

WHAT DO MDL LEADERS DO? EVIDENCE FROM LEADERSHIP APPOINTMENT ORDERS

by
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In federal multidistrict litigation (MDL), district courts regularly appoint attorneys to manage the litigation of cases that are transferred to a single district court for coordinated pretrial proceedings. Orders appointing MDL leaders serve as a constitution or charter for a particular MDL, reallocating functions that otherwise would be performed by individually retained plaintiffs' attorneys to court-appointed leaders. As such, they perform a crucial role in the "MDL model" of aggregate litigation and settlement. Yet in spite of their importance, knowledge of these orders is mostly folk wisdom.

This Article presents preliminary findings from a study of leadership appointment orders in all MDLs pending in the federal courts in June 2019. The principal finding is that, while leadership appointment orders are a standard feature of contemporary MDL, they vary significantly in how they structure plaintiffs' leadership, the functions they assign to court-appointed leaders, and how orders conceive of the relationships among court-appointed leaders, non-lead attorneys, and MDL plaintiffs. The Article's findings about the "diverse uniformity" of MDL leadership appointments shed light on debates over the nature of contemporary MDL, the duties court-appointed leaders owe to non-client plaintiffs, and the costs and benefits of MDL's dependence on decentralized, ad hoc procedure-making.

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INTRODUCTION

In 2002, a General Motors (GM) engineer decided to use an ignition switch in certain GM vehicles that “result[ed] in moving stalls on the highway as well as loss of power on rough terrain a driver might confront moments before a crash.”¹ Over the next decade, the defective switch caused scores of fatalities, culminating in a botched 2014 recall of affected vehicles.² As fatalities mounted, some 3,000 plaintiffs filed suit against GM, seeking compensation for personal injuries and economic loss caused by the defective switch.³ The Judicial Panel on Multidistrict Litigation (JPML) transferred all of the litigation pending in the federal courts to the U.S. District Court for the Southern District of New York for coordinated pre-trial management.⁴ With litigation centralized in New York, the district court oversaw a large discovery effort and scheduled six bellwether trials to inform settlement negotiations.⁵

¹ ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1 (2014).

² See *id.* at 214–15.

³ See *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-mc-02543-JMF, 2016 WL 1441804, at *1 (S.D.N.Y. Apr. 12, 2016).

⁴ Order No. 1 at 1, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, ECF No. 3.

⁵ *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *3. A “bellwether” trial does not aim “to resolve the thousands of related cases pending in either MDL in one

As the district court later observed, “[a]ll appeared to be going smoothly for the MDL” until January 2016, when the plaintiff in the first bellwether trial voluntarily dismissed his case after it was revealed that he may have committed perjury.⁶ The next business day, a handful of plaintiffs represented by attorney Lance Cooper filed an explosive motion seeking to remove Robert C. Hilliard, the court-appointed lead plaintiffs’ counsel for personal injury and wrongful death cases, from his leadership position.⁷ According to Cooper’s motion, Hilliard had breached fiduciary duties that he owed to all plaintiffs in the multidistrict litigation (MDL) when he asked the court to schedule one of his own cases as the first bellwether and negotiated an inventory settlement with GM that covered most of his cases.⁸

The district court ultimately denied the motion, but the controversy presented a microcosm of larger debates over the role, functions, and duties of court-appointed leaders in federal MDL. In an affidavit supporting Cooper’s motion, Professor Charles Silver averred that Hilliard had a fiduciary duty to “operate free of any incentive” to manage common benefit work in a way that would disserve any of the 3,000 plaintiffs gathered in the MDL.⁹ Opposing the motion, Professor Geoffrey Miller—Silver’s co-author on a 2010 article titled “The Quasi-Class Action Method of Managing Multidistrict Litigations”¹⁰—denied that court-appointed leaders were subject to any such duty.¹¹

The district court did not agree with either professor. Surveying orders it had entered organizing plaintiffs’ counsel, the court concluded that Hilliard owed significant duties to wrongful death plaintiffs represented by other counsel, but those duties were “not as strong as the duties that lead counsel owes to absentee members of a class action.”¹² The problem with Cooper’s motion was not that Hilliard owed plaintiffs no duties, the court concluded, but that Cooper had not proved Hilliard breached them. In an O. Henry twist, the court removed *Cooper* from his position

‘representative’ proceeding, but instead to provide meaningful information and experience to everyone involved in the litigations” that informs future litigation and settlement. Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332 (2008).

⁶ *Id.* at *1.

⁷ See Pls.’ Mot. to Remove the Co-Leads and Reconsider the Bellwether Trial Schedule at 20, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804.

⁸ According to Cooper, the settlement covered “well over 1,000” of Hilliard’s clients. See Pls.’ Mot. to Reconsider the Order Approving the Establishment of the 2015 New GM Ignition Switch Qualified Settlement Fund at 4, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, ECF No. 2182.

⁹ Declaration of Charles Silver at 13, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, ECF No. 2243-2.

¹⁰ Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multidistrict Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

¹¹ Declaration of Geoffrey Parsons Miller at 4, *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, ECF No. 2200-1.

¹² *In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *7.

as member of the Plaintiffs' Executive Committee, because facts revealed in his motion showed that *he* had breached duties created by the court's leadership appointment orders.¹³

As the *GM* *contretemps* illustrates, orders organizing plaintiffs' counsel and charging court-appointed leaders with performing "common benefit" work play a central role in modern MDL. Yet in spite of their importance, knowledge of these leadership appointment orders is incomplete. No studies systematically examine the prevalence of orders appointing lead attorneys in MDL, the functions they are charged with performing, or the way that appointment orders conceive of the relationship among court-appointed leaders, non-lead counsel, and MDL plaintiffs.

In an effort to shed light on these matters, this Article presents preliminary findings from a study of leadership appointment orders entered in 201 of the 202 MDLs that were pending in the federal courts in June 2019. My principal finding is that appointment orders are characterized by what might be called "diverse uniformity." Appointing leaders is extremely common in contemporary MDL, to the point that it should be considered a standard feature of the "MDL model" of aggregate litigation and settlement.¹⁴ Yet, appointment orders differ on axes including the structure (or lack thereof) for plaintiffs' leadership, the tasks that leaders are charged with performing, and the extent to which they limit non-lead attorneys' authority to practice in the transferee court.¹⁵ I find that courts never address the legal relationship between leaders and MDL plaintiffs that is created by the appointment of leadership attorneys. Orders that define leaders' duties to non-client plaintiffs are rare.

These findings shed light on debates over the nature of contemporary MDL, particularly the extent to which MDL presents the same risks and regulatory problems as class action litigation. They further suggest that a lead attorney's duties to non-client plaintiffs cannot be considered in isolation from the order or orders that appoint the attorney to a leadership position and charge the attorney with performing common benefit work. Those orders are the primary source of duties that leaders owe to non-client plaintiffs. The diversity of organizational structures and functions assigned to leaders reflected in the sample implies that leaders' duties change from

¹³ See *id.* at *13 (finding that Cooper "by his own admissions" had failed to fulfill "the duties set forth in Order No. 13, including assisting Lead Counsel with pretrial work and working to conduct the MDL on behalf of all plaintiffs").

¹⁴ See *infra* notes 55–57 and accompanying text. For the idea that MDL represents a distinct model of aggregate litigation, see Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2206 (2008); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass-Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 777 (2010). But see Alexandra D. Lahav, *Multidistrict Litigation and Common Law Procedure*, 24 LEWIS & CLARK L. REV. 531, 532 (2020) (questioning MDL's distinctiveness).

¹⁵ See *infra* notes 67–87 and accompanying text.

MDL to MDL, as they exercise greater or lesser control over actions that belong to non-client plaintiffs. Finally, my findings highlight areas where leadership appointments would benefit from greater standardization—and areas where attempts to standardize leadership appointments would be a mistake. In doing so, my findings shed light on the costs and benefits of MDL’s dependence on bottom-up procedure-making that takes place in the context of specific litigations.

The Article is organized in three parts. In Part I, I describe the debates over MDL leaders and their role in contemporary MDL that motivate the study. In Part II, I describe the study’s data and methodology and present preliminary findings on the characteristics of leadership appointment orders in contemporary MDL. Finally, in Part III, I discuss my findings’ implications for debates over the nature of MDL, the role of court-appointed leaders, and MDL’s procedural ad hocery.

I. THE CONTESTED ROLE OF MDL LEADERS

A. *The Statutory Framework*

Over the past two decades, “MDL has become the preeminent forum for working out solutions to the most intractable problems in the federal courts.”¹⁶ MDL proceeds under Section 1407 of the Judicial Code,¹⁷ which was created by the Multidistrict District Litigation Act of 1968.¹⁸ Section 1407 establishes the JPML, a “panel” of seven circuit and district judges designated from time to time by the Chief Justice of the United States.¹⁹ On motion of the panel or a party, the panel may transfer “civil actions involving one or more common questions of fact” to a single district court “for coordinated or consolidated pretrial proceedings.”²⁰

The court that actions are transferred to—known as the “transferee” court—“inherits the entire pretrial jurisdiction that the transferor court could have exercised had the case not been transferred.”²¹ “Thus, the transferee judge can rule on pretrial motions, manage discovery, appoint masters, hold settlement conferences, enter trial orders, and generally do everything that a district judge does during pretrial.”²² In

¹⁶ David L. Noll, *MDL as Public Administration*, 118 MICH. L. REV. 403, 405 (2019).

¹⁷ 28 U.S.C. § 1407 (2012).

¹⁸ Multidistrict Litigation Act of 1968, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified as amended at 28 U.S.C. § 1407).

¹⁹ 28 U.S.C. § 1407(d).

²⁰ *Id.* § 1407(a).

²¹ 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3866 (4th ed. 2013).

²² Noll, *supra* note 16, at 414.

itself, transfer under Section 1407 does not affect the “separate identities” of transferred actions.²³ However, the transferee court may entertain motions for class certification that, if granted, authorize “[o]ne or more members of a class” to “sue or be sued as representative parties on behalf of all members.”²⁴ Section 1407 provides that each transferred action “shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”²⁵ But consistent with the general decline in civil jury trials since the 1960s,²⁶ most MDL’d actions are resolved before remand through settlement, voluntary dismissal, or action of the transferee court.²⁷

Thus, while Section 1407 only authorizes transfers for pre-trial proceedings,²⁸ transfer often leads to resolution of the underlying controversy. In the words of one judge with experience on the JPML: “When we grant an MDL . . . We are asking [transferee judges] to bring their experience to bear and figure out what remedy and procedure to use.”²⁹

B. *The Role of Court-Appointed Leaders*

Because an MDL may collect hundreds or thousands of parties, the system’s ability to resolve complex litigation depends on litigation being coordinated by one or more attorneys.³⁰ In theory, attorneys might organize themselves and memorialize their arrangements by contract.³¹ As described below, however, it is more common for leadership appointments to be memorialized in court orders that designate particular attorneys as leaders and charge them with performing work on behalf of parties whose actions were transferred to the MDL. In the prototypical mega-MDL, the transferee court appoints one or more attorneys as lead plaintiffs’ counsel and a plaintiffs’ steering committee or plaintiffs’ executive committee to serve as a board

²³ *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 904 (2015).

²⁴ FED R. CIV. P. 23(a).

²⁵ 28 U.S.C. § 1407(a).

²⁶ See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

²⁷ See Edward F. Sherman, *When Remand Is Appropriate in Multidistrict Litigation*, 75 LA. L. REV. 455, 466 (2014).

²⁸ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

²⁹ Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation’s Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1693 (2017).

³⁰ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004) (“Traditional procedures in which all papers and documents are served on all attorneys, and each attorney files motions, presents arguments, and examines witnesses, may waste time and money, confuse and misdirect the litigation, and burden the court unnecessarily. Instituting special procedures for coordination of counsel early in the litigation will help to avoid these problems.”).

³¹ See Paul D. Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1, 1–3 (1982).

of directors for the litigation.³²

Like other features of MDL practice, leadership appointments have origins in pre-MDL complex litigation.³³ In 1958, the Second Circuit in *MacAlister v. Guterma* approved a district court's appointment of a "general counsel" to manage a series of shareholder derivative actions filed in the Southern District of New York.³⁴ The court of appeals reasoned that when many related actions are filed in the same district court, an order consolidating the cases under Federal Rule of Civil Procedure 42 and appointing a general counsel may be "the only effective means of channeling the efforts of counsel along constructive lines."³⁵

In the leading decision on appointment of lead attorneys in MDL, *In re Air Crash Disaster at the Florida Everglades*, the Fifth Circuit expanded on *MacAlister*.³⁶ On appeal from a district court order that required non-lead attorneys to pay "a fee of 8% of the settlement obtained by each plaintiff who had retained counsel not a member of the Plaintiffs' Committee,"³⁷ the court of appeals held that when a district court appoints lead counsel, it may require non-lead attorneys to contribute a percentage of attorneys' fees from settlements or judgments to compensate leaders for common benefit work.³⁸ Neither Section 1407 nor the Federal Rules of Civil Procedure expressly recognize courts' authority to reallocate attorneys' fees outside of the class-action context. But the court of appeals reasoned that the practice was authorized by Rule 42 and the equitable common fund doctrine,³⁹ and that Section 1407 impliedly authorized the development of procedural common law necessary to the transferee court's management of consolidated litigation.⁴⁰

³² See Noll, *supra* note 16, at 415.

³³ The earliest case I have located where a federal district court appointed lead counsel to coordinate the litigation of related cases is a 1946 shareholder derivative action against Twentieth Century Fox. As described in *Silverstein v. Clarkson*, 194 Misc. 1046, 1048 (N.Y. Sup. Ct. 1949), the district court and a judge of the New York Supreme Court appointed a "general counsel" to coordinate the litigation of 15 actions filed in the Southern District of New York and Supreme Court, New York County.

³⁴ *MacAlister v. Guterma*, 263 F.2d 65, 67–68 (2d Cir. 1958).

³⁵ *Id.* at 68.

³⁶ *In re Air Crash Disaster*, 549 F.2d 1006, 1014 (5th Cir. 1977).

³⁷ *Id.* at 1010.

³⁸ *Id.* at 1016–17.

³⁹ See *id.* at 1014 (reasoning that "Rule 42 and its policy against waste of judicial resources can take precedence over individual counsel's desires that litigation follow its normal and full-blown course"); *id.* at 1017 (reasoning that the district court's power to order compensation for common benefit work was "reinforced by the body of law concerning the inherent equitable power of a trial court to allow counsel fees and litigation expenses out of the proceeds of a fund that has been created, increased or protected by successful litigation").

⁴⁰ See *id.* at 1019 (reasoning that it would have been "demeaning to the authority of the [transferee] court, to remit the Committee to appearing all over the country in each of the numerous probate and like courts under whose authority administration of settlement monies

Today, the literature on complex litigation takes for granted that courts will organize the attorneys in large MDLs and appoint attorneys to manage litigation of transferred plaintiffs' cases.⁴¹ But this is not to say that leaders' roles are uncontroversial.

As *GM* illustrates, one source of controversy involves the duties that leaders owe to non-lead attorneys and non-client plaintiffs for whom they perform common benefit work.⁴² Another, closely related, point of contention involves the division of labor between court-appointed leaders and non-lead attorneys. In litigation over Bayer's birth control pill Yaz, plaintiffs whose actions had been dismissed for failure to comply with a case management order brought a malpractice action against four members of the court-appointed Plaintiffs' Steering Committee (PSC), arguing that the attorneys breached professional obligations by failing to respond to Bayer's motions to dismiss the individual plaintiffs' actions.⁴³ Dismissing the malpractice action, the district court reasoned that neither its orders appointing attorneys to the PSC nor its case management order requiring plaintiffs to comply with discovery obligations required PSC members to act on behalf of individual plaintiffs. While the orders entered by the court charged lead counsel with "coordinating general pretrial discovery and related tasks pertinent to all *Yaz* filings," the orders did not "supersede the authority or importance of each plaintiff's individually-retained counsel when it came to specific matters unique to each case."⁴⁴ Responding to Bayer's motions to dismiss was the responsibility of individually retained plaintiffs' attorneys, who appear to have checked out of the litigation after the cases they filed were transferred to the MDL.

would be handled, to present prayers for compensation").

⁴¹ See, e.g., 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, 75 (2019) ("Once [§ 1407] centralization occurs, the judge appoints a 'steering committee' of lawyers to manage the litigation on the plaintiffs' side."); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459 (2017) ("To streamline and organize cases, transferee judges appoint a host of what we collectively term 'lead lawyers': lead counsel, who head the litigation; steering and executive committees that make key decisions concerning litigation strategy and settlement; liaison counsel, who disseminates information to other attorneys, calls meetings, and coordinates with counsel in related state (and sometimes bankruptcy) actions; and occasionally separate committee chairs such as discovery and trial committees."); Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 321 (1996) ("[T]he practice in aggregated torts is for a judge to appoint a PSC of five to twenty lawyers who, in essence, become an ad hoc law firm created to litigate a particular case.").

⁴² *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-mc-02543-JMF, 2016 WL 1441804, at *7 (S.D.N.Y. Apr. 12, 2016).

⁴³ *Casey v. Denton*, No. 3:17-cv-00521, 2018 WL 4205153, at *2-3 (S.D. Ill. Sept. 4, 2018).

⁴⁴ *Id.* at *5.

Running through these doctrinal controversies are larger debates over contemporary MDL. Is the MDL model of aggregate litigation and settlement materially different than class action litigation in its structure and the regulatory and ethical problems it presents? Are MDL leaders merely class counsel by another name? And are the evolving, case-specific procedures that characterize MDL a reasonable way of managing a system through which billions of dollars of settlements and attorneys' fees pass each year, or is MDL's ad hoc procedure in irreconcilable tension with rule of law values?

Leadership appointment orders are relevant to these debates, but they remain understudied. Although there has been an outpouring of historical,⁴⁵ empirical,⁴⁶ and theoretical⁴⁷ scholarship on MDL in recent years, scholars tend to take for granted that lead attorneys will be appointed when cases are transferred under Section 1407 for pre-trial proceedings, that leaders exercise significant discretion over the way that transferred actions are litigated, and that the role of court-appointed leaders does not vary from one MDL to another.⁴⁸ The findings in the following Part suggest that there is some truth to that folk wisdom, but that it also obscures a

⁴⁵ E.g., Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) [hereinafter Bradt, "A Radical Proposal"]; Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711 (2017).

⁴⁶ E.g., Burch & Williams, *supra* note 41, at 1450 (examining attorneys who are selected for leadership positions, using a dataset of lead plaintiff and defense lawyers in 73 products liability and sales practices multidistrict litigations that were pending as of May 14, 2013); Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1716 (2019) (examining parties' preferences regarding transfer under Section 1407 and the JPML's transfer decisions based on MDLs filed between 2012 and 2016); Gluck, *supra* note 29, at 1675 (describing trends in MDL practice and procedure based on "lengthy and confidential oral interviews of twenty judges (fifteen federal, five state), each with significant experience in MDL litigation"); Emery G. Lee III et al., *Multidistrict Centralization: An Empirical Examination*, 12 J. EMPIRICAL LEGAL STUD. 211, 212 (2015) (finding that the JPML became more likely to order centralization over time based on an analysis for motions from the creation of the JPML to August 2013); Roger Michalski, *MDL Immunity: Lessons from the National Prescription Opiate Litigation*, 69 AM. U. L. REV. 175, 190, 218 (2019) (describing local communities' participation in the national prescription opioid litigation); D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2178 (2017) (cataloging provisions that non-class aggregate settlements use to provide closure to settling defendants); Margaret S. Williams, *The Effect of Multidistrict Litigation on the Federal Judiciary over the Past 50 Years*, 53 GA. L. REV. 1245, 1246 (2019) (surveying trends in JPML transfer decisions based on the first 50 years of decisions by the Panel).

⁴⁷ E.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259 (2017); Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019); Noll, *supra* note 16, at 40.

⁴⁸ *But see* Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. (forthcoming 2020) (manuscript at 36) (arguing that, because of its diversity, MDL is not a coherent category for rulemaking purposes).

reality that in many ways is more complex.

II. EVIDENCE FROM LEADERSHIP APPOINTMENT ORDERS

How do courts organize attorneys in the cases consolidated before them under Section 1407 and what do their choices teach about the role of MDL leaders? To gain traction on those questions, I compiled a database of leadership appointment orders entered in pending MDLs, coded the orders for 18 high-level variables, and analyzed the underlying orders where descriptive statistics revealed interesting or unusual patterns.

In this Part, I present preliminary findings from this analysis.⁴⁹ I find that leadership appointments are common, to the point that appointment orders should be considered a standard feature of contemporary MDL (with the possible exception of patent cases). But if the appointment of attorneys who coordinate litigation on behalf of MDL plaintiffs is common, there is enormous variation in how leaders are organized, the functions they perform, and the way that appointment orders approach the relationships among leaders and non-client MDL plaintiffs. Initial appointment orders are generally silent about the financial consequences of leadership appointments. And defense-side leadership appointments are rare.

Below, I first describe the sample that these preliminary findings are based upon and provide summary statistics for the sample. In later sections, I present findings on the prevalence of leadership appointments, appointment orders' choices about the organization of litigation, the financial and managerial aspects of leadership appointments, and other matters.

A. *The Sample*

The sample for the findings reported in this Article is a database of leadership appointment orders entered in MDLs that were pending in the federal courts as of June 18, 2019—the date of the JPML's most recent list of pending MDL when I began collecting data.⁵⁰ I focus on *pending* MDLs because my primary interest in this Article is courts' appointment practices in contemporary MDL.

The database of appointment orders was compiled through a manual review of

⁴⁹ The study described in this Article is part of a larger empirical and theoretical analysis of MDL leaders that I am undertaking with Professor Adam Zimmerman. In the larger study, we plan to expand the sample to account for all orders organizing counsel, collect orders allocating attorneys' fees, and examine trends in appointment order practice over time.

⁵⁰ See *Pending MDLs*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG., <https://www.jpml.uscourts.gov/pending-mdls-0> (last visited Mar. 10, 2020). A permanent archive of the June 18, 2019 report is available at *MDL Statistics Report - Docket Summary Listing*, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. (June 18, 2019), https://web.archive.org/web/20190928201540/https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_MDL_Number-June-18-2019.pdf (last visited Mar. 10, 2020).

MDL dockets. After I downloaded the list of pending MDLs from the JPML, a research assistant or I visited the master docket for each MDL using Bloomberg Law's interface to the federal courts' CM/ECF system.⁵¹ We attempted to identify whether the court had entered an order appointing leadership attorneys for plaintiffs and defendants whose actions had been transferred to the MDL. Appointment orders were often labelled with terms such as "appointing," "lead counsel," or "organizational structure," which facilitated keyword searches of MDL dockets. But orders in a nontrivial number of MDLs were docketed with generic titles like "Pretrial Order No. 4,"⁵² which necessitated reading docketed orders one-by-one to determine if the court had appointed lead attorneys.

We identified the *first* appointment order entered by the court, and I coded the MDL on the basis of that order, with two exceptions. First, if an order expressly provided that it was appointing leaders on a temporary basis—for example, to organize a meeting in advance of an initial case management conference—we ignored the order. Second, when an appointment order *expressly* referred to other appointment orders—for example, if the order provided that defense leadership would be appointed by separate order—we retrieved the referenced order or orders and coded the MDL on the basis of all of the orders. Thus, the unit of analysis for the study is a single MDL. With the exceptions noted above, each MDL corresponds to a single appointment order.

I analyzed MDLs based on the initial appointment order to ensure that they were coded on the basis of consistent, objective criteria. This approach means that this Article cannot claim to describe leadership appointments throughout the entire MDL lifecycle. To the extent that initial appointments persist through the litigation, however, this Article provides a complete picture of MDL leadership appointments.

Following the above process, we reviewed docket sheets for 201 of the 202 MDLs that appeared on the JPML's June 2019 list of pending MDLs.⁵³ Having identified pending MDLs, reviewed their dockets, and identified the initial appointment order, if any, that courts entered in them, I coded each MDL for 18 high-level variables. These variables include the presence of a leadership appointment order; whether the order appoints lead plaintiffs' counsel; whether the order establishes a plaintiffs' leadership structure, such as with a PSC; whether the court appointed defense leaders; and whether the order imposes limits on non-lead attorneys' ability

⁵¹ We visited dockets between June and August 2019. We made use of Bloomberg Law's CM/ECF interface instead of the CM/ECF systems maintained by individual district courts because Rutgers' subscription to Bloomberg Law provides unlimited access to CM/ECF dockets.

⁵² See Pretrial Order No. 4 Pl. Leadership Structure at 1, *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885-MCR-GRJ (N.D. Fla. Apr. 3, 2019), ECF No. 76.

⁵³ A single MDL, *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, No. 1:00-cv-01898-VSB (S.D.N.Y. Mar. 10, 2000), was excluded from the study because filings were not available via Bloomberg's CM/ECF interface.

to practice in the transferee court. Each of the variables in the current study was coded as a binary.

Table 1 below presents summary statistics for the sample. Where descriptive statistics revealed interesting or unusual patterns, I reviewed the underlying appointment orders by hand to better understand the patterns revealed in the descriptive statistics.

Table 1: Summary Statistics

	Yes	No	Percentage Yes
Appointment order found	174	27	86.57%
Appointment order contested	76	125	37.81%
Order appoints lead plaintiffs' counsel	157	44	78.11%
Order specifies tasks to be performed by lead plaintiffs' counsel	109	92	54.23%
Order specifies lead plaintiffs' counsel duties to plaintiffs or non-lead attorneys	9	192	4.48%
Order creates plaintiffs' leadership structure	116	85	57.71%
Order specifies authority of plaintiffs' structure	81	120	40.30%
Order specifies duties that members of plaintiffs' leadership structure hold to plaintiffs	7	194	3.48%
Order appoints plaintiffs' liaison counsel	93	108	46.27%
Order appoints lead defense counsel	28	173	13.93%
Order creates defense leadership structure	5	196	2.49%
Order appoints defense liaison counsel	24	177	11.94%
Order cites or quotes Fed. R. Civ. P. 23	49	152	24.38%
Order cites or quotes Manual for Complex Litigation	31	170	15.42%
Order limits non-lead attorneys' authority to practice in transferee court	44	157	21.89%
Order addresses court-appointed leaders' obligation to fund litigation	8	193	3.98%
Order addresses compensation of court-appointed leaders	16	185	7.96%
Order imposes recordkeeping requirements on court-appointed leaders	47	154	23.38%

B. Prevalence of Plaintiff-Side Leadership Appointments

The literature on complex litigation portrays the appointment of plaintiff-side lead attorneys as a standard feature of contemporary MDL and assumes that, once appointed, court-appointed leaders will exercise significant discretion over the way transferred actions are litigated and settled.⁵⁴ The assumption that MDL is a game played by leadership attorneys lies at the heart of critiques that analogize MDL to class action litigation and posit that the same agency problems arise in both forms of litigation.⁵⁵ Some commentators, however, question the extent to which court-appointed leaders dominate MDL practice.⁵⁶

The data in my sample are consistent with the conventional wisdom that court-appointed leaders are central to MDL as it is now practiced. Figure 1 illustrates the prevalence of different types of leadership appointments in the sample. Courts entered an order appointing lead plaintiffs' counsel in 78.11% of MDLs (n=157).⁵⁷ In 57.71% of the sample (n=116), an appointment order creates a plaintiffs' leadership structure such as a PSC or plaintiffs' executive committee.⁵⁸ In total, 83.58% of MDLs in the sample (n=168) involve a lead counsel appointment or the creation of a plaintiffs' leadership structure. These data permit me to reject the null hypothesis that the average MDL proceeds *without* the court appointing plaintiff-side leaders with a high level of confidence.⁵⁹

In the literature, commentators sometimes assert that leadership appointments are the handiwork of an old boy's network in which leadership positions are allocated based on reputation, personal relationships, and other factors that are not directly relevant to an attorney's ability to perform common benefit work.⁶⁰ On this view, attorneys informally negotiate who will lead a litigation before presenting applications for leadership positions to the transferee court.⁶¹ When the court appoints

⁵⁴ See *supra* note 39 and accompanying text.

⁵⁵ See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 74 (2017).

⁵⁶ Clopton, *supra* note 48 (manuscript at 19) (observing that some MDLs are "simply a collection of individual cases, many of which do not present any unusual complexity in case management").

⁵⁷ An order was coded as appointing lead plaintiffs' counsel if it appointed one or more lawyer to serve as "lead," "coordinating," or similar counsel for plaintiffs or a group of plaintiffs.

⁵⁸ An order was coded as creating a plaintiffs' leadership structure if it appointed more than one attorney to serve on a body, such as a PSC or plaintiffs' executive committee, that was charged with managing the litigation for plaintiffs.

⁵⁹ In a one-sample t-test at the 99.9% confidence level, the probability that the mean MDL will proceed without a leadership appointment is 0.

⁶⁰ *E.g.*, PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 7:6, Westlaw (database updated June 2019); Burch & Williams, *supra* note 41, at 1451–52.

⁶¹ RHEINGOLD, *supra* note 60, § 7:6.

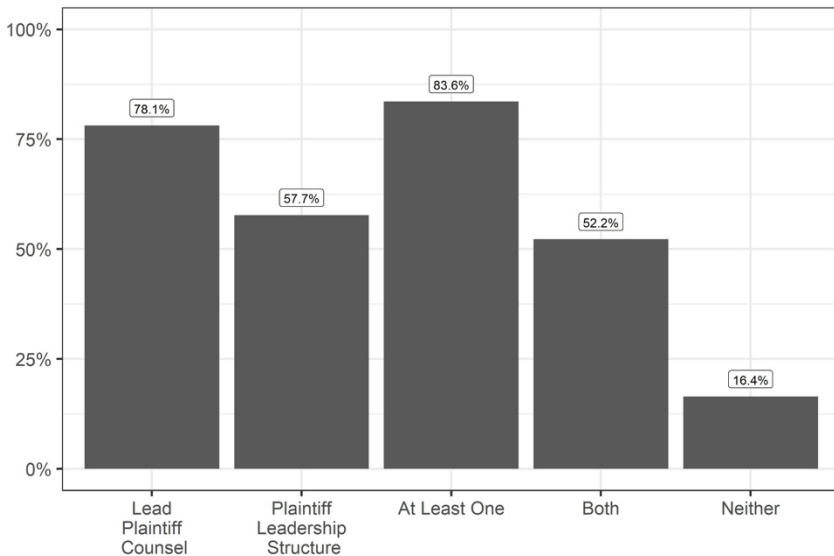
leaders, it ratifies the outcome of these informal negotiations.⁶²

One test of this theory is the presence or absence of multiple leadership appointment applications. If courts receive multiple applications for leadership positions, that tends to suggest that leadership appointments are not exclusively the product of informal bargaining among attorneys. Accordingly, I coded the orders in the sample for whether they were contested, as indicated by whether an order notes that more than one attorney applied for a leadership position. This is probably an underinclusive measure of contestedness as a court may receive multiple applications without expressly noting them in an order appointing leaders. Even so, 37.81% of orders in the sample (n=76) are contested.

To be sure, this statistic is an incomplete measure of the contestedness of leadership appointments. I have not attempted to analyze the quality of competing submissions, and it is possible that some of the applications noted by courts are frivolous or filed by attorneys who are not plausible contenders for leadership posts. Nor have I examined whether attorneys who initially compete for leadership slots join forces later in an MDL—a progression consistent with the thesis that important leadership positions ultimately are allocated through informal negotiation. Still, the finding that a substantial number of leadership appointments are contested is a marked contrast with suggestions that the leadership appointment process is wholly uncompetitive.

What happened in the 33 cases where the court did not appoint any type of plaintiff leaders? A review of dockets in those actions suggests that they fall into five

Figure 1: Plaintiff Leadership Appointment Types



⁶² *Id.*

general categories. First, some MDLs were too new for courts to have organized counsel.⁶³ Second, some MDLs settled shortly after the JPML transferred actions to the MDL court, leaving no litigation left for the transferee court to organize.⁶⁴ Third, courts in some MDLs deferred organizing counsel until they had ruled on legal issues with the potential to make or break a large number of cases at the outset of the litigation.⁶⁵ This appears to have been especially common in patent cases where, say, a ruling on patent validity would determine the need for future litigation. Fourth, one antitrust MDL involved a small number of plaintiffs litigating against a large number of defendants, inverting the many-against-few structure that characterizes most complex litigation.⁶⁶ Fifth, three cases in the sample appear to have proceeded as the kind of large consolidation Professor Zachary Clopton describes, where individually retained plaintiffs' attorneys retained control of cases litigated within the MDL.⁶⁷ In one final case, attorneys applied to serve as lead counsel and functioned in that capacity, but the transferee judge seems to have forgotten to enter an order memorializing their appointment.⁶⁸

C. Diversity in Leadership Structures, Tasks Assigned to Leaders, and Leaders' Relationships to MDL Plaintiffs

In addition to assuming that MDL is typically controlled by court-appointed leaders, the literature tends to approach court-appointed attorneys in MDL as a monolith. Commentators tend to assume that court-appointed leaders operate in essentially the same structure, perform the same functions, are subject to the same

⁶³ See, e.g., Conditional Transfer Order No. 3 at 1, *In re Allura Fiber Cement Siding Prods. Liab. Litig.*, No. 2:19-mn-02886-DCN (D.S.C. Apr. 2, 2019), ECF No. 55; Order Setting Scheduling Conference at 2, *In re Wesson Oil Mktg. & Sales Practices Litig.*, No. 2:11-ml-02291-CJC-AGR (C.D. Cal. Oct. 14, 2011), ECF No. 15.

⁶⁴ See, e.g., Settlement Agreement at 17, *In re Health Mgmt. Assocs., Inc. Qui Tam Litig.* (No. II), No. 1:14-mc-00339-RBW (D.D.C. Apr. 3, 2014), ECF No. 69; Order for Final Approval of Class Action Settlement at 1, 15, *In re Amazon.com, Inc., Fulfillment Ctr. Fair Lab. Standards Act (FLSA) & Wage & Hour Litig.*, No. 3:14-md-02504-DJH (W.D. Ky. Feb. 19, 2014), ECF No. 228.

⁶⁵ See, e.g., *In re Uber Techs., Inc., Data Sec. Breach Litig.*, No. ML 18-2826 PSG (GJSx), 2019 BL 459468, at *5–6 (C.D. Cal. Apr. 9, 2018); Order at 1, *In re Indus. Print Techs., LLC Patent Litig.*, No. 3:15-md-02614-M (N.D. Tex. Apr. 7, 2015), ECF No. 6.

⁶⁶ See *In re Capacitors Antitrust Litig.* (No. III), No. 17-md-02801-JD, 2018 BL 423183, at *1–16 (N.D. Cal. Nov. 14, 2018).

⁶⁷ See *In re 21st Century Oncology Customer Data Sec. Breach Litig.*, 380 F. Supp. 3d 1243, 1243 (M.D. Fla. 2019); *In re Gold King Mine Release*, No. 1:18-md-02824-WJ, 2019 BL 96235, at *1 (D.N.M. 2019); *In re Air Crash*, No. 11-md-02246-KAM, 2015 BL 18502, at *1 (S.D. Fla. 2015).

⁶⁸ Oct. 24, 2018 Letter to J. Lewis A. Kaplan from Att'y Mark Allison at 1, *In re Customs & Tax Admin. of Kingdom of Den. (Skatteforvaltningen) Tax Refund Scheme Litig.*, No. 1:18-md-02865-LAK (S.D.N.Y. Oct. 9, 2018), ECF No. 6.

incentives, and stand in the same relationship to non-client plaintiffs and non-lead attorneys from one MDL to the next.⁶⁹

To test these assumptions, I coded appointment orders for three high-level choices about the type of plaintiffs' leadership that they create: (1) whether an order appoints lead plaintiffs' counsel; (2) whether the order creates a plaintiff leadership structure such as a steering committee or executive committee; and (3) whether the order appoints plaintiffs' liaison counsel—a role that typically involves communicating with non-lead counsel and coordinating the presentation of plaintiffs' position at hearings and conferences.⁷⁰ I also coded orders for whether an order specifies the functions that lead counsel and members of the plaintiffs' leadership structure are expected to perform and whether an order addresses leaders' duties to non-client plaintiffs.⁷¹

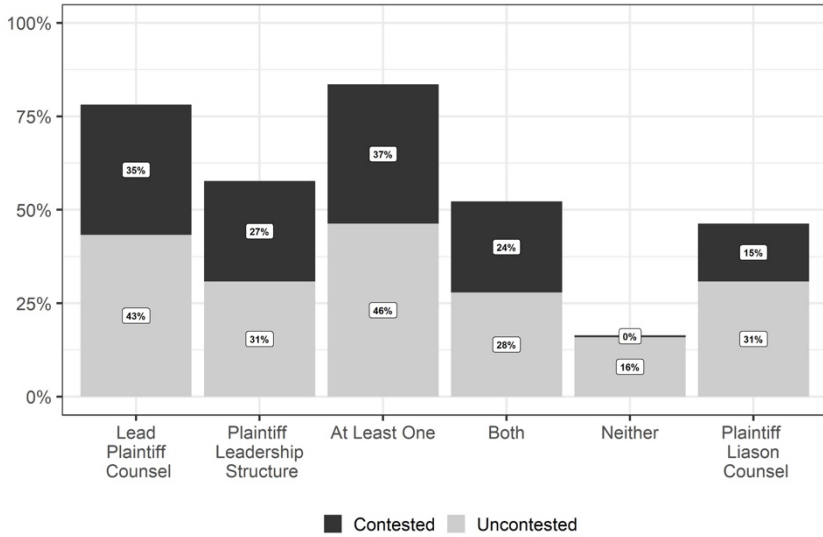
As Figure 2 shows, there is considerable variation in the types of plaintiff leadership structures that appointment orders create. As already noted, orders in 78.11% of the sample (n=157) appoint lead plaintiffs' counsel, and orders in 57.71% of the sample (n=116) create a plaintiffs' leadership structure. In MDLs where the court appointed lead plaintiffs' counsel, 44.59% of appointment orders (n=70) are contested. In cases where the court appointed a plaintiffs' leadership structure, 46.55% of appointments (n=54) are contested. Plaintiffs' liaison counsel is appointed in 46.27% of MDLs in the sample (n=93).

⁶⁹ See *supra* note 39.

⁷⁰ For the coding conventions used to identify the appointment of lead plaintiffs' counsel and the creation of a plaintiffs' leadership structure, see *supra* notes 57–58 and accompanying text.

⁷¹ Two variables, `PLAINTIFF_LEAD_COUNSEL_AUTHORITY` and `PLAINTIFF_LEADERSHIP_AUTHORITY`, track the presence or absence of language assigning specific functions to lead plaintiffs' counsel or the plaintiffs' leadership structure. These variables were coded “yes” if an appointment order contained any language assigning tasks or specifying the authority of lead counsel or the plaintiffs' leadership structure. Two further variables, `PLAINTIFF_LEAD_COUNSEL_DUTIES` and `PLAINTIFF_LEADERSHIP_DUTIES`, track the presence or absence of language recognizing duties running from lead plaintiffs' counsel and the plaintiffs' leadership structure to non-client plaintiffs. In coding these variables, I looked to the substance of the relevant order. Thus, an order that recited that it was the “duty” of lead counsel to coordinate discovery on behalf of MDL plaintiffs without specifying any duties that lead counsel held toward MDL plaintiffs was coded “yes” for specifying lead counsel's authority and “no” for recognizing duties that lead counsel held toward MDL plaintiffs.

Figure 2: Types of Plaintiff Leadership Structures and Contested vs. Uncontested Nature of Appointment



Looking beyond these general trends, a review of the underlying appointment orders reveals enormous variation in the organization of plaintiffs' leaders. At one end of the spectrum, some orders create elaborate structures with multiple committees and lines of authority running among them. For example, in the *Toyota Unintended Acceleration* MDL, the court appointed a "liaison committee for personal injury/wrongful death cases, consisting of two co-lead counsel and a total of nine members," a "lead counsel committee for the economic loss cases," a "core discovery committee consisting of the co-lead liaison counsel for the personal injury/wrongful death cases and the co-lead counsel for the economic loss plaintiffs," "[t]hree liaison counsel to the state cases and other types of federal cases to coordinate between the core discovery committee and the state and federal litigation," and "[o]ne or more counsel who shall have specific duties limited to a particular factual or legal area."⁷² At the other end of the spectrum, some orders merely specify that attorneys will play identified roles. For example, Figure 3 depicts the leadership appointment order the court entered in the *Facebook Consumer Privacy User Profile Litigation*.⁷³

⁷² Order No. 2 at 2–3, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 8:10-ml-02151-JVS-FMO (C.D. Cal. Apr. 12, 2010), ECF No. 169 [hereinafter *Toyota Order*].

⁷³ Pretrial Order No. 4, *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, No. 18-md-02843-VC (N.D. Cal. June 6, 2018), ECF No. 102.

Figure 3: Facebook Lead Counsel Appointment Order

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA	
IN RE: FACEBOOK, INC., CONSUMER PRIVACY USER PROFILE LITIGATION	MDL No. 2843 Case No. 18-md-02843-VC
<hr/> This document relates to: ALL ACTIONS	PRETRIAL ORDER NO. 4: APPOINTING LEAD COUNSEL
<p style="text-align: center;">The following people are appointed co-lead counsel in this matter: Derek Loeser of Keller Rohrback, and Lesley Weaver of Bleichmar Fonti & Auld.</p> <p style="text-align: center;">IT IS SO ORDERED.</p> <p>Dated: July 27, 2018</p> <div style="text-align: right; margin-top: 20px;">  <hr style="width: 200px; margin-left: auto; margin-right: 0;"/> VINCE CHHABRIA United States District Judge </div>	

More perfunctory still are orders that merely grant an application to create a particular leadership structure or that appoint the movants to positions that the movants themselves identify and describe.⁷⁴ To the extent that a leadership structure is described in these MDLs, it is in filings submitted by applicants for leadership positions. The orders effectively delegate the organization of counsel to the attorney or group of attorneys that files a motion seeking the appointment of plaintiffs' leadership. In a notable variation on this practice, the court in the *Treasury Securities Auction Antitrust* MDL appointed a group of attorneys as interim co-lead counsel, then directed the attorneys to "make a recommendation to the court as to the membership and size of the plaintiffs' steering committee."⁷⁵

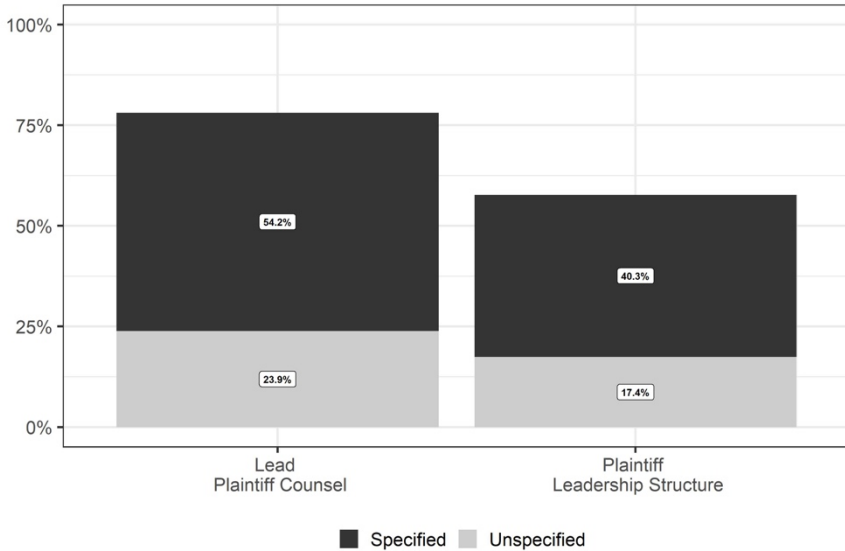
Turning from the structure of plaintiffs' leadership to the functions that leaders perform, the sample again reveals considerable variation from one MDL to the next. As Figure 4 shows, the majority of appointment orders specify leaders' authority. Appointment orders define lead counsel's authority in 54.23% of the sample, or

⁷⁴ See, e.g., Marginal Entry Order Granting Pls.' Renewed Mot. to Approve Co-Leads, Co-Liaisons, and Exec. Comm., *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP (N.D. Ohio Nov. 6, 2018), ECF No. 37; Order at 1, *In re Zappos.com Inc., Customer Data Sec. Breach Litig.*, No. 3:12-cv-00325-RCJ-CLB (D. Nev. June 14, 2012), ECF No. 202.

⁷⁵ Order at 7, *In re Treasury Sec. Auction Antitrust Litig.*, No 1:15-md-02673-PGG (S.D.N.Y Dec. 16, 2015), ECF No. 186.

69.43% of cases in which lead counsel was appointed (n=109). The order specifies the plaintiffs' leadership structure's authority in 40.30% of the sample, or 69.83% of cases in which a plaintiffs' leadership structure was created (n=81). In total, there are 118 MDLs in which an appointment order defines the authority of either lead plaintiffs' counsel or the plaintiffs' leadership structure.

Figure 4: Specification of Leaders' Authority



A review of underlying orders reveals that definitions of leaders' authorities exhibit the borrowing and case-by-case development that commentators describe as a defining feature of contemporary MDL.⁷⁶ Some orders provide a minimalist definition of leaders' authority, providing, for example, that court-appointed leaders shall "serve [in specified capacities] on behalf of all Plaintiffs whose claims are transferred to this Court as a result of the Judicial Panel on Multidistrict Litigation's [orders]."⁷⁷

More common are orders that generally charge leaders with managing the litigation on behalf of consolidated plaintiffs and then set out specific responsibilities in categories such as "Discovery," "Motion Practice and Hearings," "Contact with

⁷⁶ See Engstrom, *supra* note 47, at 8 (describing transferee judges' "freewheeling, improvisational spirit"); Gluck, *supra* note 29, at 1689 (reporting transferee judges' view that "the very hallmark of the MDL is the ability to deviate from traditional procedures"); Noll, *supra* note 16, at 423 (describing MDL as "a world of ad hoc procedure"); see also Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767, 772-73, 785 (2017) (surveying contexts where actors deploy ad hoc procedure to address emergent problems and observing that "[o]nce one begins to look for ad hoc procedure, examples of it appear everywhere").

⁷⁷ Case Mgmt. Order No. 3 at 2, *In re Sorin 3T Heater-Cooler System Prods. Liab. Litig.* (No. II), 1:18-md-02816-JEJ-SES (M.D. Pa. Feb. 2, 2018), ECF No. 57.

Defense Counsel,” “Oversight of Plaintiffs’ Counsel,” “Committee Formation,” “Trial Preparation,” and “Other.”⁷⁸ Outside of this laundry list, it is assumed that individually retained plaintiffs’ attorneys will act on behalf of their clients. The laundry list approach appears to have originated in the second edition of the *Manual for Complex Litigation* (MCL), which contains a sample appointment order assigning “Plaintiffs’ Lead Counsel” six specific tasks.⁷⁹

Still another approach to defining leaders’ authorities is to delegate the definition of leaders’ duties to leaders themselves. Thus, the appointment order entered in the *Ethicon* MDL provides:

It shall be the responsibility of Coordinating Co-Lead Counsel to work across MDL lines in conjunction with the Executive Committee . . . to determine which attorneys are best suited to handle a given task, be it common corporate discovery, expert identification, deposition preparation, motions practice and brief drafting, trial teams and other similar matters that develop as this litigation progresses.⁸⁰

Within orders that follow the laundry list approach, the number of functions assigned to leaders appears to have grown over time. The “Sample Order Prescribing Responsibilities of Designated Counsel” in the second edition of the *Manual for Complex Litigation* charges lead plaintiffs’ counsel with six specific tasks.⁸¹ A decade later, the third edition of the *Manual for Complex Litigation* charged lead plaintiffs’ counsel with three additional tasks.⁸² By February 2002, the appointment order in the *Baycol Products Liability* MDL contained ten numbered paragraphs of co-lead counsel’s responsibilities.⁸³ By the time the court appointed leaders in the *Marriot* data breach MDL in April 2019, co-lead counsel were responsible for 16 specific functions and liaison counsel were responsible for eight.⁸⁴ The order contains three paragraphs of “Duties of Plaintiffs’ Steering Committee” and a single paragraph on the “Duties of Coordinating Discovery Counsel.”⁸⁵

If courts are eager to assign leaders responsibilities in appointment orders, they

⁷⁸ Order at 3–4, *In re Dealer Mgmt. Sys. Antitrust Litig.*, No. 1:18-cv-00864 (N.D. Ill. Feb. 1, 2018), ECF No. 123.

⁷⁹ See MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.32 (1985).

⁸⁰ Pretrial Order No. 4 at 2, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-02327 (S.D. W. Va. Feb. 7, 2012), ECF No. 120 [hereinafter *Ethicon Order*].

⁸¹ MANUAL FOR COMPLEX LITIGATION (SECOND) § 41.32 (1985).

⁸² MANUAL FOR COMPLEX LITIGATION (THIRD) § 41.31 (1995).

⁸³ Pretrial Order No. 3 at 4–5, *In re Baycol Prods. Litig.*, No. 0:01-md-01431-MJD-SER (D. Minn. Dec. 19, 2001), ECF No. 16.

⁸⁴ Case Mgmt. Order No. 2 Appointing Lead Counsel, Liaison Counsel, and Steering Comm. at 7–9, *In re Marriott Int’l, Inc., Customer Data Sec. Breach Litig.*, No. 8:19-md-02879-PWG (S.D. Md. Feb. 6, 2019), ECF No. 238.

⁸⁵ *Id.* at 9–10.

are more circumspect when it comes to leaders' duties to MDL plaintiffs. None of the orders in my sample attempted to define the legal relationship between court-appointed leaders and non-client plaintiffs apart from using general terms such as "Plaintiffs' Co-Lead Counsel" or "member of the Plaintiffs' Steering Committee." Nine appointment orders, or 4.98% of the sample, specify duties that lead plaintiffs' counsel hold toward MDL plaintiffs. Seven orders (3.48% of the sample) identify duties for members of the plaintiffs' leadership structure.

The small number of appointment orders that address leaders' duties can be grouped into three categories. First, certain orders describe leaders' duties by reference to the *Manual for Complex Litigation*—an example of how the *Manual's* recommendations and suggestions become orders backed by the coercive authority of transferee courts.⁸⁶ Second, some orders provide that leaders have a responsibility to consult with non-leads in an effort to ensure that plaintiffs are adequately represented while capturing economies of scale from centralized management.⁸⁷ Finally, some orders seek to head off concerns about adequate representation by *disclaiming* leaders' duties to MDL plaintiffs and placing the burden on individually-retained plaintiffs' attorneys to protect clients' interests. For example, the appointment order in the *Ethicon* MDL provides:

All attorneys representing parties to this litigation, regardless of their role in the management structure of the litigation and regardless of this court's designation of Lead and Liaison Counsel, a Plaintiffs' Executive committee and a Plaintiffs' Steering Committee, continue to bear the responsibility to represent their individual client or clients.⁸⁸

⁸⁶ See MANUAL FOR COMPLEX LITIGATION (FOURTH) 1 (2004) ("[The *Manual*] was produced under the auspices of the Federal Judicial Center, but the Center has no authority to prescribe practices for federal judges. The *Manual's* recommendations and suggestions are merely that."). For orders applying the MCL standards, see, for example, Jointly Submitted Case Mgmt. Order No. 1 at 8, *In re* Zimmer Nexgen Knee Implants Prods. Liab. Litig., No. 1:11-cv-05468 (N.D. Ill. Aug. 8, 2011), ECF No. 162 ("Consistent with MCL 4th § 10.22, counsel appointed to leadership positions assume 'an obligation to act fairly, efficiently, and economically' and 'committees of counsel . . . should try to avoid unnecessary duplication of effort'"); Toyota Order, *supra* note 72, at 2 ("The committee will have the duties outlined in the Manual for Complex Litigation (Fourth) § 22.62, but tailored to reflect retention by individual counsel of the unique aspects of each personal injury/wrongful death case.").

⁸⁷ See, e.g., Order Appointing Leadership Counsel at 4, *In re* Ashley Madison Customer Data Sec. Breach Litig., No. 4:15-md-02669-JAR (E.D. Mo. Dec. 9, 2015), ECF No. 87 [hereinafter Ashley Madison Order] ("[I]n carrying out the [specified] duties, Plaintiffs' Co-Lead Counsel are particularly required to consult with all Plaintiffs' counsel throughout this case to assure that all interests are represented."); Mem. & Order at 6, *In re* Payment Card Interchange Fee and Merch. Disc. Antitrust Litig., No. 1:05-md-01720-MKB-JO (E.D.N.Y. Oct. 20, 2005), ECF No. 278 ("I anticipate that the Robins Kaplan group will solicit and consider the views of others, particularly the Milberg Weiss firm, in making litigation decisions on behalf of the plaintiffs.").

⁸⁸ Ethicon Order, *supra* note 80, at 10; see also, e.g., Pretrial Order No. 4 at 10, *In re* Am.

A review of the underlying orders also reveals another phenomenon that warrants mention. While some appointment orders appear to be court-drafted, others are quite obviously drafted by counsel. Consider the following order shown in Figure 5 appointing class counsel in the *Michaels Stores Fair Credit Report Act* MDL.⁸⁹

Figure 5: *In re Michaels Stores, Inc. Fair Credit Reporting Act* Leadership Appointment Order



I did not attempt to code for authorship in this study because it was not apparent from the face of many orders whether they were drafted by counsel or the court and I could not think of a proxy that would reliably indicate who drafted an order.

D. Limits on Non-Lead Practice

Designating particular attorneys as leaders does little to address coordination problems on the plaintiffs' side if non-lead attorneys are free to engage in discovery and motion practice, engage with the court and defendants, and generally litigate however they want. At the same time, barring non-lead attorneys from practicing in

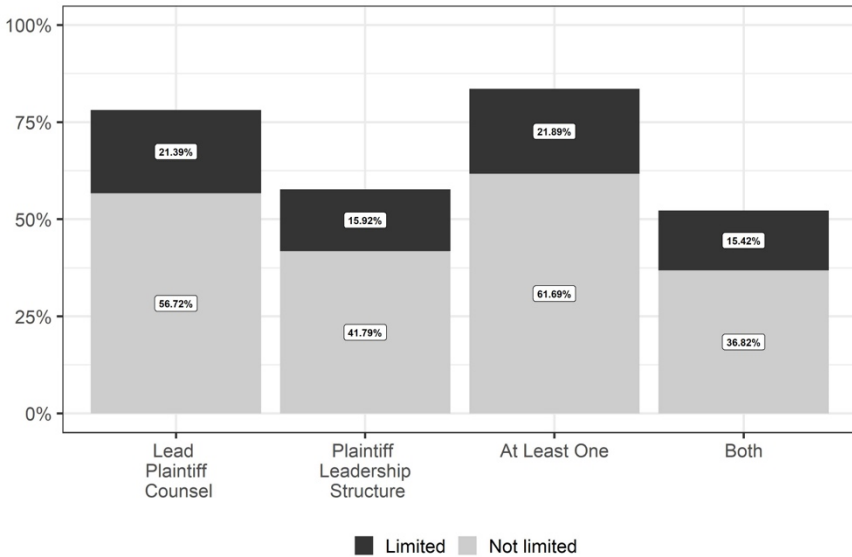
Med. Sys., Inc., Pelvic Repair Sys. Prods. Liab. Litig., No. 2:12-md-02325 (S.D.W. Va. Feb. 7, 2012), ECF No. 147; Pretrial Order No. 4 at 10, *In re Boston Sci. Corp. Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:12-md-02326 (S.D.W. Va. Feb. 7, 2012), ECF No. 103.

⁸⁹ Order, *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig.*, No. 2:14-cv-07563-KM-JBC (D.N.J. Dec. 4, 2014), ECF No. 90.

the transferee court would conflict with the principle that transfer under Section 1407 does not affect the character of transferred cases.⁹⁰ Thus, I was curious about limitations that transferee courts placed on non-leads' ability to practice in the transferee court.

I coded an MDL as limiting non-leads' authority to practice if an appointment order imposed *any* limitation on non-leads' practice in the transferee court. Under this definition, 21.89% of the sample (n=44) limits non-leads' ability to practice. Within the set of MDLs where courts appointed lead plaintiffs' counsel or a plaintiffs' leadership structure, the percentage was 26.19%. Figure 6 charts these findings.

Figure 6: Limits on Non-Lead Attorneys' Authority to Practice in Transferee Court



Once again, a review of underlying appointment orders reveals considerable variation in the way that orders organize litigation. The most anodyne restrictions on non-leads' authority instruct non-leads not to perform work that duplicates the work that leaders perform or warn that compensation will not be provided for common benefit work that is not authorized by the court or appointed leaders.⁹¹ The most restrictive orders bar non-leads from engaging in ordinary litigation activities or engaging the court and defendants without prior permission. For example, the appointment order entered in the *MONAT Hair Care Products Marketing* MDL

⁹⁰ See *Gelboim v. Bank of Am. Corp.*, 135 S. Ct. 897, 904 (2015).

⁹¹ See, e.g., Order No. 5 at 6, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-2543-JMF (S.D.N.Y. June 26, 2014), ECF No. 70; Order Appointing Pls.' Co-Lead and Co-Liaison Counsel at 4, *In re Wright Med. Tech., Inc., Conserve Hip Implant Prods. Liab. Litig.*, No. 1:12-md-02329-TWT (N.D. Ga. Feb. 27, 2012), ECF No. 79.

provides: “Counsel for Plaintiffs who disagree with Lead and Liaison Counsel, or who have individual or divergent positions, may not act separately on behalf of their clients without prior authorization of this Court.”⁹² In the *Ashley Madison* MDL, the court ordered: “no papers shall be served or filed, and no process, discovery, or other procedure shall be commenced by any counsel other than Lead Counsel, except with specific leave of Court.”⁹³

One should be careful making inferences about the actual division of labor in MDL from limitations on non-lead practice in leadership appointment orders. That roughly a quarter of appointment orders explicitly limit non-leads’ authority to practice in the transferee court might indicate that, in the remaining MDLs, non-leads are free to litigate as they see fit. But it seems more plausible that the division of labor between leaders and non-leads in these MDLs is governed by informal norms or directions from the court or court-appointed leaders about the work that non-leads can and cannot perform. My findings show only that, in a non-trivial number of cases, appointment orders expressly restrict non-leads’ ability to practice at the beginning of the litigation.

The underlying appointment orders also contain a number of provisions that *expand* the effect of leaders’ actions to all cases in MDL. An order might provide that defendants are authorized to enter into agreements with litigation leaders and that those agreements are binding on other plaintiffs in the MDL.⁹⁴ A device that is slightly more protective of plaintiffs’ rights might be termed the “expanding stipulation.” Such a provision provides that stipulations between MDL leaders and the defendant must be docketed, which triggers a period in which parties who do not wish to be bound by the stipulation must affirmatively object to it. If a party does not object, silence is taken as assent and the stipulation becomes binding on them. The periods provided for objections are not long. In 2011, Judge Joseph R. Goodwin entered an order in the *Coloplast Corp. Pelvic Support Systems* MDL that provided for a ten-day objection period.⁹⁵ The next year, Judge Robert L. Miller, Jr. entered an order in the *Biomet M2a Magnum Hip Implant Products Liability* litigation that shortened the objection period to five days.⁹⁶

⁹² Case Mgmt. Order at 9, *In re Monat Hair Care Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, No. 1:18-md-02841-DPG (S.D. Fla. June 6, 2018), ECF No. 59.

⁹³ *Ashley Madison* Order, *supra* note 87, at 4.

⁹⁴ See, e.g., Order Appointing Pls.’ Interim Co-Lead Counsel and Liaison Counsel at 3, *In re Diisocyanates Antitrust Litig.*, No. 2:18-mc-01001-DWA (W.D. Pa. Oct. 10, 2018), ECF No. 107.

⁹⁵ Pretrial Order No. 2 at 3, *In re Coloplast Corp. Pelvic Support Sys. Prods. Liab. Litig.*, No. 2:12-md-02387 (S.D.W. Va. Aug. 6, 2012), ECF No. 10.

⁹⁶ Order Concerning Pls.’ Counsel Org. Structure at 4 n.2, *In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*, No. 3:12-md-02391-RLM-MGG (N.D. Ind. Oct. 4, 2012), ECF No. 127.

E. Financial Aspects of Leadership Appointments

For attorneys whose cases are transferred to an MDL, an important function of the leadership appointment process is to allocate financial risks and rewards of litigation. Attorneys appointed to leadership positions are expected to contribute to the costs of common benefit work, while non-lead attorneys can expect to have a portion of their fees taken to pay for such work.⁹⁷ Because courts have been criticized for taking a slapdash approach to fee set-asides,⁹⁸ I coded orders in the database for whether they addressed attorneys' obligation to pay for leaders' work, how leaders would be compensated, and attorneys' duty to maintain time and billing records.

At least in the initial appointment orders that are the focus of this Article, attention devoted to financial aspects of leadership appointments is minimal. Only 3.98% of orders in the sample (n=8) address attorneys' obligation to pay for common benefit work, 7.96% address how leaders would be compensated (n=16), and 23.38% of the sample (n=47) specify timekeeping or recordkeeping requirements that apply to court-appointed leaders.⁹⁹

These findings do not show that courts *never* address the financial aspects of leadership appointments in connection with appointing leaders. In some cases, courts have addressed compensation for common benefit work in orders that were entered shortly after they appointed leader attorneys.¹⁰⁰ The findings do suggest, however, that courts do not consider the contribution, compensation, or record-keeping to be essential parts of the leadership appointment process. To the extent that courts address these issues, they tend to do so after the order appointing plaintiffs' leadership.

⁹⁷ Silver & Miller, *supra* note 10, at 112.

⁹⁸ *Id.* at 132.

⁹⁹ Among the small number of orders that addressed the financial aspects of leadership appointments, the order entered in *Polypropylene Hernia Mesh Products Liability Litigation* is particularly notable:

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

Case Mgmt. Order No. 3 Appointing Pls.' Steering Comm. at 5, *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prods. Liab. Litig.*, No. 18-md-02846-EAS-KAJ (S.D. Ohio Aug. 6, 2018), ECF No. 16. It is not clear from the face of the order whether this language was drafted by the court or proposed by counsel. The language does not appear in any other orders in the sample.

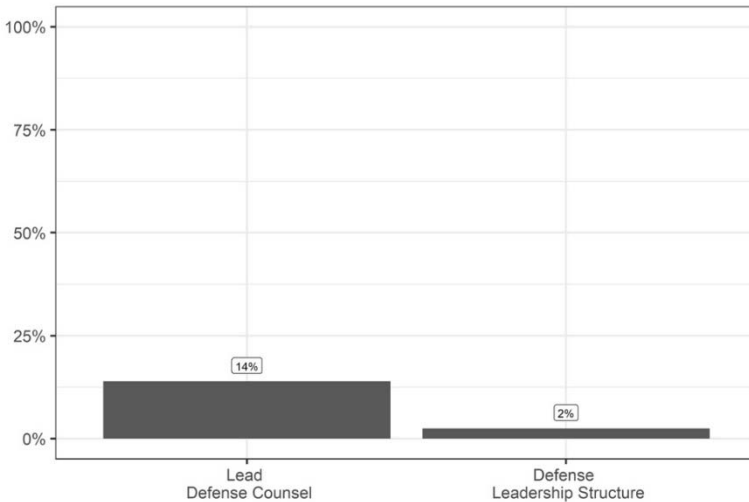
¹⁰⁰ See, e.g., Pretrial Order No. 11: Protocol for Common Benefit Work and Expenses at 1–2, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB (N.D. Cal. Dec. 8, 2015), ECF No. 1254.

F. The Curious Case of Defense Leadership Appointments

Up to this point, I have focused on how leadership appointment orders organize counsel on the plaintiffs' side of MDL. One might wonder, however, whether leadership appointment orders play a similar role in structuring defense counsel.

In a notable contrast to the prevalence of plaintiff leadership appointments, leadership appointments on the defense side are rare. As Figure 7 shows, orders in 13.93% of the sample (n=28) appoint lead defense counsel. Orders created a defense leadership structure in only five cases, or 2.48% of the sample.

Figure 7: Defense Leadership Appointments



What happened in the cases where the court created a defense leadership structure? The first MDL to use a defense leadership structure is MDL 875, the massive asbestos product liability MDL in the Eastern District of Pennsylvania.¹⁰¹ Toward the conclusion of the litigation, the district court relieved all counsel who were previously appointed to leadership positions and appointed a “Joint Plaintiffs’/Defendants’ Steering Committee” to “analyze certain administrative issues and suggest solutions to the Court.”¹⁰² In essence, defense counsel participated in an MDL-wide committee that was charged with cleaning up the litigation after most cases had been resolved through bankruptcy reorganizations, aggregate settlements, and individual proceedings.

In the remaining MDLs, appointment orders create defense-side versions of

¹⁰¹ See generally Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013).

¹⁰² Admin. Order No. 10 at 1, *In re Asbestos Prods. Liab. Litig.* (No. VI), No. 2:01-md-00875-ER (E.D. Pa. July 29, 1991), ECF No. 4506.

leadership structures that are more commonly used on the plaintiff side. For example, in the *IntraMTA Switched Access Charges* MDL, Verizon and Sprint brought suit against a large number of Local Exchange Carriers alleging that they improperly billed Verizon and Sprint for calls originated and terminated in the same major trading area.¹⁰³ The court found that “the large number of counsel and Defendants requires a substantial amount of coordination of litigation efforts.”¹⁰⁴ Accordingly, it appointed two attorneys as “Lead and Liaison Counsel for Defendants,” an eleven-member “Large/Medium LEC Steering Committee,” and a nine-member “Small/Regional/Rural LEC Steering Committee.”¹⁰⁵ In contrast, defendants in the *Valsartan Products Liability Litigation* appear to have self-organized.¹⁰⁶ The appointment order approves a “Defendants’ Leadership Structure” consisting of a four-member “Defendants’ Executive Committee” and two liaison counsel.¹⁰⁷

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

G. *Legal Reasoning and Authority*

The standards that courts use to select MDL leaders potentially affect the choices reflected in appointment orders and are a perennial target of MDL reform proposals.¹⁰⁸ Thus, I coded leadership appointment orders for whether they applied the selection criteria articulated in the *Manual for Complex Litigation* and Rule 23, which was amended in 2003 to allow the court to appoint interim lead counsel in putative class actions.¹⁰⁹

As Figure 8 illustrates, appointment orders tend not to apply these standards.

¹⁰³ *In re IntraMTA Switched Access Charges Litig.*, 67 F. Supp. 3d 1378, 1379 (J.P.M.L. 2014).

¹⁰⁴ Order Appointing Defs.’ Lead/Liaison Counsel and Steering Comm. at 2, *In re IntraMTA Switched Access Charges Litig.*, No. 3:14-md-02587-D (N.D. Tex. Dec. 16, 2014), ECF No. 76.

¹⁰⁵ *Id.* at 2, 5, 6.

¹⁰⁶ See Case Mgmt. Order No. 6 Approving Pls.’ and Defs.’ Leadership Structure at 1, *In re Valsartan Prods. Liab. Litig.*, No. 1:19-md-02875-RBK-JS (D.N.J. Feb. 14, 2019), ECF No. 96.

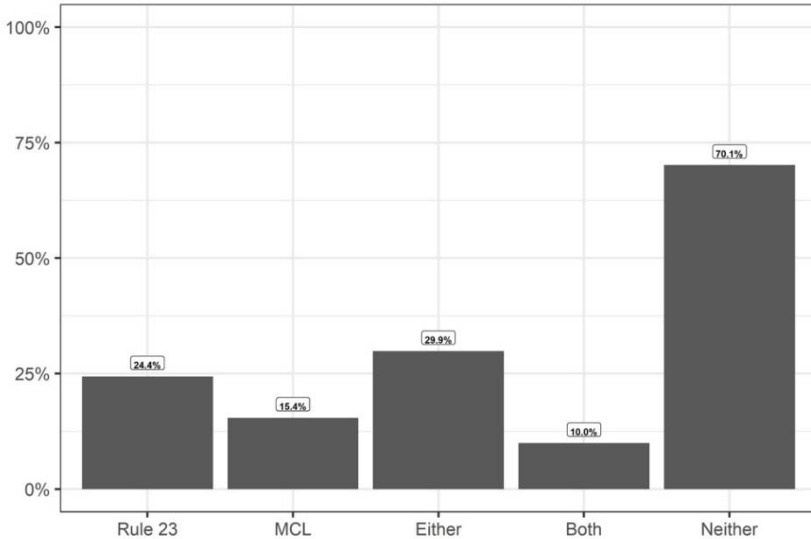
¹⁰⁷ *Id.* at 3.

¹⁰⁸ See, e.g., BOLCH JUDICIAL INST., DUKE LAW SCH., GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 29 (2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/MDL-2nd-Edition-2018-For-Posting.pdf>.

¹⁰⁹ Amendments to the Federal Rules of Civil Procedure, 215 F.R.D. 158, 159–60 (2003). An order was coded as applying the MCL or Rule 23 only if the order expressly cited those authorities or included language from them verbatim.

Orders in 24.38% of the sample apply Rule 23 (n=49), and orders in 15.42% of the sample apply the MCL (n=31). A mere 9.95% of the orders in the sample applied *both* the MCL and Rule 23.¹¹⁰

Figure 8: Legal Authority Applied



III. DISCUSSION

The findings presented in Part II suggest that, while leadership appointments are a standard feature of contemporary MDL, there is enormous variation from MDL to MDL in the way that leaders are organized, the tasks that courts assign to them, and the relationships among court-appointed leaders, non-lead attorneys, and MDL plaintiffs. In this Part, I briefly consider the implications of these findings for debates over contemporary MDL.

A. *The Nature of Contemporary MDL*

The first debate my findings bear on involves the nature of contemporary MDL. As MDL has become an increasingly important forum for resolving complex legal controversies, critics have complained that it is beset by essentially the same agency problems that are thought to characterize certain forms of class-action litigation.¹¹¹ This critique proceeds from the observation that the appointment of lead

¹¹⁰ A handful of orders in the sample apply the lead counsel provisions of the Private Securities Litigation Reform Act (PSLRA). I do not report quantitative data on the percentage of the sample that applies the PSLRA because I have not yet coded for it.

¹¹¹ For classic statements of the agency cost problem in class action litigation, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the*

attorneys separates ownership of plaintiffs' cases from control of them by giving court-appointed lead "attorneys total control over all consolidated plaintiffs' claims."¹¹² Professional obligations and ideological commitments notwithstanding, court-appointed leaders are motivated principally by the desire to earn common benefit fees.¹¹³ Thus, the critique contends, leaders' managerial decisions tend to favor leaders themselves and the defendants to whom they "sell" protection from litigation via settlements.¹¹⁴

Partially in response to this critique, others have challenged the image of MDL as a form of litigation in which court-selected leaders necessarily make all important litigation decisions. Professors Andrew Bradt and Theodore Rave suggest that MDL is better understood as a "hybrid" that functions as "a tightly knit aggregation" while also preserving the individual character of consolidated cases.¹¹⁵ In a somewhat different vein, Clopton observes that "MDL is not a uniform category of large civil cases;" some MDLs are "simply a collection of individual cases, many of which do not present any unusual complexity in case management."¹¹⁶ Running through these competing contentions are conflicting visions of what MDL *is*. Is MDL simply a class action by another name? Or, as Bradt and Rave contend, does it represent a distinctive form of aggregate litigation?

My findings suggest that while there is an element of truth in both images of MDL, neither offers a completely accurate picture. The prevalence of leadership appointments in the sample suggests that in terms of organization MDL is structurally similar to class action litigation. In both contexts, court-appointed attorneys sit

Large Class Action, 54 U. CHI. L. REV. 877, 878–79, 883–84 (1987); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 19 (1991). For claims that MDL is characterized by essentially the same problems, see, for example, Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1273 (2012) ("[A]ggregate, multidistrict litigation . . . shar[es] key features with its class action counterpart—such as attenuated attorney-client relationships, attorney-client conflicts of interest, and high agency costs . . ."); Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531, 536 (2017) ("[A]ppointment to the committees that 'run things' for plaintiffs (and sometimes for defendants) concentrates in a small group great power over all the claims, and it is this small group that the transferee judge deals with as the case goes forward."); Silver & Miller, *supra* note 10, at 146 ("[F]orced aggregation [via centralization and the appointment of lead attorneys] may saddle claimants with agency costs by putting them at the mercy of lawyers they cannot control or discharge.").

¹¹² Burch, *supra* note 55, at 67.

¹¹³ See *id.* at 107–08 ("Lead Lawyers Bargain for Common-Benefit Fees").

¹¹⁴ See *id.* (contending that the design of the Propulsid settlement "kick started a trend of expertly wedding plaintiffs' attorneys' interest in collecting fees to the defendant's closure goal").

¹¹⁵ 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, 1257 (2018).

¹¹⁶ Clopton, *supra* note 48 (manuscript at 1, 19).

atop a hierarchical organizational structure from where they make important decisions that affect many individuals' claims, some of whom are not leaders' clients. The separation of ownership and control inherent in this structure—in actuality, the multiple layers of separation—creates conditions that allow agency costs to arise when leaders' interests do not align with the parties for whom they work.

But if the structure of contemporary MDL resembles that of class action litigation, the control exercised by leaders does not. This is most apparent when one considers the consequences of courts' appointment of litigation leaders. The class action is premised on the assumption that, by advancing her own interests, a class representative advances the interests of the class. Accordingly, certification of a class action ousts non-lead counsel from representing the class.¹¹⁷ In contrast, plaintiffs in a non-class MDL retain their own counsel and file their own claims. In some MDLs, the appointment of leaders leaves non-lead attorneys with significant authority to litigate in the transferee court.

Only 43 of the 157 orders in the sample that appointed lead plaintiffs' counsel (27.38%) expressly limit non-leads' authority to practice in the transferee court. Of the 116 orders that created a plaintiffs' leadership structure, 32 (27.58%) limit non-leads' authority to practice. Moreover, only a fraction of orders that limit non-leads' authority to practice do so in a way that approximates the ouster of non-leaders effected by a class certification order.¹¹⁸ Thus while MDL resembles class action litigation in creating a principal-agent relationship between the leaders of the litigation and its beneficiaries, the agent who takes charge of litigation in the MDL context exercises authority that is more limited and variable than the agent who wields authority in the class-action context.

The difference in the authority exercised by MDL leaders, on the one hand, and class counsel, on the other, suggests caution about assuming that the appointment of MDL leaders will give rise to the same principal/agent problems that characterize class action litigation. True, an empowered agent takes control of a large number of claims in both contexts, and that agent can be assumed to be motivated by the desire to earn attorneys' fees. But the appointment of MDL leaders gives rise to a host of relationships among plaintiffs, lead attorneys, and non-lead attorneys that are absent in the class action setting.

This difference in turn suggests caution about importing legal controls, such as the conflict-of-interest principles articulated in *Amchem Products, Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.*, to non-class MDLs.¹¹⁹ Those controls were designed

¹¹⁷ See *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir. 1982).

¹¹⁸ See *supra* notes 91–93 and accompanying text.

¹¹⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626–27 (1997) (holding that a party may not represent a class certified for settlement purposes under Rule 23 where the party's interests are not aligned with the class's, and that disqualifying conflicts of interest arise when different class members seek incompatible and competing remedies from a class action settlement); *Ortiz*

to regulate risks created by a representational structure in which a small number of attorneys make decisions for a large number of absentees who are neither parties to the actions that affect their rights nor positioned to influence the court or its appointed leaders. In MDL, relationships among leaders, non-lead attorneys, and plaintiffs are configured differently.

B. *The Duties of Court-Appointed Leaders*

My empirical findings also shed light on the debate over the duties that court-appointed leaders owe to non-client plaintiffs. As noted above, some commentators contend that the appointment of counsel who perform common benefit work gives rise to a fiduciary relationship between the court-appointed leaders, on the one hand, and the MDL plaintiffs for whom they work, on the other.¹²⁰ The practical effect of recognizing such a relationship is to circumscribe leaders' freedom to litigate and engage in settlement negotiations that benefit certain MDL plaintiffs, such as those that have an attorney/client relationship with court-appointed leaders, over others.

In *GM*, for example, Professor Silver suggested that lead counsel were subject to the same conflict-of-interest principles that govern lead counsel negotiating a settlement-only class action under Rules 23(b)(2) or (b)(3).¹²¹ In his view, leaders' duty to act in the interests of all MDL plaintiffs means they must "operate free of any incentive" to take actions that would disserve *any* plaintiff for whom they performed common benefit work.¹²² Other commentators deny that court-appointed leaders are subject to any such duties or contend that other legal relationships provide a better model of the relationship between leaders and non-client plaintiffs.¹²³

The debate over the duties that MDL leaders owe to MDL plaintiffs assumes that "MDL leaders" is the relevant category.¹²⁴ But my findings cast doubt on

v. Fibreboard Corp., 527 U.S. 815, 856 (1999) (reading *Amchem* to establish "that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses . . . with separate representation to eliminate conflicting interests of counsel").

¹²⁰ See Declaration of Charles Silver, *supra* note 9, at 13 ("[T]he attorney must manage the common benefit workload in a manner that is calculated to maximize the gains for all claimants.").

¹²¹ *Id.* at 7 (relying generally on *Ortiz v. Fibreboard Corp.* for the proposition that "a serious potential for conflict exists when a lawyer in charge of an aggregate proceeding negotiates a side-settlement for an inventory of signed clients").

¹²² *Id.* at 13.

¹²³ See Declaration of Geoffrey Parsons Miller, *supra* note 11, at 3–4; see also Stephen J. Herman, *Duties Owed by Appointed Counsel to MDL Litigants Whom They Do Not Formally Represent*, 64 LOY. L. REV. 1, 2 (2018); Noll, *supra* note 16, at 461.

¹²⁴ See, e.g., Declaration of Charles Silver, *supra* note 9, at 6 ("[A] lawyer in charge of the plaintiffs' side of an MDL must operate free and clear of any conflicts that might weaken the incentive to achieve the best possible results in bellwether cases."); Declaration of Geoffrey Parsons

whether there is any such thing as a standard leadership appointment. If court-appointed leaders share a family resemblance, particular leadership appointments differ in how they organize leaders, the functions that leaders perform, the limits imposed on non-lead attorneys' ability to practice in the transferee court, and the way that appointments conceive of the relationship between leaders and non-client plaintiffs. Two points follow from this finding.

The first is that many leadership appointment orders are dangerously underspecified. Appointment orders reassign tasks that ordinarily would be performed by individually-retained plaintiffs' attorneys to court-selected leaders in order to avoid repetitive discovery, eliminate inconsistent rulings, and capture economies of scale.¹²⁵ The division of labor between lead attorneys and non-lead attorneys may be governed as much by conventions as an appointment order. But as a legal matter, the appointment order (or orders) is the critical hinge separating functions in leaders' bailiwick from functions performed by individually retained plaintiffs' attorneys. Leaving leaders' functions undefined—as many of the orders in the sample do—means that leaders operate without a charter defining their role. That creates uncertainty over the attorneys responsible for particular tasks and leaves courts without criteria for assessing leaders' performance in the event that a dispute arises over the performance of their duties. Thus, as the *Manual for Complex Litigation* instructs: “The functions of lead, liaison, and trial counsel, and of each committee, should be stated in either a court order or a separate document drafted by counsel for judicial review and approval.”¹²⁶

The second and more important point that follows from my findings is that, to the extent that leaders' duties follow from the tasks that courts assign to them, it does not make sense to speak about leaders' duties in isolation from a specific appointment order. Where an appointment order gives an attorney effective control over non-clients' cases—as where an attorney is tasked with negotiating a global settlement—the contention that the attorney must avoid serious conflicts of interest is sound. Here, the court-appointed leader steps into the shoes of an individually retained attorney and thereby assumes the duties that attach to the attorney/client relationship. Where leaders exercise less than complete control of non-clients' cases—as where leaders merely coordinate discovery into the development of a drug or medical device—the implication of strong duties to non-clients is inapposite. Here, the leader does not undertake to perform any functions that give rise to duties to non-clients.

There are good reasons for approaching leaders' duties to non-client plaintiffs

Miller, *supra* note 11, ¶ 8 (contending that the Cooper motion “misunderstands the nature of the attorney’s fiduciary duty in multidistrict litigation cases”).

¹²⁵ See *Casey v. Denton*, No. 3:17-cv-00521, 2018 WL 4205153, at *1–2 (S.D. Ill. Sept. 4, 2018).

¹²⁶ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.222 (2004).

from the vantage point of the specific functions leaders are charged with performing. In the absence of an appointment order, an attorney in a non-class MDL has no authority to act on behalf of non-client plaintiffs. A leadership appointment order thus serves as a charter or constitution that reallocates some responsibilities ordinarily created by an attorney-client relationship to court-appointed leaders. The obvious analogy is to constitutions in federalist governments that assign certain functions to a national government, while leaving others the responsibility of subnational governments. A leadership appointment order similarly picks out functions that will be handled on a centralized basis by court-appointed leaders and leaves individually retained plaintiffs' attorneys responsible for the rest of the duties that inhere in the attorney/client relationship.

By reallocating duties and responsibilities in this way, leadership appointment orders address the coordination problems presented by specific MDLs without giving leaders the total control over non-clients' cases entailed by the certification of a class action. In essence, leadership appointment orders allow courts to experiment with novel forms of representation that overcome the limitations of both individual and class-action litigation.

This is not to say that existing leadership appointment orders necessarily balance the tensions created by the centralization of plaintiff-side work in the optimal manner. The basic policy problem presented by efforts to organize complex litigation is the need to balance the economies of scale from aggregation and collective representation, on the one hand, with respect for differences in individuals' interests and the structure of legal entitlements, on the other. Responses to that problem in leadership appointment orders are incomplete and evolving. But in tailoring leaders' responsibilities and duties to the needs of particular cases, appointment orders represent a novel approach to problems that traditionally stood as an obstacle to the resolution of large-scale litigation.

C. Should Leadership Appointments Be Standardized?

Finally, my findings shed light on debates over proposals to subject MDL to regular procedures.¹²⁷ The sample reflects the evolving, ad hoc procedure that defines MDL. While courts uniformly recognize the importance of appointing plaintiff-side leaders, there is no grand progression toward more perfect, more fully specified orders. Even late in the dataset, one finds orders that simply appoint attorneys to specified positions and say nothing more. This raises the question of whether leadership appointments should be standardized to a greater extent than they currently are.

The ad hocery reflected in leadership appointment orders is no accident. In

¹²⁷ See Noll, *supra* note 16, at 427 (describing defense interest groups' lobbying for MDL-specific rules of civil procedure).

separate articles, Professor Bradt and I have each argued that the flexibility of MDL procedure reflects lawmakers' deliberate choice that MDL operate as a forum of last resort for civil litigation that defies resolution through the ordinary processes of law.¹²⁸ Influenced by the experience of the 1960s electrical equipment litigation, Section 1407's drafters anticipated that in the decades to come, the federal courts would be asked to resolve other litigation crises caused by mass disasters and the revelation of corporate and governmental misconduct.¹²⁹ The statute's designers believed that centralized management and active managerial judging were essential to the courts' ability to deal with these crises, and they structured Section 1407 to facilitate transferee courts' use of those techniques.¹³⁰ But they did not and could not anticipate the specific structures and procedures that would be needed to resolve particular litigations involving thousands of parties and claims. Following the model of statutes that delegate procedure-making authority to an administrative agency that handles a high volume of changing claims, Section 1407 directs the transferee judge to conduct "coordinated or consolidated pretrial proceedings" in the expectation that the judge will put in place appropriate procedures for moving cases toward resolution.¹³¹ This expectation—reflected in the history, design, and structure of Section 1407—was formalized in 1983, when Congress authorized amendments to Rule 16 that expressly permit a district judge to "adopt[] special procedures for managing potentially difficult or protracted actions."¹³²

These structural choices are apparent in my findings concerning leadership appointments. The diversity of leadership structures, functions assigned to leaders, and ways of approaching leaders' relationship to MDL plaintiffs in the sample suggest that courts and attorneys are adapting appointment orders to address the needs of particular cases. This case-by-case approach to organizing litigation allows courts to finesse dilemmas that have long stood as an obstacle to the resolution of complex litigation in the federal courts.

But if the unstructured quality of the leadership appointment process gives MDL enormous flexibility to address emergent problems, it is not without costs. There is no sound policy reason for the under-specification of leader responsibilities noted above. Similarly, there is no obvious reason why timekeeping and billing requirements should vary from MDL to MDL. Even presumptively applicable requirements, which could be modified for cause, would be an improvement over the status quo.

¹²⁸ See Bradt, "A Radical Proposal," *supra* note 45, at 840; Noll, *supra* note 16, at 409.

¹²⁹ Bradt, "A Radical Proposal," *supra* note 45, at 863.

¹³⁰ *Id.* at 839.

¹³¹ 28 U.S.C. § 1407(a) (2012).

¹³² FED. R. CIV. P. 16(c)(2)(L).

Whether through legislation, rulemaking, or better dissemination of best practices, these aspects of leadership appointments should be standardized.¹³³ However, the major choices in leadership appointment orders are precisely the kind of issues that cannot sensibly be addressed *ex ante*. Who to appoint, the structure of plaintiffs' leadership, leaders' responsibilities, and the duties that follow—all these questions depend on the nature of the MDL, the type of claims asserted, divisions (or lack thereof) among consolidated plaintiffs, and other matters that cannot be known in advance of a specific litigation. In light of this uncertainty, the most that can be done through *ex ante* rulemaking is to lay down general standards to guide the transferee judge's exercise of discretion, such as "General Principles for Aggregate Proceedings" articulated in the American Law Institute's *Principles of the Law of Aggregate Litigation*.¹³⁴ Stated differently, it is inevitable that crucial case-structuring decisions will be delegated to an actor who operates with more and better information than rulemakers operating *ex ante*.

Elsewhere, I have argued that while these kind of delegations are a familiar and unobjectionable feature of American public law, their acceptability in a sociological sense depends on their being paired with guarantees of transparency, accessibility, and accountability that provide the protection from arbitrary action that regular procedures aim to secure.¹³⁵ Seen from this perspective, two interventions would be beneficial for the leadership-appointment process. First, leadership appointments would be improved if courts explained the major choices reflected in appointment orders. Second, some form of *ex post* review could subject orders to a "sober second look" without seriously delaying the progress of new MDLs. The best model for such review is some sort of third-party reconsideration at the transferee court level, which could operate swiftly without the formality of a full appeal.

In the leadership-appointment context, these reforms would address some of the more serious costs of procedural ad hocery while preserving the courts' flexibility to devise novel organizational structures in response to new litigation problems. The reforms I propose would increase the time needed to organize an MDL at the margin. But in doing so, they would help to regularize and rationalize appointment

¹³³ For a fuller discussion of the different policymaking mechanisms available for MDL reform, see Noll, *supra* note 16, at 458.

¹³⁴ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03(b) (AM. LAW. INST. 2010) (stating that, "[w]hile promoting efficiency, aggregate proceedings should: (1) respect the rights and remedies delineated by applicable substantive laws; (2) facilitate legally binding resolutions; (3) protect the interests of parties, represented persons, claimants, and respondents; and (4) respect the institutional capacities of courts"); cf. Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 117 (2003) ("The four fundamental principles of class action settlement governance are (i) maximum disclosure, (ii) an actively adversarial process, (iii) expertise of decisionmakers, and (iv) independence of decisionmakers from influence and self-interest.").

¹³⁵ See Noll, *supra* note 16, at 444–47.

orders—a move with beneficial effects for the long-term viability of the MDL model of aggregate litigation.

CONCLUSION

MDL leaders matter. In offering a preliminary empirical picture of the orders that organize them, this Article has highlighted the prevalence of leadership appointments and the many variations in how leaders are organized, the tasks they perform, and leaders' relationship to MDL plaintiffs and non-lead attorneys. More work is needed to fully understand the work of MDL leaders and their role in contemporary MDL. But even these preliminary findings help fill in the picture of aggregate litigation under Section 1407.