

# NOTES

## THE FALSE PROMISE OF MDL BELLWETHER REFORM: HOW MANDATORY BELLWETHER TRIAL CONSENT WOULD FURTHER MIRE MULTIDISTRICT LITIGATION

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*Over one third of all pending cases in the federal court system are part of a Multidistrict Litigation (MDL) proceeding. Previous and ongoing MDLs include claims stemming from the opioid epidemic, the Deepwater Horizon oil spill, the National Football League concussion cases, and a myriad of pharmaceutical and medical products liability suits. Both the percentage and sheer number of cases utilizing this form of aggregate litigation have dramatically increased in recent years. Bellwether trials, designed to test the facts and legal theories underpinning many of the consolidated cases, are a key feature of MDLs in facilitating resolution. This Note examines the role of MDL bellwether trials and the potential impact of proposed reforms. Part I surveys the functions of bellwether trials as well as current judicial limitations imposed on the practice. Part II examines proposals that would further restrict the use of MDL bellwether trials: first, a bill from the 115th Congress and second, proposed amendments to the Federal Rules of Civil Procedure. These proposals would require the consent of all parties for an MDL bellwether to ensue. Finally, Part III explores the potential effects of these proposed reforms as well as the discrepancies between their purported aims and the likely impact of their enactment. These proposals would exacerbate the MDL “black hole,” result in less informed settlements, and create more opacity in the MDL process. Principally, they are an attempt to wrest power over procedure to cement defendants’ structural advantage over the MDL.*

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## INTRODUCTION

Over one third of all cases pending in the federal court system are part of a Multidistrict Litigation (MDL) proceeding.<sup>1</sup> Previous and ongoing MDLs include claims stemming from the opioid epidemic (2,644 cases), the Deepwater Horizon oil spill (6,087 cases), the National Football League concussion cases (347 cases), and a myriad of pharmaceutical and medical products liability suits.<sup>2</sup> In recent years, the percentage and sheer number of cases utilizing this form of aggregate litigation have dramatically increased.

Historically, MDLs received little attention from both the judiciary and the academy.<sup>3</sup> However, with federal courts' growing hostility towards class actions and the enactment of the Class Action Fairness Act (CAFA) in 2005, the MDL has emerged as a prominent alternative in resolving mass disputes.<sup>4</sup> As of August 2018, more than 168,000 cases were pending in a consolidated MDL, comprising forty-two percent of all federal civil cases.<sup>5</sup> This is an immense expansion from the early 2000s, when MDLs comprised just sixteen percent of federal cases.<sup>6</sup> As a result, "what was only a modest tweak to the

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<sup>1</sup> See BOLCH JUD. INST., DUKE L. SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS vii (2d ed. Sept. 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf>.

<sup>2</sup> MDL Statistics - Distribution of Pending MDL Dockets by District, JUD. PANEL ON MULTIDISTRICT LITIG. (Dec. 16, 2019), [https://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDLS\\_by\\_District-December-16-2019.pdf](https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDLS_by_District-December-16-2019.pdf). Pharmaceutical and medical products liability MDLs include Viagra and Cialis (1,054 cases), Xarelto (31,958), and Pelvic Repair System products cases (over 100,000). Additionally, asbestos-related MDLs include over 192,000 consolidated cases. See *id.*

<sup>3</sup> See Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 832 & n.2 (2017) [hereinafter Bradt, *A Radical Proposal*] (discussing how "[a]s recently as a decade ago" class actions received much more public and scholarly attention than MDLs).

<sup>4</sup> See *id.* at 844–45 ("[C]lass actions have become harder to maintain in federal court due to restrictive [Supreme Court and] lower appellate court decisions . . . . When lawyers turned to comparatively friendly state courts, Congress . . . extend[ed] federal jurisdiction over class actions . . . . [T]he MDL . . . has [thus] emerged as the primary alternative for mass-tort litigation."). CAFA's "mass action" removal provision has pushed cases from state courts into the federal system, allowing them to be consolidated into MDLs. See J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation*, 5 J. TORT L. 3, 20–21 (2014). In addition, the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), may push even more cases into the MDL system given the standard it established for finding personal jurisdiction over corporate defendants. See 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, 1256–57 (2018) (explaining how after *Bristol-Myers Squibb*, the MDL will likely replace class actions as the dominant form of aggregate litigation).

<sup>5</sup> BOLCH JUD. INST., *supra* note 1, at vii.

<sup>6</sup> *Id.*

venue statute intended to provide only meager powers to transferee judges” has become a defining fixture in American litigation.<sup>7</sup>

Importantly, whereas a class action lawsuit is a single lawsuit in which named plaintiffs represent a class of claimants,<sup>8</sup> the MDL is a procedural device that allows for the consolidation of existing lawsuits already filed in district courts across the country. Unlike class members, MDL claimants do not necessarily share a group, or class, identity.<sup>9</sup> Thus, an MDL may consolidate pending class actions as well as individually filed cases pertaining to the same underlying controversy.<sup>10</sup>

The MDL statute was enacted to foster efficiency and the consistent handling of like cases. As the country in the postwar years experienced an “explosion [of litigation] caused by booms in population, technology, and expanded rights of action created by Congress,”<sup>11</sup> the judiciary believed centralized judicial case management was necessary to reduce the growing federal case backlog and minimize “conflict and duplication in discovery and other pretrial [sic] procedures.”<sup>12</sup> Ultimately enacted in 1968,<sup>13</sup> the MDL statute authorizes “civil actions involving one or more common questions of fact [that] are pending in different districts . . . [to] be transferred to any district for coordinated or consolidated pretrial proceedings.”<sup>14</sup> Transfers are made by the Judicial Panel on Multidistrict Litigation (JPML),<sup>15</sup> a panel of seven

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<sup>7</sup> See Bradt, *A Radical Proposal*, *supra* note 3, at 837.

<sup>8</sup> *Class Action*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining class action as “[a] lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group”).

<sup>9</sup> While MDL claimants are not automatically joined into a class action class, in some cases, a class action can be initiated for settlement purposes. In that case, the MDL’s ultimate resolution is a class action settlement. See, e.g., *In re Nat’l Football League Players Concussion Inj. Litig.*, 821 F.3d 410 (3d Cir. 2016).

<sup>10</sup> The Vioxx MDL, discussed *infra* Section I.A, is an example of an MDL that consolidated existing class action lawsuits in addition to individual claims.

<sup>11</sup> Bradt, *A Radical Proposal*, *supra* note 3, at 839.

<sup>12</sup> H.R. REP. NO. 90-1130, at 2 (1968); see also *Judicial Administration: Hearings on H.R. 3991, H.R. 6703, H.R. 8276, and H.R. 16575 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 26–27 (1966) (statement of Hon. William H. Becker, C.J., W. Dist. of Mo.) (stating that the MDL bill’s purpose was to coordinate centralized pretrial management of mass litigation that was swamping the courts). See generally Bradt, *A Radical Proposal*, *supra* note 3 (discussing the history of the MDL’s passage and the unprecedented jockeying by federal judges to enact the legislation).

<sup>13</sup> The only amendment to the MDL statute since enactment was the addition of section (h) in 1976, which authorizes the Judicial Panel on Multidistrict Litigation to “consolidate and transfer with or without the consent of the parties” cases arising under the Clayton Act. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 303, 90 Stat. 1396 (codified as amended at 28 U.S.C. § 1407(h)).

<sup>14</sup> 28 U.S.C. § 1407(a).

<sup>15</sup> See *id.*

circuit and district court judges appointed by the Chief Justice of the Supreme Court.<sup>16</sup> The JPML, both *sua sponte* and by motion, initiates an MDL and selects the overseeing district court judge.<sup>17</sup>

MDL judges, also known as “transferee judges,”<sup>18</sup> then exercise the full arsenal of the federal district court to move the litigation forward.<sup>19</sup> This includes dismissing actions, managing discovery, holding hearings, ruling on evidentiary issues and class certification, appointing lead counsel, facilitating settlement negotiations, and orchestrating bellwether trials.<sup>20</sup> Accordingly, a single judge overseeing all pretrial matters can mitigate the inconsistencies and inefficiencies that arise when like cases are adjudicated in different jurisdictions.<sup>21</sup>

Facially, MDLs are a less intensive form of aggregation, as in theory each case remands for trial “to the district from which it was [initially] transferred.”<sup>22</sup> Yet, the actual picture is more complex. Ninety-six percent of cases are terminated by MDL judges, either as a result of settlement or court action.<sup>23</sup> Thus, the transferee judges, at the helm of national MDLs, shape the outcome of a vast number of federal civil cases.<sup>24</sup>

Differing from the statute’s text is the reality that today’s MDLs prioritize settlement above all else.<sup>25</sup> For this reason, MDLs are criti-

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<sup>16</sup> *Id.* § 1407(d).

<sup>17</sup> *See id.* § 1407(b)–(c). In deciding whether to initiate an MDL, the JPML can employ a laxer standard when there are more cases and a stricter standard when there are fewer. *See* DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 5:18 (2020) (“The [JPML] has recognized that the goals of the statute may readily be served by transfer of actions where a multitude of actions pend. Where, however, only a few related actions have been filed, a much stronger showing of benefits must be established.”). The JPML’s decisions are based on several other factors, including the utility of less invasive alternatives, convenience of counsel and witnesses, and the maturity of cases. *See id.* §§ 5:16, 5:18.

<sup>18</sup> This Note uses the terms “MDL judge” and “transferee judge” interchangeably.

<sup>19</sup> *See* BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUD. CTR., MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES 3 (2011), <https://www.fjc.gov/sites/default/files/2012/MDLGdePL.pdf>.

<sup>20</sup> *See generally id.*

<sup>21</sup> *See* HERR, *supra* note 17, § 2:3 (summarizing the legislative history of the MDL statute, which indicated that centralizing proceedings could minimize inefficiencies caused by dispersed pretrial procedures).

<sup>22</sup> 28 U.S.C. § 1407(a).

<sup>23</sup> BOLCH JUD. INST., *supra* note 1, at vii.

<sup>24</sup> *Cf.* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 994 (2012) (“Unless the MDL fails entirely, a plaintiff whose case has been consolidated in MDL proceedings will remain there until the parties reach a global resolution of the litigation.”).

<sup>25</sup> *See* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 894 & n.45 (2001) (noting that because centralizing and transferring cases encourages parties to settle, practitioners understand the MDL to serve a settlement function); *see also* Bradt, *A Radical Proposal*,

cized for being “pretrial” in name only.<sup>26</sup> On the plaintiff side, MDLs are criticized for depriving litigants of their right to their day in court.<sup>27</sup> The Seventh Amendment provides litigants a right to a federal jury trial in civil suits where the amount in controversy exceeds twenty dollars.<sup>28</sup> However, in this context, claimants who would prefer to pursue their cases individually are swept up into the MDL process with little voice in the proceedings or opportunity to engage in adversarial adjudication.<sup>29</sup> Moreover, during general discovery and other pretrial activities, the MDL becomes a “‘black hole’ into which cases are transferred never to be heard from again.”<sup>30</sup> During this phase, lead plaintiffs’ counsel and defendants—not MDL plaintiffs—remain active in these proceedings.<sup>31</sup> On the defendant side, MDLs are condemned for a lack of MDL-specific procedure that results in “cowboy[]”<sup>32</sup> and “imperialist[]”<sup>33</sup> judges improvising and making ad hoc decisions.<sup>34</sup> Finally, from a governance standpoint, the MDL is

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*supra* note 3, at 838 (arguing that MDLs are primarily employed to reach large-scale settlements).

<sup>26</sup> See Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1673 (2017) (“[I]t is the worst-kept secret in civil procedure that the MDL is really a *dispositive*, not pretrial, action.”).

<sup>27</sup> See Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 113–14 (2015) (arguing that MDLs deprive both the plaintiffs and defendants of their due process right to a day in court).

<sup>28</sup> U.S. CONST. amend. VII.

<sup>29</sup> See Redish & Karaba, *supra* note 27, at 111. MDL due process issues are especially stark when compared to due process requirements imposed on class actions via Rule 23 of the Federal Rules of Civil Procedure. See *id.* at 110 (“[T]he current practice of MDL actually makes the modern class action appear to be the pinnacle of procedural due process by comparison.”).

<sup>30</sup> Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008).

<sup>31</sup> See *infra* Section III.A.2.

<sup>32</sup> Andrew D. Bradt, *The Looming Battle for Control of Multidistrict Litigation in Historical Perspective*, 87 FORDHAM L. REV. 87, 89 (2018) [hereinafter Bradt, *The Looming Battle*] (discussing how the advocacy group, Lawyers for Civil Justice, believes MDL judges view themselves as “‘cowboys’ with a roving commission to resolve and settle major national crises by whatever means necessary, often making it up as they go along”).

<sup>33</sup> *Id.* (“[T]he interests of corporate defendants hew toward significant changes to MDL procedure, which they believe is currently rife with . . . overreach by imperialistic judges.”).

<sup>34</sup> See LAWS. FOR CIV. JUST., REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, RULES FOR “ALL CIVIL ACTIONS AND PROCEEDINGS”: A CALL TO BRING CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS BACK WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE 1 (2017), [https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj\\_request\\_for\\_rulemaking\\_concerning\\_mdj\\_cases\\_8-10-17.pdf](https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdj_cases_8-10-17.pdf) [hereinafter LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES]; see also *The FICALA Fix for Litigation Abuse*, U.S. CHAMBER INST. FOR LEGAL REFORM (Mar. 3, 2017), <https://www.instituteforlegalreform.com/resource/the->

denounced for producing an elite class of federal judges<sup>35</sup> and lawyers<sup>36</sup> that transforms the federal justice system into a suspiciously opaque process more reliant on personality than procedure. As one scholar describes, with such opacity raising the specter of gamesmanship and foul play, the MDL devolves into “a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies.”<sup>37</sup>

These criticisms highlight valid and disquieting challenges posed by current MDL proceedings. The MDL is imperfect procedure. Today, many MDLs are initiated to manage the aftermath of crises and mass accidents impacting thousands of people. Some posit these issues find themselves in the judicial arena squarely because Congress and state legislatures have neglected to address them in the first place.<sup>38</sup> Thus, with recent MDLs making headlines<sup>39</sup> and an intensi-

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ficala-fix-for-litigation-abuse (discussing several procedural issues with the MDL and describing how FICALA would purportedly remedy those issues).

<sup>35</sup> See Gluck, *supra* note 26, at 1673 (“MDLs have created a judicial elite among the federal judges chosen to lead them, subverting the baseline premise of horizontal equality among federal district judges . . .”).

<sup>36</sup> See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 71–74 (2017) (arguing that attorneys in MDLs may be more fixated on power, prestige, and attorney’s fees than on serving their clients’ best interests); see also Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445 (2017) (examining the impact of repeat plaintiff and defense attorneys on MDL proceedings).

<sup>37</sup> Redish & Karaba, *supra* note 27, at 111. *But see* Andrew D. 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. 73 (2019) (arguing that experience and repeat players are important in striving for fairness and optimal MDL outcomes).

<sup>38</sup> Current MDLs related to e-cigarette usage and the national opioid epidemic point to Congress and the federal government’s failure to address these crises through legislation and regulation. Notably, this was also the case with asbestos litigation throughout the end of the twentieth century. Courts waited years for a workers’ compensation-type regulatory mechanism to handle asbestos claims. Yet, Congress never acted. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (“As recommended [in 1991] by the Ad Hoc Committee [on Asbestos Litigation], the Judicial Conference of the United States urged Congress to act. To this date, no congressional response has emerged.” (citation omitted)); see also Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 584–85 (2008) [hereinafter Lahav, *2008 Bellwether Trials*] (noting that “[t]he Fifth Circuit, perhaps hoping for legislative intervention, waited eight years before reversing the district court’s trial plan” in *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998)).

<sup>39</sup> See, e.g., Mike Curley, *Juul MDL Complaints Consolidate National E-Cigarette Cases*, LAW360 (Mar. 11, 2020), <https://www.law360.com/articles/1251860/juul-mdl-complaints-consolidate-national-e-cigarette-cases>; Jan Hoffman, *Opioid Lawsuits Are Headed to Trial. Here’s Why the Stakes Are Getting Uglier*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/health/opioid-lawsuits-settlement-trial.html>; Patricia Cohen, *Roundup Maker to Pay \$10 Billion to Settle Cancer Suits*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/business/roundup-settlement-lawsuits.html>; Martina Barash, *Ford Owes Treble Damages for Transmission Woes After First Trial*,

ying chorus of critiques, proposed MDL reforms behoove meticulous examination.

This Note centers on recent proposals to impose greater constraints on MDL judges; specifically, proposals to enact a ban on bellwether trials without the consent of all parties.

Bellwether trials—trials meant to test the facts and legal theories underpinning many of the consolidated cases—are a key feature of MDLs in facilitating resolution. In a bellwether trial, the claims of “some members of a large group of claimants [are tried in order to] provide a basis for . . . settlement or for resolving common issues”<sup>40</sup> of fact or law.<sup>41</sup> Most plainly, a bellwether is a trial on the merits. Whether the MDL is a consolidation of products liability claims or suits stemming from a mass tort event or antitrust conspiracy, a bellwether trial provides an opportunity to assess issues central to the merits of the litigation and to understand how a judge and jury will evaluate specific legal and factual questions. The trial thus informs settlement negotiations.<sup>42</sup> It further allows first-time plaintiffs to counter the resource and experience advantage of corporate defendants and evade defendants’ preferred “stonewall, scorched-earth, war-of-attrition [litigation] strategy.”<sup>43</sup>

This Note examines the role of MDL bellwether trials<sup>44</sup> and the potential impact of reforms proposed by interest groups aligned with corporate defendants. Part I surveys the functions of bellwether trials as well as current judicial limitations imposed on the practice. This Part provides the necessary backdrop to understand current bell-

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BLOOMBERG L. (Nov. 15, 2019), <https://news.bloomberglaw.com/product-liability-and-toxics-law/ford-owes-treble-damages-for-transmission-woes-after-first-trial>.

<sup>40</sup> *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997).

<sup>41</sup> “The term bellwether is derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock. The ultimate success of the wether selected to wear the bell was determined by whether the flock had confidence that the wether would not lead them astray . . .” *Id.*

<sup>42</sup> *See infra* Part I.

<sup>43</sup> Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1834 (1995) (noting that when faced with potential liability from multiple, sometimes thousands, of plaintiffs, defendants aim to deter litigation by “rais[ing] transaction costs by making each plaintiff’s case as expensive and difficult as possible and by forcing each plaintiff to undergo the full rigors of the tort litigation system”).

<sup>44</sup> Scholars sometimes refer to “hard-edge” versus “soft-edge” bellwethers. RICHARD A. NAGAREDA, ROBERT G. BONE, ELIZABETH CHAMBLEE BURCH, CHARLES SILVER & PATRICK WOOLLEY, *THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION* 586 (2d ed. 2013). Hard-edge bellwethers produce a judgment with “some preclusive effect vis-a-vis the much larger number of untried, individual cases.” *Id.* Soft-edge bellwether trials are informational and do not seek formal preclusion. *Id.* This Note discusses the preclusion question, but centers on the role of “soft-edge” bellwethers, as they have become more commonplace in MDLs and aggregate litigation.



wether practice and the constraints, both judicial and economic, that limit its efficacy and application. Part II examines two proposals that would further restrict the use of MDL bellwether trials: first, a bill from the 115th Congress,<sup>45</sup> and second, proposed amendments to the Federal Rules of Civil Procedure.<sup>46</sup> These proposals would enact a bellwether universal consent requirement, a condition that the consent of all parties be given for a bellwether trial to ensue. Finally, Part III explores the effect these proposed reforms would have on MDL judges, the legitimacy of the MDL process, and the more than one hundred thousand cases currently consolidated in MDLs nationwide. In addition, Part III probes the discrepancies between the purported aims of these proposed reforms and the likely outcome of their enactment.

Through a comprehensive overview of the bellwether trial's functions and judicially imposed limitations, this Note offers a novel analytical interrogation of these bellwether proposals. It argues that these proposals would exacerbate the MDL "black hole," result in less informed settlements, and create more opacity in the MDL process. Moreover, they would magnify existing concerns over the MDL's lack of transparency and structural safeguards. Far from resolving the pressing issues currently facing MDLs, these reforms would cement defendants' structural advantage over the MDL process by wresting power over procedure away from judges and plaintiffs and consolidating it in the hands of corporate defendants.

## I

### THE BELLWETHER TRIAL'S ROLE IN MDL LITIGATION

The MDL today is a vehicle for settlement. In enumerating the goals of bellwether trials, the Federal Judicial Center, the education and research arm of the federal judiciary, lists "Promot[ing] Settlement" above all other objectives.<sup>47</sup> For hundreds or thousands

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<sup>45</sup> Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017). A bill of the same name was introduced in the prior Congress, the 114th, but did not include the MDL-related provisions and is therefore not covered by this Note. *See* Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015, H.R. 1927, 114th Cong. (2016).

<sup>46</sup> LAWS FOR CIV. JUST., MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/PLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES (2018), [https://docs.wixstatic.com/ugd/6c49d6\\_d26fb767e7a24be5943515fe0fde10e0.pdf](https://docs.wixstatic.com/ugd/6c49d6_d26fb767e7a24be5943515fe0fde10e0.pdf).

<sup>47</sup> MELISSA J. WHITNEY, FED. JUD. CTR., BELLWETHER TRIALS IN MDL PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 4–6 (2019) (listing promoting settlement, managing the MDL proceeding effectively, and assisting parties and transferor courts upon remand as three purposes of bellwether trials, in that order).

of consolidated claims, a single bellwether trial or a set of trials can *mature* the MDL litigation and shape the eventual settlement.

Bellwethers are selected for their utility in posing certain legal and factual questions critical to resolving MDL claims and “with the goal of producing reliable information about other [MDL] cases.”<sup>48</sup> Parties, interested in reaching a global resolution, consent to the bellwether process in order to select claims that will provide settlement negotiators with the greatest insights. However, in the absence of consent, the MDL judge may select a case in which both venue and personal jurisdiction are satisfied or sit by designation in another circuit in order to move the MDL forward.<sup>49</sup> Sitting by designation occurs very rarely. Therefore, if a bellwether that will provide the necessary insights and input cannot be identified among those where venue and jurisdiction are proper, party consent becomes the only means of trying an adequately representative bellwether. Where a defendant withholds consent, the pool of available bellwether claims dramatically shrinks, potentially making it more challenging to identify a case that will effectively inform settlement.

Functionally, bellwethers attach a dollar figure to the claims presented (“pricing the tort”), address common issues of fact and law, and force parties to share material information.<sup>50</sup> Bellwether trials also aid in equalizing bargaining dynamics<sup>51</sup> and provide a public forum that animates the Seventh Amendment’s goal of democratic participation.<sup>52</sup>

Employed by state and federal courts throughout the 1900s, the term “bellwether” was first used by the Supreme Court in the early 1970s.<sup>53</sup> In the MDL context, the earliest bellwethers appeared in the early 1980s, a little over a decade after the statute’s enactment,<sup>54</sup> but it was not until the 1990s that their use in MDL proceedings gained prominence. *Cimino v. Raymark Industries, Inc.*,<sup>55</sup> an asbestos MDL

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<sup>48</sup> *Id.* at 3.

<sup>49</sup> See *infra* notes 156–60 and accompanying text.

<sup>50</sup> See *infra* Section I.A.1.

<sup>51</sup> See *infra* Section I.A.3.

<sup>52</sup> See *infra* Section I.A.2.

<sup>53</sup> See WHITNEY, *supra* note 47, at 3 n.6 (detailing early uses of bellwether trials).

<sup>54</sup> The author, using various search strings, conducted a Westlaw search for cases that employed MDL bellwether trials. The earliest cases found were *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 587 F. Supp. 180, 193 (D.D.C. 1984), *modified*, 593 F. Supp. 388 (D.D.C. 1984), *aff'd*, 746 F.2d 816 (D.C. Cir. 1984) (suit against an airplane manufacturer on behalf of orphans aboard the plane when it crashed in Vietnam), and *In re Ampicillin Antitrust Litigation*, 88 F.R.D. 174, 178 (D.D.C. 1980) (antitrust suit against Bristol-Myers).

<sup>55</sup> 751 F. Supp. 649 (E.D. Tex. 1990), *vacated in part*, 151 F.3d 297 (5th Cir. 1998).

in the Eastern District of Texas, is often cited as one of the first MDL bellwether endeavors.<sup>56</sup>

This Part begins, in Section A, with a discussion of the bellwether trial's functions in maturing litigation, legitimizing private settlement, and equalizing MDL bargaining dynamics. Section B then examines key cases and practices that have shaped the bellwether's development and limited its applicability. Finally, Section C addresses litigants' efforts to sidestep the bellwether process altogether through the use of selective settlement. Whereas Section A speaks to the bellwether's import for MDL litigation, Sections B and C explicate the constraints already imposed on its use. This background is central to understanding the gravity and severity of current reform efforts, discussed *infra* Sections II.A–B, that aim to further curtail bellwether practice.

### A. Functions of the Bellwether Trial

The *In re Vioxx Products Liability Litigation*<sup>57</sup> (Vioxx MDL) is likely the most cited MDL in scholarly literature. Much has been written about Judge Fallon's handling of the case, its blueprint for achieving global peace, and its utilization of bellwether trials.<sup>58</sup> In the Vioxx MDL, plaintiffs alleged that the drug manufacturer Merck failed to adequately warn of the increased risk of stroke and heart attack posed by Vioxx, a prescription pain reliever.<sup>59</sup> The MDL consisted of thousands of individual claims and over 160 class actions.<sup>60</sup> Judge Fallon conducted six bellwether trials under various state law schemes<sup>61</sup> while over ten cases were tried in various state courts.<sup>62</sup>

These trials pushed the parties to engage in serious settlement talks and ultimately led to a \$4.85 billion settlement,<sup>63</sup> resolving claims arising from “26,000 active lawsuits, with 47,000 plaintiffs, and another

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<sup>56</sup> See Loren H. Brown, Matthew A. Holian & Arindam Ghosh, *Bellwether Trial Selection in Multi-District Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 667 (2014) (describing *Cimino* as an “early effort to impose [a] binding bellwether trial[.]”); see also Fallon et al., *supra* note 30, at 2331 (noting the early importance of *Cimino* for MDL litigation).

<sup>57</sup> 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

<sup>58</sup> See, e.g., Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2215 (2008).

<sup>59</sup> Fallon et al., *supra* note 30, at 2334–35.

<sup>60</sup> *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 453 (E.D. La. 2006).

<sup>61</sup> Fallon et al., *supra* note 30, at 2336. One of the bellwethers resulted in a plaintiff's verdict for \$51 million, which was later remitted to \$1.6 million. See *id.* Three resulted in jury verdicts for the defendant; one resulted in a hung jury, and when retried in a new bellwether, also resulted in a jury verdict for the defendant. See generally *id.* at 2335–36.

<sup>62</sup> *Id.* at 2335.

<sup>63</sup> *Id.* at 2336–37.

14,500 claimants who had sought compensation from Merck without filing suit.”<sup>64</sup> This agreement brought both state and federal court plaintiffs to the negotiating table and maximized their leverage against Merck. Finally, Judge Fallon spurred settlement by asserting his authority to limit attorneys’ fees.<sup>65</sup>

### 1. *The Bellwether’s Capacity to Mature Litigation*

The Vioxx example highlights how certain in-court and out-of-court proceedings move MDL parties towards resolution. Bellwethers, although not binding on the remaining claims, can act as a catalyst in the progression, or maturation, of an MDL. In the Vioxx MDL, the six bellwethers did just that: They matured the litigation by forcing attorneys to share information via formal discovery, requiring the parties to test their legal theories before a jury, and having the jury, via their verdicts, place a dollar figure on the claims in question—figures that then grounded the Vioxx settlement.<sup>66</sup>

In preparation for a bellwether trial, determinations on motions and other legal and evidence-related disputes mature the litigation and can move the parties towards resolution.<sup>67</sup> In the Vioxx MDL, such preparation included categorizing the vast number of claims into concrete issues that could be tested in trial and that could distinguish claimants from one another—e.g., what type of injury was suffered, the age of the claimant, and medical history.<sup>68</sup> These variables influenced settlement and differences in compensation. Similarly, bellwether preparation in the Propulsid MDL<sup>69</sup> included ruling on the admissibility of expert testimony and issues of causation.<sup>70</sup> In addition to advancing the federal MDL litigation, the byproducts of this pre-bellwether activity can facilitate the resolution of parallel state court

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<sup>64</sup> Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339, 1367 (2014).

<sup>65</sup> See *id.* at 1367–69 (explaining how Judge Fallon’s management of the Vioxx MDL settlement, including limitation of attorneys’ fees, led to unprecedented efficiency in mass tort settlement).

<sup>66</sup> See Fallon et al., *supra* note 30, at 2337–38; *cf. In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (describing the utility of bellwethers in aiding settlement negotiations as jury verdicts provide an estimate of the value of claims).

<sup>67</sup> See Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185, 187 (2018) [hereinafter Lahav, *2018 Primer*].

<sup>68</sup> Fallon et al., *supra* note 30, at 2344–45.

<sup>69</sup> Plaintiffs alleged that Propulsid, a heartburn drug manufactured by Johnson & Johnson, “caused serious heart-related injuries, including cardiac arrest and arrhythmia, and proved fatal in some.” Christine Caulfield, *Propulsid Suits Dismissed as Case Draws to a Close*, LAW360 (July 25, 2007, 12:00 AM), <https://www.law360.com/articles/30570/propulsid-suits-dismissed-as-case-draws-to-a-close>. Two global settlements were reached between over twenty thousand plaintiffs and Johnson & Johnson in 2004 and 2005. *Id.*

<sup>70</sup> Fallon et al., *supra* note 30, at 2333.

litigation. For instance, Judge Fallon, relying on his relationships, informally communicated with state court judges handling related matters.<sup>71</sup> In other cases, coordination is more formalized. For example, in the General Motors Ignition Switch MDL,<sup>72</sup> the MDL judge actively sought to coordinate discovery with state courts and ordered that he “expect[ed] counsel . . . to help ensure that such coordination [was] achieved . . . .”<sup>73</sup> In this way, the MDL court “achieve[s] the full benefits”<sup>74</sup> of the MDL mechanism by resolving the “tort itself.”<sup>75</sup>

Regarding the role of trial proceedings, the bellwether is a “learning process”<sup>76</sup> that provides critical information for the parties and the MDL judge. For example, in the Methyl Tertiary Butyl Ether (MTBE) MDL, the plaintiffs (landowners and water providers) alleged that gas refiners using MTBE had contaminated their ground water, causing issues of odor and taste and potential health concerns.<sup>77</sup> The court approved a plan to conduct a bellwether trial testing claims arising from ten of the 182 groundwater wells in question.<sup>78</sup> As the MTBE MDL court explained, the bellwether allowed the parties to litigate “without facing the daunting prospect of resolving every issue in every action.”<sup>79</sup> Given that “there are often [only] a handful of crucial issues on which the litigation primarily turns, . . . [the] bellwether trial allows each party to present its best arguments on th[o]se issues for resolution by a trier of fact . . . [while] facilitat[ing] settlement of the remaining claims.”<sup>80</sup> Most concretely

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<sup>71</sup> Sherman, *supra* note 58, at 2214 (describing coordination and sharing of discovery between Judge Fallon, state court judges, and counsel).

<sup>72</sup> The General Motors MDL resulted from a defective ignition switch. Over two million cars were recalled and approximately one hundred people died as a result of the defect. Brad Plumer, *The GM Recall Scandal of 2014*, Vox (May 11, 2015, 4:25 PM), <https://www.vox.com/2014/10/3/18073458/gm-car-recall>.

<sup>73</sup> *In re* Gen. Motors LLC Ignition Switch Litig. (MDL No. 2543) (S.D.N.Y.), Joint Coordination Order, Order No. 15 (Sept. 24, 2014).

<sup>74</sup> *In re* Syngenta AG MIR162 Corn Litig. (MDL No. 2591) (D. Kan.), Coordination Order (Document No. 1099) (Oct. 21, 2015).

<sup>75</sup> Thomas, *supra* note 64, at 1362.

<sup>76</sup> *In re* Hanford Nuclear Res. Litig., 534 F.3d 986, 1008 (9th Cir. 2008) (describing the bellwether for a non-MDL proposed class of residents near a nuclear facility that helped produce atomic bombs during World War II, alleging emissions caused cancers and other life-threatening diseases).

<sup>77</sup> Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 *FORDHAM L. REV.* 1643, 1675–76 (2011) (citing *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 379 F. Supp. 2d 348, 364–66 (S.D.N.Y. 2005)).

<sup>78</sup> *In re* Methyl Tertiary Butyl Ether (MTBE) Prod., No. 1:00-1898, 2007 WL 1791258, at \*1 (S.D.N.Y. June 15, 2007).

<sup>79</sup> *Id.* at \*2.

<sup>80</sup> *Id.*

-serving an ultimate settlement, the bellwether jury's damages determinations aid in pricing the tort. Specifically, jury awards can form the basis of a compensation grid for all MDL claimants<sup>81</sup> and ensure settlements "do not occur in a vacuum, but rather in light of real-world evaluations of the litigation . . . ."<sup>82</sup>

As these cases illustrate, the objective determinations of the bellwether jury lend perspective and data to the back-and-forth of negotiations. Likewise, the inclusion of adversarial proceedings can, come settlement, result "in a more fair and thoroughly-reasoned outcome."<sup>83</sup> Yet, this is not a guarantee. The bellwether process's success in fostering settlement may be a consequence of how many bellwethers are conducted. A single bellwether may concentrate the media frenzy and "driv[e] parties to be more adversarial and aggressive in their trial tactics."<sup>84</sup> A single trial also may not be sufficiently representative to inform settlement and price the tort.<sup>85</sup> Despite these concerns, the bellwether has the advantage of bringing substantive issues and merits-related questions to the fore in an MDL caught between its pretrial mandate and the reality of promoting global resolution.

## 2. *Public Legitimization of Private Contractual Ordering*

In addition to the bellwether's concrete benefits in maturing the litigation, it also generates intangible value in legitimizing private settlement and animating the Seventh Amendment's democracy-promoting function.<sup>86</sup>

Unlike Rule 23 class actions in which settlements are approved by the overseeing court,<sup>87</sup> an MDL resolution can take the form of a private agreement and thus occur without a formal judicial fairness hearing.<sup>88</sup> Such private and unsupervised settlements can raise con-

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<sup>81</sup> Fallon et al., *supra* note 30, at 2342 (quoting RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 223 (2007)). Upon settlement, "grids [are often used] to match medical conditions with compensation payouts in a systematic manner." *Id.*

<sup>82</sup> *Id.* at 2325.

<sup>83</sup> Amir Seyedfarshi, *Binding Bellwether Trials in Multidistrict Litigation and the Right to Jury Trial*, 17 T.M. COOLEY J. PRAC. & CLINICAL L. 295, 301–02 (2016).

<sup>84</sup> Lahav, *2018 Primer*, *supra* note 67, at 197–98.

<sup>85</sup> *See id.* ("[I]n most cases a significant number of trials will need to be held to obtain a valid picture of the population.").

<sup>86</sup> *See* Lahav, *2008 Bellwether Trials*, *supra* note 38, at 593–96 ("Involving the jury legitimizes court resolution of mass tort cases because it inserts an element of democratic participation."). The Seventh Amendment guarantees the right to a jury trial in federal civil litigation. U.S. CONST. amend. VII.

<sup>87</sup> FED. R. CIV. P. 23(e).

<sup>88</sup> Amy L. Saack, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 848 (2017) ("[O]utside of the class action mechanism, there is no

cerns of both substantive justice and procedural legitimacy.<sup>89</sup> Professor Alexandra Lahav purports that the bellwether jury can fill that oversight void, albeit imperfectly: A settlement based on the assessment of an independent, disinterested jury lends credibility to an otherwise opaque and private process.<sup>90</sup> Whereas counsel has a financial stake and the MDL judge has an incentive to clear the docket, the bellwether jury is free of these corrupting influences.<sup>91</sup>

While the jury can provide a level of credibility to settlement, legitimation via jury verdicts ultimately depends on the parties' good faith to base the settlement on the bellwether jury's determinations and the trial's formal findings. Thus, the jury's oversight capability may be less exacting and more symbolic than anything.

Bellwether trials also provide a forum for participatory democracy and the public airing of claims. In this way, the bellwether's public legitimation function stems from more than the role of a disinterested jury's damages assessment. The Seventh Amendment right to a civil jury trial strives to animate the Framers' conviction that adjudicatory outcomes should reflect a community's values<sup>92</sup>: The civil jury therefore requires citizens to participate, as jurors, in the resolution of disputes affecting the polity.<sup>93</sup> In the MDL context, both the airing of grievances and the participation of community members in dispute resolution, via the bellwether, provide the MDL's private ordering with a degree of legitimacy. For example, Judge Hellerstein, overseeing litigation arising after September 11th, specifically "wrongful death and personal injury [actions] against the airlines" and other aviation defendants,<sup>94</sup> called for a bellwether trial to determine damages for select plaintiffs who refused to settle, believing they and the public

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procedural requirement in MDL[s] for assessing the adequacy of counsel or the fairness of a mass settlement."); see also Lahav, *2008 Bellwether Trials*, *supra* note 38, at 594.

<sup>89</sup> See *infra* Section III.B.

<sup>90</sup> See Lahav, *2008 Bellwether Trials*, *supra* note 38, at 594 (discussing the bellwether jury's legitimizing function).

<sup>91</sup> See *id.* at 593 (describing the potentially adverse interests of the MDL judge and counsel).

<sup>92</sup> See Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 437 (2008) (describing the Seventh Amendment's function while arguing that national controversies, such as MDLs, require national juries and not local, district specific juries as is currently the practice) ("The civil jury's legitimacy is inextricably tied to its relationship with the community from which it is drawn. The verdicts of local juries in local cases seem legitimate when the jury's decisionmaking reflects local values.").

<sup>93</sup> See Lahav, *2008 Bellwether Trials*, *supra* note 38, at 577 (discussing the bellwether jury's democratic function).

<sup>94</sup> *In re Sept. 11th Litig.*, 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007) (not an MDL, but non-class aggregate litigation that utilized the bellwether mechanism).

had a right to a public trial.<sup>95</sup> Likewise, in the Vioxx MDL, each bellwether jury determination reflected the respective community's assessment of the litigation and the claimants' entitlements.<sup>96</sup>

Despite the challenges to MDL legitimacy, discussed *infra*, the bellwether's public orientation and grounding in real-world verdicts foster transparency and support the rule of law.

### 3. *Trial as the Great Equalizer*

While maturing the litigation and public legitimation present at-large benefits to the MDL process, the bellwether's capacity to level the playing field aids in remedying defendants' inherent advantage over MDL plaintiffs. "Commentators generally agree that MDL practice favors the defense."<sup>97</sup> Because MDLs are statutorily "pretrial," MDL plaintiffs surrender their "most valuable bargaining chip,"<sup>98</sup> the threat of trial. In typical, non-aggregate litigation, litigants operate and "bargain in the shadow of trial."<sup>99</sup> Faced with the risk of public trial and a jury returning a substantial award for the plaintiff, "defendant[s] [are pressured] to pay a reasonable amount in settlement"<sup>100</sup> and faithfully engage in negotiations. However, because MDL claims remain consolidated until the judge and the JPML decide otherwise, MDL plaintiffs lack this crucial bargaining chip as well as the ability to forgo negotiations and pursue their claims to judgment.

Under this reality, defendants unevenly control the litigation timeline and can slow the MDL process.<sup>101</sup> Moreover, the absence of trial can impact the ultimate payout. In typical non-aggregate litigation, where plaintiffs can leverage the prospect of a jury verdict to their advantage, "parties settle for the plaintiff's expected gain at trial . . . ."<sup>102</sup> Without trial, the plaintiffs' threat in ongoing settlement

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<sup>95</sup> See *In re Sept. 11th Litig.*, No. 21 MC 97 (AKH), 2007 WL 1965559, at \*3 (S.D.N.Y. July 5, 2007); Lahav, 2008 *Bellwether Trials*, *supra* note 38, at 580–81 (describing how "[s]ome of the victims were adamantly against settlement because they wanted the publicity of a trial").

<sup>96</sup> See Fallon et al., *supra* note 30, at 2334–37.

<sup>97</sup> *Delaventura v. Columbia Acorn Tr.*, 417 F. Supp. 2d 147, 155 (D. Mass. 2006) (provided in NAGAREDA ET AL., *supra* note 44, at 413, as a casebook example of MDL procedure).

<sup>98</sup> Burch, *Monopolies in Multidistrict Litigation*, *supra* note 36, at 152.

<sup>99</sup> *Delaventura*, 417 F. Supp. at 155.

<sup>100</sup> Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 123 (2010).

<sup>101</sup> Cf. *Delaventura*, 417 F. Supp. at 155 ("[B]argaining shifts in ways that inevitably favor the defense . . . . Fact finding is relegated to a subsidiary role, and bargaining focuses instead on ability to pay, the economic consequences of the litigation, and the terms of the minimum payout necessary to extinguish the plaintiff's claims.").

<sup>102</sup> Silver & Miller, *supra* note 100, at 123.



negotiations is limited to additional litigation costs and other secondary expenses.<sup>103</sup>

The bellwether provides a counterweight to defendants' preferred "war of attrition" strategy of "repetitive litigation" against less-resourced individual plaintiffs.<sup>104</sup> By introducing the threat of trial, bellwethers can somewhat equalize the MDL's defendant-skewed bargaining dynamics. Although bellwethers are informational and do not bind the defendant with regard to other claimants, they pose many of the same risks to a defendant as a non-bellwether trial: the potential exposure of damning evidence and a jury reaching an unfavorable verdict and damages determination.<sup>105</sup> Defendants who selectively settle with bellwether plaintiffs demonstrate this exact trepidation.<sup>106</sup> In this fashion, the bellwether's public airing of claims, plus its ability to build momentum in maturing the litigation, lessens the defendants' hold over the MDL process.

However, bellwether litigation often exceeds one million dollars in expenses, excluding attorney's fees,<sup>107</sup> and corporate defendants can still outspend their counterparts.<sup>108</sup> Therefore, while bellwether trials can begin to level the playing field, including by balancing litigation investment,<sup>109</sup> their non-binding status<sup>110</sup> and the defendants'

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<sup>103</sup> *Id.* The Supreme Court has acknowledged this bargaining dynamic and the importance of threatening adversarial litigation in reaching a fair aggregate settlement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (explaining that with "the impossibility of [trial] litigation, both class counsel and [the] court would be disarmed" and that "[c]lass counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer").

<sup>104</sup> Lahav, *2008 Bellwether Trials*, *supra* note 38, at 609–10; *see also* note 43 and accompanying text.

<sup>105</sup> Notably, because bellwethers are informational and do not bind all claimants as a class action trial would, they do not implicate Judge Posner's concern that plaintiffs can threaten trial and blackmail defendants into settling. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) ("The first is a concern with forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability . . .").

<sup>106</sup> *See infra* Section I.C.

<sup>107</sup> JUD. CONF. OF THE UNITED STATES, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 155 (Nov. 1, 2018), [https://www.uscourts.gov/sites/default/files/2018-11\\_civil\\_rules\\_agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf) [hereinafter ADVISORY COMM. ON CIVIL RULES, NOV. 2018 MEETING]; *cf.* Fallon et al., *supra* note 30, at 2366 ("[I]n the Vioxx MDL, . . . teams of lawyers . . . utilized jury selection consultants, shadow juries, and mock juries. Live trial testimony was streamed from the courtroom into separate 'war rooms' in the courthouse and to remote locations . . . so that attorneys could follow along and . . . draft various motions in real time.").

<sup>108</sup> *Cf.* Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 746–47 (1997) (discussing defendants' general incentive to "spend far more" in an individual case because of its impact on subsequent litigation).

<sup>109</sup> *Id.* at 746.

sometimes greater financial resources limit their efficacy. Regardless, on the whole, bellwether practice is preferable and more equitable than an MDL that occurs in its absence.<sup>111</sup> The threat of trial is critical in regulating MDL bargaining dynamics and ensuring parties' participation in advancing the litigation.

### B. *Limits on Judicial Power over Bellwether Trials*

While Section A of this Part expounded on the bellwether trial's function in MDL litigation, bellwethers are not without their limitations. The Supreme Court and the Courts of Appeals have imposed constraints on bellwether practice when it infringes on litigants' rights or the MDL's statutory mandate.

This Section details three limits on the bellwether's application: (a) the bellwether's inability to bind MDL claimants not party to the actual bellwether trial, (b) the need for a clear trial plan and bellwethers that are representative of the pool of claims, and (c) the prohibition against MDL judges self-transferring cases for bellwether treatment.

#### 1. *Cimino, the Bellwether Trial's Non-Binding Status, and the Preclusion Predicament*

*Cimino v. Raymark Industries, Inc.*<sup>112</sup> is oft cited as cementing the bellwether's non-binding status.<sup>113</sup> Despite some scholars arguing to the contrary,<sup>114</sup> the general consensus remains that a bellwether's factual findings and legal determinations can neither bind other parties in the MDL nor wholly resolve their claims.

District Judge Robert Parker, who oversaw the *Cimino* MDL, estimated it would take over six years to try each of the two thousand consolidated cases. Thus, he devised a multiphase trial plan with 160 bellwether claims in a 133-day multiphase trial.<sup>115</sup> First, the jury would come to certain factual determinations, then address damages, and finally the court would extrapolate the results of the trials into a com-

<sup>110</sup> See *infra* Section II.B.1.

<sup>111</sup> Fallon et al., *supra* note 30, at 2366–67.

<sup>112</sup> 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd*, 151 F.3d 297 (5th Cir. 1998).

<sup>113</sup> See, e.g., Lahav, 2008 *Bellwether Trials*, *supra* note 38, at 581 (“[E]xperiments [with binding bellwethers] . . . ended, perhaps due to the influence of a Fifth Circuit decision holding [binding] bellwether trials unconstitutional on Seventh Amendment grounds.”).

<sup>114</sup> See, e.g., Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. REV. 439, 457 (2013) (advocating for a method of issue preclusion that “avoids the Due Process concerns surrounding binding bellwethers”); Seyedfarshi, *supra* note 83, at 295–97 (arguing in favor of the validity of binding bellwether trials).

<sup>115</sup> *Cimino*, 751 F. Supp. at 653.

pensation grid that dictated each claimant's damages award.<sup>116</sup> The court found, by a ninety-nine percent confidence level, that the 160 selected damages cases produced an average damages award "comparable to the average result if all cases were tried" separately.<sup>117</sup> The plaintiffs agreed to be bound by the judgment and deny themselves their day in court. However, the asbestos defendants, fighting each stage of the protracted litigation, opposed the trial plan and appealed.<sup>118</sup>

After waiting eight years for a legislative fix to the asbestos litigation crisis, the Fifth Circuit Court of Appeals provided an answer, holding that despite a ninety-nine percent confidence level, the court's extrapolation was impermissible. Specifically, the Fifth Circuit held that the district court's trial plan violated the Seventh Amendment civil jury right and Texas substantive law.<sup>119</sup> Under Texas law, causation must be determined on an individual, and not a group, basis and so it was impermissible to judicially resolve the non-bellwether cases without their own trial determination.<sup>120</sup> The Court of Appeals further held that the asbestos defendants too had a Seventh Amendment jury right that included the right to have the "legally recoverable damages [of each plaintiff] fixed and determined by a jury."<sup>121</sup> For the Fifth Circuit, the fact that the MDL plaintiffs surrendered their jury rights made no difference to the Seventh Amendment analysis. Therefore, while a bellwether trial could *inform* damages and a settlement-generated compensation grid, the court could not use the bellwether to bind all of the MDL claimants and sua sponte create its own damages scheme. "*Cimino* marked the end of binding bellwether trials."<sup>122</sup> Besides the bellwether parties, no other MDL party's fate can be tied to the outcome.

The question as to whether issue preclusion, or collateral estoppel, can attach to the bellwether's findings and "bar[] a party from relitigating an issue"<sup>123</sup> in succeeding cases remains a subject of debate.<sup>124</sup> Unlike class actions where the class becomes its own entity

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<sup>116</sup> NAGAREDA, *supra* note 81, at 67–69.

<sup>117</sup> *Cimino*, 751 F. Supp. at 666.

<sup>118</sup> NAGAREDA, *supra* note 81, at 67–69.

<sup>119</sup> See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319–21 (5th Cir. 1998).

<sup>120</sup> *Id.* at 319.

<sup>121</sup> *Id.* at 320.

<sup>122</sup> Seyedfarshi, *supra* note 83, at 314.

<sup>123</sup> *Collateral Estoppel*, BLACK'S LAW DICTIONARY (11th ed. 2019).

<sup>124</sup> A year before *Cimino*, the Fifth Circuit, in *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), discussed *infra*, debated in dicta this very point and the Seventh Amendment implications. Richard O. Faulk, Robert E. Meadows & Kevin L. Colbert, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 800 (1998). Judge Parker, writing for the *Chevron* majority, discussed the

and bound by collective judgments and findings, an MDL is the consolidation of individual claims and therefore lacks a “joint venture” quality. Therefore, for a bellwether’s finding to be employed in subsequent litigation, it must satisfy the Supreme Court’s criteria for issue preclusion as established in *Parklane Hosiery Co. v. Shore*.<sup>125</sup> However, in the case of a defense verdict or factual findings favorable to the defense, MDL plaintiffs not party to the bellwether will argue it has “no effect on the remaining claims because *their* claims were not *actually* litigated”<sup>126</sup> and to rule otherwise would be a denial of their Seventh Amendment right.<sup>127</sup> In the case of a plaintiff verdict or findings favorable to the MDL claimants, the defendants risk being collaterally estopped.<sup>128</sup> This creates the potential for gamesmanship as, expenses aside, the plaintiffs could urge the court to pursue bellwethers until they receive a favorable verdict and then collaterally estop the defendant. For this reason and because the MDL’s primary goal remains settlement, judges tend to constrain bellwethers to their role of *informing* negotiations and advancing litigation along the settlement trajectory.<sup>129</sup> Finally, issue preclusion poses ethical issues for counsel and raises concerns that in advancing the bellwether case, attorneys may be incentivized to disserve other claimants.<sup>130</sup>

As a result of these Seventh Amendment, gamesmanship, and professional responsibility implications, bellwether trials tend to be both non-binding and without issue preclusive effect. This approach promotes the bellwether’s role in facilitating settlement and lowers the stakes for litigants as it can neither impose an outcome on other

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possibility of bellwether preclusion so long as the bellwether is “representative of the larger group of cases . . . .” *In re Chevron*, 109 F.3d at 1020. However, Judge Jones, in her concurrence, articulated “serious doubts” with this premise as it raised due process concerns. *Id.* at 1021.

<sup>125</sup> 439 U.S. 322, 327 n.5 (1979) (“[J]udgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.”); see Lahav, 2008 *Bellwether Trials*, *supra* note 38, at 622–26.

<sup>126</sup> Faulk et al., *supra* note 124, at 805 (emphasis added).

<sup>127</sup> See Lahav, 2008 *Bellwether Trials*, *supra* note 38, at 625.

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1197 (10th Cir. 2000) (holding “the district court erred in giving that particular issue [from the bellwether trial] preclusive effect”); *In re TMI Litig.*, 193 F.3d 613, 726 (3d Cir. 1999), *amended by* 199 F.3d 158 (3d Cir. 2000) (holding “[t]he District Court’s extension of the Trial Plaintiffs’ summary judgment decision to the Non-Trial Plaintiffs would also improperly extend the doctrine of collateral estoppel/issue preclusion”). *But see, e.g., In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, No. 1:00-1898, 2007 WL 1791258, at \*4 (S.D.N.Y. June 15, 2007) (“[I]ssue preclusion will attach only as to those defendants against whom there is an adverse verdict and who will then have the opportunity for appellate review.”).

<sup>130</sup> See Faulk et al., *supra* note 124, at 800 (“[O]ne speculates that [Judge Jones] was concerned about plaintiffs’ counsel’s ethical responsibility to plaintiffs who are not selected for bellwether trial.”).

MDL parties nor resolve all of the factual issues. In theory, one might expect parties to more readily consent to bellwethers given these lower stakes and the utility of bellwether trials. However, current reform efforts strive to further limit bellwethers in MDL litigation.

## 2. In re Chevron, the Representativeness Requirement, and the Selection Method Debate

In addition to espousing the bellwether's non-binding status, the Fifth Circuit, in its decision in *In re Chevron*, has shaped much of the debate surrounding bellwether selection.<sup>131</sup> Allegations and issues arising from this process are part of what motivates current bellwether reform proposals.<sup>132</sup> A year before *Cimino*, the Fifth Circuit decided *In re Chevron*, reversing the district court's bellwether trial plan for lacking direction and failing to select claims sufficiently representative of the claimant pool.<sup>133</sup>

In *In re Chevron*, plaintiffs whose homes were built on a former Chevron crude oil storage pit alleged that the company failed to properly "secure the site"<sup>134</sup> and subsequently "sold the property for residential development knowing that the land was contaminated."<sup>135</sup> The district court allowed the plaintiffs and the defendants to each select fifteen claims to be tried in a bellwether trial.<sup>136</sup> While the Court of Appeals recognized the benefits of the bellwether in informing settlement,<sup>137</sup> it held that a court must do more than try the fifteen "best" and fifteen "worst" cases as such a format "lack[s] the requisite level of representativeness [for] . . . a court to draw sufficiently reliable inferences about the whole."<sup>138</sup> Furthermore, the Court of Appeals took issue with the trial plan's lack of thoughtful assessment in deducing how selecting the "best" and "worst" would aid the court in reaching a global resolution.<sup>139</sup>

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<sup>131</sup> See *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997). *Chevron* was not an MDL, but a Rule 42 consolidation. Nevertheless, it is cited by scholars for its impact on MDL bellwether practice.

<sup>132</sup> See *infra* Part II.

<sup>133</sup> *In re Chevron*, 109 F.3d at 1019.

<sup>134</sup> *Id.* at 1017.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1018–19.

<sup>137</sup> See *id.* at 1019 ("The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar.")

<sup>138</sup> *Id.* at 1020.

<sup>139</sup> *Id.* ("[T]he district court's trial plan is devoid of safeguards designed to ensure that the claims against Chevron of the non-represented plaintiffs . . . are determined in a

By allowing the parties to select the cases to be tried, without further guidance or scrutiny, the district court failed to ensure “representativeness” and a direction for the bellwether trial. Prudential precedent such as *Chevron* speak to the outer bounds of permissible bellwether practice and specifically where bellwether selection may go awry.

However, selection by counsel is not per se impermissible—it simply cannot occur unfettered. In the General Motors Ignition Switch MDL, both plaintiffs and the defense selected nine cases and then the judge allowed “each side to strike cases suggested by the other side, . . . [bringing] the total number of bellwethers . . . to six cases.”<sup>140</sup> Bellwethers may also be selected by random sampling,<sup>141</sup> the MDL judge,<sup>142</sup> or a combination of all of the above.<sup>143</sup> For example, counsel may nominate bellwether candidates from which the judge can select. Or the parties may unanimously agree on which cases to try.<sup>144</sup>

As Richard O. Faulk writes, “[b]ecause matching between the bellwether plaintiffs [and the claimant pool as a whole] is an essential element of any effective plan, no method that depends upon self-serving selections by counsel can yield a reliably predictive bellwether.”<sup>145</sup> In this way, the aims of employing bellwethers efficiently and producing sufficiently predictive settlement data can quell unfettered counsel selections and limit bellwether case selection to truly representative claims.

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proceeding that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried.”).

<sup>140</sup> Lahav, 2018 *Primer*, *supra* note 67, at 191.

<sup>141</sup> Fallon et al., *supra* note 30, at 2348.

<sup>142</sup> Seyedfarshi, *supra* note 83, at 303–04. For example, Judge Polster, overseeing the National Prescription Opiate Litigation MDL, selected the bellwether cases to be tried in his court. See Jeff Overley, *Opioid MDL Judge Plots New Bellwether Trials Across US*, LAW360 (Nov. 19, 2019, 9:44 PM), <https://www.law360.com/articles/1221570>.

<sup>143</sup> See, e.g., John Kennedy, *Bellwethers Chosen in 3M Warming Device Infection MDL*, LAW360 (Apr. 10, 2017, 9:32 PM), <https://www.law360.com/articles/911518/bellwethers-chosen-in-3m-warming-device-infection-mdl> (court randomly selected 150 cases and then plaintiffs and defendant each selected sixteen cases from the subset); Emily Field, *Bellwether Trial Dates Set in Meningitis MDL*, LAW360 (Apr. 7, 2017, 5:35 PM), <https://www.law360.com/articles/911324/bellwether-trial-dates-set-in-meningitis-mdl> (“[F]our possible bellwether cases . . . [were] proposed by the parties, and after fact discovery ended, the judge directed the parties to pick two to go to trial.”).

<sup>144</sup> Seyedfarshi, *supra* note 83, at 303–04.

<sup>145</sup> Faulk et al., *supra* note 124, at 793.

### 3. Lexecon: *The Bar on Self-Transfer*

*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*,<sup>146</sup> decided in 1998, is the lone recent Supreme Court case on MDL procedure and directly addresses judicial power and the province of the MDL judge. *Lexecon* barred the practice of self-transfer.<sup>147</sup>

Prior to *Lexecon*, self-transfer was commonplace.<sup>148</sup> If an MDL judge identified a claim ripe for a bellwether trial, but personal jurisdiction or venue was not satisfied and litigants refused to consent to trial, the judge could transfer the case to herself utilizing 28 U.S.C. § 1404, the transfer statute, and hold a bellwether trial.<sup>149</sup> Self-transfer was especially prevalent in instances where plaintiffs directly filed claims into the MDL district.<sup>150</sup> However, *Lexecon*, a unanimous Supreme Court decision, held that self-transfer was inconsistent with the MDL statute and therefore impermissible.

In *Lexecon*, a dispute stemming from the failure of the Lincoln Savings and Loan Association, defendant Lexecon asked the MDL judge to remand its case to the original, transferor jurisdiction.<sup>151</sup> However, the opposing parties objected and requested the judge self-transfer the case to the MDL jurisdiction. The MDL court ruled against Lexecon, refused to remand, and transferred the case to itself via § 1404.<sup>152</sup> The Supreme Court, reversing both the Ninth Circuit and the district court, found that nothing in the MDL statute “unsettle[s] the straightforward language imposing the Panel’s responsibility to remand, [and] which bars recognizing any self-assignment power in a transferee court.”<sup>153</sup> Per the Court’s interpretation, the

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<sup>146</sup> 523 U.S. 26 (1998).

<sup>147</sup> *Id.* at 40 (“[N]one of the arguments raised can unsettle the straightforward language imposing the Panel’s responsibility to remand, which bars recognizing any self-assignment power in a transferee court and consequently entails the invalidity of the Panel’s Rule 14(b).”).

<sup>148</sup> See Courtney E. Silver, Note, *Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result*, 70 OHIO ST. L.J. 455, 461 (2009) (“Transferee judges frequently entered orders for permanent transfer of these cases under 28 U.S.C. § 1404(a) or 1406. This practice, though not entirely consistent with the language of § 1407, was endorsed by the Panel. The Panel enacted its own procedural rules that provided for self-transfer.”).

<sup>149</sup> See Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 795–98 (2012).

<sup>150</sup> It is common for plaintiffs to directly file into the MDL district after the JPML has transferred all the existing cases as it eliminates the delay and expense of filing in one’s local federal court and awaiting JPML transfer. *Id.*; Fallon et al., *supra* note 30, at 2355.

<sup>151</sup> Technically, for a case to be remanded, the MDL judge must request a remand from the JPML and then the JPML transfers the case back to the original transferor court. See 28 U.S.C. § 1407(a).

<sup>152</sup> *Lexecon*, 523 U.S. at 30–31.

<sup>153</sup> *Id.* at 40.

JPML's statutory duty to remand precludes an MDL court from self-transferring the case.<sup>154</sup>

*Lexecon* continues to present an obstacle for MDL case management as it limits the number of cases that can be used in a bellwether trial without the parties' consent. Despite bipartisan support, legislative proposals to reverse the decision languished in Congress throughout the early 2000s.<sup>155</sup> No longer can an MDL judge dismiss defendants' objections and select the best claims to mature the litigation and promote settlement via a bellwether trial.

Yet, imperfect workarounds have emerged. First, the MDL judge can conduct bellwether trials with claims properly filed in her district.<sup>156</sup> While many of the directly filed claims lack personal jurisdiction, those where personal jurisdiction and venue are proper, either based on plaintiff's domicile or place of injury, are apt for bellwether treatment. For example, Judge Polster, overseeing the National Prescription Opiate Litigation MDL in the Northern District of Ohio, scheduled the first federal bellwethers employing the claims of two plaintiffs, Cuyahoga and Summit Counties, that are domiciled in the Northern District.<sup>157</sup> This precluded the defendants from raising venue objections.<sup>158</sup> Second, where personal jurisdiction and venue are not satisfied, the MDL court can request a "*Lexecon* waiver" from the bellwether parties, i.e., a full or pretrial waiver of any venue or personal jurisdiction objections. Notably, a waiver requires defendants' cooperation. In the Vioxx MDL, Merck waived pretrial venue objections for all cases directly filed into the MDL district and then waived all venue objections for those selected for bellwether trials.<sup>159</sup> Critically, Merck desired finality whereas some defendants do not assign the same value to resolving their mounting liabilities. Third, the MDL judge can remand the case to its original, transferor jurisdiction

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<sup>154</sup> *Id.* at 34.

<sup>155</sup> *Lexecon* reversal bills were introduced in 1999, 2001, 2003, and 2005. See Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 769, 792–93 (2019). These bills had bipartisan support. Republicans, at the time, were not hostile to the MDL as they currently are. For example, the 2005 *Lexecon* reversal bill, the Multidistrict Litigation Restoration Act of 2005, passed the House without a recorded vote and was introduced in the Senate by Senator Orrin Hatch (R-UT) and cosponsored by Senator Jeff Sessions (R-AL). See Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005); Multidistrict Litigation Restoration Act of 2005, S. 3734, 109th Cong. (2006).

<sup>156</sup> WHITNEY, *supra* note 47, at 11.

<sup>157</sup> See *Cuyahoga County v. Purdue Pharma LP*, No. 18-OP-45090 (N.D. Ohio May 1, 2019) (describing the consolidation details).

<sup>158</sup> Trials did not ultimately take place as defendants and bellwether plaintiffs settled. See *infra* Section I.C.

<sup>159</sup> Fallon et al., *supra* note 30, at 2358.



and “obtain an intercircuit or intracircuit assignment to sit by designation under 28 U.S.C. § 292”<sup>160</sup> in order to preside over the bellwether trial.

Despite these workarounds, *Lexecon* still limits the pool of potential bellwethers. Intercircuit and intracircuit designations are rare, waivers require willing parties with an interest in finality, and cases where venue and personal jurisdiction are proper from the outset may not provide the most representative sample. As is occurring in the current National Prescription Opiate Litigation, an MDL judge may be forced to remand certain cases in hopes that the original transferor court will coordinate with the MDL in trying the cases as bellwethers.<sup>161</sup> However, this workaround defeats the MDL’s core objective of centralizing cases for global resolution. Perhaps if the transferor courts swiftly commence the bellwether process, there is the potential they can inform negotiations and aid in maturing the MDL litigation. Yet, this decentralized format risks wasting judicial and litigant resources, compels increased judicial communication across circuits, and requires coordination to ensure consistent judgments on key questions of law and fact. In this way, *Lexecon* frustrates the resolution of MDL claims and the tort itself.

### C. Bellwether Avoidance Through Selective Settlement

In addition to the aforementioned judicial limits on bellwether practice, selective settlement poses another hurdle to overcome in furthering the MDL bellwether process. Once individual bellwether claimants are selected, they may be enticed by a sweetheart settlement offer to forgo the bellwether process, resolving their individual claim at the expense of the MDL at large. Thus, even when personal jurisdiction and venue are proper and the case is representative of the claimant pool, a bellwether may still be averted by an eleventh-hour settlement. Selective settlement slows the process of achieving global peace.<sup>162</sup> In the case of confidential settlements, no dollar amount is provided to inform an ultimate MDL-wide compensation scheme.<sup>163</sup>

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<sup>160</sup> WHITNEY, *supra* note 47, at 14.

<sup>161</sup> See Overley, *supra* note 142 (discussing Judge Polster’s request to the JPML to remand certain cases to be tried as bellwethers in the transferor jurisdictions).

<sup>162</sup> See Thomas Sekula, Note, *Selective Settlement and the Integrity of the Bellwether Process*, 97 TEX. L. REV. 859, 863–67 (2019). Sekula discusses selective settlement only in the context of confidential payouts to bellwether plaintiffs intended to thwart going to trial. However, selective settlement stymies the bellwether and the maturation of the MDL litigation regardless of whether done confidentially.

<sup>163</sup> See George M. Fleming & Jessica Kasischke, *MDL Practice: Avoiding the Black Hole*, 56 S. TEX. L. REV. 71, 83 (2014) (describing how confidential settlements stymie information production); Sekula, *supra* note 162, at 863–64.

Yet, even when the settlement is public, the payout holds little informational value, reflecting the nuisance value of trial and negative press attention—not a disinterested jury’s merits determination or the “price” of the tort.

Pre-bellwether settlement may be part of defendants’ overall strategy to “‘buy up’ potentially high verdicts before they reach trial, . . . distort[ing] the informational benefits of the bellwether process”<sup>164</sup> by leaving just the low-dollar claims. This is also accomplished by settling the riskiest cases, as occurred in the GM Ignition Switch MDL.<sup>165</sup> However, bellwether settlement is not inherently strategic, and may be motivated by a desire to stave off the negative publicity of trial for as long as possible or at all costs necessary. Just hours before the opening arguments in the first National Prescription Opiate Litigation MDL bellwether trial, the three drug distributor and manufacturer defendants settled with the bellwether plaintiffs, two Ohio counties, for \$260 million.<sup>166</sup> A month later, District Judge Dan A. Polster scheduled a new bellwether trial for October 2020—pushing back the MDL’s first bellwether for an entire year.<sup>167</sup> The bellwether has subsequently been delayed until May 2021.<sup>168</sup>

While the parties continue to negotiate, and discovery and motions in preparation for the scheduled bellwether will yield important information for the resolution of these claims, this practice demonstrates how defendants, especially since *Lexecon*, can utilize their financial advantage to manipulate the bellwether process.

Whether by refusing to waive venue objections or paying out sweetheart settlements, defendants, uninterested in achieving a speedy resolution, can slow, stymie, or wholly defeat the bellwether process. Thus, while bellwethers have the capacity to advance MDL litigation, provide a public forum for an otherwise private settlement, and equalize bargaining dynamics, their application is constrained by

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<sup>164</sup> Sekula, *supra* note 162, at 864.

<sup>165</sup> *See id.* at 867.

<sup>166</sup> *See* Julie Carr Smyth & Geoff Mulvihill, *\$260 Million Deal Averts 1st Federal Trial on Opioid Crisis*, ASSOCIATED PRESS (Oct. 21, 2019), <https://apnews.com/c428bb2ba4cd4cc6a59f8dbe79e18d9f>.

<sup>167</sup> *See* Overley, *supra* note 142.

<sup>168</sup> *See* Adam Lidgett, *New Pharmacy Bellwether Trial Set for 2021 in Opioid MDL*, LAW360 (Apr. 30, 2020, 6:38 PM), <https://www.law360.com/articles/1269059/new-pharmacy-bellwether-trial-set-for-2021-in-opioid-mdl>. In the meantime, one of the remanded cases was scheduled for an October 2020 bellwether trial in West Virginia, but weeks before the trial date, it was postponed due to concerns pertaining to COVID-19. Jeff Overley, *Opioid MDL Bellwether Trial Delayed Amid COVID-19 Fears*, LAW360 (Oct. 9, 2020, 4:39 PM), <https://www.law360.com/articles/1318581/opioid-mdl-bellwether-trial-delayed-amid-covid-19-fears>.

jurisprudential and economic realities. Any bellwether reform proposal must be viewed against this backdrop.

## II FICALA AND #RULES4MDLS: EFFORTS TO CONSTRAIN BELLWETHER TRIALS

Since the enactment of the MDL statute, attacks on the MDL framework have come from the plaintiffs' bar, corporate defendants, and the legal academy.<sup>169</sup> As described in the Introduction, these critiques highlight valid challenges confronting the MDL device and mass litigation. Nevertheless, the MDL statute has remained almost completely untouched.<sup>170</sup> Most recently, organizations representing the interests of corporate defendants have launched “a concerted, multipronged effort to shape [and reform] the MDL process in *their* favor.”<sup>171</sup> Led by institutional actors such as the U.S. Chamber of Commerce, these organizations have called the MDL, and bellwethers specifically, “procedurally abusive”<sup>172</sup> and “burdensome” to businesses.<sup>173</sup>

These efforts have taken two forms and given corporate defendants “two bites at the procedural apple”<sup>174</sup>: first, a legislative proposal in the 115th Congress; and second, proposed amendments to the Federal Rules of Civil Procedure (FRCP). This Part details these endeavors and specifically how they aim to constrain the use of bellwether trials. Section A first discusses H.R. 985, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 or “FICALA.”<sup>175</sup> Subsequently, Section B highlights efforts to reform the MDL via amendments to the FRCP.

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<sup>169</sup> See *supra* Introduction.

<sup>170</sup> See Bradt, *The Looming Battle*, *supra* note 32, at 97 (“MDL has hummed along with virtually no legislative or Supreme Court intervention.”).

<sup>171</sup> Bradt & Rave, *supra* note 37, at 97 n.155 (emphasis added).

<sup>172</sup> Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Rep. Bob Goodlatte & Rep. John Conyers, Comm. on the Judiciary, U.S. House of Representatives (Feb. 14, 2017), [https://www.uschamber.com/sites/default/files/170214\\_ilr\\_hr985\\_fairnessinclassactionlitigation\\_goodlatte\\_conyers.pdf](https://www.uschamber.com/sites/default/files/170214_ilr_hr985_fairnessinclassactionlitigation_goodlatte_conyers.pdf) (supporting the Fairness in Class Action Litigation Act of 2017).

<sup>173</sup> *Id.*; see also Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 GA. L. REV. 1375, 1377 (2019) (“Conservative groups are targeting [the] MDL for legislative or rule-based ‘reforms’ on the ground that it is too plaintiff-friendly and effectively forces defendants to pay off non-meritorious claims.”).

<sup>174</sup> See J. Maria Glover, “*Encroachments and Oppressions*”: *The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113, 2114 (2018) [hereinafter Glover, *Encroachments and Oppressions*].

<sup>175</sup> See Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017).

A. *H.R. 985: The Fairness in Class Action Litigation and  
Furthering Asbestos Claim Transparency  
Act (FICALA)*

FICALA was introduced in February 2017 by Representative Bob Goodlatte (R-VA), then-Chairman of the House Judiciary Committee.<sup>176</sup> In addition to its MDL provisions, FICALA included provisions pertaining to class action certification and attorney's fees as well as bankruptcy asbestos liability trusts.<sup>177</sup>

1. *FICALA's Legislative Trajectory and the Non-Bellwether MDL Provisions*

The Republican committee report billed FICALA as addressing and remedying the "abuse of consumers by unscrupulous lawyers" and "the diversion of hundreds of millions of dollars [in litigation costs] away from productive purposes."<sup>178</sup> A month after introduction and without any hearings, FICALA passed the House on a party-line vote with no Democrat voting in favor (220-201).<sup>179</sup> FICALA then languished in the Senate for the remainder of the 115th Congress<sup>180</sup> and was not reintroduced in the 116th.

In addition to the bellwether provision, discussed *infra*, FICALA contained three other MDL-related proposals<sup>181</sup>: (1) a requirement that MDL plaintiffs filing personal injury claims submit evidentiary verification (typically, a factsheet) for allegations in their complaints within forty-five days of MDL transfer and that the MDL judge render a judgment on the submission's sufficiency within ninety,<sup>182</sup>

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<sup>176</sup> See Press Release, House Judiciary Comm., Goodlatte Introduces Major Litigation Reform Bill to Improve Access to Justice for American Consumers (Feb. 9, 2017), <https://replicans-judiciary.house.gov/press-release/goodlatte-introduces-major-litigation-reform-bill-improve-access-justice-american-consumers>.

<sup>177</sup> See H.R. 985. Compare Letter from Lisa Rickard to Rep. Bob Goodlatte & Rep. John Conyers, *supra* note 172 (demonstrating the Chamber of Commerce's support for non-MDL provisions), with Letter from Civil Rights Groups Strongly Opposing H.R. 985 to Rep. Bob Goodlatte & Rep. John Conyers Jr., Comm. on the Judiciary, U.S. House of Representatives (Feb. 15, 2017), <https://pdfserver.aamlaw.com/ca/Edelson%20Q&A%20-%20CivilRightsOppositiontoHR985.pdf> (arguing that non-MDL provisions would harm consumers). Over 121 civil rights groups such as the ACLU, NAACP Legal Defense and Educational Fund, Inc., and Lambda Legal opposed the non-MDL provisions. *Id.* at 4–7.

<sup>178</sup> H.R. REP. NO. 115-25, at 4 (2017).

<sup>179</sup> Fairness in Class Action Litigation Act H.R. 985, Final Vote Results for Roll Call No. 148 (Mar. 9, 2017), <https://clerk.house.gov/evs/2017/roll148.xml>.

<sup>180</sup> See Bradt, *The Looming Battle*, *supra* note 32, at 89.

<sup>181</sup> H.R. 985, § 1407(i)–(l).

<sup>182</sup> Proponents argued that this enhanced pleading would weed out meritless tagalong cases. H.R. REP. NO. 115-25, at 33. However, in addition to being premature given the lack of empirical data on the prevalence of meritless claims, the provision's ninety-day turnaround for judges to rule on each claim's sufficiency would likely be the "death knell"

(2) increased opportunities to seek interlocutory review from the Court of Appeals,<sup>183</sup> and (3) a cap on attorney's fees at twenty percent of any monetary recovery.<sup>184</sup>

If enacted, each of FICALA's MDL provisions would asymmetrically benefit corporate defendants and provide them with an even greater advantage over the MDL process. However, the bellwether provision, discussed *infra*, presents the starkest challenge to judicial administration of MDLs and the federal civil court docket. Differing from the other provisions, the bellwether proposal singularly strives to limit the judiciary's ability to advance and resolve MDLs.

## 2. The Bellwether Provision

In addition to the provisions highlighted above, FICALA would prohibit MDL bellwether trials unless all parties consented "to that civil action."<sup>185</sup> Technically speaking, FICALA does not articulate what consent by "all parties to that civil action"<sup>186</sup> means. The consent requirement could apply solely to those party to the bellwether or to all parties and claimants to the MDL itself. Corporate defendants

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for the MDL. See Glover, *Encroachments and Oppressions*, *supra* note 174, at 2119–20. Finally, courts already use factsheets when necessary and the provision would "rob[] plaintiffs" of discovery, the natural process for developing and narrowing their claims. Letter from Elizabeth Chamblee Burch, Charles H. Kirbo Chair of Law, U. Ga. Sch. L., to James J. Park, Chief Counsel, Democratic Staff, Subcomm. on the Const. & Civ. Just., H. Comm. on Judiciary 6 (Feb. 13, 2017), <https://lawprofessors.typepad.com/files/burch-final-comments-on-fairness-in-class-action-litigation-act.pdf> (providing comments on FICALA).

<sup>183</sup> This provision would (a) permit parties to file immediate appeals for orders that "may materially advance the ultimate termination of one or more" claims, and (b) allow the Court of Appeals to accept appeals from orders either denying or granting a remand. H.R. 985, § 1407(k). Appeals of non-final rulings are already available at the discretion of the MDL judge. However, there is a growing call for increased opportunities for appellate review of MDLs. See, e.g., Pollis, *supra* note 77, at 1675–76; *infra* note 294 and accompanying text. Nevertheless, FICALA's "materially advance" standard is overly broad, not rooted in precedent, and therefore would lead to confusion, undue delay, and additional litigation expenses. See Letter from Elizabeth Chamblee Burch, *supra* note 182, at 7; see also Glover, *Encroachments and Oppressions*, *supra* note 174, at 2121–22 (describing the standard as "hopelessly vague" and a "thinly veiled request by corporate entities . . . to [both] lick particular litigation wounds . . . [and] grind MDL[s] to a halt through unlimited appeal[s]").

<sup>184</sup> The attorney's fees cap was touted as necessary to prevent attorneys from allegedly obtaining an unfair share of the global settlement after "handling thousands of copycat individual cases asserting similar" claims. H.R. REP. NO. 115-25, at 37. Yet, it is unclear how the eighty percent reserved for plaintiffs would be calculated. Additionally, this provision could interfere with insurance liens asserted against plaintiffs' recoveries, impact attorneys' willingness to take on MDL cases, and potentially upend the important alignment of interests between lawyers and claimants. See Letter from Elizabeth Chamblee Burch, *supra* note 182, at 8; Glover, *Encroachments and Oppressions*, *supra* note 174, at 2123–24.

<sup>185</sup> H.R. 985 § 105(j).

<sup>186</sup> *Id.*

aside, requiring the various plaintiffs' counsel to agree on which cases to try could prove untenable.<sup>187</sup> For example, with over 40,000 plaintiffs, requiring the various plaintiffs' counsel in the Vioxx MDL to agree on the triable cases would have likely been impossible.<sup>188</sup> Because of this irrational result, this Note presumes the provision would solely apply to the bellwether parties.

House Republicans assert that given the MDL statute's use of the word "pretrial" and the MDL's operation as a pretrial mechanism, bellwether trials are never authorized.<sup>189</sup> Thus, the consent of MDL parties, whomever that entails, should be required for an MDL judge to initiate a bellwether trial.<sup>190</sup> Proponents of the "pretrial" argument, however, neglect the fact that over ninety percent of MDLs are terminated without remand, whether via settlement or otherwise.<sup>191</sup> While technically pretrial, the MDL court generally facilitates the conclusion of litigation. Moreover, a reliance on this premise contradicts a primary MDL objective: to promote settlement and global resolution.<sup>192</sup>

In the post-*Lexecon* years, consent already plays a significant role in the bellwether process.<sup>193</sup> FICALA, however, is a response to the practice of requesting *Lexecon* waivers.<sup>194</sup> Although nothing obliges a defendant to sign a *Lexecon* waiver, FICALA's proponents believe current waiver practices are coercive and insufficiently protect the rights of defendants.<sup>195</sup> They contend that MDL judges seeking to achieve global peace should be constrained to discovery and pretrial

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<sup>187</sup> See Letter from Elizabeth Chamblee Burch, *supra* note 182, at 7 ("Preventing the judge from conducting trials of any sort unless every party consents will often mean conducting no trials at all.").

<sup>188</sup> *Id.*

<sup>189</sup> H.R. REP. NO. 115-25, at 35.

<sup>190</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, TRIALS AND TRIBULATIONS: CONTENDING WITH BELLWETHER AND MULTI-PLAINTIFF TRIALS IN MDL PROCEEDINGS 1-4 (Oct. 2019), <https://instituteforlegalreform.com/research/trials-and-tribulations-containing-with-bellwether-and-multi-plaintiff-trials-in-mdl-proceedings>.

<sup>191</sup> See BOLCH JUD. INST., *supra* note 1, at vii.

<sup>192</sup> See WHITNEY, *supra* note 47, at 4 (articulating the viewpoint of the federal judiciary).

<sup>193</sup> Fallon et al., *supra* note 30, at 2354 (explaining that without litigant consent, only a very small subset of triable MDL cases remain). For example, in the Vioxx MDL, without party consent, "the total universe of triable cases would have been approximately 350 [and not thousands] and all would have been tried under Louisiana law, which does not allow recovery of punitive damages." *Id.*

<sup>194</sup> U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 190, at 3-4 (describing how courts constrained by *Lexecon* request *Lexecon* waivers in order to conduct bellwether trials).

<sup>195</sup> See *id.* at 4 ("[P]arties to an MDL proceeding can find themselves coerced or forced into an MDL trial—or a series of trials—to which they would not otherwise have consented.").

motion practice.<sup>196</sup> Thus, FICALA would implement a standalone universal consent requirement, regardless of whether personal jurisdiction and venue are satisfied. This strict textualist approach to the MDL neglects its drafters' intent and the role it plays in resolving mass disputes.

House Republicans also espouse that in selecting bellwether claims, MDL judges unfairly utilize claims “hand-picked by plaintiffs’ counsel,” depriving defendants of due process and generating oppressive settlement pressure.<sup>197</sup> Yet, given prudential precedent such as *Cimino* and *Chevron*, proponents’ concern over “pseudo-trials”<sup>198</sup> is likely unfounded. Precedent such as *Cimino* limits the bellwether to serving an informational role for settlement purposes. The bellwether can test legal theories and incentivize parties to more faithfully engage in negotiations, but it cannot hold defendants liable for the tort itself. Likewise, precedent such as *Chevron* that requires a degree of “representativeness” speaks to the outer bounds of what is considered a permissible bellwether claim. Thus, hand-picked, plaintiff-friendly claims would likely not survive appellate scrutiny. Just as the Fifth Circuit in *Chevron* condemned a trial plan consisting of the best and worst cases, a bellwether that tried just the most damning claims—FICALA’s “pseudo-trial” concern—would fail to provide the requisite information from which to draw inferences and ultimately a compensation grid.<sup>199</sup> While *Cimino* and *Chevron* are from the Fifth Circuit, these principles have been generally applied nationally and are viewed as paramount to protecting due process and fairness in MDL litigation.<sup>200</sup>

### B. #Rules4MDLs: Proposed Amendments to the Federal Rules of Civil Procedure

With FICALA’s failure in the 115th Congress, in late 2017, the defense bar and allied groups began their second bite at the procedural apple: lobbying the Advisory Committee on Civil Rules, the rulemaking arm of the federal judiciary, to codify FICALA-like provisions in the Federal Rules of Civil Procedure (FRCP).

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<sup>196</sup> See *id.* at 1 (“The explicit statutory purpose of multidistrict litigation (MDL) proceedings is to coordinate discovery and other pretrial matters . . .”).

<sup>197</sup> H.R. REP. NO. 115-25, at 35 (2017).

<sup>198</sup> *Id.*

<sup>199</sup> *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019–20 (5th Cir. 1997).

<sup>200</sup> See Lahav, 2008 *Bellwether Trials*, *supra* note 38, at 581 (describing current bellwether selection processes).

Lawyers for Civil Justice (LCJ), has been the central player in this effort.<sup>201</sup> LCJ has launched a website, a hashtag (#Rules4MDLs), and a media blitz of white papers, case studies, and advertisements.<sup>202</sup> Founded in 1987,<sup>203</sup> LCJ is a “coalition of defense trial lawyer organizations, law firms, and corporations” organized around the goal of curtailing litigation costs imposed on American corporations and “restor[ing]” balance to the civil justice system.<sup>204</sup> Members include a who’s who of MDL defendants,<sup>205</sup> including Merck, Pfizer, Johnson & Johnson, Ford, and Toyota.<sup>206</sup> This Section details LCJ’s ongoing campaign to amend the MDL through the FRCP, utilizing a very similar playbook to that employed by the Chamber of Commerce and the defense bar in fashioning FICALA.

### 1. *MDL Subcommittee Formation and FRCP Amendment Proposals*

In August 2017, LCJ submitted a proposal for MDL rulemaking to the Advisory Committee on Civil Rules.<sup>207</sup> When the Committee met that fall, they had three MDL-related proposals<sup>208</sup> and elected to establish a subcommittee dedicated to studying MDL procedure.<sup>209</sup>

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<sup>201</sup> See David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 453–54 (2019) (describing the role of LCJ).

<sup>202</sup> RULES 4 MDLs, <https://www.rules4mdls.com> (last visited Jan. 17, 2021); @Rules4MDLs, TWITTER, <https://twitter.com/rules4mdls> (Twitter bio reads: “Working to update the Federal Rules of Civil Procedure to bring consistency, fairness & predictability to the 47% of pending civil cases consolidated in MDLs.”) (last visited Jan. 17, 2021); see Noll, *supra* note 201, at 426–28.

<sup>203</sup> *Annual Report*, LAWS. FOR CIV. JUST., <https://www.lfcj.com/lcj-annual-report.html> (last visited Jan. 17, 2021).

<sup>204</sup> *About LCJ*, LAWS. FOR CIV. JUST., <https://www.lfcj.com/about-us.html> (last visited Jan. 17, 2021).

<sup>205</sup> See Noll, *supra* note 201, at 453.

<sup>206</sup> *Corporate Members*, LAWS. FOR CIV. JUST., <https://www.lfcj.com/corporate-members.html> (last visited Jan. 17, 2021).

<sup>207</sup> LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 34.

<sup>208</sup> In addition to LCJ’s proposal, the Chamber of Commerce submitted a proposal related to third-party litigation financing. See Letter from Lisa Rickard, President, U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Secretary, Comm. on Rules of Prac. & Proc. of the Admin. Office of the U.S. Courts (June 1, 2017), [https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion\\_ilr\\_et\\_al\\_0.pdf](https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf). Professor John Rabiej, Director of Duke’s Center for Judicial Studies, also submitted a proposal calling for MDLs with over 900 cases to be split between five judges for bellwether treatment post-discovery. See JUD. CONF. OF THE UNITED STATES, COMM. ON RULES OF PRAC. & PROC., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 360 (Dec. 6, 2017), [https://www.uscourts.gov/sites/default/files/2017-12-6-civil\\_rules\\_committee\\_report.pdf](https://www.uscourts.gov/sites/default/files/2017-12-6-civil_rules_committee_report.pdf) (minutes of the Civil Rules Committee’s November 7, 2017 meeting) [hereinafter CIVIL RULES COMMITTEE MINUTES].

<sup>209</sup> CIVIL RULES COMMITTEE MINUTES, *supra* note 208, at 12.



LCJ's 2017 proposal included reforms to many of the same alleged MDL ills that spurred FICALA's introduction: "meritless" claims, the rarity of interlocutory review, and bellwether trials.<sup>210</sup> However, this Note focuses on LCJ's September 2018 revised proposal, as (a) the newly formed MDL subcommittee's discussion, discussed *infra*, and ongoing scholarly debate have centered around the 2018 amended proposal; and (b) the differences between the two versions are slight and immaterial to this Note.

The 2018 proposal called for six distinct reforms related to (1) early vetting of meritless claims, (2) increased opportunity for appellate review, (3) bellwether trials, (4) third-party funding disclosure, (5) joinder, and (6) expanded pleadings requirements.<sup>211</sup> Like FICALA, LCJ called for bellwether trials to be prohibited, unless consented to by all parties.<sup>212</sup> The 2017 proposal included a "confidential mechanism"<sup>213</sup> by which parties can "withhold consent without fear of reprisal."<sup>214</sup> However, no such mechanism was part of the 2018 revision. Notably, LCJ's reasoning for the bellwether prohibition parallels much of what the Chamber of Commerce's FICALA materials discuss: frustration and dismay over *Lexecon* waivers,<sup>215</sup> multi-plaintiff trials, and the case selection process.<sup>216</sup>

## 2. *The Subcommittee's Response and the Current Status of the FRCP Bellwether Proposal*

In November 2018, the MDL subcommittee report addressed these proposals.<sup>217</sup> Like FICALA,<sup>218</sup> the LCJ bellwether proposal was imprecise as to whether consent was required of those plaintiffs and defendants party to the individual bellwether or required of all MDL parties and claimants.<sup>219</sup>

Overall, the committee called the proposal "curious."<sup>220</sup> Assuming that the provision would only apply to the parties set for

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<sup>210</sup> LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 34, at 2–3.

<sup>211</sup> See MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS, *supra* note 46, at 1–11.

<sup>212</sup> *Id.* at 7; LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 34, at 2–3.

<sup>213</sup> LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 34, at 12–13.

<sup>214</sup> *Id.* at 13.

<sup>215</sup> *Id.*

<sup>216</sup> See MDL PRACTICES AND THE NEED FOR FRCP AMENDMENTS, *supra* note 46, at 7.

<sup>217</sup> ADVISORY COMM. ON CIVIL RULES, NOV. 2018 MEETING, *supra* note 107, at 139–62.

<sup>218</sup> See Letter from Elizabeth Chamblee Burch, *supra* note 182, at 7.

<sup>219</sup> *Id.*

<sup>220</sup> ADVISORY COMM. ON CIVIL RULES, NOV. 2018 MEETING, *supra* note 107, at 156.

trial, the subcommittee explained that given current jurisdiction and venue constraints, consent is already required for most bellwethers, the exception being claims directly filed into the MDL district where jurisdiction and venue are proper.<sup>221</sup> The subcommittee explained it would be a “curious result” to block trials after JPML transfer for those cases the MDL judge “had before the order, or . . . [that were] properly filed in [the party’s] ‘home’ district.”<sup>222</sup> Moreover, it would be “curious” for a JPML order to deprive a district judge of their authority to try cases they had before JPML action.<sup>223</sup>

The newly-formed subcommittee did not elaborate beyond this tepid response. In April 2019, the Advisory Committee adopted the MDL subcommittee’s suggestion to narrow their focus to four areas of possible reform: (1) the use of plaintiff and defendant factsheets, (2) interlocutory review, (3) the court’s role in promoting settlement, and (4) third-party litigation funding.<sup>224</sup> Not bellwether trials. While the subject of bellwether trials has arisen in subsequent discussions,<sup>225</sup> a bellwether universal consent requirement is seemingly no longer a target of FRCP rulemaking. Regarding the prospect of MDL rulemaking more generally, as of October 2020, the MDL subcommittee was still examining the aforementioned issues.<sup>226</sup>

While FICALA has yet to be reintroduced and the Advisory Committee has, for now, forgone bellwether-related rulemaking, corporate defendants and allied interest groups continue to press for MDL reforms. Furthermore, both policy proposals and bill text have a proclivity for resurfacing as new legislation is crafted and issues return to the fore. Therefore, it is imperative to examine what effects these sorts of proposals would have on the MDL process.

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<sup>221</sup> See *id.* However, that is an even harder bar to meet now given the Supreme Court’s decision in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), which greatly curtailed personal jurisdiction over corporate defendants.

<sup>222</sup> ADVISORY COMM. ON CIVIL RULES, NOV. 2018 MEETING, *supra* note 107, at 156.

<sup>223</sup> *Id.*

<sup>224</sup> JUD. CONF. OF THE UNITED STATES, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 17 (Sept. 2019), [https://www.fjc.gov/sites/default/files/materials/06/jcus\\_report\\_-\\_september\\_2019\\_final\\_0.pdf](https://www.fjc.gov/sites/default/files/materials/06/jcus_report_-_september_2019_final_0.pdf). The Subcommittee has since removed third-party litigation funding from its agenda and “returned it to the Advisory Committee for monitoring” as it is not unique to the MDL context. JUD. CONF. OF THE UNITED STATES, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 47 (Apr. 2020), [https://www.uscourts.gov/sites/default/files/04-2020\\_civil\\_rules\\_agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf) [hereinafter ADVISORY COMM. ON CIVIL RULES, APR. 2020 MEETING].

<sup>225</sup> See ADVISORY COMM. ON CIVIL RULES, APR. 2020 MEETING, *supra* note 224, at 151.

<sup>226</sup> See Jud. Conf. of the United States, AGENDA: MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 40–43 (Oct. 2020), [https://www.uscourts.gov/sites/default/files/2020-10\\_civil\\_rules\\_agenda\\_book\\_final.pdf](https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf).

### III IMPLICATIONS OF A BELLWETHER UNIVERSAL CONSENT REQUIREMENT

LCJ presented their proposals as “‘consensus’ solutions”<sup>227</sup> deeply rooted in concerns over the functioning of the federal civil justice system.<sup>228</sup> Undeniably, bellwether trials are not without their risks and deficiencies: They are expensive.<sup>229</sup> Additionally, bellwethers are utilized by MDLs covering national issues and nationwide injuries, but are limited in their “informational output . . . to the views of one local jury pool.”<sup>230</sup> And by design, the bellwether is representative of the entire claimant pool and therefore does not calculate for the weakest and strongest claims, potentially aiding those with the weakest and dampening the financial recovery of those with the strongest claims.<sup>231</sup>

Despite these shortcomings, scholars have candidly labeled LCJ and FICALA’s proposals a “defense wish list”<sup>232</sup> and an exploitation of the MDL’s unpopularity to further skew the MDL to defendants’ advantage.<sup>233</sup> Corporate defendants, who once found the MDL a hospitable forum, no longer find it as defendant-friendly.<sup>234</sup> Thus, they have engaged in a unilateral push for reform and a systematic attempt “to limit [their] exposure to liability by restricting access to justice, particularly for low-income individuals, those with low-value claims, or citizens with little political power.”<sup>235</sup>

Yet, whether one focuses on these intentions or not, the theoretical and practical implications of FICALA/LCJ’s bellwether universal consent proposal behoove scrupulous evaluation. This Part dissects whether the proposal would accomplish its intended goals of reining in MDL judges and saving mass litigation from the MDL procedure-

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<sup>227</sup> Noll, *supra* note 201, at 453 (quoting LAWS. FOR CIV. JUST., MAJOR INITIATIVES AND CURRENT AGENDA 1 (2018)).

<sup>228</sup> See *Frequently Asked Questions*, RULES4MDLS, <https://www.rules4mdls.com/faq> (last visited Apr. 14, 2021) (“Clear, uniform rules in MDL cases would bring fairness, clarity and certainty to the system, benefiting all parties and disadvantaging none.”).

<sup>229</sup> See *supra* note 107 and accompanying text.

<sup>230</sup> Fallon et al., *supra* note 30, at 2366.

<sup>231</sup> Redish & Karaba, *supra* note 27, at 127.

<sup>232</sup> Noll, *supra* note 201, at 453.

<sup>233</sup> *Id.* at 454 (stating that LCJ’s “framing is disingenuous, but it reflects an incisive understanding of [the] MDL’s political vulnerabilities”).

<sup>234</sup> Conventionally, defendants preferred the MDL forum as MDLs are “to a large extent creatures of contract and agency law” and therefore “virtually unchallengeable and unreviewable.” This allows defendants to reach a “global resolution [and] ‘move beyond’ carrying unknown (but potentially huge) liabilities on their books” without confronting “the procedural restrictions of class actions.” Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531, 535 (2017).

<sup>235</sup> Glover, *Encroachments and Oppressions*, *supra* note 174, at 2114.

less abyss. Section A elaborates on how the proposal would affect the role of the MDL judge and the progression and outcome of MDL litigation. Section B then analyzes the bellwether proposal in light of macro, structural criticisms of the MDL mechanism and its footing in the federal justice system.

### A. *Impact on MDL Litigation and the Role of the Transferee Judge*

As discussed *supra* Section I.B, the use of bellwether trials in MDL litigation has already been constrained by judicial decisions. Post-*Lexecon*, an MDL judge has four options for bellwether selection: (1) consent: requesting a *Lexecon* waiver from the parties, (2) remand: remanding the desired bellwether case and requesting a judge in the transferor jurisdiction take up the case swiftly and coordinate with the MDL process, (3) intercourt assignment: requesting to sit by designation in the original, transferor district and orchestrating the trial there, or (4) finding a bellwether within the limited number of cases where both personal jurisdiction and venue are satisfied.<sup>236</sup> With sitting in designation occurring rarely, remand contradicting a central aim of MDL centralization, and directly filed cases presenting fewer options, *Lexecon*'s bar on self-transfer already places significant reliance on party consent.<sup>237</sup> The FICALA/LCJ proposal would make consent a requirement and consequently that much more challenging to go forward with bellwether trials.

#### 1. *The MDL Judge: Still Powerful, but Constrained by Consent*

Mandatory bellwether consent, as proposed, would constrain MDL judges and impede their existing authority as federal district court judges. As described by the Advisory Committee, the proposal would strip transferee judges of their capacity to conduct trials for lawsuits properly filed in their jurisdiction.<sup>238</sup> Thus, under the proposal, the consolidation of claims in a judge's district for MDL purposes would constrain her power over her existing caseload as well as over cases where the plaintiff is domiciled or the injury occurred within the jurisdiction. In this regard, FICALA fails to live up to its intended goal of restricting MDL judges from conducting alleged "pseudo-trials" or selecting cases "hand-picked by plaintiffs' counsel."<sup>239</sup> The bellwether proposal neither provides guidelines for

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<sup>236</sup> See *supra* Section I.B.3.

<sup>237</sup> Fallon et al., *supra* note 30, at 2354.

<sup>238</sup> See *supra* Section II.B.2.

<sup>239</sup> H.R. REP. No. 115-25, at 35 (2017).

case selection nor institutes a representativeness requirement. It merely bars judges from trying properly filed cases because they relate to an MDL centralized in her district.<sup>240</sup>

From a bargaining standpoint, the ability to select a bellwether from those directly filed is a vital source of leverage for the MDL judge. Given their existing statutory constraints, MDL judges have been labeled (perhaps unfairly) “paper tigers” with “few powers and weak authority.”<sup>241</sup> But the judge’s ability to threaten to select a bellwether from the more limited pool of directly filed cases can push a recalcitrant defendant to waive venue and jurisdiction objections and faithfully engage in the bellwether selection process. However, in a universal consent scenario, as envisioned by LCJ and FICALA, this threat no longer exists. Defendants operate with no incentive, beyond their own desire for finality, to waive objections and open up a larger pool of claims to bellwether treatment. This, in essence, is the goal of the bellwether provision: to eliminate transferee judges’ ability to pressure the MDL parties into participating in good faith.<sup>242</sup> Pressure, though, is not inherently undue. In the MDL context, parties expect the overseeing judge to “take a strong role . . . [as] parties can’t be trusted”<sup>243</sup> and resources are finite.<sup>244</sup> By eliminating the MDL judge’s leverage in bellwether selection, the universal consent provision transfers power over the MDL timeline and case selection from the transferee judge to MDL defendants.

Such a procedural reform is principally about power<sup>245</sup>—power to control the narrative of justice, the amount of justice attained, and how justice is served. This rule would be a stark departure from the rest of U.S. litigation, which follows a basic plotline regardless of its complexity: plaintiff sues, plaintiff and defendant cannot agree on a settlement, plaintiff takes the case to trial. However, with a bellwether universal consent requirement, MDL litigation cannot follow this natural trajectory. Defendants control the process and the pace. These maneuvers are therefore more than your typical anti-litigation mea-

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<sup>240</sup> See ADVISORY COMM. ON CIVIL RULES, NOV. 2018 MEETING, *supra* note 107, at 156.

<sup>241</sup> Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 146 (2018).

<sup>242</sup> See U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 190, at 3 (discussing the “significant power” that transferee judges wield over the MDL parties).

<sup>243</sup> Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 378 (2014).

<sup>244</sup> See *id.* at 376 (noting that parties expect judges to “ensur[e] that the parties do not expend time and money toward low-value ends”).

<sup>245</sup> Bradt, *The Looming Battle*, *supra* note 32, at 90 (“[P]rocedure is about power, when it comes both to who writes the rules and what they say. And the fight over [the] MDL, both past and present, is a striking example of this battle for power.” (citing Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL EDUC. 513, 513 (1996))).

tures. As Professor J. Maria Glover has emphasized, they are *anti-court*, an employment of procedure that “cut[s] at the core of the judicial power to manage cases and preserve the rule of law.”<sup>246</sup>

While judicial power over bellwethers would be constrained by this provision, the proposal paradoxically does not bear on the judge’s imprint on the MDL proceedings more generally. MDL judges have employed their equitable powers to appoint plaintiffs’ counsel, adjust attorney’s fees, and approve or disprove private settlements.<sup>247</sup> The vision of the MDL judge as freewheeling and imperialist<sup>248</sup> often stems from their invocation of their equitable powers to insert themselves into private settlement. Where settlement occurs outside the courthouse, MDL judges have still inserted themselves into the settlement approval and administration processes.<sup>249</sup> The bellwether provision does nothing to disrupt this use of judicial power. While equitable powers may be invoked to govern the conduct of plaintiffs’ counsel and settlement arrangements, their utility in prescribing the conduct of defendants is suspect. MDL judges have limited, if any, power to control defendants. At present, beyond civil contempt, which is both extremely severe and inapplicable here,<sup>250</sup> and sanctions to compel discovery,<sup>251</sup> an MDL judge has little beyond persuasion and public sentiment to ensure defendants and defense counsel act in good faith to resolve mass disputes.

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<sup>246</sup> Glover, *Encroachments and Oppressions*, *supra* note 174, at 2118.

<sup>247</sup> Mueller, *supra* note 234, at 535–39.

<sup>248</sup> See *supra* notes 32–33 and accompanying text.

<sup>249</sup> Informally, this has been referred to as the “quasi-class action” model. Mueller, *supra* note 234, at 537. MDL judges, lacking explicit statutory authority to insert themselves in the matter, rely on their general equity authority to justify their involvement. See *id.* at 535–39 (discussing how judges exercise control over counsel, fees, and settlement). In the Vioxx MDL, Judge Fallon set the attorney fees and oversaw the settlement administration. Similarly, in the Zyprexa MDL, Judge Weinstein invoked his inherent powers, coining the term “quasi-class action,” to do the same in adjusting the attorney fees. *Id.* at 537. Finally, Judge Hellerstein, in the World Trade Center MDL cases, institutionalized the MDL judge’s authority to disprove and approve of the proposed private settlement. *Id.* at 537–39.

<sup>250</sup> 6A FED. PROCEDURAL FORMS § 16:3 (2020) (citing *Bradley v. Am. Household Inc.*, 378 F.3d 373, 378 (4th Cir. 2004)) (“Civil contempt . . . seeks only to coerce the defendant to do what a court had previously ordered him to do.”). Because civil contempt is a remedy for compelling a party to comply with a court order, *id.*, a defendant would need to be flouting a court order in order for an MDL judge to hold the party in contempt. However, a court order is inapplicable here as a party is under no obligation to engage in a bellwether trial where jurisdiction and venue are not proper. Civil contempt therefore cannot remedy MDL defendants’ bad-faith efforts to slow and stymie the litigation.

<sup>251</sup> See, e.g., Jeff Overley, *Allergan, Teva Sanctioned for Flouting Opioid MDL Discovery*, LAW360 (Oct. 14, 2020, 10:10 PM), <https://www.law360.com/articles/1319780/allergan-teva-sanctioned-for-flouting-opioid-mdl-discovery>.

In this way, universal bellwether consent may not alter the overarching image of the MDL judge, but would have a dramatic and significant impact on MDL power dynamics and control over the MDL process. Transferee judges may continue to influence settlement by utilizing their equitable powers, but control over the MDL timeline and the progression of litigation would sit squarely with defendants.

## 2. *Prolonged Pretrial Activity and Less Informed Settlements: MDL Litigation with a Bellwether Universal Consent Requirement*

In addition to thwarting the role of the MDL judge, the bellwether proposal would *substantively* impact MDL litigation. First, the proposal could prolong pretrial activity and exacerbate litigants' concerns that MDL discovery becomes a vacuous "black hole." Second, a bellwether universal consent requirement would result in less informed settlements and potentially improperly priced payouts.

Judge Fallon describes litigants' criticism with the drawn-out nature of MDL proceedings as a "'black hole' into which cases are transferred never to be heard from again."<sup>252</sup> This eternal waiting room results from extended discovery that covers the disparate and sprawling issues encompassed within the MDL. The first stage of discovery tends to cover broad issues and "generic evidence" that could "support[] the dismissal of all claims."<sup>253</sup> However, if this generic discovery fails to result in mass dismissal of claims, the judge begins more specific discovery related to the various categories of claimants and defendants. This is what becomes a black hole.<sup>254</sup> While this degree of MDL discovery is necessary to identify key categories and points of contention,<sup>255</sup> it can become protracted without the natural aim to avert or prepare for trial. That is where bellwethers can build momentum towards resolution. Beginning with bellwether-specific discovery and then the trial itself, bellwethers provide concrete data regarding damages awards and rapidly mature the litigation towards settlement.<sup>256</sup>

Thus, under a bellwether universal consent scheme, defendants' refusal to consent to a bellwether trial would prolong MDL discovery. MDL judges may continue to facilitate discovery and negotiations, but the provision would inhibit more rapid maturation of MDL litigation. Despite this, some critics have argued that bellwethers and the related

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<sup>252</sup> Fallon et al., *supra* note 30, at 2330.

<sup>253</sup> Dodge, *supra* note 243, at 377.

<sup>254</sup> *Id.* at 377–78.

<sup>255</sup> *See id.* at 378–79.

<sup>256</sup> *See supra* Section I.A.1.

specific discovery actually *perpetuate* the MDL “black hole.”<sup>257</sup> This argument, though, is premised on the assertion that remand, and not settlement promotion, should be the MDL’s primary goal.<sup>258</sup> Yet, judges are selected to oversee an MDL based on their ability to manage complex litigation and facilitate mass resolution<sup>259</sup>—not remand. MDLs seek to promote settlement.<sup>260</sup> A wholesale shift in MDL practice towards early remand after general discovery is unlikely and out of touch with the reality of mass litigation and the imperative to reach an aggregate settlement.<sup>261</sup>

In addition to potentially delaying resolution and extending discovery, the proposed bellwether provision could result in less informed settlement results. If defendants are able to avoid bellwether trials, the MDL settlement occurs “in a vacuum” and without “real-world evaluations . . . by [a single or] multiple juries.”<sup>262</sup> Moreover, parties may reach an ultimate “settlement skewed away from the parties’ substantive entitlements,”<sup>263</sup> the monetary value of their claims. Adjudication is meant to “enforce[] the substantive law by producing outcomes that match the parties’ substantive entitlements.”<sup>264</sup> Negotiations devoid of independent evaluations of the substantive law and “distorted by . . . informational asymmetry”<sup>265</sup> risk producing outcomes that do not match MDL claimants’ substantive entitlements. This is not solely an issue of plaintiffs not receiving damages awards that match their claims. Defendants may pay out claims without merit or pay more for the plaintiffs’ claims. Settlement, in this context, could “play[] into a frivolous plaintiff’s litigation strategy,”<sup>266</sup> negating FICALA’s goal of ridding the MDL of alleged meritless and frivolous claims.<sup>267</sup> Hypothetically, the cost of paying out these additional claims could exceed the expense of engaging in the bellwether process. While defendants weigh other considerations in consenting, or

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<sup>257</sup> Fleming & Kasischke, *supra* note 163, at 71–72, 84–85 (discussing how repetitive and prolonged bellwether litigation can complicate settlement, drive plaintiffs into bankruptcy, and even outlive the plaintiffs themselves).

<sup>258</sup> *See id.* at 86 (arguing that Congress intended for remand to be the ultimate goal of the MDL statute).

<sup>259</sup> *See* Dodge, *supra* note 243, at 376.

<sup>260</sup> *See* WHITNEY, *supra* note 47, at 4 (articulating the viewpoint of the federal judiciary).

<sup>261</sup> *See* Robert G. Bone, *Settlement and the “Good” Judge*, 38 REV. LITIG. 211, 233–35 (2019).

<sup>262</sup> Fallon et al., *supra* note 30, at 2325.

<sup>263</sup> Bone, *supra* note 261, at 223.

<sup>264</sup> *Id.* at 227–28.

<sup>265</sup> *Id.* at 223–24.

<sup>266</sup> *Id.* at 224.

<sup>267</sup> *See supra* note 182 and accompanying text.



not, to bellwether trials, the potential cost of settling frivolous claims or overpaying for weak claims could directly stem from a bellwether universal consent requirement.

Delays in the MDL and the risk of uninformed settlement are at odds with FICALA/LCJ's goals. These challenges could renew focus on parallel state court litigation. Whether that be claims filed by state Attorneys General under the *parens patriae* doctrine or individual claims that were not swept into federal court by CAFA's jurisdictional provisions, state court litigation could fill the MDL bellwether void. In the Vioxx MDL, settlement negotiations were informed by state court bellwethers in addition to those conducted as part of Judge Fallon's MDL.<sup>268</sup> In a universal consent scenario, MDL judges might look to state courts to conduct bellwethers on their behalf. However, relying on state courts risks defeating the MDL's aims of avoiding conflicting judgments on key issues and wasting judicial and litigant resources. With the vast majority of claims typically consolidated under the MDL, the federal district court is better situated to achieve an efficient and equitable resolution.<sup>269</sup> In addition, the MDL court can try bellwethers under various state law schemes and is not tied to the limited output of coordinating state courts. Yet, like Judge Polster's decision to remand certain cases forming part of the National Prescription Opiate Litigation MDL to their original federal court jurisdiction,<sup>270</sup> this may be a necessary alternative in a universal consent scenario.

### B. MDL Legitimacy and Bellwether Reform: Exacerbating the Legitimacy Crisis

Like other forms of procedure and aggregate litigation, the MDL faces challenges to its legitimacy and the potential for misuse. While bellwethers, as discussed *supra*, provide a legitimizing element and an aspect of the rule of law to an otherwise private and opaque process, as a whole, critics charge that MDL procedure improperly alters substantive law and litigants' rights.<sup>271</sup> Similarly, some argue that the MDL suffers from structural faults that impede justice and allow

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<sup>268</sup> See *supra* notes 65–70 and accompanying text.

<sup>269</sup> Given that CAFA has pushed the majority of aggregate litigation out of the state courts and into the federal system, the MDL is uniquely positioned to handle these cases. Furthermore, with state courts generally unable to consolidate cases arising from other states and under different state law regimes, efficient resolution relies on federal civil litigation. See Glover, *supra*, note 4, at 44; see also *supra* note 4 and accompanying text.

<sup>270</sup> See *supra* note 161 and accompanying text.

<sup>271</sup> See *supra* Introduction (articulating criticisms of the MDL process and its impact on substantive rights).

actors to game the system for their own advantage.<sup>272</sup> These concerns have been advanced by individuals representing every faction of the legal community: plaintiffs, defendants, the judiciary, and the academy.<sup>273</sup>

FICALA/LCJ's bellwether proposal fails to address or remedy these macro, legitimacy-oriented deficiencies. Instead, the provision would exacerbate the MDL's ongoing legitimacy crisis. Bellwether universal consent fails to instill procedural safeguards and would result in less transparency.

### 1. *The Proposal's Failure to Address Litigants' Concerns*

In the face of concerns by both plaintiffs and defendants that current MDL practice upends their rights and entitlements, the bellwether proposal provides no remedy.

On the plaintiff side, MDL criticism centers around a litigant's Seventh Amendment right to pursue their case in a federal civil jury trial.<sup>274</sup> Before transfer by the JPML, as in non-aggregate litigation generally, individual claimants are at the helm of their own lawsuit and able to direct the course of the litigation. In contrast, upon JPML transfer, MDL plaintiffs are at the mercy of the MDL judge and the JPML, unable to pursue their claims on an individual basis.<sup>275</sup> Given the rarity of remand, plaintiffs' claims are either dismissed during MDL pretrial activity or swept into a master settlement. FICALA/LCJ's bellwether proposal fails to remedy the MDL's potential incursions into plaintiffs' Seventh Amendment rights. Proponents may argue that the proposal makes remand more of a possibility, allowing plaintiffs to individually pursue their cases and have their day in court. However, as discussed *supra*, that argument is ill-conceived and based on a false premise regarding the MDL's purpose.<sup>276</sup>

The proposal's potential to prolong MDL discovery could further magnify plaintiffs' Seventh Amendment challenges. Plaintiffs may find themselves in this limbo for longer as negotiations and discovery persist without a bellwether to mature the MDL. Likewise, without the bellwether jury's determination of damages and pricing of the tort, plaintiffs' claims may not match their substantive entitlements.

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<sup>272</sup> See Noll, *supra* note 201, at 421–22 (discussing how judges and counsel can exploit the MDL structure for self-interested reasons, like establishing their own high-profile docket or practice).

<sup>273</sup> See *supra* Introduction.

<sup>274</sup> See *supra* notes 27–29 and accompanying text.

<sup>275</sup> Further exacerbating plaintiffs' concerns is the MDL's lack of structural protections for plaintiffs, such as the class action's requirement that class counsel and named plaintiffs adequately represent absent class members. FED. R. CIV. P. 23(a)(4).

<sup>276</sup> See *supra* note 27 and accompanying text.

Similarly, regarding defendants' challenges to MDL legitimacy, the bellwether proposal falls short in addressing the purported ills. Defendants charge that judges "fill the [MDL] rules vacuum by using *ad hoc* procedures including 'plaintiff fact sheets' and '*Lone Pine*' orders."<sup>277</sup> They further allege that this *ad hoc* approach creates, to their disadvantage, a "lack of clarity, uniformity and predictability that the FRCP are supposed to remedy."<sup>278</sup> The bellwether provision does not provide MDL judges with rules or guidelines. It simply eliminates one tool from their arsenal. Moreover, while bellwethers tend to follow standard trial procedure, their elimination from an MDL via a universal consent requirement could further move the litigation into *ad hoc* managerial procedure during prolonged, informal negotiations.

Defendants also condemn the MDL for transferee judges' outsized role and authority in managing the MDL.<sup>279</sup> According to one commentator, the MDL "creates the sort of 'kingly power' in trial judges that the U.S. Congress has historically found repugnant."<sup>280</sup> FICALA/LCJ's bellwether proposal transfers power away from transferee judges in one facet of MDL process. However, the portrayal of supposed "judicial kingmaking" does not stem from their role in the bellwether process, but from their decisions to insert themselves into private settlement agreements via the quasi-class action model or the invocation of broad equity powers.<sup>281</sup> As discussed *supra*, constraining MDL judges' power in conducting bellwethers does not negate their ability to control attorney's fees or approve settlements.<sup>282</sup> Unlike proposals for increased opportunity for appellate review, the provision provides no check on judicial power. Thus, here too, FICALA/LCJ's bellwether proposal is of limited efficacy in ameliorating concerns of MDL legitimacy.

## 2. *Governance Issues: Diminished Transparency and Greater Potential for Abuse by Repeat Players*

In addition to raising concerns about its effect on litigants' rights, the MDL's legitimacy is plagued by concerns over its potential for abuse and failure to prioritize the attainment of justice. Namely, members of the academy have criticized the MDL both for creating a class

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<sup>277</sup> LAWYERS FOR CIVIL JUSTICE, REQUEST FOR RULEMAKING TO THE ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 34, at 8.

<sup>278</sup> *Id.* at 1.

<sup>279</sup> See *supra* note 38 and accompanying text.

<sup>280</sup> Pollis, *supra* note 77, at 1645.

<sup>281</sup> See *supra* note 272 and accompanying text.

<sup>282</sup> See *supra* Section III.A.1.

of judicial elites and for lacking structural protections to ensure fairness throughout the MDL process.

Scholars such as Professors Elizabeth Chamblee Burch and Abbe R. Gluck argue that the MDL has created a class of repeat players, both attorneys and judges, more concerned with maintaining MDL appointments, prestige, and compensation than with seeking justice for their clients.<sup>283</sup> Professor Gluck writes about the “unusually collaborative”<sup>284</sup> relationships between both opposing counsel and with MDL judges that “raise[] concerns about adequacy and vigorousness of representation.”<sup>285</sup> However, the debate over the role and efficacy of MDL repeat players is hotly contested. Professors Andrew Bradt and Theodore D. Rave have countered, arguing that since certain corporations and their counsel are already repeat players in MDL litigation, repeat plaintiff-side firms are critical to evening the MDL playing field and protecting the interests of one-time plaintiffs.<sup>286</sup> Additionally, they argue that for both attorneys and judges, expertise matters. For example, repeat, experienced judges are needed both to advance the MDL litigation and to keep in check repeat-player attorneys on both sides.<sup>287</sup>

FICALA/LCJ’s bellwether proposal could influence both the likelihood of and the challenges presented by repeat players within the MDL. It is possible judges and attorneys could sour on their desire to partake in MDLs as a result of the consent requirement and new faces, especially among plaintiffs’ counsel, could emerge. Per the reasoning of critics of MDL repeat players, such as Burch and Gluck, this would benefit MDL legitimacy by mitigating the perception of elitism and backroom dealings. However, per Bradt and Rave’s reasoning, this would disadvantage plaintiffs and further skew the MDL in defendants’ favor. Novice plaintiffs’ attorneys and MDL judges would be forced to face off against corporate defendants and their lawyers with both MDL experience and little impetus to mature the litigation.

A bellwether universal consent requirement could also exacerbate the perception of opaque backroom dealings. Bellwether trials provide in-court, on-the-record, adversarial procedure backed by the full force of law. In-court, on-the-record proceedings offer transparency, via a transcript, and consequently the ability to hold counsel and the MDL judge accountable. An adversarial trial tempers the

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<sup>283</sup> See *supra* note 41 and accompanying text.

<sup>284</sup> Gluck, *supra* note 26, at 1700.

<sup>285</sup> *Id.* at 1701.

<sup>286</sup> See Bradt & Rave, *supra* note 37, at 120–21.

<sup>287</sup> See *id.* at 122–23.

“unusually collaborative”<sup>288</sup> relationship that troubles critics of MDL repeat players.

In contrast, the bellwether proposal could push the MDL farther into protracted negotiations that rely on informal, professional relationships across the legal world. Negotiations in mass litigation depend on coordination across a vast array of parties. Thus, relationships are crucial in facilitating resolution. With many of the same lawyers and judges leading MDL after MDL<sup>289</sup> and “scant checks for abuse or due process violations,”<sup>290</sup> a resolution born solely out of prolonged negotiations raises genuine questions of process and loyalty. In the absence of bellwether proceedings, the MDL would not only move farther away from substantive law, but could also become more reliant on elite networks predicated on privilege and access to reach resolution.<sup>291</sup> Additionally, without the informational output of bellwether trials, how parties arrive at an ultimate global settlement becomes more opaque, raising the specter of impropriety and less-than-vigorous representation.

Finally, regarding the need for structural protections within the MDL, the bellwether proposal again falls short. Professor David Noll has advocated for MDL guarantees of “transparency, participation, and ex post review”<sup>292</sup> that borrow from administrative law.<sup>293</sup> Similarly, Professor Andrew S. Pollis has argued for “immediate appellate review in MDLs from interlocutory orders that raise important issues of unsettled law . . . and that are potentially dispositive of a significant number of the consolidated cases.”<sup>294</sup> As the Advisory Committee continues to investigate the need for MDL-specific rules, structural protections are part of their ongoing analysis. Specifically, both increased opportunity for interlocutory appellate review and the court’s role in promoting and approving settlement remain on the

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<sup>288</sup> Gluck, *supra* note 26, at 1700.

<sup>289</sup> See Burch & Williams, *supra* note 36, at 1445 (mapping the social networks of repeat players that populate MDL litigation).

<sup>290</sup> Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 424, 426–27 (2011) (using the Zyprexa and Vioxx MDLs to illustrate how the MDL system “sounds like a class action, but evades all due process requirements”).

<sup>291</sup> See Burch & Williams, *supra* note 36, at 1517–21 (asserting that a “well-connected” network of “repeat” attorneys use their influence to settle MDLs, often to their own benefit); see also Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 554 (2013) (arguing that “self-interested” actors can exploit the MDL structure to “resolve claims in [their own] best interests rather than the interests of injured claimants”).

<sup>292</sup> Noll, *supra* note 201, at 468–69.

<sup>293</sup> See *id.* at 454–66.

<sup>294</sup> Pollis, *supra* note 77, at 1648.

MDL subcommittee's agenda.<sup>295</sup> However, as discussed *supra*, a bellwether universal consent requirement does not create structural safeguards to ensure fairness and transparency in the MDL process. Like its ineffectiveness in remedying alleged ad hockery, the FICALA/LCJ proposal fails to resolve structural deficiencies in the MDL and even risks adding to the MDL's ills.

### CONCLUSION

With the ongoing debate over MDL reform, legislative and rules-based proposals demand examination and an assessment of whether their goals match the likely implications of their enactment. As demonstrated by the Advisory Committee's recent decision to forgo further study of bellwether reform,<sup>296</sup> a universal bellwether consent requirement may not hold the promise its proponents avow.

The MDL bellwether trial serves a critical function in maturing litigation, providing a public forum for mass disputes that bear on the national polity, and countering some of the natural imbalance of the MDL playing field. Moreover, the MDL bellwether is not without its constraints. Prudential precedents such as *Cimino* and *Chevron* in the Fifth Circuit limit the bellwether to its non-binding role of informing settlement and require the claims selected to be representative of the entire claimant pool. Likewise, *Lexecon*, the lone recent MDL Supreme Court case, bars MDL judges from self-transferring cases, limiting the number of potential bellwethers that can occur without party consent. Lastly, the economics of a sweetheart settlement may thwart a bellwether trial as parties selectively settle to avoid an impending trial.

Despite proponents' assertions that a bellwether universal consent requirement is necessary to ensure fairness and streamline the MDL process,<sup>297</sup> its likely impact would be almost the opposite: prolonged pretrial discovery, less transparency, uninformed settlements, and an MDL further skewed in defendants' favor.<sup>298</sup>

Bellwether trials stand as a unique fixture of aggregate litigation. However, more broadly, they raise critical questions about procedure's influence over judicial outcomes and the advantages of certain litigants. Like the judiciary and litigation more generally, the MDL too often fills the void left by gridlocked and non-functioning legislatures. Thus, a change in federal civil procedure has the potential to

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<sup>295</sup> See notes 244–46 and accompanying text.

<sup>296</sup> See *supra* Section II.B.2.

<sup>297</sup> See *supra* Section II.A.2.

<sup>298</sup> See *supra* Part III.

impact cases and controversies that are national in scope and reach upwards of billions of dollars in recovery.

Procedure is power.<sup>299</sup> The opportunity for advocates to push their proposals in two distinct fora, the U.S. Congress and the Advisory Committee on Civil Rules, poses a singular challenge to the independence of the federal judiciary from outside interests. This double bite at the procedural apple is not exclusive to the Civil Rules and has emerged in other federal rules settings.<sup>300</sup> While Congress and the Advisory Committee are both legally permissible venues for judicial reform and can play an effective role in streamlining the federal docket, ensuring justice, and modernizing the courts, active lobbying of both entities should give us pause. This may be especially concerning given the politicization of federal court management.<sup>301</sup> This Note does not take aim at why bellwether trials have become a political issue and a focus of the corporate defense bar and Republican reform efforts. However, the politicization of procedure in this context and others reinforces the “procedure as power” narrative.

This Note interrogates these proposals by analyzing their implications for the MDL device and the federal judiciary. The FICALA/LCJ bellwether proposal targets a feature of the MDL that functions effectively and instills an aspect of the rule of law and procedural rigor into an otherwise opaque process. While current MDL procedure has left advocates and academics with much to write about and scrutinize, solutions in name only may only exacerbate present injustices and structural deficiencies.

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<sup>299</sup> See *supra* note 245 and accompanying text.

<sup>300</sup> See, e.g., Michael Teter, *Acts of Emotion: Analyzing Congressional Involvement in the Federal Rules of Evidence*, 58 CATH. U. L. REV. 153, 154–55 (2008) (discussing how groups have pushed to change the Federal Rules of Evidence through both Congress and the Advisory Committee on the Rules of Evidence).

<sup>301</sup> See *supra* note 155 and accompanying text (discussing the changing political winds surrounding efforts to overturn *Lexecon*).