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Charles Silver

University of Texas Law School, csilver@law.utexas.edu

Geoffrey P. Miller

New York University, geoffrey.miller@nyu.edu

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THE QUASI-CLASS ACTION METHOD OF MANAGING MULTI-DISTRICT LITIGATIONS: PROBLEMS AND A PROPOSAL

CHARLES SILVER*
GEOFFREY P. MILLER#

ABSTRACT

This article uses three recent multi-district litigations (MDLs) that produced massive settlements--*Guidant* (\$240 million), *Vioxx* (\$4.85 billion), and *Zyprexa* (\$700 million)--to study the emerging quasi-class action approach to MDL management. The approach has four components: (1) judicial selection of lead attorneys; (2) judicial control of lead attorneys' compensation; (3) forced fee transfers from non-lead lawyers to cover lead attorneys' fees; and (4) judicial reduction of non-lead lawyers' fees to save claimants money. These widely used procedures have serious downsides. They make lawyers financially dependent on judges and, therefore, loyal to judges rather than clients. They compromise judges' independence by involving them heavily on the plaintiffs' side and making them responsible for plaintiffs' success. They allocate monies in ways that likely over-compensate some attorneys and under-pay others, with predictable impacts on service levels. They also lack needed grounding in substantive law because the common fund doctrine, which supports fee awards in class actions, does not apply in MDLs. Academics have not previously noted these shortcomings; this is the first scholarly assessment of the quasi-class action approach.

This article also proposes an alternative method of MDL management. It recommends the creation a plaintiffs' management committee (PMC) composed of the attorney or attorney-group with the most valuable client inventory, as determined objectively by the trial judge. The PMC, which would have a large interest in the success of an MDL, would then select and retain other lawyers to perform common benefit work (CBW) for all claimants and monitor the lawyers' performance. The new approach would thus use micro-incentives to organize the production of CBW in MDLs rather than judicial control and oversight. The court would stand back from the process, exercising only a limited backup authority to prevent abuses. If enacted as a statute, the proposal would restore judges' independence, preserve lawyers' loyalties, provide the requisite legal foundation for fee awards, and encourage the fairer, more efficient, and more appropriate representation of claimants in MDLs.

* Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure, School of Law, University of Texas at Austin.

Stuyvesant P. Comfort Professor of Law and Director, Center for the Study of Central Banks and Financial Institutions, New York University School of Law. Professors Miller and Silver both serve as paid consultants to a group of attorneys with cases in the *Vioxx* MDL who have questioned or challenged aspects of the settlement, including the fee assessment. Drafts of this article were presented at the University of Minnesota Law School and Vanderbilt University Law School. We are grateful for comments received on these occasions. We also wish to thank Samuel Issacharoff, Richard Marcus, and Richard Nagareda for comments, criticisms, and suggestions.

THE QUASI-CLASS ACTION METHOD OF MANAGING MULTI-DISTRICT LITIGATIONS: PROBLEMS AND A PROPOSAL

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I. INTRODUCTION

The preferred way of handling mass tort lawsuits in the federal courts has long been for the Judicial Panel on Multi-District Litigation (JPML) to transfer and consolidate the cases in a single district court.¹ Federal judges have handled almost one thousand multi-district litigations (MDLs), the biggest of which have involved tens of thousands of plaintiffs with billions of dollars in liability claims.² Given this wealth of experience, one would expect MDL procedures to be highly developed, carefully considered, and transparent. In some respects, they are.³ But procedures that are central to the operation of MDLs on the plaintiffs' side are rudimentary and opaque. These procedures also raise serious policy concerns that have not previously been identified or addressed. Consider four examples.

Appointment of Lead Attorneys. Judges appoint the lawyers who run MDLs on the plaintiffs' side. Although the choice of lead attorneys affects plaintiffs' greatly, judges wield the appointment power with unfettered discretion. They need not explain why they choose some lawyers rather than others, and rarely do. They face no risk of appellate review or reversal. No appointment decision seems ever to have been challenged, much less reversed. Yet, judges' choices can be puzzling. For example, they often give lead positions to lawyers with few or no clients, passing over lawyers with hundreds or thousands of clients who also volunteered.

¹ Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001).

² The Diet Drugs MDL encompassed over 18,000 personal injury lawsuits, as well as a class action with 6 million members. *In re Diet Drugs*, 282 F.3d 220, 225 (3d cir. 2002). The settlement required the defendant to pay over \$6 billion, over which more than \$600 million was awarded to MDL counsel and class counsel combined. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F.Supp. 2d 442 (E.D. Pa. 2008). The Vioxx MDL encompassed approximately 50,000 claimants. The settlement cost \$4.85 billion. See, e.g., Daniel Fisher, *Will the Vioxx Settlement Work?*, FORBES, Nov. 13, 2007, http://www.forbes.com/2007/11/12/merck-vioxx-lawsuits-biz-health-cz_df_1112vioxx.html (last visited July 5, 2008); *Morning Edition: Merck Reaches \$4.8 Billion Settlement in Vioxx Case*, (NPR radio broadcast Nov. 9, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=16147998> (last visited July 7, 2008). The lead attorneys in the MDL and related state court actions have requested 8% of the settlement fund, \$388 million, in common benefit fees.

³ For example, MDL judges now plan openly and successfully for inter-court cooperation, which makes pre-trial discovery proceed more smoothly.

Compensation of Lead Attorneys. Over the long history of MDLs, judges have awarded lead attorneys billions of dollars in fees and cost reimbursements.⁴ The practice supposedly rests on the common fund doctrine, a creature of the law of restitution which undergirds fee awards in class actions. Yet, the U.S. Supreme Court has never said the doctrine applies in MDLs, which are consolidations not class suits, and the American Law Institute's *Restatement (Third) of the Law of Restitution and Unjust Enrichment* says it does not: "By comparison with class actions, court-imposed fees to appointed counsel in consolidated litigation frequently appear inconsistent with restitution principles."⁵

Neutralized Opposition. Because MDL judges select lead attorneys and control their compensation, lead attorneys rarely challenge them. Realistically, MDL judges are lead lawyers' clients. Concerns about fees also cause non-lead lawyers to fear MDL judges, who take from them the money lead lawyers receive. By challenging an MDL judge, a non-lead lawyer must be willing to risk retribution in the form of a heavy fee tax. Because judges leave the size of forced fee transfers open until litigation ends, obedience is the prudent course for non-lead lawyers until an MDL formally concludes--even longer if the lawyers have cases in another MDL being handled by the same judge.

Ungrounded Regulation. MDL judges do more than just tax non-lead lawyers; they also cut non-lead lawyers' fees. For example, an MDL judge might order a non-lead lawyer with a 40% contingent fee contract to give 8% to the lead attorneys and to rebate another 8% to the client. The lawyer would end up with a 24% fee, meaning that the contractual fee was cut almost by half. The forced rebate is said to be justified because MDLs yield economies of scale, yet, the analysis is glaringly deficient. Judges make no serious effort to quantify the asserted scale economies. They do not consult experts armed with the data and statistical methods a rigorous econometric analysis would require. Instead, they invent numbers. Obviously, these forced fee rebates give lawyers another reason to be cautious. The price of impertinence may be an exceptionally large fee cut. Less apparent is the impact judges' behavior has on non-lead lawyers' incentives. By rendering contingent fees unpredictable, judges discourage non-lead lawyers from providing services that would help their clients. A downward spiral is predictable: judges slash fees more deeply as they see lawyers doing less and less work, while lawyers work less and less because judges keep cutting their fees. The spiral will benefit mainly defendants, who face fewer claims and enjoy cheaper settlements when plaintiffs' lawyers' find litigation unprofitable.

The four practices just described--judicial appointment of lead attorneys, judicial control of lead attorney's compensation, forced fee transfers, and fee cuts--jointly constitute the emerging "quasi-class action" approach to MDL management. Picking up on an idea first enunciated by the Fifth Circuit in the mid-1970s, several judges have recently ruled that MDLs are "quasi-class actions."⁶ This conclusion, they contend,

⁴ The precise amount awarded is unknown because no one appears to collect data on MDL fee and cost awards. However, awards in a few cases show that billions of dollars have been paid.

⁵ RESTATEMENT (THIRD) OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT § 30 cmt. 6 (Tentative Draft [T.D.] Nov. 3, 2004).

⁶ The roots of the quasi-class action doctrine extend back to *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1005, 1012 (5th Cir. 1977) (observing that "the number and cumulative size of the massed cases created a penumbra of class-type interest on the part of all the litigants and of public interest on the part of the court and the world at large . . .") [hereinafter *Everglades Crash*]. Judge Weinstein appears to have

enables a judge presiding over an MDL to exercise broad-based equitable powers usually reserved for class actions, including the power to implement the four practices just described. The judges' intentions are exemplary. They are handling complicated, multi-party cases of great importance, and are trying to fashion tools with which to resolve these cases in reasonable time and at reasonable cost. But the quasi-class action approach has serious downsides. By managing MDLs as they have, judges have compromised their independence, created unnecessary conflicts of interest, ridden roughshod over attorneys, turned a blind eye to questionable behavior, and weakened plaintiffs' lawyers' incentives to faithfully serve their clients.

This Article is the first to systematically examine the rules and norms that govern the appointment, powers, compensation, and monitoring of lead attorneys in MDLs.⁷ After analyzing and critiquing existing practice, it proposes a new MDL management approach. The proposal would require an MDL judge to appoint a Plaintiffs' Management Committee (PMC) made up of lawyers with valuable client inventories, often but not necessarily lawyers with the largest numbers of signed clients. The PMC would then select, set compensation terms for, and monitor a group of common benefit attorneys (CBAs) who perform all the common benefit work (CBW) an MDL requires. CBW is legal work, such as discovery relating to factual issues common to all plaintiffs' claims, which benefits all plaintiffs.⁸ PMC members would receive only fees from their signed clients, but this should motivate them to select, incentivize, and monitor CBAs with care because their client inventories will be valuable. CBAs would draw fees on a *pro rata* basis from all lawyers with cases in an MDL. Having the largest client inventories, PMC members would pay the most. This would motivate them to obtain the best combination of quality and price any available CBA will offer. Attorneys not on the PMC will benefit automatically from the PMC members' efforts to help themselves.

The presiding judge's involvement in the management of the plaintiffs' side of an MDL would ordinarily end with the appointment of the PMC. The judge would be available, however, to adjudicate any claims of mismanagement or wrongful behavior, and, as now, to ensure that non-lead lawyers receive appropriate opportunities to develop unusual or unique aspects of their clients' cases that require special attention a CBA is

first enunciated the idea in Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 480-481 (1994) ("What is clear from the huge consolidations required in mass torts is that they have many of the characteristics of class actions.... It is my conclusion ... that mass consolidations are in effect quasi-class actions. Obligations to claimants, defendants, and the public remain much the same whether the cases are gathered together by bankruptcy proceedings, class actions, or national or local consolidations.").

⁷ Many fine scholarly writings address MDLs as an important species of litigation and discuss examples of their use. See, e.g., Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179 (2001); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001); RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* (2007); Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245 (2008). However, no prior writing discusses the pros and cons of the quasi-class action approach to MDL management or the specific procedures identified in the text.

⁸ The nature of CBW is described more fully at text accompanying notes ___, *infra*.

unlikely to provide. Because the judge's control of the choice of PMC members would be limited and because the judge would otherwise be removed from compensation issues on the plaintiffs' side, both lawyers' independence and judges' independence would be restored.

In terms of implementation, the proposal offered here is a minor repair. MDL judges already appoint lead attorneys. The proposal simply gives them criteria to apply when doing so and requires them to make appealable findings of fact. In these respects, the proposal resembles the Private Securities Litigation Reform Act of 1995 (PSLRA), which requires a trial judge to appoint as lead plaintiff the party with the largest financial stake in the litigation. Our proposal has more potential than the PSLRA to improve the conduct of litigation, however. Only some of the investors put in charge of securities fraud class actions have the expertise, knowledge of the case, and financial interests needed to manage large lawsuits effectively. Under the proposal, all PMC members will have these attributes, for all will be successful lawyers with large client inventories.

In terms of effect, the proposal is a structural overhaul. By minimizing judges' involvement in fee-setting and related matters on the plaintiffs' side, it would safeguard judges' independence, promote objectivity and transparency, harmonize the interests of lead attorneys and plaintiffs, reduce disputes over lawyers' fees, and improve monitoring of the common benefit work. It would also foster good incentives by fixing lead attorneys' compensation in advance.

This article is structured as follows. Following this Introduction, Part II describes existing control practices. The discussion draws on three recent cases—*Guidant*, *Vioxx*, and *Zyprexa*—all of which endorse the “quasi-class action” doctrine and apply similar procedures. Part III characterizes the economic problem the control rules address—the optimal production of CBW—and critiques existing practices. Part IV sets out our proposal and defends it against various objections. Part V concludes.

II. THE QUASI-CLASS ACTION MODEL OF MDL MANAGEMENT

The cases we discuss in this article involve claims of many plaintiffs – sometimes tens of thousands of parties – which are consolidated for litigation purposes in a single federal court.⁹ These cases resemble class actions in an obvious respect: numerous plaintiffs allege that they suffered harm from a common action or course of conduct. But these cases are *not* class actions. They are not brought pursuant to Federal Rule 23. They are not certified under the Rule 23 standards of commonality, typicality, numerosity, adequacy of representation, predominance and superiority. There is no representative plaintiff and no attorney appointed by the court as counsel for the entire class. The cases are simply aggregated individual lawsuits brought together in a single court for convenience and efficiency purposes pursuant to the multidistrict litigation process.

These cases are not class actions for a reason. Typically, they are mass tort cases in which differences in exposure, background health conditions, knowledge, and other factors preclude class certification under the standards set forth in *Amchem Products, Inc.*

⁹ The federal MDL typically includes all related cases filed in federal courts, but it will not include the many cases that were filed in state courts from which they could not be removed. When significant state court litigation exists, inter-court coordination will occur and the lawsuits will proceed in tandem.

*v. Windsor*¹⁰ and *Ortiz v. Fibreboard*,¹¹ cases in which the Supreme Court rejected attempts to resolve complex claims for personal injury due to asbestos litigation by means of a class action structure. MDL judges often recognize that class actions cannot proceed in these cases by denying motions for class certification.¹² Despite this, judges increasingly call MDLs “quasi-class actions.” The attraction of the label is understandable. Aggregate proceedings look like class actions even when they are not, and judges have considerable power to manage class actions as they wish. But the label is also dangerous. The allure of class action procedures can cause judges to act in ways that are neither necessary nor appropriate in MDLs. In this section we discuss three cases in which courts have drawn on the class action analogy to develop governance procedures in aggregate cases, with questionable results.

A. MDL Basics and Three Selected Aggregations

In 1968, Congress authorized the JPML to transfer related cases pending in diverse federal courts to a single forum for pre-trial processing. The object was to “promote the just and efficient conduct of [the] actions”¹³ by taking advantage of scale economies and creating opportunities for global settlements.¹⁴ The JPML has been active ever since.¹⁵ As of 2007, it “ha[d] considered motions for centralization in over 1,900 dockets involving ... millions of claims []. These dockets encompass[ed] litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; patent validity and infringement; antitrust price fixing; securities fraud; and employment practices.”¹⁶

The largest MDLs encompass thousands of cases filed by legions of attorneys.¹⁷ Unfortunately, it is difficult to be more precise. Neither the JPML, the Administrative Office of the U.S. Courts, nor any other organization collects much data on MDLs.¹⁸

¹⁰ 521 U.S. 591 (1997).

¹¹ 527 U.S. 815 (1999).

¹² See, e.g., *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006).

¹³ 28 U.S.C. § 1407(a) (2007).

¹⁴ Resnik, *supra* note 6, at 2149 (observing that “the MDL impulse to aggregate” reflected concerns “about waste and inefficiency”); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004) (discussing opportunities for global settlements).

¹⁵ Not everyone is happy about this. For a thoughtful discussion of many problems associated with expanded use of JPML’s power to consolidate lawsuits, see Marcus, *supra* note 6.

¹⁶ United States Judicial panel on Multidistrict Litigation, An Overview of the United States Judicial Panel on Multidistrict Litigation, http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited June 6, 2008).

¹⁷ Lawyers with large inventories of signed clients often work in teams or groups.

¹⁸ JPML gathers some data and produces cursory reports, which are publicly available at United States Judicial Panel on Multidistrict Litigation, Statistical Information, http://www.jpml.uscourts.gov/General_Info/Statistics/statistics.html (last visited September 17, 2008). JPML also produces specialized reports for a fee. Neither the reports themselves nor an index of them is publicly available. Email from Ariana Estariel to Charles Silver, (July 10, 2008, 02:51:00 CST) (on file

Comprehensive data being unavailable, we constructed a picture of contemporary MDL management in the product liability area by studying three major MDLs intensively. The cases are *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation (Guidant)*, *In re Vioxx Products Liability Litigation (Vioxx)*, and *In re Zyprexa Products Liability Litigation (Zyprexa)*.¹⁹ We selected these cases for several reasons. First, all are products liability cases, the most common type of MDL.²⁰ The management of these cases should therefore reflect the wisdom of the federal judiciary accumulated over many cases and many years. Second, the three MDLs arose recently and around the same time. About a year and a half separates the earliest JPML transfer date (Apr. 4, 2004—*Zyprexa*) from the latest (Nov. 7, 2005—*Guidant*).²¹ The cases thus collectively provide a detailed snapshot of contemporary MDL management techniques. Third, all three cases are pure consolidations, meaning that none was handled as a class action. This simplifies the study of the MDL control rules by eliminating complications that arise when, as sometimes happens, both aggregation procedures are employed concurrently.²² Fourth, the judges who handled these cases, Judges Donovan Frank (*Guidant*), Eldon Fallon (*Vioxx*), and Jack Weinstein (*Zyprexa*), are the authors of the emerging doctrine that MDLs are “quasi-class actions.” The cases therefore present an opportunity to assess a developing doctrinal innovation. Fifth, all three judges employed the control rules of greatest interest to us. Each judge appointed the lead and liaison attorneys, set these lawyers’ compensation, and heavily regulated the fees all lawyers could charge. Finally, all three cases produced enormous settlements. *Vioxx* was the largest, at \$4.85 billion. *Zyprexa* came in second at \$700 million. *Guidant* trailed the field at \$195 million. These are large sums, even by the standards of group litigation.

Although the three MDLs are quite similar, they differ in some interesting respects. First, the judges handling them have different amounts of experience with MDLs. Judge Weinstein is a seasoned veteran, with eight terminated MDLs under his belt and two active MDLs on his docket.²³ Judges Frank and Fallon are relative

with author). The JPML is also so short of staff that it cannot even produce a list of its data fields for an independent researcher to examine.

¹⁹ Fees have been managed in similar or identical ways in others cases. *See, e.g., In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, No. M.05-CV-01699-CRB, 2006 WL 471782, at *2-11 (N.D. Cal. Feb. 28, 2006).

²⁰ The JPML currently divides cases into the following categories: air disaster, antitrust, contract, common disaster, employment practices, intellectual property, miscellaneous, products liability, sales practices, and securities. It has used other categories in the past. The categories do not necessarily track doctrinal lines. *See* Mark Merrmann and Pearson Bownas, *Making Book on the MDL Panel: Will It Centralize Your Products Liability Cases?*, 8 CLASS ACTION LITIG. REP. 110, 111 n.4 (2007).

²¹ The *Vioxx* litigation was transferred on Feb. 16, 2005.

²² For a case exemplifying these complications, see *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 553 F.Supp. 2d 442 (E.D. Pa. 2008). For discussions of the differences between aggregate procedures, *see, e.g., Silver, Comparing Consolidations and Class Actions*, 10 REV. LITIG. 495 (1991); Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1773 (2005).

²³ In the world of complex litigation, Judge Weinstein is a living legend and a continuing source of inspiration to many, including us. Many of his cases have become the focus of scholarly articles and books. *See, e.g.,* PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

newcomers. Neither has completed a single MDL, although both have handled complex lawsuits of other types. The cases thus present an opportunity to see how closely less seasoned judges hew to the path blazed by their senior. As readers will see, although there is a strong tendency to follow the leader, there also are important points at which Judges Frank and Fallon struck out on their own.

Second, *Zyprexa*, the earliest of the three MDLs and the source of the quasi-class action approach to MDL regulation, involved claimants who were psychologically handicapped. The claimants used *Zyprexa* because they had schizophrenia or bipolar disorder. One might therefore reasonably believe the *Zyprexa* claimants had a special need for protection, including protection from the lawyers they retained, and that feelings of paternalism strongly colored Judge Weinstein's conduct of the case. No similar basis for concern existed in *Guidant* or *Vioxx*. No mental illness or like deficiency is known to have afflicted the claimants in these MDLs. The *Guidant* and *Vioxx* claimants certainly suffered serious injuries, including heart attacks and strokes. They were, however, typical plaintiffs. Many tort cases involve plaintiffs with devastating injuries, yet these plaintiffs are thought to be responsible adults and are treated as such.²⁴ We know of no physical basis on which to distinguish the *Guidant* and *Vioxx* claimants from other plaintiffs with serious injuries.

Third, although all three MDLs encompassed large numbers of claimants, the volume of litigation varied greatly. About 4,000 lawsuits alleging injuries from defective defibrillators were pending when *Guidant* settled. The *Zyprexa* settlement resolved about 8,000 cases, which represented approximately 75% of the litigation Eli Lilly, the manufacturer, faced.²⁵ By comparison, the withdrawal of *Vioxx* from the market triggered an avalanche of lawsuits. Altogether, Merck faced more than 50,000 filed cases. In theory, sizes differences could affect judges' behavior. Judges may give plaintiffs' attorneys a freer hand in smaller MDLs, which involve fewer lawyers. Judges may also cut non-lead lawyers' fees less in smaller MDLs because these proceedings generate fewer economies of scale. Whether these differences or others influenced the judges remains to be seen.

B. Selection and Empowerment of Managerial Attorneys

All three MDLs involved too many lawyers to allow full participation by each. The need to centralize control being obvious, the judges could have asked the claimants' attorneys to choose their own leaders. Instead, all three judges took over the process completely, as the *Manual for Complex Litigation* recommends.²⁶ Each judge appointed

²⁴ See, e.g., David M. Studdert, Michelle M. Mello, Atul A. Gawande, Tejal K. Gandhi, Allen Kachalia, Catherine Yoon, Ann Louise Puopolo, and Troyen A. Brennan, *Claims, Errors and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006) (studying random sample of medical malpractice cases and finding that 80% involved injuries that caused significant or major disability or death).

²⁵ Alex Berenson, *Lilly to Pay \$690 Million in Drug Suits*, NY TIMES, June 10, 2005, available at <http://www.nytimes.com/2005/06/10/business/10lilly.html?scp=1&sq=lilly%20to%20pay%20%24690&st=cse>.

²⁶ See MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 10.22, 10.224, and 22.62.

a small number of lead²⁷ and liaison²⁸ attorneys to an executive committee and a larger number of attorneys to a Plaintiffs' Steering Committee (PSC).²⁹ As the cases progressed, each judge also created additional committees for specific purposes, such as conducting settlement negotiations or coordinating with attorneys handling state court cases. Most often, the members of these specialized committees were also lead or liaison attorneys or PSC members. Sometimes, however, the judges appointed lawyers who previously held no formal responsibilities. This was true of the *Vioxx* Fee Allocation Committee and the *Vioxx* Negotiating Committee, both of which contained attorneys with state court cases who had not previously been involved in the MDL.

The judges selected the lead attorneys from pools of volunteers. Their orders shed no light on their reasons for appointing some lawyers rather than others. Explanations were not required. The standards governing appointments of attorneys to managerial positions are extremely weak and the risk of reversal is essentially nil. There appears to be no reported case in which a disappointed lawyer appealed an unfavorable appointment decision from an MDL judge, let alone one in which the MDL judge was reversed.³⁰ The *Manual (Fourth) for Complex Litigation* advises MDL judges to consider lawyers' qualifications, competence, interests, resources, and commitment, but as a practical matter they appoint the lawyers they want for reasons known only to them.³¹

Lead attorneys typically receive almost complete control of MDLs. For example, the order Judge Frank entered in *Guidant* empowered the lead attorneys to:

Determine ... and present (in briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) ... the position of the Plaintiffs on all matters arising during pretrial proceedings ...; [] Coordinate the initiation and conduct of discovery on behalf of Plaintiffs ...; [] Conduct settlement negotiations on behalf of Plaintiffs...; [] Delegate specific tasks to other counsel in a manner to ensure that pretrial preparation for the Plaintiffs is conducted effectively, efficiently, and economically; [] Enter into stipulations, with opposing counsel, necessary for the conduct of the litigation; [] Prepare and distribute to the parties periodic status reports; ... [] Monitor the activities of co-counsel to ensure

²⁷ Lead Counsel handles "substantive and procedural issues during the litigation. Typically they act for the group—either personally or by coordinating the efforts of others—in presenting written and oral arguments and suggestions to the court, working with opposing counsel in developing and implementing a litigation plan, initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, and seeing that schedules are met." *Id.*

²⁸ Liaison Counsel, usually a local attorney, handles "administrative matters, such as communications between the court and other counsel ..., convening meetings of counsel, advising parties of developments, and ... managing document depositories and [] resolving scheduling conflicts." *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 10.221.

²⁹ In *Zyprexa*, Judge Weinstein created two PSCs as a result of settlements that required restructuring the plaintiffs' control structure. See Mealey's Emerging Drugs & Devices, *Zyprexa MDL Judge Gives A Bit More In Fees, But Denies Multipliers, Disbursement*, 13 Mealey's Emerging Drugs & Devices 7 (2008) ("A second PSC is now representing plaintiffs not included in the initial settlement with Lilly.").

³⁰ This is based on a Westlaw search.

³¹ *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 10.224.

that schedules are met and unnecessary expenditures of time and funds are avoided; [] Perform such other duties as may be incidental to proper coordination of Plaintiffs' pretrial activities or authorized by further Order of the Court; and [] Submit, if appropriate, additional committees and counsel for designation by the Court.³²

By putting particular attorneys in charge of these matters, Judge Frank relegated other attorneys to more passive roles. He also created relationships of dependency. A group of powerless attorneys would rely on a coterie of litigation managers to develop their clients' cases. The non-lead lawyers' clients would also be at the lead lawyers' mercy. Although the clients never agreed to hire the lead attorneys and had no power over them, they would depend on them for representation.

The *Manual for Complex Litigation* recognizes the vulnerable position of limited lawyers³³ and their clients. To protect them, it subjects lead attorneys to a fiduciary duty, requiring them to "act fairly, efficiently, and economically in the interests of all parties and parties' counsel."³⁴ The injunction would be unnecessary if managerial lawyers, non-lead lawyers, and claimants had identical interests, but they do not. Lead lawyers sometimes encounter opportunities to benefit themselves (and, perhaps, their signed clients) at others' expense. The fiduciary duty requires them to "act ... in the interests of all parties and parties' counsel" in these situations. In this respect, lead attorneys in MDLs resemble lead attorneys in class actions. Both are subjected to fiduciary duties because both encounter situations in which they can benefit at the expense of those they represent.

Interests on the plaintiffs' side of MDLs usually align because lead lawyers perform mainly common benefit work (CBW). This category of effort includes all litigation-related services which, when performed one time, have the potential to benefit all plaintiffs with related claims. A deposition of a fact witness is an example of CBW. Once one attorney deposes a witness thoroughly, all plaintiffs can use the transcript; the witness need not be interrogated again. Pleadings, motions, briefs, depositions summaries, and document reviews are also examples of CBW. An omnibus complaint can raise all legal theories worth pursuing for all plaintiffs. A motion to dismiss an affirmative defense need only be written, briefed, argued, and decided one time for all plaintiffs too. Many of the activities identified in Judge Frank's order concern the production of CBW.

Not all work that may contribute to a successful result in an MDL is CBW, however. Plaintiff-specific work is also required. For example, much of plaintiffs' settlement leverage comes from the number of pending claims and their quality. Lawyers, most of whom wind up being limited attorneys, create this leverage by providing plaintiff-specific services. They identify potential clients, evaluate their claims, contract with them, and file lawsuits for them. They communicate with their clients, work up their client's specific claims of damages, compile the relevant documentation (such as medical records and proof of exposure), and, if necessary,

³² *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2005 WL 3704679, at *1 (D. Minn. Dec. 20, 2005).

³³ We use the labels "non-lead lawyer" and "limited lawyer" interchangeably.

³⁴ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22.

develop expert proof of the client's injuries. Non-lead lawyers may also create leverage over defendants by keeping some clients out of MDLs and forcing defendants to do battle on several fronts.³⁵ When settlements are negotiated, non-lead attorneys also advise their clients about the costs and benefits of settling and help them file claims. Limited lawyers also have some power inside MDLs to provide client-specific services. Although they must ordinarily work through lead attorneys, they can "act separately on behalf of their client(s)" when needed to protect their clients' interests.³⁶ Usually, this means identifying unique aspects of clients' claims and convincing lead attorneys to obtain relevant discovery or brief relevant legal issues. The memorandum supporting the motion for a common benefit fee award in *Vioxx* suggests that many non-lead attorneys remained active, despite being denied lead positions.

C. Compensation of Managerial Attorneys

Given that MDL judges can appoint managerial attorneys, it seems a foregone conclusion that they can also set their compensation terms. Certainly, judges believe the power to appoint implies the power to remunerate; they have repeatedly observed that the former would be "illusory" without the latter.³⁷ This is why, to take but one example, Judge Weinstein thought he had the power to use 4% of the \$700 million *Zyprexa* settlement to cover managerial lawyers' fees.³⁸

Yet, the leap from appointment to payment requires more justification than this. The power to appoint lead attorneys arises under the common law of federal civil procedure, which gives judges substantial freedom to manage lawsuits efficiently.³⁹ The power to award fees is governed by substantive law, which limits the circumstances in which judges can pay attorneys and the sources upon which judges can draw.⁴⁰ Because procedural doctrines may not "abridge, enlarge or modify" substantive rights, the common law of procedure cannot authorize fee awards.⁴¹ Recognizing this, MDL judges,

³⁵ For example, several plaintiffs' attorneys tried *Vioxx*-related cases outside the MDL. Some won large verdicts against Merck. Although the verdicts were eventually overturned, they undoubtedly gave Merck reason to settle.

³⁶ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22.

³⁷ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *12-13 (D. Minn. March 7, 2008) (memorandum opinion and amended order regarding attorney's fees) (quoting *In re: Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 99-20593, 2002 WL 32154197, at *17 (E.D. Pa. Oct. 3, 2002) (citing *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 773-74 (9th Cir. 1977); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1005, 1014-15 (5th Cir. 1977)).

³⁸ Mealey's Emerging Drugs & Devices, *Zyprexa MDL Judge Gives A Bit More In Fees, But Denies Multipliers, Disbursement*, 13 Mealey's Emerging Drugs & Devices 7 (2008). ("PSC1 . . . was previously granted \$28.6 million in fees," to which approximately \$644,000 was added by a magistrate judge, with Judge Weinstein affirming most of the award. \$29,244,000 is approximately 4% of \$700,000,000).

³⁹ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.1.

⁴⁰ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975); *Ashland Chem., Inc. v. Barco, Inc.*, 123 F.3d 261, 263-264 (5th Cir. 1997).

⁴¹ Rules Enabling Act, 28 USC 2072(b) (2007).

including Judge Weinstein, have sought to provide a substantive foundation for their authority.

Judges argue that the common fund doctrine, which supports fee awards in class actions,⁴² also justifies fee awards in MDLs. The doctrine has an appropriate source, namely, the law of restitution, a body of substantive law which governs the allocation of benefits in the absence of bargains.⁴³ Their invocation of the doctrine also seems natural. Consolidations resemble class actions. Both involve large numbers of persons with related claims against a common foe. This is why the label “quasi-class action” has such appeal.⁴⁴

The analogy between class actions and MDLs does not work. The procedures have different structures and serve different purposes. Class actions provide legal representation to claimants who do not have it and are unlikely to receive it by other means. MDLs force claimants who already have representation to work together for the sake of efficiency. These differences make all the difference in the world, insofar as the common fund doctrine is concerned, because the doctrine is meant to force transactions only when claimants cannot help themselves.

In class actions, most claimants lack legal representation at the outset. Named plaintiffs have lawyers but absent class members do not. Relative to the number of persons affected by the relevant conduct, the number of pending lawsuits is small. Absent class members may not even know they have claims, and their claims are usually too small to warrant conventional litigation, in any event. Although they can practicably sue as a group, they cannot organize a collective action on their own because they are numerous, anonymous, and dispersed. The numerosity requirement reflects this. It allows class actions to proceed only when claimants cannot be joined as plaintiffs by traditional means, that is, permissively.

In MDLs, all claimants *are* plaintiffs. All *are* joined permissively. All also hire attorneys directly and have claims large enough to justify litigation, either individually or in groups voluntarily assembled by themselves or their lawyers. Consolidation occurs because the volume of conventional litigation is large and the judicial system wants to conserve resources (its own, the parties’, or both). By coordinating discovery and other pretrial activities, consolidation avoids duplication and waste. With or without consolidation, however, claimants would have lawsuits and attorneys.

Class actions cure market failures; MDLs do not.⁴⁵ Consequently, in MDLs, the common fund doctrine is a misfit. The law of restitution rarely forces transactions when service providers and recipients can bargain directly. It requires providers to use

⁴² See generally *Alyeska*, 421 U.S. at 245 (describing origins and justification for the common fund doctrine).

⁴³ Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

⁴⁴ See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); see also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008); *In re: Vioxx Prods. Liab. Litig.*, 574 F.Supp. 2d 606 (E.D. La. 2008.)

⁴⁵ See Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 CORNELL L. REV. 656 (1990) (setting out conditions for the application of the common fund doctrine in class actions); Charles Silver, *Comparing Class Actions and Consolidations*, *supra* note 21 (explaining differences between class actions and consolidations that make it difficult to apply the common fund doctrine in the latter).

contracts in these situations. Forced exchanges are authorized when bargaining impediments prevent contracts from working, and where there is good reason to believe that, but for the impediments, voluntary exchanges would have occurred. “The law’s strong preference for contractual over restitutionary liability accounts for the general rule by which a person who seeks compensation for benefits conferred on another ... must ordinarily found the claim on an agreement with the recipient.”⁴⁶ The law of restitution authorizes fee awards in class actions because attorneys and class members cannot bargain directly and because the forced exchange of fees for services leaves class members clearly better off than they would have been had they been left to their own devices.⁴⁷ The same cannot be said for consolidations.

Because bargaining impediments are central, the law of restitution usually disallows demands for payments from claimants who hire their own attorneys.⁴⁸ Any

⁴⁶ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. f (T.D. No. 3, 2004).

⁴⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. b (T.D. No. 3, 2004) (“The fundamental premise of class certification—that the class is too numerous to permit individual joinder—tends to support a critical element of the restitution claim in these circumstances, namely, that the claimant was justified in proceeding in the absence of contract with the defendant (here, the individual class member or common-fund ‘beneficiary’).”).

⁴⁸ See, e.g., *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 770 (9th Cir. 1977) (“[A]s a general rule, if the third parties hire their own attorneys and appear in the litigation, the original claimant cannot shift to them his attorney’s fees.”); *Id.*, at 771-72 (“[T]he reimbursement of the representative attorneys beyond the terms of their individual contracts was limited to that portion of the fund allocated to beneficiaries which had not participated in the suit [by hiring attorneys of their own].”); *Nolte v. Hudson*, 47 F.2d 166, 168 (2d Cir. 1931) (“[W]here [litigants] are represented by counsel of their own choice, who do in fact act for them, they cannot be compelled to share in the expenses incurred by the employment of other counsel by other [litigants].”); *Draper v. Aceto*, 33 P.3d 479, 484 (Cal. 2001) (“[A] court may award attorney’s fees from a common fund to an attorney who has succeeded in preserving a fund when equity requires it, but [] this cannot be where there are multiple beneficiaries of the fund and all – or substantially all – are represented by various counsel.”) (quoting *Estate of Korthe*, 9 Cal. App. 3d 572, 575, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970)); *Traveler’s Ins. Co. v. Williams*, 541 S.W.2d 587, 590 (Tenn. 1976) (The common fund doctrine “is never applied against persons who have employed counsel on their own account to represent their interests.”); *Means v. Montana Power Co.*, 191 Mont. 395, 404 (Mont. 1981) (“[O]nly inactive or passive beneficiaries should be forced to bear the costs of litigation under the common fund doctrine”); *Blue Cross and Blue Shield of Alabama v. Freeman*, 447 So.2d 757, 759 (Ala. 1983) (The common fund doctrine does not apply to “one who joins as a party in the suit, assists in the prosecution or contributes toward the expense of the recovery of the fund”); *Valder v. Keenan*, 129 P.2d 966, 972 (Ariz. 2006) (holding common benefit fees could not be assessed on party “[b]ecause of the presence of counsel, actively involved on behalf of [the client]”); *Steinberg v. Allstate Ins. Co.*, 226 Cal. App. 3d 216, 221, 276 Cal. Rptr. 554 (Cal. Ct. App. 1990) (“The [common fund] doctrine does not apply [] when each party has retained counsel, and each counsel actively prosecuted the case or actively participated in the creation of the settlement.”); *Hurst v. Cavanaugh*, No. 90-J-7, 1992 WL 208918, at *5 (Ohio Ct. App. Aug. 21, 1992) (holding that common fund doctrine cannot apply to persons represented by counsel who were active in the litigation); *Estate of Korthe*, 9 Cal.App.3d 572, 575, 88 Cal. Rptr. 465, 467 (Cal. Ct. App. 1970) (explaining that the accepted rationale for common-fund recovery “applies only where a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries sit on their hands.”); *Estate of Kierstead*, 121 Neb. 423, 237 N.W. 299, 300 (1931) (denying recovery, notwithstanding “substantial benefit” conferred on defendants, where claimants “were notified that the defendants had employed another as their attorney”); *DuPont v. Shackelford*, 235 Va. 588, 369 S.E.2d 673 (Va. 1988) (No “free rides” where all parties are represented by counsel). See also Jean F. Rydstrom, Annotation, *Construction and Application of ‘Common Fund’ Doctrine in Allocating Attorney’s Fees Among Multiple Attorneys Whose Efforts Were Unequal in Benefiting Multiple Claimants*, 42 A.L.R. FED. 134 § 2b (2005) (The common

impediments represented claimants may have faced obviously did not prevent them from retaining lawyers.⁴⁹ Consequently, an inference arises that they preferred to receive services from the lawyers they retained rather than from other attorneys, who presumably offered different combinations of price and quality.

The restitutionary policy of denying demands for payments from claimants who hire their own lawyers also frees judges from having to untangle the knotty valuation problems that arise when recoveries reflect the contributions of many attorneys. In this situation, equitable allocation of fees would require a court to decide how greatly each attorney contributed to the overall success. This process, messy in the best of circumstances, can quickly become a morass in an MDL where tens or hundreds of millions of dollars are at stake, as each fee-seeking attorney magnifies the value of his or her own contributions and minimizes the efforts of others. It is easy to understand why lead attorneys' fee applications always make their efforts seem heroic.⁵⁰ Matters are even worse when, as often happens, a global settlement settles cases pending in diverse courts, for judges must then evaluate the contributions lawyers made in other forums.

In MDLs, lead attorneys never achieve recoveries on their own. Other lawyers always contribute, including lawyers who only recruit clients and file cases. Although lead attorneys and MDL judges praise lawyers who "do the work" and deride lawyers who "warehouse" cases, the relative values of common benefit legal work and individualized client service have never been established. The reflexive tendency to value services in terms of the time they require will predictably assign more value to the former than the latter, but time may be the wrong denominator. Compensation practices at private law firms reward lawyers who bring in business, known as "rainmakers," above and beyond the hours they bill.⁵¹ Treating all the lawyers in an MDL as an *ad hoc* law firm (as Judge Weinstein sought unsuccessfully to do in the famous "Agent Orange" class action), one would have a basis for thinking that lawyers who recruit clients should

benefit doctrine does not "permit the allowance of fees from a fund created where all the parties interested are represented by counsel of their own selection, *each counsel in such case being required to look to his own client for compensation.*") (emphasis added).

⁴⁹ Even the problem of placing MDLs under unified control may be manageable contractually. Although claimants may number in the thousands, the number of lawyers is far smaller, and the lawyers can build the organizational structures MDLs require. Lawyers actually created these structures before judges took the helm. See Paul D. Rheingold, *The MER/ 29 Story. An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968) (describing mass defective products litigation in which 288 lawyers or law firms formed a group to finance discovery and other litigation activities).

⁵⁰ For a standard example of the genre, see Plaintiffs' Liaison Counsel's Memorandum in Support of Motion for Award of Plaintiffs' Common Benefit Counsel Fees and Reimbursement of Expenses, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Jan. 20, 2009).

⁵¹ Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure* 9 (Bepress Legal Series, Paper No. 1250, 2006) available at <http://law.bepress.com/cgi/viewcontent.cgi?article=5954&context=expresso> ("[L]aw firms have shifted toward a compensation structure that increasingly rewards a lawyer's ability to bring in new clients and create business over any other factor.") (citing ALTMAN WEIL, REPORT TO LEGAL MANAGEMENT: PARTNER COMPENSATION SYSTEMS—HOW FIRMS DISTRIBUTE OWNER PROFITS (James Wilber ed., 2000)).

be compensated above and beyond the time they expend.⁵² Referral practices add credence to this. Lawyers who recruit clients often receive fees based on factors other than the amount of work they perform.⁵³

Obviously, it is also possible that attorneys who merely “warehouse” clients are overpaid, even after MDL judges require them to pay lead attorneys’ fees. As mentioned, the relative values of CBW and client-specific services have never been rigorously compared. The point is not that particular lawyers make too much or too little; it is that the task of figuring out whose services are worth what is both extremely difficult as a theoretical matter and extremely messy as an empirical matter. This is why the law of restitution normally leaves the task to the private market in contexts where clients hire lawyers directly. In other words, it is why courts deny claims for restitution from represented claimants whose lawyers make any demonstrable contribution of valuable services. Only claimants who sit on their hands, as absent class members normally do, can be made to pay, as the *Restatement (Third) of Restitution & Unjust Enrichment* explains.

Common-fund recovery is rarely available from a party who has retained and paid his own legal counsel. While the difficulty of comparing the lawyers’ respective contributions is presumably part of the explanation, the more influential fact is simply that such a party cannot be characterized as a passive recipient of benefits provided by others.⁵⁴

There are no “passive recipient[s] of benefits” in MDLs. There are only clients armed with lawyers. Some of the lawyers are denied the opportunity to perform CBW when judges appoint others to lead positions. As a result, the lead attorneys expend the most time. Insofar as the law of restitution is concerned, this is irrelevant. “[W]hen all or substantially all the beneficiaries of a common fund are independently represented by counsel,” a common fund fee award is improper, even if one lawyer in particular “performed the greater part of the work.”⁵⁵

It might be possible to defend the application of the common fund doctrine if only claimants whose lawyers voluntarily agreed to rely on lead attorneys were taxed. *In re Air Crash Disaster at Florida Everglades*,⁵⁶ one of the first appellate decisions to endorse the application of the common fund doctrine in MDLs, recognized this restriction. In that MDL, only lawyers who voluntarily remained passive had to contribute.

⁵² *In re “Agent Orange” Product Liab. Litig.*, 611 F.Supp. 1452, 1458 (E.D. NY 1985), *rev’d*, 818 F.2d 216 (2d Cir. 1987).

⁵³ See Stephen J. Spurr, *Referral Practices among Lawyers: A Theoretical and Empirical Analysis*, 13 L. & SOCIAL INQUIRY 87 (1988); Stephen J. Spurr, *The Impact of Advertising and Other Factors on Referral Practices, with Special Reference to Lawyers*, 21 RAND J. ECON. 235 (1990).

⁵⁴ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30 cmt. e (T.D. No. 3, 2004). See also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30(3)(c) (T.D. No. 3, 2004) (The common fund doctrine applies only when “the beneficiary, whether in person or by counsel, has made *no significant contribution* to the transaction by which the common fund is created, preserved, or enlarged.”) (emphasis added).

⁵⁵ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 30(3)(c), illus. 1 (T.D. No. 3, 2004).

⁵⁶ 549 F.2d 1005, 1014-15 (5th Cir. 1977) [hereinafter *Everglades Crash*].

One who hires and pays his own lawyer is not a free rider if the attorney is a contributor to the final results. The district judge recognized this by excluding from the 8% contributions attorneys who continued to be active.

Appellants were not in this group.⁵⁷

Limiting the tax to lawyers “who elected not to participate in the pre-trial activities” made the forced exchange seem consensual.⁵⁸

Everglades Crash is also interesting for another reason. As noted in the excerpt, the trial judge required passive non-lead attorneys to pony up 8% of their clients’ recoveries. The *Vioxx* MDL is also pending in the Fifth Circuit, and the requested fee award there is also 8%. The memorandum supporting the request uses the 8% award in *Everglades Crash* to show that an 8% award in *Vioxx* would be reasonable.⁵⁹ The 8% figure appears to be developing a life of its own.

When other facts of *Everglades Crash* are considered, it is hard to give the 8% figure much weight. First, it applied only to recoveries by clients whose lawyers were inactive, as explained. In contemporary MDLs like *Vioxx*, the 8% figure is sought to be applied across the board. Second, the lead attorneys told the Fifth Circuit that the 8% award would require other lawyers to pay them \$275,000.⁶⁰ The *Vioxx* attorneys want \$388 million, orders of magnitude more. Third, the lead attorneys in *Everglades Crash* had about 60 signed clients.⁶¹ The *Vioxx* lawyers represent more than 10,000 individuals, from whom they stand to collect over \$300 million in fees. It is obvious that *Everglades Crash* and *Vioxx* present enormously different production problems. No serious regulator would use one case as a template for the other.

Perhaps recognizing that the analogy to class actions is strained, some judges have sought to cement their power to compensate managerial attorneys by requiring limited lawyers to sign fee transfer agreements. Judges Fallon and Frank employed this tactic. When ordering that moneys be withheld from settlements and deposited into common benefit fee accounts, they promulgated form “agreements” for limited lawyers to sign.⁶² The “agreements” purported to ratify the set-asides and recited the limited lawyers’ desire to be “legally bound.” They also purported to bind limited lawyers’ clients.

Knowing that many limited lawyers would dislike these agreements, Judges Fallon and Frank made it advantageous for them to play ball. The sooner a limited lawyer inked an agreement, the lower the lawyer’s cost of CBW.⁶³ In *Guidant*, limited

⁵⁷ *Everglades Crash*, 549 F.2d at 1019.

⁵⁸ *Id.* at 1020.

⁵⁹ See, e.g., Plaintiffs’ Liaison Counsel’s Memorandum in Support of Motion for Award of Plaintiffs’ Common Benefit Counsel Fees and Reimbursement of Expenses at 50-51, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Jan. 20, 2009).

⁶⁰ *Everglades Crash*, 549 F.2d at 1101.

⁶¹ *Id.* at 1017.

⁶² Pre-Trial Order No. 19 at 8, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Aug. 4, 2005). Judge Weinstein does not appear to have used form agreements in *Zyprexa*. Other judges have done so, however. See, e.g., *In re Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig.*, No. MDL 1699, 2006 WL 471782 (N.D. Cal. Feb. 27, 2006) (J. Breyer).

⁶³ Pre-Trial Order No. 19 at 3-4, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Aug. 4, 2005).

lawyers who signed ‘agreements’ within 90 days of Judge Frank’s order would pay at most 4%. Attorneys who failed to sign during this period would pay more.⁶⁴ In *Vioxx*, Judge Fallon promised attorneys who signed early the benefit of a 3% cap.⁶⁵ Other attorneys would pay 4%, 6%, or 8%.⁶⁶

The strategy of using these agreements to legitimate fee transfers is poorly conceived. The obvious problem is that the exchanges are forced. Limited lawyers can neither choose the managerial lawyers they want nor bargain over terms nor refuse to deal. The less obvious problem is that the use of agreements undermines the common fund doctrine, which grants a right to payment only when it is impracticable to regulate fees contractually. If the purported agreements really are binding contracts, then bargaining *is* practicable in MDLs and the common fund doctrine has to go. Of course, if the ‘agreements’ are not binding, their existence changes nothing.

As things stand now, the incompatibility of the common fund doctrine and the strategy of using agreements to regulate fee shifts is primarily of academic interest. In a surprising twist, Judges Frank and Fallon both ignored the form agreements after taking pains to get limited lawyers to sign them.⁶⁷ Although the *Guidant* agreements limited the charge for CBW to 4%, Judge Frank ordered that 18.5% of the \$240 million settlement be set aside for common benefit fees and expenses, including 14.4% (\$34.5 million) in common benefit fees.⁶⁸ When limited lawyers cried foul, he pointed out that the agreements allowed the managerial lawyers to apply for more than 4% in “class action attorneys’ fees.”⁶⁹ The observation was irrelevant. There was no class action, as Judge Frank recognized. The lead attorneys never sought to create one. Consequently, the class action exception did not apply.⁷⁰ The judge’s real point was that he expected to award more than 4% all along.⁷¹ The agreements were simply window dressing not to be taken seriously.

⁶⁴ *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2006 WL 409229, at *5-6 (D. Minn. February 15, 2006).

⁶⁵ Pretrial Order No. 19 at 4, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. Aug. 4, 2005). The 6% charge applied to cases in the federal MDL. Attorneys with related cases in state courts would be charged 4% after the 90 day period expired.

⁶⁶ *Id.* The 6% charge applied to cases in the federal MDL. Attorneys with related cases in state courts would be charged 4% after the 90 day period expired. *See also* Pretrial Order No. 37 at 4, *In re* Vioxx Prods. Liab. Litig., No. MDL 1657 (E.D. La. May 19, 2005). (subjecting attorneys who failed to sign agreements to 8% set aside).

⁶⁷ In *Bextra*, Judge Breyer did the same, raising the set aside for common benefit fees to 8% after attorneys signed agreements limiting it to 4%. Pretrial Order No. 8A: Amendment to Order Establishing Common Benefit Fund at 4, *In re* Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig., No. MDL 1699 (N.D. Cal. July 7, 2008) (amending Pretrial Order No. 8).

⁶⁸ *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008). The order set aside \$10 million in cost reimbursements only \$3.5 million of which was slated to cover the managerial attorneys’ out of pocket expenses.

⁶⁹ *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 682174, at *27 (D. Minn. March 7, 2008).

⁷⁰ *Id.* (observing that “the Plaintiffs did not ultimately seek class certification”).

⁷¹ *Id.* (observing that “the Court ... contemplate[d] additional common benefit payments in the event of settlement”).

In defense of the 14.4% fee award, Judge Frank also observed that the *Guidant* master settlement agreement (MSA) authorized him to determine the size of the common benefit fee award.⁷² To him, this meant that even if the 4% cap once was binding, “the terms of the MSA contracted around it.”⁷³ This argument is troubling for three reasons.

First, although the MSA gave Judge Frank control of the fee award, it neither mentioned the 4% cap nor gave any indication that he could or would exceed it. The natural inference was therefore that the MSA gave Judge Frank the power to award the managing lawyers up to 4%.

Second, managerial attorneys are fiduciaries; they are “obligat[ed] to act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.”⁷⁴ The law imposes this obligation because managerial attorneys can use their control of litigation and settlement activities to enrich themselves at others’ expense. In *Guidant*, the managerial lawyers negotiated the MSA. Consequently, Judge Frank’s observation that the MSA “contracted around” the 4% cap implies that the managerial lawyers used their control of the settlement negotiations to enrich themselves by voiding the 4% cap set in the form agreements. This was opportunistic behavior that should have created a risk that the lead attorneys would *forfeit* their fees.⁷⁵ Rather than reward the managerial attorneys for “contracting around” the agreements, Judge Frank might have chastised them.

Third, the lead attorneys in *Guidant* should not have involved Boston Scientific Corp., the defendant, in the process of increasing the 4% ceiling (assuming Judge Frank is right in saying this is what they did).⁷⁶ By asking the defendant to include the increase as a provision of the MSA, they gave the defendant additional bargaining leverage, which it presumably used to extract concessions it would not otherwise have obtained. The concessions may be reflected in the size of the settlement fund or other terms. It is impossible to say. Whatever form they took, the gambit was inappropriate. The lead attorneys had no business bargaining with *Guidant* over their fees.

By validating the maneuver used in *Guidant*, Judge Frank set a precedent that was followed in *Vioxx*, where the managerial lawyers also used their control of settlement negotiations to write fee-related provisions into the MSA.⁷⁷ Reflecting both the controversy that erupted in *Guidant* and Judge Frank’s endorsement of “contracting

⁷² *Id.* (observing that “a common benefit payment from the Settlement Fund is expressly contemplated by the terms of the MSA.”).

⁷³ *Id.*

⁷⁴ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22.

⁷⁵ See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000). See also Lester Brickman, *Contingency-Fee Con-Men*, WALL STREET JOURNAL, Sep. 25, 2007, at A18 (“It is beyond cavil that plaintiffs’ lawyers negotiating their fees directly with, and separately payable by, a defendant ... breach lawyers’ fiduciary obligations to clients.”).

⁷⁶ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 682174, at *27 (D. Minn. Mar. 7, 2008).

⁷⁷ Interestingly, in *Bextra* the managerial lawyers did not “contract around” their agreements, but asked the court for an order raising the common benefit set aside instead. See *supra* note xx. This was the proper way to proceed, because it did not involve an abuse of the lead attorneys’ control of settlement negotiations.

around,” the *Vioxx* provisions were clearer and more extensive. One raised the cap on common benefit fees from 3% to 8%, expressly superseded Judge Fallon’s order setting the 3% cap, and provided that the entire 8% would be deducted from lawyers’ contingent fees.⁷⁸ A second provision authorized a separate award of common benefit expenses.⁷⁹ A third required limited lawyers and their clients to agree to the first two provisions as a condition for enrolling clients in the settlement.⁸⁰ These provisions made almost \$400 million available to pay for CBW, about \$240 million more than was available under the 3% cap.

The *Vioxx* lawyers recently took the *Guidant* gambit one step further. In the memorandum supporting their request for \$388 million in common benefit fees, they argue that claimants and non-lead attorneys consented to the fee increase by enrolling in the settlement. This shows real chutzpah. The lawyers who negotiated the *Vioxx* settlement were fiduciaries. Their job was to use their control of the negotiations to build a bridge from litigation to settlement for the benefit of all claimants and attorneys. They built the bridge, but they included a mechanism requiring everyone who crosses to pay them a toll. The difference between a toll bridge and a free bridge is obvious. Were a lawyer for a single client to use a settlement negotiation to force the client to pay extra, the violation of the fiduciary duty would be self-evident. That the lawyers who used their position to enhance their fees represented tens of thousands of claimants and attorneys changes nothing.

By incorporating provisions raising their fees in the *Vioxx* MSA, the lead attorneys made it impossible for claimants and non-lead attorneys to participate without agreeing to pay more. They used their court-conferred, exclusive control of the settlement negotiations to impose a surcharge on the persons who, as fiduciaries, they were bound to protect. Under prevailing law, conduct of this sort establishes a predicate for reducing fees or forfeiting them entirely, not for paying attorneys more.

D. Caps on Contingent Fees

In *Vioxx*, it is not known whether the managerial attorneys will receive the entire \$388 million or some lesser amount. Judge Fallon has yet to rule on their compensation. However, he has ruled that limited lawyers will provide all the money for common benefit fees, meaning that claimants will not pay extra for it. In an order capping all lawyers’ charges at 32%, he held that fees for common benefit work “[would] be deducted from [] individual plaintiffs’ attorneys’ fees.”⁸¹ Assuming Judge Fallon awards

⁷⁸ Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, § 9.2.1., No. MDL 1657 (E.D. La. Nov. 9, 2007).

⁷⁹ Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, § 9.2.2., No. MDL 1657 (E.D. La. Nov. 9, 2007).

⁸⁰ Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.*, § 1.2.4., No. MDL 1657 (E.D. La. Nov. 9, 2007). By including this provision in the MSA, the lead attorneys in *Vioxx* arguably breached their fiduciary duties a second time, the first time being when they used their control of settlement negotiations to increase the fund available to pay their fees. Presumably, the lead attorneys thought the settlement was the best option for most claimants. They therefore knew that limited attorneys would be ethically bound to enroll their clients, regardless of the consequences for themselves.

⁸¹ *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657, 2008 WL 3285912, at *1 (E.D. La. Aug. 7, 2008).

the full 8% in common benefit fees, the 32% cap on total charges implies that limited lawyers will net fees of 24%.

Judge Fallon's order caught most lawyers by surprise. He provided neither notice nor a hearing before capping their fees, even though his action will cost the lawyers about \$390 million.⁸² Even so, a disinterested observer might have predicted this move. Judge Fallon was using *Guidant* and *Zyprexa* as models, and in those cases lawyers' fees were also reduced. Judge Weinstein capped contingent fees at 20% for clients who were to receive \$5,000 lump sum payments and at 35% for clients who were to receive more. Judge Frank initially set contingent fees at 10% for managerial attorneys (who would also receive common benefit fees) and at 20% for limited lawyers (who would not). This sparked a rebellion, which Judge Frank ultimately dealt with by setting the total allowable charge for any client, including the cost of CBW, at the lesser of the contractual fee, the state-imposed fee limit, or 37.18% of the client's gross recovery.⁸³ He rejected an across-the-board cap of 25% proposed by two Special Masters.

Obviously, the caps varied greatly. Judge Weinstein's 35% cap was almost half again as large as Judge Fallon's 24% cap. The caps set or recommended in *Guidant* fell in between. One might think the caps varied because the judges tailored the caps to the unique facts of their MDLs, but the procedures they employed make this view impossible to sustain. When widely sold drugs or other products visit harms upon large populations, it is entirely predictable that lawyers and judges will use voluntary litigation groups,

⁸² This assumes an average retainer agreement providing for a fee of 40% plus costs. In failing to give adequate notice, Judge Fallon also followed Judge Frank, who capped back benchers' contingent fees in an order, the main purpose of which was to set the common benefit fee award. When back benchers protested, Judge Frank defended himself by asserting that a footnote to the PSC's fee award submission gave all attorneys notice that their fees might be reduced. Order Regarding Requests for Motions to Reconsider the Court's March 7, 2008 Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 3, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. March 28, 2008). The footnote, which merely pointed out the Court's power to evaluate contingent fee agreements, was plainly inadequate. It neither said back benchers' fee agreements were unreasonable nor asked the Court to impose a fee cap. Judge Frank also stated that the lawyers who complained of lack of notice "should [have been] well aware of the case law supporting the Court's inherent right and responsibility to review contingency fee contracts for fairness." *Id.* at 4 n.3. Obviously, the knowledge that a court can review a contingent fee is no substitute for notice that it will do so at a particular time.

⁸³ Thirteen law firms urged Judge Frank to reconsider his ruling. Order Regarding Requests for Motions to Reconsider the Court's March 7, 2008 Order Regarding Determination of the Common Benefit Attorney Fee Amount and Reasonable Assessment of Attorney Fees at 1 n.1, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. March 28, 2008). Notably, the group of objectors included the entire Lead Counsel Committee (LCC). *Id.* Judge Frank stuck to his guns. Thereafter, 67 attorneys or law firms filed requests with the Court's Special Masters to increase their fees from 20% to 33%, as Judge Frank had allowed them to do. This group also included members of the LCC. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896006, at *3 n.8 (D. Minn. Aug. 21, 2008). Overwhelmed by the flood of requests, the Special Masters urged Judge Frank to raise the cap to 25% for all lawyers across the board. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896018, at *1 (D. Minn. June 30, 2008). Judge Frank rejected their recommendation because it would have required some clients to pay more in total fees than their contracts required. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 3896006, at *10 (D. Minn. Aug. 21, 2008). To ensure that no client paid more than the contract price, he imposed the cap described in the text.

MDLs, and other aggregation techniques to achieve economies of scale. Because the market for legal services is highly competitive, it is also predictable that competition will force lawyers to pass the savings onto clients. Lawyers may reduce their fees, provide higher service levels, take smaller cases, or react in other ways. Although the argument for capping fees is that market supposedly failed to price lawyers' services correctly, no judge received the evidence or expert testimony that was needed to document this failure. Nor did any judge quantify the extent to which fees were inflated above the competitive price. The judges simply pulled numbers out of the air.⁸⁴ The variation in the caps appears to reflect the variation in the judges' subjective assessments of the fees limited lawyers could reasonably charge. It may also reflect other factors, such as the size of the reductions judges thought limited attorneys would accept without making a fuss.

Although the fee caps varied, the judges' desire to protect plaintiffs from excessive charges was a constant theme in all three cases. Each judge wanted to reduce plaintiffs' litigation costs. When combined with the desire to pay the managerial attorneys, this meant that all three judges had to cap limited lawyers' fees at levels low enough to free up the money they thought the managerial lawyers deserved. Other things being equal, a larger payment for CBW required a lower cap on fees.

The fee caps thus served a dual purpose: they enabled the judges to transfer money from limited lawyers to managerial attorneys, and they saved plaintiffs money overall. The two purposes required separate justifications, which the judges provided. Forced *transfers* to managerial attorneys were needed to cure unjust enrichment, as previously explained. Fee *reductions* were needed, the judges contended, because otherwise limited lawyers' charges would be excessive, violating state bar rules, harming vulnerable clients, and soiling the reputation of bench and bar. Economies of scale were the reason. Although the contingent fees may have been reasonable when agreed to, centralized provision of CBW and the global settlement made them unreasonable by dramatically reducing costs.⁸⁵

In combination, the fee caps and forced payments for CBW substantially reduced limited lawyers' earnings. In *Guidant*, Judge Frank calculated that his 3-part cap allowed a limited lawyer with a 40% retainer agreement to collect 28% of a client's gross

⁸⁴ The judges' opinions display a significant lack of confidence in the market's ability to regulate fees. Yet, no opinion shows that the market is uncompetitive. In fact, competition abounds. Potential plaintiffs can easily use the Internet to find law firms willing to handle drug-related cases. They can also comparison shop by allowing multiple firms to compete for their cases. See, e.g., An Attorney for You, <http://www.anattorneyforyou.com> (last visited Oct. 14, 2008) (website enabling consumers to obtain offers of representation from competing law firms). Prevailing prices should therefore be efficient and should reflect among other things, predictable cost savings resulting from economies of scale produced by MDLs.

⁸⁵ *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488, 490 (E.D.N.Y. 2006) (“[M]uch of the discovery work [limited lawyers] would normally have done on a retail basis in individual cases has been done at a reduced cost on a wholesale basis by the plaintiffs’ steering committee.”); See *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *18 (D. Minn. March 7, 2008) (“Because of the mass nature of this MDL, the fact that several firms/attorneys benefited from economies of scale, and the fact that many did or should have benefited in different degrees from the coordinated discovery, motion practice, and/or global settlement negotiations, there is a high likelihood that the previously negotiated contingency fee contracts would result in excessive fees.”); Vioxx, Order & Reasons, p. 19 (“the Court must assess the reasonableness of the contingent fees in light of the fact that the economies of scale have led to a global settlement offering considerable benefit to the attorneys.”). [CITE]

recovery, a discount of 30%.⁸⁶ This understates the impact of his ruling. Under his cap, a plaintiff's total fee burden cannot exceed 37.18% of the gross recovery. If common benefit fee equals 15%, simple subtraction shows that the most any limited lawyer can charge is 22.18%. If that is right, then Judge Frank's cap actually cost a lawyer with a 40% contract 45% of his fee. The 32% cap set in *Vioxx* is slightly less draconian, even assuming Judge Fallon awards the entire 8% set aside to the managerial attorneys. To make room for the 8% payment under the 32% cap, a lawyer with a 40% contingent fee agreement would have to charge 24%. That is a 40% discount on the contractual rate—a substantial discount.

Cuts of 40%-45% fundamentally change the economics of mass tort representations. Although the matter has not been studied empirically, it seems obvious that reductions of this magnitude will influence lawyers' behavior. Presumably, they will have the same impact as other price and wage controls which, when set below market-clearing levels, cause the quantity and quality of goods and services to decline.⁸⁷ This will harm claimants by making representation harder to find and by reducing the value of their cases. Tort reform groups (and the politicians they sponsor) support limits on contingent fees for this reason.⁸⁸ They know that claimants who cannot hire lawyers cannot sue.⁸⁹

Having said that fee caps dampen lawyers' incentives, we nonetheless agree that claimants should not have to pay extra for CBW. All lawyers with clients in an MDL accepted the wages set in their contracts as compensation for providing all the legal services their clients reasonably required. This includes CBW. The problem with fee caps is that they reduce lawyers' fees below market-clearing levels without a theory of market failure or empirical evidence of inflated charges, not that CBW consumes a fraction of the fees claimants agreed to pay.

E. Allocating CBW Payments among Managerial Attorneys

⁸⁶ *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. MDL 05-1708, 2008 WL 3896006, at *20 (D. Minn. Aug. 21, 2008).

⁸⁷ Caps on prices and wages are the subject of a large literature. For a review of the use of price controls in the U.S., see HUGH ROCKOFF, *DRASTIC MEASURES: A HISTORY OF WAGE AND PRICE CONTROLS IN THE UNITED STATES* (1984). See also, Hugh Rockoff, *Price Controls*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (2d ed. 2007), <http://www.econlib.org/library/Enc/PriceControls.html> ("Price ceilings ... cause shortages"); Thomas Sowell, *An Ancient Fallacy: Price Controls*, *CAPITALISM MAGAZINE*, June 27, 2002, <http://www.capmag.com/article.asp?ID=1684> ("It is not just the quantity supplied that declines under price controls. Quality also declines.").

⁸⁸ See, e.g., Patrick Danner, *Lawyers' Fees Come Under Fire*, *THE MIAMI HERALD*, January 3, 2004, at [PAGE] (reporting that the Florida Medical Association backed a constitutional amendment capping contingent fees in medical-liability cases). Terry Carter, *Tort Reform Texas Style*, *ABA JOURNAL*, October 1, 2006, at [PAGE] (reporting that Texas Governor Rick Perry, a proponent of tort reform, proposed a cap on contingent fees).

⁸⁹ On the importance of access to counsel as a condition for suing, see Charles Silver and David A. Hyman, *Access to Justice: Self-Representation in Paid Bodily Injury Claims in Texas, 1988-2005* (paper presented at ABA Section of Litigation Symposium on Access to Civil Justice, Atlanta, GA, Dec. 4-5, 2008) (finding that less than 1% of paid bodily injury claimants filed lawsuits without retaining attorneys).

Once the dollars available to pay for CBW are fixed, it remains to allocate them among the lead attorneys. This can be a messy process in which lawyers, including lawyers with cases outside an MDL, compete for shares of a limited fund.⁹⁰ In *Guidant* and *Vioxx*, Judges Frank and Fallon appointed fee allocation committees charged with deciding which lawyers' efforts were worth how much.⁹¹ The conflicts were horrendous. The committees had to value their own members' work, including work by managerial lawyers with few or no signed clients for whom common benefit fees would be the only reward.⁹² They also had to evaluate contributions by lawyers whose work was done outside the MDL. The *Guidant* allocation committee was not up to the task. Its report provoked so many complaints that Judge Frank abandoned it.⁹³

By involving themselves in the fee allocation process, judges again use class action procedures as models for MDLs. In the famous *Agent Orange* case, Judge Weinstein used the lodestar method to calculate the fee award. His decision specified the amount each member of the PSC would receive based upon the time each lawyer put into the case. However, the PSC members had previously agreed to pool the award and reallocate it according to a plan of their own devise, the purpose of which was to reward lawyers who rescued the case from disaster by contributing financial capital late in the day. This naturally meant that lawyers who logged many hours but contributed no capital would receive less than Judge Weinstein awarded, while lawyers who contributed capital but logged few hours would receive more. David Dean was one of the lawyers who wound up on the short end of the stick. He challenged the reallocation on appeal, and the Second Circuit sided with him, holding that the ultimate allocation cannot deviate substantially from the trial court's award.

The Second Circuit's opinion provoked an obvious criticism: plaintiffs' attorneys know how to finance large lawsuits better than judges do, and "fee-splitting agreements that seem outrageous to a reviewing court may have strong efficiency justifications."⁹⁴ When it comes to fee allocations, the right regulatory stance in both class actions and

⁹⁰ Lawyers with cases in state courts share in common benefit fees because global settlements involve their clients as well as claimants in an MDL. Sometimes, these lawyers must subject themselves to regulation by an MDL judge as a condition for enrolling their clients in a global settlement. For example, §§ 9.2.3-9.2.5 of the *Vioxx* Master Settlement Agreement provided that Judge Fallon would oversee distribution of common benefit fees, after appointing a fee allocation committee and in cooperation with other identified judges. Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.* §§ 9.2.3-9.2.5., No. MDL 1657 (E.D. La. Nov. 9, 2007).

⁹¹ The allocating committees' recommendations were subject to judicial review.

⁹² In *Guidant*, Judge Frank appointed 6 lawyers to a Common Benefit Attorney Fee and Cost Committee: 4 members of the PSC and 2 lawyers with cases in both the MDL and the Minnesota state courts. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 451076, at *1 (D. Minn. Feb. 15, 2008). In *Vioxx*, Judge Fallon named 9 lawyers to an Allocation Committee: 3 members of the Plaintiffs' Executive Committee; 2 PSC members; and 4 attorneys with state court cases. Pre-Trial Order No. 32 at 1-2, *In re Vioxx Prods. Liab. Litig.*, No. MDL 1657 (E.D. La. Nov. 20, 2007).

⁹³ Order of United States District Court Judge Donovan W. Frank at 1, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708 (D. Minn. May, 27, 2008).

⁹⁴ John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV 877, 902 (1987).

MDLs is probably “benign neglect.”⁹⁵ But judges are missing the opportunity to handle MDLs correctly because they are importing class action procedures whole-hog. In MDLs, lead attorneys can allocate fees contractually. They do not need judges’ help, and judicial interference with their arrangements is likely to do claimants more harm than good.

* * * *

The discussion in this Part illustrates how Judges Fallon, Frank and Weinstein gave in to the gravitational pull of the class action model, progressively adapting control rules that evolved in litigation under Rule 23 to MDLs. The judges appointed counsel to managerial positions, oversaw their performance of those responsibilities, and set attorneys’ fees for members of the quasi-class – all of these being activities undertaken by judges supervising class action litigation. Judges have missed the fact that MDLs differ from class actions in respects that often render class action procedures inappropriate.

III. OPTIMIZING MANAGERIAL LAWYERS’ INCENTIVES

This section uses simple microeconomics to clarify the role fee transfers can play in encouraging the optimal provision of CBW. It also explains why judges are unlikely to regulate managerial lawyers’ incentives correctly and identifies other problems that arise when judges regulate lead lawyers’ compensation.

A. The Basic Economics of CBW

CBW consists of services which, when produced at any level, can benefit all claimants who wish to use them. Examples include identifying and briefing liability theories; developing common facts relating to liability, causation, or damages via discovery; retaining and preparing expert witnesses; creating electronic databases and document repositories; testing presentations on focus groups; creating trial notebooks and strategies; arguing motions and making presentations on pre-trial matters; entering into stipulations with defendants; and negotiating settlements. These services display the property of jointness, meaning that one person’s use of them does not preclude another person’s use. When CBW produces a deposition transcript, unearths a relevant document, or generates a persuasive pleading, motion or brief, as many claimants as want to can use the item without reducing its availability or value.

Because CBW consists of joint goods and services, its production raises a problem of collective action. Rather than bear the cost of CBW, each claimant would prefer to wait for someone else to produce it and then use it free of charge. If everyone free-rides, however, everyone suffers because no CBW is produced. Fortunately, the problem has a solution, at least in theory. Claimants who refuse to pay for CBW can be denied access to it. Because lawyers do not have to share work products with non-clients, they can use contracts to discourage free-riding.

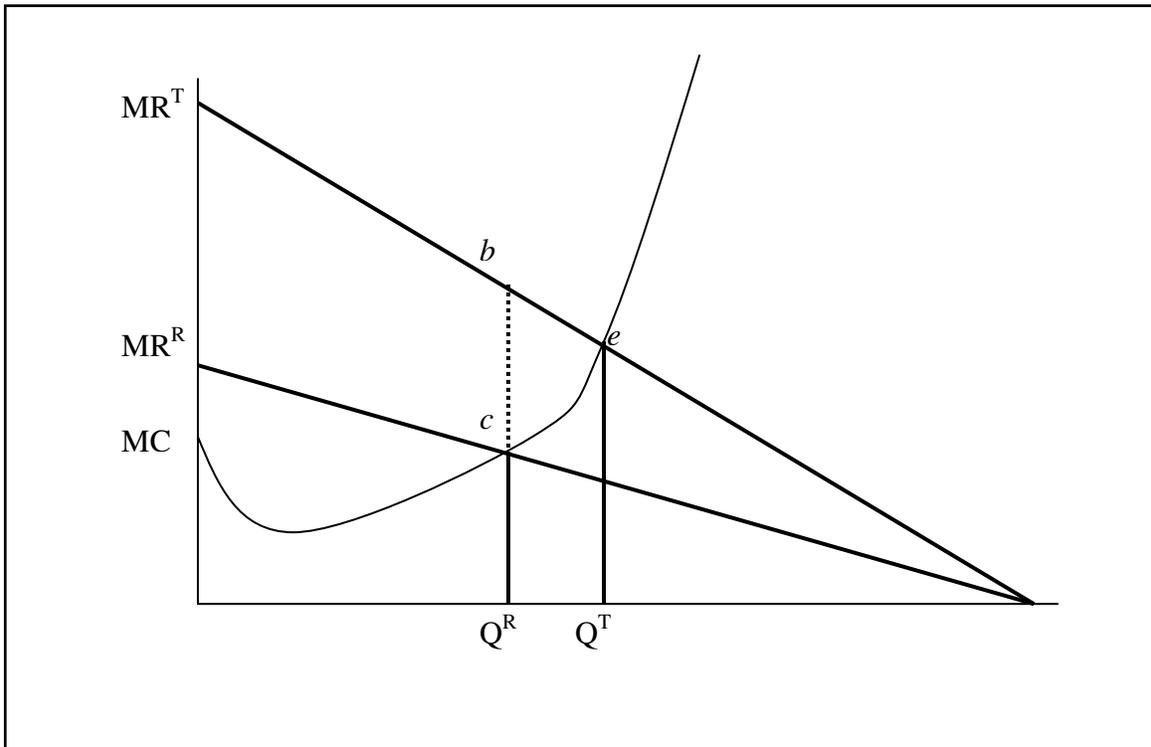
Contracts are imperfect solutions, however. They have two important defects. First, it is impossible to prevent free-riding completely. Once a pleading, motion, or other document is filed with a court or otherwise made publicly available, anyone can

⁹⁵ *Id.*

obtain it without paying legal fees. Other work product, even if not publicly available, may be leaked to persons not entitled to it. Free-riders can even benefit from CBW they do not physically possess. For example, suppose Lawyer 1 produces a new legal theory that strengthens her clients' claims. This may make the defendant willing to pay more to settle all pending cases, not just Lawyer 1's, even if other lawyers do not know about that theory. The defendant may pay more across the board because it expects other lawyers to find out about Lawyer 1's theory or because it expects settlement values to become publicly known. Because Lawyer 1 gets no share of other's gains, her incentive to develop legal theories is diminished.

Second, when claimants form multiple litigation groups, no single group is likely to want the level of CBW that would be optimal for all claimants as a whole. Figure 1 describes this problem. It assumes the existence of a total population T of identical claimants and a subgroup R whose members are represented by a common attorney. MR^T and MR^R are the marginal return curves for, respectively, T and R . The total marginal return to T or R from any unit of CBW is the sum of the marginal gains enjoyed by the claimants who belong to each group.⁹⁶ These curves slope downward to the right, reflecting the assumption that the marginal value of CBW for each claimant declines as the supply of CBW increases. The marginal cost (MC) curve for CBW falls initially as economies of scale are realized, then rises at higher levels of production as diseconomies set in. Part of the MC curve lies below MR^R and MR^T , reflecting the assumption that a positive level of CBW is optimal for both groups.

⁹⁶ Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REVIEW OF ECONOMICS AND STATISTICS 387 (1954).

FIGURE 1: OPTIMAL PROVISION OF COMMON BENEFIT WORK

Q^R is the optimal quantity of CBW for R, it being the point at which MR^R and MC intersect. This is the amount of CBW a contract that perfectly harmonized the interests of R's member and their lawyer would encourage the lawyer to provide. However, Q^R would be a suboptimal level of CBW for T. The optimal quantity of CBW for group T (Q^T) is identified by the point at which MR^T and MC intersect. Because $MR^T \geq MR^R$, $Q^T \geq Q^R$.

In theory, cooperation could ameliorate these difficulties. By joining forces, claimants (or, more realistically, their attorneys) could form all-encompassing aggregations, producing optimal incentives. In practice, cooperation occurs on an impressive scale but tends to be far from complete. In *Guidant*, *Vioxx*, and *Zyprexa*, attorneys formed working groups with thousands of clients, but the groups were several and many small clusters of claimants remained. This incomplete cooperation poses problems for defendants and courts as well as plaintiffs. When thousands of claimants form tens or hundreds of working groups, defendants and judges must perform the same or similar work repeatedly. This duplication is expensive, even if not all repetitive efforts can be characterized as waste.

B. Judicial Manipulation of Incentives

Figure 1 oversimplifies the economics of producing CBW, but it makes the relevant point. MDLs have the potential to improve upon cooperation by aggregating more cases than cooperation can reach. In terms of Figure 1, an MDL creates an opportunity to move from Q^R toward Q^T by making it economically rational to pay a plaintiffs' attorney for a higher level of production. The opportunity is not all upside, however. Forced aggregation carries risks as well.

The first point to appreciate is that forced aggregation can take advantage of the pre-existing incentive subgroup R has to provide Q^R units of CBW. To see this, suppose R's lawyer is given control of an MDL containing all members of T and is prohibited from extracting supplemental fees from anyone. R's lawyer would still find it advantageous to produce Q^R units of CBW because the expected fees from R's members would justify this. If all MDL claimants were allowed to use the CBW, the group as a whole would realize outcome b in Figure 1.

A second point is related to the first. The incentive to produce Q^R remains as long as the members of R must pay what they agreed, even if members of T not in subgroup R are allowed to use the CBW for free. There are good reasons to charge members of T not in R for access to CBW, but an incentive to produce CBW for use for all claimants in an MDL would exist without forced transfers.

When it decided *Everglades Crash*, the Fifth Circuit appears to have understood that fee transfers are meant to build upon lawyers' pre-existing incentives.⁹⁷ There, lawyers opposing a forced fee transfer asked, "[W]hy pay [the managerial lawyers]," who had 60 cases in the MDL, "for doing what they would have done anyhow on behalf of their own clients?"⁹⁸ The question posed the economic issue squarely: Why was a supplemental incentive needed? The Fifth Circuit answered as follows:

⁹⁷ *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1005 (5th Cir. 1977).

⁹⁸ *Everglades Crash*, 549 F.2d at 1017.

It is uncertain that [the managerial] lawyers would have been able to conduct prompt, orderly, precise and fruitful discovery if there had been a multitude of diligent lawyers pushing for the front seat and the maximum advantage. *The [managerial lawyer]s' 60 cases may affect the amount paid them as lead counsel* but not the power of the court to require payment.⁹⁹

Obviously, the first sentence misses the point. The objecting lawyers did not dispute the managerial lawyers' right to control discovery. They questioned the need to pay them extra for conducting discovery, arguing that they would have expended the same effort for the benefit of their signed clients anyway. From an economic perspective, the proper response was that a supplement was needed because the lawyers' pre-existing incentives were suboptimal. The second sentence is much closer to the mark. It suggests that MDL judges should take account of incentives to produce CBW provided by lawyers' signed clients, transferring less money when fees expected from signed clients are larger. This is what judges would do if their object was to move from Q^R to Q^T .

In fact, MDL judges almost never take account of lawyers' pre-existing incentives in any explicit way. A rare exception is an opinion Judge Weinstein issued in *Zyprexa* in response to the PSC's request for a second fee award. In the course of denying most of the second request, he pointed out that three law firms with positions on the PSC "derived substantial fees from representing individual clients who settled their claims in the first phase of the [MDL]: Burg Simpson, Douglas & London, and Seeger Weiss earned \$23.5 million, \$21.9 million and \$78.5 million, respectively."¹⁰⁰ The total is just shy of \$124 million. Although left implicit, Judge Weinstein's point appeared to be that PSC members had sufficient incentives to provide CBW without further supplementation because their signed clients paid them so handsomely.

Judge Weinstein may also have given weight to payments from signed clients when he evaluated the *Zyprexa* PSC's first application for fees, which he approved in full. If he did, however, he neither said so explicitly nor explained how he took account of this information when deciding how much money to transfer. In these respects, his behavior is typical. Despite the Fifth Circuit's observation in *Everglades Crash* that fees from signed clients bear on the size of forced fee transfers, there is no practice of requiring managerial attorneys to disclose what their signed clients will pay.¹⁰¹ Nor does any doctrine tell judges how to use this information should they happen to have it. "[N]o specific rules" govern the size of common benefit fees in MDLs at all, as the judge

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596, 2008 WL 1844000, at *5 (E.D.N.Y. April 22, 2008).

¹⁰¹ In *Zyprexa*, Judge Weinstein learned about the fees the lead attorneys received from their signed clients indirectly. A special master obtained it for him.

presiding over the multi-billion dollar *Diet Drugs* settlement observed in 2002.¹⁰² Awards need only be “fair and reasonable.”¹⁰³

This doctrinal vagueness reflects a failure on the part of judges to articulate a coherent theory of fee transfers in MDLs. Instead of thinking about MDLs on their own terms, judges have borrowed the fee jurisprudence of class actions, as previously explained.¹⁰⁴ Yet, the analogy to class actions again turns out to be faulty in important respects. First, in MDLs, lawyers often have valuable client inventories. The attorneys on the *Vioxx* PSC collectively stand to collect more than \$300 million from their signed clients, without a common benefit fee award. The pre-existing incentives of class counsel are much weaker. Class counsel typically has a few signed clients whose claims, standing alone, would justify the production of little CBW. The problem in class actions is to create incentives from whole cloth; in MDLs, it is to enhance pre-existing incentives that may be quite strong. For this reason, side-by-side comparisons of fees in class actions and MDLs are misleading: they ignore the (often substantial) fees managerial attorneys in MDLs receive from their signed clients. Judges sometimes justify MDL fee awards by comparing them to class action awards, even so.¹⁰⁵

Second, judges presiding over successful class actions can be reasonably confident that class members would have found it advantageous to hire class counsel on a contingency basis had bargaining impediments not prevented them from doing so. In MDLs, the same cannot be said of limited lawyers vis-à-vis lead attorneys. Limited lawyers *can* hire managerial attorneys. Their failure to do so suggests that they would rather handle CBW themselves than pay the fees lead lawyers demand.¹⁰⁶ Judges force limited lawyers to transact with lead lawyers because they want to avoid duplication, not because bargaining impediments prevent lead and limited lawyers from coming to terms.

One might dispute the argument just given by pointing out that limited lawyers lack incentives to hire lead lawyers, regardless of price, because they can free-ride on lead attorneys’ efforts once CBW is produced. This observation has merit, but it does not

¹⁰² *In re Diet Drugs* (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 553 F.Supp. 2d 442, 480 (E.D. Pa. 2008). See also Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 9, *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596 (E.D.N.Y. Dec. 29, 2006) (“fees awarded in common fund cases may not exceed what is ‘reasonable’ under the circumstances”) (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000)).

¹⁰³ *In re Diet Drugs*, 553 F.Supp. 2d at 492.

¹⁰⁴ *Id.* (applying factors developed for use when awarding fees in class actions while observing that the “factors ... do not strictly apply to the MDL because we are not dealing with a class settlement fund.”). See also *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. MDL 05-1708, 2008 WL 682174, at *16 (D. Minn. Mar. 7, 2008) (applying multi-factor approach endorsed by the Eighth Circuit in a class action) (citing *In re Xcel Energy, Inc., Sec., Derivative & “ERISA” Litig.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005)).

¹⁰⁵ See, e.g., Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 11-12, *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596 (E.D.N.Y. Dec. 29, 2006) (approving the PSC’s request for 4% of the settlement fund partly because it compared favorably with the fees awarded in identified class actions with large settlement funds).

¹⁰⁶ This may be because lead lawyers and limited lawyers are caught up in a bilateral monopoly. Once appointed by a court, lead lawyers are the only sellers of CBW and limited lawyers are the only buyers. Efficient exchanges are difficult to negotiate in this environment.

show that judges can be relied upon to size fee awards correctly. Lawyers have better information than judges and more experience financing litigation. Before giving judges control of fees, it makes sense to determine whether one can design a mechanism that encourages lawyers to make good decisions. This article offers such a procedure, which judges have not explored.

Several factors increase the probability that judges will misestimate the fee transfers needed to close the gap between Q^R and Q^T . The distance between Q^R and Q^T varies both across cases and with the make-up of managerial attorney groups. Neither Q^R nor Q^T can be directly observed. Once appointed, managerial lawyers have incentives to maximize fee transfers by understating Q^R and overstating Q^T . Finally, judges lack incentives to set transfers correctly and have other agendas, such as reducing plaintiffs' contingent fees.

Judges may even use the wrong formula when paying for CBW. In the vast majority of plaintiff representations, attorneys work for contingent percentage fees set before any significant work is done. Compensation is handled the same way when plaintiffs are referred. Both lawyers receive a fraction of the contingent percentage, and the division is fixed up front. In MDLs, by contrast, judges pay managerial lawyers for CBW by the hour at rates set *ex post* and after their reviewing time sheets. They also apply fee multipliers. The only apparent justification for applying a fee formula plaintiffs rarely use is that judges like it. A justification tied to plaintiffs' welfare would be more compelling, given that the object of compensation arrangements is to motivate lawyers to serve clients well.

C. Judicial Selection of Managerial Attorneys

Plaintiffs usually hire their own attorneys. Even in class actions, where claimants and attorneys cannot bargain directly, judicial appointment of class counsel is disfavored in securities fraud litigation.¹⁰⁷ When Congress enacted the Private Securities Litigation Reform Act (PSLRA) in 1995, it gave the power to select and retain class counsel to the lead plaintiff, not to the trial court.¹⁰⁸ Congress was persuaded that a plaintiff with a large financial interest in the outcome of a lawsuit, often a sophisticated investor, had an incentive to hire a good attorney at a reasonable rate.

What is true in securities class actions is also true elsewhere: when it comes to hiring lawyers, plaintiffs have better incentives than judges. When plaintiffs hire bad lawyers or agree to pay excessive wages, they lose money. Judges have no "skin in the game."¹⁰⁹ They spend other people's money. Presumably, they also appoint lawyers who can be expected to serve judges well, regardless of the consequences for plaintiffs.

107 For information on the frequency of securities fraud class actions, see, e.g., CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS 2008: A YEAR IN REVIEW (2008); Stephanie Plancich and Svetlana Starykh, *2008 Trends in Securities Class Actions*, NAT'L ECONOMIC RESEARCH ASSOCIATES, December 18, 2008, http://www.nera.com/publication.asp?p_ID=3674.

108 15 U.S.C. § 78u-4(a)(3)(B)(v) (2007).

109 Various sources attribute this phrase to renowned investor Warren Buffett, who used it to describe corporate officers and directors who show confidence in their decisions and align their interests with shareholders' by investing in the companies they run. See, e.g., Answers.com, <http://www.answers.com/topic/skin-in-the-game> (last visited Oct. 6, 2008).

Because plaintiffs are first party payers, one would expect attorneys competing for business in a competitive legal services market to offer them attractive combinations of quality and price. And the market is highly competitive. To verify this, we conducted Google searches for lawyers willing to handle cases relating to five on-going pharmaceutical MDLs. After identifying ten law firms for each case type, we stopped counting. Potential clients can find representation easily. They can also compare prices by submitting their cases to multiple firms or by using AnAttorneyForYou.com, a website that allows competing attorneys to bid on cases. Finally, an active referral market helps plaintiffs improve their choices by moving cases from lawyers who are good at obtaining clients to lawyers who are good at litigation.

Given the preference for allowing plaintiffs to hire their own lawyers and the obvious policy reasons supporting it, why do judges appoint managerial lawyers in MDLs? Judges could require plaintiffs' attorneys to select their own leaders. Usually, though, judges take over the process completely. This is what *the Manual (Fourth) for Complex Litigation* recommends. It advises MDL judges "to take an active part in the decision on the appointment of counsel," and it discourages them from "[d]eferred to proposals by counsel, ... even those that seem to have the concurrence of a majority of [the lawyers] affected"¹¹⁰ Among judges, the prevailing wisdom is that the choice of managerial attorneys is too important to be left to private arrangements.¹¹¹

The *Manual* identifies two reasons for judicial control: the desire to ensure adequate representation and the need to police lead attorneys' fees.¹¹² Neither reason seems particularly compelling. By selecting inferior lead lawyers or over-paying for CBW, limited lawyers would harm themselves.¹¹³ One should therefore expect them to hire good managerial attorneys at reasonable rates. Limited lawyers also know their contemporaries well and interact with them frequently. This should enable them to make good choices and to monitor performance effectively.

Commenting on a prior draft of this article, one reader observed that judicial regulation of lead lawyers' fees in MDLs is a continuing response or reaction to the many fee abuses that have occurred when lawyers were left unsupervised. The reader specifically mentioned the infamous *Fine Paper* case, in which a circus erupted after the lead attorney accused other lawyers of committing various forms of billing fraud in an effort to win as much of the \$50 million settlement for themselves as possible.¹¹⁴ Following lengthy hearings, the outraged trial judge found that the fee applications were "grossly excessive" and cut the total amount requested by 80%.¹¹⁵

¹¹⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.244.

¹¹¹ *Id.*

¹¹² *Id.* ("Deferring to proposals by counsel without independent examination ... invites problems down the road if designated counsel turn out to be unwilling or unable to discharge their responsibilities satisfactorily or if they incur excessive costs.").

¹¹³ Collusion could lead to excessive charges for CBW, as discussed below. See *infra*, Part X.

¹¹⁴ The free-for-all that erupted in the *Fine Paper* case is discussed at length in John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983).

¹¹⁵ *In Re Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 52 (E.D. Pa. 1983), *quoted in* Coffee, *supra* note 111.

Fine Paper shows quite clearly that lawyers cannot be allowed to decide how large a fraction of a settlement fund they will receive. This was not a problem in the MDLs upon which we have focused, for in those cases contracts regulated all lawyers' fees. The question 'How much money should lawyers receive?' was not at issue until the judges raised it. The lawyers were entitled to know contingent percentage fees agreed to *ex ante* by their clients.

Fine Paper also reveals the abuses that are prone to occur when judges presiding over class actions set fees *ex post* using the lodestar method. This point weighs against the arrangements judges currently use when setting lead lawyers' fees in MDLs and in favor of our proposal. Currently, judges wait for settlements to occur and pay lead attorneys for CBW by the hour. This encourages the abuses that occurred in *Fine Paper* and necessitates careful judicial scrutiny of fee requests. Under the proposal, concerning which we say more below, lead lawyers' fees would be set upfront by other lawyers who would suffer if lead lawyers were to overcharge. This would substantially reduce the need for judicial monitoring.

A skeptic might argue that judicial control benefits judges, who crave interesting, challenging, and high-profile MDL assignments. The best way to get more assignments from the JPML is by handling prior assignments well.¹¹⁶ Usually, this means achieving global settlements that save other judges from having to preside over thousands of follow-on trials. To increase the likelihood of achieving this goal, MDL judges pick managerial attorneys with reputations for making global resolutions occur.

The hope of ending all litigation may explain why judges sometimes give important positions to lawyers with few or no signed clients.¹¹⁷ In *Zyprexa*, Judge Weinstein named Melvyn I. Weiss chair of the PSC. Weiss' firm had no clients in the MDL, but he was a consummate settlement architect.¹¹⁸ In *Vioxx*, Judge Fallon gave the position of liaison counsel to Russ Herman, whom he also put on the PSC and the Plaintiffs' Negotiating Committee and made chair of the Fee Allocation Committee. When the MDL began, Herman had fewer signed clients than many other lawyers, but he too was an experienced deal-maker.

Conflicts can arise when lawyers with few or no clients hold important positions. Clientless lawyers depend entirely on judges' largesse. Being more beholden to judges than plaintiffs, they can be expected to prefer the former over the latter when interests collide. This may put them at odds with lawyers with valuable client inventories, causing friction on the plaintiffs' side.

The desire of lawyers with few or no clients to maximize fee transfers is also a predictable source of strain. Contingent fee lawyers with valuable inventories have some interest in maximizing recoveries. Clientless lead lawyers who charge by the hour have

¹¹⁶ The criteria that formally govern the JPML's choices of transferee fora are discussed in DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL chap. 7 (2008). According to Herr, "[t]he [JPML] undoubtedly considers the ability and reputation of a judge" when making assignments, *Id.* at 226, and also "look[s] specifically to prior experience as a transferee judge in MDL proceedings." *Id.* at 227.

¹¹⁷ See *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1005, 1017 (5th Cir. 1977) (commenting that "[i]n the next case the best available lead counsel may have one case out of 100").

¹¹⁸ Original PSC's Memorandum of Law in Support of Its Motion for an Award of Attorneys' Fees and Reimbursement of Expenses at 2 n.2., *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596 (E.D.N.Y. Oct. 18, 2006).

none. Their interest lies in billing as much time as a presiding judge will allow. Having done that, a clientless lawyer will rationally want to settle on any terms a defendant will offer. The lawyer has no stake in the MDL's upside potential, but will suffer greatly if negotiations fail.

Judicial control of appointments and fees compromises judges' independence as well. By appointing managerial attorneys, an MDL judge begins an iterated relationship that lasts until the case ends and the lawyers are paid. Every step in the pre-trial process can build a sense of reciprocity. As the distance between the judge and the appointed lawyers narrows, it becomes more and more difficult for the judge to act objectively, which may mean sending the lawyers home empty-handed or slashing their fees.¹¹⁹ One might have to involve MDL judges so deeply in plaintiffs' affairs if there were no better alternative. "You can't beat something with nothing," as the saying goes. But there are other options, as we show in Part IV.

D. The Impact of Judicial Fee Regulation on the Profitability of CBW

Because Q^T is unobservable, it is important to know whether judges regulate managerial lawyers' compensation in a way that incentivizes them to optimize production of CBW. It seems obvious they do not. In *Zyprexa*, for example, Judge Weinstein disallowed most of the PSC's supplemental request for \$6.5 million in attorneys' fees. Evidently, he concluded that the PSC expended more time on CBW than it should have. If Judge Weinstein was right to deny the submitted hours, then the method he used to pay for CBW encouraged them to over-produce, requiring careful oversight to protect limited attorneys from overbilling.¹²⁰

The likely culprit is the policy of paying for CBW by the hour.¹²¹ This compensation method makes time spent on CBW especially profitable because it enables managerial lawyers to collect for the same effort twice. Consider *Zyprexa*. There, Judge Weinstein capped lawyers' contingent fees on large cases at 35%, granted in full the lead attorneys' request for over \$30 million in common benefit fees and expenses, and generated the money needed to pay them by imposing a tax against the entire settlement fund. The managerial lawyers thus collected 35% of the gain CBW generated for their signed clients *plus* \$30 million from all settling claimants. The latter group included the lawyers' signed clients. Not only did the lawyers collect for the same work from two sources; they charged their own clients twice for the same work.¹²²

The ability to collect from multiple sources makes CBW more profitable than it would otherwise be. The magnitude of the increase depends on the facts. Imagine,

¹¹⁹ Reciprocity is deeply engrained in humans. *See, e.g.*, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). Even trivial gifts like coffee mugs and pens have been found to influence their decisions.

¹²⁰ Judicial orders rejecting fee requests from managerial attorneys *ex post* can, however, deter managerial lawyers from logging excessive hours in future cases.

¹²¹ *See, e.g.*, Memorandum and Order of United States Magistrate Judge Roanne L. Mann at 6, *In re Zyprexa Prods. Liab. Litig.*, No. MDL 1596 (E.D.N.Y. Dec. 29, 2006) (observing that the PSC submitted "detailed time records" for review); *Id.* at 11 (noting that the PSC requested compensation for more than "65,283 hours working for the common benefit of all plaintiffs").

¹²² This assumes that time expended on CBW increased the value of claims by more than \$30 million.

purely for purposes of illustration, a Lawyer L who, outside an MDL, represents 100 identical clients pursuant to 40% contingent fee agreements. Now assume that between Time 1 and Time 2, L expends 1000 hours on CBW and that this effort increases the expected value of the signed clients' cases by \$2.5 million. L's expected fee on the CBW is therefore \$1 million ($\$2.5 \text{ million} * .4 = \1 million) or \$1,000 per hour. Assuming a competitive market, this level of compensation should not enable L to collect any rents.¹²³

Now assume the following: (1) at T1, L's 100 cases are consolidated in an MDL with 900 more identical cases; (2) L is appointed lead counsel; (3) L devotes the same 1000 hours to CBW between T1 and T2 with the same effect on L's clients' cases; (4) the court awards L \$1,000/hour for this time, or \$1 million; and (5) as in *Zyprexa*, the court generates money to pay L by taxing every claimant \$1,000. L's total fee for CBW is the sum of his receipts from his signed clients and the payment awarded by the court, as follows: $((\$2,500,000 - \$100,000) * .4) + \$1,000,000 = \$1,960,000$. This is almost double the amount L would have received from his signed clients alone. L's hourly rate for CBW has gone from \$1,000 to \$1,960.

When L's fees and the court-imposed tax are combined, the arrangement just described costs L's signed clients more than their contracts require. The signed clients pay L \$960,000 and they pay the court \$100,000, yielding a total of \$1,060,000. To protect the clients, a judge might follow Judge Frank's lead in *Guidant* by capping their fees at the contract amount. This would require L to rebate \$60,000, and would reduce his total compensation for CBW to \$1,900 per hour. Obviously, this is still far more than his signed clients alone would have paid.

A judge could also follow Judge Fallon's example. In *Vioxx*, he capped all clients' fees at 32%, and required managerial lawyers' fees to come out of this amount. On this approach, L's signed clients would have to pay at most \$800,000 ($\$2.5 \text{ million} * .32 = \$800,000$), meaning that L could charge them only \$700,000, assuming no change in the \$100,000 tax imposed by the court. L's total compensation would then be \$1.7 million, still 70% more than he would have collected outside the MDL.

CBW would have been a profit center even under the cap Judge Frank first applied in *Guidant*. This cap allowed managerial lawyers to charge their clients 10% of the amounts they netted after 15% of the fund was set aside to pay common benefit fees. Under this cap, L could have collected \$250,000 ($\$2.5 \text{ million} * .1 = \$250,000$) from his signed clients plus \$1 million from the court, yielding \$1.25 million in total compensation and an hourly rate of \$1,250.

Because the fee transfer mechanism makes time spent on CBW more profitable, it changes the equilibrium allocation of lawyers' time, increasing the hours devoted to CBW and decreasing the number expended on other services. When representing only his signed clients, a profit-maximizing L would stop producing CBW when the expected marginal fees from it and other forms of work were equal. In the example, this point was assumed to be reached when the marginal return from CBW was \$1000. When appointed lead counsel, L performs the same comparison but, because CBW is more profitable, L cuts back on other activities and invests the free time in CBW. If CBW is worth \$1250 per hour (or any amount that generates rents), L rejects all other employment

¹²³ Rents are payments exceeding wage earners' long-run opportunity costs.

opportunities and produces CBW full time. This incentive persists as long as court-awarded compensation is flowing; neither Q^T nor any other quantity provides a natural stopping point. The profitability of CBW also creates an incentive to fabricate hours and to characterize as CBW time actually spent on other things. The hourly rates' potential to encourage billing fraud is well known.

Because neither judges nor anyone else can observe Q^T , the profitability of CBW under the standard arrangement will predictably lead to overcompensation of lead attorneys. Judges appoint lawyers to lead positions and, having appointed them, rely on them for advice concerning the amount of time CBW requires. Because the standard arrangement makes CBW is excessively profitable, however, lead lawyers' assessments will be biased. They will always prefer higher levels of CBW to lower ones, and will advise judges accordingly. Claimants' attorneys will have little power to counter lead attorneys' estimates. Their self-interest in reducing fee transfers will be apparent; their disagreements with lead attorneys will be subjective; and their influence on the court will be weakened by their status as back-benchers. Lead lawyers' incentives will therefore predictably corrode trial judges' judgments. Over time, overcompensation will become institutionalized, as fee transfers in early cases set precedents for transfers in later ones.¹²⁴

To avoid making CBW excessively profitable, a judge would have to require a lawyer to charge his signed clients 0% of their gains attributable to CBW produced during time for which the lawyer received payment from the court. Calculating this offset would be difficult. Plaintiffs' attorneys may not know how much value an increment of CBW added to their clients' claims. The value of claims at any given time can only be guessed. Even if they did know, they would have incentives to misreport because doing so would increase their fees. In theory, judges could make their own assessments guided by court-appointed expert economists. This would be an expensive and cumbersome process that would produce educated guesses, at best.

E. Factors that Matter Other than Fees

To this point, we have focused on fees to the exclusion of other forces that influence lawyers' willingness to produce CBW. Real lawyer's motives are complex. Most attorneys, in our experience, genuinely care about their clients. Even when clients number in the hundreds or thousands, they want to gain justice for them and to see them do well. Most plaintiffs' lawyers, in our experience, also dislike the defendants they sue. They think drug companies, device manufacturers, and other producers make obscene profits by deceiving regulators and exploiting vulnerable consumers. Many plaintiffs' attorneys enjoy publicity and prestige. They desire higher standing in their profession for its own sake and because it enhances their ability to gain clients. Finally, plaintiffs' attorneys also value opportunities to build litigation skills, to work with other attorneys, and to develop reputations for winning big cases.

¹²⁴ For example, 8% appears to have become the "going rate" for CBW in the Fifth Circuit as a result of *Everglades Crash*, which approved a transfer of this size. See, e.g., Master Settlement Agreement, *In re Vioxx Prods. Liab. Litig.* § 9.2.1., No. MDL 1657 (E.D. La. Nov. 9, 2007).

MDLs afford many of the opportunities plaintiffs' attorneys want, which is one reason why lead counsel positions are much sought and highly prized.¹²⁵ Lead attorneys meet in chambers with judges, work with the most successful plaintiffs' lawyers in the land, handle communications within plaintiff groups, meet with lawyers and judges handling unconsolidated cases, converse directly with defendants' most influential personnel, and talk with the press. Sometimes, they testify before Congressional committees, participate in important Supreme Court cases, or work with high-profile mediators. They are regularly invited to speak at continuing legal education programs and conferences, to lecture law students, and to publish articles describing their experiences in law reviews. Lead attorneys control the flow of large volumes of business to settlement administrators and expert witnesses. They may also meet with lawyers and claimants across the country to provide information, address concerns, and take credit for their accomplishments. To hold a lead position in a large MDL is to participate in civil litigation at the highest level.

Lead attorneys also enjoy opportunities to build important skills. They strategize, develop legal theories, argue motions, coordinate discovery, take apex depositions, prepare experts, and design settlement structures. They build document repositories and create trial notebooks. They preside over or participate in organizations of claimants' attorneys that may be bigger and wealthier than their own law firms. These skills and experiences help lawyers attract future clients and referrals, and obtain judicial appointments in future MDLs and class actions. They also enhance lawyers' chances of being invited to collaborate with other attorneys on large cases.

Lead lawyers in MDLs may also enjoy opportunities to be unusually successful. This is so because judicially-ordered aggregation can improve the odds of settling or improve settlement terms. Usually, a defendant facing a large number of lawsuits wants global peace, because ending all litigation is disproportionately valuable.¹²⁶ For this reason, a defendant will offer a global settlement premium. Conversely, a defendant asked to settle cases individually or in small groups will demand a discount. Because an MDL order concentrates lawsuits in a single forum, places them under unified control, and facilitates cooperation across courts, it makes a global resolution easier to achieve. Thus can consolidation enable a group of lead attorneys to claim that their efforts

¹²⁵ Lawyers chosen for lead positions routinely advertise the fact. The *Vioxx* case provides many examples. See, e.g., Attorney Profile: Andy D. Birchfield, Jr., <http://www.beasleyallen.com/attorney/Andy-Birchfield/> (visited June 2, 2008) ("In April of 2005, Andy was chosen to co-lead the Plaintiff's Steering Committee for the federal *Vioxx* Litigation MDL."); About Russ Herman, http://www.hhkc.com/apg_a9_Russ_M_Herman.aspx (visited June 2, 2008) ("Mr. Herman ... was Lead Negotiator and Liaison Counsel for Plaintiffs in the *Vioxx* MDL 1657 \$4.85 billion global settlement with Merck for plaintiffs' injuries relating to use of the prescription medicine *Vioxx*."); Firm Overview and History, <http://www.lfsblaw.com/overview.jsp> (visited June 2, 2008) ("Partner Arnold Levin ... continues to serve on Plaintiffs' Steering Committees and Executive Committees of many important cases including ... the *Vioxx* Products Liability Litigation"); Seeger Weiss Co-Leads Federal *Vioxx* Litigation and Plays Major Role in New Jersey *Vioxx* Litigation, <http://www.seegerweiss.com/cases/Cases.aspx?ID=24> (visited June 2, 2008) ("Seeger Weiss was recently appointed Co-Lead counsel in the federal MDL *Vioxx* litigation and Co-Liaison counsel in the New Jersey state *Vioxx* litigation.").

¹²⁶ Charles Silver and Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

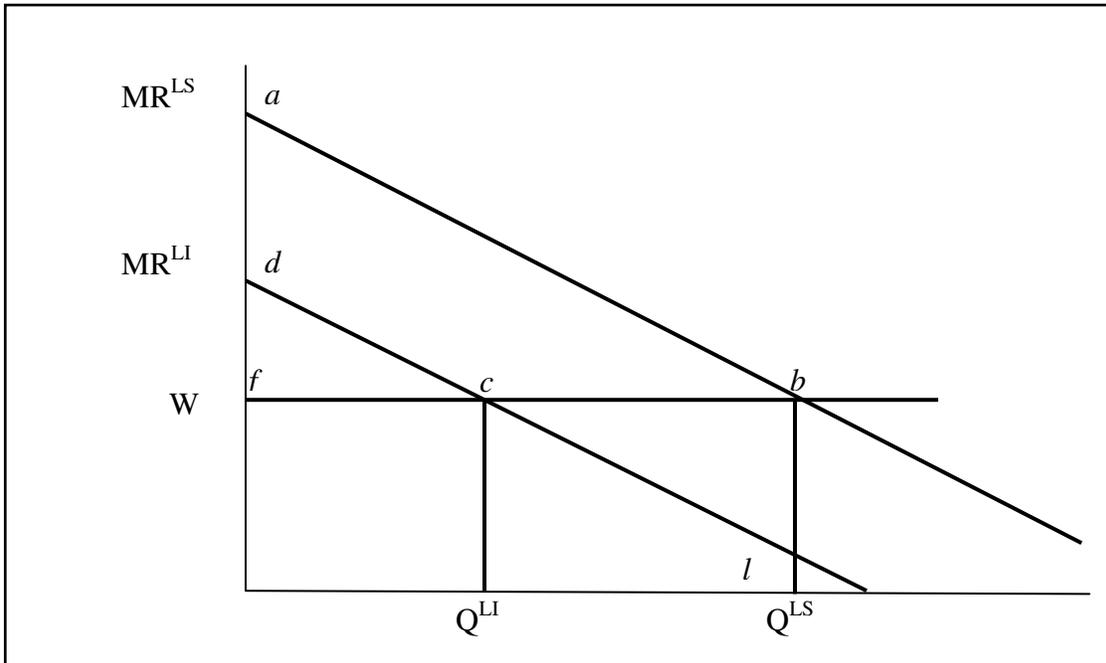
produced an exceptional outcome that was actually due in some measure to other causes.¹²⁷

In theory, these non-monetary factors can reduce the need to pay managerial lawyers for CBW. They can also affect the need to monitor their actions. Judges are, however, poorly placed to decide how much weight these factors deserve. The policy of setting managerial lawyers' fees *ex post* also ties judges' hands by making it impossible for them to comparison shop. Having previously appointed a group of attorneys and allowed them to negotiate a global settlement, a judge cannot fire the group on the ground that other lawyers would have charged less because they were more strongly motivated by other considerations. Realistically, a judge cannot even reduce a fee award on this ground. Having appointed a group of attorneys without setting their rates in advance, a judge is bound to accept their usual and customary charges.

F. Enriching the Economics of Producing CBW: The Choice of Counsel Matters

The choice of managerial attorneys affects claimants. Some attorneys are better litigation strategists, negotiators, legal theorists, advocates, or risk-takers than others. Some teams of attorneys are better than others, too. Their members respect each other, like each other, trust each other, cooperate, and avoid unnecessary costs. Figure 2 casts the difference between superior and inferior representation as a difference in the marginal return to T per unit of CBW. L^S is the superior lawyer or lawyer-group and its marginal return on effort is higher. L^I is the inferior lawyer or lawyer-group and its marginal return is lower. Both are assumed to be paid the same hourly wage (W).

¹²⁷ Distinguishing between returns for which an agent is responsible and returns attributable to other causes, usually described as "nature," is a core problem for principals.

FIGURE 2: IMPACT OF LAWYER QUALITY ON VALUE OF CBW

With L^I in charge, the claimant group fares best when Q^{LI} of CBW is produced. The net gain to the group after paying L^I is the triangle dcf . With L^S in charge, the optimal level of CBW is Q^{LS} , which is larger than Q^{LI} in reflection of L^S 's higher marginal return on effort. The net gain to the group after paying L^S is triangle abf , which obviously exceeds dcf in size. Given the quality difference, it clearly matters to claimants whether L^I or L^S has control of the case.

Judges have no particular interest in putting MDLs in the hands of superior attorneys. This should not be surprising. The procedural system is supposed to do justice under law expeditiously. In keeping with this object, it does not give judges a stake in the size of plaintiffs' recoveries. But it does bestow prestige upon judges who resolve complex cases. Consequently, a judge overseeing an MDL will want to manage the litigation successfully.¹²⁸ Unless the judge is inclined to dismiss all claims, this means achieving a global settlement. One must therefore expect a judge to keep lawyers' settlement-related abilities in mind when deciding which lawyers will control an MDL.

A judge who wished to appoint a team of superior lawyers would also face a second hurdle: the judge might not know which lawyers are best. MDL judges do not scour the continent looking for attorneys offering the best combination of quality and price. They usually draw managerial lawyers from a pool of volunteers that includes mainly lawyers with cases in the MDL. If the best managerial lawyer is not in the pool, the lawyer will not be appointed.¹²⁹ Even within the pool, judges may not know some or many of the lawyers or have any other solid basis on which to gauge their abilities. MDLs bring together lawyers from diverse places. Many of the lawyers may never have appeared in the MDL court before. How an MDL judge is supposed to assemble the best team for the plaintiffs' side is anyone's guess.

Even if judges could reliably identify the best lawyers, they would not know how to incentivize them. Although judges claim the inherent authority to regulate lawyers' fees, they do not know how or how much lawyers should be paid. The manner of regulating lead lawyers' compensation reflects this. Judges pay lead attorneys contingent hourly rates. In the market for legal services, plaintiffs rarely use this arrangement. They pay lawyers contingent percentage fees. Referral fee arrangements also use this structure. Other work sharing arrangements use different arrangements, but contingent hourly rates are only one possibility and, although evidence is hard to come by, they do not appear to be preferred.¹³⁰ Where cooperating plaintiffs' attorneys tailor compensation and cost sharing arrangements to their needs, MDL judges use a "one size fits all" approach.

¹²⁸ For a discussion of the possibility that the JPML keeps judges' ability to settle complex cases in mind when deciding where to locate MDLs, see Marcus, *supra* note 6, at 2288-2289.

¹²⁹ As previously stated, MDL judges occasionally appoint client-less attorneys to lead positions. These lawyers seem to always be local attorneys who are known to the court. Judges' reasons for appointing these lawyers are uncertain, but they may be following the MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004). After explaining that the role of liaison counsel is to handle "administrative matters," the Manual adds that "[l]iaison counsel will usually have offices in the same locality as the court." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221. Computers and electronic communications have surely rendered this instruction obsolete.

¹³⁰ In the MER/29 litigation, which occurred in the time before MDLs, cooperating lawyers supported the production of CBW by making a \$100 initial payment, a \$200 supplement, and an assessment capped at \$1,000 that varied with the number of cases a lawyer was handling. Rheingold, *supra* note 48, at 123.

Judges also prohibit lead attorneys from reallocating time-based income streams, even though reallocations might reasonably be expected to help plaintiffs by aligning attorneys' interests with theirs.¹³¹

We do not mean to exaggerate the points made in this section. As a historical matter, judges have often given control of MDLs to outstanding attorneys. Because judges enjoy working with outstanding lawyers, this should not be surprising. Many lead lawyers have also had large numbers of signed clients and have represented all claimants well. This should not be surprising either. Lead lawyers face considerable pressures from multiple sources to do well. Our point is not that existing appointment procedures fail routinely; it is rather that judges should consider a range of options before determining that the existing procedures are optimal. In the next section we propose what we believe to be a better way to manage common benefit work in MDL cases.

IV. THE PMC PROPOSAL

Using a simplified account of the microeconomics of producing CBW, Part III identified a problem MDLs have the potential to address, but also showed that the problem is a difficult one for MDL judges to resolve. This section proposes an alternative to judicial control that seems likely to produce superior results. To satisfy the need for substantive law authorizing fee awards, the proposal would have to be enacted as a statute, like the PSLRA.

A. The Proposal

The proposal builds on the existing model for selecting attorneys in securities class actions. The PSLRA entitles the so-called "most adequate plaintiff" – presumptively, the plaintiff with the largest financial stake in the case – to select and retain counsel for all claimants. In many cases, the most adequate plaintiff is an institutional investor such as a pension fund. The theory supporting this arrangement was set out in an influential article by Professors Elliot Weiss and John Beckerman.¹³² Being sophisticated in business matters and having a lot of money at stake, an institutional investor can, in theory at least, be relied on to hire a skilled attorney at a competitive price and to use a fee structure that motivates the lawyer to maximize the net recovery. A "most adequate plaintiff" also has an incentive to monitor a lawyer's performance, again because its money is on the line. Empirical evidence tends to confirm that securities litigation under the PSLRA framework reduces fees in securities cases without adversely affecting quality.¹³³

¹³¹ See, e.g., *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 216 (2d Cir. 1987). (class action in which Judge Weinstein struck down a fee sharing agreement entered into by members of the PSC that reallocated the time-based fee award).

¹³² Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 28 SECURITIES LAW REVIEW 279 (1996).

¹³³ See Michael A. Perino, *Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions* (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at SSRN: <http://ssrn.com/abstract=870577> (finding that fees in securities class actions tend to be lower when a public pension fund acts as lead plaintiff).

A PSLRA-style mechanism would not be an appropriate way to select a lead attorney in an MDL like *Guidant*, *Vioxx*, or *Zyprexa*. The plaintiffs in these cases are individuals, not businesses, and their ability to evaluate and bargain with attorneys is limited. Compared to institutional investors in securities fraud cases, their stakes are minuscule.¹³⁴ MDL plaintiffs also have individually retained attorneys. If asked to select lead attorneys, they would presumably recommend their own. Weiss and Beckerman's intuition can be adapted to MDLs, however. One need only see that plaintiffs' attorneys can act as plaintiffs' bargaining agents. A lawyer representing 2,000 identical signed clients with 40% contingent fee agreements has a financial interest equal to that of 800 clients. Such a lawyer stands to collect 40% of the clients' marginal gains when production of CBW increases from Q^R to Q^T in Figure 2. Plaintiffs' attorneys also know the best lawyers (or can easily learn who they are), have access to the entire legal services market, understand the risks and gains associated with mass tort litigation, and have incentives to bargain for competitive fees. They can also monitor the production of CBW because they are sophisticated.

Because a plaintiffs' lawyer with a large inventory of signed clients should rationally want a superior lawyer to provide CBW at a reasonable rate, the proposal relies on such a lawyer to select and retain common benefit counsel (CBC) for an MDL. After allowing all lawyers with cases in an MDL to apply, a judge would appoint a Plaintiffs' Management Committee (PMC) comprised of the lawyer or group of cooperating lawyers with the most valuable client inventory. The PMC would then select a lawyer (or lawyer-team) outside the PMC to provide CBW for the entire MDL. The PMC would also set the CBC's compensation, which would be funded by a tax on the MDL recovery and for the payment of which claimants would receive a credit against their own attorneys' fees. The CBC's fee would thus be spread across all lawyers with clients in an MDL in proportion to the value of the clients' claims. Having the most valuable inventory of cases, the PMC would have a sizeable stake in both the cost of CBW and its caliber. In other words, the PMC would have an incentive to obtain the CBC offering the best combination of quality and price.

Of course, these desirable incentives and capacities would not necessarily generate positive results if the PMC members could simply appoint themselves to perform CBW. Self-appointment would recreate the dangers and interest conflicts that exist in MDLs today. The harmful consequences of self-appointment might even swamp the improvements in quality and efficiency the proposal should afford.

Accordingly, the proposal would generally exclude PMC members from performing CBW, except at their own expense.¹³⁵ Their role, instead, would be (1) to select others to do the CBW, (2) to set CBC's compensation, and (3) to monitor CBC's performance of that work. If members of the PMC do no common benefit work, their incentives are fully aligned with those of the class and other attorneys in the case.

PMC members need not always be excluded from providing CBW. Occasionally, a PMC attorney could be uniquely qualified for a particular job. The proposal might allow exceptions in these situations, with the consent of other PMC members and the

¹³⁴ Weiss & Beckerman, *supra* note 129, at 289-94 (reporting that the mean share of the settlement accounted for by the largest single claimant in twenty cases studied was 13.1%).

¹³⁵ This constraint might be waived with the consent of lawyers off the PMC.

approval of the court. Presumably, the order granting the exception would identify the services to be performed and set appropriate limits on its scope.

The proposal would also allow PMC members to participate in settlement negotiations without specific prior judicial authorization. Settlement often is the single most important event in the life of an MDL, and the proper analysis of settlement opportunities requires an overview of the litigation as a whole. With large numbers of clients standing depending on them, PMC members would have appropriate incentives to work effectively on behalf of all claimants when negotiating global settlements.

A judge could also exercise a degree of discretion in selecting the PMC, subject to the general constraint of assigning control a lawyer or lawyer-group with a valuable client inventory. The PSLRA provides an analogy here. That statute creates a rebuttable presumption that the candidate with the largest financial interest is the “most adequate plaintiff.” A trial judge, however, may give control to a different candidate (presumably, the named plaintiff with the second largest stake) if the largest stakeholder “will not fairly and adequately protect the interests of the class.” The statute identifies one potential cause of inadequate representation—unique defenses—but one can imagine others.

The proposal for MDLs could contain a similar backstop. Representatives who serve on the PMC would have to demonstrate their ability to provide adequate and loyal services for the benefit of all plaintiffs. If a judge believed that a volunteer lacked the capacity to perform effectively as a member of the PMC, the court would not have to appoint that person but would have to give reasons for excluding an otherwise-qualified candidate. For example, in theory, a conflict of interest could exist between an identifiable set of plaintiffs and the winner of the competition for control of the PMC. This might be true if the winner represented no clients of the identified type and, consequently, had little incentive to develop evidence bearing uniquely on their claims. Some flexibility in the joints may be needed to address problems like these. As a condition for competing, judges could require candidates for the PMC to demonstrate comprehensive representation of all discrete plaintiff groups, after giving notice of the groups’ identities.¹³⁶ Obviously, inadequate representation could also be threatened if the winner of the competition were to die or otherwise become incapacitated. *Ad hoc* arrangements could handle problems like these.¹³⁷

The court could also exercise discretion in deciding who, among competing applicants, has the most valuable client inventory. Ordinarily, size should be a reliable guide. When competing lawyers have similar mixes of clients and seem otherwise indistinguishable, the one with the most clients would win. But size may not always be dispositive, for two reasons. First, cases have a range of expected payoffs and are not necessarily evenly distributed among attorneys. Some mass tort lawyers specialize in cases with severe injuries, such as asbestos lawyers who represent only clients with

¹³⁶ The Supreme Court has long been concerned about conflicts of interests in class actions that threaten to saddle segments of a class with inadequate representation. *See, e.g.*, *Hansberry v. Lee*, 331 U.S. 32 (1940); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Adequate representation is equally important in MDLs. *See* AMERICAN LAW INSTITUTE, PROJECT ON THE PRINCIPLES OF AGGREGATE LITIGATION (2003-present), http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7.

¹³⁷ For example, a judge could appoint a group of lawyers to a PMC subject to the condition that they join forces with another attorney whose inventory contains claimants with identified injuries.

mesothelioma; other lawyers assemble large blocks of cases in which less serious injuries predominate. Some lawyers screen clients carefully before agreeing to represent them; others accept requests for representation more readily. And even when cases seem similar, some lawyers obtain higher values than others. Qualitative factors like these can make the value of competing lawyers' inventories difficult to compare. Second, a mechanical rule requiring the appointment of the attorneys with the largest number of plaintiffs would encourage lawyers to accumulate clients regardless of the quality of their claims or the severity of their injuries.¹³⁸ The fear of an influx of plaintiffs with baseless claims is not imaginary. Many mass tort suits and settlements have attracted multitudes of persons whose claims were questionable, frivolous, or fraudulent.

These problems, while real, are also manageable. Indeed, judges in MDL cases have already devised workable procedures to address the problem of weak inventory cases. In the welding fumes cases, for example, the MDL judge developed a simple mechanism for identifying and excluding weak cases.¹³⁹ Judge Kathleen O'Malley entered a case management order requiring each plaintiff to provide a Notice of Diagnosis certifying that a licensed medical doctor had examined the plaintiff and diagnosed a manganese-induced neurological disorder.¹⁴⁰ This led to the dismissal of about twenty-five percent of the pending claims.¹⁴¹ If 'piling on' is a problem at the outset of MDLs, it should often be possible to use a procedure like Judge O'Malley's to exclude many weak claims.¹⁴²

Even with appropriate screening mechanisms, of course, differences are likely to remain in client quality. But courts can deal with this type of distinction. An analogous problem arises in class actions brought under the PSLRA. Although the statute requires the court to determine which person competing for the role of lead plaintiff has "the largest financial interest in the relief sought by the class," it does not provide a formula for making this assessment.¹⁴³ Nor is the right way of proceeding necessarily self-evident. One applicant may have suffered the largest absolute loss (measured in terms of

¹³⁸ See Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221 (2008) (describing procedures used by lawyers to accumulate massive inventories of asbestos cases).

¹³⁹ This paragraph is adapted from Brickman, *supra* note 135. See also Ralph A. Davies, *A Balanced Perspective: The Welding Fume Litigation* (Aug. 2007), Davies, McFarland, & Carroll, P.C., <http://www.dmcpc.com/documents/DRIArticleD0285577.PDF>.

¹⁴⁰ Brickman, *supra* note 135, at 1304 (citing Case Administration Order at 6, *In re Welding Fume Prods. Liab. Litig.*, No. MDL 1535 (N.D. Ohio Mar. 31, 2006)).

¹⁴¹ Brickman, *supra* note 135, at 1294 (citing Report of Proceedings of the Jury Trial Held Before the Honorable Nicholas G. Byron, Circuit Judge of the Third Judicial Circuit, State of Illinois, on Tuesday November 8, 2005, *In re Welding Fumes Prods. Liab. Litig.*, No. MDL 1535 (N.D. Ohio Nov. 8, 2005)).

¹⁴² Plaintiffs can also "pile on" after settlement. The settlement of the *Diet Drugs* litigation provides an example. Although medical evidence led the defendant to predict about 36,000 claims, over 87,000 were submitted. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 226 F.R.D. 498, 507-08 (E.D. Pa. 2005). Back-end piling on, however, while a significant problem for the administration of MDL cases, would not affect our proposal for the selection of PMC members, which we anticipate will be done at the beginning of the case.

¹⁴³ *In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 440 (S.D. Tex. 2002) ("The PSLRA does not delineate a procedure for determining the 'largest financial interest' among the proposed class members.").

dollars paid out and received when securities were bought and sold), but another may claim to have lost the most money during the period when the fraud is thought to have occurred. A good deal of litigation would be required to resolve close calls in PSLRA cases with a high degree of certainty. Judges understandably refuse to permit this. Instead of calculating the size of an applicant's financial interest in a rigorous and demanding way, they have developed a rough and ready multi-factor approach that relies on certain basic information.¹⁴⁴ This is surely the right approach. Once the pool is narrowed to a group of applicants with similar financial stakes, a court might as well require them to draw straws. All can be expected to do the job well.

Under our proposal, judges should handle the need to evaluate lawyers' client inventories the same way. The object is to put MDLs under the stewardship of lawyers who will take the task of providing CBW seriously because they have lots of money at stake. Success in this endeavor does not depend on quantifying a lawyer's financial interest to the nearest thousand dollars, or even to the nearest ten thousand dollars. It is probably more important to develop clear valuation rules than highly accurate ones, so as to avoid pointless litigation. Thus, the court would make a preliminary inquiry into the value as well as the number of claims. Applicants for a position on the PMC would have to make a showing to the court, documenting the number of clients they represent and arraying the clients by injury groups. However, the court would not need to conduct a "mini-trial" on this question; it should usually be sufficient to derive an ordinal ranking of the value of applicants' inventory based on a review of the papers. If subsequent events demonstrate that an applicant has distorted or exaggerated the value of his or her inventory, the court has ample authority to impose sanctions, which could include exclusion from the PMC or monetary penalties such as forfeiture of fees earned as a PMC member.

As mentioned, PMC members would normally work without additional compensation, meaning they would receive only the fees their signed clients agreed to pay, minus a proportionate share of the cost of CBW. This could be changed by agreement. Lawyers not on the PMC who thought it advantageous to offer supplements would be free to do so. For example, all lawyers might agree to reimburse the costs PMC members incur when handling administrative functions, such as those liaison counsel normally performs. These tasks include distributing notices, orders, filings, and other documents. Web-based services like LexisNexis have made it easy to perform these ministerial functions. Limited lawyers might often agree to reimburse PMC members for the actual out-of-pocket costs, the alternative being to reimburse the CBC and possibly to pay more for CBW. Limited lawyers might also reimburse PMC members for expenses incurred when negotiating global settlements or performing other services.

Although the PMC's presumptive fee award would be \$0, the trial court would retain discretion to order a payment but be instructed to use the power sparingly. The role of PMC lawyers is mainly to provide general oversight and input on strategy. One might think of them as an MDLs board of directors, the members of which are paid solely in options or shares. PMC lawyers will not ordinarily attend depositions, immerse themselves in discovered documents, or write briefs. They will be litigation leaders and

¹⁴⁴ *Id.* at 441 ("The four factors relevant to the calculation are (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs.").

will enjoy the reputation, prestige, and publicity incident to that role. When combined with the fees received from their signed clients, these non-pecuniary benefits should ordinarily eliminate the need for separate compensation.

Ideally, the trial court will decide whether and how much supplemental compensation the PMC will receive before its members are appointed. The court could, for example, make known its intention to set aside a small percentage of any ultimate settlement or judgment – say $\frac{1}{2}$ of 1% -- as compensation for the PMC attorneys in the event the case results in a recovery for plaintiffs within the MDL framework. With fees set so low, the danger associated with judicial errors would be relatively slight. Such a percentage fee would have the same desirable qualities of any percentage fee in terms of aligning the interests of attorneys and those they serve and also reducing the need for burdensome auditing of hours claimed on a lodestar basis. Advance notice would also enable all lawyers with cases in an MDL to offer their services and to volunteer to accept less. Willingness to accept a smaller transfer might then provide a basis for choosing between lawyers with similar client inventories.

How would the CBC be compensated? In our proposal, the PMC would negotiate a retainer agreement with the CBC which would, for all intents and purposes, be similar to a retainer agreement for ordinary litigation. Presumably the CBC would be given a contingent fee, but issues such as the percentage, the use (or not) of a (rising or fall) sliding scale of percentages, adjustments tied to events in the litigation (such as motions to dismiss, summary judgments, or appeals) and the allocation of responsibility for the payment of costs and expenses, would all be left to private bargaining. Judicial review would be available only to police fraud or other abuses.

One compensation question is unique to the MDL context, however. Not all MDLs resolve all pending cases – indeed, the MDL process is not intended for the final resolution of controversies, being instead (at least in theory) a pretrial procedure. Some MDLs in fact do end when pretrial preparations are completed, at which point active cases are returned to the forums from which they came. The possibility of ending an MDL without a settlement requires a plan for taxing cases that are returned to transferor courts. This is an issue under existing procedures as well as the new proposal, but may be more successfully managed under the latter. First, the proposal may facilitate consensual arrangements to govern fee sharing in remanded cases. Second, when bargaining with the CBC, the PMC could establish scales on which the CBC's fees would depend on how remanded cases fared. For example, the CBC might receive a higher fee on cases that settled soon after remand and a lower fee on remanded cases that were resolved after trials. Arrangements like these would reflect the value of the CBC's efforts and preserve lawyers' incentives to prosecute cases zealous after remand.

B. The Proposal's Advantages

The proposed mechanism has attractive features: it provides a superior mechanism for selecting, monitoring, and compensating counsel; it safeguards the independence of the judicial function; and it tends to achieve fairness and reduce distrust and animosity among plaintiffs' counsel.¹⁴⁵

¹⁴⁵ Some MDLs contain class actions. We have not tailored the proposal for use in these proceedings. One possibility would be to award fees separately for class counsel and the CBC, as was done in *Diet Drugs*.

1. Selection of Counsel

Our proposal offers advantages over the current, judge-dominated methodology for selecting CBCs. Compared with attorneys with large stakes in the outcome, judges are at a disadvantage. They have imperfect knowledge about the capacities of attorneys who seek appointment under current procedures. Some they may have observed in other cases; some they may know by reputation; some may be personal acquaintances from non-judicial activities. While these may be valid sources of information, attorneys with a stake in the cases are doubtlessly better placed than judges to select the most competent people to perform CBW.

The proposal involves two selection stages: (a) selection by the court of the PMC; and (b) selection by the PMC of the CBC. In both stages, it offers advantages over the current system. Judges will be limited to selecting PMC members under explicit standards and on the basis of written applications. The unreviewable discretion and lack of transparency which characterize the current practice will be replaced by objectivity, clarity, and sensible selection criteria. This will alleviate the existing concern that judges appoint common benefit counsel for inappropriate reasons. Animosity and distrust among disappointed bidders for common benefit work would also diminish.

PMCs, in turn, will be well-positioned to select the CBCs. Having valuable client inventories from which they hope to receive substantial contingent fees, PMC attorneys will have much to gain from the effective provision of CBW. In this respect, their incentives will align strongly with those of all plaintiffs.¹⁴⁶

PMC members will also have excellent information on which to select the CBC. They will often have worked with candidates for the CBC position and thoroughly appreciate their backgrounds and capacities. Unlike judges, who observe work product of teams of attorneys, members of the PMC will often have observed the work product of individual attorneys. They will know, much more than judges, details about interpersonal relationships, personality characteristics, and work habits – issues that can play an important role in the practical conduct of litigation. PMC members will also be better equipped than judges to negotiate retainer agreements with candidates for the CBC position and to ensure that those agreements contain appropriate safeguards for the protection of the plaintiffs as a group.

2. Compensation of Counsel

This might be workable if the tasks to be performed by class counsel and the CBC were divided upfront, for the PMC could then negotiate with the CBC knowing which tasks the CBC would perform. This seems both awkward and artificial, however. Class counsel and the CBC have the same job: providing CBW.

¹⁴⁶ An example will make the PMC's incentives clear. Suppose that all claimants in an MDL are identical, that the PMC represents half of them pursuant to 40% contingent fee agreements, and that PMC can hire Lawyer A or Lawyer B as CBC. Both lawyers want the same fee, 5% of the gross recovery, but A is the better pick and will generate an expected recovery 10% larger than B (\$110M vs \$100M). If A is hired, the PMC's fee will be $(\$110M)(.5)(.4) - (\$110M)(.05)(.5) = \$19.275M$. If B is hired, the PMC will earn less— $(\$100M)(.5)(.4) - (\$100M)(.05)(.5) = \$17.5M$. By hiring the inferior lawyer, the PMC would harm itself. This will be true as long as the PMC promises the CBC less than its entire contingent fee. Obviously, the PMC also does better by bargaining down A's fee.

Judges are also at a disadvantage when it comes to setting and allocating fees for CBW. Judges have no skin in the game; they gain nothing when CBC's fees are low, and lose nothing when CBC's fees are high. They also have no direct financial stake in the quality of CBW. Self interest thus provides judges no incentive to ensure that the CBW fees are reasonable. The evidence suggests that judges have not, in fact, done a particularly scientific job at setting fees. As shown in Part II, common benefit fees appear to have been set on a largely *ad hoc* basis, possibly according to considerations such as the politics of the plaintiffs' group or the judge's prediction of the level of dissatisfaction a particular fee will create among the limited attorneys. Sometimes judges appear to award particularly generous fees, without reference to market prices; at other times they extract concessions with a bludgeon, as Judge Frank did in *Guidant* by setting lead attorneys' hourly rates below-market levels.¹⁴⁷ Judges have no particular background or expertise in negotiating fee agreements with counsel; this is not part of their judicial function and memories of having performed this role in practice may be distant and unhelpful.

The proposal will permit the use of innovative combinations of incentives and monitoring to encourage the production high-quality CBW at the lowest possible expense. This flexibility is important. Every MDL differs from every other MDL. *Vioxx* involved more than five times as many claimants as *Zyprexa* and more than ten times as many claimants at *Guidant*. Only *Zyprexa* claimants had serious psychological disabilities. *Guidant* claimants, all of whom had implanted defibrillators, were in much poorer health to start with than *Vioxx* claimants. *Guidant* also involved a medical device, not a drug. These differences and countless others could affect the way MDLs should be funded and developed. Experienced lawyers know what to make of these things. Judges do not. They go from one MDL to another paying for CBW the same way, that is, at hourly rates for amounts of time lead attorneys deem reasonable to expend. The reason for preferring this "one size fits all" approach is not apparent. PMC members could also use non-monetary incentives to advantage. Serving as CBC in a high profile products liability MDL is a plum assignment. Lead attorneys gain prestige, enhance their ability to obtain clients and referrals, develop valuable skills, and so on. Recognizing the desirable nature of the CBC assignment, PMCs could use non-monetary benefits to obtain CBCs offering a superior combination of quality and price. PMCs could also use competition among attorneys to maximize this advantage. Innovative judges have carried out auctions of the lead counsel role in class action cases;¹⁴⁸ and although this strategy has been criticized, especially for securities fraud cases,¹⁴⁹ it appears in some cases to have

¹⁴⁷ *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 682174, at *34 (D. Minn. Mar. 7, 2008) (capping lead lawyers' rates at \$400 per hour and paralegals' rates at \$150 per hour, when the highest submitted charges were \$745 and \$290, respectively).

¹⁴⁸ See, e.g., *In re Oracle Sec. Litig.*, 132 F.R.D. 538, 542 (N.D. Cal. 1990); *In re Wells Fargo Sec. Litig.*, 157 F.R.D. 467, 470-73 (N.D. Cal. 1994). For general discussion of auctions as means for addressing agency costs in class action cases, see Jonathan R. Macey and Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

¹⁴⁹ See *In re Cendant Corp. Litig.* 264 F.3d. 201 (3d Cir. 2001) (rejecting auction approach in private securities litigation); Lucian Arye Bebchuk, *The Questionable Case For Using Auctions To Select Lead Counsel*, 80 WASH. U. L.Q. 889, 889 (2002); Jill E. Fisch, *Lawyers On The Auction Block: Evaluating The Selection Of Class Counsel By Auction*, 102 COLUM. L. REV. 650, 651 (2002). But see Geoffrey Miller,

significantly reduced fees without sacrificing quality.¹⁵⁰ Members of a PMC could experiment with an auction approach for selecting CBCs. They might also require a CBC to “buy into” an MDL. Mass tort litigation often requires attorneys to bear significant costs upfront. The members of a PMC may believe that a CBC can be properly incentivized only if he or she has a share of the sunk costs. But the choice of methods for compensating the CBC would be remitted to the discretion of the PMC, once that committee was appointed.

Not to be ignored is the fact that the proposal will also allow fees for CBW to exceed their historical levels. Although we have pointed out factors that seem likely to cause lead attorneys to be overpaid, in any given instance the presiding judge may pay them too little. Judges often cut lead attorneys’ fee requests, reducing their hours or their hourly rates or disallowing claimed services entirely. Presumably, lead attorneys know judges’ predilections and refrain from performing services for which judges will not award sufficient compensation. When CBW is reasonably expected to increase claimants’ recoveries on net, judges do not help claimants by being overly parsimonious.

3. Monitoring

Judges are at a disadvantage when it comes to monitoring the performance of CBW in MDLs. Judges are busy men and women with many cases on their dockets. Their exposure to any single proceeding – even one as complex and interesting as a products MDL – tends to be episodic. They are not equipped, nor do they wish, to assess the quotidian work of common benefit counsel. Even if they could observe this work – and generally they cannot – they are poorly equipped to determine whether work is being performed in a cost-effective manner.

Monitoring of CBW would improve under the the proposal. The CBC would be monitored by expert attorneys with high expectations, immediate access to work products, and and strong incentives to see that the work is done well. The PMC members will lose the most if the CBC performs poorly or overcharges by virtue of the size of their stakes.

Members of the PMC would have excellent sources of information with which to perform these monitoring tasks. Unlike the institutional investors who are frequently chosen as lead plaintiffs in securities class actions, the members of the PMC will all be attorneys. Their training and professional experience qualify them to monitor the work product of those who are chosen to carry out the CBW. PMC members are, moreover, attorneys for clients with cases in the litigation, and thus can be presumed to have case-specific knowledge and expertise. Because they will presumptively be the attorneys with the most valuable client inventories, they have multiple exposures to the key issues in the litigation. With many clients, they have the opportunity to observe general themes or features of the litigation that might not be apparent to an attorney with a small number of clients. Accordingly, they would be expected to be excellent monitors of the CDC attorneys.

Competing Bids in Class Action Settlements, 31 HOFSTRA L. REV. 633 (2003) (advocating ex post auctions for lead counsel rights at the time of settlement).

¹⁵⁰ See Perino, *supra* note 130 (finding that fees in securities class actions tend to be lower when lead counsel rights are auctioned).

4. Preserving Judicial Independence

Existing practices compromise judges' independence by placing judges in uncomfortably tight relationships with members of the PSC.¹⁵¹ The current regime of unfettered judicial discretion naturally sparks concerns, whether or not justified, that judges are too closely associated with the attorneys they appoint to leadership roles. The concern goes both ways: some may worry that the lead attorneys may be too influential with the judge, while others may consider that the judge's enormous power over the selection and compensation of counsel makes the lawyers occupying the leadership posts too subservient to the judicial will.

The proposal addresses both concerns. By substituting objective standards for the current discretionary regime, it adds transparency. Judges will assign control of MDLs on objective grounds. If and when they pass over attorneys with large and valuable inventories, they will have to state reasons for putting lawyers with few or no clients in charge. This will alleviate the appearance of favoritism. Even greater assurances of independence are provided by the recommended procedures for compensating CBCs. Judges would no longer be in the position of awarding hundreds of millions of dollars for common benefit work, on the basis of little analysis and no objective justification. The fees for the PMC attorneys would be either zero or a small percentage of the MDL recovery. Meanwhile fees for the CBC would be established, not by the judge, but by the PMC members. No adverse inferences about judicial independence could be drawn from this process.

5. Improving Fairness and Trust among Plaintiffs' Attorneys

We have also seen that existing practice tends to foment distrust, anger, and dissension among plaintiffs' attorneys. Some attorneys are richly rewarded for serving in leadership roles or performing common benefit work; others see their expected profits from privately negotiated fee agreements with clients evaporate as judges tax them for common benefit work done by others. Attorneys who assemble large inventories by advertising for clients tend to be denigrated as crass mercenaries whose only role is to free ride on the efforts of others – attitudes that resonate with long-standing suspicion of advertising and marketing of legal services.¹⁵²

The quasi-class action approach gives control of MDLs to lawyers skilled at managing lawsuits and providing CBW. It also rewards these lawyers lavishly, while capping other lawyers' fees at sub-market rates. The quasi-class action model thus punishes plaintiffs' attorneys whose main contribution is "rainmaking" and devalues the service of reaching potential clients and getting them to assert claims. In placing lawyers "who do the work" above lawyers "who troll for clients," the quasi-class action approach reflects the (unwarranted) disdain many judges, lawyers, bar associations, politicians, and others have for lawyers who advertise. This is not the place to debate the merits of

¹⁵¹ See text accompanying notes ___-___, *supra*.

¹⁵² This tendency is reflected in many policies regulating lawyers, including restrictions on advertising and referral fees.

attorneys' efforts to market legal services,¹⁵³ but it is appropriate to note, first, that judges discourage lawyers from reaching out to potential clients by compensating this service at sub-market rates, and, second, that judges have no special insights into the amount of marketing that is good for society or the reputation of the legal profession.

The proposal will award control of the PMC on the basis of inventory value. It follows that judges will give control to attorneys who advertise for clients some percentage of the time. This is to the good. Advertising should not disqualify a lawyer from servicing on the PMC. Attorneys with valuable inventories of cases have the most to gain – and the most to lose – from the activities of the CBC. It is, accordingly, entirely appropriate that they be given a leadership role in the selection, compensation and monitoring of these attorneys. An advertising attorney who is in fact incapable or unwilling to do the job properly will gain financially by joining forces with superior case managers. The possibility that incompetent lawyers will exercise control is not an equilibrium result.

The proposal may also enhance relationships among lawyers by encouraging the formation of large cooperating groups. As explained, the proposal will award control of an MDL to the lawyer or lawyer-group with the most valuable client inventory. If control is valuable or if lawyers prefer to be part of control groups for other reasons, incentives will exist for lawyers to improve their odds of winning competitions by teaming up with others. In the limit, a grand coalition of all lawyers with cases in an MDL would arise. Such a coalition would regulate all lawyers' responsibilities for common benefit fees and expenses contractually, eliminating the need for coerced fee sharing. Even if grand coalitions are unlikely, it is plausible that coalitions representing more than half the claimants would form. Coalitions of this size, which would meet the "minimum winning" threshold identified by game theorists, would greatly reduce the need for forced transfers, even if they would not eliminate it.¹⁵⁴

V. CONCLUSION

MDLs, are an important feature of the American litigation landscape. Unfortunately, the control structures that govern these massive proceedings are poorly designed. With good intentions, judges have taken to characterizing these cases as "quasi-class actions" and have used the the authority the label confers to exercise unfettered control over the selection and compensation of lead attorneys. Existing arrangements select and compensate counsel on the basis of opaque and arbitrary criteria, threaten the judges' independence, draw unfair and unreasonable distinctions among groups of counsel on the plaintiffs' side, and permit the arbitrary, capricious, or unreasonable exercise of judicial power.

¹⁵³ Opponents of lawyer advertising contend that it damages the profession's reputation. Empirical studies have not borne this out. See Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503 (1998); Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315 (1998). Advertisements by doctors, lawyers, and other professionals appear to enhance public opinion by communicating favorable messages.

¹⁵⁴ Russell Hardin, *Hollow Victory: The Minimum Winning Coalition*, 70 AMER. POLI. SCI. REV. 1202 (1976).

This article proposes a simple, workable, and effective alternative to the existing system. It recommends the implementation of a mechanism, inspired by the PSLRA, that would place MDLs under the control of management committees composed of attorneys with valuable client inventories – attorneys with the right incentives and expertise to properly manage the common benefit work. The management committee would then select, retain, and monitor other attorneys who perform the common benefit work under privately negotiated fee agreements. The court would stand back from the process, exercising only a limited backup authority to prevent potential abuse. This system would foster the fairer, more efficient, and more appropriate management of complex MDLs in American courts.