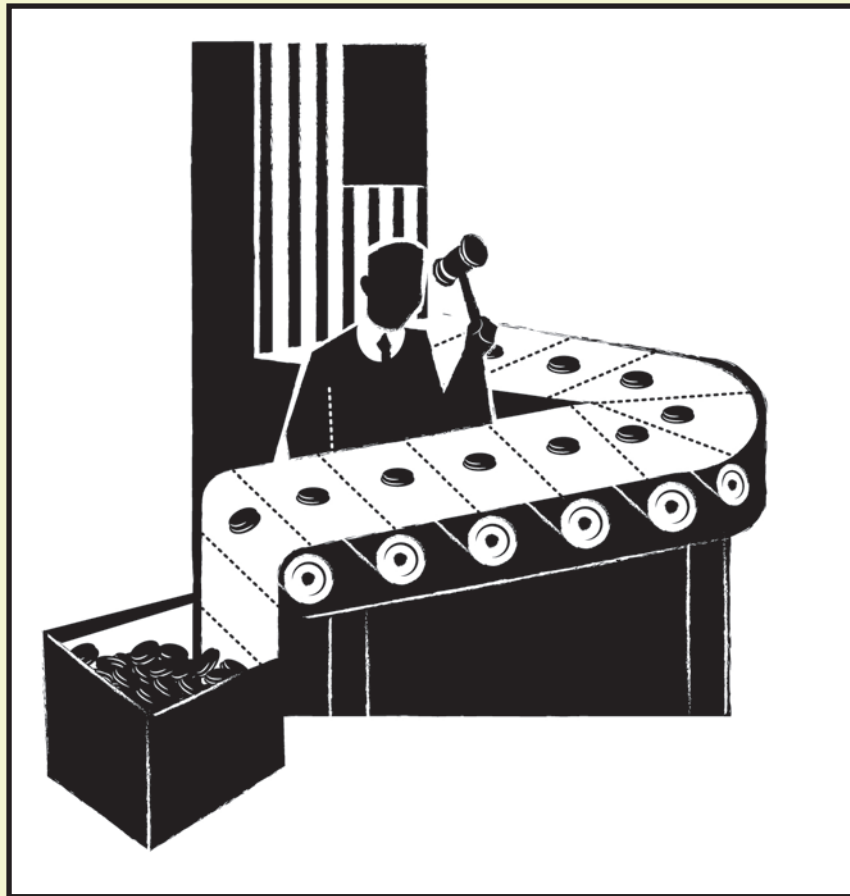


Bureaucratizing the Courts?



FINDING MDL'S PLACE IN THE TRADITIONAL LEGAL CULTURE

by Patrick Higginbotham

OVER THE PAST THREE DECADES three forces gained prominence in the narrative of the 1938 rules: the decline of trials with a companion embrace by bench and bar of arbitration and other trial avoidance devices, and responses by the judiciary to the generation of a large number of suits by a single event, failed product, or other mass disaster. Each of these three strands of history has drawn commentary recording an array of concerns over etiology, constitutionality, and consequence. Despite their interlaced interactions we persist in treating them as distinct phenomena. My objective in this brief writing is to suggest that in our struggle to respond in efficient ways to this challenge, we are shadowed by doubts that they are but parts of a larger albeit unattractive picture of independent inferior federal courts fading into administrative bureaucracies in full embrace of a utilitarian vision of due process, unwilling to bend to intrinsic values.

I.

Responding to an event such as a plane crash, hotel fire, or defective product that produces large numbers of claims resting on common facts and often common measures of liability with efforts to forge a common resolution is rational given its patent possibilities for efficiency and fairness to individual claimants. As we work with the molding force of our traditional binary model of plaintiff versus defendant it is no surprise that this genre of complex litigation has “evolved over the last forty years” to “procedural collectivism,” or “representative litigation in which the rights of purely passive claimants are adjudicated by selected parties, supposedly possessing parallel or at least similar interests, who litigate on behalf of those passive participants.”¹

Professors Martin Redish, Julie Karaba, Edward Sherman, and others² have in thoughtful writings chronicled the passage from efforts to deploy class actions under Rule 23, with its strictures protective of class members’ rights of shared interests and represen-

tation, to MDL litigation in its present form. And commentary on its strengths and weaknesses is increasingly rich, led by Professors Francis McGovern and Samuel Issacharoff, and Elizabeth Chamblee Burch with a recent empirical look at the wielding of judicial power by the MDL judge.³ I share these concerns while respecting the creative efforts of our federal district judges — never to be underestimated. Little of the good they have been able to cobble would have been possible without this talent and hard work. Yet their effectiveness came with a large draw upon the considerable trust they enjoy as life-tenured independents where they, as do we all, stand on the shoulders of others. So said, and it must be, is no answer to concerns of fairness and constitutionality. And the well of trust to draw from is not bottomless.

This dialogue now has definition and legs and I leave it to turn to my modest point that today’s focus on MDL is part of a larger picture of the changing roles of the inferior courts where our trial courts, the most important to these eyes, are on the leading edge; that MDL is not a culprit but an heir to a challenge to the system passed down the line by a sequence of judicial decisions essentially concluding “not this way.” And that happenstance can be a good thing in the hands of schooled MDL judges who find a way.

II.

I have elsewhere expressed concern over changes in the work and methods of federal trial courts, the decline in federal trials, civil and criminal, and will not rehearse them here.⁴ Some while ago I observed:

When we widen our lenses, we find disturbing trends, such as the decline of trials with federal trial courts looking like European courts. We also find a suspiciously parallel flow of dispute resolution to the administrative agencies.⁵

The disconnect between the power of the transferee judge and the power that the judge exercises rests on a

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statute that authorizes only the transfer of cases to that judge for purposes of pretrial proceeding with return to their filing homes, as the Supreme Court made clear in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*.⁶ The rest of the operation finds its footing in some form of consent and assertions of implied and inherent authority sometimes on little more than empty air.⁷ While the Supreme Court has recently reminded in *Stern v. Marshall* that the structural protections of Article III are not so easily elided,⁸ consent fairly obtained and private contract remain as powerful insulating tools for the freeing of creative processes. There are mine fields. Indeed adequate representation is wrapped in that word “fairly.” And that’s where a trapped Rule 23 has passed to MDL.

I dip into this bit of the ongoing dialogue only to keep in the forefront appreciation that the path to the present station was paved by a flight from trials to comfort of paper and settlements, to the buy in to ADR and arbitration, coupled with delegation of judicial work to others, all of which push the federal courts from its binary structure toward a more polycentric administrative model — one

that risks loss of individual roles and accountability to the public. Looking to the path traveled in the search for the path forward turns light upon the risks of redefining “case or controversy” attending efforts to achieve an efficient and legally sound MDL process. One glance over the shoulder reminds that Section 1407 by its terms contemplates a handling of cases brought together to more efficiently prepare for a trial, with return to the place that Congress has said an individual had the right to file his suit. That tradition, steeped in due process concerns, is accented by recent decisions of the Supreme Court that venue choices among those authorized belongs to the parties, and that their contracted-for choice of forum trumps inquiry into the relative private conveniences under 28 U.S.C. 1404.⁹

With the decline of trials the destination of “pretrial” became summary judgment not trial — the culture from which the MDL collects its cases. And the destination of its collection remains disposition without trial (albeit by necessity a sufficient number to achieve settlement en masse of individual suits). As apologists for the decline of trials assert, trials pose risks litigants will not take. While simplistic, to the extent it has purchase the risk of a sample trial cut from the herd is increased exponentially when it is used to inform the value of other cases gathered for coordinated pretrial. That cases are tried despite this elevated risk demonstrates their necessity; that preparation for trial is also preparation for settlement. And even a few trials serve to tether MDL to traditional process.

Defendants facing large numbers of mass-tort claims were early users of Rule 23. Unlike consumer classes where small claims would not be pursued singly and class certification effectively created liability, each one of the mass-tort cases is a threat. So defendants turned to Rule 23, as in the asbestosis cases, seeking *res judicata* — peace and lower transaction costs. This signifies because we must understand that centripetal forces attend these cases and their numbers. They are not the

creatures of MDL. It follows that our task is to find and shape processes that address this genre of cases representing a significant percentage of the total civil caseload of federal trial judges. The difficulty is that this must be done without injury to our legal and cultural commitment to fairness to individual litigants.

III.

One of the phenomena accompanying the flight from trials has been the endorsement by the judiciary of private adjudication. Arbitration quickly enjoyed strong support from the Supreme Court as it reversed course, ending its hostility to arbitration with a warm embrace. We now have a system that encourages private dispute resolution, attractive at this level of abstraction but redolent with issues of fairness and with loss of the commitment to open courts by leaving them empty. It is a sanction of private contracts for resolving disputes wholly outside federal courts, producing an outcome that with a federal court blessing becomes a judgment of a federal district court that never heard the matter. The wisdom of contracting out dispute resolution aside, it is a present reality. Perversely, it has the seeds for validation of many MDL aggregations. Indeed, as the Supreme Court has recently made plain in *Wellness International Network, Ltd v. Sharif*, while party agreement cannot manufacture jurisdiction, knowing and voluntary consent vitiates many Article III concerns.¹⁰ Implications of *Stern* aside, this is a powerful endorsement of private contracting for dispute resolution. This is so even though MDL litigation today gathers cases and achieves results with processes that are little different in substance from those found to be outside the reach of Rule 23.

In answering the due-process question differences between a class of thousands of litigants gathered with a right to opt-out and thousands of claims filed in different districts and gathered by transfer to a single MDL judge may lack the force now supposed by some commentators. The settlement that

reached the Supreme Court in *Ortiz v. Fireboard Corporation*¹¹ was only one half of the settlement confected. There was a parallel settlement of approximately the same size that was never challenged and was concluded with no judicial approval. This, because it was not a class action but a single settlement of large numbers of cases including many left pending in several states. Valuation of asbestosis cases was made relatively easy given their inherent similarity and the experience of counsel gained in the large numbers tried to verdict across the country. Nonetheless *Ortiz* remains an example of a “gathering” for settlement of large numbers of cases with a common fact pattern supported by consent — unlike its twin, which rested on a mandatory class. I will return briefly to *Ortiz* but for now I only urge that we look to the MDL process in operation and lift up those differences. In short, we ought ask the relevance of true differences between the MDL handling of filed suits and those gathered by a class with protected rights to opt out.

IV.

Recall that in *Ortiz*, Chief Justice William Rehnquist in a concurring opinion called for Congress to assist the courts in responding to the flood of asbestosis cases.¹² The divided court vacated the multi-billion dollar settlement of an extraordinary number of pending cases for, among other shortcomings, failure to abide the strictures of Rule 23. Chief Justice Rehnquist wrote separately, saluting the “near-heroic efforts” of then-District Judge Robert Parker to achieve the rejected settlement, pleading for Congressional assistance.¹³ The Court rejected efforts to defend “mandatory class treatment through representative actions on a limited fund theory,”¹⁴ finding it bound to adhere strictly to its common-law definition; that to do otherwise would contravene the Rules Enabling Act. As Justices Stephen Breyer and John Paul Stevens demonstrated in dissent, this result was not inevitable.

The point now is not over the

soundness of the decision. Given the Court's plea to Congress for help, with the implication that Congress has the power to remedy what it could not, it is rather that it would be instructive to ask what form such Congressional relief might take. What changes to Rule 23 or otherwise Congress might make that the Rules Committee and Judicial Conference, constrained as they are by the Rules Enabling Act, could not make. Equally important, we must focus on what we ought to seek. This needs careful attention by MDL judges. For example, ought we seek the authority, denied in *Lexecon*, to retain transferred cases for trial? Although an obvious possibility, the answer is not. As Judge Eldon Fallon taught in *In re Vioxx Products Liab. Litig.*,¹⁵ *Lexecon* does service in settlement, providing a defined destination with its threat of remand.¹⁶ Seeking answers to these questions will inform MDL practice, for illuminating the power of Congress also will lend light on the validity and force of various MDL practices and the wish list of MDL judges.

While *Ortiz* did not speak to the validity of classes certified under Rule 23(b)(3), *Dukes* closed that door for many actions. Doing so added further

incentive for counsel to opt for gathering the claimants, file multiple actions, and then consolidate under Section 1407 or sometimes to leave a class embedded in the gathered cases.¹⁷

V.

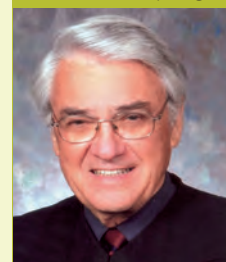
Prominent actors in the MDL game now see its role as facilitating an end by settlement or remands for trial, a retreat from the more hands-on engagement of judges in the fashioning of settlements.¹⁸ This shift in perceived role and mission is wise in its move to both traditional and safer ground, specifically to a more legally defensible role as MDL judge. This because "facilitating" rests on choice of litigants — consent and agreement, the primacy of which the Supreme Court has so recently made plain.¹⁹ Job label matters as it carries a boundary, intangible though it be. As for MDL today, the very absence of legal challenge suggests a process overarched with consent. Is it?

The efforts of Duke Law School, supported by symposia of Tulane and Emory, respond to the important task of schooling transferee judges in best practices as well as the location of the shoal waters of due process and Article III. Locating due-process limits in the

fluid dynamic attending responses to the debris of failed service and product is no small task, yet it can refuse to give way to wholly utilitarian concerns. The rights to notice, to be heard, and to participate have intrinsic value, to these eyes constitutionally secured. Indeed, the opinions of the Justices in *Ortiz*, *Concepcion*,²⁰ and *Dukes* are laced with these concerns and, while directed to Rule 23, inform efforts to develop the processes of MDL.

I can only salute the effort of the many players — with special thanks to Dean David F. Levi and John Rabiej, longtime workers in the bastion of federal rulemaking, for providing the needed forum and push for self-examination.

PATRICK E. HIGGINBOTHAM
is a senior judge on the U.S. Court



of Appeals for the Fifth Circuit. He teaches at St. Mary's Law School and is a life member of the American Law Institute.

¹ 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, 109–10 (2015).

² See, e.g., Catherine R. Borden, Emery G. Lee III, & Margaret S. Williams, *Centripetal Forces: Multidistrict Litigation and Its Parts*, 75 LA. L. REV. 425 (2014); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014); Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329 (2014); Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 EMORY L.J. 1339 (2014); Edward F. Sherman, *The MDL Model For Resolving Complex Litigation if a Class Action is Not Possible*, 82 TULANE L. REV. 2205 (2008).

³ See, e.g., Francis E. McGovern, *The What and Why of Claims Resolutions Facilities*, 57 STAN. L. REV. 1361 (2005); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 2165 (2013); Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. REV. 71 (2015).

⁴ See, e.g., Patrick E. Higginbotham, *The Present Plight of the United States District Courts*, 60 DUKE L.J. 745

(2010); Patrick E. Higginbotham, *Mabon Lecture*, 12 TEX. WESLEYAN L. REV. 501 (2006); Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts*, 55 S.M.U. L. REV. 1405 (2002); Patrick E. Higginbotham, *Bureaucracy—The Carcinoma of the Federal Judiciary*, 31 ALA. L. REV. 261 (1980); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977).

⁵ Higginbotham, *supra* note 4, at 505.

⁶ See 28 U.S.C. 1407(a) (providing that actions "may be transferred to any district for coordinated or consolidated pretrial proceedings" but requiring that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred"); *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

⁷ See, e.g., *Armstrong v. LaSalle Bank Nat. Ass'n*, 552 F.3d 613 (7th Cir. 2009) (concluding that parties could consent to venue in pretrial proceedings in transferee court); *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1326–27 (11th Cir. 2000) (same).

⁸ See *Stern v. Marshall*, 131 S. Ct. 2594, 2608–16 (2011).

⁹ See *Atl. Marine Const. Co., Inc. v. U.S. Dist. Ct. for W.D. Tex.*, 134 S. Ct. 568, 581 (2013); *In re Rolls Royce Corp.*, 775 F.3d 671, 677–78 (5th Cir. 2014).

¹⁰ No. 13-935 (2015), slip op. at 8-9.

¹¹ 527 U.S. 815 (1999).

¹² *Id.* at 865 (Rehnquist, C.J., concurring).

¹³ *Id.*

¹⁴ *Id.* at 841 (majority op.).

¹⁵ *In re Vioxx Prods. Liab. Litig.*, 230 F.R.D. 472 (E.D. La. 2005).

¹⁶ See Eldon E. Fallon, Jeremy T. Grabill, & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2344 (2008).

¹⁷ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559–61 (2011).

¹⁸ See generally Dodge, *supra* note 2.

¹⁹ See *Wellness Int'l Network, Ltd. v. Sbarif*, No. 13-935, 2015 WL 2456619 (May 26, 2015).

²⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).