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AGGREGATE LITIGATION IN STATE COURTS: PRESERVING VITAL MECHANISMS

RETHINKING MULTIJURISDICTIONAL COORDINATION OF COMPLEX MASS TORTS

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"Coordination between state and federal judges with parallel cases is hardly a new topic. Indeed, given the thoroughness of the treatment the subject has received … one might reasonably ask what new statements could possibly be made on the subject…"
—Federal Judicial Center (2011)[1]

INTRODUCTION

We are in the midst of a transformative shift in civil litigation, as the number of factually-related cases consolidated by the Joint Panel of Multidistrict Litigation ("JPML") for transfer to a single, federal judge pursuant to the multidistrict litigation statute ("MDL") has rapidly risen in recent years.[2] In 1999, MDLs represented only 11% of the federal civil docket; today, these consolidated cases comprise nearly 40% of the federal civil caseload.[3] Not only has the overall number of MDLs risen, but so too have the claims themselves become more concentrated in specific areas—particularly pharmaceutical and other products liability cases, environmental

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[1] Emery G. Lee, Federal Judicial Center Survey of Federal Transferee Judges in MDL Proceedings Regarding Coordination with Parallel State Proceedings Report to the Judicial Panel on Multidistrict Litigation and the Judicial Conference Committee on Federal-State Jurisdiction (2011) [hereinafter, Lee, *Survey of MDL Judges*].

[2] 42 U.S.C. §1407 (providing for the transfer of civil actions that are pending in different districts to "a single district for coordinated or consolidated pretrial proceedings" if the cases involve one or more common questions of fact). *See also* Amanda Bronstad, *Products Liability Cases Driving Growth in MDLs*, LAW.COM, Oct. 4, 2018 (reporting that the number of claims consolidated through the federal multidistrict litigation statute more than tripled between 1992 and 2017).

[3] MDL STATISTICS REPORT, Jan. 15, 2019, available at https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_Type-January-15-2019.pdf.

exposure actions, and mass accident and disaster cases.[4] Of the MDLs pending in January 2019, nearly 90% were mass tort cases.[5]

But consolidation of mass tort claims before a single federal district judge[6] is only part of this dramatic shift—because, for each MDL, there are hundreds and sometimes thousands of factually-related cases filed in the state courts that are not subject to consolidation.[7] This "[m]ultiplication of cases … across the federal and state systems" has become a staple of complex litigation in the modern era.[8] As a result, a typical mass tort case "often has several courts with power over various plaintiffs," creating risks of duplication, non-uniformity, and strategic manipulation by the parties.[9]

Because there are no formal rules or procedures prescribing the means of coordinating related litigation between state and federal courts,[10] judges have looked beyond rules and doctrine for creative and innovative ways of managing these complex cases.[11] One important source is the vast secondary literature on federal-state coordination. To be sure, the question of how to best facilitate multijurisdictional coordination has been the subject of intense study by numerous scholars,[12] researchers at the Federal Judicial Center and the National Center for State Courts,[13] and judges involved in these complex matters.[14] Yet, the conclusion reached by these

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[4] MDL STANDARDS & BEST PRACTICES, DUKE LAW CENTER FOR JUDICIAL STUDIES (2014), available at https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/mdl2015/P4-B1-Chapter_4.pdf at xi [hereinafter, DUKE MDL STANDARDS].

[5] *Id.*

[6] Also known as a "transferee" judge.

[7] *See* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION: PROBLEMS IN ADVANCED CIVIL PROCEDURE 41 (2002) ("At present, the transfer power is available only at the federal level, not at the state . . . level."); DAVID F. HERR, ANN. MANUAL COMPLEX LIT. § 20.32 (4th ed.) ("The inability to coordinate federal cases and state cases in multiple states is recognized as a singular weakness in the [JPML's] authority.").

[8] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20 (2004) [hereinafter, MANUAL]. Parallel state-federal litigation is more prevalent in mass tort personal injury cases, which are generally not suitable for class certification either because individual issues of causation and damages predominate and/or state law may vary widely.

[9] Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L. J. 1339, 1347 (2014).

[10] *See, e.g.*, Dunlavey v. Takeda, 2012 WL 3715456 (W.D. La. 2012) ("Because there is no comprehensive statutory scheme defining the handling of a mass tort or MDL … judges often rely on … creative and innovative efforts in managing cases").

[11] *See, e.g.*, MANUAL, *supra* note 8 at §20.36 ("State and federal judges, faced with the lack of a comprehensive statutory scheme, have undertaken innovative efforts to coordinate parallel or related litigation so as to reduce the costs, delays, and duplication of effort that often stem from such dispersed litigation.").

[12] *See, e.g.*, William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1700-31 (1992) (discussing early federal-state coordination efforts); Francis E. McGovern, *Toward a Cooperative Strategy for Federal and State Judges in Mass Tort Litigation*, 148 U. PA. L. REV. 1867 (2000).

[13] *See, e.g.*, George E Mize & James Fletcher, *Judicial Ethical Considerations When Managing Multi-District Litigation*, National Center for State Courts (2012), available at https://www.ncsc.org/Services-and-Experts/~/media/Files/PDF/Services%20and%20Experts/Government%20Relations/Judicial-Ethics-Comparative-Analyses-1.ashx.

[14] *See, e.g.*, Schwarzer, *supra* note 12 (case studies of complex MDLs by member of the JPML working in conjunction with FJC); Sam C. Pointer, Jr., *Reflections by a Federal Judge: A Comment on Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute*, 73 TEX. L. REV. 1569, 1571 (1995) (discussing state judges taking primary responsibility for portions of common discovery and other aspects of the silicone gel breast implant

knowledgeable observers seems fairly obvious: judges and lawyers in both court systems should communicate and coordinate as much and as early as possible. These sources also suggest methods for doing so—but again, all fairly obvious: "making arrangements between counsel, communications between judges, joint pretrial conferences and hearings at which all involved judges participate, and parallel orders."[15] Part I of this essay describes the conventional advice given to state and federal judges faced with the behemoth task of coordinating complex mass torts.

But it should give us pause that the coordination of complex mass tort litigation across federal and state court systems relies upon such vagaries as "making arrangements" or "encouraging communication." Or that efficient management of claims involving "tens of thousands of plaintiffs with billions of dollars in liability claims" is dependent on the ability or willingness of judges and lawyers across disparate legal systems to work together.[16] Too much rests on too little, and without clear rules governing these interactions, much can go wrong.

Indeed, in recent years, much has gone wrong and multijurisdictional coordination has not worked very smoothly or efficiently. Some argue that jurisdictional conflicts are sowed when state court lawyers take strategic advantage of coordination efforts by trying individual cases to judgment before the federal MDL can even get underway.[17] In this way, local lawyers avoid the yawning vortex of federal consolidation and retain control over the settlement values of their portfolio of cases. Others argue that the coordination problems lie with lawyers who handle numerous class actions, who are frequently appointed to lead counsel positions, in blockbuster, mass tort MDLs and who have a major hand in designing settlements. There are a host of procedural and ethical hurdles to effective coordination of mass tort claims across state and federal courts. Part II outlines these problems in an era of rising interjurisdictional litigation complexity.

So, despite the Federal Judicial Center's observation reprinted in the epigraph of this essay, I think there are "new statements … [to] be made on the subject" of coordination. Specifically, building on my prior work in this area,[18] I propose a different approach to multijurisdictional cooperation in the service of complex mass tort litigation—one that makes greater use of "issue" classes as provided in both Federal Rule of Civil Procedure Rule 23(c)(4) and numerous state procedural rules.[19] Issue classes provide a mechanism for collectively resolving core elements of

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MDL process); Sandra Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 TEX. L. REV. 1573, 1573 (1995).

[15] Barbara J. Rothstein & Catherine R. Borden, Fed. Judicial Ctr. & Judicial Panel on Multidistrict Litigation, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges* (2011) [hereinafter, Rothstein & Borden, *Pocket Guide*], available at http://www.jpml.uscourts.gov/managing_MDL_PL_Pocket_Guide.pdf.

[16] Geoffrey Miller & Charles Silver, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

[17] Rothstein & Borden, *Pocket Guide*, *supra* note 15 at 24 (warning judges to "[w]atch out for strategic maneuvering by both parties," but to be especially wary of that "plaintiffs [] seek[ing]early trial dates in jurisdictions with favorable discovery rules"). *See also* Lee, *supra* note 1, at 2 (reporting that federal judges surveyed suspect that parties may try to use state proceedings to strategic advantage).

[18] Myriam Gilles & Gary Friedman, *Rediscovering the Issue Class in Mass Tort MDLs* (forthcoming in U. GA. L. REV. 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3348129.

[19] F.R.C.P. RULE 23(c)(4) ("when appropriate, an action may be brought or maintained as a class action with respect to particular issues"). The vast majority of states have adopted procedural rules providing for class actions,

the tort that underlies all claims within an MDL and parallel state litigation, and in this way, can maximize efficiency and avoid jurisdictional conflicts.

On the proposal outlined here, a court with mass tort cases on its docket would certify a (c)(4) class on issues common to all or most of these claims—and hold a trial solely on those issues.[20] The result of this trial would be a set of preclusive findings that plaintiffs, if successful, could use in subsequent litigation over individual issues, such as reliance or damages, without having to re-prove liability. This approach promotes efficiency and cooperation in at least two ways: first, issue classes provide a cost-effective means of pooling resources and amassing expertise in order to litigate the core issues of liability, which are often the most expensive, expert-driven and contentious issues in a mass tort case; and second, once adjudicated through the (c)(4) mechanism, these issues are accorded preclusive effect, enabling individual litigants to quickly resolve personal damages claims in their home court.

Additionally, the issue class approach puts the state court judge in the driver's seat because she can make clear to her federal counterpart that—if an issue class is *not* certified in the MDL proceeding—she will proceed to either try the related cases on her docket individually or certify an issue class pursuant to state rules. Either possibility should inspire some trepidation in the MDL court, as outcomes of prior state trials in related actions can have outsized res judicata effects on consolidated federal cases. Witness the many cases in which MDL lawyers have requested that a transferee court stay or enjoin parallel state proceedings for fear that decisional state law could upset global resolution of complex mass torts.[21] Accordingly, the issue class approach offers state courts a way to take charge of intercourt coordination in ways that enable complex mass torts to resolve more quickly and efficiently.[22] Part III provides greater detail on the issue class approach to resolving common questions.

The approach outlined here is very much a judge-created, ad-hoc, and voluntary procedure—but in this way, it differs little from the current and conventional wisdom that judges should simply "find ways" to coordinate complex litigation. The significant difference is that the

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including issue classes. Thomas D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes*, 35 W. ST. U. L. REV. 147, 148 (2007) (observing that most states' procedural rules track FRCP 23, and other states (such as California) explicitly draw on "Rule 23 case law even when state language does not closely parallel the federal text").

[20] While an issue class may be certified in either the federal or state court for the coordination procedure proposed here to be effective, for ease of reference, this essay assumes that the issue class will be certified pursuant to Federal Rules of Civil Procedure 23(c)(4). *See generally infra* Part III.

[21] *See, e.g.*, In re GM Pickup Truck Fuel Tank Prods. Liab. Litig.,No. MDL 961, 1996 WL 683785 (E.D. Pa., Nov. 25, 1996) (observing that exceptions to the Anti-Injunction Act been developed in MDL cases where "pending state action threatens to frustrate the federal court's ability to finalize and craft a settlement, or jeopardizes an existing provisional settlement"); In re Diet Drugs Products Liability Litigation, 282 F.3d 220 (3rd Cir. 2002) (affirming issuance of an injunction by the federal trial court against the commencement of parallel state court actions); In re Vioxx Prods. Liab. Litig., 869 F. Supp. 2d 719 (E.D. La. 2012) (finding that, upon the conclusion of MDL or complex class litigation, the "settlement-in-progress" demands that the court exercise exclusive jurisdiction); In re MI Windows and Doors, Inc., Prod. Liab. Litig., 860 F.3d 218 (4th Cir. 2017) (Anti-Injunction Act does not prohibit a federal court from enjoining state court litigation).

[22] In an important article, Professor Burch recognized the capacity of the issue class to streamline aggregate litigation. Elizabeth Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1857 (2015) (observing that "issue classes are now experiencing a renaissance").

issue class approach gives meaningful and durable preclusive effect to core issue determinations, which will save downstream courts and parties the time and money of reproving these essential elements. Still, much lies in the particulars of the issue class model—and this essay hopes to spark discussion and deliberation among judges and lawyers involved in complex mass torts on precisely those details.

I. CONVENTIONAL APPROACHES TO MULTIJURISDICTIONAL COORDINATION

Federal and state judges faced with thousands of mass tort filings understand well that these cases "present an awesome managerial task."[23] Judges also generally recognize that, by working together, "they can jointly develop strategies to manage the litigation and [] reinforce each other's strategies."[24] Those strategies have typically involved active communication between judges and lawyers in both court systems, shared case management, and joint proceedings.

A. Communication

The most common federal-state coordination approach has been, quite simply, for transferee and state judges to talk with one another about the parallel litigations on their dockets. The Manual for Complex Litigation, for example, recommends that MDL judges "communicate personally with state court judges who have a significant number of cases in order to discuss mutual concerns and suggestions."[25] The "Pocket Guide for Transferee Judges" urges federal judges to "reach out to your state court colleagues from the outset and forge constructive working relationships with them."[26] The "Resource Book for State Trial Court Judges" also advises judges to "contact the [transferee] judge to advise him or her that you are handling some of these cases and to learn what coordination is underway and possible."[27] Other sources similarly stress the importance of early and on-going judicial communication,[28] and more recent guidance promotes

[23] Schwarzer, *supra* note 12, at 1706. *See also* Vincent v. Hughes Air W., Inc., 557 F.2d 759, 773-75 (9th Cir. 1977) ("With this advent of complex multiparty litigation have come serious administrative problems, and the federal courts have found it necessary to develop innovative procedures to meet the problems.").

[24] *Id*.

[25] MANUAL, *supra* note 8, at §20.312. *See also* In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75 (D. Mass. 2005).

[26] Rothstein & Borden, *supra* note 15.

[27] MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, § 3.4 at 30 (1995) [hereinafter, RESOURCE BOOK FOR STATE TRIAL COURT JUDGES]; *see also id.* at 31 (advising state judges that "[i]f the federal cases already have been assigned to a coordinating judge, whether or not he or she is in your jurisdiction, you should contact the judge to advise him or her that you are handling some of these cases and to learn what coordination is underway and possible")

[28] DUKE MDL STANDARDS, *supra* note 4, at 93 ("If state court actions are pending in many districts or states, communication among judges is a concrete way to demonstrate the reality of federal-state coordination and inter-judicial collegiality."); *id*. (observing that "some transferee judges have set up periodic teleconferences in which all the parallel court judges participate"); Schwarzer, *supra* note 12, at 1734 ("As a general rule, contact at the earliest possible time is desirable," keeping in mind that "the most extensive cooperation has been achieved primarily during discovery and other early stages of litigation").

technology—in particular, setting up an MDL website to centralize and make accessible case management orders and other rulings[29]—as a means of facilitating these interactions.[30]

It appears the majority of MDL judges have followed this conventional advice: the Federal Judicial Center's 2011 survey of 204 transferee judges reported that 60% communicated "directly or indirectly with state court counterparts," and in products liability and mass tort MDLs, the number rose to 80%.[31] In these early communications, surveyed judges reported that they raised the issues most likely to generate conflict and duplication, such as "scheduling dispositive motions," "establishing a common document depository," creating "a website to communicate orders," and "scheduling trial dates."[32] A similar survey of state judges conducted by the National Center for State Courts reported that 52% of respondents had communicated with their federal counterparts on these matters.[33]

The centrality of active communication as the first coordinative step can also be discerned from the transfer determinations made by the JPML. While the Panel considers numerous factors in deciding where to transfer consolidated cases—such as judicial workload, expertise in managing MDLs, and the first-filed forum—it gives particular weight to the number of cases pending in a particular district.[34] But, in addition, the Panel has also tended to transfer cases to the district located *in the state* where the greatest number of parallel cases have been filed—particularly in cases where it believes that extensive and convenient state-federal coordination may prove critical.[35]

In addition to opening lines of communication between judges, secondary sources also stress the importance of information-sharing efforts by lawyers in both court systems.[36] To facilitate these interactions, transferee judges are urged to appoint state liaison counsel (or a state liaison committee) to serve as a conduit of information between the MDL proceeding and related state cases.[37] In doing so, judges are also urged to "consider appointing attorneys from states with

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[29] Rothstein & Borden, *Pocket Guide*, *supra* note 15 (urging transferee judges "to establish an MDL-specific website so that your orders and rulings are readily available").

[30] *Id.* (observing that "most MDL judges have found that having a website updated with new orders within hours is a helpful way to communicate with state judges and state parties").

[31] Lee, *Survey of MDL Judges*, *supra* note 1.

[32] *Id*.

[33] Catherine R. Borden & Emery G. Lee III, Beyond Transfer: Coordination of Complex Litigation In State and Federal Courts in the Twenty-First Century, 31 Rev. Litig. 997, 1016 (2012) (citing Nat'l Ctr. for State Courts, MDL Survey (state) (Sept. 2, 2011)).

[34] *See, e.g.*, John G. Heyburn II, *The Problem of Multidistrict Litigation: A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2228 & 2238 (2008).

[35] *See, e.g.*, In re Century 21-Re/Max Real Estate Adver. Claims Litig., No. 1008, 1994 WL 171221 (J.P.M.L. 1994); In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 128 F.R.D. 131 (J.P.M.L. 1989). *See also* David F. Herr, Ann. Manual Complex Lit. § 20.32 (4th ed.) ("If state court litigation is concentrated in a single state, the opportunity to coordinate state and federal proceedings should be a powerful force favoring that forum as a transferee district.").

[36] The Manual recommends that courts "consider the feasibility of coordination among counsel in the various cases. Consultation with other judges may bring about the designation of common committees or of counsel and joint or parallel orders governing their function and compensation." MANUAL, *supra* note 8, at §10.255.

[37] *Id.* (suggesting that transferee judges "designat[e] a liaison attorney …to communicate" across cases and "exchange pretrial orders and proposed schedules that help avoid potential conflicts"); *see also* DUKE MDL STANDARDS, *supra* note 4, at 95 (observing that "transferee judges have found that the appointment of appointed

significant numbers of cases … to facilitate communication with the state judges and MDL counsel."[38]

Guidance sources uniformly instruct liaison counsel to immediately "identify all similar cases in other courts, their stage of pretrial preparation, and the assigned judges."[39] Nearly 30% of surveyed MDL judges report making liaison appointments,[40] and some state judges have also employed liaison counsel to aid in communication.[41] In more complex MDLs, judges have also "created additional committees for specific purposes, such as conducting settlement negotiations," and, in some cases, have appointed to these committees "attorneys with state court cases who had not previously been involved in the MDL."[42]

Early and active communication between judges and lawyers, urged by every MDL guidance manual and resource, is clearly the first step in coordinating multijurisdictional mass tort cases. Yet, we know little about what is accomplished in those early discussions—i.e., how often do they result in coordinated case management orders, discovery-sharing arrangements, joint scheduling agreements, etc.? When judges cannot agree on a coordination plan, how do they proceed? Merely picking up the phone or sending an email doesn't ensure that effective state-federal coordination of mass tort claims will ensue. The real work of managing these sprawling litigations is discussed in greater detail below.

B. Shared Case Management

Coordinating expert testimony, arranging joint depositions and common document production, making arrangements for sharing electronic discovery, and appointing a common special master to oversee the multijurisdictional discovery process result from entry of a formal case management order issued by the transferee judge, often in conjunction with her state court counterparts.[43] In the *In re Bextra/Celebrex Prods. Liab. Litig.,* for example, the transferee judge

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liaison counsel is essential in most MDLs" and that "state court judges may also decide to appoint liaisons…who have cases before the state court and are actively involved in the federal MDL as well"); Rothstein & Borden, *Pocket Guide*, *supra* note 15 ("If you appoint a state liaison committee as part of the attorney organizational structure, seek state judges' input on its membership. This early opportunity to work with state judges can set a tone of cooperation for the duration of the litigation.").

[38] Rothstein & Borden, *Pocket Guide*, *supra* note 15.

[39] *Id.; see also* Responsibilities of Plaintiffs' State Liaison Committee (2012), available at https://multijurisdictionlitigation.files.wordpress.com/2012/11/responsibilities-of-plaintiffs-state-liaison.pdf.

[40] *See, e.g.*, In re Avandia Mktg., Sales, Practices & Prods. Liab. Litig., MDL No. 07-1871, Pretrial Order No. 59 (E.D. Pa. May 21, 2009) (appointing state liaison counsel), available at http://www.paed.uscourts.gov/documents/MDL/MDL1871/PTO59.pdf; In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708 (DWF/AJB), 2008 WL 5382338 at *28 (D. Minn. 2008), vacated in part on other grounds, 2010 WL 145278 (D. Minn. 2010) (describing work of state liaison counsel).

[41] *See, e.g.*, In re N.Y. ReNu with MoistureLoc Prod. Liab. Litig., No. 07/766,000, CMO No. 2, at 8-9 (N.Y. Sup. Ct. 2007), available at http://decisions.courts.state.ny.us/fcas/FCAS_docs/2007MAR/3007660002007801SCIV.pdf.

[42] Miller & Silver, *supra* note 16, at 118.

[43] *See, e.g.*, Solis v. Lincoln Elec. Co., No. 1:04-CV-17363, 2006 WL 266530, at *1 (N.D. Ohio Feb. 1, 2006) ("After substantial discussion with the parties, the Court entered an initial Case Management Order … which addressed issues such as attorney organization, pleading and filing issues, discovery, and so on."); *see also* Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 625–27 (2006) (discussing strategies MDL courts use to coordinate and manage discovery).

ordered coordinated federal-state discovery, and he and his state court counterpart appointed the same special master to oversee these procedures across both court systems.[44] So too in *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, where the federal and state judge entered joint orders providing for coordinated discovery in the MDL and California state court proceedings.[45] A similar protocol was adopted in *In re Yaz Prods. Liab. Litig.*, where the MDL judge "coordinated with state court judges in California, New Jersey, and Pennsylvania in implementing a detailed deposition protocol covering the use and admissibility of depositions."[46]

In other cases, it seems apparent that federal and state judges decided that discovery should proceed on separate tracks, but nonetheless issue "coordinated rulings on discovery disputes" applicable across all cases, or provide for the use of common experts in both courts.[47] In the *In re PPA Prods. Liab. Litig.*, for example, the federal judge ordered that lawyers in both the MDL and state cases "cross-notice the deposition of an[y] expert … [who] had been designated in both proceedings."[48] The order specified that this was done in the spirit of encouraging "voluntary state-federal coordination."[49]

Occasionally, formal coordination appears completely absent. In these cases, transferee judges may simply invite attorneys with state claims "to share in taking expert depositions," or allow these attorneys "additional examination time on case-specific issues."[50] Judges may also maintain websites populated with master pleadings, written decisions, case management orders, discovery depositories, and other resources. While different degrees of coordination may be warranted depending on the nature of the underlying claims, it is hard to imagine a complex mass tort that would not be rendered more efficient by broader agreement on core issues.

C. Joint Proceedings

Less common coordinative efforts include joint pretrial hearings—with multiple judges physically present on the bench or participating via video-conference.[51] When feasible, joint proceedings "can facilitate prompt and uniform resolution" of disputes, "saving attorney, witness,

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[44] Both the state and federal court appointed an ex-judge, Fern Smith, to serve as Special Master. *See* In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699 (N.D. Ca. 2006); In re N.Y. Bextra & Celebrex Prod. Liab. Litig., No. 05-560001, CMO No. 5 (N.Y. Sup. Ct. Apr. 21, 2006), available at https://www.nycourts.gov/courts/1jd/supctmanh/Mass%20Tort%20PDFs/Bextra%20CMO%205.pdf; *see also id.*, n.32 (reporting that in the Yaz MDL, Judge Herndon "coordinated with state-court judges in California, New Jersey and Pennsylvania in implementing a detailed deposition protocol covering the use and admissibility of depositions) (internal citations omitted).

[45] In re: Phenylpropanolamine (PPA) Prods. Liab. Litig., MDL No. 1407, C02-423R, 2002 WL 34418423 (W.D. Wash. Nov. 27, 2002).

[46] Rothstein & Borden, *Pocket Guide*, *supra* note 15, at 25.

[47] *Id.* (these rulings might, for example, resolve "the assertion of privilege" or concern "the preservation of evidence or the examination of evidence by experts").

[48] *Id.*

[49] *Id.* (*citing* Case Management Order #12 Regarding Expert Deposition Discovery).

[50] *Id.*

[51] *See* Lee, *Survey of MDL Judges*, *supra* note 1, at 2 (reporting that, of the 53 federal MDL transferee judges who had communicated with the judges presiding over parallel state proceedings, only 13% reported holding joint hearings").

and judicial time."[52] In the *In re PPA* litigation, for example, the MDL judge "invited state court judges with PPA cases to preside over the hearings alongside the MDL judge," and videotaped the proceedings "to allow state judges unable to participate to use them."[53] Ultimately, eleven judges from the seven states with the greatest number of filed PPA cases participated in numerous joint hearings held in federal court.

Joint hearings appear most useful in working through discovery-related issues and vetting expert testimony, helping parties avoid the duplicative efforts that would inevitably result if these lengthy determinations were conducted separately in each court. For example, in multijurisdictional litigation that broke out after the 1994 crash of U.S. Air Flight 427,[54] federal and state judges held numerous joint hearings to determine the admissibility of a cockpit voice recorder tape.[55] Similarly, in *In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.,* state and federal judges conducted a "joint *Daubert/Frye* hearing" to assess the admissibility of expert evidence on causation and reliance.[56] Another example is *In re Bausch & Lomb Contact Lens Solution Prods. Liab. Litig.,* where MDL Judge Norton conducted a joint hearing with numerous state court judges co-presiding over issues of expert proof.[57] And in the *In re Diet Drugs Prod. Liab. Litig.*, MDL Judge Bechtle and a network of eleven state court judges did all of the above: held joint state/federal hearings, coordinated discovery, and hammered out a settlement that included all parties—including those represented in the state cases.[58]

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Taken together, voluntary communication, case management and joint proceedings comprise the most common coordinative methods used by state and federal judges to organize and manage masses of parallel litigation. Yet these conventional approaches have—at times proven insufficient to the increasingly complex task of managing mass tort claims. The problems and perils of relying on these methods is discussed in the next Part.

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[52] Jane Roth, *Coordination of Litigation in State and Federal Courts*, 2 BUS. & COM. LITIG. FED. CTS. § 15:28 (4th ed. 2018).

[53] Rothstein & Borden, *Pocket Guide, supra* note 15.

[54] In re Air Crash Near Pittsburgh on Sept. 8, 1994, MDL No. 1040 (W.D. Pa. 1994). Numerous wrongful death actions were also filed in state court. *See, e.g.*, McCoy v. USAir, Inc., No. 94L11726 (Ill. Cook Cnty. Dec. 23, 1997).

[55] *See* Laura E. Ellsworth et al., *Federal and State Court Coordination*, 2 BUS. & COM. LITIG. FED. CTS. § 14:40 (4th ed. 2018); *see also* In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig., 816 F. Supp. 2d 442 (W.D. Ky. 2009) (joint state-federal proceedings to determine scope of expert evidence).

[56] *See* In re Neurontin Mktg., Sales Practices, & Prods. Liab. Litig., 612 F. Supp. 2d 116, 124 (D. Mass. 2009) (assessing a *Daubert* challenge to expert testimony on general causation); In re Neurontin Prod. Liab. Litig., 24 Misc. 3d 1215 (2009) (joint *Daubert-Frye* hearing for 288 cases in state litigation and 244 cases in a federal products liability MDL). For a discussion of coordination issues that arise when jurisdictions have adopted different standards for admissibility of evidence, *see infra* text accompanying notes 70-72.

[57] *Id.*

[58] In re Diet Drugs, No. 1203, 1999 WL 124414, at *1 (E.D. Pa. Feb. 10, 1999). *See* Elizabeth Cabraser, The *Diet Drugs* Litigation: 1997-2002, 1 Litigating Tort Cases § 9:63 (describing the "thousands of fen-phen suits filed in state courts . . . notably in Pennsylvania, New York, New Jersey, and California," which resulted in "a network of coordinated proceedings" taking place "concurrently in the federal and state courts, [t]hrough formal sharing agreements" and joint efforts).

II. LIMITS ON CONVENTIONAL FORMS OF MULTIJURISDICTIONAL COORDINATION

Coordination of sprawling mass tort cases across state and federal systems has remained difficult and uncrtain for a number of reasons. This lack of predictability has created numerous problems for the judges who helm these cases, the lawyers who litigate them, and the parties whose rights and obligations are at stake. And given that MDLs currently account for nearly 40% of the entire federal civil caseload—along with thousands or tens of thousands of related state court cases—these multijurisdictional coordination problems are significant. This Part describes various procedural, substantive and structural obstacles to intercourt coordination.

A. Procedural and Substantive Hurdles at the State Level

Setting aside persistent concerns with the resources available to state courts, there are a host of procedural issues that make coordination more difficult and less effective than it need be. For instance, multijurisdictional coordination is easily thwarted where states lack procedures for consolidating related cases within their own borders—a problem that exponentially increases the difficulty of identifying and coordinating across a multitude of individual state cases in different counties. Indeed, while some states have adopted intrastate consolidation procedures that closely resemble the federal MDL statute[59]—California's Judicial Counsel Coordination Proceeding and Texas's Multi-District Litigation Panel are two examples[60]—only New York and New Jersey instruct their courts on how to coordinate with related federal litigation.[61] And the majority of states have no formal rules providing for intrastate coordination.

State court judges and administrators are increasingly aware that factually-related claims scattered across multiple counties raise both legal and resource-related concerns, and some have tried to "establish[] coordinated litigation proceedings notwithstanding the absence of any coordinating statute."[62] The Oklahoma Supreme Court, for example, has interpreted the state Constitution to "provide[] judicial authority to consolidate cases for pre-trial matters including discovery."[63] Kentucky has similarly announced the "inherent authority" of its state courts to

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[59] At least 15 states have adopted rules providing for some form of consolidation. *See* COLO. R. CIV. P. 42.1(g); CONN. GEN. STAT. § 51-347b(a); ILL. SUP. CT. R. 384(a); MD. R. 2-327(d)(1); MASS. TRIAL CT. R. XII; N.H. SUPER. CT. R. 113; N.J. SUPER. TAX SURROGATE CT. CIV. R. 4:38-1; N.Y. C.P.L.R. §202.69; OR. R. CIV. P. 32(L)(1)(b); PA. R. C. P. 213.1; TEX. R. JUD. ADMIN. 13.10; VA. CODE ANN. § 8.01-267-267.9; W. VA. TRIAL CT. R. 26.01(c).

[60] *See generally* Amanda Bronstad, *The States Are Getting in on the MDL Action*, NAT'L L.J., Sept. 19, 2011, at 12 (describing the Multidistrict Litigation Panel in Texas and the Judicial Council in California, both of which coordinate and oversee MDLs in their respective states). California rules for intrastate coordination of complex litigation are available at https://www.courts.ca.gov/27922.htm. Rule 13 of the Texas Rules of Judicial Assignment are available at https://www.txcourts.gov/about-texas-courts/multi-district-litigation-panel/.

[61] N.Y. C.P.L.R. §202.69; New Jersey Courts, Multicounty Litigant (Non-Asbestos) Resource Book at 14-15 (available at https://www.njcourts.gov/attorneys/assets/mcl/nonasbestosmanual.pdf?c=mdk).

[62] Joseph J. Ortego et al., *Coordination of Mass Tort Proceedings*, 19 No. 2 PRAC. LITIGATOR 9, 12 (2008).

[63] *Id*. (citing In re Okla. Breast Implant Cases, 847 P.2d 772 (Okla. 1993)).

manage their dockets as necessary, including by consolidating like cases.[64] Other states rely on informal practices among judges to coordinate factually-related claims. But in the absence of predictable intrastate coordination of related cases, it may be too difficult for transferee judges or liaison counsel to communicate effectively with all their state counterparts.[65]

Another potential wrench in the works is state judicial assignment practices.[66] While the majority of states assign cases to a single judge for all purposes, in some states, or in some counties, different judges may be assigned for pretrial and trial purposes. For example, some counties in New York state provide for "the assignment of one judge until trial and a different judge for the trial itself."[67] This also occurs in small counties in California, where "pretrial matters must often be handled by judges filling in for absent judges,"[68] as well as in Michigan and West Virginia.[69] This practice of rotating judicial assignments can doom efforts at establishing early communication between transferee and state judges with parallel claims.

Other coordination problems arise when state and federal procedural rules diverge. For example, "[u]nder the federal rules, exchanges of expert reports and expert depositions are routine, while in state court such discovery may not be permitted."[70] In New York, where "expert disclosure … is quite limited, and generally does not include depositions," this procedural divergence can disrupt efforts to coordinate across systems. Differences in substantive law can also create roadblocks: for example, a number of state courts require expert proof to meet the *Frye* standard, while federal courts follow *Daubert.*[71] Efforts to coordinate expert testimony—which is

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[64] *See, e.g.*, Ky. Farm Bureau Mut. Ins. Co. v. Wright, 136 S.W.3d 455, 458-59 (Ky. 2004) (acknowledging "that courts (even without express authority given by the constitution, statute, or rule of a supreme court of a state) have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice") (internal citations omitted).

[65] Note, coordination of counsel *within* the MDL can itself be a challenge. *See, e.g.*, In re San Juan Dupont Plaza Hotel Fire Litig., No. MDL 721, 1989 WL 168401, at *2 (D.P.R. 1988) ("It is not yet known how many lawyers will eventually join this litigation, but we can assume it will be pretty close to legion."). Dispersed intrastate claims—as well as claims scattered across states—add layers of coordinative complexity. *See* Rothstein & Borden, *Pocket Guide*, *supra* note 15, at 24 ("Coordination becomes much more complex when cases are dispersed across many states.").

[66] DUKE MDL STANDARDS, *supra* note 4, at 91; *see also id*. at 96, n.219 (observing that at least 15 states "have enacted analogues to the MDL statute").

[67] Joseph L. Marino, 3 WEST'S MCKINNEY'S FORMS CIVIL PRACTICE LAW AND RULES § 7:2 (2019) (*citing* N.Y. COMP. CODES R. & REGS. tit. 22, § 202.3(c)(6)).

[68] Housing Auth. of Monterey Cnty. v. Jones, 130 Cal. App. 4th 1029, 1035 (2005).

[69] *See, e.g.*, Totzkay v. DuBois, 140 Mich. App. 374, 380 (Mich. Ct. of App. 1985) (citing WAYNE CIR. CT. R. 6.1(b): "The judge to whom a civil case is assigned shall handle all preliminary matters until trial of the case begins. Following pretrial, if a matter comes before the judge which he believes should be decided by the trial judge, he shall refer the matter to the chief judge for disposition.").

[70] Ortego, *supra* note 62, at 13.

[71] *Id*. (Note that most state rules of evidence mirror the federal rules concerning the scope of admissible evidence, so that in many MDL/state cases, there is no divergence.). *See, e.g.*, In re Bausch & Lomb Contact Lens Solution Prod. Liab. Litig., MDL No. 1785, 2007 WL 3046682 (D.S.C. Oct. 11, 2007) (describing the convergence of state and federal rules of evidence).

often the most expensive and time-consuming aspect of a mass tort case—can be intractable in the face of these substantive deviations.[72]

B. Ethical Constraints

Where state and federal judges manage to communicate about parallel litigation, some worry that these constitute unethical, ex parte communications about active cases.[73] The ethical concern, put simply, is that "when judges work together and influence one another, or mold their rules to conform to those of another system, or decide matters jointly, litigants may lose the advantages of their chosen forum."[74] Indeed, some observers have opined that even the appearance of "state and federal judges join[ing] forces in deciding issues of substantive law" violates federal and state judicial canons that expressly demand independent and impartial decision-making.[75]

Given these ethical pitfalls, it is unsurprising that nearly forty percent of federal judges surveyed by the FJC "expressed reservations about the propriety of contacting their state counterparts about pending matters."[76] In a recent case, plaintiffs' lawyers in the *In re Actos Prods. Liab. Litig.* accused the federal transferee judge of "improper and unethical conduct … in … reaching out to explore coordination with state courts."[77] Specifically, counsel allege that MDL Judge Doherty engaged in "impermissible interference" with particular state court proceedings by contacting judges with Actos cases on their dockets to discuss coordinating these proceedings; and further, that state court judges had "engaged in misconduct by abdicating [their] role as sovereign judges."[78] In response to these allegations, Judge Doherty wrote a detailed (and, at times, highly defensive) 20-page opinion, attaching all correspondence between the MDL court and various state courts with parallel filings,[79] and citing numerous cases in which similar correspondence has been

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[72] *See* Roth, *supra* note 52 (observing that "joint *Daubert*/*Frye* hearings are common in coordinated state and federal mass tort litigation, as courts and parties recognize that it produces significant efficiencies and few, if any, conflicts").

[73] *See also* Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64 WASH. L. REV. 851, 856-58 (1989) (observing that federal judges may formally certify questions to state courts when necessary to decide an unclear point of state law, but that *ex parte* communications are barred by judicial ethics).

[74] Schwarzer, *supra* note 12, at 1744; *see also* Borden & Lee, *id*. at 1019 ("It is worth pondering whether inter-jurisdictional communications can be limited to scheduling and administrative matters – or, perhaps more precisely, whether administrative and substantive matters are so distinct."); Francis E. McGovern, *Rethinking Cooperation Among Judges in Mass Tort Litigation*, 44 UCLA L. Rev. 1851, 1869 (1997) ("In most cases, the administrative role of the judge is well defined and predictable. In mass torts, however, . . . the role of the judge has been expanding—from umpire to manager to player.").

[75] Borden & Lee, *supra* note 33, at 1020.

[76] *Id*. at 1016 (citing FJC Transferee Judge Survey Results).

[77] Dunlavey v. Takeda Pharm. Am., Inc., Nos. 6:12–CV–1162, 6:12–CV–1165,2012 WL 3715456 (W.D. La. Aug. 23, 2012).

[78] *Id*. at *5 (discussing specific allegations of impropriety made against Judge Sarah M. Singleton, a state court judge in New Mexico).

[79] *Id*. at *2 ("[T]his Court has sent correspondence to judges once known to this Court as having 'Actos' cases in his or her court, asking if he or she 'might wish to explore whether it might be of benefit to talk about the status of our respective cases and the possibility or desirability of coordinating some of our efforts in hopes of avoiding duplication of effort, costs and, perhaps, inconsistent rulings by the different courts.').

deemed perfectly acceptable.[80] Predictably, the opinion concludes that allegations of improper judicial conduct were "completely specious":

> Coordination, cooperation, discussion and interaction between and among the federal courts and the state courts is not a novel thing; it is not improper; rather, it is advised, encouraged and welcomed by both the federal and state courts. […] It is wholly without question this court does not have jurisdiction over state court cases, nor has it, nor will it, attempt to in any way, exercise improper jurisdiction over state courts and the cases within those courts. However, as the federal judge tasked with managing this behemoth litigation, history, guidance, comity and necessity have proven it is desirable for fairness to all parties and in promotion of equitable and efficient resolution, that this court reach out to the other judges who, also, have cases in their courts, in order to discuss possible coordination, mutual concerns, and suggestions, and to offer exchange of relevant orders and information.[81]

While the allegations of judicial misconduct in the *Actos* litigation appeared weak on their face – given the transferee judge had not issued any injunctions nor halted state court proceedings – concerns over the propriety of intercourt coordination efforts may explain why federal judges appear reluctant to make contact with state court colleagues.

State court judges also express concerns over off-the-record discussions with their federal colleagues about related cases—particularly substantive interactions about admissibility of evidence or the qualifications of an expert.[82] And these judges may be right to worry, as state judicial codes of ethics vary widely. Some codes allow judges to communicate about active cases, so long as they make "reasonable efforts to avoid information that is not part of the record," and do not "abrogate the responsibility personally to decide the matter."[83] Some require judges to give notice to the parties of any off-the-record communication, which can result in litigation over the propriety of the judicial contact.[84] And while the National Center for State Courts ("NCSC") has worked to dispel these concerns and reassure judges that there are few ethical barriers to judicial

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[80] *Id*. at n.13 (*citing* In re Aircrash Disaster at Fla. Everglades on Dec. 29, 1972, 549 F.2d 1006, 1009 (5th Cir.1977); In re Oh. Asbestos Litig., No. 83–OAL (N.D. Ohio June 1, 1983); In re MGM Grand Hotel Fire Litig., 570 F. Supp. 913, 917 (D. Nev.1983); In re L'Ambiance Plaza Litig., (D. Conn. & Conn. Super. Ct. Dec. 1, 1988) (Special Settlement Proceedings)).

[81] *Id*.

[82] RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, *supra* note 27.

[83] Mize & Fletcher, *supra* note 13, at iv, n.15 (citing 2007 ABA MODEL CODE OF JUD. CONDUCT R 2.9(A)(3); HAW. REV'D CODE OF JUD. CONDUCT R 2.9(A)(3); MINN. CODE OF JUD. CONDUCT R 2.9 (A)(3)).

[84] *Id*. (*citing* MASS. CODE OF JUD. CONDUCT Canon 3B(7)(c)(i) ("[A] judge shall take all reasonable steps to avoid receiving from court personnel or other judges factual information that is not part of the case record. If court personnel or another judge nevertheless bring non-record information about a case to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond.")).

cooperation in the management of parallel state-federal cases, these views have proven difficult to change.[85]

C. Common Benefit Funds and Global Settlements

Intercourt coordination is also critical to making sure that, upon successful resolution or settlement of the case, plaintiffs' lawyers are paid reasonable fees for common work done on behalf of all claimants—a task made more complicated in multijurisdictional cases with overlapping proceedings. MDL judges are encouraged to quickly appoint lead and liaison counsel to manage the behemoth litigation, and to then "set up a fund to which designated parties should contribute" to compensate these lawyers for general case work.[86] Typically, courts require parties to pay a fixed percentage of the settlement proceeds into the common fund.[87] And to ensure fee payment and prevent free-riding, some transferee judges have also required that lawyers sign fee transfer agreements at the start of litigation, legally binding them to set aside money from their share of proceeds to pay common benefit fees.[88]

These practices have been used in numerous MDLs to compensate lead and liaison counsel who rendered legal services beneficial to all MDL plaintiffs and the case as a whole.[89] But they have not been without controversy, as numerous critics object to both the creation of a common fund and the forced fee transfer imposed on non-lead lawyers.[90] Especially troubling are MDLs where lead lawyers have negotiated for "provisions in[] global settlement agreements increasing the set-asides," and requiring nonlead "lawyers and their clients to waive objections to these

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[85] *See generally* Mize & Fletcher, *supra* note 13; RESOURCE BOOK FOR STATE TRIAL COURT JUDGES, *supra* note 27 ("discussion and interaction between and among the federal courts and the state courts is not … improper").

[86] MANUAL, *supra* note 8, at § 20.312 at 202; see also Air Crash Disaster, 549 F.2d at 1011 (finding that lead lawyers who performed "duties beyond their responsibilities to their own clients" should be paid out of funds contributed by all lawyers in specified amounts).

[87] For examples of MDLs establishing a common benefit fund, *see* In re DePuy Orthopaedics, Inc., ASR Hip Implant Prods. Liab. Litig., MDL No. 2197 (N.D. Oh. 2011); In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Relevant Prods. Liab. Litig., MDL No. 2100 (S.D. Ill. 2010); In re Vioxx Prods. Liab. Litig., MDL No. 1657, (E.D. La. 2005); In re Propulsid Prods. Liab. Litig., MDL No. 1355 (E.D. La. 2001); In re Chinese-Mfd. Drywall Prods. Liab. Litig., MDL No. 2047 (E.D. La. 2009); In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, MDL No. 2179 (E.D. La. 2010).

[88] *See generally* Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 376 (2014) ("[I]n MDLs, the claimant does not pay the common benefit fee; the primary attorney who is the beneficiary of the common benefit work pays it."); *See also* In re Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. 2005); In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., No. MDL 1699 (N.D. Cal. 2006).

[89] *See* Fallon, *supra* note 88, at 379 ("Regardless of the legal basis given to explain its use, the common benefit doctrine has been consistently used and is well established as the justification for the payment of common benefit fees in MDLs."); *See also* In re Vioxx Prods. Liab. Litig., 760 F. Supp. 2d 640, 647 (E.D. La. 2010) ("Since the nineteenth century, however, the Supreme Court has recognized an equitable exception to this rule, known as the common fund or common benefit doctrine, that permits the creation of a common fund in order to pay reasonable attorneys' fees for legal services beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries."); In re Zyprexa Prods. Liab. Litig., 594 F.3d 113, 115-17 (2d Cir. 2010) (discussing district court order requiring 3% of all settlement and judgment proceeds to be deposited into a common benefit fund to compensate a committee of attorneys for its work on behalf of all MDL plaintiffs); In re Diet Drugs, 582 F.3d 524, 546-47 (3d Cir. 2009) (discussing common benefit doctrine).

[90] *See generally* Miller & Silver, *supra* note 16.

provisions as a condition for enrolling in the settlements."[91] Lead counsel in these cases, critics argue, have "used their control of settlement negotiations to make more money available for themselves."[92]

And if the general use of common benefit funds and fee-transfer agreements *within* the MDL has been widely criticized, things get *really* messy when parallel state cases are roped into these fee-allocation disputes. These issues generally arise when the parties in the MDL negotiate a "global settlement" requiring lawyers in parallel state cases to pay into the common fund "as a condition for enrolling their clients in a global settlement."[93] And despite the fact that federal MDL courts lack formal jurisdiction over related state court actions,[94] transferee judges have sometimes asserted authority to "tax" lawyers in parallel state cases. The Master Settlement Agreement in *In re Vioxx*, for example, provided that attorneys would only be eligible to share in the distribution of common benefit fees once their clients had agreed to the settlement terms and signed a release.[95] Another example, described by Professor Burch, is *In re Genetically Modified Rice Litig.*, where the transferee judge initially recognized "that she lacked jurisdiction to order state-court litigants to withhold and contribute 11% of plaintiffs' gross settlement recovery to a common fund that would compensate and reimburse lead lawyers."[96] But the judge nonetheless approved a settlement agreement that "required all enrolling claimants (whether litigating in state or federal court) to contribute that amount to the common fund."[97] These settlements raise ethical questions about the nature of consent and the duty of fair representation,[98] but for my purposes here, the point is simply that intercourt coordination is critical to avoiding these contestations over fees.

D. Federalism and Comity

A tension inherent in efforts to coordinate related mass tort litigation is the concern that federal courts may exert undue "persuasion and influence … over their state court colleagues,[99] in a manner that encroaches upon the independence of state courts to resolve the legal matters of state

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[91] Miller & Silver, *supra* note 16, at 132.

[92] *Id.* (discussing examples, such as *In re Guidant* and *In re Vioxx*).

[93] *Id.* at 141, n.122.

[94] *See, e.g.*, In re Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II, 953 F.2d 162, 165-66 (4th Cir. 1992) (stating that "a transferee court's jurisdiction in multi-district litigation is limited to cases and controversies between persons who are properly parties to the cases transferred," and that "plaintiffs in state and un-transferred federal cases" are not subject to the court's authority).

[95] In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. 2007), available at https://www.merckvioxxsecuritieslitigation.com/Content/Documents/Judgment.pdf.

[96] Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71, 81 (2015) (*citing* In re Genetically Modified Rice Litig., No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1-3 (E.D. Mo. 2010)).

[97] *Id.*

[98] *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 65, 279-92 (2011).

[99] Schwarzer, *supra* note 12, at 1702-03 (discussing a state court's decision to "track" the federal court's case management plan in asbestos litigation); *id.* at 1704-05 (same, in separate asbestos litigation); *id.* at 1743-44 (discussing the risk of federal judges exerting too much influence over state colleagues).

citizens.[100] Of course, fundamental principles of federalism and comity direct federal courts to be respectful of their state court colleagues. The Supreme Court has instructed that when a federal court reaches out to a state court, it must do so with "a proper respect for state functions, recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways.[101]

Despite these admonitions, MDL judges intent on coordination can sometimes act imperiously. One especially contentious issue arises when state court litigation gets underway far sooner than an MDL, which can sometimes take months to get organized.[102] Particularly in states with favorable discovery rules, individual tort suits may go before a state court jury long before dispositive rulings are made in the slow-moving MDL—and the outcomes in those state trials can heavily influence the dynamics within the MDL.[103] In their efforts to slow down or even halt parallel state court proceedings that are racing ahead of their MDLs, transferee judges can seem to flout principles of federalism and comity. For example, MDL judges have simply asked that state courts "chang[e] the speed with which the cases on their docket move forward."[104] Others have gone further, seeking to enjoin state court proceedings.[105] In *In re Worldcom Securities Litig.*, for example, Alabama state court plaintiffs requested a trial date long before the consolidated proceedings had even completed discovery.[106] The MDL judge in New York tried delaying the state case by issuing an injunction under the All Writs Act, preventing the Alabama judge from moving forward until the MDL had resolved, but was reversed.[107] Ultimately, the Alabama case "proceed[ed] ahead of the federal case," despite the efforts of the federal judge to slow it down.[108]

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[100] *Id.* at 1744 ("In light of federal courts' greater resources, this tendency [to control the litigation] is understandable, but judges should take care that dominance be avoided if possible.").

[101] Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100 (1981) (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)).

[102] Elizabeth Cosenza, *The Persistent Problem of Multi-forum Shareholder Litigation*, 10 VA. LAW & BUS. REV. 413, 434 (2012) ("Four or five months may elapse between the time a motion to transfer is made and when the MDL Panel issues a decision."); *see also* Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIG. 43, 43 (1998) (noting that it can takes months for a transferee judge to schedule the first status conference).

[103] This occurred in the *In re Guidant* MDL where a Texas state court set an individual case Guidant case for trial before the MDL was even organized. *See also* McGovern, *supra* note 74, at 858 ("[P]laintiffs' attorneys rush to their favorite judges and demand draconian procedures to pressure defendants to make block settlements . . . Defendants seek the opposite – delay is their nirvana.").

[104] *Id*.

[105] In the early 2000's, the Advisory Committee on the Federal Rules considered an amendment that would make it easier for federal judges to enjoin parallel state litigation. Georgine Vairo, *Trends in Federalism and What They Mean for the State Courts*, in STATE COURTS AND FEDERAL AUTHORITY: A THREAT TO JUDICIAL INDEPENDENCE? 15, n.62 (POUND FORUM REPORT, 2002); *see also* Martin Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000) (proposing a "zero tolerance" policy requiring that "in every instance the assertion of federal jurisdiction automatically precludes the continued conduct of the parallel state litigation").

[106] Ret. Sys. of Ala. v. J.P. Morgan Chase & Co., 386 F.3d 419, 421-22 (2d Cir. 2004).

[107] *Id.*; *see also* Vairo, *supra* note 105, at 11 ("Generally, the federal Anti-Injunction Act embodies Congress's intent that federal courts should not interfere with ongoing state litigation. Over the years, however, federal courts have crafted an exception, based loosely on the express exceptions of the Anti-Injunction Act and the federal All Writs Act, that is designed to help them achieve global settlements of complex litigation.").

[108] Cosenza, *supra* note 102, at 441.

Similarly, in *In re Baycol Prods. Liab. Litig.*, the transferee judge enjoined his state court counterpart from considering a pending motion for class certification; the circuit court affirmed this application of the re-litigation exception to the Anti-Injunction Act.[109] But the U.S. Supreme Court, in *Bayer v. Smith*, disagreed:

> "A federal court and a state court apply different law. That means they decide distinct questions. The federal court's resolution of one issue does not preclude the state court's determination of another. It then goes without saying that the federal court may not issue an injunction."[110]

In other cases, however, similar gambits have succeeded and motions to stay state court litigation pending the outcome of an MDL have been granted.[111] Taken together, these scenarios signal a deep-seated discomfort with the cooperative federalism model that transferee and state judges are encouraged to follow – and imply that coordinative distrust can hamper efforts to manage the hundreds of thousands of mass tort cases that weigh down state and federal dockets.

III. THE ISSUE CLASS SOLUTION

Ad hoc, voluntary approaches to federal-state coordination of complex mass torts are uneven and unpredictable: they can result in ethical dust-ups, federalism flashpoints, and attempts, by lawyers who handle numerous class actions, to manipulate courts. But, most critically, in an era of dwindling judicial resources, duplicative litigation detracts from the public good that our courts are charged with protecting. Thirty years ago, Professor Richard Freer remarked that "[c]ourts are a public resource, providing publicly financed resolution of private disputes. We pay for them, and we have a right to insist that their services not be squandered."[112] He also warned that, because "[t]he duplication of effort is a major cause of the protraction of time needed to resolve cases … multiplicity [of litigation] is a harm to society's legitimate interest in judicial efficiency."[113] Professor Freer's words still resonate today, particularly in state courts. Already underfunded, some state courts have been subject to budget cuts that directly interfere with access to justice, disabling judges from "fulfill[ing] their traditional role in maintaining societal order and public safety."[114] The search for procedural models that maximize efficiency in this era of austerity is essential to keeping state courts operational.

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[109] In re Baycol Prods. Litig., 593 F.3d 716 (8th Cir. 2010).

[110] Smith v. Bayer, 131 S. Ct. 2368, 2379 (2011).

[111] *See, e.g.*, In re Baldwin-United Corp., 770 F.2d 328 (2d Cir. 1985); In re Diet Drugs, 282 F.3d 220 (3d Cir. 2002); Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 838 (7th Cir. 1999); Caravetta v. McKesson HBOC, Inc., 846 A.2d 240, 246-47 (Del. Super. Ct. 2000); La. Seafood Mgmt. v. Foster, 46 F. Supp. 2d 533, 546 (E.D. La. 1999); Polaris Public Income Funds v. Einhorn, 625 So. 2d 128, 129-30 (Fla. Dist. Ct. App. 1993).

[112] Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809 (1989).

[113] *Id*. at 832.

[114] CRISIS IN THE COURTS, ABA TASK FORCE ON PRESERVATION OF THE JUSTICE SYSTEM (2012).

Accordingly, this essay proposes a different and more aggressive method of coordinating cases: using issue classes to achieve scale efficiencies in mass tort cases.[115] Issue classes accomplish this feat by resolving and according preclusive effect to core liability holdings in mass tort cases – issues such as "whether or not the defendant was negligent, or breached warranties, or intentionally concealed known risks, or sold a product that unreasonably elevates the risk of heart attack."[116] No other procedural device can reliably deliver binding downstream effect to core, common issues across jurisdictional boundaries.[117] And once these issues have been conclusively determined, it becomes possible to organize and streamline the litigation of masses of individual related claims.[118]

In recent years, federal courts have begun to recognize the vast potential of issue classes to resolve knotty legal questions at the heart of complex litigation, without triggering the heightened certification standards of Rule 23(b)(3). This trend started, ironically enough, with the Supreme Court's decision in *Comcast v. Behrend*—where a slim majority held that a Rule 23(b)(3) consumer class action could not be certified unless the plaintiffs' damages theory was standard across all class members.[119] But in dissent, four Justices reasoned that district courts could easily avoid these problems by certifying a Rule 23(c)(4) class on "liability" issues only, "leaving individual damages calculations to subsequent proceedings."[120] Numerous federal courts have followed the *Comcast* dissenters' reasoning, certifying (c)(4) "liability-only" classes in a range of cases.[121]

Indeed, Rule 23(c)(4) grants courts a great deal of discretion over whether to certify "particular" issues "[w]hen appropriate," and in the mass tort arena, the benefits of doing so are clear. At the heart of every mass tort are a set of core questions that are common across all cases, and "those questions are typically answered using common evidence, such as expert testimony and the defendant's own internal documents."[122] Gathering this evidence, however, is incredibly costly to any given individual plaintiff. As courts are beginning to recognize, certifying issue classes on these common questions, and then allowing individuals to pursue their damages claims

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[115] Professor Burch has made a similar point in an important article, *Constructing Issue Classes*, *supra* note 22, at 1860 (arguing that issue classes "offer a means for transferee judges to resolve common conduct questions in multidistrict litigation when plenary classes are unavailable").

[116] Gilles & Friedman, *supra* note 18.

[117] *Id*. (arguing that "[o]rdinary principles of issue preclusion, the now-common practice of bellwether trials, and the more ambitious judicial experiment with 'binding bellwethers'" all fail to reliably deliver preclusive effect).

[118] *See, e.g.*, Hayman Cash Register Co. v. Sarokin, 669 F.2d 162, n.69 (3d Cir. 1982) ("A disappointed litigant should not be given a second opportunity to litigate a matter that has been fully considered by a court of coordinate jurisdiction, absent unusual circumstances. Adherence to law of the case principles is even more important in this context.").

[119] *See, e.g.*, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013).

[120] Id. at 1437.

[121] *See, e.g.*, In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013) (observing that "[t]his case is different from *Comcast*" because the Whirlpool district court used Rule 23(c)(4) to certify a liability-only class); In re Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014) (observing that "the rule of *Comcast* is largely irrelevant '[w]here determinations on liability and damages have been bifurcated' in accordance with Rule 23(c)(4)"); Brown v. City of Detroit, No. 10–cv–12162, 2014 WL 7074259, at *3 (E.D. Mich. 2014); Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116, 142 (S.D.N.Y. 2014); Wallace v. Powell, 2013 WL 2042369, at *19 (M.D. Pa. 2013).

[122] Burch, *supra* note 22, at 1861.

independently without having to relitigate liability, is a fair and efficient approach to multijurisdictional coordination in complex mass torts.[123]

A. Using Issue Classes to Coordinate Complex Mass Torts

The basic model I propose still relies on early-stage judicial communication—as urged by all the guidance literature on intercourt coordination—but instead of simply crossing our fingers in hopes that judges will reach out and find ways to work together, the issue class approach increases the stakes of failing to do so. Specifically, I propose that judges with related tort cases on their dockets reach out to one another to discuss the feasibility and value of certifying an issue class to resolve common questions. If the judges agree on this procedure, the remaining steps are clear: the judges will determine (with input from and briefing by the parties) the specific issues to be certified, and a court will then certify a (c)(4) class on those issues, and hold a trial solely on those issues. The result will be a judgment that each plaintiff—if successful—can then take into her local trial court, entitling her to a binding declaration that certain core issues of her claim have been established as a matter of law. She is then free to focus her litigation energy on individual issues, such as reliance or damages, without having to re-litigate common questions.

However, if the judges are not in accord on the issue class approach, the state judge can either try the related cases on her docket individually, or, if she has been assigned a sufficient number of related cases, she can certify an issue class pursuant to state procedural rules and hold a trial on the common issues. Either option is likely to produce some consternation in the federal MDL proceeding, as outcomes of prior state trials in related actions may alter the dynamics within the consolidated federal cases. For example, if a state tort case goes to trial and the jury returns a defense verdict on causation grounds, this may change the defendant's settlement posture in the MDL. Indeed, in recent years, MDL lawyers have fought aggressively to stay or enjoin parallel state proceedings for fear that decisional state law could upset global resolution of complex mass torts.[124] For this reason, I expect that efforts by state courts to coordinate via the issue class will be met with great solicitude. Moreover, as courts begin to understand that issue classes enable related cases on their dockets to move more quickly and efficiently to resolution, and that uniformity across the state-federal divide on these common issues will protect (rather than detract

[123] *See* Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405 (6th Cir. 2018), *cert. denied*, 2019 WL 1231762 (U.S. Mar. 18, 2019) (district court certified seven issues pursuant to Rule 23(c)(4), leaving only injury, causation, and damages to be resolved individually; and stating its concern that without issue certification, the class members "might not otherwise be able to pursue their claims").

[124] *See, e.g.*, In re GM Pickup Truck Fuel Tank Prods. Liab. Litig., No. MDL 961, 1996 WL 683785 (E.D. Pa. 1996) (observing that exceptions to the Anti-Injunction Act been developed in MDL cases where "pending state action threatens to frustrate the federal court's ability to finalize and craft a settlement, or jeopardizes an existing provisional settlement"); In re Diet Drugs Prods. Liab. Litig., 282 F.3d 220 (3d Cir. 2002) (affirming issuance of an injunction by the federal trial court against the commencement of parallel state court actions); In re Vioxx Prods. Liab. Litig., 869 F. Supp. 2d 719 (E.D. La. 2012) (finding that, upon the conclusion of MDL or complex class litigation, the "settlement-in-progress" demands that the court exercise exclusive jurisdiction); In re MI Windows & Doors, Inc., Prod. Liab. Litig., 860 F.3d 218 (4th Cir. 2017) (finding that the Anti-Injunction Act did not prohibit a federal court from enjoining parallel state court litigation).

from) the legitimacy of these immense proceedings, I expect this procedure could easily become the norm for coordinating complex multijurisdictional litigation.

In addition, the issue class approach avoids many of the problems associated with current coordination efforts, as discussed above in Part II. For example, the issue class is unbothered by a lack of intrastate case coordination and is not stymied by varied judicial assignment rules. After all, once common issues are resolved, separate hearings to determine damages owed to individual class members can occur in any county of any state before any judge. Ethical concerns also diminish where the only communication between parallel courts is whether to certify an issue class and what issues should be resolved by a jury. And perhaps most importantly, the issue class creates powerful opportunities for state courts to spearhead coordination, rather than playing second fiddle; as such, this approach turns the federalism and comity concerns on their head. Indeed, even where the MDL court takes the lead in certifying and adjudicating the (c)(4) class, this model will not erode local control over individual cases. Rather, by reducing the costs and inefficiencies associated with duplicative litigation, and providing state courts some leverage vis-à-vis federal MDL proceedings, (c)(4) treatment of common questions promises to significantly advance thousands of individual cases.[125]

Despite these clear benefits, implementing the issue class approach will require courts to address numerous questions that have not yet been subject to judicial examination. For example, a (c)(4) class must satisfy the certification requirements of Rule 23(a) and one of the three prongs of Rule 23(b). But which prong of Rule 23(b) should apply—Rule 23(b)(3) or Rule 23(b)(2)? The former allows class members to opt out of the class, the latter does not.[126] As my co-author and I have written in prior work, our view is that issue classes should be certified under Rule 23(b)(2), which applies whenever "declaratory relief is appropriate."[127] After all, the (c)(4) class is seeking a declaration: it asks the court to declare that certain facts are true, or that the defendant's conduct violated some standard or law. On this view, there would be no right to opt out of a (c)(4) issue class, and all plaintiffs will be bound by the outcome in the issue class trial. But courts have yet to address this important question, which is bound to arise if the proposal offered here is implemented.

Another unresolved issue involves compensation of issue class counsel. As discussed above in Part II, common fund approaches to compensation of MDL lead and liaison counsel have proven controversial; query whether a similar approach to compensating counsel who successfully

[125] To be clear, the issue class does not solve all intercourt coordination problems—in particular, concerns over compensation of plaintiffs' counsel in both state and federal cases may prove difficult in some cases. *See* Myriam Gilles & Gary Friedman, *The Issue Class Revolution* (forthcoming) (proposing various solutions to selection and compensation of issue class counsel).

[126] Gilles & Friedman, *supra* note 18 ("The opt-out right exists to ensure the class action does not extinguish an absent class member's claim, a protected property interest, without due process. But there is no protected right to place oneself beyond the collateral estoppel effects of a judgment—just as a party's rights are not abridged when an unrelated court decides an issue that effectively forecloses her claim by operation of stare decisis or as a matter of binding precedent.").

[127] *Id.* (asserting that the (c)(4) class "is not seeking damages," but instead, "it asks the court to declare that certain facts are true, or that the defendant's conduct violated some standard or law").

litigate an issue class would raise similar questions. Moreover, should lawyers who achieve a positive ruling on common issues also recover a share of the individual damages cases that rely on their work product?

Finally, there are a host of nuts-and-bolts items. For example, to ensure the issue class functions as intended, state and federal courts may wish to manage the heightened collateral estoppel effect of the (c)(4) trial. Accordingly, judges may want to work together to draft jury interrogatories that set out in detail the specific questions to be answered by the common issue jury, and to ensure that these issues are sufficiently granular and clear to streamline subsequent individual litigation.[128] Further, the certifying judge may wish to draft a clearly-written companion decision explaining the (c)(4) procedure to further bullet-proof the outcome from collateral attack. The specifics of these efforts require judicial thought and planning to achieve the benefits of binding declarations that the issue class offers.

B. Potential Objections to Issue Classes

Observers have lodged three primary objections to the use of issue classes in mass tort cases—one grounded in the Constitution, and others in legal strategy. None stand in the way of the state-federal coordination effort proposed here.

The first objection posits that, in the wake of a jury determination in a (c)(4) issue class, any subsequent individual trial to determine a plaintiff's injury could require the re-litigation of factual issues in violation of the Seventh Amendment's Reexamination Clause.[129] Setting aside the historical argument that the Framers never intended that the Seventh Amendment would disable trial courts from using various procedural and managerial tools to organize their dockets,[130] the practical reality is that two-tiered or bifurcated trials are now a widely-accepted practice. The Supreme Court recognized the value of bifurcation in its 1931 *Gasoline Prods. v. Champlin Ref. Co.* decision, where it held that separate trials on liability and damages are constitutionally unproblematic unless the issues are "so interwoven" that they "cannot be submitted to the jury independently … without confusion and uncertainty."[131] Since the *Gasoline Prods.* decision, numerous courts faced with complex mass torts have easily detached liability from damages, submitting these issues independently to juries with careful instructions aimed at eliminating any "confusion or uncertainty."[132] And all have concurred that jurors are completely "capable of

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[128] Burch, *Issue Classes*, *supra* note 22, at 1901-2 (advising that "courts certifying issue classes should take great care to … craft special verdict forms to minimize preclusion challenges").

[129] U.S. CONST. amend. VII ("no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"); *see also* In the Matter of Rhone-Poulenc Rorer, 51 F.3d 1293, 1303 (7th Cir. 1995) (observing that, after a finding by the first jury as to "whether one or more defendants was negligent," a second jury "will have to decide … issues [that] overlap the issue of the defendants' negligence").

[130] *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (Weinstein, J.) ("the historical record demonstrates that the Framers' main objective in drafting the Seventh Amendment was to limit the ability of an *appellate* court, specifically the Supreme Court, to review de novo and overturn a civil jury's findings of fact") (internal citations omitted).

[131] Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497-98 (1931).

[132] *See, e.g.*, Martin v. Behr Dayton Thermal Prods. LLC, 896 F.3d 405, 417 (6th Cir. 2018) ("if done properly, bifurcation will not raise any constitutional issues"); In re Bendectin Litig., 857 F.2d 290, 307 (6th Cir.1988) (the Seventh Amendment is not violated where the bifurcated issue is adaptable to a separate trial without creating jury

following an instruction to respect—and not reexamine—an earlier holding."[133] Indeed, courts have even held the Reexamination Clause unaffected where the jury in a follow-on individual trial is asked to determine comparative fault as between the plaintiff and defendant—a common occurrence in mass tort cases.[134]

Another objection to broad use of Rule 23(c)(4) to determine core issues across related cases is the so-called "judicial blackmail" argument: that certifying an issue class to determine a defendant's liability and giving that determination binding, preclusive effect in subsequent litigations would exert an extortionate level of settlement pressure on the defendants.[135] On this argument, "even a low probability of a catastrophic judgment will induce a rational defendant to settle unmeritorious cases … and therefore courts should not certify mass-tort issues classes."[136] This is a quarrel that critics have long had against *damages* class actions—i.e., cases where companies agree to massive aggregative settlements rather than risk a negative outcome at a trial that would radically multiply the number of claimants to be compensated. But the "blackmail" argument makes little sense in the context of *issue* class actions, where a trial only the "threatens to establish liability-determinative facts with preclusive effect."[137] Indeed, courts in recent years have been unfazed by the blackmail objection to issues classes.[138]

The third, and final, objection against (c)(4) tort classes asserts that issue-class certification is unwarranted until a tort claim is "mature," in the sense that multiple juries over time have considered the facts and law, and found the defendant liable.[139] The "maturity" objection was an obstacles to class certification in the 1980s and 90s, but in recent years it has been met with powerful criticism that maturity is "simply too vague" to be of any use.[140] The clearest expression of this broadly-held sentiment is the Eleventh Circuit's decision in *Klay v. Humana*, where the court roundly rejected the maturity concept "as a legitimate consideration" under Rule 23 :

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confusion and uncertainty amounting to the denial of a fair trial); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir.1986) (affirming class action plan providing for trial of common factual issues involving the health hazards of asbestos, to be followed by individual damages cases); In re School Asbestos Litig., 789 F.2d 996 (3d Cir.1986), cert. denied, 479 U.S. 915 (same).

[133] Gilles & Friedman, *supra* note 18.

[134] Simon, 200 F.R.D. at 49 (observing that the Reexamination Clause requires only that courts avoid the "risk that in apportioning fault, the second jury could reevaluate the defendant's fault," by going "so far as to reapportion 100% of the fault to the plaintiff"). *See generally,* Burch, supra note 22, at 1926 ("Reexamining much of the same *evidence* in subsequent proceedings bears on whether an issue class materially advances the litigation, but it does not mean that a second jury will decide the same legal *element*.") (emphasis in original).

[135] Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

[136] Gilles & Friedman, *supra* note 18.

[137] *Id.*

[138] *Id.*

[139] Castano, 84 F.3d at 747-50 ("[A] mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23. This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.").

[140] David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 707 (1989) (observing that the maturity requirement is "simply too vague to provide courts with useful guidance in determining when to use class actions and other collective procedures"); *see also* In re Dow Corning Corp., 211 B.R. 545, 576 (E.D. Mich. 1997) ("Unfortunately, the number of jury verdicts needed…[to] make a mass tort mature…is hard to pinpoint.").

> There is no reason why, even with so-called 'immature torts,' district and circuit courts cannot make the necessary determinations under Rule 23 based on the pleadings and whatever evidence has been gathered through discovery. Moreover, there is no basis in Rule 23 for arbitrarily foreclosing plaintiffs from pursuing innovative theories through the vehicle of a class action lawsuit.[141]

Taken together, none of the objections discussed above hold much merit, and nearly all have been methodically dismantled over the years by thoughtful scholars and jurists. Accordingly, the path is clear to certifying issue classes to determine core liability issues, and then using those determinations in subsequent proceedings to determine individual damages.

CONCLUSION

Courts and scholars are just beginning to recognize the vast potential of issue classes to resolve common elements across a multitude of related cases in federal courts.[142] In recent years, a handful of courts have certified issue classes in consumer cases,[143] and we are beginning to see issue classes in mass tort cases as well.[144] This essay goes one step further, proposing that issue classes can serve as powerful expedient for coordinating multijurisdictional mass tort litigation – i.e., the hundreds and sometimes thousands of factually-related cases filed in both federal and state courts. As Professor Burch has noted, "[b]ecause issue classes preclude subsequent cases from relitigating the same issues, they also have the potential to bridge jurisdictional boundaries."[145] Indeed, by adjudicating common conduct issues collectively, an issue class allows courts to effectively work together to conserve resources by generating binding resolutions and applying preclusion principles in subsequent litigation. This approach is sorely needed in this era of rising interjurisdictional litigation complexity and limited judicial resources.

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[141] 382 F.3d 1241 (11th Cir. 2004).

[142] *See, e.g.* Elizabeth Chamblee Burch, *On Regulatory Discord and Procedure,* 11 N.Y.U. J. L. & BUS. 819, 825 (2015) (predicting that courts will "begin to use issue classes to target defendant's uniform, non-individuated conduct such that subsequent cases could use issue preclusion to prevent these conduct-related questions from re-litigation").

[143] Butler v. Sears, Roebuck & Co., 727 F.3d 796, 800 (7th Cir. 2013) ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed"); In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig., 722 F.3d 838 (6th Cir. 2013) (same).

[144] *See, e.g.*, In re Deepwater Horizon, 739 F.3d 790, 806-07 (5th Cir. 2014) (upholding ruling that "'issues relating to damages' could and would be 'severed and tried separately' from other issues relating to liability, in accordance with this court's previous case law and Rule 23(c)(4)"); Simon v. Philip Morris, Inc., 200 F.R.D. 21, 33 (E.D.N.Y. 2001) (Weinstein, J.).

[145] Burch, *supra* note 22, at 830.