# What Do MDL Leaders Do?: Evidence from Leadership Appointment Orders

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**Abstract:** The appointment of lead attorneys is one of the most important events in modern multidistrict litigation. Yet in spite of their importance, little is known about the orders that centralize control of litigation in court-selected attorneys, authorize those attorneys to perform "common benefit" work on behalf of non-client plaintiffs, and lay a foundation for later orders taxing non-lead attorneys for leaders' work. In this paper, I present preliminary findings from a study of leadership appointment orders in all MDLs pending in the federal courts as of June 2019. I find that leadership appointments are common, to the point that they should be considered a basic feature of modern MDL (with the possible exception of patent cases). But if leadership appointments are common, there is no such thing as a standard appointment order. Orders vary on axes including the structure of the plaintiff's leadership, the tasks that leaders are charged with performing, the degree to which non-lead attorneys are restricted from practicing in the transferee court, and the legal authority that courts apply to organize the litigation. The uniformity of leadership appointments and diversity of appointment order practice shed light on central debates about contemporary MDL, including the duties that leaders hold to MDL plaintiffs and the benefits and costs of MDL's reliance on ad hoc, bottom-up procedure making that takes place in the context of specific litigations.

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## Introduction

Apart from the selection of a transferee judge, the appointment of plaintiffs' leadership is one of the most consequential events in a modern multi-district litigation or "MDL." The Multidistrict Litigation Act of 1968 authorizes the Judicial Panel on Multidistrict Litigation (JPML) to transfer actions pending in different district courts to a single court for coordinated or consolidated pretrial proceedings.[1] But the Act, codified at section 1407 of the judicial code, is silent about how courts are supposed to manage the hundreds or thousands of actions collected before them pursuant to its authority. Early in MDL's history, transferee judges realized that organizing plaintiffs' counsel was crucial to moving consolidated cases toward resolution; today, appointing litigation leaders is one of the first things to happen in a new MDL. The court's choice of leaders and the way they are organized have important downstream consequences for how the litigation proceeds.

Despite their importance, our knowledge of MDL leaders is incomplete. Scholars have examined the attorneys courts appoint to leadership positions and found that appointments are concentrated in a small number of firms that specialize in complex litigation and have the financial and human capital to undertake it.[2] Apart from this, knowledge of MDL leaders and the work they perform is mostly folk wisdom. No studies systematically examine the responsibilities of MDL leaders, how work is divided among MDL leadership and non-lead lawyers, how courts conceive of leaders' relationship to MDL plaintiffs, the way in which leaders are compensated, and the outcomes they produce. To the extent that legal scholars have addressed these questions, they tend to assume that large cases that are the focus of academic and popular commentary reflect the entire universe of MDL.[3]

In an effort to shed light on these questions, this paper presents preliminary quantitative findings and case-specific data from a study of leadership appointment orders in 201 of the 202 MDLs

[1] 28 U.S.C. § 1407(a).

[2] *See* Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation 76-78 (2019); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 Cornell L. Rev. 1445 (2017).

[3] *See generally* Zachary D. Clopton, *MDL as Category*, 104 Cornell L. Rev. (forthcoming 2020).

that were pending in the federal courts as of June 2019. The focus of this paper is the orders that courts enter early in an MDL's lifecycle that centralize control of the litigation in a group of attorneys identified by the court. These orders do not answer all or even most questions about the work of MDL leaders, but they are a good point of departure for efforts to better understand leaders' work. In the absence of an appointment order, an attorney whose case been transferred to an MDL has no authority to work on behalf of plaintiffs who she has not undertaken to represent and no reason to expect to be compensated for "common benefit" work that she performs on behalf of MDL plaintiffs. An appointment order selects the attorneys who take the lead in litigating consolidated plaintiffs' claims, creates an organizational structure for the litigation, defines leaders' responsibilities, and lays the foundation for later orders reallocating attorney's fees to court-select leaders. In doing so, an appointment order serves as a corporate charter of sorts for an MDL.

My principal finding is that appointment orders are characterized by what might be called "diverse uniformity." Appointing leaders is extremely common, to the point that it should be considered a basic feature of modern MDL. Courts appointed MDL leaders in a super-majority of the MDLs in my sample. In 25.29% of the sample (n=44), courts buttressed leaders' control by formally restricting non-leads' authority to practice in the transferee court. Yet appointment orders differ on axes including the structure (or lack thereof) for plaintiff's leadership, the tasks that leaders are charged with performing, and the extent to which they limit non-leads' authority to practice in the transferee court. I find that courts never address the legal relationship between leaders and MDL plaintiffs that is created by the appointment of leadership attorneys. Orders that define leaders' duties to non-client plaintiffs are rare.

These findings shed light on some important debates surrounding modern MDL. First, they suggest that MDL is properly understood as a form of representative litigation, in the limited sense that it depends on attorneys exercising delegated authority to perform work on behalf of non-client parties to accomplish objectives identified by the court. Section 1407 allows for transferred cases to be

litigated by individually retained plaintiff's attorneys, and a Martian reading the statute for the first time could be forgiven for thinking that MDL would typically proceed in this manner. But this is not the reality of MDL as it is now practiced.

Second, my findings shed light on debates over the duties that court-appointed leaders owe to MDL plaintiffs that they have not undertaken to represent. Courts, attorneys, and scholars have put forward competing views of leaders' duties, which range from treating MDL leaders as the equivalent of class counsel to holding that they do not hold any fiduciary duties to non-client plaintiffs.[4] Much of this debate is premised on the assumption that "MDL leaders" is a coherent category, so that it makes sense to speak of the duties that, say, lead plaintiff's counsel holds to a non-client MDL plaintiff. But the tasks assigned to leaders—and the limitations on non-leads' authority to practice in the transferee court—vary from one MDL to the next. These differences are pertinent to the duties that leaders assume to non-client plaintiffs. Where MDL leaders exercise strong rights of control and non-lead attorneys' authority to practice is limited, analogizing leaders to class counsel is not crazy. On the other hand, if leaders' control is weak, and non-leads are able to represent clients' interests in the litigation, the case for subjecting leaders to norms governing class counsel is weaker. In short, leaders' duties are not fixed in stone; their duties ebb and flow with the tasks that leaders are assigned and the restrictions the court places on non-leads' authority to practice.

Lastly, my findings highlight the centrality of ad hoc procedure to contemporary MDL, and the costs and benefits of a system that relies on case-by-case procedural design to address information problems that limit the scope of ex ante rulemaking. I argue elsewhere that ad hoc procedure is central to the design of section 1407, and that reforms that would subject MDL to a regular procedural

[4] *See generally* Burch, *supra* note 2, at 96-99; Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 Loy. L. Rev. 1 (2018); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 Fordham L. Rev. 1985, 1988 (2011). *See also* infra text accompanying notes 34-35 (describing parties' competing positions on the question in the GM ignition switch MDL).

playbook would strip MDL of its ability to adapt procedure to new problems as they arise.[5] At the same time, MDL's reliance on ad hoc procedure creates a risk that like cases will not be treated alike, that self-interested parties will exploit ad hoc procedure to engage in self-dealing, and that courts will be forced to continually reinvent the wheel when addressing recurring problems.[6] Leadership appointment orders exemplify these trends. I contend that, while it would be a mistake to establish a one-size-fits-all practices for leadership appointments, some aspects of the process are sufficiently well understood that they would benefit from greater standardization. In addition, the leadership appointment process would benefit from reforms that (1) require transferee judges to explain important decisions, and (2) create new opportunities for ex post review of their decisions short of opening up MDL to interlocutory appeals in the courts of appeals.

Part I of the paper describes the origins of the MDL leadership appointment system. In doing so, it sketches the controversies and debates over leaders' role that motivate my study of leadership appointment orders. Part II describes the study's data and methodology and presents preliminary findings on current leadership appointment practice. Part III considers the findings' implications for debates surrounding the contemporary MDL system.

## I. The Origins of MDL Leadership Appointments

The practice of appointing lead attorneys in complex litigation predates the enactment of section 1407. In fact, it is almost as old as the Federal Rules of Civil Procedure (FRCP). In this Part, I summarize the origins of MDL leadership appointments and highlight some of the controversies that they have produced.

[5] David L. Noll, *MDL as Public Administration*, 118 Mich. L. Rev. (forthcoming 2019). *See also* Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669 (2017).

[6] *See* Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. Rev. 767, 795-97 (2017) (discussing these problems in the context of ad hoc procedural legislation).

## A. Pre-History

In 1946 and 1947, shareholders of Twentieth Century Fox and its subsidiary the National Theatres Corp. brought fifteen derivative actions against the companies in the Southern District of New York and New York Supreme Court.[7] The district judge assigned the federal cases entered an order consolidating the cases and appointing a "general counsel for the plaintiffs in such consolidated actions."[8] The next month, Supreme Court followed suit and appointed the same attorney as general counsel in the state cases. Plaintiffs filed consolidated complaints that "embodied substantially all the allegations of the various complaints in the actions which were consolidated."[9] By June 1948, the parties had reached a global settlement.

A decade later, shareholders filed a series of derivative actions against Bon Ami corporation in the Southern District of New York, New York Supreme Court, and the Delaware Court of Chancery.[10] Hoping to consolidate the lawsuits in a single forum, the defendant Bon Ami asked the federal judge to consolidate the federal-court actions under FRCP 42, appoint a "general plaintiff's counsel," require the filing of a consolidated complaint, and enjoin the state court suits. On appeal from the district court's order denying the motion, the Second Circuit in *MacAlister v. Guterma,* articulated the basic rationale for centralizing control of litigation in court-appointed attorneys.[11]

The court of appeals reasoned that "overlapping duplication in motion practices and pre-trial procedures occasioned by competing counsel representing different plaintiffs in separate stockholder derivative actions constitute the waste and inefficiency" that Rule 42 aims to prevent.[12] In big multi-party cases, an order consolidating cases for pre-trial purposes and appointing a general counsel "may

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[7] *See* Silverstein v. Clarkson, 194 Misc. 1046, 1048 (N.Y. Sup. Ct. 1949).

[8] *Id.*

[9] *Id.*

[10] *See* MacAlister v. Guterma, 263 F.2d 65 (2d Cir. 1958).

[11] *Id.* at 67.

[12] *Id.* at 68.

in many instances prove the only effective means of channeling the efforts of counsel along constructive lines."[13]

### B. Early Practice Under Section 1407

In the electrical equipment litigation—the sprawling antitrust litigation that provided the impetus for section 1407 and served as a model for section 1407's drafters—"[a]pproximately eighty attorneys representing plaintiffs met in Chicago on September 4, 1962 and organized the plaintiffs' counsel Steering Committee."[14] The leadership structure was privately organized; courts hearing treble-damages actions did not enter orders formally establishing the committee. Nonetheless, the committee played an important role in the resolution of the litigation. As Professor Andrew Bradt describes, the steering committee decided the order in which witnesses would deposed, established a document depository in New York for plaintiffs, developed damages models, and devised aggregate settlement proposals that were transmitted to the defendants.[15] When General Electric agreed to a lump-sum settlement under intense pressure from judges in New York and Chicago, it triggered a cascade of settlements that resolved most of the litigation.

Thus, by the time that the judges who drafted section 1407 began work on the statute, there was precedent for both courts and attorneys acting on their own initiative to designate attorney leaders who would coordinate litigation on plaintiffs' behalf. Nevertheless, apart from a general delegation of rulemaking authority to the JPML,[16] the statute which the judges proposed and Congress adopted is silent on how attorneys would be organized in actions centralized via section 1407. The most likely explanation is that the judges who drafted section 1407 thought that transferee judges had all the power they needed to organize counsel under the FRCP and Article III. When the first edition of the *Manual*

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[13] *Id.*

[14] Charles A. Bane, The Electrical Equipment Conspiracies: The Treble Damage Actions 131 (1973).

[15] *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. Pa. L. Rev. 831, 858-59 (2017).

[16] 28 U.S.C. § 1407(f) (authorizing the JPML to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure").

*for Complex Litigation* appeared in 1969, it noted that if the parties cannot agree on a "liaison" counsel to coordinate their activities, the court had power to appointment one.[17] As authority, the *Manual* cited a decision from the Eastern District of New York in which the district court appointed general counsel to supervise discovery in a 300-case litigation.[18]

The Fifth Circuit would soon endorse leadership appointments as an important part of transferee judges' toolkit. In *In re Air Crash Disaster at the Florida Everglades*, the court of appeals affirmed an order that awarded a court-appointed Plaintiff's Committee "a fee of 8% of the settlement obtained by each plaintiff who had retained counsel not a member of the Plaintiffs' Committee, payable out of the fee of the attorney for each such plaintiff."[19] Initially, the court of appeals suggested that the district court's fee order was authorized by Rule 42, which authorizes a district court to "make such orders concerning [consolidated] proceedings . . . as may tend to avoid unnecessary costs or delay." The court then suggested that the order was authorized by the common fund doctrine, which it described as an "expanding jurisprudence" that had "moved beyond the literal limits of its original bounds."[20] The court then suggested that the order was justified by principles of unjust enrichment.[21] Finally, the court suggested that the fee order was impliedly authorized by section 1407. The Plaintiff's Committee was crucial to the district court's management of the litigation. "To remit the Committee to appearing all over the country in each of the numerous probate and like courts under whose authority administration of settlement monies would be handled, to present prayers for compensation" would be "unfeasible and irrational, and demeaning to the authority of the [transferee] court."[22]

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[17] Manual for Complex and Multidistrict Litigation § 1.9 at 24 n.27 (1969).

[18] *Id.* (citing Rando v. Luckenbach Steamship Company, Inc., 25 F.R.D. 483 (E.D.N.Y. 1960)).

[19] *Id.* at 1010.

[20] *See id.* ("[I]t is fair and just that those who are deriving benefits from efforts of counsel inuring to the benefit of all claimants resulting from the death of passengers should bear their fair share of repayment of the costs and payment for counsel's skill and time and effort which have been devoted to the common question of establishing liability.").

[21] *Id.* at 1020.

[22] *Id.* at 1019.

## C. The Modern Era

*Air Crash Disaster* established a transferee court's authority to appoint lead attorneys and reallocate attorney's fees to pay for their work. Yet while this practice continued in the 1980s and 1990s—and legal support for it gradually strengthened[23]—it did not take off until the aughts.

As *Air Crash Disaster* is considered "the seminal case" on "application of the common fund doctrine in MDLs,"[24] citations to it provide a rough measure of the volume and contestedness of leadership appointments. Figures 1 and 2 chart citations to *Air Crash Disaster* in state and federal orders and motions from 1977 to the present.[25] Figure 1 is a simple graph of total citations to *Air Crash Disaster* over time. Figure 2 shows federal court orders (top row), federal court motions (middle row), and state court orders citing *Air Crash Disaster* over time. Larger dots are decisions that, themselves, and more highly cited.

As those figures show, there was a sharp uptick in citations to *Air Crash Disaster* beginning around 2006. Whereas the decision was cited an average of 2.14 times per year between 1977 and 2005, it was cited an average of thirteen times per year thereafter. A plausible explanation is that leadership appointments became more important and controversial following the enactment of the Class Action Fairness Act of 2005 (CAFA).[26] Scholars have argued that CAFA's enactment, the

[23] In 1983, district courts' authority to appoint leaders and tax non-leads for their work was strengthened by amendments to the FRCP, which authorized district courts "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Fed. R. Civ. P. 16(c)(2)(L). *See generally* Joan M. Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1640 (1983). Echoing this new authority, the *Manual for Complex Litigation, Second*, stated that while attorneys might sometimes coordinate their activities, "the court should itself institute special procedures under which the practices normally incident to individual representation are reshaped in the interests of economy and efficiency." Manual for Complex Litigation, Second § 20.22 (1985). The *Manual* identified four categories of "counsel charged with acting during the litigation not only on behalf of their own clients, but also for a group of attorneys and parties similarly suggested" that courts appoint. A new section entitled "Compensation" suggested: "In fairness, expenses incurred and fees earned by special counsel and committees should not be borne solely by their own clients, but rather should be shared equitably by all benefiting from their services and relieved from similar obligations." The third edition of the *Manual*, published in 1995, carried forward these suggestions.

[24] *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107, 130 (2010) (describing *Air Crash Disaster* as "the seminal case supporting the application of the common fund doctrine in MDLs").

[25] These figures were generated using Ravel, an analytics platform that provides access to "all published cases, from every state and federal court, from all time periods," and a "broad but not comprehensive" collection of unpublished orders. Ravel's motions data is based on analysis of court opinions; the company claims to capture data on "100+" types of motions.

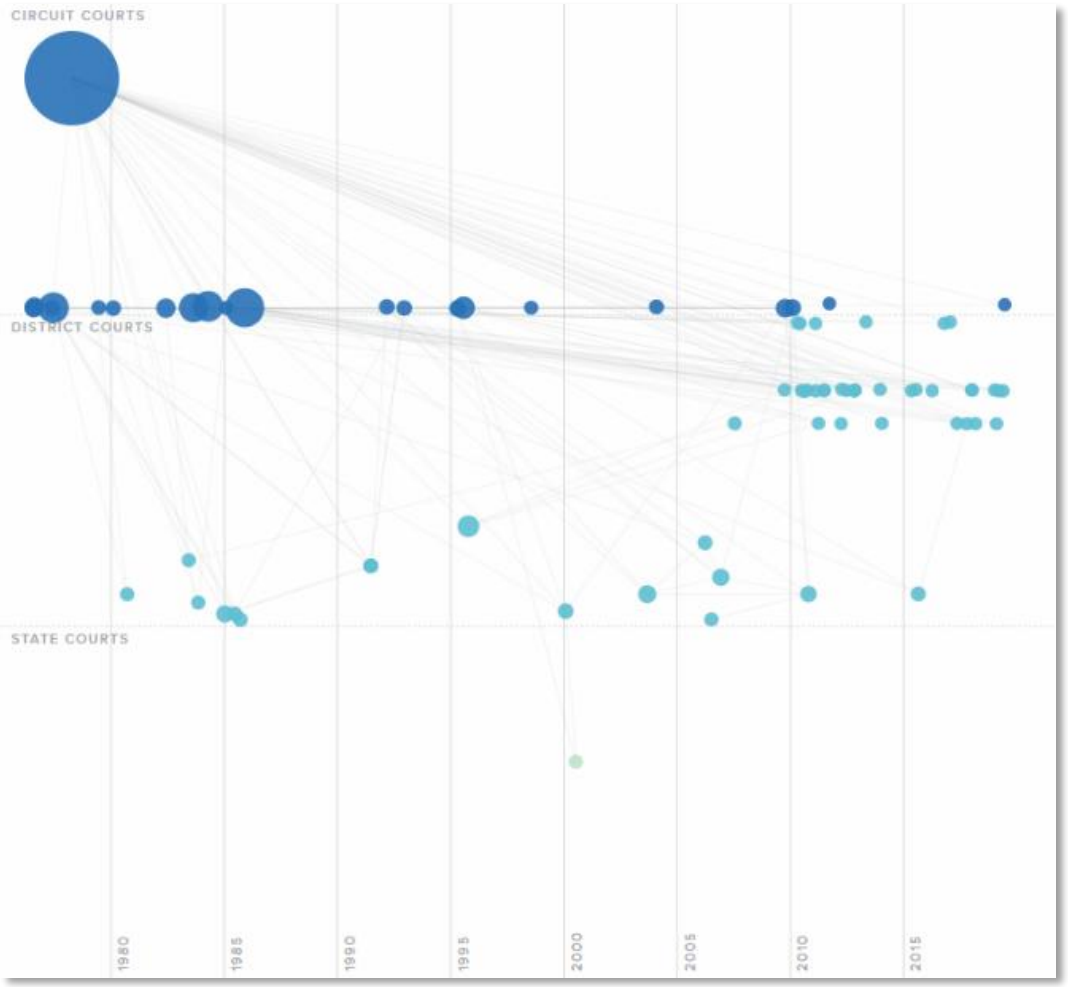
[26] Pub. L. No. 109-2, 119 Stat. 4-14 (codified at scattered section of Title 28, U.S.C.).

redirection of cases from state to federal court that it triggered, and developments in Rule 23 jurisprudence that made class certification more difficult to secure created a kind of hydraulic pressure for federal courts to develop new models for managing large-scale litigation that previously had been handled as class actions in state or federal court.[27] Although merely suggestive, patterns in citations to *Air Crash Disaster* are consistent with this hypothesis; they suggest that federal courts in the post-CAFA era built out the infrastructure for aggregate litigation conducted by court-appointed leaders who could not exercise the full authority of class counsel.

**Figure 1: Total Citations to *Air Crash Disaster***


[27] *See* Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 Tul. L. Rev. 2205 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After* Ortiz, 58 Kan. L. Rev. 775 (2010).

**Figure 2: Citations to *Air Crash Disaster* Showing Filing Type and Citation Density**




Today, leadership appointments are recognized as a central feature of MDL practice.[28] But as one might expect with respect to a practice that was invented in trial courts and evolved, haltingly, over several decades, they are not free of controversy. The nature of leaders' relationship to MDL plaintiffs, the limits of leaders' authority, leaders' duties to plaintiffs with whom they lack an attorney/client relationship, and the division of authority between leaders and non-leads are both

[28] *See, e.g.*, Andrew Bradt & D. Theodore Rave, *It's Good to Have the 'Haves' on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 Geo. L.J. (forthcoming 2020); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1288 (2012); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. Rev. 296 (1996).

contested and poorly understood.[29] Non-leads attorneys "complain of being frozen out until leadership proffers a take-it-or-leave it aggregate settlement."[30] Although pressure to make MDL work means that many conflicts are resolved informally, they occasionally boil over into public view.

A notable example occurred in the GM ignition switch MDL.[31] After the JPML consolidated litigation against GM in the Southern District of New York, Judge Jesse Furman appointed three attorneys "co-lead counsel" and appointed ten lawyers to a "plaintiff's executive committee."[32] As Furman later described, "[a]ll appeared to be going smoothly" until GM discovered that the plaintiff in the first of several bellwether trials that the court had scheduled had committed perjury. The revelation prompted the voluntary dismissal of the plaintiff's case. The next day, a member of the court-appointed executive committee, Lance Cooper, filed an explosive motion seeking to oust one of the co-leads, Robert Hilliard, from his position.[33]

Cooper alleged that Hilliard had mismanaged the litigation by changing the schedule of bellwether trials so that one of Hilliard's cases was tried first, before a case that Cooper believed was stronger. This move, Cooper alleged, was influenced counsel's refusal to split fees with Hilliard in the case that was originally scheduled to be tried first, and by a settlement that Hilliard negotiated with GM that resolved all of Hilliard's cases except those scheduled for bellwether trials and subjected his bellwether cases to a high-low agreement. Supported by an expert declaration filed by Professor Charles Silver, Cooper contended that Hilliard had breached a duty of undivided loyalty that he owed to MDL plaintiffs that he represented as co-lead counsel.[34] In a declaration submitted in opposition to

[29] *See* Paul D. Rheingold, Litigating Mass Tort Cases § 7:21, Westlaw (database updated May 2018).

[30] Noll, *supra* note 5.

[31] *See* Alison Frankel, *New Controversy in GM MDL Sharpens Debate Over Litigating Mass Cases*, Reuters, Feb. 22, 2016, http://blogs.reuters.com/alison-frankel/2016/02/22/new-controversy-in-gm-mdl-sharpens-debate-over-litigating-mass-cases/.

[32] In re: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2016 WL 1441804, at *1 (S.D.N.Y. Apr. 12, 2016).

[33] Plaintiffs' Motion to Reconsider the Order Approving the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund, In re: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF) (S.D.N.Y. Jan. 27, 2016) (Docket No. 2243).

[34] Declaration of Charles Silver, Ex. 2 to Plaintiffs' Motion to Reconsider, *supra* note 33 [hereinafter Silver Declaration].

Cooper's motion, Professor Geoffrey Miller contended that no such duty existed. While leaders owed a duty of undivided loyalty to their clients, their only duty with respect to MDL plaintiffs and non-lead counsel was to act "fairly, efficiently, and economically."[35]

Ultimately, the district court denied Cooper's motion on the ground that Cooper had failed to prove that Hilliard took any actions warranted his removal as co-lead.[36] But in doing so, the court put forward a view of leaders' duties that charted a middle course between the Silver and Miller positions. Citing orders that the court entered appointing plaintiff's leadership, the court pointed out that Hilliard exercised "authority to make any number of decisions that are binding, either literally or effectively, on all personal injury and wrongful death plaintiffs."[37] While Hilliard lacked all the authorities of either an individually retained attorney or court-appointed class counsel, he was charged with coordinating discovery on behalf of the plaintiff "class" and with speaking on behalf of MDL plaintiffs "to both [GM] and the Court."[38] If a personal injury plaintiff believed Hilliard had failed to adequately represent his interests, he could not turn directly to the court for assistance, but had to attempt to first resolve the issue with lead counsel informally.

In the court's view, it followed that Hilliard owed "significant" duties to MDL plaintiffs, though those duties "were not as strong as the duties that lead counsel owes to absentee members of a class action."[39] The flaw in Cooper's motion was not that Hilliard had no duties to MDL plaintiffs, as Prof. Miller contended, but that Cooper had not proven they were breached. Indeed, the court booted

[35] Declaration of Geoffrey Parsons Miller, Ex. 1 to General Motors LLC's Combined Response to Motion to Remove the Co-Leads and to Reconsider the Bellwether Trial Schedule and Motion to Reconsider the Order Approving the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund, In re: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF) (S.D.N.Y. Jan. 27, 2016) (Docket No. 2200) [hereinafter Miller Declaration].

[36] The court ruled found that Cooper's motion was untimely and found that Cooper had breached obligations to MDL plaintiffs by failing to raise objections to co-leads' decisions in a timely manner.

[37] 2016 WL 1441804, at *7.

[38] *Id.*

[39] *Id.*

Cooper from the executive committee based on admissions he made in the course of his motion which showed that Cooper had breached his duties to MDL plaintiffs.[40]

As Judge Furman's decision suggests, questions about the role, responsibilities, and duties of lead counsel turn importantly on orders that courts enter appointing plaintiff's leadership attorneys. No statute or FRCP defines prescribes the role of MDL leaders, so their authority and duties depend on orders entered by the transferee judge. In *GM*, for example, the "significant" duties that Hilliard was subject to traced to orders the court entered that placed Hilliard in a leadership position, charged him with performing work on behalf of MDL plaintiffs, and limited non-leads' authority to practice in the transferee court. Thus, while MDL leaders are undoubtedly regulated by many bodies of law,[41] an important first step in understanding controversies over their role is to understand what happens in leadership appointment orders.

That question is curiously understudied. Although there has been an outpouring of historical,[42] empirical,[43] and theoretical[44] scholarship on MDL in recent years, scholars tend to take for granted that lead attorneys are appointed when cases are transferred under section 1407 for pre-trial proceedings, and that the role of MDL leaders does not vary from case to case.[45] The findings in the following part

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[40] *Id.* at *13 (concluding that Cooper had failed to adequately monitor lead counsel's work and to raise his concerns with the court in a timely manner).

[41] See Lynn Baker and Stephen Herman paper in this symposium

[42] *See* Bradt, *supra* note 15; Andrew D. Bradt, *Something Less and Something More: MDL's Roots As a Class Action Alternative*, 165 U. Pa. L. Rev. 1711 (2017).

[43] *See, e.g.*, Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation* (describing local communities' participation in the national prescription opioid litigation), http://dx.doi.org/10.2139/ssrn.3444507; Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 Ga. L. Rev. 1245 (2019) (surveying trends in JPML transfer decisions based on the first fifty years of decisions by the Panel); Burch & Williams, supra note 2 (examining attorneys who are selected for leadership positions, using a dataset of lead plaintiff and defense lawyers in 73 products-liability and sales-practices multidistrict litigations that were pending as of May 14, 2013); Andrew Bradt & Zachary D. Clopton, *Party Preferences in Multidistrict Litigation*, 107 Calif. L. Rev. (forthcoming 2019) (examining parties' preferences regarding transfer under section 1407 and the JPML's transfer decisions based on MDLs filed between 2012 and 2016); Gluck, *supra* note 5 (describing trends in MDL practice and procedure based on "lengthy and confidential oral interviews of twenty judges (fifteen federal, five state), each with significant experience in MDL litigation"); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 Fordham L. Rev. 2175 (2017) (cataloging provisions that non-class aggregate settlements use to provide closure to settling defendants); Emery G. Lee III, Catherine R. Borden, Margaret S. Williams & Kevin M. Scott, *Multidistrict Centralization: An Empirical Examination*, 12 J. Emp. Legal. Studs. 211 (2015) (finding that the JPML became more like to order centralization over time, based on an analysis for motions from the creation of the JPML to August 2013).

[44] *See, e.g.*, Burch, *supra* note 2; Noll, *supra* note 5; Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 Calif. L. Rev. 1259 (2017).

[45] *But see* Clopton, *supra* note 3 (arguing that, because of its diversity, MDL is not a coherent category for rulemaking purposes).

suggest that there is some truth to that folk wisdom, but also, that it glosses over a reality which is in many ways more complex.

## II. Uniformity and Diversity in Leadership Appointment Practice

How do courts use the authority that was recognized in *Air Crash Disaster* and that led to the conflagration in the GM ignition switch litigation? To gain insight into that question, I examined every MDL that was pending in the federal courts in June 2019 and created a database of appointment orders that courts entered in those cases. I then coded the orders, compiled descriptive statistics on trends in leadership-appointment practice, and analyzed the underlying appointment orders where the descriptive statistics revealed interesting or unusual patterns. In this Part, I present preliminary findings from this analysis.

My study suggests, first, that the appointment of plaintiff-side leaders is a routine event in modern MDL, which occurs throughout the universe of MDLs with the possible exception of patent cases. This top-level uniformity, however, coexists with enormous variation in what actually happens in appointment orders. Orders vary with respect to the matters they address, how plaintiffs' counsel are organized, the presence or absence of defense leaders, the extent to which orders are reasoned and the legal authority they invoke, and the extent to which they limit non-lead counsel's authority to practice in the transferee court.

Section A below describes the sample that the findings in this paper are based upon. The following sections report findings and discuss trends revealed in my survey of leadership appointment orders.

### A. The Sample

The sample for this study is a database of leadership appointment orders entered in MDLs that were pending as of June 18, 2019, the date of the JPML's most recent report when I began collecting data for the study. I focus on *pending* MDLs because my primary interest in this paper is courts' *current*

appointment practices. In future work, the sample could be expanded to allow for analysis of appointment trends over time.

The database was compiled through a manual review of MDL dockets. After downloading the list of pending MDLs from the JPML,[46] a research assistant or I visited the master docket for each MDL using Bloomberg Law's interface to the federal courts' CM/ECF system.[47] We attempted to identify whether the court had entered an order appointing leadership attorneys for the consolidated plaintiffs or defendants. Appointment orders were often labelled with terms such as "appointing," "lead counsel," or "organizational structure," which facilitated keyword searches. But the orders in a nontrivial number of MDLs were docketed with generic labels like "Pretrial Order No. 4,"[48] which necessitated reading docketed orders one-by-one to determine if the court had appointed lead attorneys. We identified the *first* appointment order entered by the court, and I coded the MDL on the basis of that order with two exceptions. *First*, if an order expressly provided that it was appointing leaders on a temporary basis—for example, to organize a conference call in advance of an initial case management conference—we ignored the order. Second, when an appointment order *expressly* referred to other appointment orders—for example, if the order provided that defense leadership would be appointed by separate order—we retrieved all of the referenced orders and coded the MDL on the basis of the collected orders.

This approach means that this study cannot claim to describe the full universe of leadership appointments, only the first appointment entered in pending MDLs. However, my approach ensures

[46] United States Judicial Panel on Multidistrict Litigation, Pending MDLs, https://www.jpml.uscourts.gov/pending-mdls-0. A permanent archive of the June 18, 2019, report, is available is available at https://web.archive.org/web/20190928201540/https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-June-18-2019.pdf.

[47] We visited dockets between June and August 2019. We made use of Bloomberg Law's CM/ECF interface instead of the CM/ECF systems maintained by individual district courts because Rutgers' subscription to Bloomberg Law provides unlimited access to CM/ECF dockets.

[48] *See* Pretrial Order No. 4, In re: 3M Combat Arms Earplug Products Liability Litigation, No. 3:19md2885 (N.D. Fla. Apr. 19, 2019).

that MDLs were coded on the basis of consistent, objective criteria. To the extent that the initial appointments persist throughout the litigation—a hypothesis I believe to be true that could be tested in future work—the study captures the general universe of leadership appointments.

Following this process, we reviewed docket sheets for 201 of the 202 MDLs that were pending in June 2019.[49] Having identified pending MDLs, reviewed their dockets, and identified the initial appointment order, if any, that courts entered in them, I coded each MDL for eighteen binary variables. They include the presence of a leadership appointment order; whether the order appoints lead counsel and creates a leadership structure, such as a Plaintiff's Steering Committee, for MDL plaintiffs; whether the court appointed defense leaders; and whether the order limited non-leads' ability to practice in the transferee court.[50]

I then compiled descriptive statistics on leadership appointment trends, described below, and reviewed the underlying dockets and appointment orders when the statistics revealed interesting patterns.

### B. Plaintiff Leadership Appointments

Perhaps the most striking finding from my study involves the prevalence of leadership appointments. As Figure 3 illustrates, orders appointing plaintiff leaders are common in contemporary MDL. Courts entered an order appointing lead plaintiff's counsel in 78.11% of MDLs in the sample (n=157). In 57.71% of the sample (n=116), the court created a plaintiff's leadership structure such as a plaintiff's steering committee or plaintiff's executive committee. In total, 83.58% of MDLs in the sample (n=168) involved a lead counsel appointment or the creation of a plaintiff's leadership structure. These data permit me to reject the null hypothesis that the average MDL proceeds with individual attorneys controlling the litigation of individual cases with a high degree of confidence.[51]

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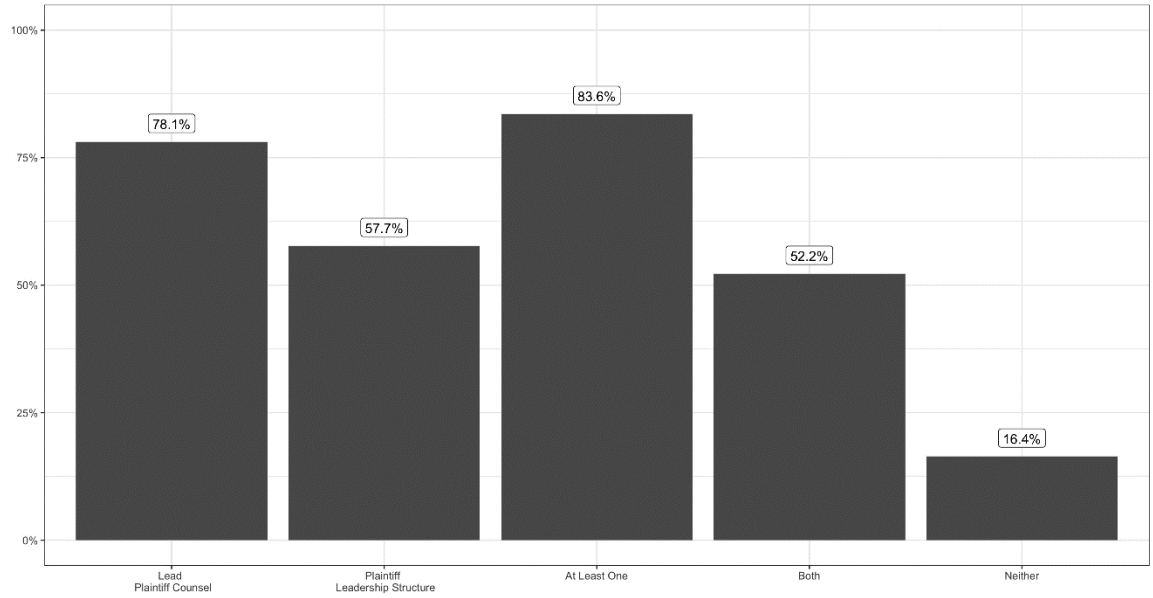
[49] A single MDL—*In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*—was excluded from the study because filings were not available via CM/ECF.

[50] My code book is available at ___.

[51] One sample t-test; p=0.0000.

**Figure 3: Plaintiff Leadership Appointment Types**




What happened in the thirty-three cases where the court did not appoint any type of plaintiff leaders? A review of the docket sheets in those actions suggest that they involve five general types of cases. *First*, some MDLs were too new for courts to have organized counsel.[52] *Second*, some MDLs settled shortly after the JPML transferred actions to the MDL court, leaving no litigation left for the transferee court to organize.[53] *Third*, courts in some MDLs focused on legal issues with the potential to make or break a large number of cases at the outset of the litigation and deferred organizing counsel while those issues were addressed.[54] This appears to be especially common in patent MDLs where, say, a *Markman* hearing or ruling on the validity of the patents at issue determines the need for further litigation and the form that it takes. *Fourth*, one antitrust MDL involved a small number of plaintiffs

[52] *See, e.g.*, Wesson Oil Marketing and Sales Practices Litigation, No. 2:11-ml-0229 (C.D. Cal); In Re Allura Fiber Cement Siding Products Liability Litigation MDL 2886, No. 2:19-mn-02886 (D.S.C.).

[53] *See, e.g.*, In re: Amazon.com, Inc., Fulfillment Center Fair Labor Standards Act (FLSA) and Wage and Hour Litigation, No. 3:14-md-02504 (W.D. Ky.); In re: Health Management Associates, Inc. Qui Tam Litigation (No. Ii), No. 1:14-mc-00339 (D.D.C.)

[54] *See, e.g.*, In re: Uber Technologies, Inc., Data Security Breach Litigation, No. 2:18-ml-02826 (C.D. Cal.); In re: Industrial Print Technologies, LLC, Patent Litigation, No. 3:15-md-02614 (N.D. Tex.).

litigating against a large number of defendants, inverting the many-against-few structure that characterizes most complex litigation.[55] *Fifth*, three cases in the sample appear to have proceeded as a large consolidation in which individually-retained plaintiff's attorneys litigated individual cases within the MDL.[56] In one last case, attorneys applied to serve as lead counsel and functioned in that capacity, but the transferee judge seems to have forgotten to enter an order memorializing the appointment.[57]

### C. Structure of Plaintiff's Leadership

What kind of plaintiff's leadership do appointment orders create? I coded for three high-level choices: (1) whether the court appointed lead plaintiff's counsel; (2) whether the court created a plaintiff's leadership structure such as a plaintiff's steering committee or plaintiff's executive committee; and (3) whether the court appointed plaintiff's liaison counsel—a role that typically involves administrative tasks and coordinating plaintiffs' presentations at hearings and conferences. I coded as an MDL as appointing lead counsel if an order appointed an attorney to a position such as "lead counsel," "lead plaintiff's counsel," or "co-lead counsel." An MDL was coded as creating a plaintiff's leadership structure if it created *any* leadership structure beyond lead counsel. Thus, an MDL with a three-member "executive committee" and a 100-attorney, 10-committee structure were both coded as creating a plaintiff's leadership structure. I also coded for whether the appointment order was contested—specifically, whether the court's appointment order indicates that more than one attorney applied for a leadership position.

As noted, courts appointed lead plaintiff's counsel in 78.11% of the sample (n=157) and created a plaintiff's leadership structure in 57.71% of the sample (n=116). Across the database, 37.81% of MDL's (n=76) involved a contested leadership appointment. In cases where the court appointed lead

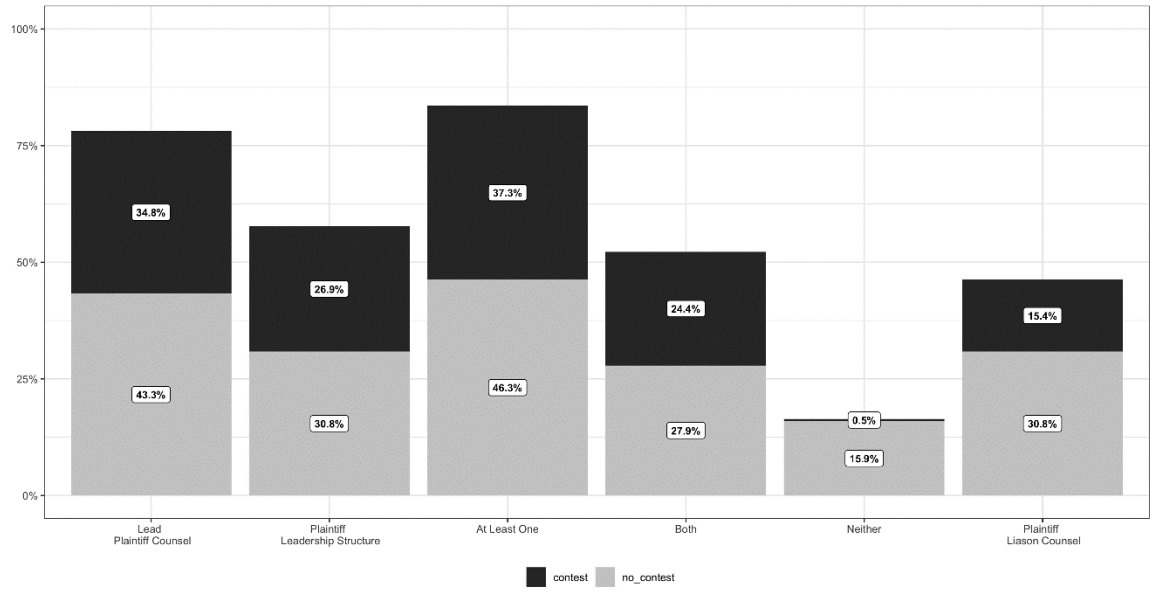
[55] *See* In re: Capacitors Antitrust Litigation (No.III), No. 3:17-md-02801 (N.D. Cal.).

[56] *See* In re: 21st Century Oncology Customer Data Security Breach Litigation, No. 8:16-md-02737 (M.D. Fla.); In re: Gold King Mine Release in San Juan County, Colorado, on August 5, 2015, No. 1:18-md-02824 (D.N.M.); In re: Air Crash Near Rio Grande, Puerto Rico, on December 3, 2008, No. 9:11-md-02246 (S.D. Fla.).

[57] In re: Customs and Tax Administration of the Kingdom of Denmark (Skatteforvaltningen) Tax Refund Scheme Litigation, No. 1:18-md-2865 (S.D.N.Y.).

plaintiff's counsel, 44.59% of appointment orders (n=70) were contested. In cases where the court appointed a plaintiff's leadership structure, 46.55% of appointments (n=54) were contested. Plaintiff's liaison counsel were appointed in 46.27% of MDLs in the sample (n=93). Figure 4 charts these findings.

**Figure 4: Types of Plaintiff Leadership Structures and Contested vs. Uncontested Nature of Appointment**




Beyond these general trends, a review of appointment orders reveals major variations in how plaintiffs' leaders are organized. At one end of the spectrum, some orders create elaborate structures with multiple committees and lines of authority among them. For example, in the Toyota unintended acceleration MDL, the court appointed a "liaison committee for personal injury/wrongful death cases, consisting of two co-lead counsel and a total of nine members," a "lead counsel committee for the economic loss cases," a "core discovery committee consisting of the co-lead liaison counsel for the personal injury/wrongful death cases and the co-lead counsel for the economic loss plaintiffs," "[t]hree liaison counsel to the state cases and other types of federal cases to coordinate between the core discovery committee and the state and federal litigation," and "[o]ne or more counsel who shall have

specific duties limited to a particular factual or legal area."[58] At the other end of the spectrum, some orders merely specify that attorneys will play particular roles. For example, consider the following order entered in the Facebook consumer privacy user profile litigation:

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE: FACEBOOK, INC., CONSUMER PRIVACY USER PROFILE LITIGATION

MDL No. 2843

Case No. 18-md-02843-VC

This document relates to:

ALL ACTIONS

**PRETRIAL ORDER NO. 4: APPOINTING LEAD COUNSEL**

The following people are appointed co-lead counsel in this matter: Derek Loeser of Keller Rohrback, and Lesley Weaver of Bleichmar Fonti & Auld.

**IT IS SO ORDERED.**

Dated: July 27, 2018

VINCE CHHABRIA
United States District Judge

Even more perfunctory are orders that simply grant an application to create a particular leadership structure or that appoint the movants to positions that the movants identify and describe.[59] Here, the orders contain no instruction about how attorneys are to be organized; that task is effectively delegated to the attorney or group of attorneys that files the motion seeking the appointment of plaintiffs' leadership. In a notable variation on this practice, the court in the treasury securities auction antitrust

[58] Order No. 2, In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, No. 8:10-ml-02151 (C.D. Cal. May 14, 2010) (Docket No. 169).

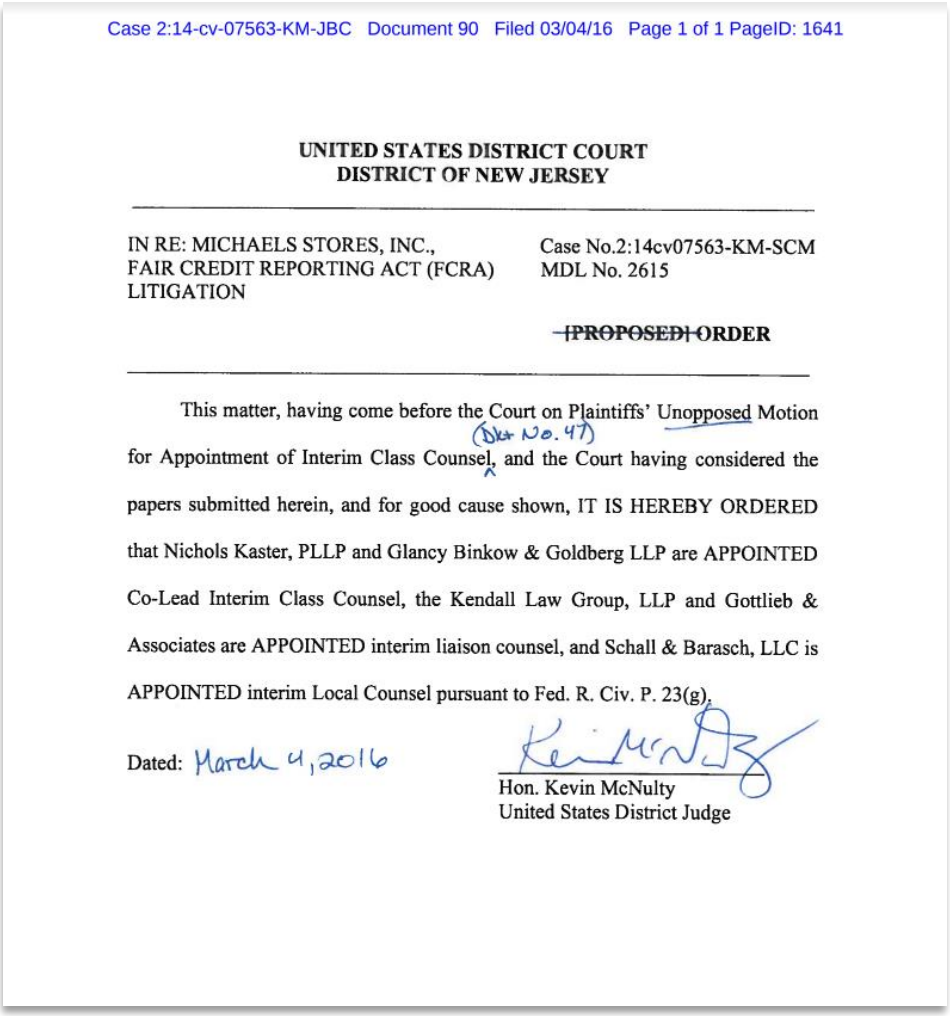
[59] *See, e.g.*, Marginal Order Granting Plaintiffs' Renewed Motion to Approve Co-Leads, Co-Liaisons, and Executive Committee, In re: National Prescription Opiate Litigation, No. 17-md-02804 (E.D. Ohio Jan. 4, 2018) (Docket No. 37); Order, In re Zappos.Com Inc., Customer Data Security Breach Litigation, No. 3:12-cv-325-RCJ-VPC (D. Nev. Sept. 18, 2014) (Docket No. 202).

MDL appointed a group of attorneys as interim co-lead counsel then directed the attorneys to "make a recommendation to the court as to the membership and size of the plaintiff's steering committee." Parties who objected to lead counsel's recommendation were given a week to voice their objections.[60]

Differences in whether the court or attorneys devise the plaintiff leadership structure highlight another phenomenon that only becomes apparent in a review of the underlying appointment orders. While some appointment orders appear to be court-drafted, others are quite obviously drafted by counsel. Consider the following order appointing class counsel in the Michaels Stores Fair Credit Report Act MDL:[61]

[60] Order, In re Treasury Securities Auction Antitrust Litigation, No 1:15-md-2673 (Aug. 23, 2017) (Docket No. 186).

[61] Order, In re: Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litigation, No. 2:14-cv-7563 (D.N.J. Mar. 4, 2016) (Docket No. 90).



Case 2:14-cv-07563-KM-JBC Document 90 Filed 03/04/16 Page 1 of 1 PageID: 1641

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

IN RE: MICHAELS STORES, INC., FAIR CREDIT REPORTING ACT (FCRA) LITIGATION

Case No.2:14cv07563-KM-SCM
MDL No. 2615

~~[PROPOSED]~~ **ORDER**

This matter, having come before the Court on Plaintiffs' Unopposed Motion (Dkt No. 47) for Appointment of Interim Class Counsel, and the Court having considered the papers submitted herein, and for good cause shown, IT IS HEREBY ORDERED that Nichols Kaster, PLLP and Glancy Binkow & Goldberg LLP are APPOINTED Co-Lead Interim Class Counsel, the Kendall Law Group, LLP and Gottlieb & Associates are APPOINTED interim liaison counsel, and Schall & Barasch, LLC is APPOINTED interim Local Counsel pursuant to Fed. R. Civ. P. 23(g).

Dated: March 4, 2016

Hon. Kevin McNulty
United States District Judge

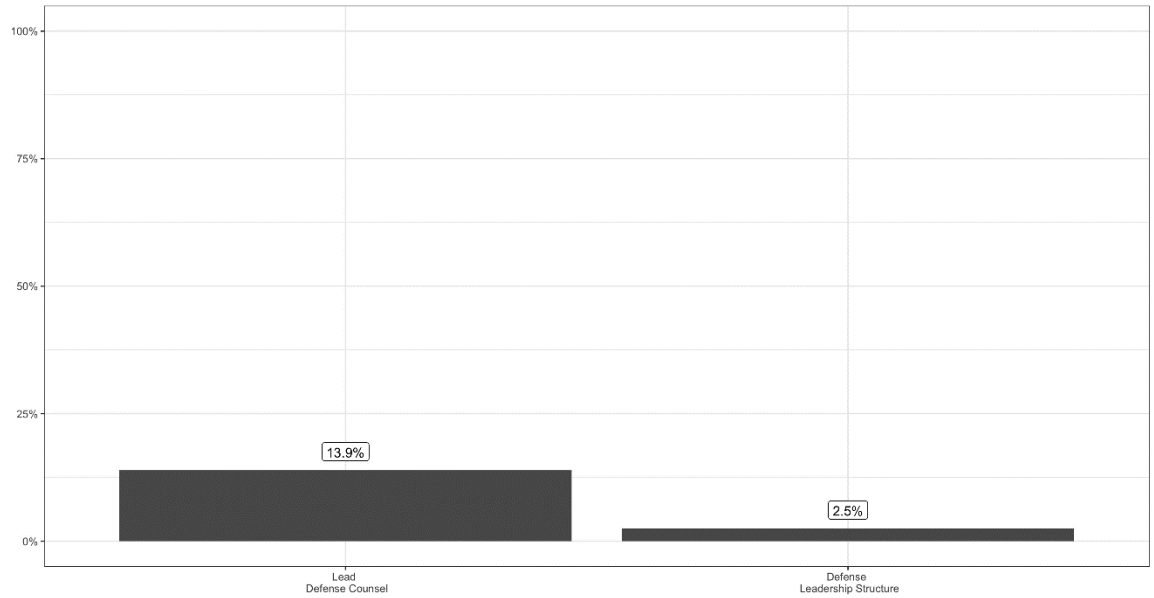
Many orders did not contain any indication whether they had been drafted by the counsel or court, and I could not think of a proxy that would reliably indicate whether the court or an attorney drafted an order, so I did not attempt to code for this property or measure it quantitatively. But attorney drafting appears to be sufficiently common that it should be understood as a regular feature of leadership appointment practice in MDL. Indeed, the *Manual for Complex Litigation, Second*, instructs, "The functions of lead, liaison, and trial counsel, and of each committee, should ordinarily be memorialized either in a court order or in a separate document drafted by the affected counsel."[62]

[62] *See* Manual for Complex Litigation, Second §20.222, at 17 (1985) ("The functions of lead, liaison, and trial counsel, and of each committee, should ordinarily be memorialized either in a court order or in a separate document drafted by the affected counsel.").

## D. Defense Leadership Appointments

In a notable contrast to the prevalence of plaintiff leadership appointments, leadership appointments on the defense side were rare. As Figure 5 shows, lead defense counsel were appointed in 13.93% of cases (n=28) in the sample. The court created a defense leadership structure in five cases, or 2.48% of the sample.

**Figure 5: Defense Leadership Appointments**




What happened in the cases where the court created a defense leadership structure? The first MDL to use a defense leadership structure is MDL 875, the massive asbestos product liability MDL in the Eastern District of Pennsylvania.[63] Toward the conclusion of the litigation, the district court relieved all counsel who were previously appointed to leadership positions and appointed a "Joint Plaintiffs'/Defendants' Steering Committee" to "analyze certain administrative issues and suggest solutions to the Court." In essence, defense counsel participated in an MDL-wide committee that was

[63] *See generally* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97 (2013).

charged with cleaning up the litigation after most cases had been resolved through bankruptcy reorganizations, aggregate settlements, and individual proceedings.

In the remaining MDLs, appointment orders create defense-side versions of leadership structures that are more commonly used on the plaintiff side. For example, in the IntraMTA switched access charges MDL, Verizon and Sprint brought suit against a large number of Local Exchange Carriers alleging that they improperly billed Verizon and Sprint for calls originated and terminated in the same major trading area.[64] The court found that "the large number of counsel and Defendants requires a substantial amount of coordination of litigation efforts."[65] Accordingly, it appointed two attorneys as "Lead and Liaison Counsel for Defendants," an eleven-member "Large/Medium LEC Steering Committee," and a nine-member "Small/Regional/Rural LEC Steering Committee." In contrast, defendants in the Valsartan products liability litigation appear to have self-organized. The appointment order approves a "Defendants' Leadership Structure" that consists of a four-member "Defendants' Executive Committee" and two liaison counsel.[66]

The scarcity of defense leaders in the sample suggests that MDL defendants do not encounter the same collective action problems that motivate courts' appointment of plaintiff-side leaders. My data do not answer whether this is due to there being fewer defendants in the average MDL, defendants' better ability to self-organize compared to plaintiffs, or some other factor. Whatever the cause, judicial organization of MDL attorneys is a phenomenon that occurs predominantly on the plaintiff's side.

### E. Plaintiff Leaders' Authorities and Duties

In addition to examining the type of plaintiff leaders that the court appointed, I also coded orders for whether they defined leaders' authorities. Two variables tracked high-level patterns by

[64] In re: IntraMTA Switched Access Charges Litig., 67 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014).

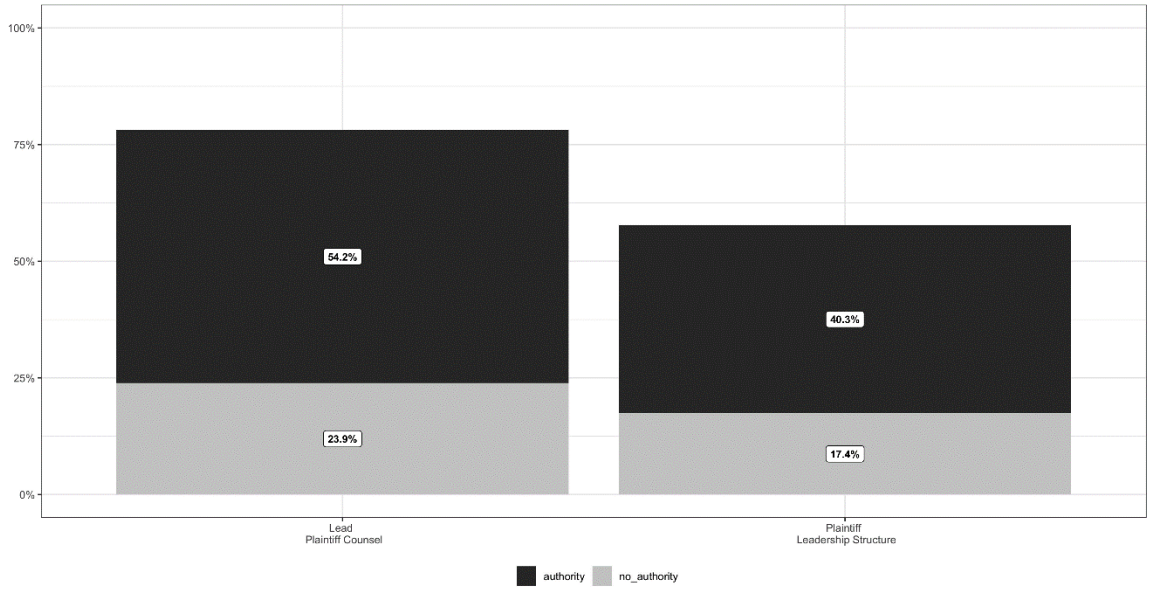
[65] Order Appointing Defendants' Lead/Liaison Counsel And Steering Committees, In re: IntraMTA Switched Access Charges Litigation, No. 3:14-md-2587 (N.D. Tex. Mar. 15, 2015) (Docket No. 76).

[66] Case Management Order No. 6 Approving Plaintiffs' and Defendants' Leadership Structure, In re: Valsartan Products Liability Litigation, No. 1:19-md-2875 (D.N.J. May 6, 2019) (Docket No. 96).

coding for whether the court assigned specific functions to lead plaintiff's counsel and the court-appointed leadership team, if any. These variables were coded "yes" if the order contained any language assigning tasks or specifying the authority of lead counsel or the plaintiff's leadership structure. I also coded appointment orders for whether they contained language identifying *duties* that court-appointed leaders held toward held toward MDL plaintiffs. In coding these variables, I looked to the substance of appointment orders. Thus, an order which recited that it was the "duty" of lead counsel to coordinate discovery on behalf of MDL plaintiffs without specifying any duties that lead counsel held toward MDL plaintiffs was coded "yes" for specifying lead counsel's authority and "no" for recognizing duties that lead counsel held toward MDL plaintiffs.

As Figure 6 shows, the majority of appointment orders specified leaders' authority. Appointment orders defined lead counsel's authority in 54.23% of the total sample, or 69.43% of cases in which lead counsel was appointed (n=109). The court specified the plaintiff leadership structure's authority in 40.30% of the sample, or 69.83% of cases in which a plaintiff's leadership structure was created (n=81). In total, there were 118 cases in which the court defined the authority of either lead plaintiff's counsel or the plaintiff's leadership structure.

**Figure 6: Specification of Leaders' Authority**




Looking at the underlying orders reveals that definitions of leaders' authorities exhibit the borrowing and case-by-case development that observers describe as an important feature of MDL procedure.[67] Some orders provide a minimalist definition of leaders' authority, providing, for example, court-appointed orders shall "serve [in specified capacities] on behalf of all Plaintiffs whose claims are transferred to this Court as a result of the Judicial Panel on Multidistrict Litigation's [orders]."[68] More common are orders that generally charge leaders with managing the litigation on behalf of consolidated plaintiffs then set out specific responsibilities in categories such as "Discovery," "Motion Practice and Hearings," "Contact with Defense Counsel," "Oversight of Plaintiff's Counsel," "Committee Formation," "Trial Preparation," and "Other."[69] This laundry list approach to leaders' authorities appears to have originated in the *Manual for Complex Litigation, Second*, which contains a sample appointment order that assigns "Plaintiffs' Lead Counsel" six specific tasks.[70] Still another approach

[67] *See generally* Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 Yale L.J. (forthcoming 2019); Noll, *supra* note 5; Gluck, *supra* note 54.

[68] Case Management Order No. 3, In re Sorin 3T Heater-Cooler System Products Liability Litigation (No. II), 1:18-md-2816 (M.D. Pa. May 31, 2018).

[69] Order, In re: Dealer Management Systems Antitrust Litigation, No. 1:18-cv-864 (N.D. Ill. Apr. 16, 2018) (Docket No. 123).

[70] Manual for Complex Litigation, Second § 41.32 (1985).

to defining leaders' authorities is to delegate that task to the leaders themselves. For instance, the appointment order entered in the Ethicon MDL provided: "It shall be the responsibility of Coordinating Co-Lead Counsel to work across MDL lines in conjunction with the Executive Committee . . . to determine which attorneys are best suited to handle a given task, be it common corporate discovery, expert identification, deposition preparation, motions practice and brief drafting, trial teams and other similar matters that develop as this litigation progresses."[71]

Within orders that follow the laundry-list approach, the number of functions assigned to leaders seems to have grown over time. The "Sample Order Prescribing Responsibilities of Designated Counsel" in the *Manual for Complex Litigation, Second*, charges Lead Plaintiffs' Counsel with six specific tasks.[72] A decade later, the *Manual for Complex Litigation, Third*, charged Lead Plaintiffs' Counsel with three additional tasks. The appointment order in the Baycol products liability MDL, entered in February 2002, contains ten numbered paragraphs of Co-Lead Counsel's responsibilities.[73] By the time the court appointed leaders in the Marriot data breach MDL in April 2019, Co-Lead Counsel were responsible for sixteen specific functions and Liaison Counsel were responsible for eight functions. The order contains three paragraphs of "Duties of Plaintiffs' Steering Committee" and a single paragraph on the "Duties of Coordinating Discovery Counsel."[74]

If courts are eager to assign leaders responsibilities in appointment orders, they are more reticent with respect to leaders' duties to MDL plaintiffs. None of the orders in the database attempted to define the legal relationship among plaintiff leaders, the plaintiff class, and non-lead counsel apart from using general terms such as "Plaintiffs' Co-Lead Counsel" or "member of the Plaintiff's Steering Committee." Nine appointment orders, or 4.98% of the sample, define duties that lead plaintiff's

[71] Pretrial Order #4, In re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation, No. 2:12-md-2327 (D.W.V. Apr. 17, 2012).

[72] Manual for Complex Litigation, Third § 41.31 (1995).

[73] Pretrial Order No. 3, In re: Baycol Products Liability Litigation, No. 0:01-md-1431 (D. Minn. Feb. 1, 2002).

[74] Case Management Order #2, In re: Marriott International, Inc., Customer Data Security Breach Litigation, No. 8:19-md-2879 (S.D. Md. Apr. 29, 2019) (Docket No. 238).

counsel held toward MDL plaintiffs. Seven orders, or 3.48% of the sample, identify duties that members of the plaintiffs' leadership structure hold toward MDL plaintiffs.

The small number of appointment orders that address leaders' duties can be grouped into three categories. *First*, certain orders describe leaders duties by reference to the Manual for Complex Litigation—an example of how the Manual's "recommendations and suggestions" can be converted in binding orders backed by the coercive authority of the transferee court.[75] *Second*, some orders provide that leaders have a responsibility to consult with non-leads in an effort to ensure that plaintiffs are adequately represented while capturing efficiencies from centralized management.[76] Finally, some orders seek to head off concerns about adequate representation by *disclaiming* leaders' duties to MDL plaintiffs and putting the burden on individually-retained plaintiffs' attorneys to represent to protect clients' interests. For example, the Ethicon appointment order provides, "All attorneys representing parties to this litigation, regardless of their role in the management structure of the litigation and regardless of this court's designation of Lead and Liaison Counsel, a Plaintiff's Executive committee and a Plaintiff's Steering Committee, continue to bear the responsibility to represent their individual client or clients."[77]

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[75] *See* Manual for Complex Litigation, Fourth 1 (2004) ("[The *Manual*] was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The *Manual*'s recommendations and suggestions are merely that. As always, the management of any matter is within the discretion of the trial judge."). For orders applying the MCL standards, see e.g., Case Management Order No. 1, In re: Zimmer Durom Hip Cup Products Liability Litigation, No. 2:09-cv-4414 (D.N.J. Feb. 18, 2011) (Docket No. 9) ("Consistent with MCL 4th $ 10.22, counsel appointed to leadership positions assume 'an obligation to act fairly, efficiently, and economically' and 'committees of counsel...should try to avoid unnecessary duplication of effort.'"); Order No. 2: Adoption of Organization Plan and Appointment Of Counsel, In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation, No. 8:10-ml-2151 (C.D. Cal. May 14, 2010) (Docket No. 169) ("The committee will have the duties outlined in the Manual for Complex Litigation (Fourth) § 22.62, but tailored to reflect retention by individual counsel of the unique aspects of each personal injury/wrongful death case.")

[76] *See, e.g.*, Order Appointing Leadership Counsel, In re: Ashley Madison Customer Data Security Breach Litigation, No. 4:15-md-2669 (E.D. Mo. Feb. 5, 2016) (Docket No. 87) ("[I]n carrying out the [specified] duties, Plaintiffs' Co-Lead Counsel are particularly required to consult with all Plaintiffs' counsel throughout this case to assure that all interests are represented"); In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 1:05-md-1720 (E.D.N.Y. Feb. 24, 2006) (Docket No. 278) ("I anticipate that the Robins Kaplan group will solicit and consider the views of others, particularly the Milberg Weiss firm, in making litigation decisions on behalf of the plaintiffs.")).

[77] Pretrial Order #4, In re: Ethicon, Inc., Pelvic Repair System Products Liability Litigation, No. 2:12-md-2327 (D.W.V. Apr. 17, 2012). *See also, e.g.*, Pretrial Order #4, American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation (S.D.W.V. Apr. 17, 2012); Pretrial Order #4, In re: Boston Scientific Corp. Pelvic Repair System Products Liability Litigation, No. 2:12-md-2326 (S.D.W.V. Apr. 17, 2012).

## F. Limits on Non-Lead Practice

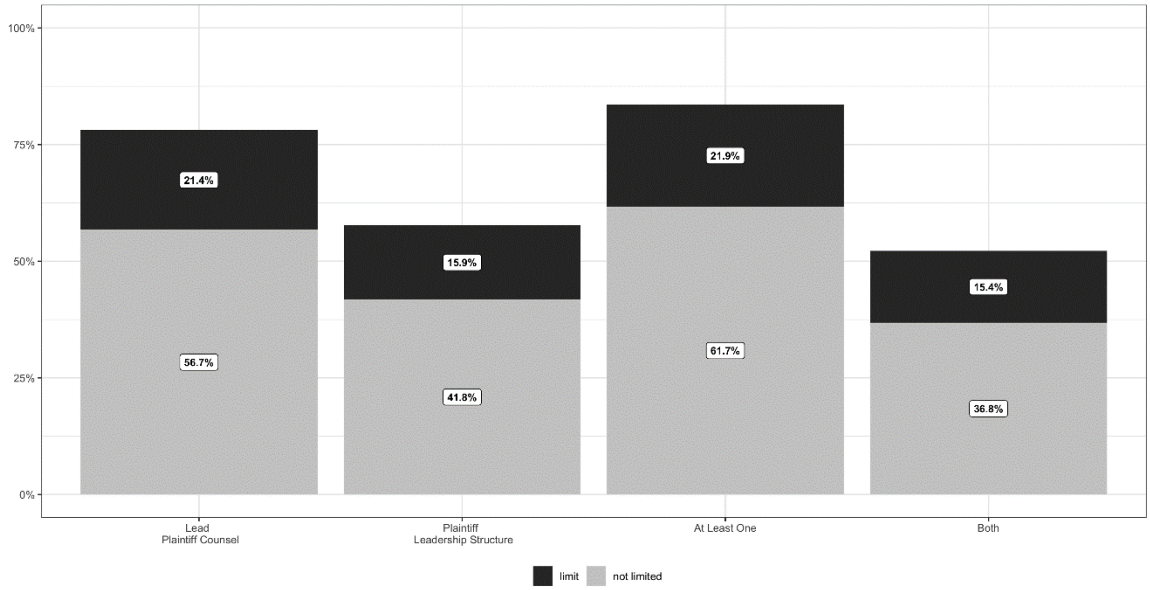
Designating particular attorneys as leaders does little to address collective action problems on the plaintiffs' side if non-lead attorneys are free to engage in discovery and motion practice, engage with the court and defendants, and generally do the things that attorneys do in civil litigation. At the same time, barring non-lead attorneys from practicing in the transferee court is in tension with the presumption that "that litigation is conducted by and on behalf of the individual named parties only"[78] and the principle that transfer under section 1407 does not, in itself, affect the character of transferred cases.[79] Thus, I was curious about the prevalence of limitations that transferee courts placed on non-leads' ability to practice in the transferee court.

I coded an MDL as limiting non-leads' authority to practice if an appointment order imposed *any* limitation on non-leads' practice in the transferee court. Under this definition, 21.89% of the sample (n=44) limits non-leads' ability to practice. Within the set of MDLs where courts appointed lead plaintiff's counsel or a plaintiff's leadership structure, the percentage was 26.19%. Figure 7 charts these findings.

[78] Califano v. Yamasaki, 442 U.S. 682, 700-701 (1979).

[79] 15 Charles Alan Wright et al., Federal Practice and Procedure § 3866 (4th ed. 2013).

**Figure 7: Limits on Non-Lead Attorneys' Authority to Practice in Transferee Court**




Once again, a review of underlying appointment orders reveals considerable variation. The most anodyne restrictions on non-leads' authority instruct non-leads not to perform work that is duplicative of that performed by court-appointed leaders, or warn that compensation will not be provided for common benefit work that is not approved by the court or the leaders it selected.[80] The most restrictive orders bar non-leads from engaging in ordinary litigation activities or engaging the court and defendants without prior permission. For example, the appointment order entered in the MONAT hair care products marketing MDL provides, "Counsel for Plaintiffs who disagree with Lead and Liaison Counsel, or who have individual or divergent positions, may not act separately on behalf of their clients without prior authorization of this Court."[81] In the Ashley Madison MDL, the court ordered: "no papers shall be served or filed, and no process, discovery, or other procedure shall be commenced by any counsel other than Lead Counsel, except with specific leave of Court."[82]

[80] *See, e.g.*, Order No. 5, In re: General Motors LLC Ignition Switch Litigation, No. 1:14-md-2543 (S.D.N.Y. June 18, 2014); Order Appointing Plaintiffs' Co-Lead and Co-Liaison Counsel, Wright Medical Technology, Inc., Conserve Hip Implant Products Liability Litigation, 1:12-md-2329 (N.D. Ga. May 3, 2012).

[81] Case Management Order, In re: MONAT Hair Care Products Marketing, Sales Practices and Products Liability Litigation, No. 1:18-md-2841 (Aug. 17, 2018) (Docket No. 59).

[82] Order Appointing Leadership Counsel, In re: Ashley Madison Customer Data Security Breach Litigation, No. 4:15-md-2669 (E.D. Mo. Feb. 5, 2016) (Docket No. 87).

Of course, one should be careful making inferences about the actual division of labor in an MDL from limitations on non-lead practice in leadership appointment orders. The fact that roughly a quarter of appointment orders explicitly limit non-leads' authority to practice in the transferee court might indicate that, in the remaining MDLs, non-leads are free to practice. However, it is more plausible that the division of labor between leaders and non-leads is governed by informal norms and controlled through later court orders controlling the work that non-leads can—and cannot—perform. The limitations I have identified show only that, in a non-trivial number of cases, appointment orders expressly restrict non-leads' ability to practice at the beginning of the litigation.

The underlying appointment orders also contain a number of provisions that *expand* the effect of leaders' actions to all cases in MDL. An order might provide that defendants are authorized to enter into agreements with litigation leaders and that those agreements are binding on other plaintiffs in the MDL.[83] A device that is slightly more protective of plaintiffs' rights might be termed the "expanding stipulation." Here, a leadership appointment order provides that stipulations between MDL leaders and the defendant must be docketed. The docketing of a stipulation, however, triggers a "laying before" period in which parties who do not wish to be bound by the stipulation must affirmatively object to it. If a party does not object, their silence is taken as assent and the stipulation becomes binding on them. Objection periods are not long. In 2011, Judge Joseph R. Goodwin entered an order in the Coloplast pelvic support systems MDL that provided for a ten-day objection period.[84] The next year, Judge Robert L. Miller, Jr. entered an order in the Biomet M2a Magnum hip implant products liability litigation shortened the objection period to five days.[85]

[83] Order Appointing Plaintiffs' Interim Co-Lead Counsel and Liaison Counsel, In Re: Diisocyanates Antitrust Litigation, No. 2:18-mc-01001 (W.D. Pa. Nov. 28, 2018) (Docket No. 107).

[84] Pretrial Order #2, In re: Coloplast Corp. Pelvic Support Systems Products Liability Litigation, (S.D.W.V. Sept. 21, 2012).

[85] Order Concerning Plaintiffs' Counsel Organization Structure, In re: Biomet M2a Magnum Hip Implant Products Liability Litigation, 3:12-md-2391 (N.D. In. Dec. 5, 2012).

## G. Legal Authority and Reasoning

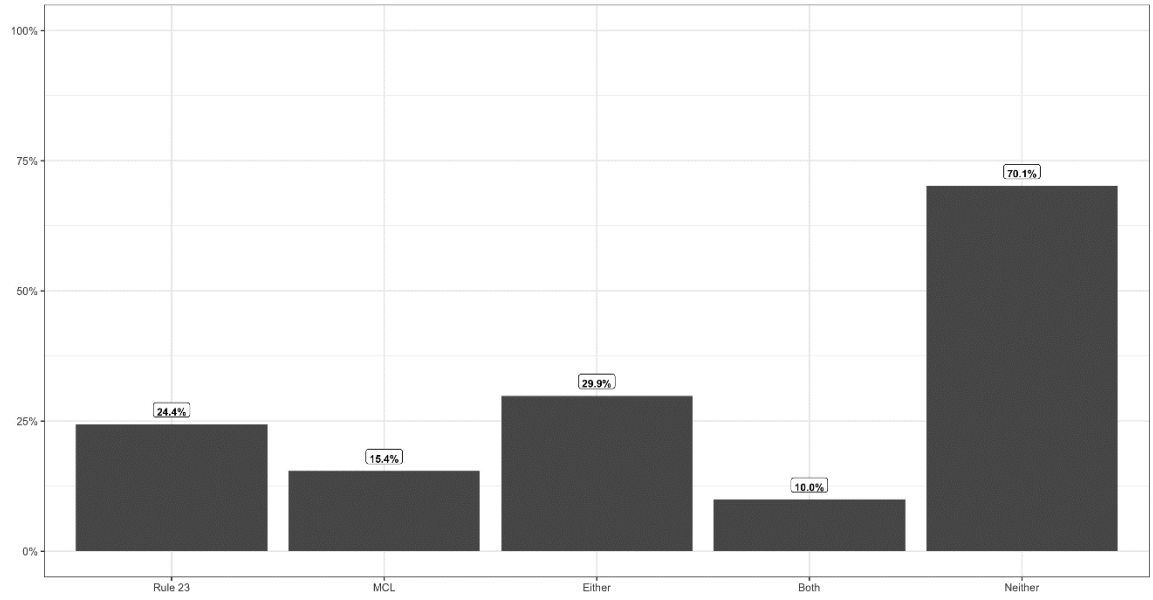
The standards that courts use to select MDL leaders potentially affect the choices reflected in appointment orders and are a perennial target of proposals to reform MDL.[86] Thus, I coded leadership appointment orders for whether they applied the selection criteria articulated in the *Manual for Complex Litigation* and Rule 23, which was amended in 2003 to allow the court to appoint interim lead counsel in putative class actions.[87] An order was coded as applying the MCL or Rule 23 only if the order expressly cited those authorities, or included language from them verbatim.

As Figure 8 illustrates, appointment orders tend not to apply these standards. Orders in 24.38% of the sample applied Rule 23 (n=49), and orders in 15.42% of the sample applied the MCL (n=31). 9.95% of the orders in the sample applied *both* the MCL and Rule 23. A handful of orders in the sample applied the lead counsel provisions of the Private Securities Litigation Reform Act (PSLRA), though I cannot report quantitative data on the percentage of the sample that applies the PSLRA because I have yet to code for it.

[86] *See, e.g.*, Burch, *supra* note 2, at 168-86; Bolch Judicial Institute, Duke Law School, Guidelines and Best Practices for Large and Mass-Tort MDLs (Second Edition) 29-50 (Sept. 2018), https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf.

[87] Fed. R. Civ. P. 23(g)(3).

**Figure 8: Legal Authority Applied**




In the underlying orders, those applying Rule 23 appeared to be more verbose about the court's reasons for selecting particular leaders. One possible explanation is that transferee judges believe the selection of lead counsel would be at issue in an interlocutory appeal under 23(f).[88] Another is that judges view the appointment of class counsel as a bigger deal—and thus worthy of more explanation—than the selection of MDL leaders. Courts' verbosity, however, is probably not explained by the fact that orders applying Rule 23 orders are more likely to be contested. 69.39% of orders that applied the Rule 23 were contested (n=34), whereas 67.74% of orders that applied the MCL (n=21) were.

On the other hand, orders applying Rule 23 tended to say less about leaders' responsibilities than those that applied the MCL. 70.97% of orders applying the MCL defined lead counsel's responsibilities (n=22), whereas 61.22% of orders that applied Rule 23 did so (n=30). One possible explanation is that the role of lead class counsel is better understood, and less likely to change from case to case, than that of lead counsel in a non-class MDL. Given the large body of precedent that

[88] Fed. R. Civ. P. 23(f) (providing for discretionary appeal of "an order granting or denying class-action certification").

limns the role of class counsel, courts may feel less need to explain the functions that class counsel are expected to perform when they are appointed.

### H. Financial Aspects of Leadership Appointments: Contribution, Compensation, and Recordkeeping

For an attorney whose case has been transferred to an MDL court, one of the most important consequences of the court appointing litigation leaders is the order's potential to reconfigure fee arrangements reflected in individual retainer agreements. An appointment order lays the foundation for later orders obligating contributions to a "common benefit" fund, taxing settlements and judgments for work performed on behalf of consolidated MDL plaintiffs, and allocating money from these sources to MDL leaders and their designates. Curious about what appointment orders say about the financial aspects of leadership appointments, I coded the orders for whether an order addressed attorneys' obligation to pay for leaders' work, how leaders would be compensated, and attorneys' duty to maintain time and billing records.

At least in the initial appointment orders that are my focus here, attention to devoted to these matters is minimal. 3.98% of orders in the sample (n=8) addressed attorneys' obligation to pay for common benefit work. 7.96% addressed how leaders would be compensated (n=16). And 23.38% of the sample (n=47) imposed recordkeeping requirements on court-appointed leaders.[89]

Of course, these findings do not show that courts never address the financial aspects of leadership appointments. Courts in some cases have entered separate orders addressing the financial

[89] Among the small number of orders that addressed the financial aspects of leadership appointments, the order entered in the polypropylene hernia mesh products liability litigation is particularly notable. That order states:

> The Court is mindful that counsel within the [Plaintiffs' Steering Committee] will advance funding [for] much of the common benefit litigation and that each of the members of the PSC have warranted their ability and willingness to advance fund the common benefit litigation as determined are [sic.] necessary by the Co-Leads and the [Plaintiffs' Executive Committee]. The failure of any member of the PSC to meet any of the advanced funding obligations as determined are necessary by the Co-Leads and the PEC may constitute good cause for removal from the PSC.

Case Management Order No. 3 Appointing Plaintiffs' Steering Committee, In re: Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Products Liability Litigation, No. 2:18-md-2846 (S.D. Ohio Sept. 18, 2018) (Docket No. 16).

It isn't clear from the face of the order whether this language was drafted by the court or proposed by counsel. The language does not appear in any other orders in the sample.

aspects of leaders' work.[90] But the findings do suggest that, to the extent courts address financial aspects of leadership appointments, they defer decisions to later in the litigation than initial leadership appointments.

## III. Implications

In this Part, I briefly consider the implications of my findings for three central debates about contemporary MDL: (1) what MDL *is*; (2) the duties that court-appointed leaders hold to MDL plaintiffs; and (3) the normative valence of MDL's reliance on ad hoc procedure that evolves to overcome problems that emerge in particular cases.

### A. The Nature of Contemporary MDL

As MDL has become an increasingly important forum for resolving complex legal problems, critics have complained that it gives rise to the same agency problems thought to affect many forms of class-action litigation.[91] According to this critique, the appointment of leadership attorneys gives court-appointed leaders power to act on behalf of a large number of plaintiffs. Those leaders, however, are motivated by the prospect of recovering common benefit fees as opposed to an Atticus Finch-like devotion to the poor and downtrodden. Hence, leaders' actions tend to benefit leaders themselves and their nominal litigation adversaries, not the plaintiffs for whom they work. Focusing on case studies that seem to illustrate these dynamics, scholars such as Elizabeth Burch and Howard Erichson maintain MDL plaintiffs are "twice victimized"—first by the defendant's real-world conduct, and then by attorneys who sell their rights for inadequate consideration.[92]

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[90] *See, e.g.*, In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., No. 3:15-md-02672-CRB, at 8 (N.D. Cal. Feb. 26, 2016) (No. 1254.

[91] For classic statements of the problem, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991).

[92] *See* Burch, *supra* note 2 (back cover).

Partially in response to this critique, others challenge the image of MDL as a form of representative litigation in which court-selected leaders necessarily call all the important shots. Professors Andrew Bradt and Theodore Rave suggest that MDL is better understood as a "hybrid" that functions as "a tightly knit aggregation" while also preserving the individual character of consolidated cases.[93] This hybridity, say Bradt and Rave, "permits MDL to accommodate the norms of traditional American one-on-one litigation far better than a class action, even while functioning, at times, like representative litigation." In a somewhat different vein, Zach Clopton observes that "MDL is not a uniform category of large civil cases;" some MDLs are "simply a collection of individual cases, many of which do not present any unusual complexity in case management."[94] Running throughout these various contentions are competing visions of what MDL *is*. Is MDL simply class action litigation by another name? Or is it a form of litigation that, as Bradt and Rave say, incorporates enough individualization to meaningfully distinguish it from class action litigation?

My findings do not resolve the debate over how MDL should be understood as a legal or conceptual matter, but they suggest that both of these images capture something important about MDL as it is now practiced. The prevalence of leadership appointments in MDL suggests that it is properly understood as a form of representative litigation in the following limited sense: (1) courts regularly delegate authority to attorneys, (2) to act on behalf of non-clients, (3) in order to advance objectives that are explicitly or implicitly identified by the court. As a result, the organizational structure of an MDL is decidedly class action-like, with empowered agents—the court-appointed leaders—sitting atop a large number of parties who they serve. As Prof. Burch emphasizes, this structure—and the separation of ownership and control that it entails—create conditions for agency costs to arise when disloyal leaders do not act in the interests of their nominal principals.

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[93] Andrew D. Bradt & D. Theodore Rave, *Aggregation on Defendants' Terms:* Bristol-Myers Squibb *and the Federalization of Mass-Tort Litigation*, 59 B.C. L. Rev. 1251, 1257 (2018)

[94] Clopton, *supra* note 3.

But the *type* of control MDL leaders exercise does not necessarily track the control that leaders exercise in class action litigation. This is most apparent when we consider the limitations that leadership appointment orders place on non-lead attorneys' ability to practice in the transferee court. The certification of a class action authorizes class counsel to act on behalf of the class and ousts non-lead counsel from representing it.[95] In contrast, the appointment of MDL leaders can leave non-lead attorneys with significant authority. Only 43 of the 157 orders in the sample that appointed lead plaintiff's counsel (27.38%) expressly limited non-leads' authority to practice in the transferee court. Of the 116 orders that created a plaintiff's leadership structure, 32 (27.58%) limit non-leads' authority to practice. Moreover, only a fraction of orders that limit non-leads' authority to practice do so in a way that approximates the ouster of non-leaders effected by a class certification order.[96] Thus, while MDL resembles class action litigation in creating a principal-agent relationship between the leaders of the litigation and its beneficiaries, the agent in the MDL context tends to exercise authority that is more limited and more variable than the agent in the class-action context.

What this means for debates over the nature of MDL is that both sides are right in some respects —or less charitably, that both sides are wrong. While MDL as practiced really is a form of representative litigation, it is a *weakly* representative form of litigation in which power is not completely centralized in the litigation leaders. The obvious analogy is federalist governments that assign some sovereign powers to the national government, while leaving other powers in subnational governments or the people themselves. In MDL, the leadership appointment order functions as a constitution that marks the boundary line between centralized and non-centralized powers. It picks out particular powers that ordinarily are exercised by an individually retained plaintiff's attorney, permits those powers to be exercised by the court-appointed leaders, and says whether leaders' exercise of authority is exclusive or concurrent with the authority of individually retained plaintiffs' attorneys.

[95] *See* In re: Fed. Skywalk Cases, 680 F.2d 1175, 1180 (8th Cir. 1982).

[96] *See supra* notes 80-82 and accompanying text.

Stated differently, "appointment orders carve out a limited exception to the rule against nonparty preclusion," which is "justified by the collective action problems that would otherwise make resolution of an MDL impossible."[97]

### B. Disaggregating Leaders' Duties

My findings are also relevant to the debate over the duties that court-appointed leaders owe to MDL plaintiffs. As noted above, the duties that court-appointed leaders owe to MDL plaintiffs—and the limitations those duties place on leaders' actions—are fiercely contested. Commentators such as Profs. Burch and Silver contend that because leaders do the work of individually retained plaintiff's attorneys, they assume a duty of undivided loyalty to plaintiffs for whom they perform common benefit work.[98] They suggest that, regardless of whether the transferee court certifies a class action, leaders who make important litigation decisions on behalf of MDL plaintiffs are subject to the conflict-of-interest principles that the Supreme Court elaborated for Rule 23 class representatives in *Amchem* and *Ortiz*.[99] Others deny that leaders are subject to any such duties,[100] or suggest that different legal structures provide a better model for understanding leaders' relationship to MDL plaintiffs.[101]

A key assumption in these debates is that the duties of "MDL leaders" is the relevant category. But as Part II describes, there are leaders and there are leaders. Some appointment orders envision that leaders will do little more than herd cats; correspondingly, non-lead attorneys retain considerable authority to practice in the transferee court. Other orders charge leaders with performing most litigation

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[97] Noll, *supra* note 5.

[98] Burch, *supra* note 2, at 178 ("When significant divisions exist between plaintiffs within a proceeding, those groups should have their own representative."); Silver Declaration, *supra* note 34 ¶ 11 (relying on *Ortiz* for the proposition that "a serious potential for conflict exists when a lawyer in charge of an aggregate proceeding negotiates a side-settlement for an inventory of signed clients").

[99] *See* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 627 (1997) ("adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups"); Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999) ("[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.").

[100] *See* Miller Declaration, *supra* note 35.

[101] *See* Herman, *supra* note 4; Noll, *supra* note 5.

functions on behalf of non-lead plaintiffs; correspondingly, they block non-leads from performing functions that attorneys ordinarily perform in civil litigation. In other words, appointment orders vary in the degree to which given MDL are transformed into a representative form of litigation.

These differences are relevant to leaders' legal duties to MDL plaintiffs. As Judge Furman reasoned in the GM ignition switch MDL, at least some of leaders' duties depend on the functions that leaders have been charged with performing and the limitations that the court places on non-lead attorneys' authority to practice in the transferee court.[102] It follows that there is not a *single* set of duties that court-appointed leaders owe to MDL plaintiffs. Rather, to the extent that leaders' duties track appointment orders, the duties ebb and flow, as courts assign more or less functions to court-appointed leaders. In concrete terms, an attorney who has been charged with, say, coordinating service of process has no duties apart from performing that job diligently. In contrast, a committee that has been charged with formulating litigation strategy for the entire plaintiff "class"—or developing settlement proposals on its behalf—is subject to stronger duties. Even here, though, the details of appointment orders matter. If non-lead attorneys have authority to participate in the litigation and influence leaders' decisions, it would be odd to say that leaders have a fiduciary duty of undivided loyalty to all MDL plaintiffs. Orders that preserve non-lead attorneys' ability to influence proceedings are premised on the assumption that non-leads will use that authority to protect clients' interests. In MDLs that make use of this pluralist form of representation, subjecting leaders to duties that evolved for a wholly different kind of attorney-plaintiff relationship, in which powerless plaintiffs are completely dependent on leaders to protect their interests, would be incongruous.

The models of representative litigation that are reflected in leadership appointment orders are incomplete, evolving, and poorly understood. But in my view, their appearance is a positive development. The basic policy dilemma presented by efforts to organize complex litigation is how to

[102] In re: Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543 (JMF), 2016 WL 1441804, at *7 (S.D.N.Y. Apr. 12, 2016).

balance the impulse to aggregate and streamline, on the one hand, with respect for differences in individuals' legal rights and doctrines designed to protect those differences, on the other.[103] The representation model that the Supreme Court endorsed in *Amchem* and *Ortiz*—which teaches that an attorney can only act on behalf of a party if their interests are aligned in all materials respects—was articulated as a response to perceived problems with judicial efforts to resolve an entire sprawling category of litigation through Rule 23 settlements. Seeing as it was articulated as a *rejection* of efforts at global peace, the *Amchem*/*Ortiz* model inevitably fails to do the hard work of identifying which conflicts of interests are sufficiently serious to prevent an attorney from acting on behalf of a class. Nor does it consider institutional arrangements other than fealty to all represented parties at all times that ensure the rights of individuals within the aggregate.

In contrast, MDL leadership appointment orders recognize that plaintiffs' interests will sometimes to be aligned and sometimes be adverse. The orders experiment with different structures for protecting plaintiffs' rights. And they avoid the dubious assumption that the legitimacy of an attorney working on behalf of a non-client party depends on the attorney's interests being perfectly aligned with the party's.

I do not mean to suggest that MDL in general or any MDL in particular strikes the appropriate balance between aggregation and individual control. But in moving beyond *Amchem* and *Ortiz*, MDL leadership appointments address rather than avoid the policy problem created by the filing of masses of related claims, which cannot realistically be addressed through individual litigation.

### C. Leadership Appointment Orders as a Case Study in MDL's Ad Hockery

Lastly, my findings shed light on the costs and benefits of MDL's reliance on procedure that is developed in the context of specific cases. Appointment orders are a prime example of MDL's ad hockery. While courts uniformly recognize the importance of appointing plaintiff-side leaders,

[103] *See* Principles of the Law of Aggregate Litigation § 1.03 (Am. Law. Inst. 2010).

appointment orders vary in leadership structures, the duties assigned to leaders, leaders' relationship to non-lead counsel, and many other matters. Organizational structures, descriptions of leaders' duties, and limits on non-lead practice appear to migrate from one case to the next, with newer orders incorporating innovations from prior MDLs. But there is no grand historical progression toward more perfect, more fully specified orders. Even late in the dataset, one finds orders that simply appoint attorneys to specified positions and say nothing more.

This ad hockery is no accident. Prof. Bradt and I have separately argued that the flexibility of MDL procedure reflects lawmakers' deliberate choice that MDL operate as a "forum of last resort" for civil litigation that, because of its complexity, defies resolution through the ordinary processes of law.[104] Influenced by the experience of the electrical equipment litigation, section 1407's designers anticipated that in the decades to come, the federal courts would be asked to address other controversies triggered by market activity that affected a large number of people. The statute's designers believed that centralized management and active managerial judging were essential to handling future litigation crises, and they structured section 1407 to facilitate transferee courts' use of those techniques. But the statute's designers did not and could not anticipate the specific forms of judicial administration that would be needed to resolve particular cases. Thus, following the model of statutes that delegate procedure-making authority to an administrative agency that handles a high volume of changing claims, section 1407 directs the transferee judge to conduct "coordinated or consolidated pretrial proceedings" in the expectation that the judge will put in place appropriate procedures for moving cases toward resolution. This expectation—reflected in the history and design of section 1407—was formalized in 1983, when Rule 16 was amended to expressly permit the district judge to "adopt[] special procedures for managing potentially difficult or protracted actions."[105]

[104] *See* Bradt, *supra* 15; Noll, *supra* note 5.

[105] Fed. R. Civ. P. 16(c)(2)(L).

The MDL system's use of procedure that is devised bottom-up in the context of particular cases gives MDL enormous flexibility to address emergent problems. But it is not without costs. The ad hockery illustrated by leadership appointment practice creates a risk that courts will continually re-invent the wheel when confronted with a problem that can sensibly be addressed through rulemaking. It means that like cases may not be treated alike. And it empowers actors with specialized knowledge and expertise to exert a powerful influence on the course of litigation. This, in turn, creates a risk that appointment orders will be used to facilitate self-dealing—for example, by remaining silent on leaders' obligations to MDL plaintiffs.

My findings reveal some aspects of leadership appointment orders that can and should be standardized. For example, there is no apparent reason why timekeeping and recordkeeping requirements for plaintiffs' leaders should vary from case to case. To the extent rule-makers addressing these matters are concerned with preserving courts' flexibility to respond to new circumstances, they could establish defaults that applied unless overridden by a court order. Such rules would lessen the administrative burden on transferee judges and ensure that a matter which is often overlooked in appointment orders is addressed.

However, the major choices in leadership appointment orders are precisely the kind of matters that cannot sensibly be addressed ex ante. Who to appoint, the structure of plaintiffs' leadership, leaders' responsibilities, and the duties that follow—all these questions depend on the nature of an MDL, the type of claims asserted, divisions (or lack thereof) among consolidated plaintiffs, and other matters that cannot be known in advance of a specific litigation. In light of this uncertainty, the most that can be done through ex ante rulemaking is to lay down general standards to guide the transferee judge's exercise of discretion, such as "General Principles for Aggregate Proceedings" articulated in

the American Law Institute's *Principles of the Law of Aggregate Litigation*.[106] Stated differently, it is inevitable that crucial case-structuring decisions will be delegated to an actor who operates with better information than rulemakers operating ex ante.

Elsewhere, I have argued that while these kind of delegations are a familiar and unobjectionable feature of American public law, their sociological legitimacy depends on their being paired with institutional designs that provide alternative guarantees of transparency, accessibility, and accountability.[107] From this perspective, two interventions that are familiar from public administrative programs would be beneficial for the leadership-appointment process. First, a reasoned decisionmaking requirement would require transferee courts to *explain* major decisions in appointment orders. Second, some form of ex post review could subject orders to a "sober second look" without seriously delaying the progress of new MDLs. The best model for such review is some of third-party reconsideration at the transferee court level, which could operate swiftly without the formality of a full appeal. Empirical evidence on the effects of these interventions is limited, but some studies suggest that, in combination, they improve compliance with statutory standards and reduce variation among actors applying discretionary standards, even when actors exercising discretionary authority apply open-ended statutory standards.[108] In the leadership-appointment context, they would address some of the more serious costs of procedural ad hockery, while preserving the courts' flexibility to devise novel organizational structures in response to new litigation problems.

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[106] Principles of the Law of Aggregate Litigation § 1.03 (Am. Law. Inst. 2010) (stating that, while promoting efficiency, aggregate proceedings should respect the rights and remedies delineated by applicable substantive laws; facilitate legally binding resolutions; protect the interests of parties, represented persons, claimants, and respondents; and respect the institutional capacities of courts"). *Cf.* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 Ind. L. Rev. 65 (2003) ("The four fundamental principles of class action settlement governance are (i) maximum disclosure, (ii) an actively adversarial process, (iii) expertise of decisionmakers, and (iv) independence of decisionmakers from influence and self-interest.")

[107] *See* Noll, *supra* note 5.

[108] *See id.* n.336 (discussing experiments described in Edward H. Stiglitz, The Reasoning Constraint (unpublished manuscript)).

The requirements I suggest could be imposed through rulemaking or, potentially, through "guidance" delivered by an appellate court.[109] At the margin, they would increase the time needed to organize an MDL. But in doing so, they would help to regularize and rationalize appointment orders—a move with beneficial effects for the long-term viability of MDL's system of structured procedural ad hockery.

## Conclusion

MDL leaders matter. In offering a preliminary empirical picture of the orders that organize them, this paper has highlighted the prevalence of leadership appointments and the many variations in how leaders are organized, the tasks they perform, and leaders' relationship to MDL'd plaintiffs and non-lead attorneys. More work is needed to fully understand what MDL leaders do. But even these preliminary findings hold important lessons for debates over the nature of MDL and the costs and benefits of the model of aggregate litigation has developed under section 1407.

[109] *See* Vioxx Prod. Liab. Litig. Steering Comm. v. Merck & Co., Inc., No. 06-30378, 2006 WL 1726675, at *1 (5th Cir. May 26, 2006) (declining to disturb district court's privilege determinations via mandamus but "suggesting" that the district court implement a new privilege review protocol on remand); In re Vioxx Prod. Liab. Litig., 501 F. Supp. 2d 789 (E.D. La. 2007) (describing the district court's implementation of the court of appeals' suggestions).