opiate Litig.*, No. 19-3935, 2019 WL 7482137, at \*2 (6th Cir. Oct. 10, 2019). A similar effort a year later also failed. Motion to Enforce Writ of Mandamus, *In re CVS Pharmacy, Inc.*, No. 20-3075 (6th Cir. June 30, 2020) (alleging that Judge Polster failed to comply with the writ of mandamus and moving to disqualify him on those grounds); *In re CVS Pharmacy, Inc.*, No. 20-3075 (6th Cir. July 16, 2020) (order denying the pharmacy defendants' motion due to its form and for lack of jurisdiction).

<sup>287</sup> BURCH, *supra* note 22, at 210–13; Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014). Several professors and attorneys raised and elaborated on the idea of episodic remands during an American Association of Justice meeting in May of 2018, including Samuel Issacharoff, Howard Erichson, and Tobi Milrood. The kernel of the idea is also included in Memorandum from AAJ's MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee (Feb. 22, 2018). See also J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 28 (2014) (arguing that nonremovable cases, if properly sampled, could be used to generate real-world data that would better inform settlement values).

<sup>288</sup> Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013) (observing that “[a]s a matter of judicial culture, remanding cases is viewed as an acknowledgement that the MDL judge has failed to resolve the case,” and pushing to change that stigma).

<sup>289</sup> See *In re Patenaude*, 210 F.3d 135, 145 (3d Cir. 2000); *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001).

<sup>290</sup> See *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Pracs. Litig.*, 840 F. Supp. 2d 1193, 1198–99 (D. Minn. 2012).

<sup>291</sup> E.g., *In re Light Cigarettes Mktg. & Sales Pracs. Litig.*, 856 F. Supp. 2d 1330, 1332 (J.P.M.L. 2012).

when settlement talks fail,<sup>292</sup> when a party declines to participate in a global settlement,<sup>293</sup> and when a case is ready for trial.<sup>294</sup> In this way, episodic remands can maintain the upside of MDLs—efficient handling of *common* pretrial issues—but without holding cases hostage, ignoring important substantive differences, stifling information production, or preventing plaintiffs from credibly threatening trial at some point. They could likewise produce more appeals to aid in developing the common law of torts.

Episodic remands strike a better balance between efficiency and litigant autonomy, states' rights, direct participation in democracy through local trials, and the litigant-voice opportunities at the heart of procedural justice. And they would not necessarily interfere with global settlement. Rather, potential remands would encourage plaintiffs' leadership to design a broadly inclusive deal that most would not *want* to decline.

#### D. *Development of Substantive Law*

Related to remands is the question of substantive state law, and the role of courts in developing it. MDL began as a federal law animal, enacted for parallel federal antitrust and securities suits.<sup>295</sup> Once it stepped in to fill the broader aggregation gap, however, it became dominated by state law issues.<sup>296</sup>

To state the obvious, tort law would not have developed if courts did not render decisions. It was Judge Cardozo, for example, in 1916 who famously held in *MacPherson v. Buick Motor Co.* that a duty of reasonable care, not privity of contract, was the linchpin for a tort suit.<sup>297</sup> Courts later introduced and blessed novel theories like alternative liability<sup>298</sup> and market-share liability.<sup>299</sup> Today, creative tort lawyers continue to press fresh theories and extensions of tort law.

MDL, however, threatens to create a kind of Substantive Law Neverland where adventuresome tort theories thrive but never

<sup>292</sup> See *In re Activated Carbon-Based Clothing*, 840 F. Supp. 2d at 1199.

<sup>293</sup> E.g., *Baltimore Cnty. v. AT&T Corp.*, 735 F. Supp. 2d 1063, 1098–99 (S.D. Ind. 2010) (suggesting remand of one remaining case that refused to settle).

<sup>294</sup> See *In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, 597 F. Supp. 2d 1377, 1379 (J.P.M.L. 2009) (“When any transferred action becomes ready for trial, the transferee judge may suggest that the Panel remand the action to the transferor court.”).

<sup>295</sup> See *supra* note 20 and accompanying text.

<sup>296</sup> See Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 857–58 (2017) (describing the change from MDL cases that “were litigated, and largely settled, under federal law” to the cases of today’s MDL practice, which were “once largely the province of state courts”).

<sup>297</sup> 111 N.E. 1050 (N.Y. 1916).

<sup>298</sup> *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

<sup>299</sup> *Sindell v. Abbott Labs*, 607 P.2d 924 (Cal. 1980).

mature. Public nuisance is a prime example. That claim forms the basis of not only opioids but also tobacco suits, lead paint litigation, and the continued attempts to sue over gun violence.<sup>300</sup> But, as *Opiates* reveals, the contours of public nuisance and whether and how it applies to defendants like the opioid manufacturers, distributors, and pharmacies are surprisingly nascent: “[T]he Court cannot allow a common law nuisance claim to proceed—and Defendants cannot meaningfully defend such a claim—without knowing what the nuisance is,” the manufacturers argued.<sup>301</sup>

It is no coincidence that the two states that have squarely addressed whether public nuisance extends to opioids are the ones where state litigation has occurred. A North Dakota trial court dismissed public-nuisance claims against Purdue because the state has not extended the statute to the sale of goods,<sup>302</sup> whereas an Oklahoma trial court concluded that Johnson & Johnson’s false and misleading marketing of opioids constituted a public nuisance under its statute and entered a judgement of \$465,026,711 for abatement.<sup>303</sup> The fact

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<sup>300</sup> See, e.g., *supra* note 67 and accompanying text (nuisance claims in tobacco litigation); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (“Although the state asserts that the public’s right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance.”); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (“If there is [a] public right to be free from the threat that others may use a lawful product to break the law, that right would include the right to drive upon the highways, free from the risk of injury posed by drunk drivers.”).

<sup>301</sup> *Manufacturer Defendants’ Memorandum in Support of Motion for Summary Judgment on Plaintiffs’ Public Nuisance Claims* at 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 19, 2019), ECF No. 1893-1. As a common law right dating back to Blackstone’s *Commentaries* in 1765, public nuisance has been applied to public health, safety, and morals, but the cases concern hog pens and diseased animals, bullfights and gambling, and explosives and fireworks—not manufacturing, distributing, or selling FDA-approved controlled substances. 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*166–69; W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 90, at 643–45 (5th ed. 1984). Complicating the issue is that many states now have statutes on nuisance too. This means not only that the common law conceptions of nuisance on which the statutes are based are underdeveloped, but also that MDL’s propensity to blend the laws of the various states likely has further stunted development of the doctrine.

<sup>302</sup> *Order Granting Defendants’ Motion to Dismiss* at 25–27, *North Dakota ex rel. Stenehjem v. Purdue Pharma L.P.*, No. 08-2018-CV-01300 (N.D. Trial Ct. Burleigh Cnty. May 10, 2019).

<sup>303</sup> *Final Judgment after Non-Jury Trial* at 24–25, 41, *Oklahoma ex rel. Hunter v. Purdue Pharma L.P.*, No. CJ-2017-816 (Okla. Trial Ct. Cleveland Cnty. Nov. 15, 2019). Judge Polster has also refused to grant summary judgment on the public-nuisance claims, holding that plaintiffs raised material issues of disputed facts on each element. *Opinion and Order Denying Manufacturer Defendants’ Motion for Summary Judgment on Plaintiffs’ Public Nuisance Claims*, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 9, 2019), ECF No. 2578.

that the two courts reached conflicting answers is telling and is part of the dialectical common law conversation we expect from multiple layers of courts.

Despite Judge Weinstein's famous assertion, tort law is not national.<sup>304</sup> The *Erie* doctrine still requires federal courts to apply the substantive law of the several states and to recognize differences across them.<sup>305</sup> Establishing rights and clarifying legal elements lends certainty to the law, making settlement more likely, accurate, and efficient, and ideally, as Cover and Aleinikoff posited long ago, improving the law itself.

For the *Opiates* negotiation class, Judge Polster certified only two *federal* RICO claims (one against the manufacturers and one against the distributors) and two issues about defendants' obligations under the federal Controlled Substances Act—a sliver of plaintiffs' many allegations against those defendants.<sup>306</sup> At the fairness hearing, he noted that it would “be unruly and unworkable to have . . . state claims from 50 states” but still observed that the releases in any later agreement would “encompass any and all claims that were brought or could be brought.”<sup>307</sup> Put simply, litigating two *federal* claims and two issues arising under *federal law* would have relinquished *all* claims upon settlement against some thirteen diverse corporate defendants, including some hyper-blended version of fifty *state* claims. As the Sixth Circuit explained in reversing, this “papered over” critical differences among state law.<sup>308</sup>

MDLs can do better to further substantive law. Judge Polster's hub and spoke remand plan is a step in the right direction.<sup>309</sup> More

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<sup>304</sup> *In re* “Agent Orange” Prod. Liab. Litig., 580 F. Supp. 690, 701 (E.D.N.Y. 1984) (referring to a products liability “law of national consensus”).

<sup>305</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *see also In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 676 (6th Cir. 2020) (discussing the enactment process for the Federal Rules and noting that closely adhering to the Rules is “critical in the class action context where a certification decision, which is procedural, can abrogate the substantive rights of class members to pursue their claims independently by binding them to a litigation class or settlement class”).

<sup>306</sup> Memorandum Opinion Certifying Negotiation Class at 14, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Sept. 11, 2019), ECF No. 2590.

<sup>307</sup> Transcript of Proceedings at 4, 68, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Aug. 7, 2019), ECF No. 2147.

<sup>308</sup> *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 675 (6th Cir. 2020). The Sixth Circuit recognized the state law problem but couched it in terms of Rule 23(b)(3)'s predominance inquiry. It noted that many of the claims “arising out of a common factual predicate” under the RICO issues class “are disparate state law claims brought by cities and counties throughout the country.” So, even if the district court's predominance analysis made sense as to the RICO issues, “the court's order minimized or marginalized the myriad state law claims.” *Id.*

<sup>309</sup> *See supra* notes 123–31 and accompanying text.

remands for bellwethers and case-specific developments are likely to produce more substantive law and give diverse communities, through their juries and judges, the opportunity to help shape those doctrines.<sup>310</sup>

Absent remand, the MDL must devote more serious pretrial attention to the differences across state laws and how they affect the strength of particular plaintiffs' claims against particular defendants—or face appellate scrutiny for failing to do so. One prominent recent example comes from the *General Motors* MDL, in which Judge Furman garnered national attention for writing an opinion reviewing differences across forty-seven states, then reversing his own prior orders with respect to twenty-three states after the review, reasoning that “subtle differences in state law can dictate different results for plaintiffs in different jurisdictions.”<sup>311</sup>

### E. Information Production

Information production, especially from big corporations, is another distinct benefit of litigation, especially aggregate litigation. But secrecy is a hallmark of MDLs and is easier to maintain in centralized proceedings. It is no surprise, then, that a recent Reuters investigation found that large numbers of documents are routinely filed under seal in MDLs.<sup>312</sup>

In *Opiates*, even though Rule 26 requires parties wishing to keep information confidential to show “good cause,”<sup>313</sup> the parties, as in many other MDLs, stipulated to a blanket protective order without showing any particular facts that warranted the order.<sup>314</sup> On the other

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<sup>310</sup> Cf. Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2415 (2008) (discussing the value of multicentered litigation where disagreement exists and ideology might otherwise privilege certain litigants over others). Reexamining snap removals and allowing some litigation to flourish in state court can offer similar benefits. See Glover, *supra* note 287; Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of “Snap Removal”*: A Proposed Amendment to the Judicial Code, 9 FED. CTS. L. REV. 103 (2016).

<sup>311</sup> Opinion and Order Regarding Application of the Court's Prior Rulings on Manifestation, Incidental Damages (Lost Time), and Unjust Enrichment to All Remaining Jurisdictions in Dispute (MDL Order No. 131 Issues) at 5, 38, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-02543 (S.D.N.Y. Sept. 12, 2018), ECF No. 6028 (quoting *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-md-02543, 2016 WL 3920353, at \*18 (S.D.N.Y. July 15, 2016)) (finding twenty-three states' laws allow various consumer-protection claims even if the product's defect has not manifested).

<sup>312</sup> Lesser et al., *supra* note 169.

<sup>313</sup> FED. R. CIV. P. 26(c)(1).

<sup>314</sup> *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 929–30 (6th Cir. 2019); see also Hon. Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53, 58 (2000) (“Courts have broad discretion in entering protective orders and sealing records.

hand, *Opiates* also exemplifies how pressure from decentralization can produce more information even when a MDL is in the picture.

First, as explored earlier, at the prompting of a number of media outlets like *The Wall Street Journal* and *The New York Times*, information about the Sackler family was disclosed in the Massachusetts AG's case in state court, changing public perception and contributing momentum to all the cases in the constellation, not just Massachusetts's.<sup>315</sup>

Second, a widely read *Washington Post* exposé followed the success of media actors who challenged Judge Polster's decision to seal the DEA's ARCOS data and other revealing discovery documents.<sup>316</sup> In reversing Judge Polster's decision denying the public records request, the Sixth Circuit specifically criticized the use of secrecy to promote settlement:

The district court repeatedly expressed its desire that the underlying litigation settle before proceeding to trial. . . . ("Nothing is going to be revealed to the media unless there's a trial. If there's a trial, obviously trials in our country are public. Hopefully there will be no trials.") [. . .] These statements suggest that at least part of the reason for the district court's about-face on what interests Defendants and the DEA have in nondisclosure of the ARCOS data might have been a desire to use the threat of publicly disclosing the data as a bargaining chip in settlement discussions. If this was a motivation for its holding, then the district court abused its discretion by considering an improper factor.<sup>317</sup>

The third major instance of information production came from the bench trial in the Oklahoma state court suit brought by the Oklahoma AG, Mike Hunter. AG Hunter, as noted, refused to play by the MDL rules and pushed ahead with his single claim of public nuisance against a single defendant, Johnson & Johnson. That solitary action nevertheless gave the public extraordinary access to an astounding amount of evidence on both sides: 33 days of televised trial testimony, 874 exhibits, and 42 witnesses.<sup>318</sup> In cases with public health implications like *Opiates*, making the information produced in

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Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders.").

<sup>315</sup> See *supra* Section III.A.1.

<sup>316</sup> *Drilling into the DEA's Pain Pill Database*, *supra* note 192; see *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 923 (vacating the district court's protective order governing disclosure of the ARCOS data). See generally Oliva, *supra* note 191, at 665–83 (describing the controversy over access to the ARCOS data).

<sup>317</sup> *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 933.

<sup>318</sup> Final Judgment After Non-Jury Trial at 2, Oklahoma *ex rel.* Hunter v. Purdue Pharma L.P., No. CJ-2017-816 (Okla. Trial Ct. Cleveland Cnty. Nov. 15, 2019).

discovery public allows the press and researchers to access the materials, connect the dots, unmask health risks, shed light on regulatory failures, and pressure companies to make safer products.<sup>319</sup>

### F. *Due Process and Adequate Representation*

The plaintiff's due process right must be linked to adequate representation, even though MDL is formally a set of individual actions. In class actions, the focus is on protecting the absent individuals whose rights are centralized in them. The judge's obligation to ensure that the class representative is typical of others and that class counsel adequately represents a relatively cohesive group is the linchpin of due process in that context.<sup>320</sup> Why not in MDL?

MDL judges instead rely on the MDL Paradox: the fiction that the individual party's control over her case frees judges from imposing the kinds of protections that Rule 23 requires in the name of due process.<sup>321</sup> MDL judges generally do not consider adequate representation when selecting lead plaintiffs' lawyers.<sup>322</sup> Instead, they focus on attorneys' MDL experience, their ability to fund the proceeding, and whether they can "play well in the sandbox" with others,<sup>323</sup> all of which tend to produce leadership slates of repeat, inside players focused on settlement. That, in turn, contributes even more momentum to centralization over individual representation.

One telling indicator of the extent of this divergence from Rule 23 came when Judge Polster had to appoint class counsel for the novel, Rule-23-inspired negotiation class. When confronted with Rule 23's adequate representation requirements, Judge Polster selected only

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<sup>319</sup> See generally Andrew F. Daughety & Jennifer F. Reinganum, *Secrecy and Safety*, 95 AM. ECON. REV. 1074, 1074 (2005) ("We provide a model showing that the use of confidential settlement as a strategy for a firm facing tort litigation leads to lower average safety of products sold than would occur if the firm were committed to openness."); Mike Spector, Jaimi Dowdell & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020) ("Sometimes the only way [regulatory watchdogs] can learn about and act on a possible threat to consumers is from evidence produced in lawsuits, but that evidence is often hidden behind a wall of secrecy.").

<sup>320</sup> FED. R. CIV. P. 23(a), (g).

<sup>321</sup> See *Hansberry v. Lee*, 311 U.S. 32, 43–45 (1940) (analyzing adequacy of representation in class actions as a matter of constitutional due process for absent class members); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (emphasizing that there must be an alignment of interests between named plaintiffs and the class members they purport to represent); cf. Bradt, *supra* note 4, at 1719 (discussing the "patina of individual control" that authorizes judges to centralize).

<sup>322</sup> E.g., Duval, *supra* note 38, at 392–95.

<sup>323</sup> *Id.* at 392 (quoting an unnamed judge); see also Gluck, *supra* note 4, at 1702 ("As one [judge] noted, 'I have heard the concerns about the elite group of lawyers but every judge wants to have someone with expertise.'").

two of the seven-lawyer settlement negotiation team he had previously chosen to lead the MDL itself, noting that at least five of them “have a conflict of interest that bars them from representing, and negotiating on behalf of, the putative class” because they represent both entities seeking to certify the class and states opposing it.<sup>324</sup> In other words, the conflict standards were lower (or nonexistent) for the MDL than they were for the class action.<sup>325</sup>

MDL plaintiffs cannot control their lawsuits or watch over their lawyers in the same way as they might in a run-of-the-mill case. True, they have contractual relationships with their “own” attorneys, but those lawyers typically represent hundreds of other clients with similar claims and see them as a case-file number, not an individual. And even those with fiercely loyal lawyers to shepherd them through the process face difficulties—unless that attorney is judicially selected for an MDL leadership role, she is relatively powerless: she cannot fire the lead lawyers even when she feels they are not acting in her clients’ best interests and she regains control of her clients’ suits only in the unlikely event of remand.<sup>326</sup>

MDL leadership selection is typically hashed out informally behind closed doors in a process that one lawyer described as “a scene out of an old mafia movie.”<sup>327</sup> In *Opiates*, for example, a mere two weeks after the JPML centralized the proceeding, attorneys for nearly all of the 206 then-docketed cases appeared at a “caucus” in Cleveland, Ohio, and unanimously adopted a leadership slate by voice vote, which Judge Polster considered two days later.<sup>328</sup>

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<sup>324</sup> Order Appointing Interim Class Counsel at 2, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Aug. 19, 2019), ECF No. 2490.

<sup>325</sup> In lieu of appointing separate counsel, to “balance . . . competing concerns” between litigating entities and non-litigating entities, Judge Polster appointed a private special master from the for-profit arbitration company JAMS to analyze “the fairness of the proposed allocation and voting schemes.” Order Directing Special Master Yanni to Assess Fairness of Allocation and Voting Proposals to Non-Litigating Entities at 3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Aug. 26, 2019), ECF No. 2529; *Cathy Yanni*, JAMS, <https://www.jamsadr.com/yanni> (last visited Nov. 18, 2020).

<sup>326</sup> Often, the most she can do is complain that the leaders have violated their fiduciary obligations to the whole group—a perilous allegation that lacks developed legal support and risks alienating her from the lawyers as well as the judge who handpicked them. *See, e.g.*, Opinion and Order Regarding the Cooper Plaintiffs’ Motions to Remove Lead Counsel and for Reconsideration of the Order Establishing the Qualified Settlement Fund, and the Hilliard and Henry Firms’ Motion for a Protective Order at 13–14, 34, *In re General Motors LLC Ignition Switch Litig.*, No. 14-md-02543 (S.D.N.Y. Apr. 12, 2016), ECF No. 2763 (admonishing movants and other attorneys for “litigating their grievances with one another” instead of focusing on the case and denying the motion to remove lead counsel).

<sup>327</sup> BURCH, *supra* note 22, at 72 (quoting attorney Lance Cooper).

<sup>328</sup> *See* Plaintiffs’ Renewed Motion to Approve Co-Leads, Co-Liaisons, and Plaintiffs’ Executive Committee at 1–3, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D.

As research from the Federal Judicial Center has shown, it is the MDL insiders who appear first in MDLs—quickly selecting leaders thus gives repeat players a leg up over those filing later.<sup>329</sup> But the variety of new players representing diverse interests in *Opiates* prompted objectors to surface nonetheless.<sup>330</sup> In response, Judge Polster expanded the leadership team to include two of the objecting attorneys but did not conduct a competitive selection process that was open to all.<sup>331</sup> When Judge Polster approved the leadership slate there were 206 cases before him. Two years later, there were 2,882.<sup>332</sup> Attorneys in these later-filed cases also sought a seat at the leadership table but were not as successful.<sup>333</sup>

*Opiates* has exposed routine conflict-of-interest issues that lurk within nearly all MDLs, but they came to the surface here largely because powerful outsiders were present and willing to cause a public ruckus.

Adequate representation must be a factor in counsel selection or, in our view, serious constitutional concerns arise from the MDL's ability to achieve its own goals of settlement. If lead attorneys' actions result in the dismissal of a plaintiff's claim or affect her case's value, adequate representation normally demands that someone at the decisionmaking table first present the most compelling case for her (or someone like her).<sup>334</sup> If blending claims or plaintiffs together creates a

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Ohio Jan. 3, 2018), ECF No. 34 (describing this procedural history). Only one hundred law firms were represented, however. *Id.* at app. A.

<sup>329</sup> Margaret S. Williams, Emery G. Lee III & Catherine R. Borden, *Repeat Players in Federal Multidistrict Litigation*, 5 J. TORT L. 141, 166–67 (2012).

<sup>330</sup> See Objection and Opposition to Plaintiffs' Motion to Approve Co-Leads, Co-Liaisons, and Plaintiffs' Executive Committee at 7–8, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 21, 2017), ECF No. 18 (arguing that the procedure for selecting the leaders was neither transparent nor fair).

<sup>331</sup> *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Dec. 21, 2017), ECF No. 22 (order directing Plaintiffs to submit another proposed leadership slate); *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio Jan. 4, 2018), ECF No. 37 (order approving the revised leadership slate).

<sup>332</sup> Docket, *In re Nat'l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio).

<sup>333</sup> The Native American tribes received their own track. See *supra* note 130. After Judge Polster denied lawyers for the NAS babies a lead position, they took the extraordinary step of requesting that the JPML sweep them out of that MDL and create an entirely new MDL solely for those cases. Memorandum in Support of Motion to Vacate CTO-47 at 1, *In re Nat'l Prescription Opiate Litig.*, MDL No. 2804 (J.P.M.L. Aug. 30, 2018), ECF No. 2398-1 (“[T]he NAS Baby Classes have been denied any voice or participation in the on-going MDL.”). The JPML denied the request, noting in the hearing that “you had your shot before Judge Polster” and “[t]here is no authority for the due process argument.” Transcript of Oral Argument at 6, 11, *In re Infants Born Opioid-Dependent Prods. Liab. Litig.*, MDL No. 2872 (J.P.M.L. Dec. 14, 2018), ECF No. 52.

<sup>334</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (explaining that adequate representation requires separate counsel for adverse subclasses); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011) (emphasizing

risk that those selected will favor one plaintiff group over another, then each group deserves its own representative.<sup>335</sup> It was, after all, a direct attack by asbestos plaintiffs (in a flood of individual lawsuits no less) that derailed the *Amchem* settlement before the U.S. Supreme Court.<sup>336</sup> As Richard Nagareda explained of *Amchem*, “[a] good deal, in itself, cannot make for a permissible class . . . because the permissibility of the class is what legitimizes the dealmaking power of class counsel in the first place.”<sup>337</sup>

The negotiation class in *Opiates* did not even contain any subclasses;<sup>338</sup> the MDL resists decentralization there, too. Assuming that all class members were alike, class counsel noted: “[S]ubclasses are routinely suggested as a solution to a problem, intra-class conflict, that does not exist here.”<sup>339</sup> Class counsel also concluded that voting gives “[e]ach type of Class member . . . [a] direct voice and choice in the process because each has a vote, and that vote is placed in multiple pools that objectively correspond with its legitimate interests.”<sup>340</sup> Despite counsel’s argument that voting would “increase ‘individual control and involvement’ by engaging class members,” the Sixth Circuit disagreed, concluding that it would “do the opposite . . . by requiring class action participants to commit to the negotiation class without knowing the issue parameters or the amount or prospect of any potential recovery.”<sup>341</sup>

We have doubts that voting can replace adequate representation. One need look only to section 524(g) of the Bankruptcy Code—the negotiation class’ intellectual predecessor—to see why. Similar voting structures in bankruptcy have been gerrymandered to favor one set of interests over another, including by some of the very same leaders who now control *Opiates*.<sup>342</sup> The force of centralization is too strong.

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that subclassing and separate representation are necessary to ensure adequate representation).

<sup>335</sup> *Amchem*, 521 U.S. at 627; PRINCIPLES OF THE L. OF AGGREGATE LITIG. § 2.07(a)(1)(B) (AM. LAW INST. 2010); Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1677–1701 (2008).

<sup>336</sup> *Amchem*, 521 U.S. at 605–08.

<sup>337</sup> Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 183 (2003).

<sup>338</sup> *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. 532, 554 (N.D. Ohio 2019), *rev’d*, 976 F.3d 664 (6th Cir. 2020).

<sup>339</sup> Plaintiffs’ Memorandum in Support of Renewed and Amended Motion for Certification of Rule 23(b)(3) Cities/Counties Negotiation Class at 70, *In re Nat’l Prescription Opiate Litig.*, No. 17-md-02804 (N.D. Ohio July 9, 2019), ECF No. 1820-1.

<sup>340</sup> *Id.*

<sup>341</sup> *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 675 (6th Cir. 2020) (quoting *In re Nat’l Prescription Opiate Litig.*, 332 F.R.D. at 551).

<sup>342</sup> In preparing to file for bankruptcy, one asbestos debtor hired prominent asbestos plaintiffs’ attorney Joseph Rice (who is now on the *Opiates*’s leadership) to use his

Voting alone cannot repair representational rifts and ward off the collateral attacks that threaten to unravel a class settlement's preclusive effect—only faithful agency can do that.<sup>343</sup>

Even if the goal remains centralization, individuals who are de facto represented in the aggregate but without due process protections may find themselves part of a global settlement that lacks constitutional authority. Even the MDL cannot preclude without due process.

### G. Sovereignty, Authority, and Finality

Finally, jurisdiction. One of the oldest civil procedure chestnuts, *Pennoyer v. Neff*, establishes that a condition of due process is that only a sovereign with power over the party has legitimate authority to decide her case.<sup>344</sup> The Supreme Court's modern personal-jurisdiction jurisprudence retains fairly territorial conceptions of jurisdiction. As such, centralization of nationwide claims in state court is nearly impossible, except in states that plaintiffs may find least desirable—corporate defendants' home turf. The result is that most mass-tort plaintiffs will find themselves in a far-flung MDL.<sup>345</sup> The non-opt-out, often cross-country-to-a-strange-court-and-strange-lawyer venue transfer of the MDL statute keeps plaintiffs within the federal system, but still raises questions about whether every federal judge can exercise jurisdiction over cross-country plaintiffs in this way.

And then there are all of the federalism considerations that we have amply detailed. Assertions of jurisdiction over state actors over whom they have no authority undermines the MDL's legitimacy.

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credibility within the plaintiffs' bar to garner the requisite seventy-five percent vote. To do so, he essentially created two separate trusts to gerrymander the voting pool, meaning that the vote came at the expense of people with serious injuries and future claimants. RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 168–73 (2007). The Third Circuit struck down that voting structure, citing concerns about similar structural conflicts that derailed the *Amchem* settlement. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201, 245 (3d Cir. 2004).

<sup>343</sup> *But see* Cabraser & Issacharoff, *supra* note 296, at 864 (arguing that combination class action/MDLs are more participatory than ordinary class actions because such class members actually filed individual suits and may therefore “avail themselves of social media to follow the progression of their claims,” making it “more likely that their continued participation in the suit is equivalent to assent”).

<sup>344</sup> 95 U.S. 714, 722 (1877) (“[N]o state can exercise direct jurisdiction and authority over persons or property without its territory.”).

<sup>345</sup> *See* *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773 (2017) (holding that state mass-tort plaintiffs with claims that lacked a connection to the chosen forum state could not sue there despite the volume of defendant's business in the state); *Bradt & Rave*, *supra* note 47 (arguing that, after *Bristol-Myers*, mass-tort plaintiffs will be drawn to MDL).

Justice Kennedy emphasized in *McIntyre* that jurisdiction is based on sovereignty.<sup>346</sup> A court that claims authority without sovereignty may succeed when insiders agree in the “ordinary” MDL, but it may get itself into protracted fights over the power grab when outsiders disrupt the system, as seems to be the case thus far with *Opiates*. Settlements resting on questionable sources of authority may lack legitimacy. If courts are being called on to step in for legislatures to solve national crises, the democratic legitimacy of those solutions derives at least in part from formally conferred authority.

And finally there is the question of formal preclusion—the finality that defendants in mega-cases desperately desire. Without formal jurisdictional authority, the preclusive power of MDL resolutions is precarious. Consider, for instance, an order in the *Abilify* (antipsychotic drug) MDL, which gave all non-settling plaintiffs less than a month’s notice to appear before the MDL judge—in person, alongside counsel—or face dismissal.<sup>347</sup> What precludes a plaintiff from suing again (and undermining finality) if the judge dismissed her case for failing to book a ticket to fly across the country to personally appear? Not consent. True, she is a party, but only in a formal, fictional sense: She does not control her own lawsuit in any meaningful way. Not state law from her home jurisdiction, which makes no appearance in the court’s order. And not adequate representation, which is the answer to the question in class actions.

Because of the fiction of remand, MDL’s personal jurisdiction over plaintiffs is merely an extension of the original transferor court’s jurisdiction.<sup>348</sup> With remand improbable if not impossible, MDL judges’ ability to preclude plaintiffs and promote widespread finality is constitutionally imperiled because their jurisdictional power over the plaintiffs comes into question. That in turn imperils MDL’s nationalist goals.

It is perhaps this discomfort that has prompted innovative MDL judges, like Judge Polster, to experiment with a return to the class form on their own terms. But this is a place where Congress might be able to set rules about when national jurisdiction is appropriate. Or perhaps it calls for Congress to enact more specific statutes detailing

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<sup>346</sup> *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (“[P]ersonal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.”).

<sup>347</sup> *In re Abilify (Aripiprazole) Prods. Liab. Litig.* at 2–3, No. 16-md-02734 (N.D. Fla. Oct. 1, 2019), ECF No. 1176 (“All [settlement] eligible plaintiffs, including *pro se* plaintiffs, who have elected not to participate in the settlement . . . must appear *in person*, with counsel (if any) . . . on . . . October 23, 2019 . . . . If any eligible plaintiff . . . fail[s] to appear . . . without leave of Court . . . that plaintiff’s claims will be dismissed with prejudice.”).

<sup>348</sup> See *supra* notes 46–47 and accompanying text.

special dispute resolution procedures for more exceptional crises, as it did for litigation stemming from 9/11,<sup>349</sup> but has failed to do for opioids or asbestos. After all, the Federal Rules do not confer personal or subject matter jurisdiction. And Federal Rule 16 alone cannot justify the kind of jurisdictional overreach often wrought by MDLs in the name of finality.

And yet even when the MDL fails to effectively assert power over state actors, *Opiates* shows this does not prevent centralization; it just materializes in new forms. Bankruptcy court, another federal court with enormous and underappreciated centralizing power, is potentially positioned to control not only diverse plaintiffs' claims from across the country but also from fifty states, and possibly over defendants who are not even bankrupt. Its power raises questions about the constitutionality of channeling injunctions as workarounds to our dialectical system, which even an MDL may not be able to overcome when state AGs and state courts assert federalism and refuse to cooperate.<sup>350</sup>

Bankruptcy courts lack the democratic bona fides of state courts, most of which include elected judges. Nor are they Article III federal courts. They are creatures of Congress pursuant to Article I (but subject to review by Article III courts). Even if one believes there are benefits to this kind of jurisdictional blurring, it seems clear that bankruptcy court is not the right way to launch such a massive shift in our understanding of federal-court authority.

## CONCLUSION

What does it mean to do “justice” in mega-cases that are dumped into the laps of courts? That is a deeper normative question than we can tackle in a single exposition. Justice comprises, in some part, the elements we have already laid out—authority, sovereignty, impartiality, the dignity of telling one's story, due process, transparency, and declaration of legal wrongs. Justice also arguably means redress, whether in the form of allocation of blame, structural change, or money. Whether industry change or significant compensatory rewards are more likely to come from a more decentralized system is an empirical question that has not been answered—data on substantive outcomes in class actions, MDLs, and individual suits are still limited.<sup>351</sup>

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<sup>349</sup> Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101).

<sup>350</sup> See *supra* Section III.C.

<sup>351</sup> See Nicholas M. Pace & William Rubenstein, *Shedding Light on Outcomes in Class Actions*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20

But we do know that something is out of whack. We are reminded here of Chief Justice Burger's observation from a different time and a different context:

The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.<sup>352</sup>

It's time to pause and really see what the MDL revolution has wrought. We have the disruptions caused by *Opiates* and its constellation of players to thank for that.

Rule 1's ideal of "the just, speedy, and inexpensive determination of every action and proceeding" is just that: an ideal. The internal contradiction itself may actually convey a preference for balance and perhaps even less transsubstantivity than the Rules by their very existence appear to mandate. Mega-cases may need to be more managed and more efficient than smaller ones, but that does not mean that other core procedural values should be excluded.

The choices need not be exclusive. In other areas of law, courts utilize strong resistance norms in the face of constitutional concerns, such as the interpretive presumptions that courts use to construe statutes that burden federalism. Those norms create higher thresholds of necessity before traditional regimes are displaced.<sup>353</sup> Similar resistance norms might create higher hurdles for efficiency workarounds to the federal rule when those workarounds conflict with other procedural values, whether those values are transparency, federalism, representation, or anything else.

We sound critical but we do not mean to be. Judge Polster was given an impossible and unenviable task—to resolve an ongoing national crisis that fifty state legislatures and the federal government have not successfully addressed. Maybe the problem is seeing that as the court's task in the first place. A process devoted to information production, truth seeking, and allocation of blame would be costly and tedious. But it could produce more information for the legislative

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(Joseph W. Doherty et al. eds., 2012) ("The lack of transparency concerning class action distribution rates is troubling because so many fundamental issues turn on what is contained in the missing data . . .").

<sup>352</sup> United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 127 (1973).

<sup>353</sup> See WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 532–52 (2014) (examining these federalism canons); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 546–47 (1988) (discussing the notion of a "presumptive formalism").

branches to do their work. And maybe it would encourage a more just settlement.

Let's start our rethinking with the MDL Paradox. How can we better give effect to the individual and state rights on which procedure is based while still allowing MDL to fill important gaps? More pretrial motion practice, interlocutory appeals, episodic remands, attentiveness to representation issues in attorney selection, and respecting jurisdictional boundaries and substantive law differences are all potential beginnings and fruit we can reach now. Although MDL insiders will surely resist because each change may add costs, each change also resurrects core countervailing procedural values that cannot be so easily dismissed.

We realize that MDL certainly is not the only one instantiation of pressures on the system. Others have written about class actions in much the same vein, and the drive to efficient settlement is a ubiquitous feature of our modern system. But MDL is the most prominent example—and the most ruleless.

Robert Cover wrote that the American system of multiple layers of courts and voices was too disorderly to have endured solely by virtue of path dependence. “It seems unfashionable,” he explained, “to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict.”<sup>354</sup> But, for Cover, the benefits of jurisdictional redundancy were worth the mess. On the other side, Kenneth Feinberg, one of the nation's most experienced MDL special masters, has written that Owen Fiss's anti-settlement argument is laudably “aspirational” but actually impractical given the problems courts are asked to solve today and the inefficiencies of litigation. Instead, Feinberg claims the best hope is “the proactive trial judge who is going to try single-handedly to vindicate [Fiss's] theses,” keeping procedure's core values in mind as he pushes toward centralization, control, and finality.<sup>355</sup>

Somewhere in between is the right balance and the direction in which MDL should bend.

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<sup>354</sup> Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981).

<sup>355</sup> Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 FORDHAM L. REV. 1171, 1176 (2009).