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## Remanding Multidistrict Litigation

Elizabeth Chamblee Burch\*

### INTRODUCTION

Scholars and commentators have long lamented vanishing trials, empty courtrooms, and the rise of alternative dispute resolution.<sup>1</sup> Aggregation—whether through class actions or, as is more likely today, multidistrict litigation—contributes steadily to disappearing trials and fuels the new paradigm of making and enforcing a settlement grid.<sup>2</sup> Section 1407, the multidistrict litigation statute, allows the Judicial Panel on Multidistrict Litigation (“the Panel”) to transfer federal cases with a common factual question to the same judge (“the transferee judge”) for coordinated pretrial proceedings.<sup>3</sup> In theory, after the parties complete discovery on common issues and the transferee judge rules on pretrial motions that affect the cases uniformly, the judge should then remand those cases to their transferor courts for case-

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\* Associate Professor, University of Georgia School of Law. Many thanks to the participants at the *Louisiana Law Review*'s Symposium—“The Rest of the Story: Resolving the Cases Remanded by the MDL”—for their comments in discussing these issues.

1. See, e.g., Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, 10 DISP. RESOL. MAG. 3 (2004) (“Moreover, the drop in trials has been recent and steep. In the early part of our period, there was an increase in federal civil trials, peaking in 1985, when there were 12,529. From then to now, the number of trials has dropped by more than 60 percent and the portion of cases disposed of by trial has fallen from 4.7 percent to 1.8 percent.”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (tracing the decline of trials in the United States); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Hope Viner Samborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (2002) (questioning whether the increase of settlements, mediation, and arbitration will harm the justice system); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329 (2005) (examining the influence of summary judgment on the trend of vanishing trials); Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 843 (2004) (analyzing the relationship between ADR and declining trials).

2. See, e.g., RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 57 (2007).

3. See 28 U.S.C. § 1407 (2012).

specific discovery and trial.<sup>4</sup> Practice, however, has proven to be quite different. Multidistrict litigation has frequently been described as a “black hole”<sup>5</sup> because transfer is typically a one-way ticket.<sup>6</sup> Indeed, interviews with attorneys who have been heavily involved in these cases suggest that “the panel has abdicated its proper role by providing no recourse to remedy or to exit an MDL black hole.”<sup>7</sup>

The numbers lend truth to this proposition. As of 2010, the Panel remanded only 3.425% of cases to their original districts.<sup>8</sup> That number dwindled to 3.1% in 2012,<sup>9</sup> and to a scant 2.9% in

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4. *Id.* § 1407(a) (“Each action so transferred 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 . . .”).

5. *See, e.g., In re U.S. Lines, Inc.*, No. 97-CIV-6727, 1998 WL 382023, at \*7 (S.D.N.Y. July 9, 1998) (explaining appellants’ description of the asbestos multidistrict litigation as “a black hole” and “the third level of Dante’s inferno”); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2330 (2008) (“Indeed, the strongest criticism of the traditional MDL process is that the centralized forum can resemble a ‘black hole,’ into which cases are transferred never to be heard from again.”); John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 27, 31 (2012) (“The single most prominent complaint about multidistrict litigation arises from counsel’s negative experiences in so-called black hole cases—those that seem not to move at an acceptable pace.”); Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L. J. 97, 126 (2013) (“Ultimately, neither the court nor the parties were ready, willing, or able to move [asbestos] cases to trial and settlement. This stage of litigation led some litigants to refer to MDL-875 as a ‘black hole,’ where cases disappeared forever from the active dockets of the court.”).

6. *See, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 n.9 (D.C. Cir. 1987) (“In practice, it has been reported, most cases transferred under § 1407 are not remanded.”).

7. Heyburn & McGovern, *supra* note 5, at 31.

8. Since Congress created the Panel in 1968, the Panel has centralized 349,914 civil actions for pretrial proceedings and, as of September 30, 2010, transferee courts have terminated 266,264 actions, reassigned 398 actions to transferor courts within the transferee district, and remanded 11,986 actions for trial. ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinesspdfversion.pdf>, archived at <http://perma.cc/98N2-PH7R>.

9. “Since its creation in 1968, the Panel has centralized 415,995 civil actions for pretrial proceedings. By the end of 2012, a total of 13,065 actions had been remanded for trial, 398 had been reassigned within the transferee districts, 341,836 had been terminated in the transferee courts, and 60,696 were pending throughout 54 transferee district courts.” ADMIN. OFFICE OF THE U.S. COURTS, 2012 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2012), available at <http://www.uscourts.gov/Statistics>

2013.<sup>10</sup> To put this number in perspective, in 2012, the multidistrict litigation docket comprised roughly 15% of all federal civil cases.<sup>11</sup>

Retaining cases in hopes of forcing a global settlement can cause a constellation of complications. These concerns range from procedural justice issues over selecting a forum and correcting error, to substantive concerns about fidelity to state laws, to undermining democratic participation ideals fulfilled through jury trials in affected communities. Yet, if transferee judges remanded cases after overseeing discovery into common issues, they could alleviate those concerns while avoiding inconsistent rulings on common questions and streamlining discovery. But transferee judges exacerbate these concerns when they disregard two inherent limitations on their power.

First, Congress intended to limit multidistrict litigation's jurisdictional reach to *pretrial* proceedings.<sup>12</sup> The statute's legislative history states that "trial in the originating district is generally preferable from the standpoint of the parties and witnesses."<sup>13</sup> Accordingly, the statute is designed to "maximize the litigant's traditional privileges of selecting where, when and how to enforce his substantive rights or assert his defenses while minimizing possible undue complexity from multi-party jury trials."<sup>14</sup> This hints at the second limitation. When nationwide plaintiffs' claims are founded on state substantive laws, common questions decrease as the differences between states' laws increase. This, in turn, creates a conundrum for transferee courts: applying the originating state's choice-of-law provision as *Klaxon*<sup>15</sup> requires

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[/JudicialBusiness/2012/judicial-panel-multidistrict-litigation.aspx](http://JudicialBusiness/2012/judicial-panel-multidistrict-litigation.aspx), archived at <http://perma.cc/D65B-ZX5N>.

10. "Since its creation in 1968, the Panel has centralized 462,501 civil actions for pretrial proceedings. By the end of 2013, a total of 13,432 actions had been remanded for trial, 398 actions had been reassigned within the transferee districts, 359,432 actions had been terminated in the transferee courts, and 89,123 actions were pending in 271 multidistrict litigation dockets throughout 56 transferee district courts." ADMIN. OFFICE OF THE U.S. COURTS, 2013 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2013), available at <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx>, archived at <http://perma.cc/MPX2-ETC8>.

11. Heyburn & McGovern, *supra* note 5, at 26.

12. See 28 U.S.C. § 1407 (2012).

13. S. REP. NO. 90-454, at 5 (1967).

14. *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 499 (J.P.M.L. 1968).

15. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must

is inefficient and challenging, but overlooking those differences to facilitate aggregate resolution ignores federalism concerns and may raise *Erie* questions.<sup>16</sup> Returning cases to their original districts as Congress intended, however, easily solves this conundrum.

Because remand occurs so infrequently, few courts or scholars have addressed the topic. This Article thus aims to ignite that discussion by explaining the potential advantages of remand, arguing that remand's scarcity is caused by repeat players' uniform interest in settlement and suggesting key junctures for both transferee judges and the Panel to disaggregate cases.

Part I begins by exploring the procedural, substantive, and communal benefits of remanding multidistrict litigation. Despite the potential upside and persistent "black hole" concerns, statistics show that remands rarely occur.<sup>17</sup> Part II considers why: remands disfavor those with litigation control—transferee judges, lead plaintiffs' attorneys, and defendants. Transferee judges deem settlement a hallmark of their success. Lead plaintiffs' lawyers try to increase their fees by inserting fee provisions into settlements. Likewise, plaintiffs' attorneys can bypass doctrinal uncertainties over weak claims by packaging plaintiffs together in a global settlement. And aggregate settlements allow defendants to resolve as many claims as possible in one stroke, take their hit, and return to business, which their shareholders view as a net positive. Moreover, the remand process itself defers to these vested interests. Although the Panel could remand cases at a party's request, in practice it appears never to have done so. Rather, it waits for the transferee judge to admit defeat and suggest remand—thereby conceding failure.<sup>18</sup>

Despite these impediments, there is some evidence that a normative shift may be underway. First, the Panel commissioned a self-study in 2010 and, upon hearing criticisms about multidistrict litigation's perception as a "black hole," Judge John G. Heyburn,

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conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.").

16. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See also Klaxon*, 313 U.S. at 496 ("We are of opinion that the prohibition declared in *Erie Railroad v. Tompkins*, against such independent determinations by the federal courts extends to the field of conflict of laws.").

17. *See supra* notes 8–10; Robreno, *supra* note 5, at 143–44 ("In reality, as it has turned out, for a variety of reasons, once the cases are consolidated they rarely are remanded to the transferor court.").

18. *See infra* Part II.A.3.

the Panel's chief judge, responded that the Panel is "encouraging judges to consider remand where their basic work is completed."<sup>19</sup> Second, Judge Eduardo Robreno, who has presided over the federal asbestos multidistrict litigation since 2008, and Judge Mark Davidson, who presided over the Texas state court asbestos litigation, have both begun disaggregating those cases for trial.<sup>20</sup> Their testimony before the American Bar Association's TIPS Asbestos Task Force led the Reporter and long-time aggregation proponent, Georgene Vairo, to question her pro-centralization stance and deem "empty courtrooms" a problem.<sup>21</sup> She concluded that "we need to let go of the 'make it go away' and the 'price of doing business' mentalities that drive all stakeholders—the plaintiffs and defense bars, as well as the courts—and return to the ideal of 'letting lawyers be lawyers' and getting cases ready for trial."<sup>22</sup> Finally, the Symposium for which this Article was written, "The Rest of the Story: Resolving the Cases Remanded by the MDL," is one of the first of its kind to examine remand and explore its implications.

If a shift toward disaggregating is to occur, however, the "pro-settlement" norm and "remand-as-a-failure" stigma must change. Likewise, transferee judges need guidance on how and when to remand. Accordingly, Part III examines the few cases in which remand has occurred, proposes ideal times for remanding cases, and encourages the Panel to reopen the direct line for parties to request remand despite the transferee judge's reluctance.

### I. WHY REMAND?

The hurdle for centralizing cases through multidistrict litigation is an extraordinarily low one: cases need to share but one common question of fact.<sup>23</sup> That factual question need not predominate or determine the outcome; it simply must exist. Granted, the more factual questions that cases share and the more central those questions are to the litigation, the more likely the Panel is to

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19. Heyburn & McGovern, *supra* note 5, at 32.

20. See Robreno, *supra* note 5, at 127; Georgene Vairo, *Lessons Learned by the Reporter: Is Disaggregation the Answer to the Asbestos Mess?*, 88 TUL. L. REV. 1039, 1057–59 (2014); Asbestos Task Force, *Transcript of the Proceedings*, A.B.A. TORT TRIAL AND INS. PRAC. SEC. 18 (2013), available at [http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos\\_tf/1013/13\\_10\\_1\\_asbestos\\_hearing\\_transcript.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/tips/asbestos_tf/1013/13_10_1_asbestos_hearing_transcript.authcheckdam.pdf), archived at <http://perma.cc/4BQS-76KG>.

21. Vairo, *supra* note 20, at 1070.

22. *Id.*

23. See 28 U.S.C. § 1407(a) (2012).

transfer and consolidate, but the threshold does not require anything close to the “predominance of common questions” required for Rule 23(b)(3) class certification. Accordingly, conducting discovery as to common questions takes the parties only so far; after that, each case will entail case-specific discovery on issues like specific causation and elements particular to each state’s law.

Consolidating can thus further some of aggregation’s goals, like “promoting the efficient use of litigation resources.”<sup>24</sup> But given the low threshold for commonality, multidistrict litigation can also reach a point of diminishing returns and inhibit the enforcement and development of substantive law because transferee courts cannot retain cases for trial.<sup>25</sup> Consequently, remanding these cases once the transferee judge resolves common pretrial issues can yield a number of intertwined procedural, substantive, and democratic benefits.<sup>26</sup>

Procedurally, disaggregating can help correct error by bypassing private, global settlements that are inherently non-appealable, building secondary judicial review into the process and incorporating pluralistic fact-finding by jurors on plaintiff-specific and state-specific issues. Substantively, if “local”<sup>27</sup> judges apply familiar state laws and explain the vagaries of those laws to jurors from the relevant community, it should produce greater accuracy, less error, and increased fidelity to state laws. Moreover, considering statewide classes and conducting trials in affected communities can ease the regulatory mismatch between defendants’ behavior, which affects citizens nationwide; transferee courts, which have nationwide authority over pretrial matters only; and a state’s laws, which govern defendants’ conduct toward its citizens. The following paragraphs explain these advantages in more detail.

First, remanding cases would increase error-correction opportunities. When transferee judges refuse to remand to goad parties into settling, they leave parties with few avenues for appellate review. Erroneous decisions can persist, and the judge

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24. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).

25. The Supreme Court’s *Lexecon* decision held that transferee judges could not transfer cases to themselves for trial. *See generally* *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). Of course, the transferee judge could try cases filed in his or her own district or with the parties’ consent.

26. Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 681–87 (2013) [hereinafter Burch, *Disaggregating*].

27. By “local,” I mean federal transferor judges sitting within the state whose laws will control the dispute’s outcome.

will have eviscerated plaintiffs' attorneys' most powerful bargaining chip: the threat of trial.<sup>28</sup> Unlike class action settlements, private aggregate settlements are not appealable. And, as I have explored elsewhere,<sup>29</sup> aggregate settlements may include coercive terms designed to further controlling stakeholders' interests at the expense of non-lead attorneys and plaintiffs. Because most interim rulings leading up to settlement are not dispositive, they are reviewable only through an extraordinary writ of mandamus or subsequent dismissal.<sup>30</sup> Even if an appellate court grants mandamus or reviews a dismissed case, it tends to do so using the highly deferential abuse-of-discretion standard.<sup>31</sup>

By contrast, remanding cases to their transferor districts—and even consolidating those cases on a statewide basis<sup>32</sup>—would build judicial redundancy into the process.<sup>33</sup> Although transferor judges receiving remanded cases should not routinely revisit pretrial

28. Plaintiffs often use the threat of trial “to press for a better offer,” so when this is taken away as a realistic opportunity, individual counsel may be “disarmed.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997). See also NAGAREDA, *supra* note 2, at 19–20 (“[M]ass tort plaintiffs’ lawyers have only one real bargaining chip, but it is a big one: their power to take cases to trial. Trial dates are scarce resources. Their availability is limited by the capacity of the judicial system.”).

29. See Elizabeth Chamblee Burch, *Group Consensus, Individual Consent*, 79 GEO. WASH. L. REV. 506, 512–14 (2011); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. (forthcoming 2015) [hereinafter Burch, *Judging Multidistrict Litigation*].

30. Transferee judges tend to issue “Lone Pine” orders after most plaintiffs’ cases are resolved through a comprehensive settlement. These orders require non-settling claimants to submit specific proof regarding their injuries to avoid dismissal. See *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); see, e.g., *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000).

31. See *In re Dresser Indus.*, 972 F.2d 540, 542–43 (5th Cir. 1992). Dismissals under Rule 16(f) are reviewed using the abuse of discretion standard. See *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (“The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.”); see, e.g., *In re Vioxx Prods. Liab. Litig.*, 388 F. App’x 391 (5th Cir. 2010) (using the abuse-of-discretion standard in reviewing the allegation that Judge Fallon should have recused himself based on his dual roles as judge and Chief Administrator of the Master Settlement Agreement).

32. For a proposal along these lines, see Burch, *Disaggregating*, *supra* note 26, at 687–93.

33. On the benefits of judicial redundancy, see Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 646–57 (1981), and Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008).



rulings,<sup>34</sup> they will inevitably have to expand, modify, or vacate certain orders affecting trial. As the Multidistrict Litigation Manual suggests, transferor courts can alter and vacate “earlier rulings so long as there is a good reason to do so.”<sup>35</sup> Although the law-of-the-case doctrine underscores these parameters,<sup>36</sup> remanding cases allows transferor courts to evaluate state-specific questions and correct transferee judges’ misinterpretations,<sup>37</sup> as well as decide questions that transferee judges declined to determine.<sup>38</sup> Because

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34. See Stanley A. Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (1978).

35. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL § 10.17 (Westlaw 2014). See also MANUAL FOR COMPLEX LITIGATION § 20.133 (4th ed. 2004) (“Although the transferor judge has the power to vacate or modify rulings made by the transferee judge, subject to comity and ‘law of the case’ considerations, doing so in the absence of a significant change of circumstances would frustrate the purposes of centralized pretrial proceedings.” (citing Weigel, *supra* note 34)); *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009) (“Under the law of the case doctrine and general principles of comity, a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge’s order or judgment merely because the later judge might have decided matters differently.” (quoting *United States v. O’Keefe*, 128 F.3d 885, 891 (5th Cir. 1997))).

36. See, e.g., *In re Pharm. Benefit Managers Antitrust Litig.*, 582 F.3d 432 (3d Cir. 2009) (vacating and remanding the transferee judge’s decision to vacate the transferor judge’s decision to compel arbitration because it violated the law of the case); *In re Ford Motor Co.*, 591 F.3d at 411 (“[T]ransferor courts should use the law of the case doctrine to determine whether to revisit a transferee court’s decision.”); *In re Multi-Piece Rim Prods. Liab. Litig.*, 653 F.2d 671, 678 (D.C. Cir. 1981) (applying the law of the case to multidistrict litigation).

37. This gives transferor courts a sound reason for revisiting the question. See *In re Ford Motor Co.*, 591 F.3d at 411–12 (“The law of the case doctrine requires that courts not revisit the determinations of an earlier court unless ‘(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work . . . manifest injustice.’” (quoting *Propes v. Quarterman*, 573 F.3d 225, 228 (5th Cir. 2009))). In *Christianson v. Colt Industries Operating Corp.*, the Supreme Court has explained the discretionary scope of the law of the case:

A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was “clearly erroneous and would work a manifest injustice.”

486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). See *Gottschall v. Crane Co.*, 2014 WL 5025725, at \*3 (Cal. Ct. App. Oct. 8, 2014) (holding that the transferee judge’s interpretation of California law was incorrect in refusing to apply the doctrine of collateral estoppel “to bind a California litigant to a principle of law adopted in the prior foreign court litigation”).

38. See, e.g., *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 276 F.R.D. 336, 347 (W.D. Mo. 2011) (declining to certify a class due to

some transferee judges refuse to rule on summary judgment motions that implicate state laws,<sup>39</sup> remand likewise offers parties an opportunity to air substantive disputes, proceed to trial, and appeal—if warranted.

Second, remanding cases can ease the substantive burdens caused by aggregating state-law claims with minimal commonality. When transferee judges consider state-law claims (such as product liability, consumer protection, fraud, warranty, and unjust enrichment) from around the country, they are confronted with sticky choice-of-law questions, particularly when plaintiffs request class certification. To make these classes seem manageable and ostensibly avoid choice-of-law problems, plaintiffs may contend that a single state's law should apply,<sup>40</sup> try to shoehorn state-law claims into a federal cause of action like RICO,<sup>41</sup> or suggest that the differences in state laws can be grouped into a few subclasses.<sup>42</sup> Plaintiffs may likewise forgo personal injury claims that implicate individual questions, which can jeopardize class members' ability to pursue those claims later.<sup>43</sup> But, as some courts recognize, when issues are state-specific and do not affect all of the cases, transferor judges are best equipped to decide them.<sup>44</sup>

the “vagaries of multiple jurisdictions” but suggesting that transferor judges could revisit the issue of whether “a statewide class is appropriate”).

39. *See, e.g., In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 109595, at \*2 (E.D. Pa. Mar. 7, 1997) (declining to rule on summary judgment motions because the transferee court “would be putting itself in the shoes of the transferor courts”).

40. *See, e.g., In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002).

41. *See, e.g., Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004).

42. *See, e.g., Cole v. Gen. Motors Corp.*, 484 F.3d 717 (5th Cir. 2007); *Gen. Motors Corp. v. Bryant*, 285 S.W.3d 634 (Ark. 2008). Sometimes transferee judges will have plaintiffs file a master complaint in the transferee forum and then use that complaint to apply the laws of the transferee court's forum state. *E.g., In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1078 (S.D. Ind. 2001). Most judges disagree with this approach. *See, e.g., In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 692–93 (N.D. Ga. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 489 F. Supp. 2d 932, 934–36 (D. Minn. 2007); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454–55 (E.D. La. 2006).

43. *E.g., Colindres v. QuietFlex Mfg.*, 235 F.R.D. 347 (S.D. Tex. 2006); *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 243 (W.D. Tex. 1999).

44. *In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 276 F.R.D. 336, 339 (W.D. Mo. 2011) (“Plaintiffs essentially ask the undersigned to decide, for instance, that a class of Washington consumers should be certified for trial in the Western District of Washington. This issue affects only a few cases, and relates to the manner in which the case will be tried. It is not an issue

Remanding cases to these judges would allow those most familiar with state law to determine whether to certify statewide classes.<sup>45</sup>

In this way, remand could alleviate some of the tension between multidistrict litigation and basic federalism principles.<sup>46</sup> As Larry Kramer has observed, when states differ about what parties' rights should be, those differences "are not a 'cost' of the system; . . . They are its object, something to be embraced and affirmatively valued."<sup>47</sup> But multidistrict litigation can muddy states' laws through settlement. All-encompassing settlements may water down state-law variations to make it easier to administer claims, which can allow plaintiffs with weak or invalid claims under their states' law to receive compensation at others' expense.

Conducting bellwether trials before settlement helps to establish claim values, but transferee courts are limited to trying cases either originally filed in that district or by the parties' consent.<sup>48</sup> Thus, bellwether trials before citizens of a single transferee forum (that often apply that forum's substantive laws) may do little to maintain substantive distinctions between state laws or test those variations before the citizens that helped enact them.

Jury trials are, after all, meant to bring a community's diverse perspectives and norms to bear on fact finding. Communities—even within a single state—can vary dramatically. Given the plurality of viewpoints and experiences within our country, it is no surprise that jurors may approach the adjudicative and deliberative process dissimilarly even with regard to the same product or

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that the undersigned should dictate to the transferor courts, but is an issue that is more appropriately decided by the judges charged with presiding over the trial."); *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 77 (D. Me. 2011) ("[T]he transferor courts, each of which is familiar with the state law of their respective jurisdictions, are in a better position to assess the parties' state law arguments and their impact on the class certification issue.").

45. *In re Bisphenol-A (BPA)*, 276 F.R.D. at 347 ("Once the cases are returned to the transferor courts, relatively little effort will be needed for Plaintiffs to pursue individual suits. There is also the prospect that one or more transferor courts will conclude—without the vagaries of multiple jurisdictions to worry about and a greater familiarity with that state's law—that a statewide class is appropriate.").

46. *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

47. Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 579 (1996).

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

action.<sup>49</sup> As many debates illustrate—think immigration or gun control, for example—plural communities fall along a broad spectrum when it comes to moral views and social values. So, although bellwether trials in the transferee forum provide the public and the nonparticipating plaintiffs a glimpse into the contested issues, without remand, multidistrict litigation can undermine democratic values of communal participation and fact finding by citizens nationwide.<sup>50</sup>

At its core, this bespeaks a problem of regulatory mismatch between transferee courts' limited decisional authority and the scope of behavior they attempt to regulate. As Professors Issacharoff and Nagareda explained, "a regulatory mismatch may occur whenever the authority charged with overseeing some economic activity has jurisdiction that is smaller than the conduct to be regulated."<sup>51</sup> For example, a variant of this concern led Congress to enact the Class Action Fairness Act (CAFA) and thereby prevent a single state court from regulating an industry's nationwide conduct under its own state law.<sup>52</sup>

But CAFA contributed to the mismatch in multidistrict litigation when states' laws provide the decisional authority. Transferee judges now have federal, pretrial jurisdiction over many would-be state class actions, but they cannot try those cases. And, because there is no federal law governing product liability, for example, they cannot resolve those cases with anything other than state law. As transferee judges often admit, they are not the foremost authority on how to apply other states' laws.<sup>53</sup> So, absent remanding cases to their transferor courts,<sup>54</sup> the nationwide scope

49. See Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 864–81 (2009); Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 745 (1995) (“[The right to a jury trial] ensures a role for the community in adjudicative proceedings.”).

50. Burch, *Disaggregating*, *supra* note 26, at 685–87.

51. Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1674 (2008).

52. *Id.* at 1674–75.

53. *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1199 (D. Minn. 2012) (“[T]he transferor courts, each of which is familiar with the state law of their respective jurisdictions, are in a better position to assess these claims.” (quoting *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 77 (D. Me. 2011))). See *Light Cigarettes Case*, 832 F. Supp. 2d at 77 (“[T]he transferor courts . . . are in a better position to assess the parties’ state law arguments and their impact on the class certification issue.”).

54. Transferee judges have requested that the Panel remand cases so that transferor judges can consider whether to certify statewide classes. See, e.g., *In re Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1331

of a transferee judge's authority to handle pretrial matters is ill-suited to resolve state causes of action through trial or wholesale class certification.<sup>55</sup> Settlement is the only option. But settlement substitutes difficult choice-of-law questions for consent and buries differences in the claims administration process.

## II. IMPEDIMENTS TO REMAND

As is the trend in all civil cases, most multidistrict litigation settles.<sup>56</sup> This is perhaps the principal reason behind the low remand rate, at least once the judge decides dispositive motions. As the trend in civil settlements suggests, by one token, multidistrict litigation settlements are nothing extraordinary. But the pressures prompting these settlements are far from conventional. Indeed, the incentive structure for controlling stakeholders (lead plaintiffs' attorneys, defendants, and transferee judges) and the procedural requirements for remand are stacked so heavily in favor of settlement that remanding even 2.9% of cases is remarkable.

### *A. Remand Contravenes Repeat Players' Vested Interests*

There comes a point in nearly every multidistrict litigation where controlling stakeholders' interests converge upon settlement. These stakeholders include plaintiffs' lead lawyers (lead counsel, steering committees, liaison counsel, etc.), defendants and their attorneys, and transferee judges—people who are often repeat players.<sup>57</sup> Appointing lead lawyers wrests decision-making authority away from plaintiffs' individually chosen counsel and places it in the hands of lawyers who are often known as settlement artists—not trial attorneys. These lead lawyers control everything from discovery to settlement

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(J.P.M.L. 2012) [hereinafter Light Cigarettes Case JPML Remand Order] (remanding cases involving putative statewide classes involving “only claims brought under the law of each plaintiff’s respective state”); *In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009) (suggesting that the transferee judge might remand cases for class certification consideration).

55. Issue classes targeted at the defendant's conduct might, however, be another possibility.

56. *Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150–51 (2006).

57. Burch, *Judging Multidistrict Litigation*, *supra* note 29 (manuscript at 22–25).

negotiations. Because plaintiffs have no option to “opt out” of multidistrict litigation and only regain control of their lawsuit in the unlikely event of remand, they are hostages to the controlling stakeholders’ interests.<sup>58</sup> And, as this Section describes, settlement—not remand—furthers the existing power structure’s interests, which explains why transferee judges have used remand as a threat to bring stakeholders to the negotiating table.<sup>59</sup>

### 1. Lead Plaintiffs’ Lawyers’ Interests

Lead lawyers have two income sources in multidistrict litigation: contingent fees from their own clients and court-ordered “taxes” from plaintiffs who benefit from their efforts. As to the former, the tendency to settle in all contingent-fee cases has been well documented,<sup>60</sup> and lead lawyers are arguably no more incentivized to settle than non-lead lawyers on those grounds. But common benefit fees—the taxes from non-clients’ cases—are a different matter altogether. The emerging common law surrounding these fees is an unpredictable hodgepodge of legal doctrines and piecemeal rationales.<sup>61</sup> Global settlements have thus begun to offer lead lawyers an ethically questionable route around this uncertainty. Because the judge gives them power to negotiate on plaintiffs’ behalf, lead lawyers have started brokering deals that incorporate their fee awards into settlement provisions.<sup>62</sup>

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58. See BARBARA J. ROTHSTEIN & CATHERINE R. BORDEN, FED. JUDICIAL CTR., *MANAGING MULTIDISTRICT LITIGATION IN PRODUCTS LIABILITY CASES* 48 (2011) (“Remember that in any products liability MDL, it is often the individual plaintiff who may be inconvenienced the most by the inclusion of his or her action in the centralized proceedings.”).

59. See Jeremy T. Grabill, *The Pesky Persistence of Class Action Tolling in Mass Tort Multidistrict Litigation*, 74 *LA. L. REV.* 433, 440 (2014) (“In the MDL context, given the threat of remand that the MDL statute confers upon transferee courts, it is inevitable that a time will come when the parties begin thinking about a potential global settlement.”); Kurt Orzeck, *Judge Delays Wind-Down in MDL over Merck’s Fosamax*, *LAW 360* (Oct. 4, 2013, 3:59 PM), <https://www.law360.com/articles/478316/judge-delays-wind-down-in-mdl-over-merck-s-fosamax>, archived at <http://perma.cc/Q9ZG-9BSP>; Julie A. Steinberg, *Merck Agrees to \$28 Million Settlement to Resolve Fosamax Jawbone Decay Suits*, *Class Action Litig. Rep.* (BNA) No. 14, at 1482 (Dec. 13, 2013).

60. See, e.g., Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 *N.Y.U. L. REV.* 1273, 1293 (2012).

61. Burch, *Judging Multidistrict Litigation*, *supra* note 29 (manuscript at 33–34).

62. *Id.* (manuscript at 57–60). I have argued elsewhere that compensating lead lawyers on a quantum-meruit basis would help alleviate these doctrinal problems. *Id.*

For example, in *Guidant*, *Vioxx*, and the *Genetically Modified Rice Litigation*, lead lawyers inserted terms into global settlements that increased their fees and required settling plaintiffs to waive their fee objections if they wanted to enroll in the settlement.<sup>63</sup> Lead lawyers combine these terms with other provisions that give defendants the right to withdraw the offer if too few plaintiffs sign up, and require plaintiffs' attorneys to recommend their clients take the deal or withdraw from representing them.<sup>64</sup> Terms like these raise the prospect that consent is less than voluntary—even in an era that has embraced contracts of adhesion and mandatory arbitration.<sup>65</sup> But, regardless of one's views on consent, turning a blind eye to the plain risk of structural collusion presented when lead lawyers negotiate their fees with defendants is an entirely different matter.<sup>66</sup>

When lead lawyers want to avoid the doctrinal uncertainty surrounding their fees via settlement, they hand defendants a meaningful bargaining chip. Defendants care little about how a lump sum is divvied up among plaintiffs and their attorneys,<sup>67</sup> but they can demand significant concessions in return. As Professors Silver and Miller pointed out, “[t]he defendant is happy to offer [lead attorneys] ‘red-carpet treatment on fees’—higher common benefit fees cost the defendant nothing—in return for other things,

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63. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL 05-1708, 2008 WL 682174, at \*2 (D. Minn. Mar. 7, 2008), *amended in part*, MDL 05-1708, 2008 WL 3896006 (D. Minn. Aug. 21, 2008); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008), *on reconsideration in part*, 650 F. Supp. 2d 549 (E.D. La. 2009); *In re Genetically Modified Rice Litig.*, No. 4:06-MD-1811 CDP, 2010 WL 716190, at \*9-11 (E.D. Mo. Feb. 24, 2010) (creating a common benefit fund). *See* MDL Settlement Agreement, *Genetically Modified Rice Litig.*, No. 4:06-MD-1811 CDP, 2010 WL 716190 [hereinafter MDL Settlement Agreement].

64. *See, e.g.*, *Vioxx Prod. Liab. Litig.*, MDL-1657, No. 05-01657 para. 1.2.8.1 (E.D. La.) (initial settlement agreement), *available at* [http://www.merck.com/newsroom/vioxx/pdf/Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf), archived at [http://perma.cc/R7\\_VS-B34K](http://perma.cc/R7_VS-B34K). After some plaintiffs' attorneys contended the settlement conflicted with ethical rules, it was reinterpreted to mean that the attorneys should recommend the deal only if it was in the client's best interest. Alex Berenson, *Lawyers Seek to Alter Settlement Over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4.

65. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

66. Burch, *Judging Multidistrict Litigation*, *supra* note 29.

67. *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1010 (2010) (describing the problems caused by lump-sum settlements).

such as a smaller settlement fund, a later funding date, or a higher participation threshold.”<sup>68</sup>

Absent a global settlement, lead lawyers stumble into less charted territory. Although transferee judges often establish common funds from which to pay lead lawyers, the percentage and calculation methods can vary dramatically.<sup>69</sup> Judges tend to analogize to the class action’s common fund doctrine and borrow from contract principles, ethics, and equity.<sup>70</sup> And because compensation arguably rests on an unjust enrichment theory—that non-lead attorneys have received something of value for which they have not paid—negotiating a global settlement surely makes that argument more palatable for both lead lawyers and judges.

Global settlements may likewise encourage plaintiffs’ attorneys to file weak claims. Known as the “Field-of-Dreams” problem—“If you build it, they will come”—multidistrict litigation coaxes claimants out of the woodwork regardless of their claim’s strength in hopes of initially staying buried under mounting cases then cashing in on settlement.<sup>71</sup> Global settlements encourage this phenomenon when the claims administration process grinds together high and low value claims and under- or overcompensates them respectively. The incentives fueling this problem vary from attorney to attorney: some might file questionable cases to increase fees, particularly after their fees are reapportioned to lead lawyers, while others might file a legion of undifferentiated claims in hopes of garnering a leadership role.<sup>72</sup> Whatever the rationale, so long as remand—and testing cases through trial—remains an unrealistic probability, aggregating cases will perpetuate a find, bind, and grind mentality.

If remand became the norm rather than the exception, it could alleviate the Field-of-Dreams problem. Attorneys hoping to free ride on lead lawyers’ efforts by filing undifferentiated claims may dismiss weak claims if faced with trial. And if remand became routine, it might deter attorneys from filing questionable claims in the first place. Then, if settlement occurred pre-remand, claimants with strong claims

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68. Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 134 (2010).

69. Burch, *Judging Multidistrict Litigation*, *supra* note 29 (manuscript at 28–30).

70. *Id.* (manuscript at 28).

71. Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, 24 LITIGATION 43, 45 (1998).

72. Having a large inventory of cases may make the attorney seem like a power broker such that the judge appoints her to a leadership position. Burch, *Judging Multidistrict Litigation*, *supra* note 29 (manuscript at 5).



would stand a better chance of receiving compensation commensurate with their claims' strength.

## 2. Defendants' Interests

Defendants often stand to gain the most through centralization and global settlement.<sup>73</sup> Multidistrict litigation dislodges plaintiffs from their chosen fora, forces plaintiffs lawyers (who have reputations for not hunting well in packs) to battle for lead positions, and renders trials a very distant threat. Centralization likewise advantages defendants by making meaningful closure possible through a global settlement.

Granted, it goes without saying that defendants would prefer to have all the cases against them dismissed. But once they lose dispositive motions and can assess the universe of claims before them, they tend to think about ways to achieve the maximum amount of finality for the lowest possible price. Class actions once served this interest moderately well, but even "settlement classes"<sup>74</sup> have become increasingly difficult to certify in litigation where individual issues outnumber common ones, like in product liability or other mass tort cases.<sup>75</sup> Thus, in some cases like *Vioxx*, defendants used innovative measures and coercive settlement tactics to achieve at least an 85% closure rate.<sup>76</sup>

This need for finality, which investors demand, explains defendants' near-uniform opposition to remanding cases for trial.<sup>77</sup>

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73. See, e.g., Herrmann, *supra* note 71, at 44 (noting that multidistrict litigation proceedings give defendants time to "organize a defense, negotiate a global settlement, or file a bankruptcy proceeding"). Likewise, multidistrict litigation proceedings can precipitate the filing of weak claims and make discovery limits difficult. *Id.* at 45–46.

74. See Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 981–87 (2014) (explaining why even negotiated settlements in cases not yet certified as classes can be problematic).

75. Burch, *Disaggregating*, *supra* note 26, at 673–76.

76. See *supra* note 61.

77. See, e.g., *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 76 (D. Me. 2011) (noting that the defendants opposed the plaintiffs' motion for remand because "class certification is a pretrial issue that the Court should resolve in order to achieve the substantial efficiencies contemplated by the JPML's reference"); *Light Cigarettes Case JPML Remand Order*, *supra* note 54 (denying the defendant's request that the Panel vacate its order remanding the cases to their respective transferor courts); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2009 WL 1874085 (D.N.J. June 30, 2009) [hereinafter *Brokerage Case June Opinion*] (noting the defendants' opposition to remand request); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2009 WL 580238, at \*2 (D.N.J. Mar. 3, 2009) ("Defendants vigorously oppose the instant [remand] motion, and assert that U-Haul should remain a

Remanding cases, whether for individual treatment or state-specific class actions, makes it much harder to corral and extinguish claims through a global settlement. Rather than dealing with a centralized authority like the plaintiffs' steering committee, defendants are forced to negotiate with disparate attorneys and lobby against piecemeal, statewide class actions that offer all of the downsides and none of the finality-related upsides of global settlements.<sup>78</sup>

### 3. *Transferee Judges' Interest*

Finally, transferee judges have an interest in pushing parties to settle. Federal Rule of Civil Procedure 16 expressly authorizes judges to facilitate settlement discussions.<sup>79</sup> As pretrial judges, transferee judges would be remiss not to encourage these conversations. Yet, as Judge Jack Weinstein has observed, "Federal judges tend to be biased toward settlement. . . . We clean the dishes and cutlery so they can be reused for the long line of incoming customers. Settlements are the courts' automatic washer-dryers."<sup>80</sup> Thus, this pro-settlement stance has become standard

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party to MDL 1663 for a variety of reasons."); *In re Columbia/HCA Healthcare Corp. Qui Tam Litig.* (No. II), 560 F. Supp. 2d 1349, 1350 (J.P.M.L. 2008) (rejecting the defendants' arguments that remand is premature); *In re Managed Care Litig.*, 416 F. Supp. 2d 1347, 1347 (J.P.M.L. 2006) (remanding a case over the defendants' objections); *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001) (noting the defendant's opposition to remand because "this case will move more expeditiously if it remains part of the MDL").

78. Light Cigarettes Case JPML Remand Order, *supra* note 54 ("Defendants also contend that ordering remand now would permit plaintiffs to 'game the system.' They argue, in other words, that if plaintiffs in future MDLs prevail on exemplar class certification rulings made by the respective transferee courts, they will seek to have those rulings applied to all pending and future related class actions, but, where certification is denied, plaintiffs in the non-exemplar cases will simply move for a suggestion of remand and thus seek a second bite of the apple before the transferor courts.").

79. FED. R. CIV. P. 16(a)(5).

80. Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement* (1984), 78 *FORDHAM L. REV.* 1265, 1265 (2009). *See also In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992) (observing that the JPML consolidated cases in front of Judge Raymond Acosta, but "[s]hortly thereafter, the Chief Justice appointed the Honorable Louis C. Bechtle as a 'settlement judge,'" such that while Judge Acosta advanced the litigation toward trial, "Judge Bechtle endeavored to advance settlement prospects by determining individual and aggregate values for the cases"); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer*

operating procedure for transferee judges. Judge Eldon Fallon conceded as much:

The MDL transferee court theoretically oversees the discovery aspect of the case and remands various cases back to the transferor courts for further proceedings. In practice, however, it is not unusual for the transferee court to conduct bellwether trials and encourage a global resolution of the matter before recommending to the Panel that the case be remanded.<sup>81</sup>

According to this view, settlement is the solution and remand is a last resort.

Given this perspective, it is not surprising that both the Panel and transferee judges lamented the Supreme Court's *Lexecon* decision. *Lexecon* forbade transferee judges from transferring cases to themselves for trial, and thus impeded settlement.<sup>82</sup> As former Panel chairman Judge William Terrell Hodges observed, "It would obviously be a lot more efficient if the transferee judge had the authority to try the cases that remain. That would add another settlement tool into the calculus that normally produces settlement anyway."<sup>83</sup>

So, even though coaxing settlement strays furthest from a judge's adjudicative role,<sup>84</sup> it is not a secret that transferee judges (like most federal judges) are pro-settlement.<sup>85</sup> But, as Judge William Young explained, "the 'settlement culture' for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice."<sup>86</sup> As he notes:

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*Power*, 82 TUL. L. REV. 2245, 2288–89 (2008) (discussing settlement bias in multidistrict litigation).

81. Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373–74 (2014).

82. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).

83. Gregory Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 ME. B.J. 16, 21 (2004).

84. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 43 (2003).

85. See Marcus, *supra* note 80, at 2272; see also *In re Zyprexa Prods. Liab. Litig.*, 238 F.R.D. 539, 542 (E.D.N.Y. 2006) (urging Congress to expand the Class Action Fairness Act to promote final, global resolution of mass disputes).

86. *Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006).

The *Manual for Complex Litigation* seems virtually to command this result: One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. *As a transferee judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.*<sup>87</sup>

This directive only partially explains the added settlement push in multidistrict litigation. Transferee judges also receive less obvious, self-interested benefits from settling high-profile cases. For example, the Panel views quickly settling a complex case as a hallmark of success that favorably disposes it to reward that judge with a new assignment.<sup>88</sup> Multidistrict litigations are plum judicial assignments; they involve interesting facts, media attention, and some of the nation's most talented attorneys. Given that only around 27% of active judges and 20% of senior judges receive these assignments, federal judges often “campaign” for them.<sup>89</sup>

Conversely, failing to resolve cases quickly can subject transferee judges to scrutiny from the Panel.<sup>90</sup> As Judge Eduardo Robreno, who handled the asbestos multidistrict litigation, observed, “As a matter of judicial culture, remanding cases is viewed as an acknowledgement that the MDL judge has failed to resolve the case,

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87. *Id.* at 150–51 (emphasis in original) (quoting MANUAL FOR COMPLEX LITIGATION § 20.132 (4th ed. 2004)).

88. This observation is based principally on conversations I have had with federal judges and their clerks, the general perception that judges who receive these cases are especially capable, and the prestige and publicity that generally accompanies such an assignment. See generally Susan Willett Bird, *The Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475, 482 n.42 (1975) (reporting that related cases were “assigned specifically to Judge X . . . because he was ‘especially able’”); DAVID F. HERR & NICOLE NAROTZKY, AM. LAW INST., THE JUDICIAL PANEL’S ROLE IN MANAGING MASS LITIGATION 249, 299 (2008) (“The Panel undoubtedly considers the ability and reputation of a judge in determining whether to assign complex, multidistrict litigation to him or her. . . . In one case, [the Panel] expressly identified former Panel membership, as well as leadership roles in various federal court committees as a reason for selecting Chief Judge Sam Pointer as a transferee judge.”).

89. Heyburn & McGovern, *supra* note 5, at 30.

90. *Id.* at 31–32 (quoting Judge John G. Heyburn II, the chair of the Panel, as saying, “[T]he panel did undertake a study of approximately 40 of our oldest dockets to look for any common problems. From this study, we have identified certain areas of concern and communicated these to our transferee judges as a group”).

by adjudication or settlement, during the MDL process.”<sup>91</sup> So, transferee judges have their own professional and reputational incentives to broker deals and thwart remand.

### *B. Remand Procedures Defer to Vested Interests*

Current procedures for requesting and effectuating remand to transferor courts serve chiefly to reinforce controlling stakeholders’ interests. Even if they wanted to, transferee judges have no power to remand cases directly to transferor courts.<sup>92</sup> They must instead suggest that the Panel remand the cases.<sup>93</sup> And although parties may make remand requests directly to the Panel,<sup>94</sup> the Panel appears never to have granted a request without first receiving the transferee judge’s blessing.<sup>95</sup> Despite judges lobbying for multidistrict

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91. Robreno, *supra* note 5, at 144.

92. *In re Wilson*, 451 F.3d 161, 165 n.5 (3d Cir. 2006).

93. *In re Roberts*, 178 F.3d 181, 183 (3d Cir. 1999); *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196 (S.D. Ind. 2001).

94. Rules of Procedure of the Judicial Panel on Multidistrict Litigation, Rule 10.1(b), 277 F.R.D. 480 (2011). Rule 10.1(b) states:

Initiation of Remand. Typically, the transferee judge recommends remand of an action, or a part of it, to the transferor court at any time by filing a suggestion of remand with the Panel. However, the Panel may remand an action or any separable claim, cross-claim, counterclaim or third-party claim within it, upon

(i) the transferee court’s suggestion of remand,

(ii) the Panel’s own initiative by entry of an order to show cause, a conditional remand order or other appropriate order, or

(iii) motion of any party.

95. See generally *id.* at Rule 10.3 (requiring additional showings if the transferee court does not initiate remand “[b]ecause the Panel is reluctant to order a remand absent the suggestion of the transferee judge”); *In re Patenaude*, 210 F.3d 135, 146 (3d Cir. 2000) (“Deference is not abdication, however, and the presence or absence of a remand recommendation from the transferee judge as a factor in the Panel’s decision-making process seems to us entirely reasonable.”); *In re Midwest Milk Monopolization Litig.*, 435 F. Supp. 930, 932 (J.P.M.L. 1977) (“In the absence of a suggestion from the transferee judge for remand of these actions, however, we find the question of remand premature.”); *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (“In considering the question of remand, the Panel has consistently given great weight to the transferee judge’s determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings.” (citing *In re IBM Peripheral EDP Devices Antitrust Litig.*, 407 F. Supp. 254, 256 (J.P.M.L. 1976))); Weigel, *supra* note 34, at 583–84 (“In the exercise of that [remand] power, the Panel defers to the views of the transferee judge. Absent a recommendation of remand from the transferee judge, any party advocating remand bears an especially heavy burden.”). In *In re Baseball Bat Antitrust Litigation*, the Panel did remand

assignments, as a matter of practice, the Panel refuses to “look over the shoulders of [its] transferee judges” for fear of “severely compromis[ing] [its] ability to attract [them].”<sup>96</sup>

Appellate judges further reinforce this single-gatekeeper system in two ways. First, they review the Panel’s decisions only upon a writ of mandamus and subject those decisions to the clear error standard.<sup>97</sup> So, if the Panel ignores cases that disappear into an abyss of multidistrict litigation, the appellate courts offer no alternative recourse. Second, the appellate courts have liberally interpreted the standard that transferee judges can hold on to cases for pretrial purposes by observing that “coordination can be found even if common issues are present only in relation to cases that have already terminated”<sup>98</sup> and “overlapping issues do not necessarily need to touch the petitioners’ particular cases.”<sup>99</sup>

Under this rationale, even once the parties complete common discovery and have only case-specific discovery remaining, the transferee judge can hold a case hostage as long as she wants. This creates a powerful settlement tool, but undermines the Supreme Court’s *Lexecon* decision.<sup>100</sup> In *Lexecon*, the Court explained that section 1407 uses mandatory nomenclature dictating that the Panel “shall” remand actions once pretrial proceedings conclude unless those cases were terminated.<sup>101</sup> Even though this result is supposed

the entirety of a case as opposed to following the transferee judge’s suggestion that it remand only one claim. *See* 112 F. Supp. 2d 1175 (J.P.M.L. 2000).

96. Heyburn & McGovern, *supra* note 5, at 31.

97. 28 U.S.C. § 1407(e) (2012) (“No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code.”); *In re Wilson*, 451 F.3d 161, 168–69 (3d Cir. 2006) (“We have observed that because of the ‘great weight’ that the JPML places upon an MDL court’s suggestion of remand, ‘only those plaintiffs who actually sought suggestion of remand from the [MDL] court have satisfied the first prong of the mandamus inquiry.’” (quoting *Patenaude*, 210 F.3d at 142)).

98. *Wilson*, 451 F.3d at 170; *Patenaude*, 210 F.3d at 146 (holding that “because individual settlement negotiations and conferences are ongoing in the plaintiffs’ individual cases, and because the transferee court is conducting discovery on overlapping issues that affect many asbestos cases, even if not the plaintiffs’, coordinated pretrial proceedings have not concluded”).

99. *Wilson*, 451 F.3d at 170 (3d Cir. 2006). *Cf. In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1197 (S.D. Ind. 2001) (“The exercise of that [remand] discretion generally turns on the question of whether the case will benefit from further coordinated proceedings as part of the MDL.” (citing *In re Air Crash Disaster*, 461 F. Supp. 671, 672–73 (J.P.M.L. 1978))).

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

101. *Id.* at 35.

to be “impervious to judicial discretion,”<sup>102</sup> circuit courts have read it in conjunction with Rule 16, which allows judges to facilitate settlement conferences.<sup>103</sup> The result endows transferee judges with near eternal pretrial authority that persists long after joint discovery and uniform pretrial rulings have ceased.

So, even though Congress saw it fit to give the Panel the power to remand cases at a party’s behest,<sup>104</sup> in practice, the three roads to remand—at the transferee court’s suggestion, the Panel’s own initiative, or by motion of any party—have converged to one. Remand occurs only if the transferee judge suggests it. And transferee judges prefer to avoid remand and the stigma of “failure” that accompanies it. Thus, when a transferee judge clings to cases in hopes of coercing a settlement,<sup>105</sup> there is no path around the bottleneck.<sup>106</sup>

### III. LIBERATING CASES THROUGH REMAND

In theory, the bottleneck should not exist. Even before the Supreme Court’s admonishment in *Lexecon*, the Panel recognized that transferee judges will not “necessarily complete all pretrial proceedings,” but “will conduct the *common* pretrial proceedings.”<sup>107</sup> Of course, practice has proven otherwise.

Nevertheless, there are some indications that change may be underway. The chairman of the Panel, Judge John G. Heyburn, has stated:

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102. *Id.*

103. *Patenaude*, 210 F.3d at 144–46. Some trial courts have taken a more limited view. *See, e.g., In re Bisphenol-A (BPA) Polycarbonate Plastic Prods. Liab. Litig.*, 276 F.R.D. 336, 339 (W.D. Mo. 2011) (“Matters related to the administration of individual trials—or matters that relate to only a few cases—should be decided by the court that will actually conduct the trial. The purpose of an MDL is to foster efficiency by having a single judge address and decide issues that will apply to all (or at least a significant number of) the transferred cases.”).

104. The party requesting remand has the burden of demonstrating that remand is appropriate. *See In re Integrated Res., Inc. Real Estate Ltd. P’ships. Sec. Litig.*, 851 F. Supp. 556, 562 (S.D.N.Y. 1994) (citing *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977)).

105. *See generally In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1199 (D. Minn. 2012) (“Efforts to effect a global settlement may provide a sufficient basis for keeping transferred actions in an MDL court, but in light of the previous failed attempts, settlement appears unlikely under the circumstances here.” (citation omitted)).

106. In contrast, courts can and have considered remand sua sponte. *See, e.g., id.* at 1201 (ordering remand to transferor courts sua sponte).

107. *In re Evergreen Valley Project Litig.*, 435 F. Supp. 923, 924 (J.P.M.L. 1977) (emphasis added).

We are well aware that, in certain MDL dockets, the parties have vigorously disputed whether cases should be remanded to the transferor courts. We have adopted a more proactive approach to these concerns. We have emphasized to transferee judges that, unlike their judicial appointment, an MDL assignment need not extend for a lifetime. We are encouraging judges to consider remand where their basic work is completed.<sup>108</sup>

Moreover, Judge Eduardo C. Robreno, who presided over the federal asbestos multidistrict litigation, and Judge Mark Davidson, who handled all Texas state court asbestos litigation, have embraced and advocated the fundamental idea of disaggregating cases.<sup>109</sup>

To incite these tentative steps toward remand, this Part urges the Panel and transferee judges to consider two additional measures. First, the Panel should seriously consider parties' remand requests even when the transferee judge does not support them. Second, transferee judges should routinely entertain a suggestion for remand by a party or initiate them *sua sponte* as soon as discovery on common issues concludes and only case-specific issues remain.

The first measure—encouraging the Panel to actively consider motions to remand from the parties even when they lack the transferee judge's blessing—is designed to remedy the bottleneck that current practice creates. Without rejuvenating this avenue for recourse, the concern that “the [P]anel has abdicated its proper role” will persist.<sup>110</sup> As long as the Panel continues to “reward” transferee judges who quickly settle cases with new multidistrict litigation assignments and quietly bemoan the rest, transferee judges will prefer to keep assignments as long as it takes to browbeat the parties into settling. And, while the second measure is designed to destigmatize remand as a failure, norms do not shift overnight. Parties need immediate recourse from a system that flattens review into a single source: the transferee judge.

Congress expressly gave the Panel this reviewing function. Despite the Panel's protests to the contrary,<sup>111</sup> it need not speculate

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108. Heyburn & McGovern, *supra* note 5, at 32.

109. Vairo, *supra* note 20, at 1057–59.

110. Heyburn & McGovern, *supra* note 5, at 31.

111. *E.g.*, *In re Brand-Name Prescription Drugs Antitrust Litig.*, 170 F. Supp. 2d 1350, 1352 (J.P.M.L. 2001) (deferring to the transferee judge as to when to remand because she has special insight into the question of whether further coordinated or consolidated proceedings are likely to be useful) (citing *In re*



about the transferee judge's motivations for keeping a case. Parties will typically first ask the transferee judge to suggest remand. This gives the judge an opportunity to explain her rationale for refusing to do so. And the adversarial nature of the process—with most controlling stakeholders opposing remand—would give the Panel a complete picture of the litigation's development. It could thus police cases where transferee judges exceed multidistrict litigation's scope and purpose.

The second measure aims to make remand a standard feature of multidistrict litigation, at least as soon as common discovery concludes and the judge has ruled on motions that affect the cases uniformly. This combats the stigma that a transferee judge has somehow failed if she suggests that the Panel remand her cases. It serves as a signpost: the judge has fulfilled her mandate by ensuring common pretrial issues were handled on a coordinated, efficient basis, but centralization has now reached the point of diminishing returns. If the practice becomes routine, it may also serve to deter attorneys from filing weak claims in hopes of freeriding on lead lawyers' efforts, which could result in global settlements that hew closely to a claim's true value.

Entertaining a suggestion of remand or proposing it *sua sponte* when common discovery ends resonates with transferee judges' articulated rationales in the few cases they have remanded. For instance, transferee judges have asked the Panel to send cases back to their transferor districts when only case-specific discovery and motions remain,<sup>112</sup> after denying class certification,<sup>113</sup> when

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Holiday Magic Sec. & Antitrust Litig., 433 F. Supp. 1125, 1126 (J.P.M.L. 1977)).

112. *In re Patenaude*, 210 F.3d 135, 145 (3d Cir. 2000) (noting that the Panel may remand “when everything that remains to be done is case-specific”); *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Practices Litig.*, 840 F. Supp. 2d 1193, 1198 (D. Minn. 2012); *In re Phenylpropanolamine Prods. Liab. Litig.*, No. MDL 1407, 2004 WL 2034587, at \* 2 (W.D. Wash. Sept. 3, 2004) (“[T]he transferee court typically does not rule on cumbersome, case-specific legal issues.” (citing *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791 (N.D. Ohio 2004))); *In re Bridgestone/Firestone, Inc.*, 128 F. Supp. 2d 1196, 1198 (S.D. Ind. 2001) (“[P]laintiff may renew her request for suggestion for remand, so long as it is accompanied by the certification that all discovery she intends to conduct in preparation for trial is complete or that her remaining discovery is entirely casespecific [sic.]”); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 109595, at \*2 (E.D. Pa. Mar. 7, 1997) (declining to rule on summary judgment motions because the transferee court “would be putting itself in the shoes of the transferor courts”).

113. *Carbon-Based Hunting Clothing*, 840 F. Supp. 2d at 1198 (“Further, when transferred to this Court by the JPML, each Related Action potentially was a large class case, impacting dozens (if not hundreds or thousands) of plaintiffs

transferor courts should consider state-specific class actions,<sup>114</sup> when settlement talks fail,<sup>115</sup> when a party declines to participate in a global settlement,<sup>116</sup> and when a case is ready for trial.<sup>117</sup> As several transferee judges observed, when courts refuse to remand cases after common discovery ends, they impede dispositive, case-specific summary judgment motions that require intimate knowledge of state substantive law—the transferor judge’s specialty.<sup>118</sup>

So, the second measure has two goals: (1) to pay more than lip service to the premise that multidistrict litigation is designed to resolve common issues and then remand cases for trial, and (2)

who had purchased the defendants’ products. But the Court has denied class certification in each action, leaving nearly all of them as single-plaintiff cases.”).

114. *In re Light Cigarettes Mktg. Sales Practices Litig.*, 832 F. Supp. 2d 74, 77 (D. Me. 2011) (“There are only four remaining cases and in each, the Plaintiffs reasonably claim that the class certification issues present case-specific questions unique to the state law of their respective jurisdictions. Furthermore, the transferor courts, each of which is familiar with the state law of their respective jurisdictions, are in a better position to assess the parties’ state law arguments and their impact on the class certification issue.”); *In re Chrysler LLC 2.7 Liter V-6 Engine Oil Sludge Prods. Liab. Litig.*, 598 F. Supp. 2d 1372, 1373 (J.P.M.L. 2009) (“We are presented with five putative statewide class actions for five different states under each state’s laws. While it is clear that discovery will overlap, class certification will vary. Therefore, the transferee judge may find that, eventually, the just and efficient conduct of these actions would best be served by suggesting to the Panel that the Panel remand these actions to the transferor courts for class certification considerations.”). *But see* *Baltimore Cnty. v. AT&T Corp.*, 735 F. Supp. 2d 1063, 1098 (S.D. Ind. 2010) (“In this multi-district litigation, No. 1313, the court has presided over more than 40 state-wide class action settlements through final judgments and administration of the settlements.”).

115. *Carbon-Based Hunting Clothing*, 840 F. Supp. 2d at 1199 (“In addition, the Court has undertaken several attempts to resolve this MDL in its entirety through settlement, without success (despite yeoman efforts by the Magistrate Judge). Efforts to effect a global settlement may provide a sufficient basis for keeping transferred actions in an MDL court, but in light of the previous failed attempts, settlement appears unlikely under the circumstances here.” (citation omitted)).

116. *See, e.g., Baltimore Cnty.*, 735 F. Supp. 2d at 1099 (remanding one remaining case that refused to settle).

117. *In re Yamaha Motor Corp. Rhino ATV Prods. Liab. Litig.*, 597 F. Supp. 2d 1377, 1379 (J.P.M.L. 2009) (“When any transferred action becomes ready for trial, the transferee judge may suggest that the Panel remand the action to the transferor court.”).

118. *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2009 WL 1874085, at \*3 (D.N.J. June 30, 2009) (remanding cases after completing common discovery to allow parties to file dispositive motions); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, MDL No. 1014, 1997 WL 109595, at \*2 (E.D. Pa. Mar. 7, 1997) (declining to rule on summary judgment motions because the transferee court “would be putting itself in the shoes of the transferor courts”).

eliminate remand's status as a second-best option, when global settlement talks fail. To be sure, there is nothing inherently wrong with settlement. But settlements should be the byproduct of vigorous litigation, not the endgame that they have become for the controlling stakeholders. When the litigation's focal point is settlement, there is a significant danger that settlement furthers stakeholders' interests at claimants' expense and sacrifices the differences in state substantive laws along the way.

#### CONCLUSION

If the undercurrents of change are to take hold and make remand a viable option, the Panel and the transferee judges must be the ones to embrace and implement that shift. As this Article has explored, lead plaintiffs' attorneys and defendants gain little to nothing by having cases remanded to the transferor courts. But individual plaintiffs and (sometimes) their attorneys can suffer without remand, as can state substantive laws, procedural justice, and democratic participation opportunities.

Remand can yield fairer compensation for those with strong claims by restoring claimants' option to "see you in court," and weeding out the weak cases that threaten to dilute compensation funds. Moreover, it can help ensure that defendants do not exploit the regulatory mismatch between a nationwide transferee forum and the state laws that often govern defendants' conduct. In cases founded on state laws, like consumer protection and products liability, transferee judges should be more willing to remand so that transferor judges might decide whether defendants' conduct can be best addressed—and deterred—through state-specific class actions or trial. Otherwise, multidistrict litigation will serve chiefly as settlement's handmaiden and trial's death knell.