Procedural Self-Inflicted Wounds?

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I. Introduction

The large corporations that tend to be defendants in complex legal proceedings, and the attorneys who represent them, routinely take two seemingly inconsistent positions: (1) they complain that the duration and cost of complex litigation forces them to settle even meritless cases; and (2) they pursue changes to civil procedure through legislation, rule amendment, and judicial decisions that protract complex litigation and increase its expense.

This Essay seeks to make sense of this apparent contradiction. It focuses in particular on a recent proposal (the "Proposal") to add a new rule allowing immediate interlocutory appeal of certain non-final orders in multidistrict litigation ("MDL") proceedings. The new rule, if adopted, would hold the potential to make complex litigation slower and more expensive. For example, motions to dismiss, which are infrequently granted, would wend their way more often beyond trial courts to appellate courts where, presumably, they would generally be affirmed, in the process requiring hundreds of additional hours of work for judges and attorneys and likely extending the time before trial, at least in some cases.

This Essay explores why corporate defendants and their lawyers seek these sorts of procedural changes. Four likely answers arise:

> (1) Good Policy: the changes could make sound policy sense;
> (2) Strategic Advantage: the changes could confer a strategic advantage on corporate defendants;
> (3) Motivated Cognition: corporate agents might expect the changes to be beneficial because of natural distortions in how human beings think, even if the changes would in fact harm corporations; and
> (4) Agency Costs: the changes could involve agency costs, benefiting the corporations' legal counsel but not necessarily the corporations themselves.

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These possibilities are not mutually exclusive. More than one could be true for any proposed procedural change. Which ones are—and are not—will depend on the particular proposal at issue. So this Essay uses the proposed expansion of interlocutory appellate review as a case study. It concludes that the Proposal is unlikely to make good policy sense. The arguments in its favor are unpersuasive and unsubstantiated.

Perhaps more surprisingly, the Proposal also may not confer a clear strategic benefit on corporations. True, delay and expense in litigation often redound to the benefit of wealthy defendants. They can beat down plaintiffs and their lawyers, deterring them from filing suit and forcing them to settle on relatively favorable terms for defendants. But that is not always what occurs. Some procedures that increase costs can harm defendants. Imprudent motions to dismiss, for example, can cause courts to frame legal standards in a way that benefits plaintiffs. After all, those motions are difficult to win. And judges in defending the results they reach may have a tendency to emphasize the ways in which the law supports their decisions, to some extent becoming advocates for the plaintiffs—adopting legal positions that may then govern the remainder of the case. That same pattern may emerge in appellate courts, harming corporate defendants not only in particular cases but also systemically.

But why would corporations pursue procedural changes that actually harm them? Don't they know best what serves their interests? One possible answer is motivated cognition. When people analyze complex matters, their judgments tend to be clouded by various interests they have—including a desire to view themselves in a favorable light—and they are often unaware of this phenomenon. A term for it is motivated cognition. We all suffer from it.

Motivated cognition can cause us to tell stories about the world that flatter us and denigrate our detractors. The possibility is worth contemplating that in descrying the consequences of a rule change in the murky future, the views of corporate actors might be colored by their desire to think of themselves—and the corporations for which they work—as unlikely to violate the law. Corporations may think that they are unlikely to do anything wrong. Other corporations might, they may think, but not us. So if we are sued in the future, the claims are likely to be unmeritorious. We should win on them on a motion to dismiss in the trial court and if not—perish the thought—that injustice surely would be corrected if only we could get an early review by an appellate court.

There is nothing unusual about this way of thinking. It is all too common, even among sophisticated actors. Motivated cognition can help to explain why corporations might support a procedural change that harms them. They—like virtually everyone else—may not have a fully realistic view of themselves. They may underestimate the likelihood that they will take actions that could cause them to become embroiled in legitimate litigation and they may overestimate their odds of extricating themselves from that litigation. That could cause them to favor rules that would benefit them if reality were the way they like to imagine it but that harms them given how reality really is.

Another reason corporations and their counsel might support the Proposal—even if it harms corporations on the whole—is agency costs. Corporations know the legal system through attorneys—often through outside counsel—and the interests of the corporations and outside

counsel do not align perfectly. While corporations may not benefit from an increased rate of interlocutory appeals, their outside lawyers likely would. They would get paid handsomely for the additional hours those appeals require. Indeed, even if the law as a result becomes somewhat more favorable to plaintiffs, that could increase the number of lawsuits in the future—again, benefiting corporate defense counsel, if not their clients. None of this reasoning is meant to imply corporate attorneys act in bad faith. Not at all. Rather the point is that they too may suffer from motivated cognition—believing what is good for them is also good for their clients and, for that matter, good for society.

These last two points—which are not mutually exclusive—suggest an intriguing possibility. Highly politically influential corporations—and their highly politically influential counsel—might advocate for procedural reforms that are harmful—that damage society, plaintiffs, and even corporate defendants. That possibility is, to say the least, counterintuitive, but it could help to explain why our civil litigation seems to become ever more slow, expensive, and cumbersome in many ways, even while all the participants in the process cry out for greater speed and efficiency.

II. The Proposal for Interlocutory Appellate Review in (Some) MDL Cases

In exploring the above possibility, let us begin with a recent proposal. In 2018, Lawyers for Civil Justice ("LCJ"), a special interest group representing large corporations and defense law firms,[1] proposed amending Federal Rule of Civil Procedure 23.3—the Proposal we address in this Essay. The Proposal has taken various forms in informal discussions, but it originally called for allowing a mandatory appeal of an MDL court's interlocutory orders on motions to dismiss or motions for summary judgment if the outcome of the appeal could be dispositive of 50 or more cases.[2] LCJ proposed amending Rule 23.3 after Congress failed to pass H.R. 985, a bill containing a similar right to appeal interlocutory orders in MDL cases.[3]

The Proposal provides:

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[1] *See* Lawyers for Civil Justice Annual Report – 2018 (https://www.lfcj.com/uploads/1/1/2/0/112061707/lcjreport_2018_4_12_2019.pdf) at p. 17 (members include Bayer, GlaxoSmithKline, Lilly, Johnson & Johnson, Merck, Pfizer, and several large defense law firms).

[2] *See* Lawyers for Civil Justice, MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules, September 14, 2018 ("LCJ Proposal") (https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_memo_-_mdl__tplf_proposals_for_discussion_9-14-18__004_.pdf).

[3] *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017) (requiring courts of appeal to accept appeals "from an order issued in coordinated or consolidated pretrial proceedings if: (1) the order is applicable to one or more civil actions seeking redress for personal injury, and (2) an immediate appeal may materially advance the ultimate termination of one or more civil actions in the proceedings.") H.R. 985 passed the House of Representatives a month after its introduction in 2017, but the Senate never voted on the bill.

Rule 23.3 Multidistrict Litigation Proceedings

(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).

(1) Appeals. A court of appeals shall permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based.[4]

The proponents (the "Proponents") later indicated that the proposed rule should apply to "mass tort MDL proceedings," which they defined to mean "any MDL proceeding in which the MDL Panel's initial transfer order noted that personal injury claims would be a substantial component."[5] The Proponents also have suggested expanding the rule to allow appellate review of other interlocutory orders that are "outcome-determinative," including orders related to the admissibility of expert testimony.[6]

III. Various Policies Support the Final Judgment Rule

To put the Proposal into context, a short discussion may prove helpful of the origins and policy objectives of the general refusal of federal appellate courts to hear interlocutory appeals. Allowing a party to appeal only when the case has concluded has been the foundation of federal appellate jurisprudence since it was included in the first judiciary act in 1789.[7] This long-held finality doctrine promotes several important policy goals, including judicial efficiency and allowing district judges to conduct their proceedings without undue interference.[8] Over time,

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[4] LCJ Proposal, *supra*.

[5] *See* Letter from J. Beisner to R. Womeldorf ("Beisner Letter") (Nov. 21, 2018), Submission 18-CV-BB, (www.uscourts.gov/sites/default/fles/18-cv-bb-suggestion_beisner_0.pdf) at p. 1-2 and fn. 3.

[6] Advisory Committee on Civil Rules, Minutes of Meeting of Committee on Rules of Practice and Procedure, Jan. 3, 2019, p. 10 (https://www.uscourts.gov/file/25759/download) ("Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*.")

[7] Judiciary Act of 1789, 1 Stat. 73, 83-89.

[8] *See, e.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380 (1987) ("the finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system. Pretrial appeals may cause disruption, delay, and expense for the litigants; they also burden appellate courts by requiring immediate consideration of issues that may become moot or irrelevant by the end of trial. In addition, the finality doctrine protects the strong interest in

certain limited exceptions to the final judgment rule have been created. But each time an exception has been considered, a careful balance was maintained to ensure that the policy goals of the final judgment rule were not frustrated.[9] And the appellate courts have applied those exceptions narrowly to preserve the core principles of the final judgment rule.[10]

Both Congress and the Judicial Conference have rejected proposals similar to the rule that the Proponents suggest. For example, the original proposal for the law that would become §1292(b) permitted interlocutory appeals when "necessary or desirable to avoid substantial injustice."[11] Both the Judicial Conference Committee and Congress rejected that version of the law, based on their concern about "opening the door to frivolous, dilatory, or harassing interlocutory appeals."[12] More recently, Congress did not pass a variation on the Proposal that would have created a mandatory right to immediately appeal for certain interlocutory orders in MDL proceedings.[13]

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allowing trial judges to supervise pretrial and trial procedures without undue interference. . . The judge's ability to conduct efficient and orderly trials would be frustrated, rather than furthered, by piecemeal review.")

[9] *See e.g.*, Thomas Baker, A Primer on the Jurisdiction of the U.S. Courts of Appeals 57 (2d. ed 2009), available at https://www.fjc.gov/sites/default/files/2012/PrimJur2.pdf) (Describing the legislation that created discretionary interlocutory appeals under 28 U.S.C. §1292(b) as the "greatest legislative compromise . . . on the policy of finality that has marked the history of the court of appeals.").

[10] *See, e.g., Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) ("The normal rule is that a 'final decision' confers upon the losing party the immediate right to appeal. . . Creating exceptions to such a critical step in litigation should not be undertaken lightly"); *Caraballo-Seda v Municipality of Hormigueros*, 395 F.3d 7 (1st Cir. 2005) ("interlocutory certification under § 1292(b) should be used sparingly and only in exceptional circumstances, and where proposed intermediate appeal presents one or more difficult and pivotal questions of law not settled by controlling authority.")

[11] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF A SPECIAL SESSION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 203 (Mar. 20– 21, 1952) [hereinafter SPECIAL SESSION PROCEEDINGS REPORT]; see also Appeals from Interlocutory Orders and Confinement in Jail-Type Institutions: Hearings Before the Subcomm. No. 3 of the H. Comm. on the Judiciary on H.R. 6238 and H.R. 7260, 85th Cong. 9 (1958).

[12] *See* Note, Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b), 88 HARV. L. REV. 607, 610 & n. 15 (1975) (describing the discussion in the Judicial Conference that emphasized striking a balance between justice and judicial efficiency, and noting that the congressional hearings focused on a similar compromise).

[13] Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017) ("A federal appeals court having jurisdiction over the transferee district shall permit an appeal from an order issued in coordinated or consolidated pretrial proceedings if: (1) the order is applicable to one or more civil actions seeking redress for personal injury, and (2) an immediate appeal may materially advance the ultimate termination of one or more civil actions in the proceedings.")

The existing exceptions to the final judgement rule provide safeguards to all litigants, including MDL defendants. For example, §1292(b) gives the district court the discretion to certify an interlocutory order for appellate review if it involves a "controlling question of law as to which there is substantial ground for difference of opinion" and where "immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ."[14] Rule 54(b) allows for partial judgments, which are immediately appealable. And if a party believes that a judge has exceeded his or her authority in a way that irreparably harms the party, the party may file a writ of mandamus.[15]

A key provision that makes discretionary interlocutory appeals under §1292(b) work well is that *both* the district court judge and a panel of the circuit court must agree that an interlocutory appeal is justified. [16] The original proposal for §1292(b)—like the Proposal—gave the circuit

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[14] 28 U.S. C. §1292(b).

[15] Even if the Proponents are correct in their claim that the final judgment rule is an unwise policy because it does not allow defendants to appeal the denial of their dispositive motions, the problem they identify is not one that is limited to MDLs that involve personal injury claims. There is, therefore, little justification to limit a new rule to only those cases as the defendants propose. Instead, the Proponents are really arguing to totally abolish the final judgment rule for all dispositive orders. As is discussed below, the Proponents have not shown any evidence that the final judgment rule and the existing exceptions to the rule are not working well. Without such evidence, it is dangerous and unwise to embark on such a seismic and potentially harmful change in federal appellate practice. *See* Mark R. Kravitz, To Revise, or Not to Revise: That is the Question, 87 DENV. U. L. REV. 213, 220 (2010) ("Care must be taken in revising old rules and fashioning new ones, for unintended and adverse consequences abound. As Professor Tidmarsh reminds us, 'All the rules . . . are interwoven. As with a spider's web, a tug on a single rule can collapse the entire structure.'") (quoting Jay Tidmarsh, Resolving Cases "On the Merits," 87 DENV. U. L. REV. 407, 428 (2010)).

[16] In discussions with the Advisory Committee, the Proponents have suggested that they need direct access to the appellate courts because MDL courts never grant certification for interlocutory review under §1292(b) of MDL courts' orders denying defendants dispositive motions. *See, e.g.*, Letter from Brian Devine to Rebecca Womeldorf, _____ (19-CV-____, 10/___/2019); *see also* Letter from 45 Corporations to Rebecca Womeldorf, The Need for FRCP Amendments Concerning Multi-District Litigation (MDL) Cases (No. 19-CV-AA, 10/3/2019) at p. 2 (https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjJ46rk2ZflAhXUjp4KHf13ClMQFjAAegQIABAC&url=https%3A%2F%2Fwww.uscourts.gov%2Ffile%2F26729%2Fdownload&usg=AOvVaw3bDxR46CGxZb8rvyJTWDE1) (citing to Devine Letter and claiming that the opponents of the proposed interlocutory appeal rule "cannot cite a single instance in which § 1292(b) led to appellate review of the type of motion about which the Committee is concerned.").
The facts do not seem to support the Proponents' position. In at least 19 recent cases an MDL court granted a defendant's request for a §1292(b) certification to seek an appeal of the court's denial of a dispositive motion. *In re Avandia Mktg*., 804 F.3d 633 (3rd Cir. 2015) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motion to dismiss.); *In re Camp Lejeune N.C. Water Contamination Litig.*, 768 F.3d 1378 (11th

Cir. 2014) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motion to dismiss plaintiffs' claims); *In re: Fosamax Prods. Liab. Litig.*, 2011 U.S. Dist. LEXIS 72123 (S.D.N.Y 2011) (MDL court granted the defendant's request to certify a §1292(b) appeal of cross-cutting issue related to the proper risk-benefit analysis that should be used to determine whether a drug is defective); *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69 (E.D.N.Y. 2008) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motion for summary judgment); *In re Blue Cross Blue Shield Antitrust Litig*., 2018 U.S. Dist. LEXIS 113563 (N.D. Ala. 2018) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's order deciding the appropriate standard of review applicable to a Sherman Act claim); *Joffe v. Google, Inc. (In re Google Inc. St. View Elec. Communs. Litig.)*, 729 F.3d 1262 (9th Cir. 2013) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's partial denial of defendants' motion to dismiss); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288 (3rd Cir. 2004) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motions to dismiss for lack of personal jurisdiction); *In re Chinese-Manufactured Drywall Prods. Liab. Litig*., 753 F.3d 521 (5th Cir. 2014) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's order denying defendants' request to vacate a default judgment); *In re Chinese-Manufactured Drywall Prods. Liab. Litig*., MDL 09-2047, ECF No. 21231 (E.D. La., Mar. 6, 2018) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's order denying defendants' motion to dismiss); *Louisiana Wholesale Drug Co. v. Hoechst Marion Roussel, Inc. (In re Cardizem CD Antitrust Litig.)*, 332 F.3d 896 (6th Cir. 2003) (MDL court granted the defendants' request to certify a §1292(b) appeal of the court's denial of defendants' motion to dismiss plaintiffs' claims and its granting of plaintiffs' motion for summary judgment); *Hepting v. AT&T Corp. (In re NSA Telcoms. Records Litig.)*, 508 F.3d 898 (9th Cir. 2007) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss.); *In re Aggrenox Antitrust Litig.*, 2015 U.S. Dist. LEXIS 94516 (D. Conn. 2015) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's partial denial of the defendants' motion to dismiss); *In re Adelphia Communs. Corp. Sec. & Derivative Litig.*, 2006 U.S. Dist. LEXIS 11743 (S.D.N.Y. 2006) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss); *In re Mushroom Direct Purchaser Antitrust Litig*., 54 F. Supp. 3d 382 (E.D. Pa. 2014) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion for summary judgment); *In re Enron Corp.*, 2006 U.S. Dist. LEXIS 63223 (S.D.N.Y. 2006) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 307 F. Supp. 2d 145 (D. Me. 2004) (MDL court granted the defendant's request to certify a §1292(b) appeal of the court's denial of the defendants' motion to dismiss); *Novell, Inc. v. Microsoft Corp. (In re Microsoft Corp. Antitrust Litig.)*, 505 F. 3d 302 (4th Cir. 2007) (MDL court granted the defendant's request to certify a §1292(b) appeal of the denial of defendants' motion to dismiss); *Valley Drug Co. v. Geneva Pharms. (In re Terazosin Hydrochloride Antitrust Litig.)*, 344 F.3d 1294 (11th Cir. 2003) (MDL court granted the defendant's request to certify a §1292(b) appeal of the granting of plaintiff's motion for partial summary judgment); *In re Domestic Drywall Antitrust Litig.*, 2018 U.S. Dist. LEXIS 174981 (MDL court granted the

court the sole discretion to allow interlocutory appeals, removing the district court judge from the decision. Congress rejected this approach, concluding that the district courts are in a superior position to exercise the discretion to allow or disallow interlocutory appeals.[17]

The Supreme Court repeatedly has held that permitting interlocutory appeals without the district court judge's approval "would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system."[18] As eight retired federal district judges recently observed, "Such battlefield decisions are best made by the one observing the combatants."[19]

Indeed, because MDL cases are so complex, the circuit courts have provided MDL judges with unusually broad discretion to decide how to manage their cases. For example, the Eighth Circuit has held repeatedly that "MDL courts must be given greater discretion to organize, coordinate, and adjudicate its proceedings . . . ."[20] Likewise, the Fifth Circuit held, "The trial court's managerial power is especially strong and flexible in matters of consolidation."[21]

The Proposal should require particularly strong support, given that Congress specifically rejected it in drafting 1292(b) and that courts have indicated the need for trial court independence and

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defendant's request to certify a §1292(b) appeal of the denial of defendant's motion for summary judgment.).

[17] H.R. Rep. No. 85-1667, at 5–6 (1958), reprinted in 1958 U.S.C.A.N.N. 5255, 5262 ("Only the Trial Court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the future course of the litigation with any degree of accuracy.")

[18] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *see also, Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995) ("Congress thus chose to confer on district courts first line discretion to allow interlocutory appeals"), *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435-7 (1956) (holding that the district judge serves as a "dispatcher" of appeals, to "meet the demonstrated need for flexibility" in certifying partial judgments and this decision is, "with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay"), *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 12 (1980) ("the task of weighing and balancing the contending factors [associated with certifying an issue for interlocutory appeal] is peculiarly one for the trial judge, who can explore all the facets of a case.")

[19] Brief of Retired United States District Judges as *Amici Curiae* in Support Of Respondents, *Hall v. Hall*, U.S. Supreme Court case No. 16-1150 (available at https://www.supremecourt.gov/DocketPDF/16/16-1150/24465/20171219182434223_16-1150%20bsac%20Retired%20US%20DCT%20Judges%20PDF-A.pdf) (arguing that a the district court is in the best position to determine when partial appeals are appropriate in a consolidated case).

[20] *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007*); see also, Freeman v. Wyeth*, 764 F.3d 806, 809 (8th Cir. 2014); *In re Prempro Prods. Liab. Litig.*, 423 Fed. Appx. 659 (8th Cir. 2011).

[21] *Center for Biological Diversity, Inc. v. BP America Production Co.*, 704 F.3d 413 (5th Cir. 2013).

discretion is particularly great in MDL proceedings. The risk is high that the Proposal would create new difficulties without actually solving any problems.[22]

IV. The Policy Justifications for the Proposal Are Unpersuasive.

The Proposal's Proponents claim it would accomplish three general policy goals: (1) appellate asymmetries: eliminating perceived asymmetries in the appellate review of dispositive motions, (2) trial court errors: correcting erroneous trial court orders in high-stakes litigation, and (3) distorted settlements: stopping defendants from being forced into distorted settlements.[23] We analyze each of these proposed policy benefits below and conclude that the Proposal does not appear to serve any of them.

A. Eliminating Perceived Appellate Asymmetries

The Proponents claim that the current rules treat defendants unfairly because a plaintiff is permitted an immediate appeal of a grant of an adverse dispositive motion, but a defendant is not ordinarily permitted an immediate appeal of a denial of the same dispositive motion.[24]

The premise of this argument is shaky, at best. It is in a sense partially factually true. A plaintiff is permitted to appeal immediately, for example, from a grant of a motion to dismiss against it while a defendant is not ordinarily permitted an immediate appeal from its denial. But there is in fact symmetry: if a plaintiff files a dispositive motion against a defendant and loses—say, a motion for summary judgment—the plaintiff has no immediate appeal. But if the motion is granted, and resolves the action, the defendant has an immediate appeal. Symmetry.

The real issue is that plaintiffs rarely have viable pre-trial dispositive motions and defendants often do (although perhaps not nearly so often as defendants would like to think). In other words, there is a realistic possibility in many cases of a plaintiff losing a case before trial but no similar

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[22] *See also* Howard M. Erichson, Symposium Civil Litigation Reform In The Trump Era: Threats snd Opportunities Searching For Salvageable Ideas In FICALA, 87 Fordham Law Rev. 20 (describing the special rules Pharma proposes, including the interlocutory appeal rules, as serving the "goals of corporate defendants" but concluding that "as a matter of litigation policy, the proposals solve nonproblems.")

[23] *See, e.g.,* John H. Beisner and Jordan M. Schwartz, MDL Imbalance: Why Defendants Need Timely Access To Interlocutory Review, U.S. Chamber Institute for Legal Reform, April 2019 (https://www.instituteforlegalreform.com%2Fuploads%2Fsites%2F1%2FMDL-Defendent-Interlocutory-Review-Timely-Access.pdf&usg=AOvVaw1C13xppJuKzerXYBkT76rD); Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation , 79 Fordham L. Rev. 1643 (2011).

[24] Beisner and Schwartz, supra at p. 1 ("This troubling dynamic is not only inefficient, but also highly unfair and one-sided given that it is only the denial of broadly applicable dispositive motions that is not immediately appealable; plaintiffs are free to appeal the grants of such motions posthaste.")

realistic possibility of the defendant losing before trial. That may be the result of sound policy decisions. Or it might not. But it can hardly be said that the asymmetry benefits *plaintiffs*. They would surely like a system in which they could win many legal actions early in the proceedings and in which defendants generally cannot. And the Proponents presumably would not like that reversal of positions—even though the "asymmetry" in appellate rights would then benefit defendants. In effect, what the Proponents are really complaining about is a very substantial strategic *advantage* they have in litigation: they may well win without going to the jury but they are almost certain not to lose unless a jury makes findings against them. That is a strange grievance.

Thus, far from being "unfair and one-sided,"[25] as the Proponents claim, the final judgment rule provides a carefully balanced foundation of appellate review that has served the judiciary and all litigants well for over 220 years. Every party has the right to appeal a case once it has concluded, so the final judgment rule is symmetrical.

B. Promoting Correct Rulings

The Proponents claim that immediate appeals are necessary to correct erroneous pretrial rulings in MDLs.[26] Pursing the correct application of the law is a legitimate policy goal. But both the Supreme Court and Congress have concluded that some level of error is acceptable to ensure that litigation is not burdened by unreasonable disruption, delay and expense from interlocutory appeals.[27]

One argument that the Proponents could make to support their proposal is that the balance of interests is sufficiently different in MDLs than other litigation to warrant a different approach. Another is that MDL trial judges are more prone to error—and in greater need of early correction—than trial court judges in other cases. Neither justification for the Proposal survives scrutiny.

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[25] Beisner and Schwartz, *supra*, at 1.

[26] Beisner and Schwartz, *supra* at 13 ("'The fact that pretrial orders are not routinely appealable' before final judgment 'is clearly an enormous factor, with a variety of implications,' the '[m]ost obvious' of which is 'the inability for error correction relating to pretrial rulings that can have enormous significance for many litigants.'") (quoting Abbe R. Gluck, Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understanding of Procedure, 165 U. Pa. L. Rev. 1669, 1706 (2017)).

[27] *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 429-30 (1985) ("Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'") (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982)).

That the interests in MDL proceedings tilt in favor of interlocutory appeals is not at all obvious. To be sure, the stakes are higher in many MDLs than in much—but not all—other litigation.[28] That could justify spending more party, attorney, and judicial resources on MDLs than on other cases, including potentially in the process of interlocutory appeals.

But in MDLs the costs of delay to plaintiffs also increase. The number of plaintiffs awaiting recovery is much higher than in most other litigation. Moreover, interlocutory appeals could deprive many plaintiffs of the ability to obtain justice during their lifetime at all. The type of MDLs that the Proposal targets often involve medical devices and pharmaceuticals used by an older population with underlying medical ailments. The members of that population are at an increased risk of dying before their cases get resolved. Adding further delays to the already lengthy litigation process could prejudice these people further.[29]

Further, the burden on plaintiffs' attorneys—who generally operate on a contingent basis—is far greater in MDL litigation than in most other legal actions. Delay and disruption could add pressure on plaintiffs and their attorneys to settle at a greater discount than would otherwise be justified by the expected value of the litigation.

In short, there is no obvious reason to think the interests in an MDL proceeding are meaningfully different than the sum of the interests of what would otherwise be individual cases—assuming bringing the cases individually would be feasible. And there is some reason to think any differences weigh *against* allowing interlocutory appeals, not in their favor.

Nor do Proponents show that MDL judges are particularly prone to error. To the contrary, MDL judges' orders are affirmed nearly 90% of the time. Attached as Appendix 1 are the results of a study undertaken to determine if a problem exists in the accuracy of MDL trial court rulings that one version of the Proposal would solve. The study identified all of the recent MDLs to which the Proposal would have applied, using data provided by the Judicial Panel for Multidistrict Litigation. It identifies all of the large MDL actions (more than 500 cases) that are recent

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[28] Even if measured solely by the dollar value, many non-MDL cases involves stakes that are as large or larger than MDL cases. For example, in 1985, Pennzoil won an $11 billion verdict against Texaco, which had to declare bankruptcy and settle for $3 million. *See* Michael Ansaldi, Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem, 27 Hous. L. Rev. 733, 735-36 (1990). In 2013, Teva Pharmaceuticals agreed to pay $1.6 billion to settle patent infringement claims made by Pfizer and other companies related to the drug Protonix. (https://www.tevapharm.com/news/teva_reaches_settlement_agreement_with_pfizer_and_nycomed_regarding_generic_protonix_pantoprazole_tablets_06_13.aspx) In 2003, ExxonMobil Corp. won $416.8 million against Saudi Basic Industries Corp. *See* Steve Seidenberg, Exxon Mobil Wins $416.8 Million Jury Verdict, Nat'l L.J., Mar. 31, 2003, at A15.

[29] *See, e.g.*, Mark R. Kravitz, To Revise, or Not to Revise: That is the Question, 87 DENV. U. L. REV. 213, 220 (2010) ("The Civil Rules Committee is always alert when a proposed rule change may favor one group of litigants over another. A proposed change may appear sensible on its face. But, if in practice the proposed change is likely to advantage one group at the expense of another, that fact may counsel against a change.")

(opened in the last 20 years and either still open or terminated in the last 5 years), and mature (closed or with more than 70% of the cases resolved) and involve personal injuries. This search identified 37 MDLs that together resolved almost 200,000 individual cases.

All 37 MDL cases were searched to determine how frequently an MDL judge denied a request for interlocutory review of an order using the existing procedures, only to be reversed after final judgment. After searching the appellate history for all 37 of these MDL cases, no cases were identified in which this occurred.

The study also determined the rate at which MDL judges are reversed by the appellate courts—regardless of whether there was a request for interlocutory appellate review.[30] All appellate decisions that reviewed an order issued by an MDL transferee judge in any of the 37 MDL cases were reviewed. Of the 115 resulting appellate court opinions, the MDL judge's decision was fully affirmed 87 percent of the time and partially affirmed another 3 percent of the time. In total, then, MDL trial judges were affirmed about 90% of the time.[31] This high affirmance rate suggests that MDL judges are not especially prone to mistakes. In fact, the data suggest that the reversal rate in the MDL cases we examined is slightly lower than the 12.18% average reversal rate for all private civil cases in the federal courts over the last eight years.[32] Consequently, there is no apparent reason to depart from the careful balance that the final judgment rule strikes between correcting erroneous rulings and the disruption, delay and expense that come with piecemeal appeals.

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[30] *Id*.

[31] This analysis is limited in some ways. It includes appeals on a variety of matters—some crucial to litigation and some relatively minor—and appeals by plaintiffs and by defendants. It is possible the reversal rate is higher for crucial matters or for appeal by defendants or both. Unfortunately, the data set is too small to draw meaningful inferences based on those narrower categories.

[32] *See* Federal Judicial Center, U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding During the 12-Month Period Ending June 30, 2019 (Table B5) (https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2019/06/30) (reversal rate for all private civil appeals decided between 7/1/2018 – 6/30/2019 was 12.5 percent); Federal Judicial Center, U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding During the 12-Month Period Ending June 30, 2018 (Table B5) (https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2018/06/30) (reversal rate for all private civil appeals decided between 7/1/2017 – 6/30/2018 was 11.7 percent); Federal Judicial Center, U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding During the 12-Month Period Ending June 30, 2017 (Table B5) (https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2017/06/30) (reversal rate for all private civil appeals decided between 7/1/2016 – 6/30/2017 was 12.1 percent); Federal Judicial Center, Just the Facts: U.S. Courts of Appeals, Table 2 (12/20/2016) (https://www.uscourts.gov/news/2016/12/20/just-facts-us-courts-appeals) (reversal rate for all private civil appeals decided between 2011 and 2015 were: 12.4 percent (2011), 10.4 percent (2012), 11.8 percent (2013), 12.3 percent (2014), and 14.2 percent (2015).

C. Avoiding "Distorted" Settlement Values

The Proponents argue that defendants are forced to settle cases for "distorted" values because dispositive rulings in MDL cases are not immediately reviewable by an appellate court.[33] The notion of "distortion" requires some baseline—although the Proponents do not make that baseline clear. Much like the Proponents' claim of asymmetry, their implicit notion of distortion is a bit odd. The final judgment rule is the norm. It applies to the great bulk of litigation. It is more natural to consider it as part of the baseline for settlement value than as "distorting" settlement value.

That said, there is a way in which the concept of distortion can be given relevant meaning. An undistorted settlement might be one that would be for the expected value of litigation if it were reached in an immediate, final decision.[34] That final decision—we should assume—would not be infallible. No realistic procedural system can be constructed in the hope of achieving infallibility. As Justice Jackson famously wrote of the United States Supreme Court, "We are not final because we are infallible. We are infallible because we are final."[35] We might imagine a world with imminent finality—if not infallibility—at the expected value of litigation and then treat it as a kind of ideal and any deviation from it as a kind of distortion.

It is hard to generalize about whether the Proposal would cause settlements to more closely approximate the ideal understood in this way. In some cases, it no doubt would. In other cases, it would not. But there is reason to believe on the whole the final judgment rule is preferable from this vantage.

To see why, it is important to consider how procedural rules can result in deviation from the ideal. One common explanation is that the prospect of the cost, disruption, and delay associated with litigation causes defendants to pay more for settlement than they otherwise would. That appears to have been the reasoning of the Supreme Court in *Twombly*[36] in modifying the standard for ruling on motions to dismiss. The Court noted that litigation takes up the time of defendants, creating "an *in terrorem* increment of. . . settlement value."[37] The Court cautioned against forgetting that litigation is expensive[38]—implying that the expense of litigation can cause defendants to pay more in settlement than they otherwise would.

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[33] *Id*. ("Defendants faced with unfavorable dispositive motion rulings that they know will not be addressed by an appellate court for years often feel pressured to settle the hundreds or thousands of claims in an MDL proceeding, rather than incur massive additional litigation expenses and roll the dice on costly trials. The settlements that ensue are often distorted because the soundness of the MDL court's dispositive motion rulings has not been tested on appeal.")
[34] Joshua P. Davis, Taking Uncertainty Seriously: Revising Injunction Doctrine; Joshua P. Davis, Expected Value Arbitration.
[35] Citation.
[36] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[37] *Id*. at 546 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 ()).
[38] *Id*.

Interlocutory appeals add to the cost, disruption, and duration of litigation. That is a significant reason for adopting the final judgment rule. Indeed, the Supreme Court has long recognized that the final judgment rule is good policy because it avoids "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." [39] When Congress debated allowing discretionary interlocutory appeals through what became §1292(b), Senators expressed deep concern that "the indiscriminate use of such authority [might] result in delay rather than expedition of cases in the district courts."[40]

To quantify the amount of delay that the proposed rule would cause in MDL cases, we studied the amount of time it took the circuit courts to decide interlocutory appeals in 2018. The results of our study are attached as Appendix 2. We found that the average was 23 months. The shortest time was 10 months. The longest was 43 months.

The delays caused by interlocutory appeals can impose significant detrimental consequences on the litigants and the judicial system, particularly in large MDL cases. For example, Judge Jack Weinstein (later quoted by Judge Shira Scheindlin) compared discovery in MDL proceedings to moving an oil tanker, noting that "neither is amenable to sudden stops or changes in direction. Suspending discovery for many months while appeals are taken would constitute a significant burden on the timely and efficient disposition of the cases."[41]

So if the reasoning in *Twombly* is compelling—if drawing out litigation and increasing its cost causes defendants to pay *more* in settlement than they otherwise would—then the Proposal could "distort" settlement values by forcing them to pay even more in settlement than they currently do.

Nonetheless, there are at least a couple of phenomena that could cause the Proposal to *decrease* the amount defendants pay in settlement: early appellate reversals and risk aversion. As to early appellate reversals, the Proponents' point about asymmetry becomes relevant. As discussed above, asymmetry does not—as the Proponents suggest—create intrinsic unfairness. Plaintiffs and defendants both get to appeal once a final judgment is entered against them. It is just that plaintiffs are much more susceptible to early adverse final judgments than defendants. Putting aside the unpersuasive claim about unfairness, that distinction does suggest a way in which interlocutory appeals could benefit defendants.

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[39] *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), *quoting Cobbledick v. United States*, 309 U.S. 323, 325 (1940), *see also Canter v. American Ins. Co.*, 28 U.S. 307, 318 (1830) ("It is of great importance to the due administration of justice, and is in the furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final judgments only, that causes should not come up here in fragments, upon successive appeals. It would occasion very great delays, and oppressive expenses.")

[40] S. REP. NO. 85-2434, at 3

[41] *National Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 167 (E.D.N.Y 1999); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 174 F. Supp. 2d 4, 9 (S.D.N.Y. 2001).

If interlocutory appeals are available largely in situations where plaintiffs can currently appeal but defendants cannot—as the Proposal seems to contemplate—they could systematically benefit defendants. That could, in turn, cause defendants to settle for less. But, again, it is not obvious that the Proposal would have this effect. True, it would benefit defendants more than plaintiffs. But it could harm both by protracting litigation. From the defendants' perspective, the issue becomes whether they would benefit enough from the prospect of an early appellate ruling in their favor to overcome the additional cost associated with their failed appeals, also taking into account the relatively few new interlocutory appeals plaintiffs would pursue and the even fewer occasions when those would be successful. Our finding that trial court rulings in MDL proceedings are affirmed in about 90% of appeals suggests that the mathematics would not support the Proposal—even from the defendants' perspective. Appeals are not cheap. If they succeed only 10% of the time, they are probably a losing proposition, at least when considered purely in terms of defendants' net expenses in litigation.[42] Again, if we think as the Supreme Court did in *Twombly*, we would expect that average increase in net expenses to result in defendants paying more in settlement than without the Proposal.[43]

But *Twombly* may not have offered a complete picture. The prospect of high litigation costs affects the bargaining position not just of defendants, but also of plaintiffs. The Proposal could cause plaintiffs too to face significantly higher litigation expenses. And if they lose in litigation, they never recover those expenses. So we might conclude that the Proposal would benefit defendants, particularly if we take into account the phenomena that shape settlement dynamics, including risk aversion.

Consider the circumstances of the parties and their counsel in large MDLs. The defendants tend to have tremendous resources. Most large MDLs involve Fortune 500 companies as defendants, and many of these companies have annual litigation budgets in the hundreds of millions of dollars.[44] The plaintiffs do not have similar resources. As a result, the plaintiffs are apt to be more averse to the risks caused by the expense of litigation—and perhaps to litigation risks generally—than defendants. So a first pass at considering these sorts of dynamics suggest that

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[42] Net expenses in litigation is the right metric in this context because the assumption is that defendants are settling for too much based on the expected cost of litigation.

[43] To be sure, the above analysis considers net litigation costs only from the perspective of defendants. But that is not the only relevant perspective. If we look at the system as a whole, increasing the cost of litigation on average through interlocutory appeals would be harmful. Having numerous interlocutory appeals—each of which would have poor prospects of succeeding and thereby expediting the resolution of litigation—could be highly inefficient.

[44] *See, e.g.*, Merck & Co. 2018 Annual Report, p. 63 (https://s21.q4cdn.com/488056881/files/doc_financials/2018/Q4/2018-Form-10-K-(without-Exhibits)_FINAL_022719.pdf) (Merck's had legal defense reserves as of 12/31/2018 in the amount of $245 million); Medtronic plc 2018 Annual Report, p. 93 (http://newsroom.medtronic.com/static-files/262eb1cb-ed16-422c-b33c-d9f031105481) (Medtronic had accrued litigation reserves of $900 million as of 4/27/2018); Johnson & Johnson 2018 Annual Report, p. 132 (http://www.investor.jnj.com/annual-meeting-materials/2018-annual-report) (Johnson & Johnson's net litigation expenses for 2018 was $1.99 billion).

defendants may settle for too little rather than too much. Adopting the Proposal—which would likely shift negotiation leverage in defendants' favor—could exacerbate that dynamic. The shift would occur because defendants might suffer from an increase in litigation costs on average but would gain a chance at an early outright victory whereas plaintiffs would suffer a similar increase in litigation costs on average while also facing the prospects of an early loss, one that could deprive them of a settlement that they might otherwise obtain.

Focusing exclusively on the parties, however, misses a key dynamic. An important layer of incentives involves counsel. Defense attorneys are ordinarily compensated by the hour and do not pay for litigation costs. And they generally do not have any contingent interest in the outcome of a lawsuit. As a result, they benefit from the protraction of proceedings and are not averse to risk. Plaintiffs' attorneys, in contrast, are ordinarily paid on a contingent basis. They generally receive compensation and are reimbursed for litigation costs only if they obtain a recovery. They fare best—obtain the highest hourly rate—if they reach relatively early settlements and they suffer greatly if they lose outright. So they are harmed by delay and tend to be risk averse. This combination of the incentives before the attorneys—what economists call "agency costs"—puts pressure on plaintiffs to settle early, even if for a relatively modest amount, and puts pressure on defendants to be aggressive in settlement negotiations, rejecting even reasonable settlement offers.[45]

The above dynamics can help to explain empirical studies showing that when faced with moderate probabilities of losing at trial, plaintiffs are more likely to prefer to settle, but defendants are more likely to choose the risk-seeking option of trial.[46] And the same logic would seem to apply to appeals: a plaintiff faced with a moderate risk of losing on appeal may prefer to settle, whereas a defendant may choose the risk-seeking option of an appeal. Consequently,

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[45] See, e.g., JPD & RL, Defying Conventional Wisdom: The Case for Private Antitrust Enforcement.

[46] The theory behind these findings goes beyond the dynamics discussed in the text and reflects people's tendencies—at least in some circumstances—to be risk averse when it comes to choosing between different amounts of gains and risk prone when it comes to averting losses. *See, e.g.*, Chris Guthrie, Framing Frivolous Litigation: A Psychological Theory, 67 U. CHI. L. REV. 163, 168 (2000) ("When deciding whether to settle a case or go forward to trial, the Framing Theory thus predicts that plaintiffs are likely to prefer the risk-averse option-settlement-because they view both settlement and trial as gains, while defendants are more likely to prefer the risk-seeking option—trial—because they view both settlement and trial as losses."); Jeffrey J. Rachlinski, Gains, Loses and the Psychology of Litigation, 70 S. Cal. L. Rev. 113 (1996); Russell Korobkin and Chris Guthrie, Psychology, Economics and Settlement" A New Look at the Role of the Lawyer,76 TEX. L. REV. 77 (1997); Linda Babcock, et al., Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values, 15 Intl Rev L & Econ 289 (1995); Russell Korobkin and Chris Guthrie, Psychological Barriers to Litigation Settlement" An Experimental Approach, 93 Mich L Rev 107, 129-42 (1994); Peter J. van Koppen, Risk Taking in Civil Law Negotiations, 14 L & Human Beh 151 (1990); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System-And Why Not? 140 U. Pa. L. Rev. 1147, 1218 (1992).

plaintiffs may be more likely to assign a higher discount value to the risk that they could lose on appeal, and the defendants may be more tolerant of that risk.

To be clear, even if agency costs contribute to these dynamics, we do not mean to suggest that lawyers act in a deliberately unethical manner. They have an obligation to pursue the best interests of their clients and generally no doubt work hard to do so. But incentives matter. As discussed below, our interests tend to color our judgments in ways we have great difficulty in detecting. So the incentives before even ethical lawyers are likely to inform settlement outcomes, and not always in a way that serves their clients. To be sure, some clients are able to monitor and mitigate the incentives before counsel—to the extent they diverge from the clients' interests. That is particularly likely to be true for large corporate defendants in MDL proceedings, given their sophistication and resources. It is at least somewhat less likely to be true for plaintiffs in MDL proceedings, who tend to be less sophisticated and often lack the resources to second guess the advice of their counsel. As a result, the main point holds true: the incentives before counsel are likely to reinforce the tendency of settlements in MDL proceeding to be too small rather than too large. If so, the Proposal would likely lead to more—rather than less—distortion.[47]

V. Motivations and their Implications.

Let us assume, then, that the policy justifications for the proposal are unpersuasive. Why, then, would the Proponents pursue it? There is an obvious—and uninteresting—answer. Perhaps they are cynical, dressing up a recommended procedural reform as serving the public interest when it is contrary to the public interest and serves only the interests of large corporations, particularly when they violate the law.

But that is a highly uncharitable view. And there is good reason to think it is wrong. That reason is a phenomenon sometimes called motivated cognition. To oversimplify a bit, motivated cognition is believing what we want to believe, even in the face of contrary evidence.

One reason that the above description of motivated cognition is an oversimplification is the use of the term "want." It might suggest a conscious decision made in furtherance of a conscious desire, one that serves our interests in a straightforward way. But motivated cognition is much more subtle than that. The mechanisms by which it operates are often subconscious and difficult to detect. Indeed, one manifestation of motivated cognition is that each of us tends to believe that we are less affected by motivated cognition than are others—making it difficult to correct for our cognitive biases.

Further, motivated cognition can serve our impulses—even self-destructive impulses—rather than any desires we might express or interests we might recognize. Think of addicts. They

[47] Note that this argument does not deny that new information about the merits of a case will almost always change its settlement value. The final resolution of a dispositive issue on appeal, therefore, will usually alter its settlement value. But that does not necessarily mean that a pre-appeal settlement value is distorted. It means only that the value of a pre-settlement appeal is different from the value of a post-settlement appeal because the two values are based on different information.

famously will deny that they are addicts. In doing so, they may well be sincere—at least at a conscious level. Their impulse is to resist an understanding of themselves that they would experience as threatening to their sense of self. That does not mean that they want to be addicted, that they want to be ignorant of their own addictions and therefore unable to address them, or that their addictions and their self-deceptions serve their interests understood in an ordinary sense.

One natural reaction is to think that addicts suffer from distorted thinking in a way that most of us do not. In fact, a reason that such a reaction is natural is motivated cognition. Our minds are quick to distinguish—and pathologize—others as a way to make ourselves feel good. The reality is that motivated cognition is pervasive. Addicts—and some others—may tend to suffer more acutely from self-deception than (some) non-addicts, but the difference is likely not to be one of kind but one of degree.

Recognition of motivated cognition suggests three possible explanations of the motivation behind the Proposal, none of which assume bad faith. First, the Proposal might *benefit* corporate defendants, causing them to believe it also serves the public interest even though it does not. Second, the Proposal might *harm* corporate defendants and the public interest, but corporations might have reason to think they would benefit from it. Third, the Proposal might *harm* corporate defendants and the public interest, but benefit the lawyers who represent corporations—lawyers who play a crucial role in shaping the perceptions of corporations about their own interests. Notably, these last two points—about motivated cognition affecting corporations and their counsel—are not mutually exclusive but rather would tend to be mutually reinforcing.

A. A Strategic Advantage to Corporate Defendants.

Let us not be naïve. There is a real possibility that large corporations and their counsel support the Proposal because they rightly perceive it would give a strategic advantage to corporate defendants in MDLs. By adding a right to intermediate appeals—potentially even several sequential intermediate appeals—the Proposal could make MDLs more time-consuming, expensive, and difficult for plaintiffs to litigate.[48]

Defense attorneys are sometimes criticized for—and even publicly boastful of—using delay as a strategy to increase their billings, protract litigation, and force plaintiffs to accept lower settlement values.[49] From this perspective, the Proposal can be understood as providing an almost endless opportunity for defense lawyers to force delays. If the Proposal were adopted, the ability of defendants to protract the litigation would be limited only by the often extraordinary

[48] Defendants' attempts to delay and complicate MDL proceedings frustrates the guiding purpose of MDLs to "promote the just and efficient conduct of such actions". 28 U.S.C. §1407(a).
[49] Monroe H. Freedman, Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements, 26 Hofstra L. Rev. 641, 647 (1998) ("The ability to delay litigation for tactical advantage is widely recognized among litigators as an essential lawyering skill. Bruce Bromley, a highly respected litigator, once boasted at a conference of lawyers and judges: 'I was born, I think, to be a protractor ....I quickly realized in my early days at the bar that I could take the simplest antitrust case ... and protract it for the defense almost to infinity.'")

creativity of their lawyers, some of whom—like Bruce Bromley—have described the role of defense attorneys as "protractors."[50]

The Proposal could provide a win-win for defendants: their lawyers could file long-shot motions, and even if they are denied, the ensuing appeals could potentially delay the case for two years or more. During those two years, some plaintiffs may die or become so financially desperate that they will settle their case for a relative pittance. Even if the appellate court affirms, the defense lawyers could dream up other motions. Rinse and repeat.

So it is possible that the Proposal would benefit corporate defendants and that is why they and their counsel support it. And it is also possible that causes them to believe the Proposal would serve the public interest even though it would not. But there are other possibilities.

B. Harm to Corporate Defendants but a Perception of Benefit.

There are various ways in which the Proposal could *harm* corporate defendants. It is at least conceivable that corporate defendants are risk averse and focus on their own bottom lines in negotiations rather than on the risks plaintiffs face. This is the model that the *Twombly* Court seemed to contemplate.[51] Assuming this model, if the Proposal would on net increase the average cost and duration of litigation for corporate defendants in MDLs, they might suffer an expected increase in litigation expenses and as a result pay more in settlements. And it is possible—again, assuming this model—that plaintiffs in MDLs would actually benefit from the proposal.

But the above model seems implausible. For the reasons described supra, corporate defendants are likely to achieve at least a relative advantage over plaintiffs in negotiations from the prospect of delay.

Tweaking our analysis to reflect this likely reality, the Proposal might nonetheless harm corporate defendants on the whole, even if it harms plaintiffs more. The reason is that the Proposal might significantly increase the duration and cost of litigation for all parties—and the judiciary—before litigation settles. True, according to this line of analysis, the corporate defendants would ultimately settle on average for less than they would without the Proposal. The price, however, might be an increase in the cost of litigation that results in their suffering a net loss. That could be true even if plaintiffs suffer an even greater net loss. Note that procedural reform, unlike a settlement for purely monetary relief, is not necessarily a zero-sum game. What harms plaintiffs can also harm defendants.

There are other less obvious ways in which the Proposal could harm corporations. Consider the following possibility. We know that the great majority of appeals fail, including in MDLs (as the appendices show). It is also possible that judges "over-justify" their decisions, interpreting the law and the facts in a way that makes the outcomes they reach seem more certain than they really are. If so, the parties that appeal more often will not only tend to lose those appeals but, in the

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51 See also Robert Bone article (in Duke?).

process, are likely to create adverse precedents, skewing the law against them. In this way, legal process may inform legal substance.

Of course, this phenomenon is speculative. However, if it is real, the current "asymmetry" in the system may skew appellate law in favor of defendants. After all, as the Proponents note, plaintiffs get to appeal adverse judgments throughout litigation, but defendants generally only get to appeal an adverse result at trial. And, as we all know, trials are rare. So the majority of appeals—and the great majority of appeals in the early stages of litigation—are brought by plaintiffs. They usually lose. And when they lose judges—in seeking to justify their decisions—may tend to overstate how strongly the law supports defendants.

The Proposal to some extent could reverse this phenomenon—again, if it is a real phenomenon. Defendants might be able to appeal large numbers of adverse trial court MDL decisions that they could not appeal in the past, including denials of motions to dismiss, for summary judgment, and to exclude expert testimony. Appellate courts may view these appeals skeptically, particularly in light of their novelty and the relatively lenient standards that plaintiffs need to satisfy to prevail on them. Defendants might lose regularly and, if they do, appellate judges may support their decisions at times by overstating the strength of the law that favors plaintiffs. A systemic effect of the Proposal, then, may be to shift the law in favor of plaintiffs.[52]

Assuming the proposal would be bad for corporate defendants, the question then becomes why they would support it.[53] Don't corporations know what is good for them? Aren't they consummate sophisticated legal actors? Maybe. But maybe not.

The reality is that the people who make significant decisions in litigation on behalf of corporations are likely to identify strongly with those institutions. And they are likely to be surrounded by others who feel the same way. In many ways that is good. They should believe in the work they do. So acknowledging that the entities for which they work would violate—or have violated—the law is likely to be a threat to their sense of self-worth. They are like to perceive evidence in a way that minimizes their sense of that threat. Being surrounded by others

[52] We mean to take no position here on whether this change would be good, bad, or indifferent. To address that issue, we would need an ideal baseline. In this context, identifying one would be far from straightforward.

[53] Before one rejects this possibility entirely, it is worthwhile considering other procedural decisions that corporate defendants currently make and that may also harm them. There is at least a perception, for example, that defendants—including corporations—started making many more motions to dismiss in the aftermath of *Twombly* and *Iqbal*. Those motions often fail. And it is plausible—based on the kind of judicial over-justification discussed in the text—that a consequence is that courts frame the law more favorably for plaintiffs than they would if they were not asked to assess the merits of the litigation until later in the proceedings, perhaps at summary judgment, when the standard for dismissal is much more favorable to defendants. This dynamic provides another credible possibility of corporate defendants acting contrary to their own interests.

with similar cognitive biases is likely to reinforce that dynamic. The result may well be a distorted view of reality. Cognitive bias.

Cognitive bias could cause corporate agents to believe that, if the corporation for which they work are sued, the litigation would surely be meritless. And it could cause them to believe that if the corporation has been sued, the litigation *is* meritless—and to believe that, if a trial court judge misjudges the merits of the litigation, surely an appellate court, given the opportunity, would set matters straight. True, some corporations really do violate the law. But we don't and won't. Most corporations are like us—good actors, much more likely to be falsely accused than to act improperly, much less illegally.

This kind of reasoning is perfectly natural. We are all, in our own ways, like the residents of Lake Wobegon, who believe all their children are above average. But natural phenomena can be dangerous. In this context, they could cause corporate agents greatly to underestimate the likelihood that they will be sued, that they will pursue an interlocutory appeal, that they will lose the appeal, and that they will regret the resulting costs and disruptions that they have in effect imposed on themselves.

C. Harm to Corporate Defendants but a Benefit to Defense Counsel.

Given the pervasive effects of motivated cognition, it should be unsurprising that the lawyers who represent corporate defendants might believe—and might contribute to their corporate clients believing—that a procedural reform would benefit those clients even if in fact it would not. After all, to the extent the in-house representatives of the clients already have reasons to favor the Proposal, the lawyers are likely to be predisposed to agree with them. Why risk being killed as the messenger?

Further, as noted above, counsel for corporations are the most likely to benefit from the Proposal. If the costs of litigation increase on the whole, that may—or may not—harm corporate defendants, but it would certainly benefit their lawyers. Further, if in a subtle, systemic way the Proposal would slowly modify the law to benefit plaintiffs—and perhaps thereby encourage more litigation—that too would likely increase the fees of corporate defense lawyers. Again, factor in cognitive bias, and the lawyers are likely to lead the charge on the Proposal and to believe sincerely that they are serving the interests of their clients, even if in fact they are not.

Perhaps the notion that sophisticated corporate representatives and their very talented attorneys would engage in distorted reasoning seems farfetched. If so, consider two cases—*MTBE* and *Vioxx*—that form a centerpiece of the Proponents' argument that without interlocutory appeals corporate defendants are forced to settle cases for inflated values.[54] In both of these cases, later events show that if the defendants had waited until after an appeal was decided, they might well have had to pay significantly *more* to settle.

MTBE

[54] *See* Beisner and Schwartz, *supra*, at p. 10-11, Polis, *supra* at 1675-1684.

When water utilities and public agencies sued gasoline refiners alleging that groundwater was contaminated by the gasoline oxygenate MTBE, the cases were transferred to an MDL in the Southern District of New York. The MDL judge denied the MTBE defendants' motion to dismiss, finding that the Clean Air Act did not preempt plaintiffs' claims. Because her preemption decision was not one about which there was "substantial ground for a difference of opinion," the MDL judge declined to certify her order for an interlocutory appeal under §1292(b).[55]

Most of the defendants agreed to settle the MTBE litigation that was brought by water utilities and public agencies in 17 states for $423 million. Claiming that these defendants were pressured into entering into this settlement because they could not immediately appeal the preemption decision, the Proponents claim, "It stands to reason that the cost of these settlements was higher as a result of the district court's rulings and the inability to obtain immediate appellate review. Indeed, appellate review might have established that the defendants had no liability at all."[56]

However, the subsequent history of the case suggests the opposite conclusion: that the MTBE defendants likely *underpaid* for the pre-appeal settlement because the court of appeal would have affirmed the MDL court's preemption decision. We know this because an MTBE case against a non-settling defendant went to trial, resulting in a $105 million verdict for just one city—New York City—and against just one group of defendants—Exxon and its affiliated companies.On appeal, the Second Circuit affirmed the MDL judge's preemption decision and fully affirmed the $105 million verdict.[57]

Rather than vindicating the defendants—as they claim would have happened—an immediate appeal could have conclusively eliminated the profound risk to the plaintiffs' case at the time they agreed to settle. If the settling defendants had waited for the appeal to be decided before settling the case, plaintiffs' case might well have become much stronger and the settlement value much higher than it was before the appeal.

Vioxx

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[55] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 174 F. Supp. 2d 4 (S.D.N.Y. 2001). In denying the request for certification, the MDL judge also observed, "The consolidated cases before this Court involve an essential public right, *i.e.*, the right to water free from contamination, and effect a great number of people. It is important that these actions move forward in a timely and efficient manner. More likely than not, an interlocutory appeal would interfere with discovery, which is progressing well. . . . Moreover, as stated above, it is not clear that an interlocutory appeal would eliminate all of plaintiffs' state law claims—leaving doubt as to whether such an appeal would advance the ultimate termination of these cases." *Id.*

[56] Beisner and Schwartz, *supra* at 10-11, (quoting Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 Fordham L. Rev. 1643, 1645-46 (2011)).

[57] *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2nd Cir. 2013), *cert denied Exxon Mobil Corp. v. New York*, 2014 U.S. LEXIS 2772 (U.S., Apr. 21, 2014).

Patients who took the painkiller Vioxx sued the manufacturer alleging that it caused serious injuries such as heart attacks and strokes. The cases were transferred to an MDL in the Eastern District of Louisiana. The MDL court denied the defendants' motion for summary judgment, finding that the Food, Drug, and Cosmetics Act did not preempt plaintiffs' claims.[58]

One of the bellwether trials resulted in a verdict for the plaintiffs in the amount of $51 million, which the MDL court later remitted to $1.6 million.[59] The defendant appealed the verdict to the Fifth Circuit in September 2007.[60] Defendants' appeal was never briefed, but clearly if defendants wanted to raise the issue, the Fifth Circuit could have reviewed the MDL court's preemption ruling, an issue that could have affected all of the cases in the MDL. Rather than appeal preemption, defendants instead chose to enter into a $4.85 billion global settlement in November 2007, two months after filing their appeal. Defendants then dismissed their appeal in April 2008, never allowing the Fifth Circuit to address preemption.[61]

After the settlement, the U.S. Supreme Court decided the same implied preemption argument raised by the *Vioxx* defendants in a case involving a different drug. The Court held that the Food, Drug, and Cosmetics Act did *not* preempt plaintiffs' claims.[62] Here, as in *MTBE*, preemption was a profound risk facing plaintiffs' case. If the Vioxx defendants had awaited an appellate court ruling and if it had eliminated that risk, the value of the settlement almost certainly would have been much higher.

MTBE and *Vioxx* show that defendants by settling cases before resolution of an appeal may obtain better terms than they would afterwards. Of course that is true. What is less obvious is what the Proponents' reliance on *MTBE* and *Vioxx* suggests: that the representatives of corporations may misperceive reality. The Proponents—attorneys for corporations—seem to think appellate review would have benefited the corporate defendants in *MTBE* and *Vioxx* but the evidence suggests the opposite. That smacks of cognitive bias. It is the kind of thinking that could cause those same attorneys to pursue unwise interlocutory appellate review on behalf of their clients. It also could cause them to champion a new rule allowing such interlocutory appellate review even though it would in fact harm their clients on the whole. Sophisticated clients and lawyers are not immune to cognitive bias. None of us are.

VI. Conclusion.

The corporations that tend to find themselves defending legal actions and the attorneys who represent them seem at times to take contradictory positions. First, they claim that procedural reforms that increase the expense and duration of litigation would benefit both them and society. The Proposal discussed in this Essay appears to be one such procedural reform. But there are plenty of others. Consider recent efforts at modifying class procedure. Corporate defendants have

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[58] *In re Vioxx Prods. Liab. Litig*., 501 F. Supp. 2d 776 (E.D. La. 2007).
[59] *In re Vioxx Prods. Liab. Litig*., 448 F. Supp. 2d 737, 738 (E.D. La. 2006).
[60] *See Barnett v. Merck & Co.*, No. 07-30897 (5th Cir. Sept. 14, 2007) (notice of appeal).
[61] *See Barnett v. Merck & Co*., No. 07-30897 (5th Cir. Apr. 18, 2008) (entry of dismissal).
[62] *See Wyeth v. Levine*, 555 U.S. 555 (2009) (rejecting drug manufacturer's preemption argument and affirming jury verdict in favor of plaintiffs);

argued that class actions should involve full-blown *Daubert* inquiries[63] and bifurcation, trifurcation or other chopping up of discovery and trial.[64] They have also sought at class certification ever deeper exploration of the merits and correlatively ever more expensive expert reports[65] and evidentiary hearings that require many hundreds of hours of attorney time and hundreds of thousands of dollars in expert costs.[66] These procedural changes, corporate defendants and their lawyers assert, will improve the system and relatedly serve the interests of corporate defendants. That is true even though they increase the expense of litigating class actions.

Second, those same corporate defendants complain that the ever-increasing cost of class litigation forces them to settle even meritless litigation, an argument that gained traction in *Twombly*. The prospect of expensive, disruptive, protracted litigation, they say, has an *in terrorem* effect on them. They complain, in other words, about the consequences of the very procedural reforms for which they advocate.

There is a resulting riddle—why do they lobby for procedural reforms that they claim harm them? It has various possible solutions. One may lie in somehow reconciling these competing claims as both being true. How to do so is not obvious.

Another is to disregard the second claim—that protracting litigation harms corporate defendants. It may be that adding to the expense and during of litigation actually confers a strategic *benefit* on corporate defendants, even though they have claimed the contrary in requesting other procedural reforms, such as a heightened pleading standard. Corporate defendants might falsely assert the second claim because they are cynical. Or, as we have suggested, they might do so in good faith and in error. Motivated cognition can explain why they would do so.

Motivated cognition can support another possibility as well. It may be that the first claim is wrong—that adding to cost and delay in litigation *harms* corporate defendants—at least in many circumstances. If so, the Proposal we discuss in this Essay provides a possible example of a procedural reform that would likely damage them. So would the various recent and potential modifications to class procedure noted above. And the apparent inconsistency of corporate defendants and their counsel in advocating for these procedural reforms may be explained by cognitive bias. That possibility, we submit, is at least worth entertaining.

[63] Dukes v. Wal-Mart.

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[66]

Appendix 1 – Affirmance Rate of MDL Transferee Judges

Our search was based on data available as of May 7, 2019.

To identify all multidistrict litigation proceedings, we used two reports published by the Judicial Panel on Multidistrict Litigation ("JPML"):

- "MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending" as of April 15, 2019, and
- "Multidistrict Litigation Terminated Through September 30, 2018" (the most recent data available as of 4/15/2019).

We reviewed this data to identify all MDLs that met the following four criteria:

- **Large** - More than 500 total actions;
- **Recent** – MDL created in last 20 years and either still open or terminated in the last 5 years; and
- **Mature** – Either terminated or open with more than 70% of the cases resolved; and
- **Personal Injury** – MDL primarily involved claims of personal injury caused by a product.

The 37 MDLs (17 terminated and 20 still open) that met all four criteria are:

	MDL No.	Name
1.	MDL - 1431	Baycol Products Liability Litigation
2.	MDL - 1871	Avandia Marketing, Sales Practices And Products Liability Litigation
3.	MDL - 1964	Nuvaring Products Liability Litigation
4.	MDL - 2158	Zimmer Durom Hip Cup Products Liability Litigation
5.	MDL - 2187	C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation
6.	MDL - 2197	DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation
7.	MDL - 2243	Fosamax (Alendronate Sodium) Products Liability Litigation (No. Ii)
8.	MDL - 2272	Zimmer NexGen Knee Implant Products Liability Litigation
9.	MDL - 2325	American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation
10.	MDL - 2326	Boston Scientific Corp. Pelvic Repair System Products Liability Litigation
11.	MDL - 2327	Ethicon, Inc., Pelvic Repair System Products Liability Litigation

	MDL No.	Name
12.	MDL - 2329	Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation
13.	MDL - 2331	Propecia (Finasteride) Products Liability Litigation
14.	MDL - 2387	Coloplast Corp. Pelvic Support Systems Products Liability Litigation
15.	MDL - 2391	Biomet M2a Magnum Hip Implant Products Liability Litigation
16.	MDL - 2419	New England Compounding Pharmacy, Inc., Products Liability Litigation
17.	MDL - 2428	Fresenius Granuflo/Naturalyte Dialysate Products Liability Litigation
18.	MDL - 2433	E. I. Du Pont De Nemours And Company C-8 Personal Injury Litigation
19.	MDL - 2440	Cook Medical, Inc., Pelvic Repair System Products Liability Litigation
20.	MDL- 1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation
21.	MDL- 1507	Prempro Products Liability Litigation
22.	MDL- 1657	Vioxx Products Liability Litigation
23.	MDL- 1742	Ortho Evra Products Liability Litigation
24.	MDL- 1760	Aredia® and Zometa® Products Liability Litigation
25.	MDL- 1789	Fosamax Products Liability Litigation
26.	MDL- 1842	Kugel Mesh Hernia Patch Products Liability Litigation
27.	MDL- 1909	Gadolinium-Based Contrasts Products Liability Litigation
28.	MDL- 1928	Trasylol Products Liability Litigation
29.	MDL- 1943	Levaquin Products Liability Litigation
30.	MDL- 1953	Heparin Products Liability Litigation
31.	MDL- 2004	Mentor Corp. Obtape Transobturator Sling Products Liability Litigation
32.	MDL- 2092	Chantix (Varenicline) Products Liability Litigation
33.	MDL- 2299	Actos (Pioglitazone) Products Liability Litigation

	MDL No.	Name
34.	MDL-2342	Zoloft (Sertraline Hydrochloride) Products Liability Litigation
35.	MDL-2385	Pradaxa (Dabigatran Etexilate) Products Liability Litigation
36.	MDL-2434	Mirena IUD Products Liability
37.	MDL-2502	Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No II)

We then conducted searches on Lexis between April 25, 2019 and April 30, 2019 to attempt to identify all cases in which a court of appeals reviewed a decision by the MDL judge in any of these 37 MDLs.[67] This search identified 115 decisions by MDL courts that were reviewed on the merits by a circuit court or the Supreme Court.

In these appellate opinions (which are summarized below):

- The circuit court affirmed the MDL court in 100 of the 115 cases (87%)
- The circuit court partially affirmed and partially reversed or vacated the MDL court's decision in 3 of the 115 cases (3%)
- The circuit court reversed the MDL court in 12 of the 115 cases (10%)

[67] We attempted to find all opinions by using search terms that included, in the disjunctive, the MDL number (*e.g.*, "MDL-2272"), the case number (*e.g.*, "md-2272"), and variations of the MDL case name (e.g., "NexGen" OR "In re: Zimmer"). We recognize that we may not have found all opinions if an opinion did not contain the MDL number, the MDL case number, and if the name of the MDL was misspelled or otherwise was not accurate in the opinion. For example, if an individual case was appealed and the circuit court opinion did not mention or reference the MDL case name or number, we could have missed that opinion (although our use of broad search terms such as "NexGen" should have found any case that involved this product even if it did not mention the MDL case number). Because of the large number of cases that are included in our study, and because any missed cases likely would have the same affirmance rate as those that we found, we do not believe that any missed cases would significantly impact the conclusions we reach from the data.

MDL No.	Case Name	Appeals	Affirmed	Reversed	Partially Affirmed / Reversed
MDL - 1431	Baycol Products Liability Litigation	8	3	3	2
MDL - 1871	Avandia Marketing, Sales Practices And Products Liability Litigation	10	9	1	0
MDL- 2187	C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation	1	1	0	0
MDL - 2243	Fosamax (Alendronate Sodium) Products Liability Litigation (No. Ii)	2	1	1	0
MDL - 2272	Zimmer NexGen Knee Implant Products Liability Litigation	1	1	0	0
MDL - 2326	Boston Scientific Corp. Pelvic Repair System Products Liability Litigation	2	2	0	0
MDL - 2327	Ethicon, Inc., Pelvic Repair System Products Liability Litigation	2	2	0	0
MDL - 2391	Biomet M2a Magnum Hip Implant Products Liability Litigation	1	1	0	0
MDL - 2434	Mirena IUD Products Liability Litigation	2	2	0	0
MDL- 1203	Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation	39	38	1	0
MDL- 1507	Prempro Products Liability Litigation	5	4	1	0
MDL- 1657	Vioxx Products Liability Litigation	14	14	0	0
MDL- 1742	Ortho Evra Products Liability Litigation	1	1	0	0
MDL- 1760	Aredia and Zometa Products Liability Litigation	6	6	0	0
MDL- 1789	Fosamax Products Liability Litigation	3	3	0	0
MDL- 1909	Gadolinium-Based Contrast Agents Products Liability Litigation	1	1	0	0
MDL- 1928	Trasylol Products Liability Litigation	5	5	0	0
MDL- 1943	Levaquin Products Liability Litigation	2	1	0	1
MDL- 1953	Heparin Products Liability Litigation	1	1	0	0
MDL- 2004	Mentor Corp. Obtape Transobturator Sling Products Liability Litigation	5	1	4	0

MDL No.	Case Name	Appeals	Affirmed	Reversed	Partially Affirmed / Reversed
MDL-2342	Zoloft (Sertraline Hydrochloride) Products Liability Litigation	1	1	0	0
MDL-2385	Pradaxa (Dabigatran Etexilate) Products Liability Litigation	2	1	1	0
MDL-2502	Lipitor (Atorvastatin Calcium) Marketing, Sales Practices And Products Liability Litigation (No II)	1	1	0	0
	TOTALS	**115**	**100**	**12**	**3**
			86.9%	**10.4%**	**2.6%**

DETAILS OF ALL APPEALS REVIEWED

Baycol Products Liability Litigation (MDL -1431)

1. Partially Reversed - Plaintiffs' attorneys appealed the MDL court's imposition of sanctions. The 8th Circuit affirmed the removal of an attorney from the Plaintiffs' Steering Committee, but vacated the sanctions. *Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794 (8th Cir. 2005).
2. Reversed – Following the MDL court's denial of a motion by plaintiffs to certify a class of West Virginia consumers, other consumers sought to certify a class in West Virginia state court. The MDL judge granted defendants' request to enjoin the plaintiffs from relitigating class certification in state court. The 8th Circuit affirmed the MDL court's order. *Smith v. Bayer Corp. (In re Baycol Prods. Litig.*), 593 F.3d 716 (2010). The Supreme Court later reversed the 8th Circuit and the MDL court's order and vacated the injunction under the Anti-Injunction Act. *Smith v. Bayer Corp*., 131 S. Ct. 2368 (2011).
3. Reversed –Plaintiff appealed the MDL court's dismissal of her qui tam case on the ground that she was not an "original source" of the information. The 8th Circuit reversed, holding that the MDL court misapplied the circuit's definition of "original source." *In re Baycol Prods. Litig.*, 870 F.3d 960 (8th Cir. 2017).
4. Reversed – A deceased plaintiff's successors in interest appealed the MDL court's denial of their motion to substitute following the plaintiff's death. The 8th Circuit reversed the MDL court's decision. *Torres v. Bayer Corp. (In re Baycol Prods. Litig.)*, 616 F.3d 778 (8th Cir. 2010)
5. Affirmed – Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Brewer v. Bayer AG (In re Baycol Prods. Litig.)*, 2009 U.S. App. LEXIS 24903 (8th Cir. 2009)
6. Affirmed - Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Caravella v. Bayer AG (In re Baycol Prods. Litig.*), 359 Fed. Appx. 679 (8th Cir. 2009).
7. Affirmed - Plaintiffs appealed the MDL court's decision excluding their expert and dismissing their case on summary judgment. The 8th Circuit affirmed the MDL court's decisions. *Flesner v. Bayer AG (In re Baycol Prods. Litig.)*, 596 F.3d 884 (8th Cir. 2010).
8. Partially Reversed – Qui tam plaintiff appealed MDL court's dismissal of her case for failure to plead fraud with particularity. The 8th Circuit affirmed the dismissal relating to some of plaintiff's claims, but reversed as to other claims and remanded for further proceedings. *United States ex rel. Simpson v. Bayer Healthcare (In re Baycol Prods. Litig.)*, 732 F.3d 869 (8th Cir. 2013)

Avandia Marketing, Sales Practices and Products Liability Litigation (MDL -1871)

1. Reversed - A health insurer appealed the MDL court's dismissal of its case against a pharmaceutical company, holding that the Medicare Act did not provide Medicare Advantage organizations with a private cause of action to seek such reimbursement. The 3rd Circuit reversed. *In re Avandia Mktg*., 685 F.3d 353 (3rd Cir. 2012)

2. Affirmed - A plaintiff's attorney appealed the MDL court's pretrial order establishing a common benefit fund that included an assessment from proceeds recovered in cases litigated in state court. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig*., 658 Fed. Appx. 29 (3rd Cir. 2016).
3. Affirmed – A plaintiff appealed the MDL court's dismissal of his complaint for failure to serve a required expert report. The 3rd Circuit affirmed the MDL court's dismissal. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 687 Fed. Appx. 210 (3rd Cir. 2017)
4. Affirmed – Plaintiff's attorney appealed an order by the MDL court holding that the law firm violated an order requiring a common benefit assessment on settled cases. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 617 Fed. Appx. 136 (3rd Cir. 2015)
5. Affirmed – A plaintiff appealed the MDL court's dismissal of her case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 746 Fed. Appx. 122 (3rd Cir. 2018)
6. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on a 12(b)(1) motion to dismiss. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig*., 639 Fed. Appx. 866 (3rd Cir. 2016)
7. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on a 12(b)(1) motion to dismiss. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Lit.*, 564 Fed. Appx. 672 (3rd Cir. 2014)
8. Affirmed - A plaintiff appealed the MDL court's dismissal of her case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 639 Fed. Appx. 874 (3rd Cir. 2016).
9. Affirmed – Plaintiff appealed the MDL court's dismissal of his breach of express warranted claim. The 3rd Circuit affirmed the MDL court. *In re Avandia Mktg. Sales Practices & Prods. Liab. Litig.*, 588 Fed. Appx. 171 (3rd Cir. 2014)
10. Affirmed – In an interlocutory appeal certified under §1292(b), pharmaceutical company appealed MDL court's denial of their motion to dismiss a third-party payor's RICO claim. The Third Circuit affirmed the MDL court's decision. ***This interlocutory appeal took two years to decide from the time of the MDL court's original order***. *In re Avandia Mktg*., 804 F.3d 633 (3rd Cir. 2015).

C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation (MDL 2187)

- Affirmed – Defendant appealed MDL judge's order excluding evidence of FDA 510(k) clearance at trial, and its order finding that the award of punitive damages was not unconstitutional. The 4th Circuit affirmed the MDL judge's orders. *Cisson v. C.R. Bard, Inc. (In re C.R. Bard, Inc.)*, 810 F.3d 913 (4th Cir. 2016).

Fosamax (Alendronate Sodium) Products Liability Litigation (No. II) (MDL -2243)

1. Affirmed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 3rd Cir. affirmed the MDL court. *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150 (3rd Cir. 2014).
2. Reversed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 3rd Cir. reversed the MDL court. *In re Fosamax Alendronate Sodium Prods. Liab. Litig.*, 852 F.3d 268 (3rd Cir. 2017).

Zimmer NexGen Knee Implant Products Liability Litigation (MDL -2272)

1. Affirmed - A plaintiff appealed the MDL court's dismissal of his case on summary judgment. The 7th Cir. affirmed the MDL court. *Zimmer, NexGen Knee Implant Prods. Liab. Litig.*, 884 F.3d 746 (7th Cir. 2018).

Boston Scientific Corp. Pelvic Repair System Products Liability Litigation (MDL -2326)

1. Affirmed - Defendants appealed the MDL judge's decisions to consolidate actions for trial and to exclude certain regulatory evidence. The 4th Cir. affirmed both decisions. *Campbell v. Boston Sci. Corp.*, 882 F.3d 70 (4th Cir. 2018),
2. Affirmed – Defendants appealed the MDL judge's decisions to consolidate actions for trial and his denial of a motion for judgment as a matter of law. The 11th Cir. affirmed both decisions. *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304 (11th Cir. 2017)

Ethicon, Inc., Pelvic Repair System Products Liability Litigation (MDL -2327)

1. Affirmed - Plaintiffs appealed an order dismissing the action for failure to effect service. The Fourth Circuit affirmed the decision. *Weer v. Ethicon, Inc. (In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.)*, 643 Fed. Appx. 304 (4th Cir. 2016).
2. Affirmed – Plaintiffs appealed an order dismissing the action for failure to effect service. The Fourth Circuit affirmed the decision. *Marshall v. Ethicon, Inc.*, 670 Fed. Appx. 775 (4th Cir. 2016).

Biomet M2a Magnum Hip Implant Products Liability Litigation (MDL-2391)

- Affirmed – Plaintiff appealed dismissal of his case on a motion for summary judgment. The 7th Circuit affirmed the MDL court. *Eastman v. Biomet, Inc.*, 724 Fed. Appx. 481 (7th Cir. 2018).

Mirena IUD Products Liability (MDL-2434)

1. Affirmed – Plaintiffs appealed the MDL court's order granting summary judgment on the basis of lack of admissible expert evidence. The 2nd Circuit affirmed the MDL court's order. *Mirena MDL v. Bayer Healthcare Pharms. Inc. (In re Mirena IUD Prods. Liab. Litig.)*, 713 Fed. Appx. 11 (2nd Cir. 2017).
2. Affirmed – Plaintiff appealed the MDL court's order dismissing her case as time barred. The 2nd Circuit affirmed the MDL court's order. *Medinger v. Bayer Healthcare Pharms. Inc.*, 667 Fed. Appx. 321 (2nd Cir. 2016).

Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig. (MDL-1203)

1. Affirmed – Plaintiffs and law firms appealed MDL court's award of common benefit attorneys' fees. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig.*, 582 F.3d 524 (3rd Cir. 2009)

2. Affirmed – Plaintiff filed an interlocutory appeal of MDL court's order, pursuant to the All Writs Act, enjoining a mass opt out of a state class. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig*., 282 F.3d 220 (3rd Cir. 2002)
3. Affirmed – Plaintiff appealed MDL court's determination that she is not entitled to benefits under settlement agreement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 2019 U.S. App. LEXIS 4017 (3rd Cir. 2019)
4. Reversed – Plaintiff appealed the MDL court's orders, under the All Writs Act, preventing them from seeking certain damages in state court proceedings. The 3rd Cir. upheld the MDL court's exercise of power under the All Writs Act, but vacated certain parts of the injunctions. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 369 F.3d 293 (3rd Cir. 2004).
5. Affirmed – Plaintiff appealed MDL court's order denying recovery in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig*., 543 F.3d 179 (3rd Cir. 2008)
6. Affirmed – Class members appealed the MDL court's order approving class action settlement and imposing certain restrictions on opt-out claims. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., Fleming & Assocs., LLP*, 385 F.3d 386 (3rd Cir. 2004)
7. Affirmed – Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig*., 444 Fed. Appx. 627 (3rd Cir. 2011)
8. Affirmed – Plaintiffs appealed MDL court's order ruling that they were bound by a prior settlement agreement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141 (3rd Cir. 2005)
9. Affirmed – Plaintiffs appealed MDL court's order approving an amendment to the settlement agreement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 93 Fed. Appx. 338 (3rd Cir. 2004)
10. Affirmed – Plaintiff appealed the MDL court's order enjoining her from litigating a settled claim against the defendant. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 92 Fed. Appx. 890 (3rd Cir. 2004)
11. Affirmed – Plaintiff appealed MDL court's orders denying his motion for voluntary dismissal following exclusion of expert and granting summary judgment in favor of defendants. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig. Rubin*, 85 Fed. Appx. 845 (3rd Cir. 2004)
12. Affirmed - Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 601 Fed. Appx. 143 (3rd Cir. 2015)
13. Affirmed - Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig*., 297 Fed. Appx. 181 (3rd Cir. 2008)

14. Affirmed – Plaintiff appealed MDL court's order denying his motion to compel settlement trust to audit a claim. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig*., 200 Fed. Appx. 95 (3rd Cir. 2006)
15. Affirm and Remand – Plaintiff appealed MDL court's order enjoining opt-out plaintiffs from making evidentiary arguments related to, inter alia, punitive damages. The 3rd Circuit agreed with the MDL court's damage limitations and held that, for the most part, the terms of the injunction were appropriate. The 3rd Circuit made suggestions to clarify the injunction and remanded the case to the MDL court for further consideration. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 123 Fed. Appx. 465 (3rd Cir. 2005).
16. Affirm – Plaintiffs appealed the MDL court's order granting additional time to settlement trust to administer the settlement claims received by suspending all deadlines for five months. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 90 Fed. Appx. 643 (3rd Cir. 2004)
17. Affirmed - Plaintiff appealed MDL court's order denying his motion to compel settlement trust to audit a claim. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig. (Dahlka),* 427 Fed. Appx. 233 (3rd Cir. 2011)
18. Affirmed – Plaintiffs appealed MDL court's dismissal of their claims for failure to comply with a discovery order concerning expert reports. The 3rd Circuit affirmed the MDL court's dismissal. *In re Diet Drugs Prods. Liab. Litig*., 30 Fed. Appx. 27 (3rd Cir. 2002)
19. Affirmed - Plaintiff appealed the MDL court's denial of certain benefits under a settlement. The 3rd Circuit affirmed the MDL court's order. *Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig. v. Farr*, 451 Fed. Appx. 165 (3rd Cir. 2011)
20. Affirmed – Plaintiff appealed MDL court's order denying her motion to opt out of a class settlement and dismissing her case. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prods. Liab. Litig*., 89 Fed. Appx. 314 (3rd Cir. 2004)
21. Affirmed – Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. In re Diet Drugs Prods. Liab. Litig., 133 Fed. Appx. 832 (3rd Cir. 2005)
22. Affirmed – Court of appeals affirmed the MDL court without a written opinion. *In re Diet Drugs Prods. Liab. Litig.*, 2001 U.S. App. LEXIS 20127 (3rd Cir. 2001)
23. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 575 Fed. Appx. 69 (3rd Cir. 2014)
24. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 596 Fed. Appx. 93 (3rd Cir. 2014)
25. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 573 Fed. Appx. 178

26. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 573 Fed. Appx. 184 (3rd Cir. 2014)
27. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.,* 412 Fed. Appx. 527 (3rd Cir. 2011)
28. Affirmed – Plaintiffs appealed MDL court's order denying reconsideration of attorneys' fee award. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.,* 383 Fed. Appx. 242 (3rd Cir. 2010)
29. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 601 Fed. Appx. 158 (3rd Cir. 2015)
30. Affirmed – Plaintiff appealed the MDL court's order enjoining her lawsuit against defendant. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 573 Fed. Appx. 182 (3rd Cir. 2014) In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig., 706 F.3d 217 (3rd Cir. 2013)
31. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermin/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 597 Fed. Appx. 719 (3rd Cir. 2015)
32. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.,* 525 Fed. Appx. 140 (3rd Cir. 2013)
33. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramin/Dexfenfluramine) Prods. Liab. Litig.,* 595 Fed. Appx. 109 (3rd Cir. 2014)
34. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/ Dexfenfluramine) Prod. Liab. Litig*., 553 Fed. Appx. 145 (3rd Cir. 2014)
35. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 609 Fed. Appx. 78 (3rd Cir. 2015)
36. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs Prod. Liab. Litig.,* 375 Fed. Appx. 269 (3rd Cir. 2010)
37. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig*., 573 Fed. Appx. 186 (3rd Cir. 2014)

38. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 601 Fed. Appx. 162 (3rd Cir. 2015)
39. Affirmed - Plaintiff appealed MDL court's order denying her benefits in settlement. The 3rd Circuit affirmed the MDL court's order. *In re Davis*, 551 Fed. Appx. 642 (3rd Cir. 2014)

Excluded Cases:

- Excluded: Court of appeals dismissed plaintiff's appeal because notice of appeal was untimely filed. *In re Diet Drugs Prod. Liab. Litig*., 327 Fed. Appx. 334 (3rd Cir. 2009)
- Excluded: Plaintiff sought interlocutory appeal and writ of mandamus challenging MDL court's order requiring plaintiffs to pay a separate filing fee for each severed and amended complaint. Circuit court denied writ of mandamus and dismissed appeal. *In re Diet Drugs Prods. Liab. Litig*., 418 F.3d 372 (3rd Cir. 2005)
- Excluded: Court of appeals dismissed plaintiff's interlocutory appeal of MDL court's order declining to remand their cases from the MDL court to state courts. *In re Diet Drugs (Phentermine/ Fenfluramine/ Dexfenfluramine) Prods. Liab. Litig.*, 93 Fed. Appx. 345 (3rd Cir. 2004)
- Excluded: Court of appeals denied plaintiff's writ of mandate. *In re Briscoe*, 448 F.3d 201 (3rd Cir. 2006)
- Excluded: Law firms sought interlocutory appeal and mandamus of MDL court's interim order awarding attorneys fees. Court of appeals denied mandamus and dismissed appeal. *In re Diet Drugs Prods. Liab. Litig*., 401 F.3d 143 (3rd Cir. 2005)
- Excluded: Denial of writ of mandate – The 3rd Circuit denied a writ of mandate filed by plaintiffs seeking remand by the JPML. *In re Wilson*, 451 F.3d 161(3rd Cir. 2006)

Prempro Products Liability Litigation (MDL-1507)

1. Affirmed - Plaintiff appealed the MDL court's dismissal of her complaint for failure to comply with the court's pretrial orders. The 8th Circuit affirmed the MDL court's dismissal. *Freeman v. Wyeth*, 764 F.3d 806 (8th Cir. 2014)
2. Reversed – Plaintiff appealed the MDL court's orders denying the plaintiff's motion to remand and granting the defendants' motion for summary judgment. The 8th Circuit reversed, finding that remand to state court was proper. *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613 (8th Cir. 2010)
3. Affirmed – Following trial, both parties appealed evidentiary decisions and rulings on post-trial motions. The 8th Cir. affirmed the jury verdict and the MDL court's evidentiary orders and jury instruction. It also affirmed the MDL court's order granting judgment as a matter of law in favor of Upjohn, but reversed it as to Wyeth, adopting the MDL court's alternative holding and granting Wyeth a new trial on punitive damages. *Scroggin v. Wyeth (In re Prempro Prods. Liab. Litig.)*, 586 F.3d 547 (8th Cir. 2009)
4. Affirmed – Plaintiffs appealed the MDL court's dismissal for failure to prosecute. The 8th Circuit affirmed the MDL court. *In re Prempro Prods. Liab. Litig.*, 423 Fed. Appx. 659 (8th Cir. 2011)
5. Affirmed – Following trial, the plaintiff appealed the jury's verdict and the MDL court's evidentiary decisions and jury instructions. The 8th Circuit affirmed the verdict and the

MDL court's rulings. *Rush v. Wyeth (In re Prempro Prods. Liab. Litig.*), 514 F.3d 825 (8th Cir. 2008)

Vioxx Products Liability Litigation (MDL-1657)

1. Affirmed – A plaintiff appealed the MDL court's dismissal of his complaint for failure to serve a required expert report. The 5th Circuit affirmed the MDL court's dismissal. *Dier v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 388 Fed. Appx. 391 (5th Cir. 2010)
2. Affirmed - A plaintiff appealed the MDL court's dismissal of his complaint for failure to serve a required expert report. The 5th Circuit dismissed the appellant's motion to proceed in forma pauperis, holding that the MDL court did not abuse its discretion in dismissing plaintiff's case. *Schneller v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 452 Fed. Appx. 500 (5th Cir. 2011)
3. Affirmed – Plaintiff appealed order granting summary judgment of her misrepresentation and consumer protection claims against a number of attorneys and law firms. The 5th Circuit *affirmed the MDL court's dismissal. Isner* v. Seeger Weiss, L.L.P. (In re Vioxx Prods. Liab. Litig.), 661 Fed. Appx. 831 (5th Cir. 2016).
4. Affirmed – Plaintiff's attorney appealed the MDL court's order awarding attorneys fees to another attorney in a fee dispute. The 5th Circuit affirmed the MDL court's order. *In re Vioxx Prods. Liab. Litig. v. Merck & Co.,* 544 Fed. Appx. 255 (5th Cir. 2013)
5. Affirmed - A plaintiff appealed the MDL court's dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court's dismissal. *In re Vioxx Prods. Liab. Litig. v. Merck & Co.*, 509 Fed. Appx. 383 (5th Cir. 2013)
6. Affirmed - A plaintiff appealed the MDL court's dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court's dismissal. *Bilal v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 499 Fed. Appx. 362 (5th Cir. 2012)
7. Affirmed – Plaintiff appealed the MDL court's order denying his motion to vacate his enrollment in the settlement and entering a judgment dismissing his claims. The 5th Circuit affirmed the MDL court's order. *Weeks v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 412 Fed. Appx. 653 (5th Cir. 2010)
8. Affirmed - A plaintiff appealed the MDL court's dismissal of his complaint for failure to comply with discovery orders. The 5th Circuit affirmed the MDL court's dismissal. *Chepilko v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 393 Fed. Appx. 242 (5th Cir. 2010)
9. Affirmed - A plaintiff appealed the MDL court's dismissal of her complaint for failure to disclose her claim in a prior bankruptcy filing. The 5th Circuit dismissed the appellant's motion to proceed in forma pauperis, holding that the appeal was frivolous. *Strujan v. Merck & Co. (In re Vioxx Prods. Liab. Litig.),* 532 Fed. Appx. 551 (5th Cir. 2013)
10. Affirmed – Plaintiff appealed the MDL court's order granting summary judgment on the ground that plaintiff's action was barred by the statute of limitations. The Fifth Circuit affirmed the dismissal. *Roach v. Merck & Co.*, 529 Fed. Appx. 396 (5th Cir. 2013)
11. Affirmed – Plaintiffs appealed MDL court's dismissal of their case on forum non conveniens grounds. The 5th Circuit affirmed the MDL court. *Adams v. Merck & Co.*, 353 Fed. Appx. 960 (5th Cir. 2009).

12. Affirmed – Insurers appealed MDL court's denial of preliminary injunction prohibiting claims administrator from disbursing settlement funds. The 5th Circuit affirmed the MDL court's order. *Avmed Inc. v. Browngreer PLC*, 300 Fed. Appx. 261 (5th Cir. 2008).
13. Affirmed – Plaintiff appealed the MDL court's dismissal of her RICO complaint. The 5th Circuit affirmed the MDL court's order. *Petty v. Merck & Co.*, 285 Fed. Appx. 182 (5th Cir. 2008).
14. Affirmed – Plaintiff appealed the MDL court's order denial of his motion to proceed in forma pauperis. The 5th Circuit affirmed the MDL court's decision. *Fitzgerald v. Merck & Co.*, 418 Fed. Appx. 366 (5th Cir. 2011).

Excluded Cases:

- Excluded: Plaintiff who signed a stipulation of dismissal, which was entered by the MDL court, filed an appeal to challenge the private settlement administrator's determination of his claim. The 5th Circuit dismissed the appeal because it did not raise an appealable issue. *Jones v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 422 Fed. Appx. 315 (5th Cir. 2011)
- Excluded: Defendant sought review by appeal and writ of mandamus of MDL court's order regarding privileged nature of documents sought in discovery. The Fifth Circuit dismissed the appeal, holding that discovery rulings are not immediately appealable. *Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co.*, 2006 U.S. App. LEXIS 27587 (5th Cir. 2006)

Ortho Evra Products Liability Litigation (MDL 1742)

1. Affirmed - Plaintiffs appealed the MDL court's dismissal of their case. The 6th Cir. affirmed the MDL court's dismissal. *Yates v. Ortho-Mcneil-Janssen Pharms., Inc.*, 808 F.3d 281 (6th Cir. 2015)

Aredia & Zometa Prods. Liab. Litig (MDL-1760)

1. Affirmed – Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Osterwald-Kalkofen v. Novartis Pharm. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 352 Fed. Appx. 996 (6th Cir. 2009)
2. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant and denying their motion for additional discovery. The 6th Circuit affirmed the MDL court. *Fragomeli v. Novartis Pharms. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 352 Fed. Appx. 994 (6th Cir. 2009).
3. Affirmed - Plaintiff appealed the MDL court's order excluding expert opinions and granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Simmons v. Novartis Pharms. Corp. (In re Aredia & Zometa Prods. Liab. Litig.)*, 483 Fed. Appx. 182 (6th Cir. 2012)
4. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court. *Emerson v. Novartis Pharms. Corp.*, 446 Fed. Appx. 733 (6th Cir. 2011)

5. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment in favor of defendant and denying their motion for additional discovery. The 6th Circuit affirmed the MDL court. *Patterson v. Novartis Pharms. Corp*., 451 Fed. Appx. 495 (6th Cir. 2011).
6. Affirmed - Plaintiff appealed the MDL court's order excluding expert opinions and granting summary judgment in favor of defendant. The 6th Circuit affirmed the MDL court's decision. *Thomas v. Novartis Pharms. Corp*., 443 Fed. Appx. 58 (6th Cir. 2011)

Fosamax Products Liability Litigation (MDL-1789)

1. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment. The 2nd Circuit affirmed the MDL court's order. *Secrest v. Merck, Sharp & Dohme Corp. (In re Fosamax Prods. Liab. Litig.)*, 707 F.3d 189 (2nd Cir. 2013)
2. Affirmed – Plaintiff appealed the MDL court instructing the jury on Florida's "government rules defense." The 2nd Circuit affirmed the MDL court's instruction and the jury verdict. *In re Fosamax Prods. Liab. Litig*., 509 Fed. Appx. 69 (2nd Cir. 2013)
3. Affirmed – Plaintiff appealed the MDL court's dismissal of her case on the ground that the statute of limitations was not tolled by the filing of a putative federal class action that raised identical claims. The 11th Cir. certified questions to the Virginia Supreme Court and later affirmed the MDL court's decision. *Casey v. Merck & Co.*, 678 F.3d 134 (2nd Cr. 2012).

Gadolinium-Based Contrast Agents Products Liability Litigation (MDL-1909)

1. Affirmed – Following trial, plaintiff appealed the MDL court's decisions related to evidentiary matters, recusal, and its denial of a motion for new trial. The 6th Circuit affirmed all of the MDL court's orders and the verdict. *Decker v. GE Healthcare Inc.*, 770 F.3d 378 (6th Cir. 2014)

Trasylol Products Liability Litigation (MDL 1928)

1. Affirmed – Plaintiffs appealed the MDL court's dismissal of their case for failure to properly serve process on defendants. The 11th Cir. affirmed the MDL court's dismissal. *Nelson v. Bayer Corp. (In re Trasylol Prods. Liab. Litig.)*, 503 Fed. Appx. 850 (11th Cir. 2013)
2. Affirmed - Plaintiff appealed the MDL court's order granting summary judgment on the ground that plaintiff's action was barred by the statute of limitations. The 11th Circuit affirmed the dismissal. *Rodriguez v. Bayer Corp*., 440 Fed. Appx. 813 (11th Cir. 2011)
3. Affirmed - Plaintiffs appealed the MDL court's dismissal of their case. The 11th Cir. affirmed the MDL court's dismissal. *Roberts v. Bayer Healthcare*, 403 Fed. Appx. 427 (11th Cir. 2010)
4. Affirmed – Plaintiffs appealed MDL court's order dismissing their complaints for failing to perfect service of process on defendants. The 11th Circuit affirmed the MDL court. *Moore v. Bayer Corp.*, 487 Fed. Appx. 477 (11th Cir. 2012).

5. Affirmed – Plaintiffs appealed MDL court's order granting summary judgment in favor of defendants. The 11th Circuit affirmed the MDL court. *Putnam v. Bayer A.G.*, 467 Fed. Appx. 832 (11th Cir. 2012)

Levaquin Products Liability Litigation (MDL-1943)

1. Reversed / Affirmed – Following trial, defendant appealed the MDL court's denial of judgment as a matter of law on the ground based on the jury's award of compensatory damages and punitive damages. The 8th Circuit affirmed the MDL court's decision denying the JMOL regarding compensatory damages, but reversed the MDL court regarding punitive damages. *Schedin v. Ortho-McNeil-Janssen Pharms., Inc. (In re Levaquin Prods. Liab. Litig.)*, 700 F.3d 1161 (8th Cir. 2012)
2. Affirmed – Following trial, and while its other appeal was pending, defendant appealed the MDL court's denial of its motion for relief from judgment under FRCP 60(b)(2) and (3). The 8th Cir. affirmed the MDL court's denial of the motion. *Schedin v. Ortho-McNeil-Janssen Pharms., Inc. (In re Levaquin Prods. Liab. Litig.)*, 739 F.3d 401 (8th Cir. 2014)

Heparin Products Liability Litigation (MDL-1953)

1. Affirmed - Plaintiffs appealed the MDL court's order granting of summary judgment in favor of defendants on the basis of statute of limitations. The 6th Circuit affirmed the MDL court's order. *Mustapha Nya v. Baxter Int'l, Inc. (In re Heparin Prods. Liab. Litig.)*, 629 Fed. Appx. 645 (6th Cir. 2015)

Mentor Corp. Obtape Transobturator Sling Products Liability Litigation (MDL-2004)

1. Reversed – Plaintiff appealed the MDL court's dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court's order. *Alvarado v. Mentor Corp. (In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.)*, 718 Fed. Appx. 772 (11th Cir. 2017)
2. Reversed - Plaintiff appealed the MDL court's dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court's order. *Perryman v. Mentor Worldwide LLC (In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.)*, 748 Fed. Appx. 212 (11th Cir. 2018)
3. Reversed – Plaintiff appealed the MDL court's order dismissing her case on summary judgment. The 11th Cir. reversed the order granting summary judgment and remanded the case. *Hampton v. Mentor Corp*., 725 Fed. Appx. 825 (11th Cir. 2018)
4. Reversed – Plaintiff appealed the MDL court's dismissal of her claim based on the statute of limitations. The 11th Cir. reversed the MDL court's order. *Rogers v. Mentor Corp*., 682 Fed. Appx. 701 (11th Cir. 2017).
5. Affirmed - Plaintiff appealed the MDL court's dismissal of her claim based on the statute of limitations. The 11th Cir. affirmed the MDL court's order. *Curtis v. Mentor Worldwide, LLC*, 543 Fed. Appx. 901 (11th Cir. 2013)

Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig (MDL-2342)

- Affirmed – Plaintiffs appealed the MDL court's order excluding an expert based on a Daubert challenge and granting of summary judgment in favor of defendants. The 3rd Circuit affirmed the MDL court's order. *Zoloft (Sertraline Hydrochloride) Prods. Liab. Litig.*, 858 F.3d 787 (3rd Cir. 2017)

Pradaxa (Dabigatran Etexilate) Products Liability Litigation (MDL-2385)

1. Reversed – Defendant sought writ of mandamus against MDL judge's order requiring several witnesses who lived in Germany to appear in the United States for a deposition. The 7th Circuit granted mandamus and directed the MDL court to rescind the order requiring the witnesses to appear in the United States. *In re Boehringer Ingelheim Pharms., Inc.*, 745 F.3d 216 (7th Cir. 2014).
2. Affirmed – Plaintiffs appealed MDL court's order dismissing their case for failure to comply with deadlines and failure to respond to sanctions orders. The 7th Circuit affirmed the MDL court. *Nwatulegwu v. Boehringer Ingelheim Pharms., Inc.*, 668 Fed. Appx. 173 (7th Cir. 2016).

Lipitor (Atorvastatin Calcium) Marketing, Sales Practices and Products Liability Litigation (No II) (MDL-2502)

- Affirmed - Plaintiffs appealed the MDL court's order excluding experts based on a Daubert challenge and granting of summary judgment in favor of defendants. The 4th Circuit affirmed the MDL court's order. *Lipitor (Atorvastatin Calcium) Mktg. v. Pfizer, Inc.*, 892 F.3d 624 (4th Cir. 2018)

APPENDIX 2

A Lexis search was conducted on 4/22/2019 for all opinions referencing "1292(b)." The results were filtered to include only those cases decided by a circuit court between 1/1/2018 – 12/31/2018. This search returned 94 results.

We reviewed each of the 94 opinions to identify those that met the following criteria:

1. The district court had certified an order for interlocutory review pursuant to §1292(b), and

2. the circuit court accepted the order for interlocutory review, and

3. the circuit court issued an opinion deciding the interlocutory order.

25 cases met these criteria; 69 cases did not. The 69 cases that did not meet these criteria included a citation to §1292(b), but it was not the jurisdictional basis for the circuit court to issue a decision on the merits.

In the 25 cases that did meet these criteria, the average time that elapsed between the district court entering the order that was subject to interlocutory review and the circuit court filing a decision on the appeal was **23 months**. The shortest time was 10 months, and the longest time was 43 months.

The following 25 cases were included in this analysis:

Case Name	Circuit	Court of Appeals Decision	District Court Decision	Months
Crystallex Int'l Corp. v. Petróleos de Venez., S.A. 879 F.3d 79	3rd Cir.	1/3/2018	9/30/2016	15.3
Lester v. Exxon Mobil Corp. 879 F.3d 582	5th Cir.	1/9/2018	10/23/2014	39.1
Gov't Emples. Ins. Co v. Tri-County Neurology & Rehab. LLC 721 Fed. Appx. 118	3rd Cir.	1/10/2018	12/4/2015	25.6
Galilea, LLC v. AGCS Marine Ins. Co. 879 F.3d 1052	9th Cir.	1/16/2018	4/4/2016	21.7
Batterton v. Dutra Grp. 880 F.3d 1089	9th Cir.	1/23/2018	12/15/2014	37.8
Mineworkers' Pension Scheme v. First Solar Inc. 881 F.3d 750	9th Cir.	1/31/2018	8/10/2015	30.2
Barahona v. Union Pac. R.R. 881 F.3d 1122	9th Cir.	2/6/2018	6/7/2016	20.3
Santomenno v. Transamerica Life Ins. Co. 883 F.3d 833	9th Cir.	2/23/2018	3/14/2016	23.7
Olympic Forest Coal. v. Coast Seafoods Co.	9th Cir.	3/9/2018	6/3/2016	21.5

Case Name	Circuit	Court of Appeals Decision	District Court Decision	Months
884 F.3d 901				
A.D. v. Credit One Bank, N.A. 885 F.3d 1054	7th Cir.	3/22/2018	8/19/2016	19.3
Drummond Co. v. Conrad & Scherer, LLP 885 F.3d 1324	11th Cir.	3/23/2018	1/22/2016	26.4
Breuder v. Bd. of Trs. of Cmty. Coll. Dist. No. 502 888 F.3d 266	7th Cir.	4/17/2018	3/3/2017	13.7
Hartsock v. Goodyear Dunlop Tires N. Am. Ltd. 723 Fed. Appx. 224	4th Cir	5/24/2018	11/30/2015	30.2
Petersen Energía Inversora S.A.U. v. Argentine Republic 895 F.3d 194	2nd Cir.	7/10/2018	9/9/2016	22.3
Reading Health Sys. v. Bear Stearns & Co. 900 F.3d 87	3rd Cir.	8/7/2018	2/1/2016	30.6
Thompson v. Cope 900 F.3d 414	7th Cir.	8/14/2018	9/25/2017	10.8
Taksir v. Vanguard Grp. 903 F.3d 95	3rd Cir.	9/4/2018	5/26/2017	15.5
Nwanguma v. Trump 903 F.3d 604	6th Cir.	9/11/2018	8/8/2017	13.3
Lupian v. Joseph Cory Holdings LLC 905 F.3d 127	3rd Cir.	9/27/2018	3/7/2017	19.0
Pa. Dep't of Envtl. Prot. v. Trainer Custom Chem., LLC 906 F.3d 85	3rd Cir.	10/5/2018	8/30/2016	25.5
Hicks v. State Farm Fire & Cas. Co. 751 Fed. Appx. 703	6th Cir.	10/15/2018	3/25/2015	43.3
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