UMKC Law Review

Volume 89
Number 4 *Multidistrict Litigation: Judicial and Practitioner Perspectives*

Article 17

6-2021

A Judicial Perspective on Approaches to MDL Settlement

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A JUDICIAL PERSPECTIVE ON APPROACHES TO MDL SETTLEMENT

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For as many different types[1] of Multidistrict Litigation ("MDL") that exist, there are at least as many different approaches to settlement of an MDL. Considering that "[f]or the first time in its 50-year history, multidistrict litigation makes up more than 50 percent of the federal civil caseload"[2] and close to fifteen percent of all lawsuits in the nation,[3] it is not surprising that most MDLs end in settlement because most civil cases settle.[4] But as with many of the issues raised by MDLs, settlement can present a double-edged sword: "MDLs make global peace easier to obtain for defendants, but they also put a lot of power in the hands of the judges selected to oversee them."[5]

Given that "MDLs were created in the 1960s to relieve crowded backlogs in federal courts,"[6] federal judges handling these large and complex cases have become adept at resolving them. Criticism regarding forced settlements comes from both the defense side[7] and the plaintiff perspective.[8] This article, interspersed

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[1] In 2019, the most common types of MDLs were product liability (34.2%), antitrust (24.7%), sales practices (10.5%), intellectual property (15.8%), securities (2.6%), contract (2.1%), common disaster (1.6%), employment practices (0.5%), and miscellaneous claims (17.9%). *See* U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG., CALENDAR YEAR STATISTICS: JANUARY THROUGH DECEMBER 2019, at 11 (2019).

[2] Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, AM. BAR ASS'N (Feb. 19, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket/.

[3] Terry Turner, *Multidistrict Litigation*, DRUGWATCH.COM (June 29, 2020), https://www.drugwatch.com/lawsuits/multidistrict-litigation/.

[4] *See* ROBERT H. KLONOFF, FEDERAL MULTIDISTRICT LITIGATION IN A NUTSHELL 243 (2020) ("[Ninety-seven] percent of all MDLs are resolved by the transferee court, either by settlement or other disposition. (Of course, the vast majority of non-MDL cases settle as well.)").

[5] *Multi-district Litigation Proceedings (MDLs)*, FEDERALIST SOC'Y PRAC. GRP. PODCAST (Sept. 20, 2019) (transcript available at https://fedsoc.org/events/multi-district-litigation-proceedings-mdls).

[6] Turner, *supra* note 3.

[7] Stephen McConnell, *MDL Judges: Information-Forcing or Settlement Forcing?*, DRUG & DEVICE L. BLOG (Sept. 7, 2016), https://www.druganddevicelawblog.com/2016/09/mdl-judges-information-forcing-or-settlement-forcing.html ("[F]ar too many MDL judges act as if any defendant who does not gallop over to the plaintiff steering committee with a settlement offer, a grid, and an open checkbook needs a spanking.").

[8] William Cash, *Is it Time to Rethink the MDL for Mass Tort Cases?*, NAT'L TRIAL LAWS. (Sept. 1, 2015), https://thenationaltriallawyers.org/2015/09/rethink-the-mdl-for-mass-tort-cases/ ("In many cases, the company makes just one offer—take it or leave it—to the entire universe of plaintiffs.").

with the wisdom of experienced federal MDL judges, examines several approaches to MDL settlement and the practical application of these varying methods.

I. APPROACHES TO MDL SETTLEMENT: AN OVERVIEW

"Multidistrict litigation presents a federal judge with difficult management, intellectual, and personal challenges."[9] As United States District Judge Gary Fenner of the Western District of Missouri observed:

> I have found my MDL cases to be very much like other complex civil litigation. They are without a doubt more challenging from a legal and management standpoint, but establishing and enforcing a realistic scheduling order, timely ruling motions, and being available to resolve disputes moves cases.[10]

These sentiments are echoed by United States District Judge John Lungstrum from the District of Kansas, who stated:

> I believe the most effective way to resolve an MDL is early on to set deadlines, including for trial(s), and stick to them. And as a corollary, rule on motions, such as for dismissal or for class certification, promptly. Each MDL is different, but they share the common trait of needing hands-on management by the judge that sends the clear message that this will not become a black hole.[11]

While some federal judges take a very hands-off approach to managing normal civil litigation, every MDL judge appears to take a very active role in moving an MDL. The Manual for Complex Litigation, "the 'bible' for complex cases in the federal courts,"[12] speaks to the role an MDL judge plays in settlement:

> One of the values of multidistrict proceedings is that they bring before a single judge all of the federal cases, parties, and counsel comprising the litigation. They therefore afford a unique opportunity for the negotiation of a global settlement. Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court. As a transferee

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[9] U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. & FED. JUDICIAL CTR., TEN STEPS TO BETTER CASE MANAGEMENT; A GUIDE FOR MULTIDISTRICT LITIGATION FOR TRANSFEREE JUDGES, at v (2d ed. 2014) [hereinafter TEN STEPS TO BETTER CASE MANAGEMENT].

[10] Interview with the Honorable Gary Fenner, United States District Judge for the Western District of Missouri (July 8, 2020).

[11] Interview with the Honorable John Lungstrum, United States District Judge for the District of Kansas (July 7, 2020).

[12] Christine Durham, *Taming the Monster Case: Management of Complex Litigation*, 4 J.L. & INEQ. 123, 124 (1986).

> judge, it is advisable to make the most of this opportunity and facilitate the settlement of the federal and any related state cases.[13]

While the Manual for Complex Litigation does not specifically address techniques to settle an MDL, it offers several guideposts: setting a firm bellwether trial date, referring mediation to another judge and/or an outside mediator, engaging in confidential discussions with the judge, appointing settlement counsel and special masters, issuing orders barring contribution, making offers of judgment, and severing important issue(s) for a separate trial.[14] These broad approaches are tools that already exist in every judge's toolbox.

A. First Things First: Remove the Obstacle

Professor Robert H. Klonoff, in his recent book, *Federal Multidistrict Litigation in a Nutshell*, observes that:

> Most MDL judges view their job as attempting, whenever possible, to dispose of the cases so that they are not remanded to the transferor courts. Some judges have been clear about this objective, noting early on their goal of achieving a global settlement. For instance, in the widely publicized *National Prescription Opiate* MDL, the transferee judge strongly suggested at his initial hearing as MDL judge that his goal was to oversee a comprehensive settlement. He noted that "[p]eople aren't interested in figuring out the answer to interesting legal questions like preemption and learned intermediary, or unraveling complicated conspiracy theories. . . . [M]y objective is to do something meaningful to abate this crisis and to do it [quickly]."[15]

This approach is called "remove the obstacle." United States District Judge Dan Polster for the Northern District of Ohio, the Opioid MDL judge cited to by Professor Klonoff, expanded on the removal of obstacle approach:

> [Judge Charles] Breyer has cogently stated that the main task of the MDL Transferee Judge is to identify early on the principal impediment to resolution, and then to structure the MDL to tackle that impediment. You generally have excellent counsel on both sides, and by engaging in focused discussion with them the judge should be able to identify the issue and then to develop an action plan. It may be a purely legal issue that needs to be briefed and decided. It may be an issue that requires fact and/or expert discovery. It may be the need to coordinate the MDL litigation with investigations and enforcement actions by the federal government, or by state Attorneys General. Or in the case of a truly

[13] MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).
[14] *See id.* § 13.13.
[15] KLONOFF, *supra* note 4, at 223.

> unique challenge such as the one posed by the Opioid MDL, it could be the need to create a new structure that would permit global resolution.[16]

Identifying the obstacle is the first hurdle. Obstacles to settlement can take many forms. For example, defense counsel may not disclose that there is a dispute about insurance coverage between insurance carriers. In-fighting among plaintiffs' counsel might not be readily apparent. Genuine legal issues may need to be resolved before settlement can be realistically discussed. Experienced MDL judges often hold regular and frequent status and telephone conferences to address and proactively resolve these types of obstacles.[17] In-person hearings—where lawyers, judges, and maybe even the parties, can all see each other—are a great way to keep the case moving and, to borrow Judge Polster's phrase, promote a more honest "focused discussion" about the real obstacle preventing settlement.[18] Once that obstacle is identified, the additional methods that follow may further assist in removing common barriers to settlement.

B. There Is No Substitute for Hard Work

As any Midwestern farm kid will tell you, the value of hard work can never be overlooked. In an MDL context, prioritizing the resolution of any dominant legal issue early in the MDL process can pave the way for settlement. One less-aggressive approach to encouraging MDL settlement is emphasizing mediation early on in the litigation process. As suggested in *Ten Steps to Better Case Management: A Guide for Multidistrict Litigation*, "it may be a good idea to suggest that counsel establish a mediation structure, select a mediator, and begin settlement negotiations."[19] The following are aggressive approaches that promote settlement yet require additional hard work by judges and the parties alike.

1. Front-Load Dispositive Issues, Including Preemption and Scientific Causation

MDLs come in many shapes and sizes, with each raising a different set of legal issues and problems. Preemption may be the vital legal issue in a pharmaceutical product liability claim, but may be inapplicable in a sales practices suit. Structuring and scheduling an MDL in a manner that allows the MDL's significant and dispositive issues to be addressed and resolved in an expedient manner can help lay the groundwork for productive settlement discussions down the road. Preemption was an enormous issue in the National Football League's concussion MDL, so much so that United States District Judge Anita Brody of the Eastern District of Pennsylvania stayed discovery to allow the parties to file only

[16] Interview with the Honorable Dan Polster, United States District Judge for the Northern District of Ohio (July 9, 2020).
[17] *See* TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 6.
[18] *See* Interview with the Honorable Dan Polster, *supra* note 16.
[19] TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 7.

preemption-based motions to dismiss.[20] United States District Judge Richard Gergle of the District of South Carolina emphasizes the importance of tackling science issues early:

> I am often surprised how often complex science issues that are critical to the outcome of litigation have not been thoroughly addressed and thought through by the parties. The early focus by the Court on these issues can help the parties to do additional work and narrow the differences that may exist between them. In my [aqueous film-form foams] AFFF MDL, I asked the parties to each give me a set of 10 articles that they considered the most important to support their positions on the science. There was not a single article in common from the 10 provided each by the plaintiffs and defendants! I have also found very useful a Science Day early in the MDL to sort out what the parties know and claim to know about the science underlying their claims. I conducted a Science Day in my AFFF MDL in which I had each party present to me three experts. No direct or cross, just presentations to me by the experts and responses to my questions. I found the Science Day very helpful in getting me up to speed on the science.[21]

While the legal hurdles are different in every case, preemption and scientific causation are two frequent impediments that have been effectively addressed by experienced MDL judges by prioritizing them early in the litigation. Investing the effort and time to resolve or clarify those issues at the beginning of an MDL can yield positive results and help streamline other aspects of the litigation, including settlement.

2. Appoint a Settlement Committee

Just as Stephen R. Covey advises us to "begin with the end in mind,"[22] United States District Judge Charles Breyer of the Northern District of California appointed the settlement committee at the very beginning of the Volkswagen Clean Diesel MDL.[23] Appointing a settlement committee at the onset of an MDL emphasizes that settlement is a priority to the court and, in turn, should similarly be a priority to all parties involved.

Once appointed, ideally a settlement committee will not lie dormant, but each judge must decide the extent of his or her engagement in settlement talks. Some judges actively engage the settlement committee by scheduling frequent

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[20] *See In re* Nat'l Football League Players' Concussion Injury Litig., 307 F.R.D. 351, 390 (E.D. Pa. 2015).

[21] Interview with the Honorable Richard Gergel, United States District Judge for the District of South Carolina (July 17, 2020).

[22] *See generally* STEPHEN R. COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE 109 (25th ed. 2020).

[23] *See generally In re* Volkswagen "Clean Diesel" Mktg., Sales Practices and Prods. Liab. Litig., 148 F. Supp. 3d 1367, 1368 (J.P.M.L. 2015).

hearings and ordering counsel, parties, and insurance carriers to appear. Judge Brody in the NFL Concussion MDL rejected the first proposed settlement of $765 million because she "was primarily concerned that the capped fund would exhaust before the 65-year life of the Settlement."[24] Judge Brody later approved an uncapped resolution after she ordered actuarial data to be shared with the special master.[25] Some judges may opt for a different approach depending on the nature of the MDL. In a class action context, it is important to note that "[i]n reviewing the settlement, the court is acting as a fiduciary for the class"[26] and the "judge cannot rewrite the agreement."[27] While the role as a fiduciary for the class is not without controversy, that role becomes even more complicated the deeper a judge ventures into the settlement conversation, especially in a non-class MDL where there is no true statutory basis for approval of the settlement. Nevertheless, no matter how involved or hands-on a judge plans to be in the settlement process, appointing and utilizing a settlement committee from the onset remains an important step in ensuring the steady progression and resolution of an MDL.

3. Appoint a Respected Settlement Master

Many federal judges have opted to appoint settlement masters to keep the parties focused on resolving the case. Settlement masters have been utilized to reach global settlements in large-scale tort litigation dating back to at least the late 1980s, and "[c]ourts have come to realize that the appointment of a neutral third-party who is granted quasi-judicial authority to act as a buffer between the court and the parties can provide a useful approach to reaching a settlement."[28] Once the settlement master is appointed (either unilaterally or with the input of the parties), most MDL judges enter an extensive order outlining the settlement master's powers and regularly follow up with the parties and the master.[29] David Cohen, one of the most nationally well-known special masters, observed:

> Similar to a "regular" case, nothing encourages global MDL settlement like setting bellwether trials (and more than one trial can be scheduled right from the start). It may take more than one, but choosing MDL bellwethers and trying them to verdict provides information the parties need to value their litigation. Also, Discovery Masters and Settlement

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[24] *In re* Nat'l Football League Players Concussion Injury Litig., 307 F.R.D. at 364.
[25] *Id.*
[26] KLONOFF, *supra* note 4, at 255.
[27] MANUAL FOR COMPLEX LITIGATION, *supra* note 13, at § 21.61.
[28] ACADEMY OF COURT-APPOINTED MASTERS, APPOINTING SPECIAL MASTERS AND OTHER JUDICIAL ADJUNCTS: A HANDBOOK FOR JUDGES AND LAWYERS 4, § 1.1 (2d ed. 2009).
[29] *See, e.g.*, *In re* Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. 2672 CRB (JSC), 2016 WL 4010049, at *1 (N.D. Cal. July 26, 2016) (discussing appointment of former FBI Director Robert Mueller as settlement master and his role in settlement negotiations); *see also* Reuters, *This Former FBI Director will be Volkswagen's "Settlement Master"*, FORTUNE (Jan. 19, 2016), https://fortune.com/2016/01/19/volkswagen-robert-mueller/.

> Masters undoubtedly grease the skids to get trials and settlements to occur more efficiently and quickly.[30]

Judges have increasingly opted to appoint special masters with expertise in fields of particular relevance to the litigation (e.g., accounting, finance, science, and technology).[31] The Manual for Complex Litigation offers an excellent discussion and comparison of the pros and cons associated with utilizing a special master versus a magistrate judge in the settlement-negotiation process.[32]

4. Order Fact Sheets to Establish an Inventory List

Mass tort settlements are "importantly different" from other types of MDLs and require the valuation of large groups of claims.[33] To help establish the value of the underlying claims in an MDL, judges in over half of all MDL proceedings have ordered plaintiffs to complete plaintiff fact sheets—"party-negotiated and court-approved standardized questionnaires that seek information about parties' claims and defenses."[34] Fact sheets typically include the claimant's personal identification information and other relevant data, e.g., health records or litigation history.[35] Sometimes the fact sheets go even deeper into discovery[36] and are used by defendants to value the inventory list of claims in the MDL.

Some judges have found that mandating the use of fact sheets is a quick way to get the MDL lawyers to know their inventories.[37] Professor Elizabeth Burch of the University of Georgia School of Law analyzed "all publicly available non-class [MDL] settlements," which each involved the negotiated resolution of inventories.[38] Fact sheets, however, are not universally viewed with favor by either the plaintiff or defense perspective. Plaintiff lawyers have occasionally opposed fact sheets,[39] and some defense attorneys believe fact sheets are not a good

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[30] Interview with Attorney David Cohen, Charter Member of Academy of Court-Appointed Masters (July 20, 2020).
[31] MANUAL FOR COMPLEX LITIGATION, *supra* note 13, at § 11.52.
[32] *See id.* §§ 11.52-.53.
[33] *See* Lynn A. Baker, *Mass Tort Remedies and the Puzzle of the Disappearing Defendant*, 98 TEX. L. REV. 1165, 1166 (2020).
[34] MARGARET S. WILLIAMS, JASON A. CANTONE, & EMERY G. LEE III, FED. JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION PROCEEDINGS: A GUIDE FOR TRANSFEREE JUDGES 2-3 (2019).
[35] *See id.* at 1-3.
[36] *See, e.g.*, Plaintiff Fact Sheet, *In re* C.R. Bard, Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 2187, *available at* https://www.wvsd.uscourts.gov/MDL/2187/pdfs/PFS.pdf (United States District Judge Joseph R. Goodwin ordered plaintiffs to use a twenty-four page fact sheet inquiring into, among other things, the pelvic mesh product lot number, date of implant, and doctor's name and address).
[37] *See* WILLIAMS ET AL., *supra* note 34, at 1-3.
[38] *See* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 87 (2017).
[39] *See* Cash, *supra* note 8 ("Somewhere along the way from the creation of the modern mass tort, to today, [the plaintiffs' bar] accepted the notion that all cases were the same, all cases could fit into the same tidy plaintiff's fact sheet, and the same judge could and should decide all the issues. Why?").

substitution for getting rid of frivolous cases. Objections to fact sheets and the shortcomings[40] of their use aside, plaintiff steering committees and defendants need to have some idea of scale when they are evaluating resolution of an MDL by settlement. "Settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims."[41] Fact sheet usage in mass tort MDLs is at least one helpful judicial tool used to create an inventory of the claims that can smooth the path to future settlement talks.

5. Implement a Focused, Targeted Discovery Plan

Once the lawyers and the judge have a firm grasp on the scope and scale of the MDL, tailoring a discovery plan that focuses on the main legal issues or disputes is an effective strategy for moving the MDL toward resolution. United States District Judge Fernando Gaitan from the Western District of Missouri states that in his experience, "the most effective approach on resolving an MDL case is limited and targeted discovery."[42] The value of this approach cannot be overstated. When formulating a discovery schedule, judges should consider the obstacles or dispositive legal issues raised by the MDL and how targeted discovery may be able to narrow the scope of litigation and pave the way to a more expedient resolution.

Crafting a focused discovery plan responsive to the issues and needs of a given MDL takes more work and planning from all parties involved. In addition to simply entering a case management order, "[s]equencing the discovery and briefing necessary to resolve class certification and summary judgment is one of [an MDL judge's] most vital tasks. . . . On the other hand, limited discovery or 'reverse sequencing' may be appropriate if settlement is likely."[43] Whatever the circumstance, constructing a focused and targeted discovery plan requires judges to have candid, honest discussions with counsel about the sticking points in their cases and what information is needed from either side. In my own experience on the bench, I have found that lawyers generally know the real issues in the case and the information needed to move forward. During a regular scheduling hearing, I ask each attorney the following question: "What do you need from the other side to evaluate the case?" The lawyers are usually very candid, whether it be medical records, deposition of the plaintiff, or business valuation. From my perspective, these conversations help me issue orders that facilitate production and impose or alter deadlines based on the parties' needs. While the scale of discovery is

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[40] *See* Burch, *supra* note 38, at 70 ("Clients are people, not inventories.").

[41] DUKE UNIV., BOLCH-DUKE CONFERENCE, GUIDELINES AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 1 (2018), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_4-plaintiff_fact_sheets.pdf.

[42] Interview with the Honorable Fernando J. Gaitan, Jr., United States District Judge for the Western District of Missouri (July 7, 2020).

[43] TEN STEPS TO BETTER CASE MANAGEMENT, *supra* note 9, at 3-4.

obviously different in an MDL context, the same principles apply and, as exemplified by Judge Gaitan's experience,[44] are similarly effective.

C. Group Apples with Apples: The Multi-Track Approach

As the MDL process unfolds, it often becomes readily apparent that the one-size-fits-all approach does not work for all claims, even when there are common issues of law or fact. In my conversations with experienced federal judges who have overseen some of the largest and most complex MDLs in recent memory, several commented on the benefits of establishing different tracks for cases within an MDL. Categorizing cases into different tracks based on their complexity, progression, factual commonalities, relief sought, or other relevant dimensions can help prioritize and maximize the time and effort of the parties and the court. In many cases, it can also facilitate more expedient resolution. Organizing cases in this manner may allow for similarly positioned cases to be settled, thereby resolving a portion of the litigation and redirecting the parties' attention to the remaining cases.[45]

For example, United States District Judge Pattie B. Saris from the District of Massachusetts established two tracks in the *Pharmaceutical Industry Average Wholesale Price Litigation* MDL.[46] Track 1 was a "fast track" that involved five defendants, a bench trial, and extensive findings of fact and conclusions of law.[47] Track 2, in contrast, involved ten defendants, two hundred drugs, and the parties negotiated settlements largely based on the outcome of Track 1.[48] In the Bard IVC Filter Products Liability Litigation MDL, United States District Judge David Campbell of the District of Arizona developed a two-track approach based on how close the parties were to resolution.[49] After a bellwether trial, Judge Campbell established the following options:

> **Track 1: Tentatively Resolved Cases.** These include cases or groups of cases that have been resolved in principle pursuant to an executed release or term sheet.
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> **Track 2: Cases Near Settlement.** These include cases or groups of cases that are the subject of substantive settlement negotiations in which

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[44] *See* Interview with the Honorable Fernando J. Gaitan, Jr., *supra* note 42.
[45] *See* CATHERINE R. BORDEN, FED. JUDICIAL CTR., MANAGING RELATED PROPOSED CLASS ACTIONS IN MULTIDISTRICT LITIGATION 12 (2018).
[46] *See id.*
[47] *See id.*
[48] *See id.*
[49] Interview with the Honorable David Campbell, United States District Judge for the District of Arizona (July 8, 2020).

> both sides agree that discussions have progressed to the point where execution of a release or term sheet is likely in the near future.[50]

All other cases were to be remanded back to the transferor districts (or if directly filed, then back to the proper district under 28 U.S.C. § 1404(a)).[51] Judge Campbell also set specific reporting deadlines to ensure cases did not linger, stating that "[t]he Court . . . advises the parties that it does not intend to delay remand or transfer of MDL cases after a reasonable opportunity to settle."[52] The message was clear: if the parties jointly believed settlement was moving along for an individual case—great news, stay the course.[53] But if the case was not moving toward settlement, pack your bags—the case was getting remanded to the transferor court.[54]

II. "NOT MY JOB": STRIKING A BALANCE

Federal judges are not a monolith that can be stereotyped. Though many MDL judges actively strive to settle a case and view remand to the transferor court as a failure, other judges think reaching a settlement is "not my job." Judges from both camps must learn to strike a balance between establishing a framework to allow the parties to resolve cases without forcing settlements on either party.
United States District Judge David Campbell from the District of Arizona articulated his own approach in the massive *In re Bard IVC Filter* MDL:

> In my MDL, which was fairly large (about 8,500 cases), I held the same view that I do in my cases generally – that it is not my role to get directly involved in settlement discussions. So, I told the parties before the bellwether trials began that I would not hold the MDL for a sustained period after the trials to facilitate settlement. I explained my view that my work as an MDL judge would be done once we were through with discovery and resolution of MDL-wide motions.[55]

Judge Campbell's hard-work approach is straight out of the MDL enabling statute that states: "[e]ach action so transferred shall be remanded by the panel at or before

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[50] Case Management Order No. 42, at 5-6, *In re* Bard IVC Filters Prods. Liab. Litig., MDL 15-02641-PHX-DGC, (D. Ariz. Mar. 21, 2019).
[51] *Id.* at 6.
[52] *Id.* at 5.
[53] *See id.* at 5-6.
[54] *See id.* at 5-6. While beyond the scope of this article, a word of caution is warranted here. Large, complex litigation such as MDLs involves the overlap of state, federal, and even international jurisdiction, and a host of transjurisdictional issues can arise in the implementation of a global settlement agreement. Judges and attorneys facing these issues would be well-served by reading *Morphing Case Boundaries in Multidistrict Litigation Settlements*, an article by Professor Margaret S. Thomas exploring three paths taken by different federal judges in various MDL cases to address these transjurisdictional settlement issues. *See* Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014).
[55] Interview with the Honorable David Campbell, *supra* note 49.

the district conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[56] United States District Judge Kathryn Vratil of the District of Kansas, who served on the Judicial Panel on Multidistrict Litigation (JPML) from 2004-2013, echoes Judge Campbell's approach with her observation that "[n]othing encourages MDL settlement like an announcement that at the close of common discovery, the cases will be remanded to the transferee judges."[57]

Judicial involvement in MDL settlement has its place, and in many instances it can serve as a moderating force that protects the interests of the claimants. Professor Burch notes, in stating valid criticism of the extremely repetitive nature of steering committee appointments by lawyers who have never tried a case to verdict, that many MDL settlements are negotiated without "the threat of trial in the face of an unsatisfactory settlement offer."[58] Without the threat of trial, "[o]ften touted as the plaintiff's most valuable bargaining chip, multidistrict litigation eliminates that threat for all but a few bellwether cases."[59] Professor Burch suggests that an amendment to J.P.M.L. Rule 10.1(b) to require immediate remand of non-settling plaintiffs would help correct this imbalance.[60] The idea of immediate remand has to be music to Judge Campbell's and Judge Vratil's ears. Immediately remanding would not only help ensure the preservation of the constitutional right to trial by jury for all parties, but would also restore the balance between a plaintiff's lawyer's traditional threat to go to trial and a defense lawyer's ability to take her opponent up the courthouse stairs and into the courtroom.[61]

III. CONCLUSION

Before I came on the federal bench, I had my own small plaintiffs' practice. I handled mostly personal injury claims and insurance coverage disputes, along with some class actions. I hated MDLs; it meant that my client's case would

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[56] 28 U.S.C. § 1407(a).

[57] Interview with the Honorable Kathryn Vratil, United States District Judge for the District of Kansas (July 7, 2020).

[58] Burch, *supra* note 38, at 152.

[59] *Id.* at 152-53.

[60] *See id.* at 153.

[61] Their benefits aside, MDLs, the process of consolidation, how judges are appointed to the JPML, the lack of diversity on steering committees, and the power to review and approve non-class settlements are frequent areas of criticism. While beyond the scope of this article, numerous proposals for reform have been offered over the years to address these concerns. In particular, the Advisory Committee to the Civil Rules is currently taking comments on changes to the Federal Rules of Civil Procedure and an MDL subcommittee issued a related report in the Civil Rules Agenda Book on April 1, 2020. *See generally* ADVISORY COMMITTEE ON CIVIL RULES, MINUTES TO THE APRIL 1, 2020 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES (Apr. 1, 2020), https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf. Whether these proposals remain ideas or are eventually translated into rules or amendments, recognizing the underlying concerns articulated by the MDL Subcommittee is important for judges and attorneys grappling with challenges and implications raised by the MDL settlement process.

be filed, get removed to federal court, and immediately be transferred to the court presiding over the MDL. The motion to remand would never be ruled on, the case would be settled without any communication with me or my client, and I would be stuck with trying to explain the "justice system" to my client and why I had not been "in the room where it happened."[62] It just felt wrong. Eventually I added a paragraph to my client contract stating that I would no longer represent them if the case got swept up into an MDL.

Now, as a federal trial judge, I am required to follow the rules for Multidistrict Litigation set forth in 28 U.S.C. § 1407. From my vantage point, I can now see the wisdom of consolidating one-half of the civil docket, and I am gaining an appreciation for the MDL system. But I still have genuine concerns about the treatment of the individual plaintiffs, the lack of communication by plaintiff steering committees, and viewing an individual claimant as merely part of an inventory. I also share many of Professor Burch's concerns about a homogenous monopoly of MDL lawyers exercising unchecked power over the MDL process.[63] Similarly, the idea that forcing a defendant to settle just because he or she has been sued several times (or several thousand times) offends my notions of fair play and due process. By talking to my judicial peers, I perceive that sometimes there is a feeling of failure if the cases are not all settled or resolved at the conclusion of the MDL proceeding. But if the right to jury trial is to be preserved,[64] defendants cannot be forced to settle whenever an MDL is formed. Forcing settlement on defendants only feeds the flames of plaintiff lawyers' advertising, monopolistic behavior in pre-formed committees, and third-party litigation finance.[65]

Judges, by adopting creative and just solutions to address common impediments to MDL settlement, face the challenges of balancing the rights of the claimants and defendants with the expediency and efficiency offered by the MDL process. As every lawyer and judge knows, this is not a science. Every human and every case are a little different. Nevertheless, my goal as a federal judge—one I am confident is shared by my judicial peers—is to do everything in my power to keep a case progressing steadily toward resolution, whether that comes in the form of a jury trial or a global settlement agreement. Ultimately, we are seeking the "just, speedy, and inexpensive determination of every action."[66] Achieving that goal with half the federal civil docket[67] just makes it a little more challenging.

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[62] *See generally* Lin-Manuel Miranda, *Act II: The Room Where It Happens*, HAMILTON: AN AMERICAN MUSICAL (2015).

[63] *See generally* Burch, *supra* note 38, at 75.

[64] *See* U.S. CONST., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

[65] *See* JAYME HERSCHKOPF, FED. JUDICIAL CTR., THIRD-PARTY LITIGATION FINANCE 1 (2017) (listing criticisms of third-party financing as increasing the number of weak cases, prolonging litigation, undercutting plaintiff and lawyer control, and constituting champerty).

[66] FED. R. CIV. P. 1.

[67] *See* Wittenberg, *supra* note 2 (noting multidistrict litigation makes up more than fifty percent of the federal civil caseload and fifteen percent of all lawsuits in the nation).