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The Myth of Settlement in MDL Proceedings

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THE MYTH OF SETTLEMENT IN MDL PROCEEDINGS

Douglas G. Smith¹

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INTRODUCTION

The accepted wisdom within both the academy and among practitioners is that the goal of multidistrict litigation, or at least its frequent result, is a global settlement of asserted claims that resolves the litigation. Commentators have pointed out that the most common result of multidistrict litigation is some form of settlement and have argued that multidistrict litigation provides a vehicle for aggregating claims in a manner that can facilitate settlement.²

In many MDL litigations, however, there is no settlement at all. There are a number of well-publicized instances where MDL courts have disposed of all claims by granting omnibus motions to dismiss or for summary judgment.³ Accordingly, consolidation in multidistrict proceedings can serve the valuable function of resolving common questions that may prove dispositive of the litigation in its entirety. In other cases, the common questions may dispose of part of the litigation or shape the litigation in ways that significantly impact the value of the asserted claims. Such examples alone refute the notion that the end goal of multidistrict litigation is settlement.

Moreover, even where there is some form of settlement, such settlements frequently arise only after many of the claims have been eliminated through dispositive motion practice or after bellwether trials⁴ have shown that the value of

² See, e.g., RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* ix (2007) (“As in traditional tort litigation, the endgame for a mass tort dispute is not trial but settlement.”); Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 WM. & MARY L. REV. 1165, 1224 (2018) [hereinafter Bradt, *Long Arm*] (“In most large MDLs, what actually happens is that a settlement agreement is eventually negotiated by the lead lawyers, and it is likely to be one that leaves the plaintiff little practical choice but to accept.”); Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 791 (2012) [hereinafter Bradt, *Shortest Distance*] (“[A]s several scholars have noted, like the class action, the key virtue of the MDL is that is [sic] collects most parties in a single organized proceeding in order to facilitate a global settlement.”); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 416 (2014) [hereinafter Burch, *Remanding*] (“[T]he ‘settlement culture’ for which the federal courts are so frequently criticized is nowhere more prevalent than in MDL practice.” (quoting *Delavventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006))); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1447 (2017) [hereinafter Burch & Williams, *Repeat Players*] (“Even though multidistricting aims to avoid duplicative pretrial efforts, most cases settle.”); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 128 (2015) (“Settlement is the fate of almost all cases that are part of an MDL. . . . Parties to MDL cases and the transferee judges who preside over them face tremendous pressure to settle.”); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2206 n.4 (2008) (“[M]ost multidistrict litigation is settled in the transferee court.”).

³ See, e.g., Douglas G. Smith, *Resolution of Common Questions in MDL Proceedings*, 66 U. KAN. L. REV. 219, 229–30, 232–47 (2017).

⁴ A “bellwether” trial is a mechanism used to test theories of the case and potentially provide guidance in settlement discussions by assessing how such theories may fare before juries. *Id.* at 256–57 n.204–06.

the claims is not particularly great.⁵ While it is true that in such cases the litigation may be terminated through a global settlement, the settlement may be at a value that is so low that essentially it amounts to a “loss” for the plaintiffs. Because the terms of settlements are typically confidential, the outside world may be unable to ascertain whether the settlements that occur are actually substantial or rather merely represent a mechanism for terminating the litigation.

This article addresses a phenomenon in MDL proceedings that is more subtle and frequently less transparent than the effect of dispositive motion practice or bellwether trials. Many of the claims in MDL proceedings are eliminated—not based on any ruling on a dispositive motion—but through informal means because the claims are meritless on their face.⁶ Indeed, claims are frequently eliminated because plaintiffs’ counsel agree to voluntarily dismiss them.⁷ Similarly, plaintiffs may simply fail to produce basic evidence to support the claims. Thus, there is another—frequently unnoticed—way in which claims are weeded from MDL proceedings, further undermining the narrative that multidistrict litigation is simply about reaching settlement.

This phenomenon also illustrates how the myth of settlement surrounding MDL proceedings has the potential to be profoundly counterproductive. Allowing claims to go untested because they are aggregated in an MDL proceeding whose alleged goal is to achieve settlement inevitably results in the compensation of claims with little or no merit, to the detriment of both defendants and other claimants alike. In addition, this approach to multidistrict litigation only encourages the filing of additional frivolous claims. Plaintiffs’ counsel may assume that the court is unlikely to scrutinize the asserted claims, and instead focus on achieving a global settlement to resolve all claims in the litigation.⁸

As commentators have observed, this dynamic is contrary to the just resolution of claims in MDL proceedings, and indeed may lead to the violation of fundamental principles of due process.⁹ This is no small matter. Litigation in the federal courts is increasingly being conducted in the context of MDL proceedings. Estimates of the proportion of cases in the federal system that have been consolidated for pretrial proceedings in multidistrict litigation run from one-third to one-half of all federal cases.¹⁰ Thus, flaws in the MDL process inevitably will have a significant impact on civil justice within the federal court system.

⁵ See, e.g., *id.* at 256 (“[P]laintiffs’ counsel typically seek to try selected ‘bellwether’ cases as soon as possible in order to use the results of such trials to pressure defendants into global settlements.”).

⁶ See *id.* at 254.

⁷ See *id.*

⁸ See, e.g., Hon. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL–875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 187 (2013) (noting that “aggregation promotes the filing of cases of uncertain merit” and that “[t]he incentive becomes the number of cases that can be filed, not the relative merit of the individual case”).

⁹ See, e.g., Redish & Karaba, *supra* note 2, at 151 (contending that “MDL, as currently structured . . . infringes on individual claimants’ procedural due process rights”); Robreno, *supra* note 8, at 187 (noting “the significant due process issues raised by forcing parties to litigate or settle cases in groups”).

¹⁰ See, e.g., Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. 1259, 1259 (2017) (noting that “more than one third of the

The fact of the matter is that, because of the growing significance of MDL litigation, such proceedings are increasingly the subject of debate within both the academic community and the legal community in general.¹¹ Numerous recent articles have been published in law reviews describing these phenomena.¹² Proposals for statutory reform of the MDL process have been introduced in Congress.¹³ And, increasingly, judges and practitioners are becoming cognizant of the flaws in the MDL system.

Fortunately, in many cases, MDL courts and litigants have utilized the tools available in MDL proceedings to address these issues and weed out claims that have no merit. As noted, dispositive motion practice is one way in which courts have resolved common issues that dictate the outcome of all, or large categories of, claims filed in MDL proceedings.¹⁴ This article focuses on the more informal mechanisms that have been employed, which frequently fly below the radar, and which typically give more individualized treatment to claims filed in MDL proceedings. These may include informal resolution through discussion between plaintiff and defense counsel, identification of unsupported claims through *Lone Pine*¹⁵ and show cause orders, or dispositive motions filed in individual cases pending in the MDL proceedings that can influence whether plaintiffs pursue other, similarly-situated cases.

Part I discusses the problems associated with aggregation in MDL proceedings. Aggregation tends to encourage the filing of meritless claims for a variety of

federal civil caseload is MDL”); Bradt, *Shortest Distance*, *supra* note 2, at 784 (“[O]ne third of all civil cases in the federal courts right now are part of a pending MDL.”); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) [hereinafter Burch, *Monopolies*] (“[F]rom 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts’ entire civil caseload. Removing prisoner and social security cases escalates that number to 45.6 percent.”); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2324 (2008) (“In an age of increasing skepticism regarding the use of class actions in our legal regime, the modern multidistrict litigation (MDL) process embodied in 28 U.S.C. § 1407 is emerging as the primary vehicle for the resolution of complex civil cases.”); DUKE LAW SCH. CTR. FOR JUDICIAL STUDIES, MDL STANDARDS AND BEST PRACTICES xi (2014), https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/MDL_Standards_and_Best_Practices_2014-REVISED.pdf [<https://perma.cc/GJH5-35R9>] (noting that “MDLs represented 45.6% of the pending civil cases as of June 2014”).

¹¹ See, e.g., Bradt, *Long Arm*, *supra* note 2; Andrew D. Bradt, “A Radical Proposal”: The Multidistrict Litigation Act of 1968, 165 U. PA. L. REV. 831 (2017) [hereinafter Bradt, “A Radical Proposal”]; Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015) [hereinafter Burch, *Judging*]; Burch, *Remanding*, *supra* note 2; S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391 (2013).

¹² See sources cited *supra* notes 2, 11.

¹³ See, e.g., Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 102(2) (2017) (stating that one of the purposes of the Act was to “diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system”).

¹⁴ See Smith, *supra* note 3, at 252–53, 256.

¹⁵ *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at *1 (N.J. Super. Ct. Law Div. Nov. 18, 1986). A *Lone Pine* order is one that requires plaintiffs to provide basic information regarding their claims at the outset of the litigation, including potentially an affidavit from a medical expert supporting each plaintiff’s claim. Smith, *supra* note 3, at 230.

reasons, including the reduction of individual scrutiny received by claims that are pending in aggregated proceedings. As a result, there are many instances in which multidistrict litigations have been inundated with claims that have later been eliminated because they lacked merit.

Part II provides examples of MDL proceedings in which large numbers of claims have been resolved through informal mechanisms. These mechanisms may complement dispositive motion practice in resolving claims at the pretrial stage before bellwether selection. The examples discussed in Part II illustrate that many different and varied procedures have been employed by the courts and the parties to eliminate meritless claims.

Part III addresses some of the implications of these examples. These examples show that assessment of claims at an early stage in the litigation is critical to the fair and efficient resolution of multidistrict proceedings. Simply driving toward settlement is not an option where large numbers of invalid claims are allowed to linger in MDL proceedings, and indeed such claims can actually frustrate settlement. Settlement efforts may be impaired because defendants are unwilling to pay for a universe of claims that the defendants know are meritless. Settlement can also be frustrated in more indirect ways; for example, the presence of large numbers of meritless claims can interfere with the selection of representative cases for bellwether trials. Such examples also illustrate that settlement is not the only, or even the primary, outcome in many MDL proceedings. In addition to those MDL proceedings that are completely resolved through dispositive motion practice, significant progress frequently is made in resolving MDL proceedings through these less formal mechanisms.

I. THE PROBLEM WITH MDL AGGREGATION

The problems that arise in MDL proceedings are akin to those that arise in all proceedings in which claims are aggregated: aggregation tends to incentivize the filing of claims of dubious merit. There are many reasons for this phenomenon and many potential causes.

A. *Factors Leading to Meritless Claims*

The most obvious cause of the problem is the financial incentive plaintiff lawyers have to maximize their returns. The more claims that are filed, the greater the potential recovery.¹⁶ A secondary incentive is that a firm's inventory of claims is often a key determinant of its role in the MDL proceedings. Typically, MDL courts establish a plaintiff steering committee, and membership on that committee may be driven in large part by the number of claims—and therefore financial

¹⁶ See Smith, *supra* note 3, at 219 (“[T]here is an incentive for plaintiffs’ counsel to include more and more claims that are not meritorious, in order to increase their own fees and influence in the proceedings.”).

interest—a firm has in the litigation.¹⁷ Accordingly, with a larger inventory of claims comes a greater chance of having a more significant role in the proceedings.

Perhaps a slightly more charitable explanation for the recognized fact that many claims in MDL proceedings lack merit is that the larger the volume of claims, the more difficult it becomes for the lawyers to adequately screen the claims before filing them. MDL claims are frequently the result of mass-advertising campaigns that encourage members of the public to file claims if they believe they have been injured with the incentive of payment with little effort on their part.¹⁸ As a result, law firms may be inundated with large numbers of claims that they must screen before filing. The extent to which, and the effectiveness with which, these firms screen the claims that come in the door may vary among firms. Nonetheless, while counsel have an ethical obligation to refrain from filing frivolous cases,¹⁹ many are filed anyway—potentially evidencing a failure to properly screen them.

Another factor leading to the proliferation of meritless claims in MDL proceedings is closely tied to aggregation. When claims are aggregated before a decisionmaker with finite resources, inevitably claims will receive less scrutiny than if they are filed with multiple decisionmakers. One hundred claims filed with one judge inevitably will receive less scrutiny than the same claims filed with one hundred or even fifty judges. Knowing that this is the case, plaintiff counsel may file claims that they would not otherwise file, believing that they will not receive the scrutiny that they would otherwise receive outside an MDL proceeding.²⁰

Finally, and perhaps most importantly, the belief that MDL proceedings inevitably will result in settlement rather than robust litigation of asserted claims can only further incentivize plaintiff counsel to file claims that lack merit.²¹ Comfortable in the belief that the merits of the claims will never be subjected to scrutiny, plaintiff counsel are much more likely to file claims that simply lack merit. As one MDL judge recently observed, “[s]ome lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being

¹⁷ See BOLCH JUDICIAL INSTITUTE, DUKE LAW SCH., GUIDELINES AND PRACTICES FOR LARGE AND MASS-TORT MDLS 33–34 (2d ed., 2018).

¹⁸ See Bexis, *The Multi-District Litigation Statute Needs Rewriting*, DRUG & DEVICE LAW (Dec. 19, 2016), <https://www.druganddeviceblog.com/2016/12/the-multi-district-litigation-statute-needs-rewriting.html> [<https://perma.cc/8MBS-9FB5>].

¹⁹ MODEL RULES OF PROF'L CONDUCT AND CODE OF JUDICIAL CONDUCT § 3.1 (AM. BAR ASS'N 2016).

²⁰ See Smith, *supra* note 3, at 231 (recognizing the concern “that aggregating claims in an MDL proceeding allows plaintiffs’ counsel to shield frivolous claims from scrutiny by lumping them with other claims and avoiding individualized treatment”).

²¹ See Burch, *Remanding*, *supra* note 2, at 402 (“[P]laintiffs’ attorneys can bypass doctrinal uncertainties over weak claims by packaging plaintiffs together in a global settlement.”); see also *id.* at 413 (“[M]ultidistrict litigation coaxes claimants out of the woodwork regardless of their claim’s strength in hopes of initially staying buried under mounting cases then cashing in on settlement.”); Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 622 (2006) (“[A]ttempts to aggregate similar, though not identical, claims through class actions or global settlements cause an unfortunate blurring of the merits of individual claims, often resulting in overcompensation for weak claims and undercompensation for strong claims.”).

scrutinized as closely as it would if it proceeded as a separate individual action.”²² Thus, to the extent the settlement narrative is perpetuated in MDL proceedings, it is likely to have a profoundly negative effect—incentivizing counsel to file meritless claims at the expense of both defendants and those plaintiffs whose claims have merit.²³

B. Recognition of the Problem

These problems are no secret among the bar and judges who have gone through the process of resolving complex MDL proceedings. Commentators have repeatedly noted the dubious nature of many claims filed in mass tort MDLs in particular.²⁴ As one judge recently observed: “MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.”²⁵

The recognition of the problem has led to calls for formalized rule or statutory changes to make it easier to weed out frivolous claims filed in MDL proceedings. These reforms have included proposals for more formalized procedures at the beginning of MDL cases requiring the production of basic information needed to establish plaintiffs’ claims.²⁶ They have also included proposals for increased

²² *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, No. 4:08-MD-2004, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

²³ At least one commentator has argued that MDL judges have an incentive to encourage settlement that is bound up with their reputation among the judiciary, and specifically with the Judicial Panel on Multidistrict Litigation, which has the authority to assign them (or not) to future MDL cases. *See* Burch, *Remanding*, *supra* note 2, at 417–18, 421 (“[F]ailing to resolve cases quickly can subject transferee judges to scrutiny from the Panel. . . . So, transferee judges have their own professional and reputational incentives to broker deals and thwart remand. . . . As long as the Panel continues to ‘reward’ transferee judges who quickly settle cases with new multidistrict litigation assignments and quietly bemoan the rest, transferee judges will prefer to keep assignments as long as it takes to browbeat the parties into settling.”); *see also* Burch, *Judging*, *supra* note 11, at 83–84 (“[T]he Panel views quickly settling a complex case as a hallmark of success that disposes it to reward that judge with new litigation.”).

²⁴ *See, e.g.*, Advisory Comm. on Civil Rules, MDL Subcommittee, *Notes of February 28, 2018 Conference Call*, in ADVISORY COMMITTEE ON CIVIL RULES: PHILADELPHIA, PA; APR. 10, 2018, at 157, 161 (2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/M7V4-QN5S>] (“There are simply too many claims ‘parked’ in MDL proceedings that would never be presented, or survive early motion practice, as individual actions.”); Civil Rules Advisory Comm., *Draft Minutes of the November 7, 2017 Meeting of the Advisory Committee on Civil Rules*, in ADVISORY COMMITTEE ON CIVIL RULES: PHILADELPHIA, PA; APR. 10, 2018, at 67, 91 (2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/M7V4-QN5S>] (“The problem is the frivolous cases, not the ‘gray-area’ cases. Reliable sources suggest that in big MDLs of some types 20% or more of the claims are ‘zeroed out.’”).

²⁵ *In re Mentor Corp.*, 2016 WL 4705827, at *2. The Judicial Panel on Multidistrict Litigation, which is responsible for establishing MDL proceedings, has also noted the problem: “The response to such concerns more properly inheres in assigning all related actions to one judge committed to disposing of spurious claims quickly.” *In re Seroquel Prods. Liab. Litig.*, 447 F. Supp. 2d 1376, 1379 (J.P.M.L. 2006).

²⁶ *See, e.g.*, BOLCH JUDICIAL INSTITUTE, DUKE LAW SCH., *supra* note 17, at 9 (“[R]equiring plaintiffs at an early juncture to produce information verifying their basic factual allegations addresses concerns that MDL proceedings invite unsubstantiated claims.”).

access to interlocutory appellate review of decisions made by MDL courts so that appellate courts may provide guidance to MDL judges to ensure that rigorous standards are applied.²⁷

Legislative proposals have been introduced in Congress to embody such reforms in formal statutes.²⁸ The Advisory Committee on Civil Rules has also considered proposals for changes to the Federal Rules in order to address the problem.²⁹ Finally, projects such as the Bolch Judicial Institute's *Guidelines and Best Practices for Large and Mass-Tort MDLs* have sought to outline best practices for MDL proceedings short of formal amendment of rules or statutes.³⁰ All of these efforts are in response to an acknowledged problem: the large number of facially meritless claims that are filed in large MDL proceedings.

II. MECHANISMS THAT HAVE BEEN USED TO ADDRESS THE PROBLEM

When one examines actual practice in MDL proceedings, it becomes clear that settlement is not inevitable. As noted, many MDLs are resolved in whole or in part through dispositive motion practice.³¹ Large MDLs such as the *Meridia*, *PPA*, and *Norplant* MDLs have been resolved in whole or large part through rulings on motions for summary judgment.³² Recent examples of MDLs where claims were

²⁷ See, e.g., Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105(k)(1) (2017).

²⁸ See, e.g., *id.* (establishing procedural standards and limits for class action cases).

²⁹ See Civil Rules Advisory Comm., *supra* note 24, at 86–95.

³⁰ See BOLCH JUDICIAL INSTITUTE, DUKE LAW SCH., *supra* note 17, at ix.

³¹ See Rothstein et al., *supra* note 21, at 638 (observing that motions for summary judgment and *Daubert* motions “are a major vehicle for reducing meritless claims in a large litigation”); Bradt, *Long Arm*, *supra* note 2, at 1172–73 (noting that “in the recent nationwide products liability MDL involving the drug Zolofit, the MDL court granted summary judgment against 333 transferred cases in one fell swoop”).

³² See *In re Lipitor* (Atorvastatin Calcium) Mktg., Sales Practices and Prods. Liab. Litig. (No II) MDL 2502, 892 F.3d 624, 649 (4th Cir. 2018) (affirming grant of summary judgment in product liability actions involving statins); *In re Zolofit* (Sertraline Hydrochloride) Prods. Liab. Litig., 858 F.3d 787, 800 (3d Cir. 2017) (affirming summary judgment on all claims); *In re Fosamax* (Alendronate Sodium) Prods. Liab. Litig. (No. II), 751 F.3d 150, 164 (3d Cir. 2014) (affirming holding that claims against generic manufacturers of pharmaceuticals were preempted by federal law); *Meridia* Prods. Liab. Litig. v. Abbott Labs., 447 F.3d 861, 869 (6th Cir. 2006) (affirming grant of summary judgment as to all claims in MDL); *In re Temporomandibular Joint (TMJ) Implants* Prods. Liab. Litig., 113 F.3d 1484, 1498 (8th Cir. 1997) (affirming summary judgment in favor of the supplier of silicone gel used in implants); *In re Mirena IUD* Prods. Liab. Litig., 202 F. Supp. 3d 304, 327–28 (S.D.N.Y. 2016) (excluding various expert opinions in MDL, leading to a grant of summary judgment); *In re Phenylpropanolamine (PPA)* Prods. Liab. Litig., 289 F. Supp. 2d 1230, 1251 (W.D. Wash. 2003) (excluding evidence regarding alleged causative link between phenylpropanolamine (PPA) and hemorrhagic or ischemic stroke where plaintiffs had not taken the medication within seventy-two hours of their stroke and further excluding expert evidence regarding any causal link between PPA and all other alleged injuries such as seizures, cardiac injuries, and psychoses); *In re Norplant Contraceptive* Prods. Liab. Litig., 215 F. Supp. 2d 795, 828–29 (E.D. Tex. 2002) (holding that, under the learned intermediary doctrine, claims relating to the twenty-six conditions contained in contraceptive labeling were barred as a matter of law); *In re Indep. Serv. Orgs. Antitrust* Litig., 964 F. Supp. 1479, 1491 (D. Kan. 1997) (granting dispositive motion on antitrust claims).

decided entirely, or in large part, through dispositive motion practice provide an illustration of how such mechanisms work to resolve aggregated litigation.

In the *Lipitor* MDL proceedings, for example, the court rejected most of the claims filed in the MDL after finding that there was no reliable scientific evidence to support them.³³ While plaintiffs maintained that the defendant's cholesterol medication increased the risk of developing Type 2 diabetes, the court concluded that the proffered evidence was not scientifically reliable.³⁴ Accordingly, the court granted *Daubert*³⁵ motions to exclude plaintiffs' expert evidence, concluding that the claims were "not based on sufficient facts and data."³⁶

Specifically, the court in *Lipitor* held that there was no reliable scientific evidence establishing a statistically significant relationship between the medication and diabetes for the vast majority of the doses on the market.³⁷ Indeed, the studies found no statistically significant association between these doses and diabetes, tending to refute any causal relationship.³⁸ Moreover, the court concluded that the remaining "evidence" plaintiffs had submitted, such as alleged "admissions" by the defendant, were insufficient to establish that there was any causal relationship.³⁹

In *Mirena*, the court issued a painstaking opinion rejecting all claims in the MDL, parsing through each proffered expert's opinion and concluding that there was no reliable scientific evidence to support the litigation.⁴⁰ The issue there was whether defendant's IUD was defective, resulting in migration of the device and perforation of the uterus.⁴¹ In excluding plaintiffs' scientific evidence, the court concluded that the plaintiffs' expert's theory "ha[d] never been tested or studied in human patients, nor ha[d] it undergone animal or *in vitro* testing"⁴² or "gained 'general acceptance' within the scientific community."⁴³ The court determined that the plaintiffs' expert was essentially "given a conclusion by lawyers" and then "worked backwards to hypothesize a mechanism by which it might occur."⁴⁴ As the court observed, however, there were "just too many gaps between [the expert's] analysis and the conclusions" the expert drew from the evidence.⁴⁵ Without reliable

³³ See *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices and Prods. Liab. Litig.*, 227 F. Supp. 3d 452, 491 (D.S.C. 2017), *aff'd*, 892 F.3d 624 (4th Cir. 2018).

³⁴ *Id.* at 456, 462.

³⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). "*Daubert* provides the analytical framework for determining whether expert testimony is admissible under Rule 702 of the Federal Rules of Evidence." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 620–21 (S.D. Tex. 2005).

³⁶ *In re Lipitor*, 227 F. Supp. 3d at 463, 491.

³⁷ See *id.* at 463.

³⁸ *Id.* at 463, 482–83.

³⁹ *Id.* at 479–84.

⁴⁰ See *In re Mirena IUD Prods. Liab. Litig.*, 202 F. Supp. 3d 304, 327–28 (S.D.N.Y. 2016).

⁴¹ *Id.* at 305.

⁴² *In re Mirena IUD Prods. Liab. Litig.*, 169 F. Supp. 3d 396, 429 (S.D.N.Y. 2016).

⁴³ *Id.* at 429–30 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 594 (1993)).

⁴⁴ *Id.* at 430.

⁴⁵ *Id.* at 445.

evidence of causation, plaintiffs were unable to establish a fundamental element of their claims, and the court granted summary judgment.⁴⁶

Such decisions are not mere anomalies. There are many instances in which MDL judges have resolved all or a large portion of asserted claims through dispositive pretrial motion practice. There are frequently issues that are common among asserted claims that can be resolved through omnibus motion practice.⁴⁷ Whether, for example, a product causes a particular injury or condition often turns on scientific evidence that is uniform with respect to the asserted claims. Issues like this and others are amenable to resolution on a common basis in a proceeding where claims are aggregated. Such procedures are an effective means of resolving MDL litigation and, contrary to the settlement narrative, have been employed repeatedly.

However, there are other, less formalized procedures that are frequently employed to eliminate large numbers of claims in MDL proceedings. These procedures tend to be more individualized in nature, going through claims on a claim-by-claim basis and eliminating the claims that have no merit for various reasons.⁴⁸ It may be that product liability plaintiffs lack evidence of exposure to the product asserted. It may be that they lack evidence that they actually suffered the injury they alleged in the complaint. It may be that, for a variety of case-specific reasons, it is unlikely that the product at issue actually caused their particular injury. It may be that the claims are legally flawed based on the particular state law that governs the claims. Or there may be defenses like the statute of limitations that bar the claims on their face.

The elimination of claims using such procedures often occurs under the radar. Indeed, many dismissals may be obtained on a voluntary basis where defendants provide evidence of the claims' insufficiency to plaintiffs' counsel who then agree to eliminate the claims.⁴⁹ Other dismissals may be obtained through motion practice.⁵⁰ And yet other claims may be eliminated through simple inaction by plaintiffs in producing information required by established MDL procedures, such as by failing to adequately complete a plaintiff fact sheet⁵¹ or providing medical records or other discovery required by the MDL court.⁵² In sum, there is a large diversity in the ways in which such claims may be eliminated, and frequently this

⁴⁶ *In re Mirena*, 202 F. Supp. 3d at 327–28 (rejecting plaintiffs' efforts to substitute purported "admissions" in company documents, labeling, or other materials for reliable scientific evidence of causation).

⁴⁷ Smith, *supra* note 3, at 229 ("The standard way in which such issues are resolved is at the outset of the litigation through omnibus motions to dismiss or for summary judgment on all, or specific categories of, claims.").

⁴⁸ See *infra* notes 53–152 and accompanying text.

⁴⁹ See Smith, *supra* note 3, at 254 ("In some cases, plaintiffs' counsel may agree to dismissal in order to avoid scrutiny of their claims by the court.").

⁵⁰ BOLCH JUDICIAL INSTITUTE, DUKE LAW SCH., *supra* note 17, at 67 ("The [MDL] litigation may be resolved through motion practice that results in a dismissal by the court, or rulings that effectively end the litigation.").

⁵¹ See, e.g., *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1239–40 (9th Cir. 2006).

⁵² See Smith, *supra* note 3, at 254 ("[I]t is standard practice to require that plaintiffs produce their medical records so that the claims can be evaluated.").

phenomenon is underappreciated given the less than transparent way it often manifests itself in MDL proceedings.

A. *In re Heparin: Voluntary Dismissal*

Many MDL proceedings have combined dispositive motion practice as to common issues with more informal means of eliminating claims. In the *Heparin* MDL proceedings, the court granted summary judgment on several issues that eliminated most of the claims in the litigation.⁵³ Plaintiffs alleged that contaminated heparin, an anticoagulant, given to patients with end-stage renal disease and patients undergoing coronary artery bypass surgery was responsible for a range of adverse health conditions, including death.⁵⁴ The court eliminated several categories of these claims because they were not based on reliable scientific evidence.⁵⁵ The court ruled, among other things, that plaintiffs lacked sufficiently reliable scientific evidence that the contaminated heparin could be associated with these conditions if the conditions occurred more than sixty minutes after receipt of heparin.⁵⁶

Less formal proceedings, however, also led to the resolution of many claims filed in the MDL proceedings. For example, one significant issue in the proceedings was whether plaintiffs actually received contaminated heparin that was manufactured by defendants.⁵⁷ Only certain lots during a limited period of time were potentially contaminated.⁵⁸ Many plaintiffs who filed claims did not receive contaminated heparin, or at least it was very unlikely that they received contaminated heparin.⁵⁹ Others did not even receive heparin manufactured by the defendants in the MDL, but rather likely received heparin produced by other

⁵³ *In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712, 755 (N.D. Ohio 2011).

⁵⁴ *Id.* at 719–21.

⁵⁵ *Id.* at 753.

⁵⁶ *Id.* at 738–39, 753. The Centers for Disease Control and Prevention had performed a study examining adverse events that occurred after administration, which found that the events that seemed to be occurring were anaphylactoid events that occurred within sixty minutes of administration of heparin that contained contamination. *Id.* at 721–23. This study, and the absence of contrary epidemiological evidence, supported the court's ruling that plaintiffs' expert opinions lacked any scientific basis and were inadmissible under Rule 702 and *Daubert*. *See id.* at 753. The court determined that mechanistic arguments based on *in vitro* or animal studies could not overcome the lack of epidemiological evidence supporting plaintiffs' claims. *See id.* at 738–39. The court noted that plaintiffs' expert had "shown that there is increased kallikrein activity, but her opinion that this activity can have effects beyond the sixty-minute time period is speculative." *Id.* at 739.

⁵⁷ *See, e.g.,* *Dodson v. Baxter Intern., Inc. (In re Heparin Prods. Liab. Litig.)*, No. 1:09HC60020, 2009 WL 2916888 (N.D. Ohio Sept. 4, 2009); *Schweikert v. Baxter Healthcare Corp. (In re Heparin Prods. Liab. Litig.)*, No. 1:10HC60154, 2012 WL 1944805 (N.D. Ohio Mar. 6, 2012).

⁵⁸ *See In re Heparin Prods. Liab. Litig.*, 803 F. Supp. 2d 712, 721 (N.D. Ohio 2011) (discussing recall of particular lots and fact that "severe adverse reactions associated with heparin were reported between November, 2007, and January, 2008").

⁵⁹ *E.g., Schweikert*, 2012 WL 1944805, at *1 (finding that one shipment received by hospital occurred "before distribution of any contaminated heparin" and with respect to second shipment, "plaintiff has shown no proof that it was from a contaminated lot").

manufacturers.⁶⁰ Using information regarding batches that contained contamination along with shipping information, claims that were unlikely associated with contamination could be identified.⁶¹ Once such claims were identified, plaintiffs' counsel frequently dismissed them voluntarily.

Where necessary, defendants filed motions for summary judgment in the individual cases.⁶² The MDL court expeditiously dealt with these motions and, as a consequence, plaintiffs' counsel who might have been reticent to voluntarily dismiss meritless claims began doing so in order to avoid the spotlight shining on the meritless claims by the individual motion practice. As a result, while there was some up-front investment of time by the court (which could have been avoided had plaintiffs' counsel been more compliant), it paid dividends as plaintiffs' counsel began to voluntarily dismiss claims that should not have been filed in the first place. Between dispositive motion practice and these more informal procedures, more than half of the claims that were filed in the MDL were eliminated.⁶³

The *Heparin* proceedings illustrate how informal mechanisms may lead to the resolution of hundreds of claims without intervention by the court or the expenditure of judicial resources. Plaintiffs' counsel typically seek to avoid alerting the court that they have filed claims of dubious merit. Where, as in *Heparin*, the facts or the law demonstrate that plaintiffs' claims on their face have no merit, plaintiffs' counsel have an incentive to agree to eliminate those claims rather than litigating them in front of the court. This incentive, of course, is counterbalanced by the incentive to maximize potential financial returns and the likelihood of obtaining

⁶⁰ *E.g.*, *Dodson*, 2009 WL 2916888, at *2 (granting summary judgment because undisputed evidence showed the heparin plaintiff received "could not have been manufactured by Baxter," but rather was made by another manufacturer, APP).

⁶¹ *See, e.g., id.* (conducting analysis and granting summary judgment on plaintiff's claims); *Schweikert*, 2012 WL 1944805, at *1 (conducting analysis and granting summary judgment on plaintiff's claims).

⁶² *See generally, e.g., Schweikert*, 2012 WL 1944805 (granting defendants' motion for summary judgment based on the lack of proof of exposure to contaminated heparin); *Dodson*, 2009 WL 291688 (granting defendants' motion for summary judgment based on the lack of proof of exposure to contaminated heparin); *Nya v. Baxter Int'l Inc. (In re Heparin Prods. Liab. Litig.)*, No. 3:14HC60000, 2014 WL 11515374 (N.D. Ohio Nov. 3, 2014) (summary judgment granted where "no proof" plaintiff "received contaminated heparin"); *Fioretti v. Baxter Healthcare Corp. (In re Heparin Prods. Liab. Litig.)*, No. LO-10-2824, 2011 WL 5-23904 (N.D. Ohio Oct. 19, 2011) (summary judgment granted where "no proof" plaintiff "received contaminated heparin").

⁶³ Interview with S. Donnell, counsel of record in the *Heparin* MDL (April 2019); Smith, *supra* note 3, at 236 (noting that more than 50% of claims were eliminated through generic motion practice alone). In addition to its ruling regarding the timing of the adverse events following administration, the court also held that certain adverse events such as sepsis-related events were not associated with contaminated heparin. *In re Heparin*, 803 F. Supp. 2d at 738. The court further determined that the adverse events that might be associated with contamination occurred with a very specific type of administration. *Id.* at 739–40. The court noted that studies had indicated that such adverse events typically occurred with intravenous administration of heparin, as opposed to subcutaneous administration, and therefore held that there was no reliable scientific evidence to support claims based on the latter method of administration. *Id.* As the court noted, there was "simply too great an analytical gap between" the expert's opinions and the data on which they were based. *Id.* at 740 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

a leadership role in the MDL by filing as many claims as possible. Nonetheless, in many instances, claims may be dismissed voluntarily without the need for the court to intervene, and if they are not, then the filing of a few motions in individual cases frequently provides an incentive to plaintiffs' counsel to cooperate without the need for the resolution of individual motions in every case.

B. In re Mentor Corp.: Show Cause Orders and Threat of Sanctions

Another mechanism by which claims may be eliminated short of formal motion practice is through show cause orders or similar procedures. In the *Mentor* MDL proceedings, for example, the court implemented such an approach as a means of dealing with the volume of meritless claims that had been filed in the MDL proceedings.⁶⁴

The *Mentor* MDL involved claims alleging that a mesh sling used to treat patients with stress urinary incontinence was defective, leading to a variety of adverse medical conditions.⁶⁵ As the court observed, after the MDL was established with twenty-two cases, claims “exploded to more than 850 cases, which explosion appears to have been fueled, at least in part, by an onslaught of lawyer television solicitations.”⁶⁶

After reviewing the claims, the court concluded that plaintiffs' counsel in the MDL had filed numerous claims that they “should have known” lacked any “good faith basis” because they were “clearly barred by the applicable statute of limitations.”⁶⁷ plaintiffs' counsel were “unable to identify a specific causation expert,” or “counsel threw in the towel and did not even bother to respond to [a] summary judgment motion.”⁶⁸ The court warned plaintiffs' counsel that if it were forced to decide summary judgment motions on cases that lacked a good faith basis in the future, the court would issue show cause orders as to why sanctions should not be imposed.⁶⁹ Accordingly, the court provided that “in future orders granting summary judgment in which no good faith basis existed for maintaining the action through the summary judgment stage, the Court intends to include an addendum in the order requiring counsel to show cause why sanctions should not be imposed.”⁷⁰

The *Mentor* MDL provided something of an education for the trial court. As in many MDLs, while a court may initially provide plaintiffs the benefit of the doubt, believing that plaintiffs' counsel have adequately investigated claims before they file them, once the proceedings progress to a certain point and the court actually begins to review individual claims, frequently there is a realization that this is not

⁶⁴ See *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 4:08-MD-2004, 2016 WL 4705827, at *1 (M.D. Ga. Sept. 7, 2016).

⁶⁵ *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 711 F. Supp. 2d 1348, 1353 (M.D. Ga. 2010).

⁶⁶ *In re Mentor Corp.*, 2016 WL 4705827, at *1 n.2.

⁶⁷ *Id.* at *1.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

the case. Given the benefit of its own experience, the court sought to inform other members of the judiciary that, as a general matter, “transferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly.”⁷¹ The court in the *Mentor* MDL believed that the use of sanctions was an appropriate tool to deal with the problem, hoping that “the robust use of Rule 11” would “help” to eliminate and deter such filings.⁷²

The court, however, also employed other mechanisms to eliminate claims in addition to the threat of Rule 11 sanctions. The court noted that, in addition to the one hundred separate summary judgment rulings the court had already issued, seventy-four cases had been “dismissed voluntarily by the plaintiffs via notice of voluntary dismissal or a motion to dismiss” and that an additional 458 cases were either “dismissed by stipulation of the parties” or by “order of dismissal following a notice of settlement.”⁷³ Accordingly, as in other MDL proceedings, voluntary dismissal of claims by plaintiffs’ counsel was a significant mechanism for weeding out invalid claims.⁷⁴ Implementation of judicially-supervised procedures, such as the sanctions mechanism employed in the *Mentor* MDL, can further encourage the elimination of claims through voluntary measures.

C. In re Silica: Review of Diagnoses and Sanctions

One of the most widely-publicized examples of an MDL that went off the rails due to the rampant filing of meritless claims is the *Silica* proceeding.⁷⁵ There, plaintiffs alleged that they had developed silicosis, an impairment of the respiratory system they claimed was associated with exposure to respirable silica during the course of their occupations as sandblasters, foundry workers, and members of other trades.⁷⁶ As the court began to explore the claims, however, it quickly became apparent that the diagnoses of the plaintiffs were the result of unreliable and medically invalid procedures, if not widespread fraud.⁷⁷ As Judge Jack observed

⁷¹ *Id.* at *2.

⁷² *Id.*

⁷³ *Id.* at *1 n.2.

⁷⁴ *See id.*

⁷⁵ *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). Many other scholars have discussed the *Silica* case as illustrative of the problems in the MDL system. *See, e.g.*, Brown, *supra* note 11, at 425 (“[A]fter the threatened demise of asbestos litigation triggered a rush to file silicosis claims, thousands of asbestos plaintiffs were ‘recycled’ as silicosis plaintiffs.”); Mark A. Behrens & Corey Schaecher, *Rand Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the “Phantom” Silica Epidemic that May Deter Litigation Screening Abuse*, 73 ALB. L. REV. 521 (2010); Robreno, *supra* note 8, at 121 (“Judge Jack had conducted *Daubert* hearings and determined that almost all of the silicosis cases on her MDL docket were fraudulent.”).

⁷⁶ *In re Silica*, 398 F. Supp. 2d at 569, 569–73.

⁷⁷ *See id.* at 635.

after evaluating the claims, they appeared to be “driven by neither health nor justice: they were manufactured for money.”⁷⁸

First, as Judge Jack noted, the sheer volume of claims alone demonstrated that there was a problem.⁷⁹ There were so many claims filed beyond what would have been expected that there “appear[ed] to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system.”⁸⁰ Moreover, the claims were concentrated in certain states where litigation was filed before the MDL was created.⁸¹

As the court investigated, it found that the diagnoses of the plaintiffs were not made by the plaintiffs’ treating physicians.⁸² Rather, they were made by “the same handful” of physicians affiliated with screening companies that plaintiffs’ counsel had retained for the purpose of the litigation.⁸³ These doctors purported to have reviewed literally thousands of cases. As the court noted, “over 9,000 Plaintiffs who submitted Fact Sheets were diagnosed with silicosis by only 12 doctors.”⁸⁴ As a result, the court described these reports as being “essentially manufactured on an assembly line.”⁸⁵

The court utilized the mechanism of a *Daubert* hearing to dig into the problem, ordering that the diagnoses be subject to review under Rule 702 and *Daubert*.⁸⁶ In preparation for the hearing, the parties conducted discovery into the methodology the doctors followed in providing the diagnoses, deposing the doctors and obtaining records regarding the procedures they followed.⁸⁷ This discovery demonstrated that there were significant problems.

As a threshold matter, the doctors repeatedly testified that they did not actually diagnose any plaintiff with silicosis, and indeed in some instances indicated that they had *never* diagnosed *any* patient with silicosis and did not know the criteria for doing so.⁸⁸ Rather, as one doctor noted, he simply reviewed plaintiffs’ chest

⁷⁸ *Id.* (“The record does not reveal who originally devised this scheme, but it is clear that the lawyers, doctors and screening companies were all willing participants.”).

⁷⁹ *See id.* at 572.

⁸⁰ *Id.* at 572–73. As the court observed, one small screening company “found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.” *Id.* at 603; *see also id.* at 620 (concluding that “there simply is no rational medical explanation for the number of alleged diagnoses of silicosis in this MDL”).

⁸¹ *Id.* at 573–74 (noting that many plaintiffs in the MDL cases were citizens of Mississippi, Alabama, and Texas).

⁸² *Id.* at 580.

⁸³ *Id.* at 580, 633 (“[W]hen it comes to the doctors who diagnosed these Plaintiffs with silicosis, 12 names appear.”).

⁸⁴ *Id.* at 580.

⁸⁵ *Id.* at 633.

⁸⁶ *Id.* at 620–22; *see also* Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 677 (2017) (“[I]t was a *Daubert* motion Judge Jack used to uncover fraud in the *Silica* MDL, which brought that potentially costly litigation to an early end.”).

⁸⁷ *In re Silica*, 398 F. Supp. 2d at 580–94.

⁸⁸ *Id.* at 581, 588 (observing that doctors admitted “they had *never* diagnosed anyone with silicosis”).

x-rays.⁸⁹ These and other statements contradicted the “reports” that were submitted on the experts’ behalf.⁹⁰

Because there were so many cases to review, the amount of time that the physicians spent reviewing the materials was exceedingly small. Physicians would provide as many as seventy-five “diagnoses” in a single day.⁹¹ Moreover, the exposure histories on which they relied were generally taken by individuals who had “no medical training” and had “significant financial incentives to find someone positive for exposure to silica” because they were lawyers for plaintiffs or the lawyers’ clerks.⁹² Accordingly, the court concluded that “[t]he steps in the diagnosing process were divided among a number of different people, not all of whom were qualified and none of whom assumed overall responsibility and oversight for the entire process.”⁹³

The court concluded that the entire process was largely driven by the lawyers and legal considerations, rather than medical or scientific principles:

If nothing else, this MDL illustrates the mess that results when lawyers practice medicine and doctors practice law. In almost all of these cases, one vital requirement for the diagnosis of silicosis—the taking of occupational histories—was performed absent medical oversight by the lawyers or their agents or contractors. More generally, the lawyers determined first what disease they would search for and then what criteria would be used for diagnosing that disease.

. . . .

Conversely, virtually all of the challenged diagnosing doctors seemed to be under the impression they were practicing law rather than medicine. They referred to the Plaintiffs as “clients” rather than “patients”, and they utilized shockingly relaxed standards of diagnosing that they would never have employed on themselves, their families or their patients in their clinical practices.⁹⁴

As a result, the court found that the diagnoses were fundamentally unreliable and failed the *Daubert* test.⁹⁵

⁸⁹ *Id.* at 581.

⁹⁰ *Id.* at 588 (noting that two “doctors testified that, contrary to the language in the typed forms, they did not see any x-rays, x-ray reports or pulmonary function tests, and they did not diagnose any Plaintiff with silicosis”).

⁹¹ *Id.* at 582.

⁹² *Id.* at 622, 624 (“[T]he evidence shows that none of the challenged experts took an occupational or exposure history. They all relied upon a history taken by lawyers and clerks with no medical training or supervision.”).

⁹³ *Id.* at 633.

⁹⁴ *Id.* at 634–35.

⁹⁵ *Id.* at 625.

The results of the investigation the court conducted found that many of the plaintiffs were simply former asbestos plaintiffs whom the plaintiff law firms sought to transform into silicosis plaintiffs using this screening process.⁹⁶ As the court observed, there were a “staggering number” of silica plaintiffs who had previously filed asbestosis claims.⁹⁷ Yet, as the court noted, silicosis and asbestosis were distinct diseases with distinct causes that were seldom observed together in a single patient.⁹⁸

Finally, the physicians failed to take into account alternative explanations for the observations they made with respect to the plaintiffs’ x-rays.⁹⁹ The court found that “[i]n almost all of the MDL cases, the challenged diagnosing doctors simply ignored this final criterion (i.e., the absence of any good reason to believe that the positive radiographic findings are the result of some other condition) altogether.”¹⁰⁰ Again, the doctors’ failure to follow any reliable methodology further demonstrated that they were not really “diagnosing” plaintiffs with any disease.¹⁰¹

As a result of its investigation, the court ended up imposing sanctions, ordering payment of expenses and costs associated with the *Daubert* hearings that led to the court’s rulings.¹⁰² Indeed, confronted with the evidence, at least one physician felt that he needed to obtain legal representation before he could continue to provide testimony.¹⁰³ As the court observed, in addition to harming defendants, the filing of meritless claims also harmed those plaintiffs who had claims that potentially had merit: “every meritless claim that is settled takes money away from Plaintiffs whose claims have merit.”¹⁰⁴

⁹⁶ *Id.* at 628. The problems in the *Silica* litigation stemmed in part from the fact that plaintiffs were seeking to recycle asbestos claimants as silica claimants. *See id.* As one commentator observed:

Some double dippers (some 6,000, in fact) sought funds from *both* silica and asbestos manufacturers and therefore claimed (in separate filings) that they were suffering from silicosis or, alternatively, asbestosis, despite the fact that the two diseases have different sources of exposure, on x-rays look “vastly different,” and are very rarely found in the same individual.

Engstrom, *supra* note 86, at 659.

⁹⁷ *In re Silica*, 398 F. Supp. 2d at 628.

⁹⁸ *Id.* at 594–95, 628–29.

⁹⁹ *Id.* at 630 (finding that the doctors’ failure to take into account alternative explanations for x-ray observations “clearly is not generally accepted in the field of occupational medicine”).

¹⁰⁰ *Id.* at 629–30. The court noted that “[e]ach lawyer had to know that he or she was filing at least some claims that falsely alleged silicosis.” *Id.* at 636.

¹⁰¹ *See id.* at 633.

¹⁰² *Id.* at 676–78, 680.

¹⁰³ *Id.* at 607.

¹⁰⁴ *Id.* at 636. The *Silica* litigation is not the only litigation in which courts have uncovered problems with the diagnoses of plaintiffs. As noted below, the court uncovered a similar problem in the *In re Welding Fume* proceedings with respect to the diagnosis of Parkinson’s disease. *See* TED FRANK, WELDING FUME: A DISAPPEARING MASS TORT? 9 (2007), <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/nllLcuj8dSjZeopO77pYsP1quYXdJnsmwMpcEHJI.pdf> [<https://perma.cc/C6KH-QL3J>]. Similarly, in the *fen-phen* litigation, there were medically unsupported diagnoses of heart valve damage by a small number of physicians. Engstrom, *supra* note 86, at 656–57 (“[T]he lead plaintiffs’ lawyer for the fen-phen class alleged that a stunning 70 percent of class

D. In re Welding Fume: Requiring Diagnosis by Independent Physicians

A similar phenomenon occurred in the *Welding Fume* MDL. Just as in *Silica*, mass screenings resulted in thousands of meritless claims that were eventually dismissed.¹⁰⁵ The *Welding Fume* litigation involved claims alleging that exposure to fumes from defendants' welding products was associated with Parkinson's disease and other neurological conditions.¹⁰⁶ Much like the *Silica* litigation, the plaintiffs in the *Welding Fume* litigation were typically not diagnosed with an alleged injury by their treating physicians. Rather, they were diagnosed through mass screenings sponsored by plaintiffs' counsel.¹⁰⁷ In fact, of the plaintiffs alleging they had Parkinson's disease, "more than seventy percent of the plaintiffs diagnosed with this condition were diagnosed by the same doctor."¹⁰⁸

As with many multidistrict proceedings in which courts fail to implement procedures for early scrutiny of claims, the court began to understand the magnitude of the problem when the parties began selecting bellwether cases for trial.¹⁰⁹ As these individual cases came under scrutiny, the evidence showed that individuals who claimed they were "disabled" were actually far from it, and that there were instances of what appeared to be outright fraud.¹¹⁰ One powerful indicator of the meritless nature of the claims was that the vast majority of the plaintiffs who were diagnosed through these mass screenings never sought any treatment for their alleged conditions.¹¹¹

Influenced by these events, the court put in place a critical order requiring that all plaintiffs come forward with a diagnosis by an independent physician supporting their claims by a court-imposed deadline or have their claims dismissed.¹¹² In response to this order, thousands of plaintiffs simply dropped their lawsuits.¹¹³ Accordingly, the *Welding Fume* litigation again illustrates the relative

claimants had diagnoses for severe heart-valve damage that were 'medically unfounded and unjustified because the claimant doesn't have the condition.'").

¹⁰⁵ FRANK, *supra* note 104, at 9, 12.

¹⁰⁶ See *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 667 (6th Cir. 2010).

¹⁰⁷ FRANK, *supra* note 104, at 9 ("Almost all the plaintiffs in the litigation were diagnosed at mass medico-legal screenings, in which plaintiff-hired neurologists conducted five-minute examinations and then diagnosed thousands of welders with this rare disorder.").

¹⁰⁸ *Id.*

¹⁰⁹ See, e.g., *Tamraz*, 620 F.3d at 667 ("The district court selected Tamraz's case for one of several bellwether trials to guide the resolution of the other cases.").

¹¹⁰ See FRANK, *supra* note 104, at 10 ("[P]laintiffs have dismissed three cases selected for early trials in the MDL proceeding after defendants learned that the plaintiffs had provided false responses in their discovery responses.").

¹¹¹ *Id.*

¹¹² Case Administration Order, *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000 (N.D. Ohio 2006).

¹¹³ FRANK, *supra* note 104, at 9 ("[Defendants] have achieved dismissal of thousands of claims through a case administration order . . ."); *id.* at 11 ("Since the CAO was entered, plaintiffs have moved to dismiss more than 1,000 cases rather than submit Notices confirming that a physician actually diagnosed the claimant with a welding-related injury.").

ease with which courts can weed out claims that lack merit from multidistrict litigation. Simply requiring plaintiffs to produce evidence that they must ordinarily produce in any normal, individual litigation resulted in the elimination of a large portion of the cases in the MDL.¹¹⁴

In addition, the proceeding also illustrates that ultimately no one benefits from litigation populated by meritless claims. While the vast majority of the claims in the litigation were voluntarily dismissed, several went to trial both within the multidistrict proceedings and outside the proceedings. Almost all of the trials, however, resulted in defense verdicts.¹¹⁵ Accordingly, while procedures were implemented belatedly to weed out many of the claims in the litigation, the litigation nonetheless imposed significant costs on the judicial system.

E. In re Asbestos: Assisted Review Utilizing Magistrate Judges

Procedures for eliminating individual claims on a case-by-case basis have been employed effectively even in the most massive MDL proceedings. In the federal asbestos product liability MDL—which has been characterized as “the largest MDL in terms of number of claims and cases historically”¹¹⁶—the court established procedures to facilitate individual review by placing each case “on an individual scheduling order setting forth . . . fixed deadlines for completion of discovery and filing of dispositive motions.”¹¹⁷

Like many MDL proceedings, the *Asbestos* MDL began with an orientation toward settlement. As the federal judge presiding over the MDL observed, the establishment of the multidistrict litigation for asbestos claims “inspired hope for a global and comprehensive settlement.”¹¹⁸ No such settlement emerged, however, and the court went about establishing a process to address the tens of thousands of asbestos claims that were transferred to the MDL proceedings.¹¹⁹ In large part, this entailed claim-by-claim adjudication given that the issues frequently involved whether there was adequate evidence of exposure to each defendant’s products, injury, and specific causation in each plaintiff’s case.¹²⁰ The court developed procedures to address the mass of claims in this MDL of unprecedented size and scope, illustrating in

¹¹⁴ The court’s order resembles the sort of *Lone Pine* orders that have been entered in many mass tort cases to require plaintiffs to provide expert evidence supporting their claims before they may proceed. See, e.g., *In re Zimmer NexGen Knee Implant Prods. Liab. Litig.*, No. 1:11-CV-05468, 2016 WL 3281032, at *1 (N.D. Ill. 2016); *In re Fosamax Prods. Liab. Litig.*, No. 06-MD-1789(JFK), 2012 WL 5877418, at *2 (S.D.N.Y. 2012); *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744–45 (E.D. La. 2008); *In re Rezulin Prods. Liab. Litig.*, No. 00 Civ. 2843(LAK), 2005 WL 1105067, at *1 (S.D.N.Y. 2005).

¹¹⁵ FRANK, *supra* note 104, at 9 (“There have been seventeen welding fume trials in state and federal court over the last several years. Sixteen have resulted in defense verdicts.”).

¹¹⁶ Robreno, *supra* note 8, at 100 n.4.

¹¹⁷ *Id.* at 127.

¹¹⁸ *Id.* at 112.

¹¹⁹ *Id.* at 112, 126–27 (discussing how each claim had to be “disaggregated” and reviewed based on the principle of “one plaintiff-one claim”).

¹²⁰ See *id.* at 118–19, 127.

the process that the MDL mechanism could indeed be used to scrutinize even the tens of thousands of claims that the court confronted in the *Asbestos* litigation.¹²¹

Such procedures were critical in the *Asbestos* MDL because, much like the *Silica* litigation, diagnoses were frequently the result of mass screenings of dubious validity.¹²² As Judge Robreno, who presided over the *Asbestos* MDL, observed, “[t]he rate of ‘positive’ findings by these doctors can be startlingly high, often upwards of 50% and in some studies as high as 90%,” suggesting that the readings may not be neutral or legitimate.”¹²³ As Judge Robreno noted, the entire process was more of a litigation-driven exercise than one driven by medicine or science: “During litigation screenings, doctors acting in the capacity of ‘litigation consultants,’ and not as treating physicians, determined whether the screening indicated a positive result.”¹²⁴ The artificial nature of the review generated many claims that could not survive judicial scrutiny.¹²⁵ Without such scrutiny, aggregation in an MDL proceeding would result in the payment of meritless claims at the expense of both defendants and plaintiffs whose claims potentially had merit.¹²⁶

The court utilized magistrates to assist with the processing of the massive number of cases filed in the *Asbestos* proceeding.¹²⁷ Through show cause orders, “[t]he court required, among other things, each plaintiff to submit medical reports

¹²¹ See *id.* at 110–12.

¹²² *Id.* at 120–21.

¹²³ *Id.* at 121 (quoting AM. BAR ASS’N COMM. ON ASBESTOS LITIG., REPORT TO THE HOUSE OF DELEGATES 8 (2003), <https://www.cdc.gov/niosh/docket/archive/pdfs/niosh-015/020103-exhibit12.pdf> [<https://perma.cc/VEH4-YEUY>]).

¹²⁴ *Id.* at 120–21.

¹²⁵ See *id.*

¹²⁶ Rothstein et al., *supra* note 21, at 622–23; see Robreno, *supra* note 8, at 120–21, 137 (discussing the issues with false claims and the procedure created by the court to scrutinize claims). As Judge Robreno noted, the track record in the asbestos litigation before he was designated to preside over the *Asbestos* MDL evidenced such problems: “After nearly twenty years of intensive litigation in the federal courts, it seemed apparent to the court that efforts toward aggregation of cases and consolidation of claims had proven ineffective.” *Id.* at 126. When he was appointed to preside over the existing *Asbestos* MDL, he found several problems with aggregation:

Aggregation stopped progress on individual cases while the parties and the court worked on global solutions. Once the global solutions proved unfeasible, the parties did not return to the task of processing the cases individually. Ultimately, neither the court nor the parties were ready, willing, or able to move cases to trial and settlement. This stage of litigation led some litigants to refer to MDL-875 as a “black hole,” where cases disappeared forever from the active dockets of the court.

Id.

¹²⁷ Robreno, *supra* note 8, at 128. As the MDL judge later noted, the reliance on other personnel is not really unusual in the context of MDL proceedings:

While, of course, the adjudicating role remains the sole responsibility of the district judge, the duties and burden of administering a large MDL must be shared with other judicial officers and retained professionals. Therefore, the court must recruit and rely upon magistrate judges, special masters, other administrative personnel, the Clerk’s Office staff, IT specialists, and law clerks for the administration of the case.

Id. at 188.

based on ‘medically accepted principles and practices’ along with a complete exposure history to support their claims or face dismissal.”¹²⁸ In addition, plaintiffs had to identify the products to which they were exposed and the defendants against whom they were filing a claim.¹²⁹

“In response, some plaintiffs voluntarily dismissed their claims, while defendants challenged the compliance of other plaintiffs.”¹³⁰ Magistrate judges assisted the court in reviewing the remaining claims by conducting *Daubert* and other evidentiary hearings where, for example, defendants challenged the evidence plaintiffs submitted to show asbestos-related impairment.¹³¹ Cases that were not voluntarily or involuntarily dismissed, or that were not resolved through the *Daubert* and evidentiary hearings, “proceeded to discovery and summary judgment.”¹³² The court concluded that these procedures were efficient, given the MDL court’s familiarity with the litigation, and that they “would provide predictability and consistency.”¹³³ With the aid of such procedures, the court was able to resolve over 183,000 cases.¹³⁴

The *Asbestos* MDL refutes the notion that cases pending in MDLs are inevitably “litigated as a group.”¹³⁵ This was by any measure one of the largest MDLs, and yet the claims in the *Asbestos* MDL were uniformly resolved on a case-by-case basis based on the facts and circumstances of each case.¹³⁶ If individualized adjudication of claims was possible in the *Asbestos* MDL, it is possible in *any* MDL proceeding.

Indeed, an examination of precedent demonstrates that it is more accurate to say that MDLs “combin[e] aspects of individual and group litigation.”¹³⁷ In fact, it is critical in MDLs that courts not lose track of the individual nature of the claims. Just as it is important in MDLs for the courts to address common issues—and in fact that is the rationale for such a proceeding¹³⁸—so too, it is important for courts to continue to resolve claims on an individualized basis. Claims are transferred to the MDL court for “pretrial proceedings”¹³⁹—not for resolution of common issues only. In order to fairly and effectively resolve the MDL proceeding, courts must also pay attention to individual issues with respect to individual claims, as evidenced by the numerous examples provided herein.

¹²⁸ Smith, *supra* note 3, at 255 (quoting Robreno, *supra* note 8, at 137–38).

¹²⁹ Robreno, *supra* note 8, at 138–39.

¹³⁰ Smith, *supra* note 3, at 255.

¹³¹ Robreno, *supra* note 8, at 140.

¹³² *Id.* at 141.

¹³³ *Id.*; see also *id.* at 143 (“The key to the successful execution of the summary judgment procedure was the MDL court’s adherence to a rigorous schedule for all cases. . . . Setting a goal line for the MDL litigation, that is, the time for filing a motion for summary judgment, and thereafter deciding the motions promptly, provided encouragement to counsel to litigate the case diligently in the MDL or to settle.”).

¹³⁴ *Id.* at 180 (noting that “since 2006, there have been 186,524 cases transferred to MDL-875” and that “[o]f those cases, 183,545 have been resolved”).

¹³⁵ Bradt, *Long Arm*, *supra* note 2, at 1207.

¹³⁶ Robreno, *supra* note 8, at 100 n.4, 127.

¹³⁷ Bradt, *Long Arm*, *supra* note 2, at 1206.

¹³⁸ See 28 U.S.C. § 1407(a) (2012).

¹³⁹ *Id.*; see also *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 494 (J.P.M.L. 1968) (“[A]ll judicial proceedings before trial are pretrial proceedings.”).

F. In re Propulsid: Settlement Criteria

Finally, an examination of MDL precedent demonstrates that in some sense a review of individual claims is almost inevitable in a multidistrict proceeding. If such a review is not done from the outset of the MDL—the best and most efficient approach¹⁴⁰—in many instances, it will be done in the context of settlement.¹⁴¹ The *Propulsid* MDL, for example, utilized procedures that, far from ideally, provided scrutiny to asserted claims at the settlement stage. There, the parties agreed that asserted claims would be reviewed by a panel of physicians jointly selected by the parties' counsel to ensure that the plaintiffs met certain criteria before receiving settlement funds.¹⁴² When those claims were subjected to independent expert review, however, it soon became clear that the vast majority of asserted claims had no merit.¹⁴³ As a result, while plaintiffs' counsel received tens of millions of dollars in fees, very little of the settlement funds were distributed to the plaintiffs themselves because their claims did not merit compensation.¹⁴⁴

The *Propulsid* MDL involved allegations that a medication used to treat nocturnal heartburn symptoms was associated with heart irregularities.¹⁴⁵ After the parties selected bellwethers and conducted bellwether trials, they negotiated a settlement agreement that established a fund for the compensation of claimants, but required that the individual claims be subjected to medical review by a panel of neutral experts.¹⁴⁶ While there were 6,012 plaintiffs who opted for the settlement process, only thirty-seven of those claimants survived the medical review process.¹⁴⁷ As a result, out of an \$87 million fund, plaintiffs received approximately \$6.5 million in settlement proceeds, while the lead lawyers received "over \$27 million in common-benefit fees."¹⁴⁸ While the oversized award to plaintiffs' counsel compared to the award to plaintiffs in the MDL has been criticized,¹⁴⁹ it is a function of the fact that the vast majority of the claims filed in the MDL had no merit.

There are likely many other examples where a significant proportion of plaintiffs are unable to satisfy settlement criteria. In many instances, however, such

¹⁴⁰ See Robreno *supra* note 8, at 187 (discussing lessons learned from the *Asbestos* case, including the necessity of reviewing individual cases at an early stage).

¹⁴¹ See *id.* at 112, 133.

¹⁴² Fallon et al., *supra* note 10, at 2333–34; see also Consent Order, *In re Propulsid Prods. Liab. Litig.*, 2004 WL 305816, at *2 (E.D. La. 2004) (stating court's intention "to terminate MDL plaintiff and claimant rights to sue defendants . . . if the Medical Panel decides that they are not entitled to compensation").

¹⁴³ See Burch, *Monopolies*, *supra* note 10, at 74–75.

¹⁴⁴ See *id.*

¹⁴⁵ Fallon et al., *supra* note 10, at 2332–33.

¹⁴⁶ *Id.* at 2332–34.

¹⁴⁷ Burch, *Monopolies*, *supra* note 10, at 74–75.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.* These were not the only procedures utilized in the MDL that resulted in the elimination of claims. For instance, the court dismissed several claims filed by plaintiffs who missed the deadline for submitting their patient profile forms. See *Propulsid MDL Judge Dismisses 92 Cases for Noncompliance: In re Propulsid Prods. Liab. Litig.*, 7 ANDREWS DRUG RECALL LITIG. REP., no. 2, Sept. 2003, at 8.

information is confidential.¹⁵⁰ Nonetheless, glimpses of the problem are provided in the literature,¹⁵¹ and more complete disclosure might provide a greater window into the failures of the multidistrict litigation system to weed out such claims before the settlement stage. As the examples above demonstrate, several courts have engaged in such efforts, demonstrating both their feasibility and actual widespread use. Nonetheless, there has arguably been a lack of publicity regarding these successes. As a result, a myth is perpetuated that the goal of multidistrict litigation is settlement. This myth, along with the corresponding failure to weed out meritless claims, is counterproductive and damaging to the MDL process.

While it is good that there are examples where settlement criteria and corresponding review have been used to prevent non-meritorious claims from receiving settlement compensation, such examples arguably represent a failure of the system. Claims should be weeded from the beginning of the process—not the end. As noted below, the failure to provide early scrutiny of submitted claims interferes with the entire bellwether process.¹⁵² Moreover, as in *Propulsid*, it can result in rewarding plaintiffs' counsel with tens of millions of dollars in fees for populating the federal court docket with thousands of claims that have no merit. Such compensation only encourages counterproductive behavior and leads to the filing of meritless claims in ever increasing numbers.

III. LESSONS LEARNED

The failure to weed out meritless claims at the outset of an MDL proceeding can have a significant adverse impact on the course of a multidistrict litigation proceeding. For example, in many large MDL proceedings, courts preside over “bellwether” trials to attempt to ascertain the strength of the asserted claims.¹⁵³ These trials involve test cases that are selected to be “representative” of the body of cases filed in the multidistrict proceeding.¹⁵⁴ When the body of claims includes

¹⁵⁰ See Amy L. Saack, Note, *Global Settlements in Non-Class MDL Mass Torts*, 21 LEWIS & CLARK L. REV. 847, 857 (2017) (“[I]t is not unusual for Master Settlement Agreements in non-class MDLs to be confidential.”).

¹⁵¹ There are many examples where settlement funds have been inundated with unsupported claims. See S. Todd Brown, *Specious Claims and Global Settlements*, 42 U. MEMPHIS L. REV. 559, 560–64 (2012). For instance, in the *fen-phen* litigation, “once people began to suspect that bogus claims were inundating the \$3.75 billion settlement trust, Judge Harvey Bartle ordered an audit of *all* claims, ultimately resulting in many denials.” Engstrom, *supra* note 86, at 679. Similarly, in the *Vioxx* MDL settlement, over 30% of the asserted claims were unable to fulfill the requirements for obtaining settlement payments, which included a qualifying injury, minimum use of Vioxx, and use within a time period proximate to the alleged injury. Transcript of Status Conference at 19–20, 22–23, *In re Vioxx Prods. Liab. Litig.*, No. 05-MD-1657-L (E.D. La. 2010) (No. 05-1657), <http://www.laed.uscourts.gov/sites/default/files/vioxx/Transcripts/072710.transcript.pdf> [<https://perma.cc/5RSB-NRRS>].

¹⁵² See discussion *infra* Section III.

¹⁵³ See Fallon et al., *supra* note 10, at 2337–38 (describing the bellwether process and noting that, “[i]n the MDL setting, bellwether trials can be effectively employed for nonbinding informational purposes and for testing various theories and defenses in a trial setting”).

¹⁵⁴ *Id.* at 2325.

many that are frivolous in nature, however, the process frequently breaks down.¹⁵⁵ Plaintiffs' counsel will not want to take cases to trial that they know they will lose, and which defendants will then hold up as "representative" of the remainder of the claims. Accordingly, as in the *Welding Fume* litigation discussed above,¹⁵⁶ plaintiffs' counsel frequently end up dismissing weak claims that happen to be selected through the bellwether process, and, if plaintiffs' counsel do not voluntarily dismiss such claims, the court may do so through rulings on pretrial motions.¹⁵⁷ The inclusion of large numbers of meritless claims in an MDL proceeding thus interferes with the parties' ability to select bellwethers in the first instance and, more fundamentally, casts doubt on the entire process.¹⁵⁸

As one MDL judge has observed, such flaws in the bellwether selection process can result in it having "a limited global impact":

If bellwether trials are to serve their twin goals as informative indicators of future trends and catalysts for an ultimate resolution, the transferee court and the attorneys must carefully construct the trial-selection process. Ideally, the trial-selection process should accurately reflect the individual categories of cases that comprise the MDL in toto, illustrate the likelihood of success and measure of damages within each respective category, and illuminate the forensic and practical challenges of presenting certain types of cases to a jury. Any trial-selection process that strays from this path will likely resolve only a few independent cases and have a limited global impact.¹⁵⁹

Neither plaintiffs nor defendants can have any confidence in the "representative" nature of bellwether trials where the population of claims includes a significant fraction that should never have been filed.

Likewise, populating the MDL docket with meritless claims can hamper settlement efforts.¹⁶⁰ No defendant will want to pay money for claims of dubious merit, and the fact that such claims are included on the MDL docket only increases

¹⁵⁵ See FRANK, *supra* note 104, at 10–12.

¹⁵⁶ See *supra* Section II.D.

¹⁵⁷ In the *Propulsid* litigation, for example, the court dismissed one of three selected bellwethers on the ground that "the plaintiff could not state a claim because her alleged gastric problems predated her use of Propulsid." Fallon et al., *supra* note 10, at 2333 (citing *In re Propulsid Prods. Liab. Litig.*, 2003 WL 367739, at *1 (E.D. La. 2003)).

¹⁵⁸ As Judge Fallon has noted:

A bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation; therefore, it is imperative to know what types of cases comprise the MDL. Otherwise, the transferee court and the attorneys risk trying an anomalous case, thereby wasting substantial amounts of both time and money.

Id. at 2344.

¹⁵⁹ *Id.* at 2343.

¹⁶⁰ See D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2179 (2017).

the uncertainty of the value of the claims inventory.¹⁶¹ Likewise, the failure to weed out these invalid claims creates inherent conflicts among the plaintiffs and their counsel.¹⁶² To the extent the strength of claims varies by firm, there may be conflicts among those firms that have a weaker inventory of claims and those that have a stronger inventory. Similarly, there is likely a fundamental conflict among the plaintiffs themselves. Claimants with legitimate claims will not want their recovery watered down by payments to plaintiffs that never had valid claims to begin with. Accordingly, even if the goal of the MDL process were settlement—and this article argues that it should not be, particularly to the exclusion of actually testing the merits of asserted claims—that goal is fundamentally impaired when the MDL court fails to provide the required scrutiny to the claims filed in the proceeding.¹⁶³

More generally, the failure to apply judicial scrutiny to claims that are aggregated in multidistrict litigation inevitably results in bogging down the process and hindering progress in the resolution of the litigation.¹⁶⁴ One of the “lessons learned” identified by Judge Robreno after presiding over the massive *Asbestos* MDL was that such scrutiny of claims is critical at an early stage in the proceeding:

Regardless of the amount of judicial effort and resources, unless the court establishes a toll gate at which entrance to the litigation is controlled, non-meritorious cases will clog the process. Therefore, courts must establish procedures by which, at an early point, each plaintiff is required to provide facts which support the claim through expert diagnostics reports or risk dismissal of the case.¹⁶⁵

As the examples above illustrate, the mechanisms for achieving such scrutiny are diverse in nature. MDL courts have utilized a variety of mechanisms to collect information and weed out claims that lack merit. Nonetheless, as these examples also illustrate, doing so is critical in achieving progress in a multidistrict proceeding.

¹⁶¹ *Id.* at 2183.

¹⁶² See Bradt & Rave, *supra* note 10, at 1266–67.

¹⁶³ The measures that courts have taken to weed out claims are also consistent with the general tenor and goals of the Federal Rules of Civil Procedure. For instance, FRCP 16 encourages federal courts to use their case management authority to “formulat[e] and simplify[] the issues, and eliminat[e] frivolous claims or defenses.” FED. R. CIV. P. 16(c)(2)(A). This includes “limiting the use of testimony under Federal Rule of Evidence 702.” FED. R. CIV. P. 16(c)(2)(D). It also includes “controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37.” FED. R. CIV. P. 16(c)(2)(F).

¹⁶⁴ Robreno, *supra* note 8, at 126, 186.

¹⁶⁵ *Id.* at 186–87. Early attention to the elimination of meritless claims is also consistent with the Federal Rules of Civil Procedure. For example, the comments to FRCP 16 explain that “a mandatory scheduling order encourages the court to become involved in case management early in the litigation,” and that “the fixing of time limits serves to stimulate litigants to narrow the areas of inquiry and advocacy to those they believe are truly relevant and material.” Notes of Advisory Committee on 1983 Amendments, FED. R. CIV. P. 16(b). The drafters hoped to “promot[e] efficiency and conserv[e] judicial resources by identifying the real issues prior to trial, thereby saving time and expense for everyone.” Notes of Advisory Committee on 1983 Amendments, FED. R. CIV. P. 16(c)(1). The rule contemplates that such narrowing of the issues need not “await a formal motion for summary judgment” and may be accomplished by stipulation. *Id.*

Moreover, in many ways, typical procedures employed in MDLs are set up to facilitate early scrutiny of claims. Courts generally require early disclosure of key information for all claims, including approving fact sheets that require the disclosure of support for basic elements of plaintiffs' claims and the disclosure of medical records where plaintiffs allege some form of personal injury.¹⁶⁶ Thus, defendants generally have in their possession information that can be used to provide the sort of scrutiny described in the proceedings above.

As the Judicial Panel on Multidistrict Litigation has observed, individualized scrutiny of claims may actually be facilitated by the centralization that occurs in an MDL proceeding.¹⁶⁷ While the individual facts and circumstances of each case may differ, an MDL court will soon become familiar with the sorts of fact patterns found among the individual claims and thus will be in a better position to provide the sort of scrutiny that would ordinarily occur if the claims remained separate before different federal judges.

CONCLUSION

MDL proceedings are becoming increasingly important. The percentage of federal cases being litigated within the confines of multidistrict proceedings continues to grow. A potential impediment to the full utilization of the MDL procedure, however, is the notion that the fundamental goal of such proceedings is to achieve a global settlement. As the examples presented herein demonstrate, early scrutiny of individual claims is critical to the fair and efficient resolution of an MDL proceeding. In many MDLs, a large percentage of the claims that are filed have no merit. The failure of MDL courts to weed out such claims can significantly impair the effective resolution of such proceedings.

Conversely, as prior MDLs demonstrate, there are a number of different mechanisms that can be used to provide scrutiny to asserted claims and which, in fact, have been utilized to eliminate thousands of claims that lacked merit in a variety of different MDL proceedings. The MDL courts and the parties themselves have demonstrated that there are a number of creative mechanisms to provide scrutiny to claims filed in MDL proceedings. Routine utilization of these and other procedures by MDL courts will only increase the effectiveness of the MDL procedure.

¹⁶⁶ Smith, *supra* note 3, at 230; DUKE LAW SCH. CTR. FOR JUDICIAL STUDIES, *supra* note 10, at 11–12 (“One of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery is the use of fact sheets. . . . Similarly, requiring the collection of plaintiffs’ medical records (in personal injury cases) or employment histories (in employment cases) is another straightforward way that MDL courts can encourage a robust exchange of key information at a relatively early stage.”).

¹⁶⁷ As the Panel has noted: “[T]he transferee court handling several cases in an MDL likely is in a better position—and certainly is in no worse position than courts in multiple districts handling individual cases—to properly address meritless claims. There are many tools a transferee court may use to accomplish this task.” *In re Cook Med., Inc., IVC Filters Mktg., Sales Practices and Prods. Liab. Litig.*, 53 F. Supp. 3d 1379, 1381 (J.P.M.L. 2014).